Testimony before the

U.S. HOUSE OF REPRESENTATIVES COMMITTEE ON FINANCIAL SERVICES
Task Force on Financial Technology

Regarding

"License to Bank: Examining the Legal Framework Governing Who Can Lend and Process Payments in the Fintech Age"

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Summary

Chairman Lynch, Ranking Member Emmer, and Members of the Financial Technology Task Force, thank you for inviting me to testify regarding the legal framework governing who can lend and process payments. I offer my testimony as Policy Counsel to the Demand Progress Education Fund (DPEF)[1] and a Fellow at the Americans for Financial Reform Education Fund (AFR Education Fund).[2] I have previously served as Special Counsel to the Enforcement Director at the Consumer Financial Protection Bureau (CFPB).

Today, I would like to provide a public interest perspective on developments in the fintech sector. While many relatively new "bank-like" technologies may provide benefits to individual users, they also present risks to the integrity of the financial system, consumer protections, and our civil rights (especially our rights to privacy). Moreover, many of these innovations only serve to entrench the power of Big Tech and further erode our democracy.

I echo previous calls for policymakers to adopt a bright-line, precautionary approach to digital "bank-like" activities.[3] What industry calls "innovation" is often easily mapped to a longstanding financial service and therefore the existing laws should apply. At the same time, certain tools and certain forms of partnerships should have no place in our economy whatsoever.[22] Treating innovation as an unqualified good leads regulators to ignore both considerations of equity and long-term, sustainable innovation. Give the interface between powerful corporations, complex products, and the public, precaution should be the norm, as it is in food and drug regulation.[4]

In this testimony, I discuss the following (non-exhaustive) list of concerns:

- The existing regulatory framework allows nonbank companies to "rent" a bank charter in order to evade state consumer protection laws. The recent "*Madden*-fix rules" adopted by the Office of the Comptroller of the Currency (OCC) and the Federal Deposit Insurance Corporation (FDIC), as well as the OCC's proposed "true lender rule", exacerbate this problem.

[1] DPEF is a fiscally-sponsored project of New Venture Fund, a 501(c)3 organization. DPEF and our more than two million affiliated activists seek to protect the democratic character of the internet — and wield it to render government accountable and contest concentrated corporate power.
[2] AFR Education Fund is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR Education Fund include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups.
[3] *See, e.g.* Saule T. Omarova, *Dealing with Disruption: Emerging Approaches to Fintech Regulation*, 61 WASH. U. J.L. & POL'Y 27, 34-36 (2020) (discussing the problem with "smart" regulation: regulation that is "iterative, flexible, carefully tailored, risk-sensitive, and innovation-friendly."); JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 174, 182-187 (2019) (underscoring the importance of understanding platform digital activities in order to meet systemic threats).
[4] COHEN, *supra* note 3, at 91-92.

- The use of artificial intelligence (AI) and predictive analytics for marketing, loan underwriting and monitoring, and the pricing of various products and services raises fundamental consumer protection risks and fair lending concerns.

- Existing partnerships between banks and surveillance-based technology companies have already raised unique, specific concerns regarding discrimnation.

- Rather than providing consistent guidance and oversight through proper process, many regulators have adopted a *laissez faire* attitude toward fintech.

- Wall Street and Silicon Valley are irresponsibly integrating banking and commerce (and payments and platforms).

- Global stablecoin projects proposed by Big Tech would entrench corporate power and threaten financial stability.

- Wall Street, Silicon Valley, and the fintech industry are waging a "war on cash", leading to heightened surveillance, increased corporate power, and financial exclusion.

- Financial data collection is becoming increasingly intertwined with federal, state, and local law enforcement and threatening our civil rights.

With these concerns in mind, the Americans for Financial Reform EF and DPEF urge Congress to pursue the following (non-exhaustive) list of recommendations

- Prevent the issuance of Special Purpose National Bank Charters (SPNBCs) and clarify the narrow range of financial institutions that can receive National Banking Charters.

- Close the "Industrial Loan Corporation" (ILC) Loophole.

- Strengthen consumer protections, including by instituting a 36% rate cap.

- Designate the deposit-like obligations of dominant tech platforms as "deposits", prohibiting the platforms from issuing such obligations absent approval by banking regulators.

- Constrain corporate data usage to a short list of permissible purposes.

- Re-establish a bright line between the ownership of large tech companies and financial institutions.

- Establish privacy-respecting public options for real-time payments, safe deposits, international money transfer, and other basic digital financial services.

The fintech industry's "endless capacity for self-referential growth"[5] suggests prudence. In fact, it can only be disciplined by policymakers' own forward thinking about services people actually need in an informational economy.[6] Policymakers must avoid being swayed by general promises of innovation and create systems for real accountability on behalf of the public.

Discussion

The existing regulatory framework allows nonbank companies to "rent" a bank charter in order to evade state consumer protection laws. The OCC and FDIC's recent "*Madden*-fix Rules" and the OCC's proposed "true lender rule" exacerbate this problem.

Some bank and non-bank company partnerships may provide important benefits to individual customers. But others exist primarily as a means for the nonbank company to "rent" a bank charter in order to evade state consumer protection laws.[7]

Since the American Revolution, states have set interest rate caps to protect their residents from predatory lending. Courts have long rejected efforts to evade usury laws, looking beyond the technical form of a transaction and toward its substance.[8] Beginning with a 1978 Supreme Court decision, a combination of federal and state law changes eliminated rate caps for most banks. Still the vast majority of states retain interest rate limits for longer-term loans by *nonbank companies*.[9] Around one in three states also maintain interest limits for shorter loans.[10]

In *Madden v. Midland Funding*,[11] the Second Circuit Court of Appeals held that the National Bank Act (NBA) does not regulate what nonbank assignees may charge, and that limiting the interest charged by debt buyers purchased debt for pennies on the dollar did not significantly interfere with the business of banking. This decision is consistent with the aforementioned, longstanding power of states to regulate interest rates charged by *nonbank companies*, and with the traditional rule that state consumer protection laws are not preempted unless they significantly interfere with banks.

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[5] *Fintech: Examining Digitization, Data, and Technology: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 115th Cong. 17 (2018) (Statement of Saule T. Omarova, Prof. of Law, Cornell L. Sch.), *available at* https://www.banking.senate.gov/download/omarova-testimony-and-appendix-91818.

[6] *See, e.g.,* Amy Kapczynski, *The Law of Informational Capitalism*, 129 YALE L.J. 1460, 1467 (2020) ("we need...a more serious engagement with the political economy of data, grounded in the recognition that data is a social relation--an artifact not only of human cognition but also of legal structures.")

[7] *See generally* Letter from Center for Responsible Lending (CRL) et al. to OCC (Sept. 3, 2020), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/OCC-True-Lender-Comments.pdf ("CRL et al. True Lender Comments").

[8] *Id.*

[9] For example, 43 states and the District of Columbia cap the rate on a $500, 6-month loan, at a median of about 36%. NAT'L CONSUMER LAW CTR. (NCLC), STATE RATE CAPS FOR $500 AND $2,000 LOANS, (2020), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/FactSheet-StateRateCap.pdf. In addition, in recent years, votes in many states, including Arizona, Colorado, Montana, and South Dakota have approved rate cap initiatives that eliminate both short-term and longer-term high-cost loans.

[10] CRL, MAP OF U.S. PAYDAY INTEREST RATES (2019), https://www.responsiblelending.org/research-publication/map-us-payday-interest-rates.

[11] 786 F.3d 246, 249-53 (2d Cir. 2015).

Recent rulemaking by the OCC and FDIC — the so-called "*Madden*-fix rules" — permit *nonbank companies* to ignore state caps if the loan was originated by a bank and assigned to the nonbank company.[12] The OCC has also recently proposed a rule ("true lender rule") that would specify that a national bank or federal savings association "makes" a loan when, as of the date of origination, the bank is either "named as the lender in the loan agreement" or "funds the loan."[13] In concert, the rules would allow a *non-bank company* to charge as high of an interest rate as it would like, even if the partnering bank only touches a loan for a mere second.

The OCC's true lender proposal entirely fails to even mention the loans peddled by existing "rent-a-bank" schemes include some of most exorbitantly priced and irresponsible loans on the market. The proposed rule is irrational, arbitrary and capricious, and outside the OCC's authority. The OCC has not even made a pretense of complying with the Dodd-Frank Act's requirements for preempting state law, nor can it, because it has no authority to preempt state interest rate limits as applied to *nonbank companies.*[14]

We have long argued the OCC has also threatened consumer protections by offering a SPNBCs,[15] which New York successfully challenged in Federal District Court[16] and which the OCC is appealing to the Second Circuit.[17]

The use of AI and predictive analytics for marketing, loan underwriting and monitoring, and the pricing of various products and services raises fundamental consumer protection risks and fair lending concerns.

Many claims are made about the promise of Big Data to increase financial inclusion, but those claims fail to reckon with, much less solve, the systemic reasons people are left out or more accurately deliberately excluded. Data analytics can potentially benefit individual consumers, especially consumers who have a "thin file" or no file on record with a traditional

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[12] The OCC and FDIC rules state that when a bank sells, assigns, or otherwise transfers a loan, interest permissible prior to the transfer continues to be permissible following the transfer. In other words, if a bank originates a loan at 160% in South Dakota, where voters adopted a 36% interest rate cap in 2016, the loan could be sold to a nonbank lender that could continue to charge new interest at 160%. *See* NCLC, FDIC/OCC PROPOSAL WOULD ENCOURAGE RENT-A-BANK PREDATORY LENDING, (Dec. 2019), https://www.nclc.org/images/pdf/high_cost_small_loans/ib-fdic-rent-a-bank-proposal-dec2019.pdf.

[13] *Id.*

[14] *See* 12 U.S.C. § 25b(b)(1)(B) (Dodd-Frank states that the OCC may preempt state consumer financial laws "only if" the law discriminates against national banks or the State consumer financial law prevents or significantly interferes with the exercise by the national bank of its powers).

[15] OCC, "Exploring Special Purpose National Bank Charters for Fintech Companies," (Dec. 2016), https://www.occ.gov/publications-and-resources/publications/banker-education/files/pub-special-purpose-nat-bank-charters-fintech.pdf.

[16] Vullo v. OCC, 378 F. Supp. 3d 271, 292-98 (S.D.N.Y. 2019).

[17] Notice of Appeal, Lacewell v. OCC, No. 1:18-cv-08377 (S.D.N.Y. Dec. 19, 2019).

credit reporting agency.[18] However, data analytics can also worsen existing disparities.[19] In light of the way that exploitation of unbanked and underbanked communities of color is baked into our financial system, industry plans for greater "financial inclusion" demand careful scrutiny.[20] So-called "alternative data" can be used inappropriately to charge higher prices to those least able to afford them. Analysis of price sensitivity and propensity to comparison shop may lead to higher prices for less sophisticated consumers, those with more limited internet access, those with fewer banks in their community, and those with fewer options.

Banks and fintech partners are increasingly using payments and deposit data to evaluate credit applications.[21] Some banks partner with lenders that access transaction data through data aggregators.[22] This trend raises myriad concerns. For instance, deposit pattern analysis could lead to lending based on ability to collect, rather than ability to repay, which can have multiple negative consequences for borrowers and for markets. Data that goes into lending or other decisionmaking could be attributed to the wrong consumer or be otherwise erroneous. The conclusions of computer algorithms could be off-base. The Fair Credit Reporting Act (FCRA), which is aimed at ensuring accuracy, predictiveness, transparency, and appropriate data usage, may not be applied to "alternative data." Thus, many fintech consumers lack access to dispute mechanism, resolution rights, and other FCRA protections.

Existing partnerships between banks and surveillance-based technology companies have already raised unique, specific concerns regarding disparate impact, digital redlining, predatory inclusion, and racialized surveillance.

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[18] National Bureau of Economic Research, The Role of Technology in Mortgage Lending, Working Paper 24500, April 2018 *available at* https://www.newyorkfed.org/medialibrary/media/research/staff_reports/sr836.pdf.

[19] *See, e.g.*, Carol Evans, Board of Governors of the Federal Reserve System, *Keeping Fintech Fair: Thinking about Fair Lending and UDAP Risks*, Consumer Compliance Outlook (Second Issue 2017) 4 ("[T]he fact that an algorithm is data driven does not ensure that it is fair or objective."); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Lauren Saunders, Assoc. Dir., NCLC), *available at* https://www.nclc.org/images/pdf/cons-protection/testimony-lauren-saunders-data-aggregator-nov2019.pdf (discussing fintech and the ECOA); *Banking on Your Data: The Role of Big Data in Financial Services: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 20-21 (2019) (Statement of Dr. Seny Kamara, Assoc. Prof., Dept. of Comp. Sci., Brown Univ.), *available at* https://financialservices.house.gov/uploadedfiles/hhrg-116-ba00-wstate-kamaras-20191121.pdf ("[Algorithmic bias] is a serious concern in the context of the ECOA and the FHA, both of which prohibit discriminatory lending practices").

[20] *See*, *e.g,* NCLC, Past Imperfect: How Credit Scores and Other Analytics "Bake In" and Perpetuate Past Discrimination 2, (2016), http://www.nclc.org/images/pdf/credit_discrimination/Past_Imperfect050616.pdf [https://perma.cc/S8ED-WTDR].

[21] Account data will almost certainly exhibit disparities by race because one of the factors used by scoring models is likely to be overdrafts. African-Americans are disproportionately affected by bank overdraft practices, 25 which often encourage people to overdraft rather than helping them avoid fees. CRL et al. True Lender Comments, *supra* note 7, at 7.

[22] Some financial services companies have argued that the security practices of data aggregators are not comparable to the standards applied at banks and the security practices of consumer fintech application providers are even weaker. *See* Amer. Bankers Assoc., *Fintech – Promoting Responsible Innovation* (May 2018), at 3-4, *available at* https://www.aba.com/Advocacy/Documents/fintech-treasury-report.pdf.

Too often, promises of technological empowerment yield "predatory inclusion" — a process whereby financial institutions offer needed services to specific classes of users, but on exploitative terms that limit or eliminate their long-term benefits.[23] They may also simply produce new costs and fees for consumers while producing no benefit. Many longer-term loans originated based on alternative data are marketed toward "underbanked" low-income households, but carry extremely high interest rates and are made with little regard for the borrower's ability to repay.

Creditworthiness is often determined by a closed box of algorithms,[24] which assesses our 'digital character' in an opaque manner,[25] and may perpetuate discrimination in doing so.[26] In theory, facially neutral algorithms mitigate the risk that consumers will face intentional discriminatory treatment based on protected traits such as race, gender, or religion.[27] But evidence demonstrates that the data sets being used are often incomplete or inaccurate, and that discriminatory outcomes can result from use of data that correlates with race. The Equal Credit Opportunity Act (ECOA) prohibits credit discrimination on the basis of race, color, religion, national origin, sex, marital status, age, and other factors.[28] The Fair Housing Act (FHA) prohibits discrimination in the sale, rental or financing of dwellings and other housing-related activities on the basis of race, color, religion, national origin, sex, disability or familial status.[29] Both statutes prohibit policies or practices that have a disproportionately negative impact on a protected class even though the creditor has no intent to discriminate and the practice appears neutral on its face.

Much like the factors that drive the disparities in traditional credit scores, new sources of data reflect deeply ingrained structural inequalities in employment, education, housing and economic opportunity.[30] Geolocation data reflects deeply entrenched racial and ethnic segregation in housing. Even seemingly neutral variables, when used alone or in combination, can correlate with race, ethnicity and other prohibited factors. Machine learning (ML) algorithms may pick up subtle, but statistically significant patterns that correlate with race and other

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[23] Louise Seamster & Raphaël Charron-Chénier, *Predatory Inclusion and Education Debt: Rethinking the Racial Wealth Gap*, 4 SOC. CURRENTS 199, 199-200 (2017) (describing the targeting of mortgagors and students who borrow to purchase homes or education as "predatory inclusion."). *See also* Kristin Johnson et al., *Artificial Intelligence, Machine Learning, and Bias in Finance: Toward Responsible Innovation*, 88 FORDHAM L. REV. 499, 505, 517–21 (2019) (arguing fintech firms may "hardwire predatory inclusion" into financial markets for the "next several generations").

[24] *See generally,* FRANK PASQUALE, THE BLACK BOX SOCIETY: THE SECRET ALGORITHMS THAT CONTROL MONEY AND INFORMATION (2015).

[25] *See* Tamara K. Nopper, *Digital Character in the "Scored Society": FICO, Social Networks, and the Competing Measurements of Creditworthiness, in* CAPTIVATING TECHNOLOGY: RACE, CARCERAL TECHNOSCIENCE, AND LIBERATORY IMAGINATION IN EVERYDAY LIFE 170, 170-188 (Ruha Benjamin ed., 2019), (coining and analyzing the concept of "digital character").

[26] *See*, *e.g.*, Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 13 (2014).

[27] *See*, *e.g.* Alex P. Miller, *Want Less-Biased Decisions? Use Algorithms*, HARV. BUS. REV. (July 26, 2018).

[28] 15 U.S.C. §§ 1691 et seq.

[29] 42 U.S.C. §§ 3601 et seq.

[30] *See* NCLC, *supra* note 19 (noting African American, Latinx, and Asian consumers have lower credit scores as a group than whites).

protected characteristics and replicate existing bias.[31] ML algorithms may also analyze variables that engineers did not intend them to analyze.[32] In any case, alternative credit can be mined to extract protected characteristics and produce discriminatory outcomes.

Steering occurs online when a consumer is directed towards or away from a loan product or feature because of a prohibited characteristic, rather than a consumer need or other legitimate factor.[33] For example, a creditor may steer limited English proficient (LEP) consumers to a different range of products than non-LEP borrowers.[34] *Digital redlining* occurs when a creditor provides unequal access to credit or unequal terms of credit based on prohibited characteristics.[35]

Alternative data and analytics have enabled creditors to engage in *price discrimination,* targeting people of color and those living in low-income neighborhoods with high-cost products with poor terms.[36] The recent action against Facebook by the Department of Housing and Urban Development (HUD) highlighted the discriminatory impact of these targeted advertising and marketing practices.[37] Consumers of color may be directed to subprime credit cards based on personal characteristics, even though they could qualify for more competitive rates. In the mortgage context one study noted that fintech lenders reduced but did not erase discriminatory lending patterns, particularly with respect to mortgage pricing.[38]

Concerns regarding transparency abound. Big Data's records are often inaccurate.[39] For instance, errors might arise as the data is passed along, especially when screen scraping (using a

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[31] *See* Moritz Hardt, *How Big Data is Unfair, Understanding Unintended Sources of Unfairness in Data Driven Decision Making*, MEDIUM (Sept. 26, 2014), http://www.cs.yale.edu/homes/jf/HardtHowBigDataIsUnfair.pdf; Andrew Selbst, *A New HUD Rule Would Effectively Encourage Discrimination by Algorithm*, SLATE (Aug. 19, 2019), https://slate.com/technology/2019/08/hud-disparate-impact-discrimination-algorithm.html.

[32] Johnson et al., *supra* note 23, at 510.

[33] Carol Evans, Board of Governors of the Federal Reserve System, *From Catalogs to Clicks: The Fair Lending Implications of Targeted, Internet Marketing*, Consumer Compliance Outlook (Third Issue 2019) at 4.

[34] *See* CFPB, Supervisory Highlights, Issue 13 (Oct. 2016), http://s3.amazonaws.com/files.consumerfinance.gov/f/documents/Supervisory_Highlights_Issue_13__Final_10.31.16.pdf.

[35] *Id.*

[36] Comment from Nathan Newman, Research Fellow, New York Univ. Information Law Institute, to FTC (Aug. 2014), https://www.ftc.gov/system/files/documents/public_comments/2014/08/00015-92370.pdf.

[37] The data used to target Facebook users was unwittingly provided through the actions of users, and those associated with them, on and off the platform. Such behavioral data enabled Facebook to classify users based on protected characteristics and invited advertisers to discriminatorily target or exclude housing-related ads to users based on these imputed protected traits. HUD v. Facebook, Charge of Discrimination, FHEO No. 01-18-0323-8 at paragraph 12.

[38] Robert Bartlett, Adair Morse, et al., *Consumer Lending Discrimination in the Fintech Era, National Bureau of Economic Research*, Working Paper 25943 (June 2019), https://www.nber.org/papers/w25943 (Latinx and African American borrowers paid 7.9 and 3.6 basis points more in interest for home purchase and refinance mortgages respectively because of discrimination. These magnitudes represent 11.5% of lenders' average profit per loan).

[39] For example, an examination of consumer reports generated by eBureau, which has since been acquired by TransUnion, revealed that the underlying information used to assess income and education level was incomplete and primarily gathered without the consumer's knowledge. *See* NCLC, BIG DATA, A BIG DISAPPOINTMENT FOR SCORING CONSUMER CREDITWORTHINESS 18 (2014), https://www.nclc.org/issues/big-data.html.

consumers' username and password to access an account) is involved.[40] Any data used for credit decisions must comply with the ECOA and the FCRA, which at a minimum mandate that data used be accurate and predictive of creditworthiness,[41] and require that creditors provide credit applicants with notices stating the reasons for credit denial or for taking other adverse actions on an application. These notices may provide clues to help uncover whether the creditor's decision was in fact, discriminatory.[42] However, where complex algorithms are based on unknown alternative data, it is impossible to know exactly what factors were used and how they were used. The opaqueness undermines the legislative intent of ECOA.[43]

Existing partnerships between bank and surveillance-based technology companies have already raised issues. For instance, the new Apple Card — offered in partnership with Goldman Sachs — is currently the subject of a New York State investigation for gender discrimination.[44] Amazon now offers credit cards in tandem with Synchrony Bank, formerly GE Capital Retail Bank, which the CFPB ordered to provide an estimated $225 million in relief to consumers harmed by illegal and discriminatory credit card practices.[45] A checking account partnership between Google and Citibank has drawn criticism from privacy advocates, who argue Google wants to sell or share financial data for targeted advertisement or other purposes.[46]

The fintech companies that have applied for banking charters have also raised red flags. When private equity-funded mobile banking start-up Varo Money first applied for a national charter, the National Community Reinvestment Coalition (NCRC) outlined how the bank would not meet Community Reinvestment Act (CRA) priorities. [47] Social Finance (SoFi) pulled its previous application for a national bank charter after its CEO announced he would resign due to

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[40] *CFPB's Symposium on Consumer Access to Financial Records, Section 1033 of the Dodd-Frank Act*, (2020) (Statement of Chi Chi Wu, Staff Attorney, NCLC), *available at* https://files.consumerfinance.gov/f/documents/cfpb_wu-statement_symposium-consumer-access-financial-records.pdf.

[41] ECOA, 15 U.S.C. § 1691 et seq.; FCRA, 15 U.S.C. § 1681 et seq.

[42] Reg. B, 12 C.F.R. § 1002.9(a)(3)(i)(B). *See also* Curley v. JP Morgan Chase Bank, 2007 WL 1343793 (W.D. La. May 7, 2007) (discussing the provision), aff'd, 261 Fed. Appx. 781 (5th Cir. 2008).

[43] For a list of studies, see NCLC, *supra* note 20.

[44] Neil Vigdor, *Apple Card Investigated After Gender Discrimination Complaints*, N.Y. TIMES (Nov. 10, 2019), https://www.nytimes.com/2019/11/10/business/Apple-credit-card-investigation.html.

[45] Kate Rooney, *Amazon launches a credit card for the 'underbanked' with bad credit,* CNBC (Jun. 10, 2019), https://www.cnbc.com/2019/06/10/amazon-launches-a-credit-card-for-the-underbanked-with-bad-credit.html; CFPB, CFPB Orders GE Capital to Pay $225 Million in Consumer Relief for Deceptive and Discriminatory Credit Card Practices (Jun. 19, 2014), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-ge-capital-to-pay-225-million-in-consumer-relief-for-deceptive-and-discriminatory-credit-card-practices/.

[46] John Constine, *Leaked pics reveal Google smart debit card to rival Apple's*, TECHCRUNCH (April 17, 2020), https://techcrunch.com/2020/04/17/google-card/.

[47] Comment from NCRC to OCC (Nov. 8, 2018), https://ncrc.org/ncrc-comments-regarding-advance-notice-of-proposed-rulemaking-docket-id-occ-2018-0008-reforming-the-community-reinvestment-act-regulatory-framework/#_edn33. *See* also OCC, Conditional Approval No. 1205 2 (Sept. 2018), https://www.occ.treas.gov/topics/charters-and-licensing/interpretations-and-actions/2018/ca1205.pdf. *See also* Comment from Ams. for Fin. Reform to FDIC (July 19, 2017), https://ourfinancialsecurity.org/2017/07/letter-regulators-afr-opposes-sofis-deposit-insurance-application/ (arguing SoFI's CRA plan baldly proposed serving low-and-middle income consumers with substandard products).

allegations of sexual harassment and skirting risk and compliance controls.[48] Since then, SoFi has been the target of a class action lawsuit alleging it systematically denied and limited access to lending and refinancing opportunities for participation in the federal Deferred Action for Childhood Arrivals (DACA) program.[49] A recent application by Formative Bank — which would only serve fintechs — appears to have simply copy-and-pasted CRA plans from OCC guidance, indicating a lack of meaningful commitment to equity.[50]

Rather than providing consistent guidance and oversight through proper process, many regulators have adopted a laissez faire attitude toward fintech, issuing no-action letters and creating "sandboxes." Some banking regulators are even attempting to cede or delegate core oversight functions to the tech industry or industry-led bodies.

We are concerned by the recent trend of encouraging fintech companies to regulate themselves. Several regulators have created "sandboxes" — "safe spaces" where fintech companies can develop and test their innovations without being subject to the full extent of financial regulation.[51] By providing guidance or taking ad hoc actions such as issuing no-action letters, regulators ostensibly enable fintech firms to better innovate, insofar as they are able to better recognize what kind of regulatory burden they might face.[52] However, consumer advocates have strenuously objected to sandboxes and no-action letters.[53] State regulators have also signalled opposition. For instance, the Conference of State Bank Supervisors has also issued a letter objecting to the CFPB's recent "experimentalist approach, arguing "[t]he Bureau is not authorized to prevent state officials from enforcing federal consumer financial laws."[54] Twenty-two state attorneys general have also opposed these policies.[55]

We have also urged the FDIC to refrain from delegating its responsibilities to a public-private standard-setting organization (SSO) and to instead to develop its own expertise in the context of a robust, precautionary, approach to oversight. Simply facilitating compliance with

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[48] Katie Brenner & Nathaniel Popper, *Chief Executive of Social Finance, an Online Lending Start-Up, to Step Down*, N.Y. TIMES (Sept. 11, 2017), https://www.nytimes.com/2017/09/11/technology/sofi-mike-cagney-sexual-harassment.html.

[49] Press Release, Lawyers for Civil Rights, DACA Discrimination Class Action Against Online Lender (May 19, 2020), http://lawyersforcivilrights.org/our-impact/economic-justice/daca-recipient-files-discrimination-class-action-against-major-online-lender/.

[50] Comment from NCRC et al. to OCC (Sept. 23, 2020), https://ncrc.org/ncrc-comment-on-formative-application-to-occ/.

[51] Dirk Zetzsche, Ross Buckley, Douglas Arner & Janos Barberis, *Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation*, 23 FORDHAM J. CORP. & FIN. L. 31, 64 (2017).

[52] *See* Chris Brummer & Yesha Yadav, *Fintech and the Innovation Trilemma*, 107 GEO. L.J. 235, 283 (2019).

[53] Comments from Ams. For Fin. Reform et al. to CFPB (2019), https://ourfinancialsecurity.org/wp-content/uploads/2019/02/NAL-Product-Sandbox-comments-consumer-groups-FINAL.pdf.

[54] Conference of State Bank Supervisors, Comment Letter on Proposed Policy Guidance and Procedural Rule on No-Action Letters and Product Sandbox (Feb. 11, 2019), https://www.csbs.org/sites/default/files/2019-02/CSBS%20Letter--CFPB%20NAL%20Policy%20Revisions%20and%20Product%20Sandbox_%20021119%20FINAL%20NOSIG.pdf.

[55] Comments from state AGs to CFPB (2019), https://ag.ny.gov/sites/default/files/cfpb_nal_and_sandbox_comment_final.pdf.

SSO standards is not an acceptable means of regulation, nor an acceptable alternative to regulation. We especially oppose privatizing responsibility for standard-setting at a time when the FDIC and other regulators are opening the banking franchise to Big Tech and surveillance-driven technology.[56]

Wall Street and Silicon Valley are irresponsibly integrating banking and commerce (and payments and platforms).

We strongly advise against allowing Wall Street and Silicon Valley to intertwist any further.[57] Historically, commercially-owned banks have made unsound loans to business partners, denied services to competitors, and generally engaged in imprudent activities to spur commercial user purchases.[58] Commercial firms that also engage in financial services tend to use such enterprises to fund other risky business activities, heightening the moral hazard of bailout.[59] The risk of predatory behavior increases. Allowing Big Tech to take advantage of federal deposit insurance and other attendant protections (without concomitant responsibilities) threatens responsible practices within the tech sector overall. Just as distressingly, allowing Big Tech to engage in shadow banking activity jeopardizes financial stability.[60] These combinations should not be allowed.[61]

The FDIC's recently proposed rule concerning ILCs[62] only stands to make a bad situation worse. ILCs have frequently failed due to problems such as reckless lending, inadequate capital, and insufficient liquidity.[63] The dangers typically flowed from the broader activities of the ILC parent company. Strikingly, zero of the core elements of Bank Holding Company (BHC)

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[56] *See, e.g,* Lev Menand & Morgan Ricks, *Policy Spotlight Lacewell v. OCC,* JUST MONEY (Aug. 5, 2020), https://justmoney.org/lacewell-v-occ/ (discussing the OCC's plans to grant SPNBCs to fintech companies that do not issue or maintain deposit balances, exempting them from key federal regulations).

[57] *See* Comment from Arthur E. Wilmarth, Jr., Prof. of Law, Geo. Wash. Univ. L. Sch., to FDIC (Apr. 10, 2020), https://www.fdic.gov/regulations/laws/federal/2020/2020-parent-companies-of-industrial-banks-3064-af31-c-002.pdf.

[58] Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN L. REV. 1539, 1598-1606 (2007).

[59] *Id.* at 1569.

[60] For relevant background, see, e.g., L. Randall Wray, *Global Financial Crisis: Causes, Bail-Out, Future Draft*, 80 UMKC L. REV. 1101, 1107 (2012) (describing how the shift of economic power to shadow banks triggered the operation of "Gresham's Law", whereby safer and stabler financial firms were driven out of business).

[61] We have also called on regulators to more thoroughly review all tech acquisitions of financial services companies. Comments from AFR Education Fund & DPEF to FDIC (July 2, 2020), https://ourfinancialsecurity.org/wp-content/uploads/2020/07/Americans-for-Financial-Reform-EF-DPEF-Comment-FDIC-Docket-RIN-3064-AF31-.pdf.

[62] *See* FDIC Docket RIN 3064-AF31, 85 Fed. Reg. 17771 (Mar. 31, 2020), https://www.fdic.gov/news/press-releases/2020/pr20031a.pdf.

[63] Thirteen ILCs failed between 1982 and 1984. ILCs declined from 58 to 23 between the beginning of the financial crisis in 2007 and the end of 2019, and the total assets of ILCs dropped from $177 billion to $141 billion.# Moreover, several parent companies failed and were rescued by the federal government during the global financial crisis. Other parent companies, including General Motors Acceptance Corp. (GMAC), Merrill Lynch, Goldman Sachs, and Morgan Stanley, would have failed had they not received generous bailouts. *See* AFR Education Fund & DPEF Comments to FDIC, *supra* note 60.

supervision are included in the proposed eight commitments that an ILC parent company must agree to under the proposed rule.[64] The FDIC's limited supervisory powers over parent companies and other affiliates of ILCs are plainly inadequate to prevent the systemic risks, conflicts of interest, and threats to competition and consumer welfare created by commercially-owned ILCs.[65]

We agree with Prof. Wilmarth that Big Tech firms would not be satisfied with making "toehold" acquisitions of ILCs and will do what they can to take advantage of the loophole, including by making deals with private equity investors.[66] Regulators should bear in mind that data collection in the ILC context is its own form or arbitrage.[67] Providing data processing, data storage, and data transmission services is permissible for BHCs and their subsidiaries. However, the Bank Holding Company Act (BHCA) limits the activities of BHCs and their subsidiaries to banking, managing and controlling banks and other subsidiaries, and performing services for its subsidiaries.[68] Companies collecting data from a customer's social media account or their lifestyle, for instance, could avoid these limitations. There may be few privacy protections on the use of financial data, period.[69] But ILC arrangements threaten these safeguards — especially when it comes to consumer protection. Fundamentally, banks have commercial reasons *not* to share certain personal data. Banks understand that the core transactional data and increasingly the identity data is unique to banks. Customers do not expect their banks to capture data that would support commercial business lines, outside of contexts regulated by the FCRA.[70]

We are also concerned by the encroachment of dominant platforms into the payments space. Big Tech companies use their "platform privilege" not only to analyze users, but to acquire and appropriate from competitors that rely on the infrastructure they supply.[71] According to a new poll released by Consumer Reports, six in ten Americans support the government taking

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[64] *Id.*
[65] *See* Wilmarth Comment, *supra* note 57, at 10.
[66] AFR SoFi Letter, *supra* note 47.
[67] *See generally* Cinar Oney, *Fintech Industrial Banks and Beyond: How Banking Innovations Affect the Federal Safety Net*, 23 FORDHAM J. CORP. & FIN. L. 541, 552–53 (2018).
[68] *See* 12 U.S.C. § 1843(a)(2).
[69] Heather Hogsett, *Consumer Protections and the Digital Evolution in Banking*, MORNING CONSULT (Feb. 13, 2020), https://morningconsult.com/opinions/consumer-protections-and-the-digital-evolution-in-banking/.
[70] *See* Astra Taylor & Jason Sadowski, *How Companies Turn Your Facebook Activity Into a Credit Score*, THE NATION (May 27, 2015), https://www.thenation.com/article/archive/how-companies-turn-your-facebook-activity-credit-score/.
[71] *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (Testimony of Sally Hubbard), *available at* https://www.judiciary.senate.gov/imo/media/doc/Hubbard%20Testimony.pdf

more steps to regulate online platforms.[72] Still, most powerful platform-based companies have opposed even the mildest, most established forms of financial regulation.[73]

The systematic monitoring of financial activity allows dominant platforms to become even more extractive and more powerful.[74] As payment transactions illuminate the social links between fund senders and recipients, companies that already collect similar social data find payments data extremely valuable. With a more comprehensive perspective on consumer behavior, dominant platforms can more easily take over adjacent markets, engage in predatory pricing, self-deal, increase the monetary value of their advertising, and accumulate more economic power. They can use the integrated information to both enhance existing products and offer new services (like credit scoring) to new groups of consumers.[75] Because corporate currencies are literally means of paying for other products, they could render the ability to tie and bundle products together limitless.[76] As TenCent has demonstrated in China, combining a payments network with a massive social media platform allows powerful companies to generate extreme pricing power within captive ecosystems.[77]

Payment platforms can be dangerously insecure and lack proper consumer protections. Many mobile money platforms do not simply transfer funds, but store balances unprotected by federal deposit insurance, or any equivalent mechanism.[78] By avoiding custody agreements with FDIC-insured institutions, mobile payment companies avoid most banking regulation,

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[72] Chris Mills Rodrigo, *Majority of Americans want more government regulation of tech platforms: poll*, The Hill (Sept. 24, 2020), https://thehill.com/policy/technology/518020-majority-of-americans-want-more-government-regulation-of-tech-platforms.

[73] *See, e.g.* PayPal's recent lawsuit over the CFPB Prepaid Rule - a rule that most of the payments industry does not oppose. *Is Cash Still King? Reviewing the Rise of Mobile Payments Testimony: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 8 (2020) (Statement of Christina Tetreault, Sr. Policy Counsel, Consumer Reports), *available at* https://advocacy.consumerreports.org/wp-content/uploads/2020/01/Hhrg-116-ba00-wstate-tetreaultc-20200130-u1-1.pdf (arguing protections are threatened by litigation initiated by PayPal).

[74] *See* Letter from AFR Education Fund & DPEF to H. Comm. on the Judiciary (Apr. 17, 2020), https://ourfinancialsecurity.org/2020/04/joint-letter-promote-tradition-of-separating-banking-and-commerce-regarding-dominant-platforms/ (arguing for the structural separation of large tech platforms and payments).

[75] Bank for International Settlements, Big tech in finance: opportunities and risks, Bank for International Settlements Annual Economic Report, https://www.bis.org/publ/arpdf/ar2019e3.htm.

[76] Indeed, competitors have already alleged that Facebook used an older payment system, Facebook Credits, to instigate *per se* unlawful tying arrangements. *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013).

[77] Jacky Wong, *The Next Level for China's Tencent: Global Domination*, Wall St. J (Nov. 13, 2019) https://www.wsj.com/articles/the-next-level-for-chinas-tencent-global-domination-11573655785; In 2012, Mark Zuckerberg explicitly stated he wanted to create a payment product to exercise pricing power over third-party developers. Matt Stoller, Libra Basics: What Is Facebook's Currency Project?, Open Mkts Inst. (updated July 19, 2019), https://openmarketsinstitute.org/reports/libra-basics-facebooks-currency-project/.

[78] Federal deposit insurance programs only protect deposits in commercial banks and federal savings institutions. *See, e.g,* Sarah Jane Hughes & Stephen T. Middlebrook, *Advancing A Framework for Regulating Cryptocurrency Payments Intermediaries*, 32 Yale J. on Reg., 495, 527 (2015); U.S. GAO, GAO-18-254, Additional Steps by Regulators Could Better Protect Consumers and Aid Regulatory Oversight 18 (2019).

constituting "shadow payment platforms."[79] In the event of disaster, the last line of defense is general corporate bankruptcy law, rather than a central bank balance sheet.[80] Federal regulation of money services business (MSBs) provides a shallow consumer protection arrangement, primarily in the form of mandated disclosure.[81] Fifty different state MSB regulators also apply a mix of minimum net worth requirements, surety bond, and other security and investment requirements. These laws have proven ineffective in keeping MSBs afloat.[82]

Global stablecoin projects proposed by Big Tech would entrench corporate power and threaten financial stability in multiple jurisdictions, including the United States.

In late June, we released the "Libra Black Paper", arguing policymakers should prevent Facebook and the Geneva-based Libra Association — a cartel of junior Silicon Valley partners — from moving forward with their global corporate currency project.[83] Our concerns extend well beyond financial regulation. For instance, in April, we filed a comment asking the House Judiciary Committee to tackle the risk of unfair competition in the payments space.[84] To put it bluntly, Facebook stands to leverage its platform power to expand its digital advertising monopoly, take over adjacent markets, self-deal, and establish a global surveillance system.

The general idea is to use "Libra Coins" and other tools to build a parallel "vibrant financial services economy." The project exhibits multiple features of shadow banking. But Libra-based payments also generate data. Dominant platforms grow by expanding their platforms' user base and information access, securing revenue by selling products directly to their users or by selling access to their users to third parties.[85] Through the Libra Project and its new subsidiary Novi — which would offer digital wallets to hold Libra Coins — Facebook could easily take advantage of integrated, intimate information about what people like, do, and buy, in

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[79] *See* Dan Awrey & Kristin van Zwieten, *Mapping The Shadow Payment System* 41-44 (SWIFT Institute Working Paper No. 2019-00, 2019), *available at*: https://ssrn.com/abstract=3462351 (discussing comparative approaches in the U.S., UK, EU, and China).

[80] *See* Dan Awrey, *Bad Money,* 106 CORNELL L. REV. 1, 23 (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3532681 (discussing how the corporate bankruptcy regime fails depositors). *See also* Ryan Surujnath, *Off the Chain! A Guide to Blockchain Derivatives Markets and the Implications on Systemic Risk*, 22 FORDHAM J. CORP. & FIN. L. 257, 301 (2017) (discussing how this dynamic can be especially dangerous when distributed ledger technology (DLT) is involved, as a lack of clear transaction finality may make it difficult to determine liability in the context of corporate insolvency).

[81] 12 C.F.R. § 1005.3. *See also* Awrey, *supra* note 80, at 34.

[82] *Id.* at 39-41 (arguing state money transmitter laws do not provide "robust prudential regulation, deposit guarantee schemes, lender of last resort facilities, or special resolution regimes" equivalent to conventional deposit-taking banks" and often fail to protect consumer funds, rendering them insufficient to regulate peer-to-peer payment platforms and aspiring stablecoin issuers).

[83] RAÚL CARRILLO, BANKING ON SURVEILLANCE: THE LIBRA BLACK PAPER, AFR EDUCATION FUND & DPEF (2020), https://ourfinancialsecurity.org/wp-content/uploads/2020/06/Libra-Black-Paper-FINAL-2.pdf.

[84] Letter from AFR Education Fund & DPEF to H. Comm. on the Judiciary, *supra* note 74.

[85] *See, e.g.*, BANK FOR INTERNATIONAL SETTLEMENTS, *supra* note 75 (arguing Big Tech business models depend upon enabling direct, *monitored* interactions between more and more users. Firms learn from these interactions in order to deploy yet another range of services that generate further activity that generates more data.)

order to better sell ads as well as new products. It could also surveill business partners.[86] Under Libra's current design, a consortium of multinational corporations would share access to a ledger (the Libra Blockchain) that could reflect the transactions of billions of people. Currency exchanges and mobile wallet providers like Novi would know users' true identities. Although Novi claims it would not share that information with Facebook or third parties without customer consent, we have no idea what consent would actually entail. Facebook has previously made vows regarding firewalls between subsidiaries and quickly broken those promises. In any case, participants could collude to determine the true identities of transacting parties — or reconfigure the blockchain. Moreover, the Libra Association would constantly, affirmatively monitor the Libra network for suspicious activity. There would be no real privacy.

Surveillance could extend well beyond payments. Facebook already uses technology like Facebook "Like" buttons, to track users and non-users across the internet.[87] By centralizing this sensitive information, Facebook can further mine data and determine the maximum prices consumers and competitors are willing to pay for various services. The Ninth Circuit recently decided these "social plug-ins" may constitute "wiretaps."[88] But Novi could easily mimic this practice by embedding payment buttons across the internet. This is merely the beginning. We can expect Big Tech to further encroach on financial services. [89]

Wall Street, Silicon Valley, and the fintech industry are waging a "war on cash", leading to heightened surveillance, increased corporate power, and financial exclusion.

Policymakers must be mindful of the social and economic consequences of the "war on cash"[90] — the systematic replacement of physical, bearer instruments that do not track us (like cash and coins) with digital account-based instruments that do so (like bank account deposits). Noncash transactions generate vast amounts of data, recording the time, date, location, amount, and subject of each consumer's purchase. Those data are shared with or sold to digital marketers and advertisers. Paying with cash provides consumers with substantially more privacy than electronic forms of payment.

Cash is the most common form of payment for purchases and bill-paying, and its use is not limited to underbanked or unbanked consumers.[91] In fact, the study revealed that high cash

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[86] Facebook has historically spied on rivals to appropriate ideas or acquire rivals outright. It could also bully its potential partners into using Libra. *See generally* LIBRA BLACK PAPER, *supra* note 83.
[87] Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1004 (2019).
[88] Shoshana Wodinsky, *Court Rules Facebook Widgets Can Be Considered Wiretaps*, GIZMODO (July 2, 2020), https://gizmodo.com/court-rules-facebook-widgets-can-be-considered-wiretaps-1844245159.
[89] John Detrixhe, *Amazon is invading finance without really trying*, QUARTZ (Nov. 1, 2017), https://qz.com/1116277/amazons-aws-cloud-business-is-reshaping-how-the-financial-services-industry-works/ (describing how Amazon already provides the cloud-computing systems that serve as the "technological backbone" of many fintech firms).
[90] Some organizers and scholars alternatively refer to the phenomenon as "the gentrification of payments." Brett Scott, *Gentrification of Payments Spreading the Digital Financial Net*, TRANSNAT'L INST. (Jan. 15, 2019), https://longreads.tni.org/state-of-power-2019/digital-payment-gentrification.
[91] Cardtronics and Javelin Strategy & Research, 2020 Health of Cash Study (Feb, 2020), *available at* https://landing.cardtronics.com/hubfs/Cardtronics/Docs/Health_Of_Cash_Study_2019.pdf.

users also employ many other forms of payment, including credit cards, debit cards, mobile wallets, and online checkout services. It also showed that consumers make the choice to use cash for a variety of reasons: privacy, security, reliability, availability, and even its universal and egalitarian nature. Cash users are not Luddites who shun fintech; they're all kinds of people who pay with cash for a variety of legitimate and understandable reasons.

Cities, states, and storefronts that have moved toward cashlessness and coinlessness have necessarily segregated the payment system, even if that is not the intention. Unbanked consumers have little access to noncash forms of payment.[92] Without a bank account, they are unable to obtain credit or debit cards or to use other non-cash payment methods, with the possible exception of prepaid cards.[93] Moreover, they fundamentally ask consumers to share data with third-party corporations and the government in order to gain financial inclusion. By contrast, some cities and states have enacted laws or ordinances that bar brick-and-mortar retail stores from refusing to accept cash.[94] Congress should follow suit.[95]

Financial data collection is becoming increasingly intertwined with federal, state, and local law enforcement and threatening our civil rights.

"Bulk" financial surveillance eventually creates a detailed picture of our most private social, familial, romantic, religious, and political activities. Data about a single transaction can be linked to purchase history, creating a "picture of the person behind the payment."[96] A massive data broker industry connects data regarding our finances to data about our employment, marital status, homeownership status, medical conditions, and even our interests and hobbies.

Law enforcement authorities use sensitive corporate data, including financial data, to target vulnerable communities.[97] As a general matter of course, "surveillance-as-a-service" companies sell data, including financial data, to local police departments.[98] Historically, the

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[92] Letter from Consumer Action, the Consumer Fed. of America, Ams. for Fin. Reform, Demand Progress, et al. to U.S. Sens. Kevin Cramer, Sen. Bob Menendez, and Rep. Donald M. Payne, Jr., https://www.consumer-action.org/press/articles/consumers-should-have-the-right-to-pay-retailers-with-cash.

[93] *Id.*

[94] Massachusetts, New Jersey, New York City, Philadelphia and San Francisco have enacted legislation protecting cash users. *Id.*

[95] *See also* Meera Jagannathan, "World Health Organization: We did NOT say that cash was transmitting the coronavirus," MarketWatch (March 9, 2020), *available at* https://www.marketatch.com/story/who-we-did-not-say-that-cash-was-transmitting-coronavirus-2020-03-06. (neither the World Health Organization (WHO) nor the Centers for Disease Control and Prevention (CDC) have concluded that cash presents any more danger than credit cards or other forms of payment).

[96] Albert Fox Cahn & Melissa Giddings, *In the Age of COVID-19, the Credit Card Knows All*, Surveillance Technology Oversight Project - Urban Justice Center (May 18, 2010), https://www.stopspying.org/latest-news/2020/5/18/in-the-age-of-covid-19-the-credit-card-knows-all.

[97] *See, e.g.,* Simone Browne, Dark Matters: On the Surveillance of Blackness 10-29 (2015) ("Surveillance is nothing new to black folks. It is the fact of antiblackness."); Virginia Eubanks, Automating Inequality 1-38 (2017) (detailing how programs have demanded poor people sacrifice their rights to privacy and self-determination); Cohen, *supra* note 3, at 61 (noting law enforcement agenices have conducted prolonged, intrusive surveillance of Muslim and Latinx communities, relying on corporate communications metadata).

[98] *See, e.g.,* Shoshana Zuboff, The Age of Surveillance Capitalism 37 (2019).

National Security Agency (NSA) and other federal law enforcement agencies have exploited corporations' growing troves of records.[99] Indeed, tech companies have a long history of spying on users at the behest of government agencies (which disregard court rulings as to the unconstitutionality of their practices).[100] It would be unwise for regulators to divorce analysis of corporate surveillance from government surveillance.[101]

As Justices Thurgood Marshall and William Douglas warned in the 1970s, technology that allows for faster and better banking has led to easier law enforcement access to depositor data.[102] While it is true that bank account holders are protected by statutes like the Right to Financial Privacy Act of 1978, this law only requires government agencies provide individuals with a notice and an opportunity to object before a bank discloses personal information to the federal government.[103] There is also a general carveout for certain law enforcement, rendering the law more of a procedural rather than substantive barrier to violations of civil liberties.[104]

All financial institutions must comply with Title III of the USA PATRIOT Act, which requires they implement robust customer identification programs, commonly labeled "know your customer" (KYC) provisions.[105] Financial institutions must generally assist police investigations

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[99] *See, e.g.,* COHEN, *supra* note 3, at 238-242 (arguing bulk collection and analysis of data generated by networked communications intermediaries have become "pillars" of state surveillance).

[100] *See* SEAN VITKA, DEMAND PROGRESS, "INSTITUTIONAL LACK OF CANDOR" A PRIMER ON RECENT UNAUTHORIZED ACTIVITY BY THE INTELLIGENCE COMMUNITY (Sept. 27, 2017), https://s3.amazonaws.com/demandprogress/reports/FISA_Violations.pdf.

[101] *See, e.g.,* COHEN, *supra* note 3, at 43 (describing a "surveillance-innovation complex", wherein the state and private sector producers of surveillance technologies form a "symbiotic relationship").

[102] Dean Galaro, *A Reconsideration of Financial Privacy and United States v. Miller*, 59 S. TEX. L. REV. 31, 54 (2017).

[103] *See* 12 U.S.C. § 3404.

[104] *See id.* at §§ 3406-08 (financial institutions can disclose customer records in response to a search warrant, subpoena, or written request from a government authority).

[105] *See*, *e.g.,* Letter from Rep. Tlaib et al., to the Treas. Sec. Steve Mnuchin, et al., (July 17, 2019), https://tlaib.house.gov/sites/tlaib.house.gov/files/Final_BWM_Regulators.pdf (arguing many Muslim and Arab Americans have been automatically labeled "high-risk" and are therefore unable to maintain access to financial services). For a history of the relevant PATRIOT Act amendments, see, e.g., Maria A. de Dios, *The Sixth Pillar of Anti-Money Laundering Compliance: Balancing Effective Enforcement with Financial Privacy*, 10 BROOK J. CORP. FIN & COM. L. 495 (2016); Cheryl R. Lee, *Constitutional Cash: Are Banks Guilty of Racial Profiling in Implementing the United States PATRIOT Act?*, 11 MICH. J. RACE & L. 557, 564 (2006) (arguing the Patriot Act 'puts banks in the business of practicing selective enforcement and racial profiling with every transaction, every hour of every business day"); Eric J. Gouvin, *Bringing Out the Big Guns: The USA PATRIOT Act, Money Laundering, and the War on Terrorism,* 55 BAYLOR L. REV. 955 (2003).

requiring financial information and provide specific information to law enforcement agencies,[106] including by filing "suspicious activity reports" (SARs).[107]

Given these obligations, and the racial injustices perpetrated by law enforcement, we are especially concerned by suggestions that banks — on their own initiative or in partnership with tech companies — should collect more geolocation or biometric data.[108] Geolocation data revealed by payment histories is uniquely difficult to anonymize.[109] Privacy and racial justice advocates vehemently oppose the use of biometric tools like facial recognition technology, iris-scanning, and palm prints.[110] Facial recognition software is likely to mislabel or misrecognize members of racial minority groups, especially Black Americans.[111] Overall, the general use of this kind of sensitive data not only increases the risk of predation by banks and civil liberties violations by governments, but security breaches by competitors and hackers.[112]

In general, we should question whether specific forms of financial exclusion are in fact technological at their roots. Heightened surveillance may actually stand to chill financial inclusion. FDIC surveys consistently note that many "unbanked" households refuse to open bank

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[106] The information in the database is accessible by federal, state and local law enforcement agencies, and can be used in investigations. *See*, *e.g.,* Daniel Bush, *How banks and the government keep track of suspicious financial activity*, PBS NEWSHOUR (June 12, 2020), https://www.pbs.org/newshour/politics/how-banks-and-the-government-keep-track-of-suspicious-financial-activity. For further background, see, e.g., Ben Hayes, *Counter-Terrorism, "Policy Laundering," and the FATF: Legalizing Surveillance, Regulating Civil Society*, 14 INT'L J. NOT-FOR-PROFIT L. 5, 19 (2012); Natsu Taylor Saito, *Whose Liberty? Whose Security? The USA PATRIOT Act in the Context of COINTELPRO and the Unlawful Repression of Political Dissent*, 81 OR. L. REV. 1051, 1116 (2002) (noting many companies report being pressured to "turn over customer records voluntarily, in the absence of either a court order or a subpoena, 'with the idea that it is unpatriotic if the companies insist too much on legal subpoenas first.'").

[107] 31 C.F.R. § 1022.320.

[108] *See, e.g,* Letter from Demand Progress et al. to Leaders McConnell and Schumer, Speaker Pelosi and Leader McCarthy (July 1, 2020), https://s3.amazonaws.com/demandprogress/letters/2020-07-01_Facial_Recognition_Moratorium_and_Divestment_Letter_FINAL.pdf; Alfred Ng, *Facial recognition has always troubled people of color. Everyone should listen*, CNET (June 12, 2020), https://www.cnet.com/news/facial-recognition-has-always-troubled-people-of-color-everyone-should-listen/.

[109] *See, e.g.,* Cahn & Giddings, *supra* note 96.

[110] *See, e.g.*, *A Biometric Backlash Is Underway — And A Backlash To The Backlash*, PYMNTS (May 17, 2019), https://www.pymnts.com/authentication/2019/biometric-backlash-privacy-law/; *Mandatory National IDs and Biometric Databases*, ELECTRONIC FRONTIER FOUND., https://www.eff.org/issues/national-ids (last visited Apr. 25, 2020); de Dios, *supra* note 105, at 501 (describing how prior to September 11, 2001, even non-biometric KYC data collection was widely considered an unacceptable, "massive invasion of financial privacy.").

[111] *See, e.g.,* Victoria Burton-Harris & Philip Mayor, *Wrongfully Arrested Because Face Recognition Can't Tell Black People Apart*, ACLU (June 24, 2020), https://www.aclu.org/news/privacy-technology/wrongfully-arrestedbecause.

[112] *See, e.g.*, Jason Leopold & Jessica Garrison, *US Intelligence Unit Accused Of Illegally Spying On Americans' Financial Records*, BUZZFEED (Oct. 6, 2017), https://www.buzzfeednews.com/article/jasonleopold/Us-Intelligence-unit-accused-of-illegally-spying-on (reporting that FinCEN employees have accused colleagues at the Office of Intelligence and Analysis of illegally collecting and storing private financial records); Aaron Mackey & Andrew Corker, *Secret Court Rules That the FBI's "Backdoor Searches" of Americans Violated the Fourth Amendment*, ELECTRONIC FRONTIER FOUND. (Oct. 11, 2019), https://www.eff.org/deeplinks/2019/10/secret-court-rules-fbis-backdoor-searches-americans-violated-fourth-amendment; Chen Han & Rituja Dongre, *Q&A. What Motivates Cyber-Attackers?*, TECH. INNOV. MGMT. REV. 40, 40-41 (2014), https://timreview.ca/article/838 (describing economic motivations for hacking).

accounts due to privacy concerns.[113] While providing increased access to digital financial services is important, a rapid shift to digitization stands to harm low-income people of color in particular.[114] Among other features, the fintech revolution presumes a certain technological infrastructure (like universal broadband),[115] not to mention a certain level of household financial stability.[116]

Recommendations

Prevent the issuance of SPNBCs and clarify the narrow range of financial institutions that can receive National Banking Charters.

The national bank charter must be respected. In various ways, scholars have argued the government has delegated some of its "money-creation" power to banks.[117] Indeed, 33 banking law scholars recently submitted an amicus brief to the Second Circuit, arguing that "[c]reating deposit dollars is a delegated sovereign privilege" and that OCC lacks the authority to charter Silicon Valley firms.[118] In a sound and health banking regime, the charter would create a logical site for regulation.[119] But myriad forces, including the Law and Economics movement, have driven a proverbial "race to the bottom" in terms of charter-based enforcement.[120]

The OCC lacks the authority to extend national bank charters to companies that do not hold deposits and are not banks in any traditional sense of the word.[121] But lending charters

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[113] FDIC, National Survey of Unbanked and Underbanked Households, 2017 4, 23-24, https://www.fdic.gov/householdsurvey/. *See also, id.* at 3 (noting Black households are nearly six times more likely to be unbanked than white households, while Hispanic households are nearly five times more likely to be unbanked than white households).

[114] Jay Stanley, *Say No to the "Cashless Future" — and to Cashless Stores*, ACLU (Aug. 12, 2019), https://www.aclu.org/blog/privacy-technology/consumer-privacy/say-no-cashless-future-and-cashless-stores.

[115] *See*, *e.g.*, Terri Friedline, *An Open Internet is Essential for Financial Inclusion, FinTech Revolution*, Huff. Post (Dec. 14, 2017), https://www.huffpost.com/entry/an-open-internet-is-essential-for-financial-inclusion_b_5a3345dce4b0e1b4472ae520.

[116] *See* Stanley, *supra* note 114.

[117] *See, e.g.,* Robert C. Hockett & Saule T. Omarova, *The Finance Franchise*, 102 Cornell L. Rev. 1143, 1147 (2017) ("At its core, the modern financial system is effectively a public-private partnership ...."); Morgan Ricks, The Money Problem: Rethinking Financial Regulation (2016); Christine Desan, Making Money: Coin, Currency, and the Coming of Capitalism (2014); Katharina Pistor, *A Legal Theory of Finance*, 41 J. Comp. Econ., 315, 315 (2013) ("[F]inancial markets are legally constructed and as such occupy an essentially hybrid place between state and market, public and private.").

[118] Brief of Thirty-Three Banking Law Scholars as Amici Curiae in Support of Appellee in *Lacewell v. OCC*, No. 19 Civ. 4271 (2d Cir. July 29, 2020), *available at* https://justmoney.org/lacewell-v-occ/.

[119] *Id.*

[120] *See* William K. Black, *Neo-Classical Economic Theories, Methodology, and Praxis Optimize Criminogenic Environments and Produce Recurrent, Intensifying Crises*, 44 Creighton L. Rev. 597, 628 (2011) (arguing these scholars believe competition among the States to charter corporations acts like an 'invisible hand' to align the interests of investors and officers and produce governance rules that are 'optimal for society.)'

[121] Letter from NCLC to OCC 9 (Aug. 3, 2020), https://www.nclc.org/images/pdf/rulemaking/2020-OCC-fintech-NCLC-comments.pdf.

would simply be dangerous. Predatory lenders are eager to obtain national bank charters so that they can ignore state usury laws and charge rates that are illegal under most state laws. The OCC is already supporting predatory lenders that partner with national banks to evade state interest rate caps, and doing nothing to restrain the banks' role in predatory practices,[122] and we do not have confidence that a nonbank charter would not be available to predatory lenders. Moreover, the OCC does not intend for SPBNC recipients to be subject to the CRA, which only applies to depository institutions, creating a higher risk they would offer products that harm the communities where they do business rather than serve these communities with responsible products.

Close the "ILC Loophole."

The FDIC is poised to open the floodgates to the acquisition of ILCs by nonfinancial firms, including commercial businesses that depend on customer and business partner surveillance methods that have no place in our regulated banking system and should not be attached to the federal safety net. As a general matter, any companies acting as banks — regardless of the financial or nonfinancial nature of their parent companies — should be regulated as banks, under consolidated supervision. Companies acting as BHCs should be regulated as BHCs. In 2016, the Federal Reserve Board of Governors (Board) recommended that Congress should prohibit ownership of ILCs by commercial firms, based on the same risks and policy concerns cited by the FDIC when it adopted and extended its moratorium.[123] The FDIC did not endorse the Board's recommendation in the 2016 joint report, but the FDIC did not object to the Board's recommendation either. Moreover, it did not challenge the Board's analysis of the risks and policy concerns created by commercially-owned ILCs.[124] It is time to permanently end the ILC exemption.

Strengthen consumer protections, including by instituting a 36% federal rate cap.

Interest rate limits are the simplest and most effective protection against predatory lending.[125] AFR EF supports the bipartisan effort to extend the 36% APR interest rate cap on payday and car-title lenders in the Military Lending Act (MLA) to cover all Americans.[126] Every time a person takes out another loan, the overall amount of debt increases as interest and fees pile

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[122] CRL et al. True Lender Comments, *supra* note 7, at 52-57.
[123] Bd. of Governors of the Fed. Res. Sys. et al., Report to the Congress and the Financial Stability Oversight Council Pursuant to Section 620 of the Dodd-Frank Act (2016), *available at* https://www.federalreserve.gov/newsevents/pressreleases/files/bcreg20160908a1.pdf [https://perma.cc/3UDT-MKRV].
[124] *Id.* at 52, 74.
[125] NCLC, Misaligned Incentives: Why High-Rate Installment Lenders Want Borrowers Who Will Default, (2016), https://www.nclc.org/images/pdf/high_cost_small_loans/payday_loans/report-misaligned-incentives.pdf.
[126] *See, e.g,* Letter from CRL, Ams. for Fin. Reform, et al. to Leaders McConnell and Schumer, Speaker Pelosi and Leader McCarthy (July 1, 2020), https://ourfinancialsecurity.org/wp-content/uploads/2020/03/CRL-Group-Letter-on-Financial-Services-Stimulus-Recommendations.pdf (All new loans made during the crisis should comply with consumer safeguards in the Military Lending Act, including a cap of 36% APR.)

on. Collectively, the "debt trap" is draining $8 billion every year from American consumers.[127] By prohibiting loans with an APR above 36%, we would fight the debt trap.

The CFPB should exercise all relevant powers available to it. The CFPB exercises supervisory powers over nonbank remittance providers,[128] allowing it to examine some these companies and to ensure they disclose certain information to users.[129] Consumer advocates have argued the CFPB should promulgate a rule authorizing it to supervise all "data aggregators" for compliance with consumer financial protection laws.[130] When the Bureau updated the regulations for the Electronic Funds Transfer Act in 2019, it declined to opine on whether error resolution rights and related protections apply to virtual currency wallets.[131] It should extend such safeguards now.

Designate the deposit-like obligations of dominant tech platforms as "deposits", prohibiting the platforms from issuing such obligations absent approval by banking regulators.

Some analysts have argued that mobile payments platforms should be subject to full-scale banking regulation.[132] Yet regulators lack the authority to simply designate a nonbank company, as a bank. In fact, federal laws contain several different and potentially conflicting definitions of a "bank",[133] limiting regulators ability to constrain banking activities to institutions with banking charters.[134]

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[127] DIANE STANDAERT ET AL., CRL, PAYDAY AND CAR-TITLE LENDERS DRAINNEARLY $8 BILLION IN FEES EVERY YEAR (2019), https://www.responsiblelending.org/sites/default/files/nodes/files/research-publication/crl-statebystate-fee-drain-apr2019.pdf.

[128] *See* 12 C.F.R. § 1090.107; *see also* Defining Larger Participants of the International Money Transfer Market, 79 Fed. Reg. 56631 (Sept. 23, 2014).

[129] The CFPB may bring enforcement actions against any entity providing a "consumer financial product or service," or any entity materially assisting that provider. *See* 12 U.S.C. § 5536(a)(1); 12 U.S.C. § 5481(6)(A); 12 U.S.C. § 5481(15); 12 U.S.C. § 5481(26)(A). *See also* Nizan Geslevich Packin & Yafit Lev-Aretz, *Big Data and Social Netbanks: Are You Ready to Replace Your Bank?*, 53 HOUS. L. REV. 1211, 1260 (2016)(noting the CFPB and FTC currently assume concurrent responsibility of online nonbanking consumer protection).

[130] *See, e.g.*, EDITH RAMIREZ ET AL., FED. TRADE COMM'N, DATA BROKERS: A CALL FOR TRANSPARENCY AND ACCOUNTABILITY i-ix (2014), *available at* http://www.ftc.gov/system/files/documents/reports/data-brokers-call-transparency-accountability-report-federal-trade-commission-may-2014/140527databrokerreport.pdf (suggesting the CFPB could define "large data brokers" as subject to its examination authority under 12 U.S.C. § 5514(a)(1)(B)); Saunders, *supra* note 19, at 20-21 (2019) (arguing the same point).

[131] *Id.* See also, *Is Cash Still King? Reviewing the Rise of Mobile Payments Testimony: Hearing Before the H. Comm. on Fin. Services*, 116th Cong. 8 (2020) (Statement of Christina Tetreault, Sr. Policy Counsel, Consumer Reports), *available at* https://advocacy.consumerreports.org/wp-content/uploads/2020/01/Hhrg-116-ba00-wstate-tetreaultc-20200130-u1-1.pdf (arguing that what protections exist are threatened by litigation initiated by PayPal).

[132] *See, e.g.*, Paul Kupiec, *Why Libra Must Be Treated Like Traditional Banks and Currency*, THE HILL (Nov. 4, 2019), https://thehill.com/opinion/finance/468924-why-libra-must-be-treated-like-traditional-banks-and-currency.

[133] For discussions of these definitions, see, e.g., Awrey & Zwieten, *supra* note 79, at 816; Saule T. Omarova & Margaret E. Tahyar, *That Which We Call A Bank: Revisiting the History of Bank Holding Company Regulation in the United States*, 31 REV. BANKING & FIN. L 113, 115 (2011).

[134] For extensive discussion, see Morgan Ricks, *Money As Infrastructure*, 2018 COLUM. BUS. L. REV 757, 811-821 (2018) (For instance, the Banking Act of 1933 classifies "banks" as institutions that take deposits and are examined and regulated by state or federal banking authorities. Section 21 makes it illegal for an entity to accept deposits

Despite widespread acknowledgement that definitional problems allow nonbanks to engage in arbitrage,[135] the issues remain unresolved. Banking regulators could attempt to promulgate rules clarifying the definitions of "bank" and "deposit", but courts have generally been unwilling to expand the scope of such statutory terms.[136] Congress must prevent the rise of a surveillance-driven shadow banking sector.[137] We need a forward-looking bill that seeks to integrate emerging digital financial technologies into traditional banking services in a way that strengthens regulatory supervision, clarifies the legal status and classification of digital financial assets, but above all, promotes safety of consumer funds. We should recognize as a deposit any digital financial asset that promises a fixed nominal value, on demand, denominated in or pegged to the U.S. dollar, and regulates the relevant institutions as depository institutions.

Policymakers may create a narrower space for firms that do not seek to engage in broader depository activities beyond accepting funds and making payments, but all companies must be subject to regulation that matches the risks posed to consumers and the broader public. We do not expect the OCC's Payments Charter to meet this goal.[138] As it stands the OCC lacks the authority to issue its Payments Charter.[139] But as a policy matter, the decision of whether and how to grant a national payments charter should be left to Congress. A payments charter raises important issues with respect to consumer and fair lending protections, the separation of banking and commerce, and supervision of holding companies.

Constrain corporate data usage to a short list of permissible purposes, and ban the use of data for other purposes.

Experts argue the U.S. data protection and federal privacy framework is fundamentally broken, and will face imminent revision.[140] When Big Tech is present, privacy is absent. For instance, assertion by social media giants that they will not commingle financial and social data

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without being regulated by a banking regulator. The provision has been interpreted as an "axiomatic" statement preventing firms other than banks from issuing deposit liabilities. Prof. Wilmarth has argued that it is a criminal offense for nonbanks to hold deposits. Unfortunately, the Banking Act of 1933 does not define "deposit", meaning regulators cannot easily invoke Section 21 to prevent nonbanks from engaging in general banking activities. Even if regulators or courts were to attempt to borrow the definition of "deposit" from another statute, there would be "no practical way forward." For instance, because the Federal Deposit Insurance Act defines a "deposit" as "money or its equivalent received or held by a *bank*..." (emphasis added), this creates a "perfect legal circle.")

[135] *See, e.g.*, U.S. TREAS., FINANCIAL REGULATORY REFORM: A NEW FOUNDATION (Oct. 8, 2009), https://www.treasury.gov/initiatives/Documents/FinalReport_web.pdf.

[136] For instance, the Supreme Court struck down a Board regulation intended to expand the BHCA definition of "bank" to cover "nonbank banks." *See* Board of Governors v. Dimension Financial Corp, 474 U.S. 361, 374 (1986).

[137] *See* Kristin N. Johnson et al., *(Im)perfect Regulation: Virtual Currency and Other Digital Assets As Collateral*, 21 SMU SCI. & TECH. L. REV. 115, 142 (2018) (arguing that expanding the existing definition of "deposit accounts" to include virtual wallets and platforms would presumably subject them to a host of intermediary regulations imposed on more traditional depository institutions).

[138] See ABA, "Podcast: OCC's Brooks Plans to Unveil 'Payments Charter 1.0' This Fall," June 25, 2020.

[139] Comment from NCLC to OCC 5 (Aug. 20, 2020), https://www.nclc.org/images/pdf/rulemaking/2020-OCC-fintech-NCLC-comments.pdf.

[140] *See, e.g.*, Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1, 1687, 1687-88 (2020).

absent consumer consent are virtually meaningless. The very notion of digital consent has been complicated by "dark patterns" and other technology Big Tech uses to exploit limits in user cognition and understanding.[141] Consumers typically have no knowledge of what they are consenting to on the internet.[142] Many experts argue the existing notice-and-consent regime does *nothing* to curb commercial surveillance.[143]

While the FTC does have some tools at its disposal,[144] no overarching federal privacy law currently curbs the collection, use, and sale of personal data among corporations.[145] Ultimately, Congress should take action to minimize data collection to that which is narrowly tailored to permitted usages, so that many of the aforementioned anti-competitive practices become commercially unfruitful.[146] Legislation should also shift the burden of privacy protection away from consumers, who have minimal resources to protect themselves, and toward the companies, which profit immensely from the aggregation of our data.[147]

Reestablish a bright line between the ownership of large tech companies and the ownership of financial institutions.

Legislators should reestablish a bright line between the ownership of large tech companies and the ownership of financial institutions. We need structural partitions between

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[141] *See, e.g.*, Neil Richards & Woodrow Hartzog, *The Pathologies of Digital Consent*, 96 WASH. U. L. REV. 1461, 1461-1478 (2019) (borrowing a definition of dark patterns as "'tricks used in websites and apps that make you buy or sign up for things that you didn't mean to.'").

[142] Comment from Freedom from Facebook to FTC (Aug. 20, 2018), https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0051-d-0008-147767.pdf.

[143] *See, e.g.*, Packin & Lev-Aretz, *supra* note 129**,** at 1279–81 (2016); Nathan Newman, *How Big Data Enables Economic Harm to Consumers, Especially to Low-Income and Other Vulnerable Sectors of the Population*, 18 J. INTERNET L. 11, 19 (2014).

[144] For extensive treatment, see Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. 645, 650-698 (2017) (arguing the Sherman Antitrust Act of 1890 authorizes the FTC to break up a conglomerate when it is monopolizing or attempting to monopolize a market. This section was memorably used to sue Microsoft in the late 1990s. The FTC also retains expansive power to interpret the antitrust provision of Section 5 of the FTC Act, which prohibits "unfair competition", generally. Using this authority, the FTC should establish presumptions of illegality for competitively suspect practices, including certain surveillance practices, either through enforcement activity or through rulemaking).

[145] BERKELEY MEDIA STUDIES GROUP ET AL., THE TIME IS NOW: A FRAMEWORK FOR COMPREHENSIVE PRIVACY PROTECTION AND DIGITAL RIGHTS IN THE UNITED STATES, Citizen.org, (last visited Mar. 31, 2020), https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf.

[146] *See, e.g.*, Woodrow Hartzog and Neil M. Richards, *Privacy's Constitutional Moment and the Limits of Data Protection,* 61 BOSTON COLL. L. REV.(forthcoming 2020), *available at* https://ssrn.com/abstract=3441502; Press Release, Senate Democrats, *Privacy and Data Protection Framework* (Nov. 18, 2019), *available at* https://www.democrats.senate.gov/imo/media/doc/Final_CMTE%20Privacy%20Principles_11.14.19.pdf.

[147] Press Release: Statements of Support re: Data Accountability and Transparency Act (DATA 2020), Sen. Sherrod Brown (June 18, 2020), https://www.banking.senate.gov/download/statement-of-support.

commerce and banking, profit-driven enterprise and "money creation",[148] and platforms and payment systems.[149]

Finally, we urge Congress to establish privacy-respecting public options for real-time payments, safe deposits, international money transfer, and other basic digital financial services.

We have commended the Board on its decision to establish and implement FedNow, a new interbank 24x7x365 real-time gross settlement (RTGS) system to facilitate real-time payments (RTP) between financial institutions of all sizes.[150] Households living paycheck to paycheck will be able to receive their wages more quickly and more easily pay bills when due, avoiding the common "cascade of negative consequences."[151]

In addition to upgrading our payments infrastructure, many central bankers, regulators, activists, and academics have pushed for some form of public banking option.[152] This could be utterly transformative. The COVID-19 pandemic response has shown that the very foundations of our economy are fragile. We are forced to rely on the banks as middlemen to deliver government assistance. Some of them have even seized emergency COVID-19 payments to collect debts.[153]

Today, only privileged banks and governmental entities are granted high interest, low fee accounts. The federal government could easily offer the same option to everyone, and provide better consumer safeguards than Wall Street, as well as higher interest, faster payments, and

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[148] For one vision of such separation, see Lev Menand, *Why Supervise Banks? The Forgotten Past and Uncertain Future of a Distinctive Form of Governance*, VAND. L. REV. 1, 23-24 (forthcoming 2020), *available at* https://ssrn.com/abstract=3421232 [https://perma.cc/W5H5-B2FN].

[149] *See* Awrey, *supra* note 80 at 41-43 (comparing various approaches to this issues); AFR Education Fund and DPEF Judiciary Letter, *supra* note 74 (arguing for the structural separation of large tech platforms and payments).

[150] *See* Letter from AFR Education Fund & DPEF to Board (2019) https://www.federalreserve.gov/SECRS/2019/December/20191230/OP-1670/OP-1670_110719_136983_394241172069_1.pdf. *See also* Comment from FTC Comm'r Rohit Chopra to FTC (Nov. 7, 2019), https://www.ftc.gov/public-statements/2019/11/comment-commissioner-rohit-chopra-federal-reserve-proposal-develop-round (urging the Board to proceed promptly, arguing that slow development has created space for the Libra project and "attempts to bypass our banking system altogether.")

[151] *Facilitating Faster Payments in the U.S.: Hearing Before the U.S. S. Comm. on Banking, Hous., and Urban Affairs*, 116th Cong. 1-2 (2019) (Statement of Sheila C. Bair, Former Chair, FDIC), *available at* https://www.banking.senate.gov/download/bair-testimony-9-25-19.

[152] *See, e.g.,* Mehrsa Baradaran, *It's Time for Postal Banking*, 127 HARV. L. REV. F. 165 (2014); Morgan Ricks et al., *A Public Option for Bank Accounts (or Central Banking for All)* 1 (VANDERBILT UNIV. LAW SCH., RESEARCH PAPER NO. 18-33, 2018), *available at* https://ssrn.com/abstract=3192162; Robert Hockett, *Money's Past is Fintech's Future: Wildcat Crypto, the Digital Dollar, and Citizen Central* Banking 2 STAN. J. BLOCKCHAIN L. & POL'Y 221 (2019).

[153] *See* Press Release, U.S. S. Comm. on Banking, Hous., and Urban Affairs, *Brown, Warren Call On Banks To End The Seizure Of Stimulus Checks* (Apr. 15, 2020), *available at* https://www.banking.senate.gov/newsroom/minority/brown-warren-call-on-banks-to-end-the-seizure-of-stimulus-checks.

complete deposit protection.[154] As a recent New York Times editorial endorsing FedAccounts for getting out stimulus payments put it: "Stop Dawdling. People Need Money."[155] Even after the pandemic, a public banking option could make it easier to prioritize assistance through more direct fiscal policy, avoiding ongoing issues with delayed funds, debt collection, and frozen bank accounts.

Some experts have called for Silicon Valley firms to partner with the government on this endeavor.[156] But Big Tech's involvement in public money development would doom any future for financial privacy.[157] Lest it fall victim to the same sort of criticisms as the Facebook Libra project, for instance, a new "digital dollar" would need to respect the privacy of its users.[158] Such respect would entail, among other features, offering digital wallets as well as bank accounts for all, preserving the existing choice of bearer instruments that do not track user activity (like paper Federal Reserve Notes) and registered instruments that do track user activity (like bank deposits).[159] While legal firewalls might prevent some level of abuse in an account-based system, technological solutions are necessary. If the owner of a public centralized ledger system, (for instance, the Federal Reserve Bank of New York) were able to access digital dollar transaction activity at any given time, that data could be inappropriately accessed by other governmental entities, including law enforcement.[160] By contrast, within our existing monetary system, the Federal Reserve System does not make any records of where individual Federal Reserve Notes are at any given time; circulation is merely recorded as a single aggregate liability on the Fed's balance sheet titled 'Federal Reserve Notes Outstanding.'[161]

A new public option for financial services should proceed from the principle that data that is not harvested in the first place cannot be abused. It should not ask users to choose between financial inclusion and privacy. In order to mitigate illicit flows, policymakers could choose to

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[154] *See* Raúl Carrillo, *For Fairer Relief, Fix the Pipes!*, Take on Wall St. Blog (May 7, 2020), https://takeonwallst.com/2020/05/stimulus-checks-fed-accounts/.

[155] *Stop Dawdling. People Need Money*, N.Y. Times (Apr. 15, 2020), https://www.nytimes.com/2020/04/15/opinion/coronavirus-stimulus-check-payment.html.

[156] *See, e.g., The Digitization of Money and Payments: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs,* 116th Cong. 7-10 (2020) (Statement of Hon. J. Christopher Giancarlo, Chair Emeritus, CFTC), *available at* https://www.banking.senate.gov/download/giancarlo-testimony-6-30-20&download=1.

[157] As would Wall Street's involvement. *See, e.g.,* Raúl Carrillo, *Postal Banking: Brought to you by JP Morgan Chase?*, Take on Wall St. Blog (Aug. 27, 2020), https://takeonwallst.com/2020/08/postal-banking-jp-morgan-chase/.

[158] *See, e.g.*, Jason Brett, *Congress Considers Federal Crypto Regulators In New Cryptocurrency Act Of 2020*, Forbes (Dec. 19, 2019), https://www.forbes.com/sites/jasonbrett/2019/12/19/congress-considers-federal-crypto-regulators-in-new-cryptocurrency-act-of-2020/#716eff165fcd (describing the popularization of the idea of the digital dollar in response to Libra's development).

[159] *See* Jonathan Dharmapalan & Rohan Grey, The Case for Digital Legal Tender: The Macroeconomic Policy Implications of Digital Fiat Currency, eCurrency Mint Ltd. (2018), https://www.ecurrency.net/static/resources/201802/TheMacroeconomicImplicationsOfDigitalFiatCurrencyEVersion.pdf.

[160] *See, e.g.*, Matla Garcia Chavolla, *Cashless Societies and the Rise of the Independent Cryptocurrencies: How Governments Can Use Privacy Laws to Compete with Independent Cryptocurrencies*, 31 Pace Int'l L. Rev. 263, 273 (2018).

[161] Rohan Grey, *Administering Money: Coinage, Debt Crises, and the Future of Fiscal Policy*, Ky. L.J. 1, 16-18 (forthcoming 2020), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3536440.

only offer anonymity under a certain threshold of holdings, as federal law does now with paper cash.[162] Public sector innovation is necessary to truly regulate the space, and privacy and public sector innovation need not conflict.[163]

[162] *See* Marco Dell'Erba, *Stablecoins in Cryptoeconomics: From Initial Coin Offerings to Central Bank Digital Currencies,* 22 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 43 (2020). However, *see also*, Jason Leopold et al., *The FinCEN Files*, BUZZFEED (Sept. 20, 2020), https://www.buzzfeednews.com/article/jasonleopold/fincen-files-financial-scandal-criminal-networks (arguing the post-9/11 AML, CFT, and sanctions regime, in addition to violating civil rights, does not work as purported. Surveillance has not necessarily led to increased law enforcement).

[163] Kamara, *supra* note 19 (arguing cutting-edge pro-privacy technology has applications for financial services).