Cooley

# CFPB Signals Desire to Expand Supervision of Nonbank Payments Firms

October 12, 2023

During remarks at a payments-focused event on October 6, 2023, Consumer Financial Protection Bureau (CFPB) Director Rohit Chopra signaled that the bureau intends to expand its oversight of digital payments and the companies that provide these types of services. Chopra's statements provide additional insight into the CFPB's thinking about payments regulation and follow several recent bureau actions that highlight its particular interest in emerging payments activities.

## Chopra's remarks

In his remarks, Chopra emphasized several key aspects of the CFPB's roadmap for exercising supervisory authority over consumer payments.

**First,** the CFPB intends to explore its authority under the Dodd-Frank Wall Street Reform and Consumer Protection Act to enable the bureau to "conduct supervisory examinations of nonbanks operating consumer payment platforms," including when firms act as service providers to large depository institutions. Chopra also noted that the CFPB may use its authority to define "larger participants" in the market by rule, "which would subject nonbanks meeting a particular size threshold" to supervision.[1]

**Second,** Chopra signaled that the CFPB would issue additional demands to "certain large technology firms" regarding their use of personal data and "any issuance of private currencies." This remark builds on the CFPB's 2021 inquiry, in which the bureau ordered six large technology companies operating payments systems in the US to provide information about their business practices.

**Third,** Chopra discussed the need for cross-agency collaboration. In particular, he said that the Financial Stability Oversight Council should use its authority under Title VIII of Dodd-Frank to designate the operation of a payments platform as an activity that either contains systemic risk or is "likely to become" a "systemically important payment, clearing, or settlement activity."

**Fourth,** Chopra noted that the bureau is considering issuing new guidance "regarding the applicability of the Electronic Fund Transfer Act [EFTA] with respect to private digital dollars and other virtual currencies."

**Fifth,** and less clearly defined, is the CFPB's interest in combating market concentration in consumer financial markets, and associated data use risks. Chopra commented on his "fear" that the US "is lurching toward a consolidated market structure, like the one that has emerged in China, that blurs the lines between payments and commerce and creates the incentives for excessive surveillance and even financial censorship … . As we seek to configure a payments architecture that can provide safe and secure electronic cash, we should make sure that the deployment of private sector technologies and services are aligned with our values for fair competition, consumer protection, and our national interest."

## Market power considerations

While aspects of Chopra's remarks provide additional insight into the CFPB's current thinking about how to approach payments regulation – especially with respect to the CFPB's desire to examine certain larger nonbank payments companies and the possibility of new virtual currency guidance – Chopra also reiterated many of the CFPB's previously articulated areas of emphasis. In particular, Chopra's concerns regarding the potential for data misuse within a consolidated market structure appear to be driving several recent bureau actions and initiatives. For example:

- The CFPB press release announcing the aforementioned 2021 inquiry into six large payments platforms stated the bureau's view that "the scale and market power of large technology companies raise concerns about potential new risks to consumers and to broader competition in the marketplace."
- In comments to the House Financial Services Committee regarding upcoming rulemaking implementing 12 USC § 5533 of Dodd-Frank, Chopra remarked that the bureau "want[s] to make sure that standards are giving the ability for consumers and all market participants … to switch." Further, Chopra said that "when a consumer has the power to vote with their feet, you'll see how our system will give them better service as well."
- The CFPB has published "issue spotlights" highlighting the potential impact of market concentration in consumer payments.

Also apparent from recent CFPB initiatives is the emphasis on collaboration between the bureau and other federal agencies in service of the regulation of large payments companies. For example:

- A comment submitted by Federal Trade Commission Chair (FTC) Lina Khan in response to the CFPB's 2021 payments inquiry highlighted that these issues were of concern to the FTC, and that the commission would be "looking to this inquiry and the findings it produces to help inform the FTC's work."
- Last year, on the same day that the CFPB published a Consumer Financial Protection Circular stating its view that providing "[i]nadequate security for the sensitive consumer information collected, processed, maintained, or stored by … [a] company can constitute an unfair practice" under the Consumer Financial Protection Act,[2] the FTC announced an advance notice of proposed rulemaking seeking public comment on commercial surveillance practices.
- Chopra's comments on October 6, 2023, expressly called upon the Financial Stability Oversight Council to support the CFPB's efforts to regulate larger payments companies.

# Applying EFTA to virtual currency

As noted above, Chopra previewed that the CFPB is considering issuing new guidance regarding the applicability of the EFTA to certain private digital dollars and other virtual currencies. While his remarks discussed the potential for regulation of stablecoins and/or central bank digital currencies via the EFTA, Chopra suggested that the CFPB is particularly focused on the status of credit card points under the law. Noting the volume of questions the bureau receives on the issue, he suggested that "bait-and-switch" tactics, where issuers potentially misrepresent the benefits of points-based sign-up bonuses, is a point of specific focus.

Accordingly, issuers of what Chopra characterizes as "private money" (e.g., stablecoins, but in particular, credit card points) should remain alert for any further communications from the bureau regarding the scope of applicability of the EFTA. Similarly, given the interest from the CFPB and other agencies, larger nonbank payments companies and the banks that partner with them should pay close attention to developments from the CFPB and other federal regulators.

**Notes**

1. See 12 US Code § 5514(a)(1)(B).
2. *Id.* § 5536(a)(1)(B).

This content is provided for general informational purposes only, and your access or use of the content does not create an attorney-client relationship between you or your organization and Cooley LLP, Cooley (UK) LLP, or any other affiliated practice or entity (collectively referred to as "Cooley"). By accessing this content, you agree that the information provided does not constitute legal or other professional advice. This content is not a substitute for obtaining legal advice from a qualified attorney licensed in your jurisdiction, and you should not act or refrain from acting based on this content. This content may be changed without notice. It is not guaranteed to be complete, correct or up to date, and it may not reflect the most current legal developments. Prior results do not guarantee a similar outcome. Do not send any confidential information to Cooley, as we do not have any duty to keep any information you provide to us confidential. When advising companies, our attorney-client relationship is with the company, not with any individual. This content may have been generated with the assistance of artificial intelligence (AI) in accordance with our AI Principles, may be considered Attorney Advertising and is subject to our legal notices.

# Key Contacts

| | |
|---|---|
| Adam Fleisher<br>Washington, DC | afleisher@cooley.com<br>+1 202 776 2027 |
| Elyse Moyer<br>Washington, DC | emoyer@cooley.com<br>+1 202 776 2113 |


This information is a general description of the law; it is not intended to provide specific legal advice nor is it intended to create an attorney-client relationship with Cooley LLP. Before taking any action on this information you should seek professional counsel.

Copyright © 2023 Cooley LLP, 3175 Hanover Street, Palo Alto, CA 94304; Cooley (UK) LLP, 22 Bishopsgate, London, UK EC2N 4BQ. Permission is granted to make and redistribute, without charge, copies of this entire document provided that such copies are complete and unaltered and identify Cooley LLP as the author. All other rights reserved.