

Alert | Financial Regulatory & Compliance



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CFPB Spotlight Targets Mobile ‘Tap-To-Pay’ Technology

Go-To Guide:

- The CFPB’s Sept. 7 issue spotlight targets Big Tech’s influence over mobile payment technology.
- Contactless payments are expected to expand by 150% in 2028, growing into a nearly \$300 billion industry.
- In an effort to clarify consumer data rights and promote competition, the CFPB is expected to issue its proposed Section 1033 Personal Financial Data Rights rule in October 2023, with a final rule expected in 2024.

Big Tech companies, fintechs, and traditional financial institutions are paying attention to the Consumer Financial Protection Bureau’s (CFPB) September 2023 issue spotlight, which focuses on tap-to-pay or contactless payment technology. The CFPB’s [report](#) highlights the role of Big Tech companies in the mobile payment space.

Given the increasing use of contactless payments or “tap-to-pay” on mobile devices and wearables, the CFPB points out that “tech companies are playing a powerful role in determining consumers’ payment options,” and promises to “take appropriate steps to ensure that Big Tech companies do not impede the development of open ecosystems for digital payments.”

Key takeaways from the report include:

- **Rapid growth of tap-to-pay.** Consumer use of tap-to-pay is steadily rising in the United States, with millions of users on various payment platforms. By 2028, point-of-sale (POS) usage is expected to grow by 150%, nearing an estimated \$300 billion spent across three major payment platforms.
- **Differing regulations by mobile operating systems.** Dominant leaders impose different policies and agreements governing how their mobile operating systems may be used for contactless payments. The CFPB specifically highlights that some devices only permit tap-to-pay via the platform integrated with the device, while others allow third-party payment app use.
- **Impact on innovation.** The CFPB is concerned that restrictions on tap-to-pay use can reduce consumer choice and hinder innovation in the development of a robust open banking ecosystem. For example, one company's current policy prohibits directly integrating tap-to-pay functionality into existing banking and other payment apps.

The CFPB plans to accelerate the shift to open banking and payments to “help people get paid faster, access more attractive rates on deposits and loans, switch more easily, avoid intrusive surveillance, and minimize the consequences of inaccurate credit reporting.”¹ To do so, the CFPB plans to issue a new proposed rule next month titled Personal Financial Data Rights under its Section 1033 authority of the Dodd-Frank Act.² According to CFPB Director Rohit Chopra, “dominant firms shouldn’t be able to hoard our personal data and appropriate the value to themselves. The CFPB’s personal financial data rights rulemaking has the potential to jumpstart competition, giving Americans new options for financial products.”³

If successful, the new Section 1033 rule would govern access to and sharing of consumers’ personal financial data, which would have a massive impact on the relationship between banks, fintechs, and consumers. “The proposals under consideration would require that financial firms provide consumers access to their own financial data on deposit accounts, credit cards, and other transaction accounts. Consumers would then be able to provide permissions to this data safely and securely to other financial firms.”⁴

Notably, the CFPB’s rulemaking authority is **pending** review by the Supreme Court after the Fifth Circuit found that the CFPB’s funding from the Federal Reserve violates the Constitution’s Appropriations Clause (*CFSA v. Consumer Financial Protection Bureau*, 51 F.4th 616 (5th Cir. 2022)). In July, a Texas judge **enjoined** the CFPB’s enforcement of its final Section 1071 rule against the plaintiffs in that case while *CFSA* is pending before the Supreme Court (*Texas Bankers Assoc. v. CFPB*, S.D. Tex., No. 7:23-cv-00144). Please see GT Alerts from **January 2023** and **April 2023** for our Section 1071 coverage.

Our Take

The CFPB’s report aimed at the Big Tech companies dominating the contactless payments space demonstrates the Bureau’s desire to create “open banking and finance frameworks” and perhaps a suggestion to the Federal Trade Commission to conduct its own look.

¹ Id.

² On October 27, 2022, the CFPB issued its **outline** for its proposed rulemaking on Personal Financial Data Rights.

³ CFPB Press Release, “CFPB Kicks Off Personal Financial Data Rights Rulemaking” (Oct. 27, 2022).

⁴ CFPB, Prepared Statement of Director Rohit Chopra before the House Committee on Financial Services (Dec. 14, 2022).

When viewed against the backdrop of the CFPB's upcoming Section 1033 rulemaking aimed at promoting greater consumer control and portability of data and, ultimately, competition, those looking to gain traction in the contactless payments space should pay attention.

As the CFPB's report highlights, the CFPB (and regulators abroad) have identified mobile payments, particularly the tap-to-pay variety, as a key part of the future of consumer payments, and we may see efforts to ensure that non-Big Tech players have access to tap-to-pay technology in popular consumer devices.

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