

DTTF CFPB

[00:00:00] **Intro/Outro Voiceover:** Welcome to the New York City Bar Association podcast.

In this episode: What's in Your Wallet - the CFPB Goes after Digital Wallets and Payment Apps

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[00:00:15] **Jerome Walker:** Hello everyone and welcome to another podcast hosted by the City Bar Task Force on Digital Technologies. My name is Jerome Walker I'm a Co Chair of the Task Force, and I'm very pleased to introduce three members of the Task Force who will serve as panelists today. Stephen Aschettino is a Co Chair of the Task Force Subcommittee on Payment Services and Systems and a partner at Norton Rose. Melissa Baal Guidorizzi is a Co Chair of the Task Force Subcommittee on Digital Technologies Consumer Protection, a partner at Orrick and a former senior official at the Office of Enforcement of the Consumer Financial Protection Bureau. The Consumer Financial Protection Bureau is commonly referred to as the CFPB. Eamonn Moran, is a Co Chair of the Task Force Subcommittee on Digital Technologies Consumer Protection and a senior counsel at Norton Rose and a former senior official at the office of regulation of the CFPB.

Today's podcast will focus on the CFPB, which was created in 2010 as a part of Dodd-Frank and the CFPB's November 7th proposed rule and request for information. The CFPB issued the proproposed rule to define larger participants of a market for general use digital consumer payment applications. The proposed rule indicates that the proposed market would cover providers of funds transfer and wallet functionalities through digital applications for consumers general use in making payments to other persons for personal family and household purposes. Clearly the CFPB is a heavyweight. In consumer financial protection and perhaps the most powerful consumer financial protection agency in the nation. To level set the discussion and help the audience understand the CFPB, we will initially focus on the CFPB and then turn to the proposed rule. Let's start with Eamon. Eamon, what makes the CFPB such an important and powerful agency in consumer financial protection? And what are some of the entities that are currently subject to the supervision and regulation of the CFPB? Please distinguish between the CFPB's supervision authority and its regulation authority, especially with respect to examinations and how the CFPB supervises and examines entities subject to its jurisdiction.

[00:03:01] **Eamonn Moran:** Sure. Thanks, Jerome. So there's a few questions in there, so I will try to take them one at a time as best as possible. So to start with what makes the CFPB so unique and important, I would say a couple of things. We all know that it's been a hot potato to some degree, both in terms of challenges on the litigation side over the course of its existence, as well as Congressional opposition during the time that the agency has been around.

So those obviously are, part and parcel of, I think, what and how significant the agency is since it was created under Dodd Frank. At a high level, the Bureau regulates markets for consumer financial services and has broad jurisdiction over everything from Mortgages and credit cards to consumer finance data, as well as payment processing. So part of the purpose of why the CFPB was created was to increase accountability in the government by consolidating consumer financial protection authorities that had existed across several different federal agencies into one. So I think we all learned during the financial crisis that prior to the passage of the Dodd Frank Act, which was passed in 2010, consumer financial protection really wasn't the primary focus of any federal agency or regulator. And there was no agency that really had, quite effective tools to set the rules for and oversee the whole market. So why and how the Bureau is so significant and powerful, I think, is in part because of how it was designed by Congress in the statute, under Dodd Frank. It is an independent federal agency that's actually housed within the Federal Reserve. It's entitled to a percentage of the Federal Reserve's operating expenses. So this is pretty much guaranteed funding that's not subject to the congressional appropriations process. Now, I'll just put a footnote here in terms of that this current piece is the subject of an ongoing constitutional challenge that will be decided by the Supreme Court in the first part of next year. Oral arguments were heard in this case back at the beginning of October. So what you have here is really a significant amount of regulatory and budgetary power that's given to, under the Bureau structure, to one person, a single director leadership structure. And although it's housed and funded by the Federal Reserve, the Fed's Board of Governors really cannot interfere in the actions and decisions of the agency. So there's some independence from both congressional, as well as federal reserve oversight. And in terms of executive oversight, it's only been over the past few years as a result of another Supreme Court case in two0two0, in which the court decided that the President can actually now remove the head of the CFPB at will, which was not how the Bureau was originally set up. And this was something that we saw play out following the election of Joe Biden as president, when he asked the then CFPB director to resign, and he replaced her with a new director. Now, in terms of the entities that the Bureau has jurisdiction over, so I would say there's four key supervisory prongs that provide some indication and representation of the types of entities that actually fall under the CFPB supervisory authority.

So first is large banks, thrifts, and credit unions with assets over 10 billion, as well as their affiliates. In addition, the supervisory authority of the Bureau extends to non bank mortgage originators and servicers, payday lenders, and private student lenders of all sizes. And the third, the Bureau has larger participant supervisory authority.

So to date, the Bureau has issued larger participant rules in six markets including actually five markets. So consumer reporting, consumer debt collection, student loan servicing, international money transfer and automobile financing. So the payments' larger participant role that we're discussing today would be the sixth one in that category. And finally, the Bureau also has a risk based supervisory authority. So this allows the agency to supervise non banks whose activities the Bureau has reasonable cause to determine pose risks to consumers. Now, final point here is just that regardless of whether companies and entities or persons are subject to the CFPB supervisory authority, non bank covered persons generally are also subject to the CFPB's regulatory and enforcement authority, which I know Melissa will be speaking to later on during this session. I think we're getting to the last question in your first set of questions posed to me, Jerome. So this one is with respect to distinguishing between the supervision authority and its regulation authority, especially with respect to examinations. Let's start with rulemaking. The CFPB's rulemaking authority either comes from its Dodd Frank authority or an enumerated law.

For example, the Equal Credit Opportunity Act, the Electronic Fund Transfer Act, or the Truth in Money Act. The rulemaking power extends over covered persons, which is a defined term, offering a consumer financial product or service, which are defined terms as well in the Dodd Frank Act. The Bureau may prescribe rules and issue orders and guidance as may be necessary or appropriate to enable the agency to administer, enforce, and otherwise implement the provisions of federal consumer financial law and to prevent evasions thereof. The rulemaking authority of the agency is exclusive to the CFPB, except where it shares rulemaking power with the Federal Trade Commission under the Federal Trade Commission Act.

This expansive authority in terms of rulemaking power does authorize the CFPB to issue new rules and guidelines as well as to revise ones already in existence. The Bureau may also prescribe rules applicable to a covered person or service provider identifying as unlawful, unfair, deceptive, or abusive acts or practices in connection with any transaction with the consumer for a consumer financial product or service or the offering of such.

So we all commonly refer to this category as UDAAP U-D-A-A-P, so two A, with respect to the CFPB's authority here as compared to one A with other agencies. The rules with respect to UDAAP could be promulgated by the CFPB may include requirements for the purpose of preventing such UDAAPs as well, so preventing such unfair, deceptive or abusive acts or practices.

Separately, the Bureau has the authority to issue rules to ensure that the features of any consumer financial product or service, both initially and over the term of the product or service, are fully, accurately, and effectively disclosed to consumers in a manner that permits consumers to understand the costs, benefits, and risks associated with the product or service.

So this is a disclosure rulemaking authority that is in addition to the UDAAP authority as well as the general rulemaking authorities that the CFPB has. Important to note here. Any final rules adopted by the CFPB may be set aside only where the Financial Stability Oversight Council finds, by a two thirds majority, that the rule would put the safety and soundness of the United States banking system or the stability of the financial system of the United States at risk.

So this is a high standard, indeed, as you might imagine. Practically, the FSOC, as the Financial Stability Oversight Council is known, does not really have meaningful veto power given these high thresholds that it would have to meet to overturn any CFPB rulemaking. The courts also must afford deference to the CFPB's determinations regarding the meaning or interpretation of federal consumer financial law, as if the CFPB were the only agency authorized to apply, enforce, interpret, or administer that law.

So accordingly, The CFPB may act contrary to the existing legal precedent and interpretations by other federal agencies, and that is well within its authority. So that kind of gives an overview of the CFPB's rulemaking function.

Now in terms of its supervision authority and function, we discussed previously a little bit about how the CFPB has a supervisory authority that allows it to examine certain covered persons to determine whether they are complying with both the enumerated laws that transferred over to the CFPB when it was first created.

As well as the Dodd Frank Act's prohibition on UDAAP. This authority only extends to certain types of covered persons. So the CFPB is authorized to supervise non bank covered persons for purposes of one, assessing compliance with federal consumer financial law, two, obtaining information about such

person's activities and compliance systems or procedures, and three, detecting and assessing risks to consumers and consumer financial markets.

So the CFPB's supervisory authority also extends to service providers of those covered persons that are subject to supervision, regardless of the service provider side. So that's an important thing to note here. It's not just the larger service providers that would potentially be implicated as a result of the supervision authority and power. In terms of examinations, the CFPB conducts exams of various scopes of supervised entities. In addition, the Bureau may, as appropriate, request information from supervised entities prior to or without conducting exams. The larger participant regulations that are existing and on the books ready from the Bureau do provide that the agency may require submission of certain records, documents, and other information for purposes of assessing whether a person is a larger participant of a covered market.

Now it's important to also note and understand that in terms of how the CFPB actually conducts these exams, it prioritizes supervisory activity among non bank covered persons on the basis of risk. So it takes into account things like the size of the entity, the volume of its transactions involving consumer financial products or services, the size and risk presented by the market in which it is a participant. Is there any relevant state oversight at play as well as the field and market information that the CFPB already has on the entity that information could include, for example, information gleaned from consumer complaints. As well as any other information that the agency has about risks to consumers and to markets posed by a particular company.

The specifics of how an exam takes place do vary by market and entity, so there's no necessarily bright line rules at play, but the process generally proceeds as follows. CFPB examiners will contact the entity for an initial conference with management. And often request records and other information at that point, they will ordinarily also review the components of the company's compliance management system.

Now, after those sort of preliminary steps, based on those discussions, as well as a review of the information that's been received, examiners will determine the scope of an on site or remote examination, and then we'll coordinate with the company to initiate this next portion of the exam. Now, while on site or working remotely, the Bureau's examiners do spend some time discussing with management.

What are the compliance policies? What are the processes? What are the procedures? They will review documents and records. They'll do some testing

transaction, as well as looking at and evaluating the compliance management system, as I noted previously. And exams may involve issuing confidential exam reports, supervisory letters, and compliance ratings.

The Bureau does use the Supervision and Examination Manual as a resource in conducting exams and other supervisory activities. This is available online on the agency's website. And the Bureau may also conduct other supervisory activities such as periodic monitoring along the way. Finally, it's worth noting and highlighting that as the Bureau noted in its first larger participant rule covering the consumer reporting market, the CFPB supervisory authority is not limited to the products or services that qualify the person for supervision, but it also includes other activities of that person that involve other consumer financial products or services or are subject to federal consumer financial law.

So what does this mean? If you sell, provide, or issue stored value or payment instruments, for example, and that's associated with activity that falls within the proposed market definition which could be a circumstance that could develop with respect to the larger participant role that we're speaking of today, then that well may constitute a consumer financial product or service that the CFPB may supervise when examining a larger participant of the proposed market.

So just sort of to close things up, the Bureau's authority could extend beyond just sort of the initial ask within a larger participant rule to the extent that you do company does offer other products or services that would qualify as consumer financial products or services, as well as be subject to federal consumer financial law.

So this is just something to keep in mind for companies that are looking to kind of see potentially what the scope of this larger participant rulemaking could look like, both in terms of scope, as well as products that could potentially be evaluated and supervised by the CFPB going forward.

[00:16:20] **Jerome Walker:** Thanks, Eamonn. Melissa, to kind of pick up where Eamonn left off. Would you please explain the CFPB's enforcement authority and some of the laws and regulations administered and enforced by the CFPB? What types of enforcement actions do CFPB can commence and do those? Actions commence an administrative proceeding in federal court or both? Please also explain how the CFPB cooperates or coordinates with other consumer protection authorities and other regulatory agencies.

[00:16:56] **Melissa Baal-Guidorizzi:** Thanks. I'm so glad to be part of this. So I'm just going to jump off a little on what Eamonn had said. I was in house prior

to going to the CFPB and a financial company that had state regulated entities in a bank holding company back when that was sort of the fashion. And so the intersection between state regulatory land and federal regulatory world was something that I was familiar with. And when Dodd Frank started coming out, I came up with this sort of idea for myself of this agency would be so important. And it's sort of the marriage of OCC authority, Fed authority, and FTC all at once. It's the heavy supervision tool along with a lot of enforcement authority.

So going to the enforcement authority piece of it, the definition of consumer financial product and service is quite broad. It really covers, as Eamonn referred to, a lot of traditional things like auto finance and debt collection and mortgage, but also payment processing and a lot of the payments and data writ large kind of activity that's happening out of the CFPB now. And so the CFPB has, as Eamonn described, different authorities related to supervision, which means their ability to examine or impose a federal exam upon small banks, small institutions under 10 billion, and non banks is limited. The enforcement authority at the CFPB is not limited by size.

So if you fall within the covered institution that provides a consumer financial product or service, regardless of size, the CFPB can actually start an investigation and take an enforcement action. And that's a really interesting and new piece to what has made the CFPB distinguishable as a regulator.

Unlike some other agencies, the Office of Enforcement can generate its own work. So the strategies are developed itself in the Office of enforcement complaints are looked at on its own. They can open up their own investigations irregardless of whether or not something has come over from supervision through an exam process.

So that again has also created a much broader scope of who could fall underneath the CFPB's enforcement authority. And I think you had talked about whether or not They can take administrative and or court action, the CFPB, unlike some other federal regulators that might have to seek litigating authority from the DOJ in order to implement some of their supervision activity and move into enforcement, the CFPB has independent litigating authority both administratively and through court action.

And they have taken a lot of action. So one of the things that, the CFPB really touts, and I think it's something that's worth noting here as to why it's important, is that, 3.9 million complaints have been taken in by the CFPB as stated on its website, 17.5 billion in financial relief for 200 million people.

So the breadth of being able to enforce across products between non banks and banks the CFPB is one of the reasons why the CFPB has become a very important consumer protection regulator. I think you had one more question in there.

[00:20:29] **Jerome Walker:** Sure. Explain how the CFPB coordinates and cooperates with other. Consumer protection authorities and regulatory agencies.

[00:20:39] **Melissa Baal-Guidorizzi:** So as many institutions who fall within the CFPB's authority understand there are a lot of different agencies that cover the same institutions, right? So some non banks are going to be state regulated. They're also, if they're a state chartered bank, they might also have responsibilities to the Fed. The OCC might have concurrent authority. The FTC has some concurrent authority.

There's a web of federal regulators on a lot of these consumer financial product and service providers. The CFPB has both active coordination on the examination front. They are required to try to coordinate with state regulators when they're doing their exam scheduling. There is an effort to try to lower the burden on certain non banks that are going to be examined. The National Association of Attorneys General has a very close relationship with the CFPB, as do many consumer protection advocates. And federal agency working groups, depending on what administration there may be more of them. They may be more active versus other administrations, but they exist. And when I was in the Office of Enforcement, there was active participation to create consistency across the agencies.

[00:22:01] **Jerome Walker:** Stephen, it's pretty clear that the CFPB is a major player. And as a result, when the CFPB issues a proposal, it has to be taken seriously. In this particular case. Amon spoke about the larger participation rules that cover five markets now, and this would be a new market. As I mentioned in the introduction, on November 7th, the CFPB issued the proposed rule to define quote, larger participants of a market for general use. Digital consumer payment applications. The proposed rule would pick up, and I'm quoting here "many consumer financial products and services that are commonly described as digital wallets. payment apps, funds transfer apps, person to person payment apps, and P to P apps." Would you please summarize the purpose of the proposed rule, its key provisions, and explain the implications of the proposed rule?

[00:23:13] **Stephen Aschettino:** Jerome. First, thank you for including me. It's An honor to be included with two former CFPB attorneys. As someone who

practices primarily in the payments and digital assets space, I was particularly interested in the CFPB's proposed rule. As both Eamonn and Melissa pointed out, the CFPB's mandate extends to digital payments, which is a rapidly evolving sector, and the CFPB is more and more concerned about making sure that consumers are not harmed by non bank financial institutions, which is essentially what we're discussing here. The CFPB's proposed rule seeks to establish a clear framework for defining and supervising what they're referring to now as larger participants in the digital payments market. This initiative aims to promote accountability and protect consumers from potential harm while ensuring a level playing field for both banks and non bank financial institutions. The proposed rule encompasses both non bank companies that provide general use digital consumer payment applications, including person to person payment services and digital wallets. And it sets forth a two pronged test to determine whether the non bank covered person, which would be a payments company, but there are other categories that could be in there as well whether that person is a larger participant of the general use digital consumer payment applications market. So what are the criteria? First, the company together with its affiliates must provide general use digital consumer payment applications with an annual volume of at least five million of consumer payment transactions. And we'll come back to that provision, the consumer payment transactions piece in a minute. And second, the non bank covered person must not be a small business concern based upon applicable Small Business Administration size standards. Additionally, any non bank covered person that qualifies as a larger participant would remain a larger participant until two years from the first day of the tax year in which the person last met the larger participant test. So there's a lot to unpack there. What this means really is that these types of payment companies would be subject to CFPB supervision examination, and all of the wonderful things that Melissa and Eamonn described the CFPB can do to entities which it supervises. The proposed rule may introduce additional compliance obligations for these companies, particularly for the larger participants, but also those that may be considered larger participants in the future would have to keep an eye on what their policies and procedures are and how they impact consumers. Increased oversight, one could argue, can bring benefit for consumers, such as enhanced data protection, fair treatment, transparency of fees, terms of service, and other positive contributions. And this new rule may have implications for competition in the digital payments landscape, potentially shifting dynamics between established players. Particularly those that are considered large participants and emerging entrants. One of the particularly interesting things about this is that it potentially impacts digital assets. Certain transfers of funds in the form of digital assets that have monetary value and are readily usable for financial purposes would fall within the scope of this rule. This by itself is significant because it would mark the first time the CFPB has taken a formal

step towards regulating digital asset products or services, including crypto assets, and is now essentially stating that it would exert jurisdiction over them.

[00:27:07] **Jerome Walker:** Thanks Stephen. Eamonn, the comment period closes on or before January 8th, 2024 that seems awfully short to me. The CFPB also proposes that once issued, the final rule would become effective 30 days after it is published in the federal register and that seems short for me. There are circumstances under which, for example, with the bank regulatory agencies, where they provide a lot more time. Could you please kind of explain what's going on here and is that enough time to actually review the and comment on the rule? How should the industry be thinking about this in light of what, at least to me seems to be these short time periods?

[00:28:03] **Eamonn Moran:** Sure. Great question. Thanks, Jerome. So I guess, probably not surprisingly, right? I'll just say there's probably, and a general sense, at least within the industry that common periods provided in rulemakings across the agencies, could and should be longer. I think probably everybody feels like they would like to have a little bit more time to be able to comment thoroughly. And some institutions are able to do so more quickly than others. And some members of the public are able to do. So more quickly than others, right? Yeah, as with anything in life, we always, we had a little bit more time, right? And so sometimes that's not provided.

I went back and actually looked at the prior of larger participant rulemaking. So the Bureau has engaged in since it opened its doors. And so this common period that's being offered here is about two months after the proposed rule's issuance, which is actually quite similar, if not exactly the same as the common periods that was provided in these other larger participant rulemakings. So I think that's kind of one point right now. Of course, whether, anybody or any person or any company feels like this time period to comment is long enough, or is it too short? That answer probably also depends upon which side of the debate you might fall on. For example: the proposed rule receives quick praise from certain banking industry trade groups who view this proposal as a step towards, what they would say, leveling the playing field between banks and non banks. I think kind of keep that point in mind too, right? But in all candidness, I would query whether, the data limitations that are present in the payment space, these are things that the Bureau acknowledges and recognizes at various places in the proposed rule here. I query whether these data limitations could complicate or at least pose certain challenges to industry's ability to thoroughly review and comment on the proposed rule within a relatively short window of about two months. To the extent that those data limitations are substantial that obviously could pose challenges and sort of, may not provide sufficient time within two

months, but I'll just sort of, leave that there as a question because it remains to be seen.

So you also asked about the effective date. So the CFPB stated rationale now granted this section of the proposed rule was quite short. So we don't have much to go off on here other than the stated rationale and the rule is that the Administrative Procedures Act generally requires that rules be published not less than 30 days before their effective dates. So in that vein, the CFPB is proposing that once issued the final rule for this proposal would be effective 30 days after it is published in the federal register. I realize that this reasoning that's provided by the agency may not be entirely satisfying.

And given also that it was only given a few sentences worth of page material in the proposed rule, but let me offer a few other points here, right? First, the proposed rule would actually not impose any new substantive consumer protection requirements or alter the scope of the CFPB's other authorities. Second, some non bank covered persons that would be subject to the supervisory authority under this proposed rule may actually already be subject to other CFPB supervisory authorities, including, for example, as a larger participant in another of the five markets that we identified previously that the Bureau has already issued in terms of its larger participant rulemakings. Third, now regardless of whether any entity is subject to the CFPB supervisory authority, as I mentioned previously, non bank covered persons generally are subject to the CFPB's regulatory and enforcement authority. Because finalization of this proposed rule, if it actually gets finalized, that process would not require any provider of what we're calling here, general use digital consumer payment applications, or that's how the Bureau has defined it, right? Because the rule itself would not require any of the covered entities to alter their conduct. Determining whether the proposed effective date is reasonable and realistic may actually just come down to what current compliance levels are in the space, right? And what market participants behavior. Would be and what potentially changes would be made in response to any final rule issue by the CFPB. Of course, I'll also underscore here that the CFPB is inviting comment on all aspects of this notice of proposed rulemaking as well as on the specific issues on which it solicits comment that are buried throughout the rulemaking particular questions posed on particular aspects of the rulemaking. Now, one of the things and issues that would be included in this comment period is their proposed effective date. So having worked on significant rulemakings during my time in the Office of Regulations at the Bureau, as well as being responsible for managing the effective date sections of certain rulemakings, I can tell you that feedback, and especially I'll emphasize here, specific feedback providing supporting details on what industry feels would be a reasonable implementation and compliance period could be would be or should be. Can move the needle

among the powers that be at the CFPB. And so sometimes really what the agency needs to hear is just why or why not industry feels like a proposed compliance period and implementation period could work or wouldn't work. And sometimes the agency, just doesn't have, the data from the business world to really come down and calibrate the most effective period.

So I really just, try to encourage everybody that's listening to the extent that you have any interest in commenting and you have any supporting details with respect to what rule of this nature might entail in terms of a reasonable compliance period to do so with, if you're going to be participating in the comment period, because this is the type of feedback that not just the CFPB, but any agency really needs to hear as part of any rulemaking process.

[00:34:12] **Jerome Walker:** Melissa, earlier you explained how the CFPB cooperates or coordinates with a very wide range of consumer protection authorities and other regulatory agencies. In this particular proposal, the CFPB identified with specificity, the Federal Trade Commission the Federal Reserve, the CFTC, the FDIC, FINCEN, the National Credit Union Administration, the OCC and the SEC. It's common for the CFPB to coordinate with the federal banking regulatory agencies. With respect to this rule what is the thinking behind the CFPB also coordinating, for example, with FINCEN and coordinating with the SEC. I understand the FTC and banking regulatory agencies, but the SEC and FINCEN. Also the CFPB didn't name any of the state agencies that it might have coordinated with. When the CFPB does not name specific state agencies that does that imply, for example, they didn't coordinate with the various state banking departments or with the AGs or it's just they didn't include it here.

[00:35:37] **Melissa Baal-Guidorizzi:** So that's a great question. It's a good note to really pay attention to who is called out and who is not called out. They don't always mean what you think they might mean. And I'm just surmising as an external party. I don't have any particular knowledge, except you can guess from the perspective. Federal agencies, other than the financial regulatory agencies, the breadth of what they're hoping to cover. As Stephen alluded to this move to really look at digital wallets of varying types, including crypto assets, ones that hold crypto assets, there's some language in there about pass through wallets that just have credentials in them.

The swath of digital wallets is much broader than what the CFPB had defined in the past under sort of the prepaid rule where digital wallets first sort of came into the fore. And you can see that there would be a lot of different agencies that

might have some of their constituencies and the supervised entities impacted and that includes CFTC, SEC and others.

And so I think what this is, to the extent that people want to look at whether the CFPB has done its due diligence and whether or not it's just moving out on its own completely in creating this rule, it's a nod to the fact that there was consultation, as I said before, the CFPB in the past and as their normal course does try to coordinate and use federal resources efficiently.

And I was able to serve under five directors. So you know that at different varying levels, that coordination does happen, and this is an acknowledgement of that. Does it mean that any and or all of those agencies listed support the rule? I would dissuade people from thinking that because as anyone who's dealt with many of these federal agencies knows, consensus is not the norm.

So everyone has their own views. They have their different approaches. It's part of what makes the regulatory system in the U. S. both a challenge and also perhaps an example. If you're very pro regulation in the coverage, as I said, it's like a web or a quilt. And so I think it's really a nod to the fact that there was some consultation.

I don't think it would be reasonable to say that means that everyone signed off who's listed. And on the state piece, because there is already active participation on the supervisory side, as I alluded to earlier, on coordinating supervision exam schedules and scope perhaps that's why they didn't include that. Set of regulators because that already happens under the normal course.

And going back to something to just a couple of points to add on to some of the things that Eamonn said: this rule is about who gets examined, adding new people to the examination schedule, essentially. That schedule is scheduled at least two years out at this point.

Perhaps they'll do a big push and hire a lot of examiners, but those schedules are set sometime in the future. And so even if it's six months after effective date, it would take some time to get on the schedule and actually receive the, have the examination happen. And in the past, the CFPB has made public its general thought I, perhaps there's been some slight changes, but the heads of supervision have gone out and said that when a new rule comes out, they try to have some lag time, even from effective date prior to doing some examination.

Not sure that would happen here because there's no new rule, as Eamonn said, it's just new entrance. But there could be some principal approach saying that

they wouldn't even try to schedule people until six months after the six months, even though it would be effective. Those things could happen and so perhaps that's a way to mitigate some of the concern around it as Eamonn said. It's not a new set of responsibilities, maybe just new to some people. Although as others have said, many of these institutions and companies have already been subject to CFPB authority for other products and services that they provide.

[00:40:19] **Jerome Walker:** Yeah, that's a really important point. And so I want to pose a question to all of you. And you could address it in the order in which you want to. Earlier Eamonn and I think Stephen as well pointed to the numbers. And I think Eamon indicated there's a lot of numbers in this proposal.

What's interesting in part to me is that the CFPB's proposal in one part suggest that the proposed rule, if final, in its current form would apply to 17 large participants. But it drops a series of footnotes that make it absolutely clear that the CFPB has identified something in the range of 190, potential participants who would be subject to the rule and the CFPB explains that the CFPB itself does not have sufficient information to, to make a determination with respect to half of that that 190 in another place.

Within the rule the CFPB has the transaction, the annual transaction number at 5, 000, 000 and then it ask a question. Could you comment on whether we should increase the rule to 10, 000, 000 or decrease the rule to 1, 000, 000? What is going on here? And what should. The industry take from all of those numbers that the CFPB is using in the proposal? You guys can start in whatever order you, you want, but please help clarify what's going on there.

[00:42:05] **Melissa Baal-Guidorizzi:** I'm going to do as I did at the CFPB: I'm going to defer to the regs lawyer.

[00:42:11] **Jerome Walker:** Eamonn, that means you're on the hook.

[00:42:15] **Eamonn Moran:** Thanks, Melissa. That's okay. I feel like that's why we're doing our job. Yeah, I mean, you're right Jerome. I think there are a lot of numbers in the proposal. Apparently, there's a data shortage or lack of data availability. Maybe a combination of all those different factors.

I mean, I think, from my perspective, again, speaking high level here, this is a larger participant rulemaking. By its very nature, the Bureau is not intending to capture every single player that's offering a generally used digital payment app. And that's obviously part and parcel of just how the larger participant rulemakings work.

So you're not going to capture every player. The Bureau is, intending to focus its limited resources on, what it envisions to be the largest players that happen to be in the space. I think I wouldn't necessarily focus on the number of 190 is, potentially the, any potential cap on the number of players out in the space.

I would just say, I think whatever the number is, whether it's, I think the Bureau acknowledges that, the 190 number actually could be an underestimate because of the limited data. But I think that's why this two part threshold test is being proposed, right? So one is just transaction volume.

And the second part of that is, you know, SBA size metrics. So a good portion of what I would say participants in the space are going to be smaller entities that probably would get exempted because of the SBA size limitation, right? If they don't meet the transaction volume piece as well. I think whatever the number is, I mean, it seems like from what the Bureau is saying, and it's analysis that. Whether you move the figure to 10,000,000, or you drop it to the South of five million, you're not going to really capture many more participants in the space. Again, based upon the Bureau's estimates here. I think it's certainly an important point to think about and for industry and folks to comment on as part of the comment period process.

But I'm not sure that we have really a concrete and granular understanding of whatever the numbers are. But I don't think that's really what the focus really should be here, right? I think it's really what's a reasonable test to capture the largest players in the market? Because I think in those numbers that you were citing to Jerome. The Bureau is, or at least estimating that, even if you had 17 entities being brought under the CFPB supervisory authority if this proposed rule as it's proposed would be adopted, right? So that's only about nine percent of what they think to be all known non bank covered persons in this market. But according to their data, they're saying those entities, even if it's 17, for example, collectively facilitated approximately 88 percent of known transactions in the space as of 2021. Again, I would say, focus on what the Bureau is looking at here in terms of larger participants. Again, not looking to capture in every entity that's playing in the space, but, those that have the larger participation and presence. And so for those institutions, that's who the Bureau is looking to capture here.

[00:45:21] **Melissa Baal-Guidorizzi:** And so I'll just add to that from a contextual position of the fact that a lot of that data probably came from the 1022 orders that the CFPB put out with big tech companies related to their payment, amongst other things, their payment systems and their activity. And

Would you

[00:45:42] **Jerome Walker:** explain what a 1022 order is so that the audience will follow what you're saying.

[00:45:48] **Melissa Baal-Guidorizzi:** So amongst as many authorities, the CFPB has the authority to monitor the market. And so there are sections of Dodd Frank that allow the CFPB to essentially ask questions of different players in the market in a way that is not an exam or a an investigation. So not a subpoena or a CID and not an exam or an information request.

And those usually come out of the Office of Research Markets and Regulations. These are done on a regular basis, for instance, in the credit card markets. Because the credit card report is a statutory requirement that the Bureau has to produce every two years. And so they'll do a request to credit card issuers and ask for different information in order to create that report.

That same authority allows them to ask questions of others. And I can't remember the date off the top of my head, but there were these orders that were issued to big tech companies. That are likely part of this L. P. 17 now, and I think it's worth seeing the thread as part of the strategy on data and payments.

The CFPB has really been moving. There's rulemaking out now, not on just this, but open banking. There's for Credit Reporting Act and this confluence of how payments and funds move and data is something that FTC, the consumer, the premier consumer protection regulators in this space are really trying to cover more fully than they have in the past.

So this is a piece of that puzzle. And as Eamonn noted, they're just trying to get the larger participants. And if you look at the thread, you can even look at consumer finance dot gov, which is the CFPB's website. And, search on terms like big tech or payments and you'll see a lot of the information that they put out related to their concerns about consumer protection issues in that in those markets.

[00:47:59] **Jerome Walker:** Stephen, Melissa has pointed out that the CFPB had been signaling that it was concerned about the payment space. And it has taken some actions, including the request for information to the larger tech companies. So what are you telling your clients about the actions that the CFPB is taken and what they should be thinking about or doing in anticipation of the CFPB getting into this space in ways that the CFPB had not before?

[00:48:40] **Stephen Aschettino:** Look, we've been watching CFPB activity for a while and while the specifics of this rule do come as a surprise, the fact that they're seeking to extend their jurisdiction over these types of payments companies really doesn't. We've been giving this kind of advice for some time. The CFPB, putting aside the statutory challenges it's been dealing with, has a very broad view of its authority. To me, this doesn't really change too much in terms of the advice that we've already been giving. Going back to the numbers piece, I can't even try to slice and dice those numbers the way that Melissa and Eamonn have. I would just add from a practical perspective, it's conceivable that the 17 was essentially a Goldilocks number. If we set the threshold too low and now have 170 new entrants, that might be too much to digest. And if we set it too high where we only have five, people may question why are we even writing this rule. So just another point of view.

[00:49:43] **Jerome Walker:** Yeah. Eamonn, you discussed earlier the fact that this is the sixth time with this proposed rule that the CFPB would be supervising larger participants in a market. So five times the CFPB has asserted jurisdiction and has been supervising markets. What are the potential lessons that Stephen's clients can take from what has been learned about how the CFPB has dealt with the five prior markets?

[00:50:23] **Eamonn Moran:** So I would say a couple of things and I would, I'll keep this sort of high level or CFPB supervision focus, right? CFPB supervision, I mean, the supervision prong of the agency is really in many ways, the Bureau's most powerful tool for finding out what goes on within a company. And it allows the Bureau to find things that are not really evident from the outside. So things that may not be apparent through consumer complaints that are submitted or things that aren't sort of visible on a public facing website that the company offers. At a high level, the Bureau's ability to discover issues that they may identify as problematic is massively higher when they have the opportunity to do a supervisory exam, for example, than when they're just relying on consumer complaint data and other public information. So the Bureau has historically used supervisory exams as a way to exert some pressure on the entities that it supervises. And I would say, part of this is really designed to make, business process changes that the Bureau would like to see.

So that pressure can be exerted. In a completely confidential way through the exam process where there's not like a judge or a court or anything like that. And the CFPB doesn't even have to publicly state what it's doing. And it can push for industry changes with presumably cooperative supervised entities wanting to preserve the relationship with their regulator. And, the Bureau has some flexibility and leeway to try to change the law or conduct, at least through that

supervisory context. This might be at least in part on what's on the Bureau's mind when it's proposing, now the sixth larger participant rule that we're speaking of today. For one thing in terms of this overall supervision, what we've learned going back to the other larger participant rulemakings, I would say we have seen the CFPB this year send out large numbers of inquiries to companies that are in the industry to find out whether they are larger participants under the existing larger participant rules. And it looked to me like the volume of those requests was really designed to usher in a larger population of companies under the existing non bank rules who would be subject to future CFPB exams. We've also seen a lot of use by the CFPB of supervision in ways that go beyond and that are different from traditional full on site exams. And that's something that the Bureau has done. I would say probably starting in 2020 relating to the COVID 19 pandemic. The Bureau started to do these prioritized assessments where they were offering and providing exams by questionnaire, where there's no actual physical examiners coming on site to do an exam, but the Bureau sends some questions out about a topic of interest to them. We've seen the CFPB using those specialized questionnaires to target very specific issues with supervised entities that the CFPB already, I think, has a feeling that it wants to take action on. And then rapidly moving from those questionnaires to demands for process changes as well as or customer restitution as part of that. The Bureau has a unique tool, and I think we briefly highlighted this before during the session, but in addition to using supervision to exert pressure on supervise entities, they also have a specific law that prohibits something. And the old standby there is UDAAP. So unfair, deceptive and abusive acts and practices. Probably the Bureau would be looking to use UDAAP in the payment space as well to make changes or to seek remediation in the supervisory process.

Overall, big picture, we see the Bureau using a supervisory authority on a wider set of non banks through its larger participant rulemakings as well as in ways that really allow the Bureau a quicker ability to find and demand changes in industry practices through the use of, abbreviated exams, like sending out questionnaires that the bureau has taken onto.

And so I think this larger participant rule that was just issued or the proposal I should say, really comes in the background or backdrop right of that heightened and faster use of supervision that we're seeing across the board with the agency.

[00:54:27] **Jerome Walker:** Melissa I think it's really important that Eamonn mentioned UDAAP, and one of the reasons that's important is the CFPB itself, while it has broad authority within the proposed rule, it identified UDAAP, it identified Reg P, which has to do with privacy and Reg E. Does that mean that you would be advising your clients that if this rule were final, three of the more

important rules that would likely form the basis of an enforcement action, if there were an enforcement action, would be those three so that you should put some emphasis on the front end on those three, three rules.

[00:55:18] **Melissa Baal-Guidorizzi:** Yes, I think that's right. Obviously they're very difficult compliance obligations for even very sophisticated financial institutions. And I think one of the things, that I when I'm talking to clients, a federal exam, particularly for a non-bank that has not had a really thorough exam process in its life cycle is very difficult. Unlike, investigations and subpoenas and CIDs can be difficult, but what an exam is like a full physical exam, a checklist of stem to stern. You're getting asked about all your policies, procedures. It's maybe an inch deep, but a mile wide. And that's a lot of effort on testing your compliance management systems from beginning to end. And they're going to look at some of the top regulatory burdens. And you can look at all the Reg E cases that have come out from the CFPB which have been very significant and the text of Reg E and UDAP with the CFPB having the additional authority over abusive acts or practices.

So from a state level, if you have state regulatory experience as a non bank, you might be familiar with unfair and deceptive acts or practices. But abusive acts or practices is something that the CFPB can examine on and investigate. And that can be really difficult burden.

I'd like to also piggyback off of what Eamonn said. One of the things that we're seeing in the examination space is that there are more demands being made on examination subjects for changes in process that are more like injunctive relief that you might see in an enforcement action and restitution with very long time periods, clawback periods. And so that's something that is something to work to consider when you're thinking of being part of this new rule, maybe doing some sort of testing and analysis, any gap analysis that might be helpful.

The last thing I would say about this new rule. The CFPB has taken an even deeper look at its use of supervisory highlights. So one of the things in the past that an entity could sort of benefit from in a supervisory action versus an enforcement action is the idea that supervisory actions are non public and confidential and that enforcement actions are public. But to the extent that the supervisory highlights are becoming more and more detailed each quarter, I think, there may be more ease in trying to identify which entity had to give back 100, 000 or had this violation? And so I think that those are the kinds of things that players in this space and the institutions that are trying to provide these services should think about when considering the new rule.

[00:58:21] **Jerome Walker:** Thanks Melissa, Eamonn and Stephen. And we look forward to the next time you guys join the Task Force to record a podcast. Everyone have a wonderful day and we'll see you soon. Take care.

[00:58:39] **Intro/Outro Voiceover:** Thank you for listening to this episode of the New York City Bar Association podcast. Opinions expressed are those of the speakers and not necessarily of the City Bar.

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