

December 21, 2021

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, D.C. 20552

Dear Director Chopra:

We write to express our concern about Big Tech exploitation of digital payments technology, and to express our support for your recently opened inquiry into Big Tech’s power in this vital and growing market. Big Tech domination of digital payments technology could entrench their edge in data acquisition, facilitate anti-competitive conduct in this market and adjacent markets, and harm American consumers. We urge the Consumer Financial Protection Bureau to thoroughly investigate this conduct and its likely harms.

Background

On October 21, the Consumer Financial Protection Bureau (CFPB) ordered the Big Tech firms (Amazon, Apple, Facebook, and Google) and other large technology companies (PayPal and Square) to turn over information related to their digital payments systems and associated business practices.¹ Such a move was long overdue: payment systems like Apple Pay and Google Pay “now dominate large portions of e-commerce and person-to-person payments.”² Google Pay unveiled an array of new features last year, in an effort to become an all-in-one money app—think Apple Pay, Venmo, and an online bank put together.³ Facebook has big ambitions for Facebook Pay, which enables payment via WhatsApp, Facebook Messenger, and Instagram in the U.S.⁴ Amazon’s new payments technology, Amazon One, scans a customer’s hand for convenient, contactless payment. It is now in almost 100 locations nationwide.⁵ As you acknowledge, such payments technology carries potential benefits: “families can send money to friends without delay, or to relatives overseas at lower costs. Fast payment systems can also help

¹ Consumer Financial Protection Bureau, *CFPB Orders Tech Giants to Turn Over Information on their Payment Systems*, CFPB Press Release (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

² Ken Sweet, *Consumer Watchdog to probe Big Tech payment systems*, ASSOCIATED PRESS (Oct. 21, 2021), <https://apnews.com/article/technology-business-lifestyle-apple-inc-2732c74f3b7b5b6a41987172395455f5>.

³ Dieter Bohn, *Google Pay’s Massive Relaunch Makes It an All-Encompassing Money App*, THE VERGE (Nov. 18, 2020), <https://www.theverge.com/2020/11/18/21571806/google-pay-relaunch-money-payments-finances-deals-offers-banking-plex>.

⁴ Facebook Pay falls under the unit called “Facebook Financial”, which also includes the curtailed but still concerning Libra cryptocurrency project. See Chris Welch, *Facebook is getting more serious about becoming your go-to for mobile payments*, THE VERGE (Aug. 11, 2020), <https://www.theverge.com/2020/8/11/21363642/facebook-pay-mobile-payments-financial-david-marcus-instagram-whatsapp>.

⁵ See the Amazon One page—Amazon, *Amazon One locations* (last accessed 12/15/2021), <https://one.amazon.com/>.

small businesses succeed with lower cost...And faster settlement can reduce the need for families and business to borrow.”⁶

What’s the catch? In a word: data. Big Tech wants to use its scale and its oceans of data to dominate the digital payments space and drive out competitors. Control of this market means even more data (about your transaction history, or even your palmprint⁷) to buttress the competitive moats of the Big Tech firms and ensure the very few remain the winners in our digital economy. And the loser, in ways big and small, may well be the American consumer.

Data

Personal data can be quite valuable, and the Big Tech firms control vast reserves of it.⁸ Each Big Tech firm’s business relies upon acquiring and monetizing data—either by selling it to advertisers, using it to give other business lines a competitive advantage, or both. That data comes from us: almost everything we do on the platforms owned and operated by Google, Facebook, Amazon, and the like is monitored and then monetized.

The interplay between consumer data and digital payments technology troubles us for three additional reasons. First, consumer payment data can be quite valuable. The payments data available to the Big Tech firms could be more comprehensive and fine-grained than anything available to other companies, especially if combined with data Big Tech already has. Big Tech firms could use that data to reinforce their competitive advantage in their core products. Google’s potential plans to use Google Pay to offer users a “trial” (where Google Pay users offer up three months of micro-transaction data, in return for personalized offers) is but one example of how Big Tech might use this data.⁹ Whatever it promises to the contrary, Big Tech, if it can, is going to get—and use—our data.¹⁰ Second, Big Tech firms moving into the digital payments space may be able to out muscle banks and other financial services providers, because they can combine traditional creditworthiness and financial data with other data (location, shopping, search history, etc.) that Big Tech firms control.¹¹ If successful, Big Tech firms could find

⁶ Rohit Chopra, *Statement Regarding the CFPB’s Inquiry into Big Tech Payment Platforms*, CFPB Press Release (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/statement-regarding-the-cfpbs-inquiry-into-big-tech-payment-platforms/>.

⁷ Google and Amazon’s plans make this clear—the amount of data available from micro financial transactions or your palm itself is staggering. See Bohn, *supra* note 4 (detailing Google’s “trial” offer to give users personalized deals based off their transaction history) and James Vincent, *Amazon’s palm reading technology starts at the grocery store, but it could be so much bigger*, *The Verge* (Oct. 1, 2020), <https://www.theverge.com/2020/10/1/21496673/amazon-one-palm-reading-vein-recognition-payments-identity-verification> (explaining Amazon’s potential use and misuse of your palm as a password.)

⁸ THE ECONOMIST, *The world’s most valuable resource is no longer oil, but data* (May 6, 2017), <https://www.economist.com/leaders/2017/05/06/the-worlds-most-valuable-resource-is-no-longer-oil-but-data>.

⁹ See *supra* note 7.

¹⁰ Raúl Carrillo, *The Libra Black Paper: Banking on Surveillance* 29-31, Americans for Financial Reform (2020), <https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Libra-Black-Paper-FINAL-2.pdf>.

¹¹ The success of the Chinese Big Tech giants—Alibaba (AliPay) and Tencent (WeChat)—at transmitting social, gaming, shopping, and other consumer data into a highly successful financial services arms demonstrates this point. See Dirk A. Zetzsche, Ross P. Buckley, Douglas W. Arner, and János N. Barberis, *From Fintech to TechFin: The Regulatory Challenges of Data-Driven Finance*, 14 N.Y.U. J. L. & BUS. 2, 405-410 (2018). Both companies, of course, have faced severe regulatory headwinds in China this year. For a broad overview, see Barry Naughton,

themselves with an unparalleled amount of data and financial power—and outside the traditional U.S. financial regulatory and fair credit reporting structure. Finally, this “new arena for data collection” offers Big Tech firms another way to augment and leverage their market power via anti-competitive tools like predatory pricing, exclusionary terms, self-dealing, and the like.¹² This foreboding feedback loop must be a primary focus of the CFPB.

Anti-Competitive Conduct

Big Tech dominance of digital payment platforms will allow Big Tech firms to bring their existing anti-competitive and abusive practices to new territory. Big Tech firms consistently abuse their power to consolidate their dominance in their core markets and to unfairly leverage that power into other markets. The playbook is similar across Big Tech; after gaining dominance they impose exclusionary contract terms, force customers to accept pre-set apps and settings, impose higher fees, and use the data, design, and power to unfairly elevate their own products in other markets. It is easy to imagine Big Tech applying this playbook to digital payments.

First, they can easily abuse their market power to unfairly gain dominant power in the digital payments space. A dominant platform could require consumers to use their digital payment technology to maintain functionality on the main platform. From here, the platform could insist on unfair and extractive contractual terms like high fees and restrictive access because of their power over those consumers. Mark Zuckerberg admitted to this exact goal with Libra: “If we layer in a service like this with our login, then that’s a pretty awesome combo and a good reason for people to use FB platform,” he wrote. “If we make it so [developers] can generate revenue for us in different ways, then it makes it more acceptable for us to charge them quite a bit more for using [our] platform.”¹³ Conversely, a platform could afford to employ predatory pricing to gain users at a price point that other providers could not match.¹⁴

Second, they can use this market power to abuse competition. One can easily imagine a dominant platform denying rivals access to their crucial payment platform and technology. Just as easily they could use the huge trove of financial consumer data they gain from a payment system to entrench their power in the targeted advertising market.¹⁵ Each anti-competitive move is a tried-and-true part of Big Tech’s arsenal.¹⁶ And each anti-competitive move could fortify Big Tech’s power and crush current and future competitors in digital payments or in their core

What’s Behind China’s Regulatory Storm, WALL STREET JOURNAL (Dec. 12, 2021), <https://www.wsj.com/articles/what-is-behind-china-regulatory-storm-11638372662>.

¹² Carrillo, *supra* note 10, 2-3.

¹³ Matt Stoller, Open Markets Institute, *Libra Basics: What is Facebook’s Currency Project?* (updated July 19, 2019), <https://www.openmarketsinstitute.org/publications/libra-basics-facebooks-currency-project> (citing pg. 240 of this UK government report: <https://www.parliament.uk/globalassets/documents/commons-committees/culture-media-and-sport/Note-by-Chair-and-selected-documents-ordered-from-Six4Three.pdf>).

¹⁴ Carrillo, *supra* note 10, 33.

¹⁵ Dominant advertising platforms already regularly ask for this data from financial institutions. *See e.g.*, Emily Glazer, Deepa Seetharaman and Anna Maria Andriotis, *Facebook to Banks: Give Us Your Data, We’ll Give You Our Users*, WALL STREET JOURNAL (Aug. 6, 2018) <https://www.wsj.com/articles/facebook-to-banks-give-us-your-data-well-give-you-our-users-1533564049>.

¹⁶ *See* Carrillo, *supra* note 10, 29-33. Carrillo is writing about Facebook Libra, but his arguments apply more generally to Big Tech entry into digital payments spaces.

markets. The end result in any case is a worse set of experiences for consumers as their financial interactions are weaponized to harm competition in the digital economy. More generally, Big Tech's moves into payments and banking threatens to erode the all-important American separation of commerce and banking. Such an erosion threatens current and future Big Tech competitors, but it also may threaten the American consumer and the American economy.¹⁷

Consumer Protection and the Economy

Big Tech dominance in payments poses major risks for American consumers and for the economy as a whole. First, consumers may find themselves in debt to Big Tech companies, with their most personal data insecure and unprotected. Social media data already makes low-income consumers vulnerable to bad actors, who target them with exploitative and predatory financial products.¹⁸ Big Tech companies could do both at once; think possible Google Loans or Amazon Lay Away, payday loans or hidden fee products in all but name. Financial and payments data is also among the most private data a person has. It can reveal basically everything about an individual. Big Tech companies do not have an encouraging track record when it comes to preventing data breaches or maintaining internal firewalls.

Second, the possibility of Big Tech payments technology morphing into a form of shadow banking looms large. What happens in a theoretical run on a digital payment system? Who is left holding the bag? Such questions do not have easy answers, and may suggest the current “too big to fail” subsidy our megabanks enjoy gets transferred to Big Tech firms—with all the disastrous consequences for economic concentration and political power that implies.¹⁹

National Security

We also appreciate the CFPB's investigation of AliPay and WeChat, as both firms are controlled by a foreign government with geopolitical goals that threaten the core national security interests of the American people. The Chinese government engages in attempted social control of diaspora groups and notable public critics beyond its borders, and its own tech firms, as well as its exploitation of U.S. firms, are likely a core element of that strategy.

Conclusion

We call on the CFPB to thoroughly investigate Big Tech encroachment into digital payment technology. Where necessary, CFPB should use its significant authority in this space—from data

¹⁷ Comment from Arthur E. Wilmarth, Jr., Prof. of Law, Geo. Wash. Univ. L. Sch., to FDIC at 16 (Apr. 10, 2020), <https://www.fdic.gov/regulations/laws/federal/2020/2020-parent-companies-of-industrial-banks-3064-af31-c-002.pdf> (noting the threat to the traditional separation of banking and commerce posed by Big Tech generally, and more specifically by Big Tech acquiring banks).

¹⁸ Mary Madden, Michele Gilman, Karen Levy, and Alice Marwick, *Privacy, Poverty, and Big Data: A Matrix of Vulnerabilities for Poor Americans*, 95 Wash. U. L. Rev. 1, 77 (2017), https://openscholarship.wustl.edu/cgi/viewcontent.cgi?article=6265&context=law_lawreview. See also Nathan Newman, *How Big Data Enables Economic Harm to Consumers, Especially Low-Income and Other Vulnerable Sectors of the Population*, Fed. Trade Comm'n (Aug. 2014), https://www.ftc.gov/system/files/documents/public_comments/2014/08/00015-92370.pdf.

¹⁹ Wilmarth, *supra* note 15, 16-17.

privacy to credit reporting and loan fairness—to enforce existing laws and regulations against Big Tech violations and, where necessary, to promulgate new rules to fill in any gaps in our existing regulatory structure. At a minimum, Big Tech firms should be restricted from selling, sharing, or profiting from consumer financial data and should be held liable for breaches of that data. Strict rules against self-preferencing, refusal to deal, and other exclusionary conduct should also be applied to the payments platforms. Given the likely explosive growth of this new technology, it is critical that CFPB pursue this inquiry and any necessary follow-on actions with all the resources it can muster.

We note that some signatories of this letter have also joined in other comments focusing on specific consumer protection and antifraud issues in this space.

Sincerely,

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