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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 Digital Consumer Payment Applications, Docket No. CFPB-2023-0053 – Comments Concerning Justice-Involved Individuals

The National Consumer Law Center (NCLC), on behalf of its low-income clients, and Worth Rises are pleased to submit these comments in response to the Consumer Financial Protection Bureau's (CFPB or Bureau) proposed rule defining larger participants of a market for general-use digital consumer payment applications, Docket No. CFPB-2023-0053 (Proposed Rule).[1] We thank the Bureau for proposing a rule defining a market for general-use digital consumer payment applications and providing that larger participants of that market would be subject to its supervisory authority. We also thank the Bureau for contemplating coverage of corporations operating in the carceral context. We urge the Bureau to finalize a rule that would establish supervisory authority over larger nonbank providers of (1) money-transfer services for incarcerated people and their loved ones and (2) prepaid cards for people being released from prison or jail, known as "debit release cards" or "release cards."

These comments first describe the dynamics that characterize the correctional financial services industry—focusing on money transfers and release cards in particular—as well as how consumers of these services are particularly vulnerable to abuses and would benefit from CFPB supervisory authority. Second, we discuss why the proposed definition of "general use" appropriately includes transactions implicating justice-involved people. Third, we explain why the market definition should include payment services not heavily accessed by digital applications and why the test for defining larger market participants should count both digital and non-digital transactions. Fourth, we address the scope of the CFPB's supervision and why it should cover a company's entire business. Fifth, we describe how larger providers of correctional money-transfer services and release cards likely satisfy the CFPB's proposed "test to define larger participants" and should be subject to supervision. Finally, we explain why the Bureau should ensure that this rule subjects larger nonbank money-transfer and release-card providers to CFPB supervisory authority even if they also may be subject to other CFPB supervisory authorities.

[1] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090), https://www.federalregister.gov/documents/2023/11/17/2023-24978/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications.

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I. Consumers of Correctional Money Transfers and Release Cards Are Particularly Vulnerable to Abuses, Justifying CFPB Supervisory Authority

As the CFPB recognizes in the Supplementary Information to the Proposed Rule, in addition to the very largest providers of general-use digital consumer payment applications, "other providers play an important role in the marketplace," including because "more vulnerable consumers" may transact with these other providers. This precisely describes the dynamics around financial products and services in the carceral context, including money transfers and release cards. In the carceral context, consumers are particularly vulnerable to the corporations they are forced to transact with. Moreover, the market for carceral financial services is quite large and impacts a large number of consumers.

In the subsections that follow, we discuss the dynamics of the correctional financial services industry and how these dynamics render consumers particularly susceptible to abuse. We focus in particular on money-transfer services and release cards, which, as discussed further below, should be subject to the CFPB's supervision under the final rule.

A. Justice-involved consumers often must rely on abusive money-transfer services and release cards

Justice-involved consumers often must rely on particular money-transfer services and release-card providers because companies often have monopolies in a given correctional facility. The prevalence of monopolies for goods and services in correctional facilities—and the harm to consumers they cause—are well known to the CFPB. As the CFPB explained in a January 2022 report, fairness and competition "seldom appear in the markets for products and services that capitalize off the criminal justice system, where firms may enter into exclusive relationships with government actors, rather than competing on the basis of consumer choices."[2]

Private companies often can secure these exclusive relationships with correctional facilities by paying them large kickbacks, called "site commissions." More specifically, private companies compete with one another for a contract to provide services in a given facility by offering to make kickback payments. The higher the kickback payment, the more attractive the company's offer to the facility. In exchange for these payments, the company requires the correctional facility to make it the exclusive provider of the contracted service. This secures for the company what is, in many cases, a literally "captive market." Companies pass on the costs of these kickback payments directly to consumers—incarcerated people and their loved ones. They do so by aggressively inflating prices and charging excessive fees, which the exclusive terms of their contracts allow them to do without fear of competition. These dynamics often play out in the context of correctional money-transfer services and release cards.

1. Correctional money-transfer services

Correctional facilities are supposed to provide a basic level of subsistence to people who are incarcerated. Unfortunately, correctional facilities often fail to do so, meaning that incarcerated people's loved ones must pick up the slack by sending in money for basic necessities like

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[2] Consumer Fin. Prot. Bureau, Justice-Involved Individuals and the Consumer Financial Marketplace 3 (2022), https://www.consumerfinance.gov/data-research/research-reports/justice-involved-individuals-consumer-financial-marketplace/ [hereinafter CFPB, Justice-Involved Individuals Report].

hygiene products, medication, food, and paper from the commissary.[3] Sending money to someone in prison or jail typically requires dealing with a private corporation that handles money transfers.[4] Today, people can send money to an incarcerated loved one through a corporation's website or an application.[5]

Money-transfer providers often win an exclusive contract with a particular correctional facility, and often take unreasonable advantage of their status as consumers' only option to extract outrageous fees. The Prison Policy Initiative (PPI), a non-profit, non-partisan organization, recently reviewed the money-transfer setups in all state prisons and found that money transfer-related fees are alarmingly high. The average is around 20% of the principal amount in 26 states that issue monopoly contracts; the highest fees observed were 37%.[6] By comparison, services like Venmo, CashApp, Paypal, and Zelle provide *free* automated clearing house (ACH) transfers from bank accounts (correctional money-transfer companies do not offer an ACH option), and they offer transfers from a credit or debit card either for free or for a typical fee of 3% or less.[7]

2. Release cards

When people leave prison or jail, so does their money. Upon leaving custody, people often have money left in their inmate trust account[8]—whether from accumulated earnings; support from family; or, in the case of a short-term jail stay, a return of whatever cash they had in their possession when arrested.[9]

In the past, people received their money in the form of cash or a check. But, working in concert with private-equity backed financial services firms, correctional facilities have increasingly given

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[3] Incarcerated people obtain many necessities of life at the commissary, a retail outlet that is often operated by a for-profit contractor. The commissary is where people can buy necessary hygiene products and over-the-counter medications; purchase basic supplies like paper, batteries, and small appliances; and supplement the low-quality, too-small, and possibly spoiled or rotten food served in the cafeteria. Ariel Nelson & Stephen Raher, *Captive Consumers: How government agencies and private companies trap and profit off incarcerated people and their loved ones*, Inquest (Mar. 19, 2022), https://inquest.org/captive-consumers/.

[4] *See* CFPB, Justice-Involved Individuals Report, *supra* note 2, at 17–18; Worth Rises, The Prison Industry: How It Started. How It Works. How It Harms. 61–62 (2020), https://static1.squarespace.com/static/58e127cb1b10e31ed45b20f4/t/621682209bb0457a2d6d5cfa/1645642294912/The+Prison+Industry+How+It+Started+How+It+Works+and+How+It+Harms+December+2020.pdf [hereinafter Worth Rises, The Prison Industry].

[5] CFPB, Justice-Involved Individuals Report, *supra* note 2, at 19 ("Money transfer providers often offer transfers online . . . . [V]endors heavily advertise the fast processing of their electronic money transfer services, which are quicker but more expensive than the systems they replace.").

[6] Stephen Raher & Tiana Herring, Prison Pol'y Initiative, *Show Me the Money: Tracking the Companies that Have a Lock on Sending Funds to Incarcerated People* (2021), https://www.prisonpolicy.org/blog/2021/11/09/moneytransfers/.

[7] *Id.*; *see also* CFPB, Justice-Involved Individuals Report, *supra* note 2, at 18.

[8] "Trust account" is a term of art in the correctional sector, referring to a pooled bank account that holds funds for incarcerated people whose individual balances are sometimes treated as subaccounts. The term "trust" is used because the correctional facility typically holds the account as trustee, for the benefit of the individual beneficiaries (or subaccount holders). *See, e.g.*, Wanda Bertram, Prison Pol'y Initiative, The CFPB's Enforcement Order Against Prison Profiteer JPay, Explained n.1 (2021), https://www.prisonpolicy.org/blog/2021/10/28/cfpb-jpay/#lf-fnref:1.

[9] CFPB, Justice-Involved Individuals Report, *supra* note 2, at 27–29; *see also* Worth Rises, The Prison Industry, *supra* note 4, at 62–63.

released people their money in the form of a prepaid debit card. These prepaid products, known as "debit release cards" or "release cards,"[10] are digitally preloaded with people's money.[11]

Oftentimes, people have no choice but to receive their money from a release-card company that has an exclusive contract with the correctional facility from which they are being released. Many companies take unreasonable advantage of consumers' absence of choice to force them to pay outrageous fees to access their own money.

In its Policy Statement on Abusive Acts or Practices, the CFPB cites one company's—JPay's—actions involving its release cards as an example of abusive conduct enabled by its monopoly status.[12] Unfortunately, JPay is far from the only release-card company engaged in abusive practices. PPI conducted a survey of 48 active release cards issued by five different financial institutions, using the CFPB's prepaid product agreements database.[13] PPI's survey revealed widespread abusive conduct, with companies taking unreasonable advantage of consumers' lack of choice to charge them for things like having an account (periodic maintenance fees), using their account (purchase fees), not using their account (account closure fees), and declined purchases. These fees do not appear to compensate card issuers for real costs. These problematic charges are described in more detail in other recent comments to the CFPB[14] and the Federal Trade Commission.[15]

B. <u>Financial-service providers are part of the oligopolistic dynamics that characterize the corrections sector more broadly, rendering consumers vulnerable to abusive practices</u>

The CFPB has recently observed that consumers are often vulnerable and unable to protect their interests if companies have outsized market power,[16] and in the context of financial products and services in correctional facilities, companies often have outsized power because oligopolistic dynamics characterize the corrections sector more broadly. These dynamics limit the choices that prisons and jails have to choose among providers and further render consumers vulnerable to abusive practices.

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[10] Stephen Raher, Prison Pol'y Initiative, Insufficient Funds: How Prison and Jail "Release Cards" Perpetuate the Cycle of Poverty (2022), https://www.prisonpolicy.org/blog/2022/05/03/releasecards/; *see also* Worth Rises, The Prison Industry, *supra* note 4, at 59, 62–63.

[11] Alexes Harris, Tyler Smith, & Emmi Obara, *Justice "cost points": Examination of privatization within public systems of justice*, 18 Criminology & Pub. Pol'y 343, 343–59 (2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8059698/pdf/nihms-1686142.pdf.

[12] Consumer Fin. Prot. Bureau, Policy Statement on Abusive Acts or Practices 17 n.72 (2023), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf [hereinafter CFPB, Policy Statement on Abusive Acts or Practices] (explaining that JPay "took unreasonable advantage of the market structure which allowed it, as a single-source government contractor for prepaid cards, to charge fees even if consumers did not want to do business with the company because consumers were denied a choice on how their money would be given to them upon release from incarceration").

[13] *See* Prison Pol'y Initiative, Comment Letter on Request for Information on Fees Imposed by Providers of Consumer Financial Products or Services, Exhibit 2 (Apr. 11, 2022), https://www.regulations.gov/comment/CFPB-2022-0003-2517.

[14] *Id.* at 7–11.

[15] Comments of Nat'l Consumer L. Ctr. et al. on Advanced Notice of Proposed Rulemaking on Unfair or Deceptive Fees 7–9 (Feb. 8, 2023), https://www.nclc.org/wp-content/uploads/2023/02/Unfair-or-Deceptive-Fees-ANPR-R207011_NCLC-et-al.pdf.

[16] CFPB, Policy Statement on Abusive Acts or Practices, *supra* note 12, at 16.

The two companies that dominate the correctional phone market—Securus Technologies and ViaPath Technologies (formerly called Global Tel*Link or GTL)—have acquired numerous competitors that sell products and services like release cards and money-transfer platforms. For example, Aventiv Technologies, the corporate parent of Securus, explains on its website that Securus is "continuing [its] transformation from a traditional corrections telecommunications service provider to a diversified technology company" that provides products and services "across multiple sectors."[17] Aventiv is now the corporate parent of Securus, JPay, and AllPaid, whose combined correctional products and services span communications, security, entertainment, education, parole and probation payments, tablets, and—particularly relevant here—money transfers and release cards.[18]

Because of this consolidation, corporations now offer correctional facilities packages of unrelated services in one huge "bundled contract," which gives the corporation exclusive rights to offer incarcerated people multiple services, all covered by a single contract. Bundling, which is now the norm,[19] allows corporations to obscure the actual cost of providing their various services—hiding cost information from both users and the contracting correctional facility.

The oligopolistic nature of the corrections macroeconomy also means that correctional facilities have little choice in deciding which company to award contracts. This lack of competition prevents companies from having to compete with one another by offering lower costs, thereby distorting the proper functioning of the market, to consumers' detriment.

In sum, the fact that very few companies operate in this space nationwide severely limits consumer choice and renders them vulnerable to exploitation and abuse.

C. <u>The common characteristics of consumers relying on correctional financial services, including money transfers and prepaid cards, also render them vulnerable to abuses</u>

In addition to being subject to detrimental monopolistic and oligopolistic market dynamics, justice-involved people and their loved ones are particularly vulnerable consumers for at least two additional reasons. First, incarcerated people have especially limited financial resources: the median income among people entering prison is 41% less than the national average, and people have virtually no ability to earn meaningful wages while they are incarcerated.[20] Second, the financial cost of supporting incarcerated family members tends to fall disproportionately on

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[17] Press Release, Aventiv Technologies, Securus Technologies Realigns Business Units, Diversifies Product Offerings Under New Corporate Parent: Aventiv Technologies (Oct. 10, 2019), https://www.aventiv.com/securus-technologies-realigns-business-units-diversifies-product-offerings-under-new-corporate-parent-aventiv-technologies/.

[18] *Id.*

[19] Peter Wagner & Wanda Bertram, Prison Pol'y Initiative, State of Phone Justice 2022: The Problem, the Progress, and What's Next, at n.20 (2022), https://www.prisonpolicy.org/phones/state_of_phone_justice_2022.html. To incentivize a bundled contract, the companies typically offer a higher commission payment, and dangle the prospect of getting more services for less negotiation and paperwork. But in exchange, the facilities give up the leverage to retain *only* the quality services they want at a price they consider fair.

[20] Wendy Sawyer, Prison Pol'y Initiative, How Much Do Incarcerated People Earn in Each State? (2017), https://www.prisonpolicy.org/blog/2017/04/10/wages/ (showing average hourly wages of 14¢ to 63¢ for typical prison jobs).

low-income people of color, and Black women in particular, raising important equity considerations.[21] People leaving incarceration are even worse off financially.[22]

D. Consumers would benefit from CFPB supervisory authority over larger nonbank providers of money transfers and release cards

Given the dynamics of correctional financial services sector, which make it an environment particularly susceptible to abuse, and given the exceptional vulnerability of consumers forced to rely on providers of such services, consumers stand to benefit greatly from the CFPB's exercise of supervisory authority over larger providers of correctional money transfers release cards.

As the CFPB notes, supervision of larger participants in the market for general-use digital consumer payment applications "would help to ensure that they are complying with applicable requirements of Federal consumer financial law," including the "[Consumer Financial Protection Act (CFPA)]'s prohibition against unfair, deceptive, and abusive acts and practices." Larger participants in this market that operate in the carceral context appear to be engaging in such unfair, deceptive, and abusive acts and practices. The CFPB has taken enforcement action against at least one such actor, JPay.[23] NCLC and other organizations also have detailed this abusive conduct in previous comments to the CFPB and other federal agencies.[24]

As the CFPB explains in the Supplementary Information to the Proposed Rule, the prospect of potential CFPB supervisory activity could incentivize larger participants to "allocate additional resources and attention to compliance with Federal consumer financial law," including the CFPA, thereby reducing harm to consumers. Likewise, an actual examination could reveal past or present noncompliance, which the CFPB could correct through supervisory activity or an enforcement action.

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[21] CFPB, Justice Involved-Individuals Report, *supra* note 2, at 15–16 (explaining how the "disproportionate impact [of supporting incarcerated people] falls on families who are low-income and from communities of color," and even more specifically on women of color); Saneta deVuono-powell et al., Ella Baker Center for Human Rights, Who Pays? The True Cost of Incarceration on Families 9 (2015), https://ellabakercenter.org/who-pays-the-true-cost-of-incarceration-on-families/.

[22] *See, e.g.*, Terry-Ann Craigie et al., Brennan Ctr. for Just., Conviction, Imprisonment, and Lost Earnings: How Involvement with the Criminal Justice System Deepens Inequality, 6 (2020), https://www.brennancenter.org/our-work/research-reports/conviction-imprisonment-and-lost-earnings-how-involvement-criminal?ref=honeysucklemag.com (finding that "[o]n average, formerly imprisoned people earn nearly half a million dollars less over their careers than they might have otherwise," that "[t]hese losses are borne disproportionately by people already living in poverty," and that "they help perpetuate it").

[23] Press Release, Consumer Fin. Prot. Bureau, CFPB Penalizes JPay for Siphoning Taxpayer-Funded Benefits Intended to Help People Re-enter Society After Incarceration (Oct. 19, 2021), https://www.consumerfinance.gov/about-us/newsroom/cfpb-penalizes-jpay-for-siphoning-taxpayer-funded-benefits-intended-to-help-people-re-enter-society-after-incarceration/#:~:text=The%20order%20also%20requires%20the,said%20CFPB%20Director%20Rohit%20Chopra.

[24] *See* Comments of Nat'l Consumer L. Ctr. et al. on Statement of Policy Regarding Prohibition on Abusive Acts or Practices, Docket No. CFPB-2023-0018 (Apr. 12, 2023), https://www.nclc.org/wp-content/uploads/2023/07/Consumer-Coalition-Comment-on-Abusive-Practices_FINAL-Lauren-Saunders.pdf; Comments of Nat'l Consumer L. Ctr. et al. on Advanced Notice of Proposed Rulemaking on Unfair or Deceptive Fees (Feb. 8, 2023), https://www.nclc.org/wp-content/uploads/2023/02/Unfair-or-Deceptive-Fees-ANPR-R207011_NCLC-et-al.pdf.

We also agree with the CFPB that it is likely that other market participants would increase compliance in response to the supervisory activity that any final rule authorizes. In the corrections sector, this seems especially likely: if the CFPB takes action against a larger entity, the relatively small number of other companies operating in this space will likely take notice and seek to improve their own compliance to reduce their exposure.

In short, many vulnerable consumers would benefit if the CFPB exercises supervisory authority over larger nonbank providers of correctional money transfers and release cards.

II. The Definition of "General Use" Appropriately Includes Payment Transactions Implicating Justice-Involved People

One aspect of the proposed market definition is that it would apply to providers of payment applications with "general use." We support the CFPB's proposed definition of "general use" and the explanation in the Supplementary Information that a digital payment application "still may have general use even with the universe of potential recipients for a funds transfer is fixed, such as when a consumer can only make a transfer of funds to friends or family located in a prison, jail, or other secure facility."[25] As the CFPB states, incarcerated consumers can use funds transferred into their accounts for "a wide range of purposes."[26] These purposes include purchasing not only food, but also hygiene products, medication, and medical supplies from the commissary; e-messages and other communications; and books, movies, and other media items for their tablets. As the CFPB further notes, when a person leaves incarceration, any unused funds in their accounts may revert to a release card. Release cards themselves have "a wide range of purposes" because they are unrestricted accounts can be used anywhere in the free world where debit cards can be used.

Moreover, the United States has thousands of federal, state, local, and tribal criminal justice systems, which together hold almost 2 million people.[27] Undergirding that number is "the enormous churn in and out of correctional facilities."[28] In 2021, about 421,000 people entered prisons, but people went to jail almost 7 million times.[29] In short, the number of people incarcerated in the United States is significant and also never fixed.

Given that money-transfer services available in the carceral context serve broad functions, they should qualify as general use. Release cards serve even broader functions. We urge the CFPB to adopt a definition of "general use" that includes transactions involving incarcerated and recently incarcerated people.

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[25] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80207 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090), https://www.federalregister.gov/documents/2023/11/17/2023-24978/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications.
[26] *Id.* at 80207–08.
[27] Wendy Sawyer & Peter Wagner, Prison Pol'y Initiative, Mass Incarceration, the Whole Pie (2023), https://www.prisonpolicy.org/reports/pie2023.html#:~:text=Together%2C%20these%20systems%20hold%20almost,centers%2C%20state%20psychiatric%20hospitals%2C%20and.
[28] *Id.*
[29] *Id.*

III. The Market Definition Should Encompass Services Not Heavily Accessed by Digital Applications, and the Test for Defining Larger Market Participants Should Count Digital and Non-Digital Transactions

A. The final rule should encompass payment services, such as prepaid cards, that may not primarily involve digital applications

The CFPB has appropriately proposed a broad rule that would help ensure oversight of large nonbank entities providing payment services. However, because it focuses on the volume of transactions facilitated by a digital application, the Proposed Rule leaves a gap in the oversight of the consumer payments market.

The proposed market definition applies to "providing covered payment functionalities through a digital application."[30] The CFPB states that the proposed definition of "digital application" would exclude "the consumer's presentment of a . . . prepaid card . . . in plastic, metallic, or similar form at the point of sale."[31] Even though the CFPB notes that using the same payment card "in a wallet functionality provided through digital application" would bring the wallet provider's transactions within the market definition,[32] the provider of the card—which is the company covered by Regulation E and other laws—would not be supervised. Many prepaid cards offer a digital application, but the primary use is still likely the card itself, especially for release cards. The amounts loaded onto release cards are generally modest. And consumers who must use these cards—people leaving incarceration—likely do not have a smartphone and need to use the funds immediately. Thus, the proposed definition likely would result in the exclusion of nonbank release-card issuers, service providers, and program managers from the market.

Given the abuses discussed above, the problems revealed in the CFPB's enforcement action against JPay involving release cards, and the vulnerability of the consumers forced to rely on release cards, we urge the CFPB to ensure that the market definition, including the definition of "digital application," does not exclude these products.

B. The CFPB should count all transactions in determining whether a market participant satisfies the annual covered consumer payment transaction volume test

Many money-transfer services that enable families and friends to send funds to incarcerated people have digital applications, including websites and applications through which funds can be sent. Those transactions are appropriately covered by the proposed rule and may be sufficient in number to bring these correctional money-transfer companies within the proposed larger participant definition. But given the low-income population that these companies serve, not all friends or family members have easy access to digital applications. Many money-transfer companies not only allow consumers to complete their transactions through websites and applications, but also through other methods, such as call centers and correctional facility booking kiosks. These other methods may not be considered digital transactions. As noted

[30] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80206 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090), https://www.federalregister.gov/documents/2023/11/17/2023-24978/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications.
[31] *Id.*
[32] *Id.*

above, the same may be true in the release-card context—that is, consumers use release cards in ways that may not be considered digital transactions under the proposed rule.

Potential problems posed by these services, including compliance issues and the vulnerability of their consumers, exist whether the transfer is accessed through a digital application or another method. Moreover, unique problems may arise in a card-based or in-person context but not in the context of transactions initiated through a digital application. Delivery of disclosures is different, and the possibility that employees could mislead consumers lurks, for example. In determining whether a covered person satisfies the annual covered consumer payment transaction volume, the CFPB should count all transactions—including non-digital transfers—facilitated by the entity that provides general-use digital payment applications.

Additionally, as discussed below in Section V.A.2, some entities provide money-transfer services in the corrections context as well as in the free world context. The CFPB similarly should count transactions in both contexts in determining whether a particular entity satisfies the covered consumer payment transaction volume.

Counting all transactions would help ensure that larger participants that serve particularly vulnerable consumers—which, as discussed above in Section I, includes providers of correctional financial services—are subject to the CFPB's supervisory authority. It also may allow the CFPB to more easily and efficiently determine which entities satisfy the transaction volume test.

IV. The Scope of the CFPB's Supervision Should Cover a Company's Entire Business

Broadening the scope of the transactions considered in the market definition, as discussed above in Section III, not only is important for purposes of ensuring that all larger nonbank payment-transfer companies are subject to supervision. The scope of the market definition also may determine the scope and coverage of the CFPB's examination manual. Although the CFPB has the authority to supervise all of a company's consumer financial activities once the company is subject to supervision,[33] it is not clear if the CFPB's examinations routinely cover all of those activities, or if instead they focus on the activities that are part of the market definition, looking at other activities only if they catch the examiner's eye or generate complaints.

The CFPB should ensure that all payment service-related activities of the larger nonbank companies are subject to active supervision, through a broader market definition or, in the alternative, through ensuring that the examination manual is sufficiently broad.[34] There is no reason to leave gaps in oversight of this important market.

[33] *Id.* at 80198 n.7 ("[T]he CFPB's supervisory authority is not limited to the products or services that qualified the person for supervision, but also includes other activities of such a person that involve other consumer financial products or services that are subject to Federal consumer financial law." (internal quotation marks and citation omitted)).
[34] The CFPB may be considering this alternative approach. *See id.* ("[Se]lling, providing, or issuing of stored value or payment instruments is associated with the activity that falls within the proposed market definition, and may constitute a consumer financial product or service that the CFPB may supervise when examining a larger participant of the proposed market.").

V. Larger Correctional Money-Transfer Companies and Release Cards Should Be Subject to CFPB Supervision

The CFPB should exercise supervisory authority over the larger corporations providing correctional money-transfer services, to which vulnerable consumers must turn to access funds for necessities like food, clothing, medication, and communications (such as stamps, envelopes, and electronic messaging). The CFPB also should exercise supervisory authority over the larger corporations providing prepaid cards for people leaving incarceration—some of whom are the same corporations that provide correctional money-transfer services—to which these consumers must turn to access their own money upon release.

The CFPB notes that its estimate of the entities operating in the proposed market is rough because of incomplete data.[35] Our discussion below regarding whether certain larger providers of correctional money transfers and release cards may satisfy the CFPB's proposed "test to define larger participants" is similarly limited. The CFPB should obtain the data necessary to determine whether such providers meet the CFPB's proposed definitions. If the data shows they do not meet certain proposed definitions, we urge the CFPB to alter any definitions necessary to encompass the full range of their transactions, as discussed above, and potentially to lower the transaction threshold, to promulgate a final rule ensuring that larger correctional money-transfer and release-card providers are subject to supervision. In addition to the general reasons the CFPB provides in the Supplementary Information, ensuring such supervision is critically important in this context for the reasons laid out in Section I.

A. Money-transfer services for incarcerated people and their loved ones

In assessing whether certain larger money-transfer providers should be subject to supervisory authority under this rule, the CFPB should consider three subcategories of providers that operate in the corrections context: (1) companies that provide money transfers in the correctional context only, (2) companies that provide money transfers in the free world as well as in the corrections context, and (3) companies that facilitate purchases of goods and services by incarcerated people.

1. Correctional money-transfer companies

Three companies dominate the correctional money-transfer market: JPay (whose parent company is now Aventiv Technologies), ViaPath Technologies (formerly Global*Tel Link), and Access Corrections (a product brand of the Keefe Group, whose parent company is TKC Holdings).[36] These corporations allow people to transfer money to incarcerated loved ones online and/or through applications, as well as through non-digital methods.

As noted above, we do not have complete data on these corporations such that we can precisely assess whether they satisfy the Bureau's proposed test for defining larger market

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[35] *Id.* at 80210.

[36] Justice-Involved Individuals Report, *supra* note 2, at 18; Raher & Herring, *supra* note 6 (study focuses on prisons); Worth Rises, The Prison Industry, *supra* note 4, at 61 (noting that Keefe Group is "the largest correctional commissary corporation and a parent company of the third largest prison telecom corporation, ICSolutions."). For more on the corporate structure and ownership of these entities, see Worth Rises, The Prison Industry Corporate Database, https://data.worthrises.org/ (last visited Dec. 19, 2023).

participants. However, available information about JPay and ViaPath Technologies provides insight into their size and suggests that they likely satisfy the proposed test.

The press obtained slides from a 2015 presentation to investors that shed light on JPay's size at the time.[37] In 2014, JPay had 29 state clients and 18 county clients and served around 2.3 million incarcerated people.[38] Its "transfer volume" was around $525 million in around 7.5 million transactions.[39] JPay generated $53.9 million in revenues for its payment services business,[40] which appears to include both money transfers and prepaid cards.[41]

By 2020, according to consolidated financial statements that PPI obtained,[42] revenues from Aventiv's (JPay's parent company) payment services business alone was up to $153.7 million.[43] The document notes that "Revenues related to payment services are comprised of fees charged for the facilitation of online payments, which are recognized when the payments are processed."[44] Total revenue, which includes revenue from communication, media, and other services; payment services; and electronic monitoring services, was $767.4 million.[45]

As for ViaPath, the most recent data we reviewed is from 2020 (when it was still called Global*Tel Link). That year, the corporation's "Deposit / Pmt Processing Revenue" was over $42 million. Its total revenue, which includes revenue from "Prime Phone," OMS Revenue," "Wholesale Phone," "Public Coin," "Video," "In-Pod and media," and "Fees & Other revenues," was $654.3 million.[46]

These money-transfer providers operating solely in the corrections context likely satisfy the currently proposed "test to define larger participants." Regardless, the CFPB should count both digital and non-digital transactions, as discussed above in Section III.B, in making this determination. We urge the CFPB to ensure that these large corporations, which often hold the monopoly contract for money-transfer services in a given prison or jail, are subject to the CFPB's supervisory authority under the final rule.

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[37] Stephen Raher, Prison Pol'y Initiative, You've Got Mail: The promise of cyber communication in prisons and the need for regulation, Exhibit 3 (2016), https://www.prisonpolicy.org/messaging/report.html#lf-fnref:28 [hereinafter Raher, You've Got Mail]; *see also* Worth Rises, The Prison Industry, *supra* note 4, at 61.

[38] Raher, You've Got Mail, *supra* note 37, Exhibit 3 at 38. The presentation notes that people can send money to incarcerated people not only through websites and applications, but also through MoneyGram Payment Systems, a 24-7 call center, in facility lobbies and booking kiosks, and through a money order lockbox. *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.* Exhibit 3 at 31.

[42] Prison Pol'y Initiative, Prison and Jail Telecommunications Industry Financial Information, https://www.prisonpolicy.org/phones/financials/ (last visited Dec. 21, 2023) (listing financial reports PPI received "via public records requests and from other public sources").

[43] Aventiv Technologies, Consolidated Financial Statements December 31, 2020 and 2019, at 3, https://www.prisonpolicy.org/phones/financials/2020/Aventiv_Technologies_2020.pdf.

[44] *Id.* at 10.

[45] *Id.*

[46] Letter from Susan Cockerham, Sr. Manager, Regulatory Operations, FAS Tek Compliance Solutions, to Bill Cook, Alabama Public Service Commission, at 2 (Mar. 23, 2020), https://www.prisonpolicy.org/phones/financials/2019/GTL_2019.pdf.

2. *General money-transfer companies*

Some large companies that provide money-transfer services in the free world, such as Western Union and MoneyGram, also provide them in the corrections context. In some jurisdictions, these companies act as agents of another company, like JPay, which holds the contract with a given correctional facility to handle all money transfers.[47] In other jurisdictions, these companies act as an independent option for sending money to incarcerated people.[48]

Western Union and MoneyGram both allow people to send money to their incarcerated loved ones through a website or application.[49] Western Union recently introduced an online payment platform and application specifically for sending money to incarcerated people called "Send2Corrections."[50] Many of their transfers—whether to incarcerated people or to others within the United States—are initiated in person, however.

Western Union and MoneyGram likely satisfy the CFPB's proposed "test to define larger participants." In making this determination, the CFPB should count transfers made in both the free-world and corrections context as well as digital and non-digital transactions, as discussed above in Section III.B. In short, the CFPB should ensure that the final rule brings these corporations, and others like them, within the CFPB's supervisory authority.

3. *Companies that facilitate purchases by incarcerated people*

We note that the act of transferring money *to* an incarcerated person may constitute only one aspect or one type of transaction relevant to the Proposed Rule. Incarcerated people use money in their trust accounts to purchase a variety of items, including e-messages; food, medication, and hygiene items from the commissary; and books, movies, and other media items. One way some incarcerated people might complete such a purchase is through an application on a tablet from a private corporation. The CFPB should assess: (1) whether that transaction is handled by the same entity (or an affiliated company) that handled the initial transfer of money to the person in prison or jail, and if so, whether this additional transaction should be considered in evaluating whether the entity meets the consumer payment transactions threshold; and (2) whether a separate private corporation handles the transaction, and if so, whether that entity separately satisfies the transactions threshold and other aspects of the larger participant test.[51]

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[47] Raher & Herring, *supra* note 6. This is what now may be occurring in the federal prisons system as well. JPay's website announces: "You can now send funds to your loved ones in select Federal prisons. This new offering is available through JPay's partnership with MoneyGram." JPay, Jpay.com (last visited Dec. 19, 2023).

[48] PPI reported that as of 2021, Western Union was "an independent, competitive option for sending money to people incarcerated in Colorado, Connecticut, Illinois, Iowa, and Washington's prison systems," and noted that Western Union or a similar company may be an actual competitive option in other states, "but it is very difficult to tell based on publicly available information." Raher & Herring, *supra* note 6, at n.3.

[49] MoneyGram, How to Send a Money Transfer to an Inmate, https://www.moneygram.com/mgo/us/en/send/how-to-send-money/send-to-an-inmate/ (last visited Dec. 19, 2023); Western Union, Introducing Send2Corrections, https://www.westernunion.com/us/en/send-money-to-inmate.html (last visited Dec. 19, 2023).

[50] Western Union, Introducing Send2Corrections, https://www.westernunion.com/us/en/send-money-to-inmate.html (last visited Dec. 19, 2023).

[51] It is possible that these transactions involve funds transfer functionality or digital wallet functionality.

B. Prepaid cards for people leaving incarceration

As discussed above in Section I.B, some of the same large corporations that provide money-transfer services in the carceral context also provide release cards, such as JPay (whose parent company is Aventiv Technologies) and the Keefe Group (whose parent company is TKC Holdings).[52] Given the prevalence of abusive practices and the vulnerability of the consumers who must use these products, discussed above in Section I, the CFPB should ensure that large nonbank release-card issuers, servicers, and program managers are subject to supervision under the final rule.

VI. The Rule Should Subject Larger Money-Transfer and Release-Card Providers to the CFPB's Supervisory Authority Even If They Also May Be Subject to Other CFPB Supervisory Authorities

The CFPB notes that "some nonbank covered persons that would be subject to the CFPB's supervisory authority under the Proposed Rule also may be subject to other CFPB supervisory authorities under CFPA section 1024, including, for example, as a larger participant in another market defined by a previous CFPB larger participant rule."[53] We note that this may be the case with some of the correctional financial service providers described in this comment, and we agree with the CFPB that regardless of coverage under other supervisory authorities, the final rule should cover such providers.

Some money-transfer providers, such as MoneyGram and Western Union, may be larger participants under the CFPB rule defining larger participants of the international money transfer market.[54] Similarly, some release-card issuers and service providers may be subject to supervision because the institutions that issue them are banks with assets over $10 billion.[55] However, the majority of release cards—and their nonbank service providers and program managers—do not appear to be subject to the CFPB's existing supervisory authority.[56] We urge

[52] Worth Rises, The Prison Industry Corporate Database, *supra* note 36.
[53] Defining Larger Participants of a Market for General-Use Digital Consumer Payment Applications, 88 Fed. Reg. 80197, 80198 (proposed Nov. 17, 2023) (to be codified at 12 C.F.R. pt. 1090), https://www.federalregister.gov/documents/2023/11/17/2023-24978/defining-larger-participants-of-a-market-for-general-use-digital-consumer-payment-applications.
[54] 12 C.F.R. § 1090.107. However, as noted above in Section IV, we are not certain that the domestic aspects of these businesses are subject to supervision. Although the CFPB has the authority to supervise all of a company's consumer financial activities once the company is subject to supervision, it is not clear if the CFPB's examinations routinely cover all of those activities.
[55] *See, e.g.*, Consumer Fin. Prot. Bureau, Supervisory Highlights 20 (May 2022) ("The Bureau's Supervision program covers both institutions that issue prepaid accounts and prepaid account service providers."), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights_issue-26_2022-04.pdf; Consumer Fin. Prot. Bureau, Depository Institutions (2023), https://www.consumerfinance.gov/compliance/supervision-examinations/institutions/ (listing Comerica Bank and Comerica Bank & Trust, National Association); Consumer Fin. Prot. Bureau, Prepaid Product Agreements Database, https://www.consumerfinance.gov/data-research/prepaid-accounts/search-agreements/?page=1&prepaid_type=Prison%20release&status=Active (last visited Dec. 19, 2023) (listing a prison release card issued by "Comerica").
[56] *See* Andrew Stuart, *Debit Card Issuers Still Prey on People Released from Prisons and Jails: HRDC Lawsuits Challenge Companies in Court*, Human Rights Defense Ctr. (Dec. 1, 2020) ("[T]he minor lawsuits were enough to make big banks, like Bank of America and JP Morgan, exit the prison and jail debit-card space.").

the CFPB to ensure that the final rule covers nonbank issuers, servicers, and program managers of release cards, along with money-transfer providers for incarcerated people.

VII. Conclusion

We urge the Bureau to finalize a rule that would establish supervisory authority over larger nonbank release-card issuers, servicers, and program managers, as well as larger providers of money-transfer services for incarcerated people and their loved ones. Consumers forced to rely on these corporations are particularly vulnerable to abuses, justifying and necessitating robust CFPB supervision.

* * *

Thank you for the opportunity to submit these comments and for contemplating a rule that would establish supervisory authority over large corporations that provide payment transaction services in the carceral context. If you have any questions, please contact Ariel Nelson at anelson@nclc.org or 617-542-8010.

Respectfully submitted,

National Consumer Law Center (on behalf of its low-income clients)
Worth Rises