Ballard Spahr LLP

Antitrust Law Adds to the Consumer Finance Regulatory Arsenal

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I. OVERVIEW

Regulatory scrutiny and class action litigation relating to the consumer financial services (CFS) industry have typically focused on issues of disclosure, customer privacy, and fees charged to consumers. CFS lawyers are familiar with this regulatory regime and its goals of preventing deception and promoting fairness to consumers.

Within the past several years, however, regulators and class action plaintiffs have broadened their focus to challenge various CFS industry practices with increasing frequency on the grounds that they undermine competition. This expanded focus utilizes the antitrust laws and the substantial remedies associated with them, which include injunctive relief to block mergers, as well as treble damages and counsel fees in private litigation.

In this new climate, it behooves CFS lawyers to become familiar with principles of antitrust law and how they can be applied to the CFS industry. A fuller understanding of these laws will enable CFS firms to minimize risk, provide advice and counsel to their business units, and enhance the likelihood of prevailing in litigation aimed at various revenue-enhancing practices. This White Paper discusses the impact of this broadened focus on the antitrust laws.

II. WHY NOW IS THE TIME TO START FOCUSING ON COMPETITION LAW

In the summer of 2021, President Biden issued a widely publicized executive order on competition.[1] The President called for a "whole-of-government" approach to competition issues and encouraged the Department of Justice, the Federal Trade Commission, the CFPB, and others to overhaul their approach to enforcement and bring the federal scheme into the 21st century.[2]

The agencies responded. As part of the federal government's increased focus on competition, there has been increased scrutiny over the past two years of the level of competition in the CFS industry. Jonathan Kanter, the Assistant Attorney General of the Department of Justice Antitrust Division, reported in September 2022 that the agencies "are litigating more than [they] have in decades," and "will litigate more merger trials this year than in any fiscal year on record."[3] "At the same time," Mr. Kanter continued, "we have indicted 20 criminal cases since November [2021], more than any time since the 1980s."[4] President Biden's pick to chair the Federal Trade Commission (FTC), Lina Khan, has shown similar zeal.[5] Both leaders indicated an intent to ramp up antitrust enforcement and use every applicable federal statute to do so.[6]

The CFPB has similarly shown an interest in increased competition enforcement.[7] In May 2022, the CFPB announced a new unit within the agency, the Office of Competition and Innovation, as a part of a broader initiative to make the consumer financial services industry more competitive.[8] The CFPB is focusing heavily on CFS firms' use of customers' personal financial data and "unfair" fees.[9] A climate of heightened competition enforcement has developed, with increasing focus on digital markets and technology's impact on competition.

A. Antitrust Law Generally

The primary vehicles for antitrust enforcement by both the federal government and private litigants are the Sherman Act, the Clayton Act, and the FTC Act. The Department of Justice and the FTC work in concert to enforce these laws at the federal level, and the Sherman and Clayton Acts are widely used by private plaintiffs, especially in the class action context.[10]

The antitrust laws proscribe anticompetitive business practices and unlawful mergers in general terms. Because of this, the law of antitrust is principally made by judges interpreting statutes and applying them to the facts before them. This case-by-case approach can render antitrust enforcement unpredictable.[11]

Antitrust litigation is notoriously costly because of the complexity and breadth of discovery and the need for experts. Below we provide greater detail on the three most relevant antitrust statutes for the consumer financial services industry.

1. The Sherman Act

The Sherman Act outlaws "every contract, combination, or conspiracy in restraint of trade"[12] and "monopolization, attempted monopolization, or conspiracy or combination to monopolize."[13] The Sherman Act does not prohibit every restraint of trade, only those that are unreasonable.[14] Some behaviors covered by the Act, like joint ventures, are considered potentially beneficial, and are therefore evaluated under a balancing framework known as the rule of reason.[15] Other behaviors, like price fixing, are presumptively illegal and are deemed "per se" violations of the Sherman Act.

Sherman Act penalties can be severe. Generally such claims are civil in nature, but not always, as "individuals and businesses that violate it may be prosecuted by the Department of Justice."[16] The criminal penalties are considerable: "up to $100 million for a corporation and $1 million for an individual, along with up to 10 years in prison."[17] The stated maximum fines can be increased, as well, under certain circumstances.[18] In civil cases, damages are trebled, plus attorney's fees and costs.

2. The Clayton Act

The Clayton Act addresses specific practices that the Sherman Act does not clearly prohibit. The most relevant section of the Clayton Act, Section 7, "prohibits mergers and acquisitions where the effect 'may be substantially to lessen competition, or to tend to create a monopoly.'"[19] Other sections of the Clayton Act ban "certain discriminatory prices, services, and allowances in dealings between merchants." Congress amended the Clayton Act in 1976 by the Hart-Scott-Rodino Antitrust Improvements Act, changing the law "to require companies planning large mergers or acquisitions to notify the government of their plans in advance."[20] Finally, the Clayton Act provides for the private right of action with trebled damages, as discussed above.

3. The FTC Act

Congress enacted the FTC Act, at least in part, to supplement and strengthen the antitrust laws.[21] The FTC Act bans "unfair methods of competition" and "unfair or deceptive acts or practices."[22] Among other behaviors, Section 5 enables the FTC to challenge, in their incipiency, practices that, if allowed to continue, would harm competition.[23] Courts have held that "unfair methods of competition" include any violation of the Clayton Act or the Sherman Act.[24] However, the scope of FTC Act Section 5 is broader than the scope of the Clayton Act and the Sherman Act.[25] Importantly, nothing in the FTC Act expressly requires proof of the existence of an "agreement" among competitors before anticompetitive multi-firm conduct can be condemned.[26] The FTC Act does not provide for treble damages, but the bar is much lower to establish a violation.[27]

B. Digital Markets and FinTech

A great deal of antitrust law and enforcement turns on market power, which is the percentage of a relevant market controlled by the defendant.[28] Traditionally, a market is defined geographically (such as the United States) and by product (such as corn). However, as the economy has moved increasingly into the digital space, the antitrust laws have struggled to define digital markets and therefore have struggled to effectively establish market share in litigation.[29] This means that, until recently, it was much harder to regulate anticompetitive conduct by digital platforms.[30]

The federal agencies have recently refined their efforts to measure the market power of digital firms,[31] leading to new uses of the antitrust laws in an effort to, in their view, make digital markets more competitive. This is especially important for the CFS industry, as some of the most innovative products in the industry (like digital payment platforms and Buy Now, Pay Later (BNPL) plugins) exist almost entirely in the digital space.

Below, we highlight four issues that should be top of mind for CFS firms in 2023. We provide examples of how antitrust enforcement is changing to focus on digital markets. We also discuss federal agencies that are newly focused on competition in the CFS industry.

III. MAJOR DEVELOPMENTS IN COMPETITION LAW FOR CFS FIRMS

A. Increased Focus on Competition at the Consumer Financial Protection Bureau[32]

The CFPB has the statutory authority to take action against institutions violating consumer financial laws, including those engaging in unfair, deceptive, or abusive acts or practices.[33] President Biden's director of the CFPB, Rohit Chopra, is a former antitrust enforcer.[34] Director Chopra has broadened the CFPB's mission to include the effect of various business practices on fair competition in the CFS industry.[35] As such, CFS firms should be prepared for competition-related scrutiny from the agency. The CFPB recently created a new Office of Competition and Innovation,[36] which has already announced a few priority actions: exploring ways to reduce the barriers to switching accounts and providers; researching market structure problems that create obstacles to innovation; researching how big tech companies may threaten fair competition; identifying ways to address obstacles like access to capital and talent; and hosting events to explore barriers to entry.[37]

1. Junk Fees

Fees charged by CFS firms have long been a target of regulators and plaintiffs' lawyers, and the antitrust laws provide a new set of tools to challenge fees. Recent actions by the CFPB are illustrative.

In January 2022, the CFPB launched an initiative to "save Americans billions in junk fees."[38] The CFPB published a request for comment[39] to inform its rulemaking and enforcement priorities for the years ahead. In the release, the CFPB explained that "[c]ompanies across the U.S. economy are increasingly charging inflated and back-end fees to households and families[,]" which "distorts our free market system by concealing the true price of products from the competitive process."[40] The CFPB specifically asked for comments "about people's experiences with fees associated with their bank, credit union, prepaid or credit card account, mortgage, loan, or payment transfers[.]"[41]

On June 29, 2022, the CFPB issued an advisory opinion that federal law prohibits debt collectors from charging "pay-to-pay" fees.[42] "'Federal law generally forbids debt collectors from imposing extra fees not authorized by the original loan,' said CFPB Director Rohit Chopra."[43] The advisory opinion focused largely on competition, emphasizing that "*the CFPB wants to ensure that law-abiding debt collectors are not disadvantaged by their competitors that impose unlawful fees*."[44]

The CFPB issued guidance in October 2022 to help banks avoid charging illegal junk fees on deposit accounts.[45] Specifically, the CFPB identified depositor and overdraft fees as oftentimes illegal under the Consumer Financial Protection Act. Depositor fees are fees charged by a bank when a customer attempts to deposit a check that bounces.[46] In the Bulletin on "Unfair Returned Deposited Item Fee Assessment Practices," the CFPB warned that "[b]lanket policies of charging Returned Deposited Item fees to consumers for all returned transactions irrespective of the circumstances or patterns of behavior on the account are likely unfair under the Consumer Financial Protection Act."[47] The CFPB took a similar position with respect to unanticipated overdraft fee assessment practices, explaining that "overdraft fees assessed by financial institutions on transactions that a consumer would not reasonably anticipate are likely unfair."[48]

And in March 2023, the CFPB released a special edition of its Supervisory Highlights that reports on "unlawful junk fees uncovered in deposit accounts and in multiple loan servicing markets, including in mortgage, student, and payday lending."[49] In its publication, the CFPB explained that, "[a]s part of its emphasis on fair competition the CFPB has launched an initiative, consistent with its legal authority, to scrutinize exploitative fees charged by banks and financial companies, commonly referred to as 'junk fees.'"[50]

This focus on junk fees extends to enforcement actions. In September, the CFPB ordered Regions Bank to pay $50 million to the CFPB's victims' relief fund and refund at least $141 million to customers who were charged surprise overdraft fees known as "authorized positive fees."[51] According to the CFPB, from 2018 to 2021, Regions Bank charged customers surprise overdraft fees on certain ATM withdrawals and debit card purchases. This occurred even after the bank had told consumers that they had sufficient funds at the time of the transactions.[52] Furthermore, the CFPB found that, "Regions leadership knew about and could have discontinued its surprise overdraft fee practices years earlier, but they chose to wait while Regions pursued changes that would generate new fee revenue to make up for ending the illegal fees."[53]

2. Late Fees[54]

Like junk fees, late fees have long attracted scrutiny from regulators and plaintiffs' lawyers, but these fees are now being looked at through a competition lens. In March 2022, the CFPB issued a report on Credit Card Late Fees.[55] The findings in the report revealed that many major credit card companies charge the maximum late fee allowed under the immunity provision, and that the credit card market continues to generate sizable profit from late fees ($12 billion in 2020).[56]

On June 22, 2022, the CFPB announced a review of the credit card industry's penalty policies.[57] At the same time, the CFPB published an Advance Notice of Proposed Rulemaking asking for information to help determine whether regulatory adjustments are needed to address late fees under the Credit Card Accountability and Disclosure Act of 2009 (CARD Act).[58] The CARD Act banned excessive credit card penalties, and in 2010 the Federal Reserve voted to implement provisions of the CARD Act that required penalties to be "reasonable and proportional to the omission or violation."[59] The Federal Reserve's rule "prohibited generating more revenue from late fees than

was necessary to cover the cost of late payment."[60] But the rule also included an immunity provision that allowed credit cards to escape enforcement scrutiny if they set fees at a predetermined level, "even if the fees were not necessary to deter a late payment and generated excess profits."[61]

In its June 22, 2022, press release seeking comment on proposed changes to this rule, the CFPB emphasized that the agency "is seeking data about credit card late fees and late payments, assessing whether those fees are 'reasonable and proportional[,]'" with an ultimate goal of determining whether adjustments are needed to address late fees.[62] Director Chopra delivered prepared remarks on the Advanced Notice of Proposed Rulemaking, stating: "*Our broader initiative to improve the credit card market will also include* better ways to use the CFPB's existing credit card data collection responsibilities, and *taking a closer look at* deferred interest promotions, *fair competition***,** and consumers' fair access to affordable credit."[63]

3. Buy Now, Pay Later[64]

Antitrust regulators have also taken an interest in the Buy Now, Pay Later (BNPL) industry. BNPL has become increasingly prevalent in the United States as "a form of credit that allows a consumer to split a retail transaction into smaller, interest-free installments and repay over time."[65] In December 2021, the CFPB issued market monitoring orders to five BNPL firms, and in September 2022, the CFPB issued a report on the industry that detailed the findings from those orders.[66] The report identified three broad areas of concern with BNPL products: (1) operational difficulties with the product, such as difficulty in filing and resolving disputes; (2) data harvesting; and (3) overextension on the part of consumers. The report found that this market is large and growing, as the five lenders surveyed "originated 180 million BNPL loans totaling $24.2 billion" in 2021.[67]

The report and the accompanying press release make clear that the CFPB plans to increase regulation in this space. The CFPB plans to issue guidance on compliance with statutory requirements for credit cards, to "address emerging issues with data harvesting[,]" and address how the industry can establish appropriate credit reporting practices.[68] In the accompanying press release, the CFPB focused in part on the anticompetitive effects of the BNPL market, and highlighted that the data-harvesting element of BNPL "may lead to a consolidation of market power in the hands of a few large tech platforms who own the largest volume of consumer data, and reduce long-term innovation, choice, and *price competition*."[69]

4. Takeaway for CFS Firms

Although the CFPB was designed to monitor and challenge the behavior of CFS firms, President Biden's CFPB has been exceptionally active in using competition justifications for its enforcement actions. CFS firms have been the target of various CFPB enforcement efforts that the Bureau has claimed are grounded in a concern about the level of competition in the CFS industry.[70] For example, in addition to the Regions Bank order discussed above, in April 2022, the CFPB took action against Hello Digit for an automated savings algorithm that depleted checking accounts and led to overdraft penalties for consumers.[71] The resulting order required Hello Digit "to pay redress to its harmed customers" and it fined "the company $2.7 million for its actions."[72] The CFPB explained it found that Hello Digit had falsely guaranteed no overdrafts, broke promises to make their aggrieved customers whole, and pocketed interest that should have gone to consumers.[73]

The CFPB sued another CFS firm, ACTIVE Network, in October 2022.[74] ACTIVE Network is a payments platform used to sign up for community activities.[75] In the press release announcing the lawsuit, Director Chopra explained that "the CFPB's investigation revealed that ACTIVE Network engaged in a years-long campaign that used dark patterns to

cram junk fees onto the annual bills of families signing up for community activities."[76] Additionally, the CFPB has shown a recent interest in CFS firm's use of customer data, which is discussed more fully in Part III.A, *supra*.

Thus, CFS firms should be aware of the CFPB's increased focus on the competitiveness of the consumer finance industry, and especially aware that digital platforms are receiving greater enforcement attention than ever. CFS firms should not assume that because a behavior has not yet been condemned that it is not illegal, and should consult with competition counsel to ensure that they do not run afoul of anticompetitive prohibitions in the consumer protection laws.

B. A New Focus on CFS Firms' Use of Customer Data

Government enforcers and private plaintiffs alike are increasingly focused on financial technology companies' use of customer data. This is a rapidly developing area of competition law, and CFS firms should be aware that behaviors that before would not have fallen within the ambit of competition law are now being challenged as anticompetitive.

1. Consumer Financial Data and the CFPB

In May 2022, the CFPB highlighted research showing that (1) only about half of the largest credit card companies contribute data to credit reporting companies listing the exact monthly payments made by customers;[77] and (2) that "over a short period of time, several of the largest credit card companies began to suppress actual payment amount information that they had previously provided or furnished on consumers."[78] In response, the CFPB sent letters to the CEOs of the nation's biggest credit card companies,[79] asking them to explain their payment reporting practices. The CFPB was concerned that the practice could impact consumers and their ability to access credit at the most competitive rates.[80]

In February 2023, the CFPB reported on its findings from the inquiry.[81] The Bureau found that "[c]ompanies suppressed data to limit competition" in an attempt to make it harder for competitors to "to offer their more profitable and less risky customers better rates, products, or services."[82] A handful of the credit card companies responded by noting that "other credit card companies had stopped furnishing and [they] did not want to be at a 'competitive disadvantage' of inadvertently providing data their competitors had chosen to stop sharing."[83] In conclusion, the CFPB promised to "continue to monitor and address credit card company practices that impede effective market competition" and "brief the appropriate financial regulators and law enforcement agencies on our findings."[84]

And in October 2022, the CFPB initiated a rulemaking regarding personal financial data rights, proposing "options to strengthen consumers' access to, and control over, their financial data as a first step before issuing a proposed data rights rule that would implement section 1033 of the Dodd-Frank Act."[85] Under the options the CFPB has proposed, consumers would have better access to their personal financial data and could "more easily and safely walk away from companies offering bad products and poor service and move towards companies competing for their business with alternate or innovative products and services."[86] The press release announcing the rulemaking stated:

> *If today's proposal is finalized, the rule would require firms to make a consumer's financial information available to them or to a third party at that consumer's direction.* As described in the outline, the CFPB is considering proposals, for instance, that would empower consumers who want to switch providers to transfer

their account history to a new company, so they do not have to start over if they are unsatisfied with the service provided by an incumbent firm.[87]

This focus on competition and competitors is new for the CFPB and is a part of a larger trend blurring competition enforcement with consumer protection in the Biden administration.

2. Increased Focus from the FTC

The FTC has shown increased interest in tech companies' use of consumer data. In September 2021, the FTC issued a Report to Congress on Privacy and Security.[88] In the Report, the Commission stressed "four areas of FTC focus for improving the effectiveness of our efforts to protect Americans' privacy: integrating competition concerns, advancing remedies, focusing on digital platforms, and expanding on our guidance on and understanding of the consumer protection and competition implications of algorithms."[89] The FTC vowed to "spend more time on the overlap between data privacy and competition[,]" explaining that digital markets are powerful because they have access to and control over user data so the Commission must "make sure we are looking with both privacy and competition lenses at problems that arise in digital markets."[90]

The overlap between the use of customer data and competition law is complex. Competition law, in some scenarios, requires firms to share in resources and facilities that are deemed "essential." This is known as the essential facility doctrine.[91] Some antitrust enforcers view customer data as an "essential facility" that ought to be shared.[92] However, this conflicts with an individual's right to privacy and control over their data. Although these conflicting views have previously impeded regulation in this area, the recent FTC Report signals a change.

The Report explained that market power may enable violations of consumer protection laws, and vice versa, and that the FTC will be looking to more competition-based remedies: "Companies should not only have to stop their illegal conduct, they should not be allowed to gain a competitive advantage by benefiting from data they collected unlawfully."[93] FTC Chair Khan commented that "the digitization further hastened by the pandemic makes this a particularly urgent and opportune time for the Commission to examine how we can best use our tools and update our approach in order to tackle the slew of data privacy and security challenges we presently face."[94]

In August 2022, the FTC announced it was exploring potential rules to crack down on harmful commercial surveillance and lax data security.[95] Chair Khan commented that the "growing digitization of our economy—coupled with business models that can incentivize endless hoovering up of sensitive user data and a vast expansion of how this data is used—means that potentially unlawful practices may be prevalent."[96]

3. Private Litigation

In addition to this increased regulatory focus, several putative class actions were filed against the prominent CFS firm Plaid in 2020.[97] Plaid is a platform that connects user's bank accounts to third-party payment apps. Plaintiffs alleged that Plaid had acquired "vast troves of information about consumers' private financial lives" via software embedded in third-party apps, allowing Plaid to exploit "its position as middleman to acquire app users' banking login credentials and then use those credentials to harvest detailed transaction histories and other financial data, all without consent."[98] The complaint further alleged that Plaid benefitted from its illegal activities by marketing its data to app customers, analyzing the data to derive insights into consumer behavior, and "selling its collection of data to Visa as part of a multibillion dollar acquisition."[99]

A federal judge approved a $58 million settlement between Plaid and the classes.[100] In addition to the monetary award, Plaid agreed to implement business practice changes such as improving user control over their private login information and personal financial data and increasing privacy safeguards for customers.[101]

4. Takeaway for CFS Firms

Technology firms' use of customer data has largely been unregulated for the past several decades. The tide appears to be turning, and CFS firms may find themselves in violation of new policies and statutes. This is a dynamic, changing landscape. Beyond mere compliance with data use legislation and regulations, CFS firms must be aware that their policies relating to customer data use may become the basis of an antitrust lawsuit or a CFPB investigation. CFS firms should consult with competition counsel to ensure that their practices are compliant and/or adaptable to changing standards.

C. Changes in Merger Enforcement

Financial services companies, like other largely digital industries, are receiving increasing attention from competition authorities. The agencies are looking to update their merger guidelines to be more flexible about which firms they consider "competitors" in a given market. This could result in scrutiny of mergers that were previously unchallenged on the ground that they affected too small a percentage of the defined market. This shifting focus should be alarming for CFS firms: Many acquisitions of nascent companies may soon be considered anticompetitive by the government and challenged in court. And government merger challenges are likely to become more numerous under the Merger Filing Fee Modernization Act of 2022 signed into law last December.[102]

1. Background on Merger Enforcement

Under Section 7 of the Clayton Act, the FTC and the Department of Justice (DOJ) can challenge mergers if their effect "may be substantially to lessen competition, or to tend to create a monopoly."[103] Mergers can lessen competition in two ways: (1) by creating a monopoly, permitting the monopolist to impose unilateral price increases and exercise undue control over the market in question; or (2) by facilitating collusion between competitors, which typically results in reduced output and higher consumer prices.[104] The government challenges mergers under both "unilateral effects" theories and collusion facilitation theories.

As noted above, the antitrust laws have not been easily applied to digital markets, and federal enforcers appear keen to adopt changes that need to occur in order to challenge mergers and acquisition of and by digital companies.

2. Changes in the Merger Guidelines

Merger guidelines are frameworks for the analysis of mergers under the antitrust laws.[105] The DOJ first published merger guidelines in 1968 to provide transparency into the standards for merger review.[106] Since the 1960s, the agencies have published a series of updates, specified by whether the transaction is considered horizontal (same market) or vertical (same supply chain).[107]

In a January 18, 2022 announcement, the DOJ and the FTC launched a joint public inquiry aimed at modernizing the merger guidelines to better detect and prevent anticompetitive deals on the ground that the current merger guidelines are not effectively curbing concentration in key industries.[108] Assistant Attorney General Jonathan Kanter, in remarks in support of the inquiry, noted, "[j]ustice . . . demands that we ensure our approach to analyzing mergers is not one-dimensional or two-dimensional, but captures the rich complexity of the modern economy. That will be how we prevent, in their incipiency, all of the harms of unlawful consolidation."[109] Echoing those

concerns, FTC Chair Khan explained that the purpose behind the inquiry is to "ensure our merger guidelines accurately reflect the realities of the modern economy."[110] Chair Khan also noted that "this review of the merger guidelines is especially timely and ripe" as "[g]lobal deal-making in 2021 soared to $5.8 trillion, the highest level ever recorded, with the FTC and DOJ receiving more than double the number of merger filings received on average in any of the past five years."[111]

The DOJ/FTC inquiry sought input on the purpose and scope of merger review, the concentration thresholds for presumptively illegal mergers, the use of traditional market definition in analyzing competitive effects, threats to nascent competition, and the unique characteristics of digital markets.[112]

Additionally, and notably for CFS firms, the agencies exhibited a desire to be flexible with their conceptions of relevant markets and move away from a horizontal versus vertical classification.[113] For example, in past decades a firm could reasonably expect that a merger between a credit card issuer and a payments app would not have been condemned. However, under a more flexible approach, such a merger can expect scrutiny, as discussed below with respect to the now-abandoned Visa/Plaid merger.

The first draft of the new guidelines is expected soon,[114] and will likely feature an approach to mergers involving direct measures of competition on other indicia of monopoly power and anticompetitive effects.[115] This means, importantly, that firms that would have been safe from merger enforcement for being too small before can potentially be subject to federal antitrust enforcement efforts.[116]

3. Increasingly Aggressive Merger Remedies

In the meantime, the agencies have already gotten more aggressive with the remedies that they seek in merger challenges. Merger remedies take two forms: one type addresses the structure of the market, the other addresses the conduct of the merged firm.[117] Structural remedies generally involve the sale of businesses or assets by the merging firms. A conduct remedy usually entails injunctive-type provisions that would regulate the merged firm's post-merger behavior.

In recent years, the agencies have opted for conduct remedies less frequently, preferring instead to block mergers before they are consummated or to pursue structural remedies post-merger. Per the DOJ's 2020 Merger Remedies Guidelines "conduct remedies . . . may restrain potentially procompetitive behavior, prevent a firm from responding efficiently to changing market conditions, and require the merged firm to ignore the profit-maximizing incentives inherent in its integrated structure."[118] The guidelines further emphasize that the longer a conduct remedy is in effect, the less likely it is that it will effectively prevent the feared competitive harm, and ultimately "conduct remedies are inappropriate except in very narrow circumstances."[119]

While President Biden's agencies have taken a strong stance against conduct remedies, they have also changed their approach to structural remedies. A defining characteristic of this administration's antitrust enforcement "has been a strong preference to challenge potentially problematic mergers while avoiding consent decree settlements under most circumstances[,]" even those that propose structural remedies.[120] In the past year the agencies have challenged many mergers outright, and we have seen "an astoundingly busy court docket for the DOJ."[121]

This trend holds true in the CFS industry. In November 2020, DOJ's Antitrust Division filed a lawsuit to prevent Visa from acquiring the payments platform Plaid.[122] "Plaid's technology allows developers to plug into consumers' various financial accounts, with consumer permission, to aggregate spending data, look up balances, and verify other personal financial data."[123] Plaid connects to over 200 million bank accounts and has become a leading financial data aggregation company in the United States.[124]

The complaint alleged that Visa's CEO viewed the acquisition as an insurance policy to protect against a threat to their domestic debit business, and that the CEO sold the deal to Visa's board of directors as "strategic, not financial[.]"[125] Visa executives allegedly were concerned that if Plaid remained free to develop its competing payment platform, "Visa may be forced to accept lower margins or not have a competitive offering."[126]

The government ultimately asserted that Visa's proposed acquisition of Plaid violated Section 7 of the Clayton Act,[127] stating the transaction would "maintain Visa's monopoly power," giving Visa the power to raise prices and increase barriers to entry; "eliminate nascent competition between Visa and Plaid;" increase the price of online debit transactions; and "reduce quality, service, choice, and innovation."[128] Visa and Plaid abandoned their merger plans.[129]

4. Takeaway for CFS Firms

The agencies already have exhibited an enforcement interest in the CFS industry. Based on the available information about the proposed changes to the federal merger guidelines, the agencies are looking to target acquisitions that before would have escaped scrutiny and will not be deterred from seeking to block a merger even between smaller firms. In addition, the agencies are seeking drastic remedies in their enforcement actions, predominantly preferring to block mergers outright.

CFS firms should be mindful that, whereas before they might have been able to merge with or acquire a firm in a different "market" within the broader payments industry, the agencies are now relaxing their approach to market definition when deciding whether to pursue a merger challenge. This can mean that companies that traditionally would have been considered a non-competitor, and therefore a fine target for a merger, are no longer a safe bet and may trigger a federal suit seeking to block the merger.

The abandoned merger between Visa and Plaid serves as an apt illustration. CFS firms can no longer rely on traditional approaches to market definition and Clayton Act Section 7 enforcement. CFS firms should be mindful of these developments and consult antitrust counsel early in the deal-making process.

D. FTC Act Section 5 – Unfair Methods of Competition

Digital markets are an area of increased focus for the FTC. CFS firms should be aware that even behavior that is not illegal under the Clayton and Sherman Acts may be enjoined under Section 5 of the FTC Act, which prohibits "unfair methods of competition."[130] Although standalone Section 5 claims are rare, Chair Khan has expressed an interest in bringing these claims to challenge behaviors that are not otherwise cognizable under the antitrust laws.

1. Background on Section 5 of the FTC Act

As discussed above, Section 5 of the FTC Act condemns "unfair methods of competition."[131] Among other behaviors, Section 5 enables the FTC to challenge, in their incipiency, practices that, if allowed to continue, would harm competition.[132] Courts have held that "unfair methods of competition" include any violation of the antitrust laws.[133] The FTC has historically challenged: (1) conduct that violates other antitrust laws[134]; (2) invitations to collude and facilitating practices[135]; (3) exchanges of competitively-sensitive information[136]; (4) anticompetitive courses of conduct[137]; and (5) abuses of standard-setting processes.[138]

Antitrust practitioners and scholars have long debated the degree to which Section 5 extends beyond the scope of the antitrust laws,[139] but the courts have never clearly delineated Section 5's outer boundaries.[140] This creates a muddy picture of the statute, depriving many firms of the ability to discern which business practices might violate the law.

2. Enforcement by the FTC Generally

The FTC has the exclusive power to enforce the FTC Act.[141] The Commission may challenge unfair methods of competition through administrative hearings governed by Section 5 of the Act.[142] The FTC can also bring a Section 5 claim by seeking an injunction in federal court under Section 13(b) of the FTC Act, which authorizes the FTC to file a lawsuit in federal court when a firm is violating the FTC Act or is about to.[143]

The FTC cannot assess prison terms or damages.[144] The agency most frequently seeks an injunction, called a "cease and desist" order, directing the defendant to stop engaging in a certain anticompetitive practice.[145] The FTC also has the authority to bring an action in court to levy fines for violation of an existing cease and desist order, or for "knowing violations" of the FTC Act and antitrust laws.[146] In general, a knowing violation is a practice previously found by the Commission to be illegal.[147]

While at Yale Law School, Lina Khan published a student note about platform monopoly[148] that made a significant impact on the national antitrust discussion.[149] Although the positions Ms. Khan advocated were criticized by some antitrust scholars,[150] Ms. Khan was nominated as a Commissioner of the FTC just four years after graduating from law school[151] and was made Chair soon after.[152]

3. Recent Developments in Section 5 Enforcement

In 2015, the FTC issued a statement of enforcement principles regarding its use of standalone Section 5 authority, which served as one of the few citable points of authority on the scope of the Act and what behaviors might be illegal.[153] The FTC rescinded the statement in 2021. Ms. Khan stated that the prior policy statement "contravene[d] the text, structure, and history of Section 5 and largely wr[ote] the FTC's standalone authority out of existence."[154] Ms. Khan further emphasized "[w]ithdrawing the 2015 Statement is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets."[155]

Chair Khan gave remarks recently at the Fordham Annual Conference on International Antitrust Law & Policy that confirm her intent to bring standalone Section 5 cases and her focus on digital markets.[156] She explained that she did not believe that the FTC Act was constrained by any efficiencies analysis or consumer welfare measures, and instead emphasized that, "Congress distinguished between *fair* and *unfair* methods of competition and charged the FTC with fleshing out that distinction based on its expertise."[157] She continued, "I believe it is clear that respect for the rule of law requires us to reactivate our standalone Section 5 enforcement program."[158]

On November 10, 2022, the FTC issued new guidance "regarding the scope of unfair methods of competition under Section 5 of the Federal Trade Commission Act."[159] The policy statement provides limited guidance regarding conduct that may be condemned under Section 5 of the FTC Act, only stating "[t]he conduct must be a method of competition" that is "unfair."[160] In determining whether a method of competition is "unfair," the FTC will look at two conjunctive criteria: (1) whether "the conduct may be coercive, exploitative, collusive, abusive, deceptive, predatory, or involve the use of economic power of a similar nature," or is "otherwise restrictive or exclusionary"; and (2) whether the conduct tends to negatively affect competitive conditions.[161] The statement then makes clear that the FTC considers Section 5 violations to be closer to a per se rule than a rule of reason:

> It is the party's burden to show that the asserted justification for the conduct is legally cognizable, non-pretextual, and that any restriction used to bring about the benefit is narrowly tailored to limit any adverse impact on competitive conditions. In addition, the asserted benefits must not be outside the market where the harm occurs. Finally, it is the party's burden to show that, given all the circumstances, the asserted benefits outweigh the harm and are of the kind that courts have recognized as cognizable in standalone Section 5 cases.[162]

Lastly, the policy statement provides a list of "non-exclusive" examples of conduct that the FTC considers unfair methods of competition, which unsurprisingly includes every known antitrust violation, and even some conduct that falls outside the other antitrust laws.[163]

As reported in the press, "FTC Chair Lina Khan said the policy, which re-affirms Section 5 of the FTC Act, will effectively reactivate the FTC's authority to police conduct, especially in online markets."[164] However, business groups, such as the United States Chamber of Commerce, and technology advocates "condemned the statement as a power grab by the FTC."[165]

4. Takeaway for CFS Firms[166]

The FTC is focused on CFS firms. For example, in September 2022 the FTC filed an administrative complaint before the FTC against Credit Karma, alleging that "[i]n numerous instances, in connection with the advertising, promotion, or offering of financial products," Credit Karma had represented that "[c]onsumers were "Pre-Approved" for credit products; and . . . [c]onsumers had '90% odds' of approval," when in fact those representations were false, misleading, and unsubstantiated.[167] The complaint alleges that this behavior constitutes violations of Section 5 of the FTC Act."[168] The accompanying consent order required the company to pay $3 million for aggrieved customers and required that Credit Karma stop making such claims.[169]

By way of example, the FTC sued Facebook in 2020 under Section 5 of the FTC Act, among other statutes.[170] Facebook's motion to dismiss was granted on June 28, 2021, but Chair Khan was given leave to submit an amended complaint.[171] The FTC did so. In the amended complaint, Facebook's acquisition of nascent competitors and leveraging its network are characterized as anticompetitive acts under Section 5.[172]

Chair Khan has released a number of public statements indicating that she is focusing on digital markets and financial services. For example, in December 2021 she submitted a public comment regarding CFPB's Inquiry into Big Tech Payment Platforms.[173] There, Ms. Khan emphasized that "Big Tech companies' participation in payments and financial services could enable them to entrench and extend their market positions and privileged access to data and AI techniques in potentially anticompetitive and exploitative ways."[174]

The current FTC poses a real threat to digital markets. Between Chair Khan's aggressive focus on digital markets and her demonstrated intent to revitalize standalone Section 5 claims, CFS firms should be wary. Antitrust counsel can work with CFS firms to review competitive strategy and reduce the risk of becoming a target of this ambitious FTC agenda.

ENDNOTES

1 President Biden Executive Order (EO) 14036, Promoting Competition in the American Economy (July 9, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/.

2 *Id.*

3 DOJ, *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Virtual Remarks for the 2022 International Bar Association Competition Conference* (Sept. 10, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-virtual-remarks

4 *Id.*

5 *See* FTC, *Agency Priorities Memorandum from Chair Lina Khan* (Sept. 22, 2021) ("[W]e need to be forward-looking in anticipating problems and taking swift action. On both the competition and the consumer protection sides, this means being especially attentive to next-generation technologies, innovations, and nascent industries across sectors.").

6 *See* DOJ, A*ssistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium* (Sept. 13, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust ("At the Antitrust Division, we are firing on all cylinders, working to use every tool we have available to promote competition and meet the moment.").

7 CFPB Director Rohit Chopra, *Promoting competition in our financial markets* (July 11, 2022), https://www.consumerfinance.gov/about-us/blog/promoting-competition-in-our-financial-markets/.

8 CFPB, *CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance* (May 24, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-lauches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/.

9 CFS firms should be aware that this focus on modernization and adapting antitrust enforcement started even before President Biden took office. In 2020, the Department of Justice created a new "Financial Services, Fintech, and Banking" section to focus more closely on the financial services sector. *See* Michael Murray, *The Muscular Role for Antitrust in Fintech, Financial Markets, and Banking: The Antitrust Division's Decision to Lean In*, remarks as prepared for discussion at University of Michigan Law School (Oct. 14, 2020), https://www.justice.gov/opa/speech/file/1327491/download.

10 However, only the FTC can enforce the FTC Act. FTC, *The Antitrust Laws* https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Mar. 16, 2023).

11 *Id.*

12 15 U.S.C. § 1.

13 15 U.S.C. § 2.

14 FTC, THE ANTITRUST LAWS, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 13, 2023).

15 *See Standard Oil* Co. *v. United States*, 221 U.S. 1 (1911) (establishing the rule of reason).

16 FTC, THE ANTITRUST LAWS, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 13, 2023).

17 *Id.*

18 "Under federal law, the maximum fine may be increased to twice the amount the conspirators gained from the illegal acts or twice the money lost by the victims of the crime, if either of those amounts is over $100 million." *Id.*

19 *Id.* (quoting 15 U.S.C. § 18).

20 *Id.*

21 HERBERT HOVENKAMP & PHILLIP AREEDA, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 302a (4th ed. 2019).

22 15 U.S.C. § 45.

23 HOVENKAMP & AREEDA, *supra* note 21, at ¶ 302h1.

24 *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 466 (1986).

25 HOVENKAMP & AREEDA, *supra* note 21, at ¶ 302h1.

26 *Id.*, at ¶ 302h3.

27 *Id.*

28 HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 12.1a (6th ed. 2020) ("Most strategies for earning monopoly profits require either a dominant firm or relatively high concentration as a prerequisite. Many of the strategies work much better as concentration levels go up.").

29 John M. Newman, *Antitrust in Digital Markets*, 72 VANDERBILT L. REV. 1497 (2019) ("Antitrust law has largely failed to address the challenges posed by digital markets.").

30 *Id.* at 1502 ("[T]he antitrust enterprise has thus far chosen to maintain a hands-off approach to digital markets.").

31 OECD, *The Evolving Concept of Market Power in the Digital Economy*, OECD Competition Policy Roundtable Background Note (2022), www.oecd.org/daf/competition/the-evolving-concept-of-market-power-in-the-digital-economy-2022.pdf:

> Assessing the degree of market power in digital markets can present a range of challenges for authorities. They must carefully [scrutinize] claims about the importance of data access and network effects as entry barriers, and thus sources of market power. Further, authorities must grapple with multi-sidedness and the need to incorporate the relationship between demand and competitive constraints in multiple markets. Such markets may also feature services provided at a price of zero, requiring non-price factors to play a particularly important role in the assessment. Proposals have also been made to adjust the way authorities approach market power in digital markets, namely addressing tipping risks in markets that do not yet feature a dominant player, and considering the risk of market power being leveraged into other markets.

32 On October 19, 2022, a federal appeals court ruled "that the Consumer Financial Protection Bureau, a leading financial regulator, has been unconstitutionally funded since its creation more than a decade ago, in a decision that vacated a bureau rule on payday lending and cast doubt over a vast swath of its regulations." Stacy Cowley, *Appeals Court Finds Consumer Bureau's Funding Unconstitutional*, N.Y. TIMES (Oct. 20, 2022), https://www.nytimes.com/2022/10/20/business/consumer-bureau-funding-unconstitutional.html. The CFPB petitioned for a writ of certiorari, which was recently granted. Cmty. Fin. Servs. Ass'n of Am. v. CFPB, 51 F.4th 616 (5th Cir. Tex., Oct. 19, 2022), *cert. granted*, 215 L.Ed.2d 104 (U.S. Feb. 27, 2023) (No. 22-448). We await further action from the Supreme Court.

33 CFPB, "The Bureau" (last visited on Nov. 28, 2022), https://www.consumerfinance.gov/about-us/the-bureau/.

34 Ryan Tracy & Andrew Ackerman, *How a D.C. Bureaucrat Amassed Power Over Businesses, Banks and Consumers*, The Wall Street Journal. (June 9, 2022), https://www.wsj.com/articles/rohit-chopra-biden-regulation-cfpb-fdic-ftc-11654713281.

35 *Id.* (emphasis added) ("A key concern for Mr. Chopra: *Firms aren't necessarily competing on the upfront price of services when core elements of their revenues stem from fees that are charged on the back end*, similar to a hotel

that advertises a low nightly rate but then tacks on resort fees. "Our focus is of course on banking," he said," but this is all over the economy."); *see also* Washington Post Live, *Transcript: The Path Forward: Consumer Protection with Rohit Chopra*, WASH. PO. (Feb. 10, 2022), https://www.washingtonpost.com/washington-post-live/2022/02/10/transcript-path-forward-consumer-protection-with-rohit-chopra/ (emphasis added) ("I'm very concerned that consumers don't always face *a competitive market* when it comes to interest rates on their credit card.").

36 CFPB, *CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance* (May 24, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-lauches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/.

37 *Id.*

38 CFPB, *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees* (Jan. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/.

39 The FTC has also shown a recent interest in junk fees. *See* FTC, *Federal Trade Commission Explores Rule Cracking Down on Junk Fees* (Oct. 20, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees.

40 CFPB, *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees* (Jan. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/ (emphasis added).

41 *Id.*

42 CFPB, *CFPB Moves to Reduce Junk Fees Charged by Debt Collectors* (June 29, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/.

43 *Id.*

44 *Id.* (emphasis added).

45 CFPB, *CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts* (Oct. 26, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/.

46 *Id.*

47 CFPB, *Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices*, 87 FR 66940 (Nov. 7, 2022), https://www.govinfo.gov/content/pkg/FR-2022-11-07/pdf/2022-23933.pdf

48 CFPB, *Consumer Financial Protection Circular 2022-06* (Oct. 26, 2022), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

49 CFPB, *CFPB Uncovers Illegal Junk Fees on Bank Accounts, Mortgages, and Student and Auto Loans* (Mar. 8, 2023), https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf.

50 CFPB, *Supervisory Highlights Junk Fees Special Edition Issue 29, Winter 2023* (March 2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf.

51 CFPB, *Regions Bank Consent Order*, No. 2022-CFPB-0008 (Sept. 28, 2022) https://files.consumerfinance.gov/f/documents/cfpb_Regions_Bank-_Consent-Order_2022-09.pdf

52 CFPB, *CFPB Orders Regions Bank to Pay $191 Million for Illegal Surprise Overdraft Fees* (Sept. 28, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/.

53 *Id.*

54 The CFPB recently proposed a rule to limit late fees on credit cards "to $8 from as much as $41 for a missed payment, according to the CFPB, which said the fees typically far exceed the card issuers' costs to collect late payments." Andrew Ackerman & Annie Linskey, *Biden Administration Proposes Rule to Lower Credit-Card Late Fees*, THE W.S.J. (Feb. 1, 2023), https://www.wsj.com/articles/biden-administration-to-propose-rule-to-lower-credit-card-late-fees-11675243257.

55 CFPB Office of Research Publication, *Credit card late fees* (Mar. 29, 2022), https://www.consumerfinance.gov/data-research/research-reports/credit-card-late-fees/.

56 *Id.*

57 CFPB, *CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Year* (June 22, 2022) https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/.

58 Advance notice of proposed rulemaking, Credit Card Late Fees and Late Payments CFPB-2022-0039 (June 22, 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_anpr_2022-06.pdf.

59 CFPB, *CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Year* (June 22, 2022) https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/.

60 *Id.*

61 *Id.*

62 CFPB, *CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers $12 Billion Each Year* (June 22, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-initiates-review-of-credit-card-company-penalty-policies-costing-consumers-12-billion-each-year/.

63 CFPB, *Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call* (June 22, 2022), https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/ (emphasis added); see also CFPB, CFPB Enhances Tool to Promote Competition and Comparison Shopping in Credit Card Market (Mar. 21, 2023) ("Upgrades to the CFPB's terms of credit card plans survey are designed to increase price competition in the credit card market by allowing people to comparison shop for the best prices and products. The survey will also help smaller credit card issuers, who often offer the lowest rates, reach comparison shoppers.").

64 The FTC has also shown interest in increased oversight of the BNPL industry. In a September 2022 publication, the FTC cautioned the industry to be mindful of three requirements: (1) advertising claims for a BNPL must hold true for a typical consumer and provide an accurate picture of the fees involved; (2) focus more on educating customers than on collecting their data and turning them into customers; and (3) "[w]hen retailers and BNPL companies offer payment plans to consumers, both may be held liable when people are deceived or treated unfairly." Helen Clark FTC, *Buy now, pay later – and comply with the FTC Act immediately* (Sept. 26, 2022).

65 CFPB, *Buy Now, Pay Later: Market trends and consumer impacts* at 3 (Sept. 2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf.

66 *Id.* at 4–5.

67 *Id.* at 31.

68 CFPB, *CFPB Study Details the Rapid Growth of "Buy Now, Pay Later" Lending* (Sept. 15, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-study-details-the-rapid-growth-of-buy-now-pay-later-lending/#:~:text=The%20five%20firms%20surveyed%20in,said%20CFPB%20Director%20Rohit%20Chopra:

To address the discrete consumer harms, the CFPB will identify potential interpretive guidance or rules to issue with the goal of ensuring that Buy Now, Pay Later lenders adhere to many of the baseline protections that Congress has already established for credit cards. As part of this review, the agency will also ensure Buy Now, Pay Later lenders, just like credit card companies, are subjected to appropriate supervisory examinations.

To address emerging risk issues with data harvesting, the CFPB will identify the data surveillance practices that Buy Now, Pay Later lenders should seek to avoid.

To reduce the risk of borrower overextension, the CFPB will continue to address how the industry can develop appropriate and accurate credit reporting practices. The agency will also take steps to ensure the methodology used by the CFPB and the rest of the Federal Reserve System to estimate household debt burden is rigorous.

Id.

69 *Id. (*emphasis added).

70 *See, e.g.*, CFPB, *Policy Statement on Abusive Acts or Practices* at 16–17 (Apr. 3, 2023), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf (internal citations omitted) ("Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have outsized market power. When an entity's market share, the concentration in a market more broadly, or the market structure prevents people from protecting their interests by choosing an entity that offers competitive pricing, entities may not use their market power to their 'unreasonable advantage.'").

71 CFPB, *CFPB Takes Action Against Hello Digit for Lying to Consumers About Its Automated Savings Algorithm* (Aug. 10, 2022) https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-hello-digit-for-lying-to-consumers-about-its-automated-savings-algorithm/

72 *Id.*

73 *Id.*

74 Statement of CFPB Director Rohit Chopra on Complaint Against ACTIVE Network (Oct. 18, 2022), https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-complaint-against-active-network/.

75 *Id.*

76 *Id.*; *see also* CFPB, *CFPB Takes Action Against Choice Money for Remittance Failures* (Oct. 4, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-choice-money-for-remittance-failures/.

77 CFPB, *CFPB tells credit card CEOs: Practice of suppressing payment data has potential for consumer harm* (May 25, 2022), https://www.consumerfinance.gov/about-us/blog/cfpb-tells-credit-card-ceos-practice-of-suppressing-payment-data-has-potential-for-consumer-harm/.

78 *Id.*

79 JP Morgan Chase, Citibank, Bank of America, Capital One, Discover, and American Express. *Id.*

80 *Id.*

81 John McNamara for the CFPB, *Why the largest credit card companies are suppressing actual payment data on your credit report* (Feb. 16, 2023), https://www.consumerfinance.gov/about-us/blog/why-the-largest-credit-card-companies-are-suppressing-actual-payment-data-on-your-credit-report/.

82 *Id.*

83 Letter from the CFPB to Credit Card Companies (Feb. 16, 2023), https://files.consumerfinance.gov/f/documents/cfpb_actual-payment-summary-of-findings-letter_2023-02.pdf.

84 John McNamara for the CFPB, *Why the largest credit card companies are suppressing actual payment data on your credit report* (Feb. 16, 2023), https://www.consumerfinance.gov/about-us/blog/why-the-largest-credit-card-companies-are-suppressing-actual-payment-data-on-your-credit-report/.

85 CFPB, *CFPB Kicks Off Personal Financial Data Rights Rulemaking* (Oct. 27, 2022), https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/

86 *Id.*

87 *Id.* (emphasis added).

88 FTC, *Report to Congress on Privacy and Security* (Sept. 13, 2021) https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf.

89 *Id.* at 3.

90 *Id.* at 4.

91 *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd by* 472 U.S. 585 (1985) (quoting *Byars v. Bluff City News Co., Inc.*, 609 F.2d 843, 856 (6th Cir. 1980)) ("Under this approach, a business or group of businesses which controls a scarce facility has an obligation to give competitors reasonable access to it.").

92 Alden F. Abbott (General Counsel, U.S. Federal Trade Commission), *Big Data and Competition Policy: A US FTC Perspective*, presented at the Penn Wharton China Center, Beijing, China (July 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543858/big_data_and_competition_policy_china_presentation_2019.pdf.

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94 *Id.*

95 FTC, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices* (Aug. 11, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/08/ftc-explores-rules-cracking-down-commercial-surveillance-lax-data-security-practices.

96 *Id.*

97 *In re Plaid Inc. Privacy Litig.*, No. 20-3056 (N.D. Cal.), Dkt. 61, https://angeion-public.s3.amazonaws.com/www.PlaidSettlement.com/docs/Consolidated+Amended+Class+Action+Complaint+for+Damages+and+Declaratory+and+Equitable+Relief.pdf.

98 *Id.* at ¶¶ 2–3.

99 *Id.* at ¶ 7.

100 *Id.* at Dkt. 184.

101 *Id.*

102 Merger Filing Fee Modernization Act of 2022, *included within* the Consolidated Appropriations Act, 2023, H.R.2617, 117th Congress (2021-2022), https://www.congress.gov/bill/117th-congress/house-bill/2617/actions.

103 15 U.S.C. § 18. *See* DOJ, 2010 HORIZONTAL MERGER GUIDELINES § 7. The antitrust laws also allow for private merger challenges under Sections 4 and 16 of the Clayton Act. 15 U.S.C. §§ 15(a), 26.

104 Several courts have recognized the importance of collusion in merger law. *See, e.g.*, *HospitalCorp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986), *cert. denied*, 481 U.S. 1038 (1987) ("[Merger] may enable the acquiring firm to cooperate (or cooperate better) with other leading competitors on reducing or limiting output, thereby pushing up the market price.").

105 DOJ, 2010 Horizontal Merger Guidelines § 1.

106 DOJ, 1968 Merger Guidelines.

107 The most recent iterations of these guidelines are the 2010 Merger Guidelines and the 2018 Vertical Merger Guidelines. *See* DOJ, Merger Enforcement Statutes and Guidelines, *updated on* Aug. 4, 2022, https://www.justice.gov/atr/merger-enforcement.

108 DOJ and FTC, *Federal Trade Commission and Justice Department Seek to Strengthen Enforcement Against Illegal Mergers*, (Jan. 18, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/01/federal-trade-commission-justice-department-seek-strengthen-enforcement-against-illegal-mergers.

109 DOJ, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines* (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

110 FTC, *Remarks of Chair Lina M. Khan Regarding the Request for Information on Merger Enforcement* (Jan. 18, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599783/statement_of_chair_lina_m_khan_regarding_the_request_for_information_on_merger_enforcement_final.pdf

111 *Id.*

112 *Id.*

113 DOJ, *Assistant Attorney General Jonathan Kanter Delivers Remarks on Modernizing Merger Guidelines* (Jan. 18, 2022), https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-remarks-modernizing-merger-guidelines.

114 Conversation with H. Hovenkamp on Nov. 7, 2022.

115 In a September 2022 address, Mr. Kanter explained the agencies' new approach to merger policy:

> Too often, we have treated the test for illegality as essentially a rule of reason balancing framework, limited to models that attempt to concretely predict the precise effects of a merger on prices. But this leaves underenforced a statute that was meant to be prophylactic.
>
> The Clayton Act and Anti-Merger Act were intended to stop, in their incipiency, the problems addressed by the Sherman Act. Indeed, the last time the Supreme Court addressed the standard was in *California v. American Stores*, when it said that "Section 7 creates a relatively expansive definition of antitrust liability: To show that a merger is unlawful, a plaintiff need only prove that its effect 'may be substantially to lessen competition.'" What's more, writing for a unanimous court, Justice Stevens italicized the words "may be." We should take that standard seriously—if the effect of a merger may be substantially to lessen competition, then the merger violates Section 7.

DOJ, *Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium* (Sept. 13, 2022) https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust.

116 Bryan Koenig, Guiding DOJ, *FTC Merger Mantra: Not Every Deal Is 'Fixable'* (Oct. 7, 2022), https://www.law360.com/articles/1538132 (Biden's antitrust enforcers "push the bounds of the law and their authority by contesting conduct and mergers that may have escaped scrutiny in the past.").

117 Antitrust Division of the DOJ, *Merger Remedies Manual* (Sept. 2020), https://www.justice.gov/atr/page/file/1312416/download.

118 *Id.*

119 *Id.*

120 Bryan Koenig, *DOJ Antitrust Head Eyes Merger Policy 'Disconnect'* (Sept. 13, 2022), https://www.law360.com/articles/1530017.

121 Bryan Koenig, *Guiding DOJ, FTC Merger Mantra: Not Every Deal Is 'Fixable'* (Oct. 7, 2022), https://www.law360.com/articles/1538132 ("An important driving force for this administration, noted Ryan Danks, the Antitrust Division's director of civil enforcement, is an emphasis under Kanter to generally avoid consent decrees permitting mergers, with a strong preference instead to challenge deals outright.").

122 Complaint, *United States v. Plaid*, No. 3:20-07810 (N.D. Cal. filed Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

123 DOJ, *Justice Department Sues to Block Visa's Proposed Acquisition of Plaid* (Nov. 5, 2020) https://www.justice.gov/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid.

124 *Id.*

125 Complaint at ¶ 12, *United States v. Plaid*, No. 3:20-07810 (N.D. Cal. filed Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

126 *Id.* at ¶ 11.

127 And Section 2 of the Sherman Act.

128 Complaint at ¶ 78, *United States v. Plaid*, No. 3:20-07810 (N.D. Cal. filed Nov. 5, 2020), https://www.justice.gov/opa/press-release/file/1334726/download.

129 DOJ, *Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block* (Jan. 12, 2021) https://www.justice.gov/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

130 15 U.S.C. § 45. Section 5(a) also prohibits "unfair or deceptive acts or practices in or affecting commerce," but here we focus only on unfair methods of competition.

131 15 U.S.C. § 45. Here, we focus on the "unfair methods of competition" prong of Section 5. However, in 2021 Lending Club settled an "unfair or deceptive acts or practices in or affecting commerce" lawsuit brought against them by the FTC. LendingClub was forced to disgorge more than $17 million dollars to consumers. FTC, *Federal Trade Commission Returns More Than $9.7 Million To Consumers Harmed by LendingClub's Deceptive Hidden Fees* (Aug. 11, 2022) https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-returns-more-97-million-consumers-harmed-lendingclubs-deceptive-hidden-fees.

132 Hovenkamp & Areeda, *supra* note 21, at ¶ 302h2.

133 *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 466 (1986).

134 *See, e.g., In the Matter of IDEXX Labs., Inc.*, No. 101-0023 (F.T.C. 2013) (exclusive dealing); *In the Matter of Sigma Corp.*, No. 101-0080 (F.T.C. 2012) (price fixing).

135 *See, e.g., In the Matter of National Association of Music Merchants, Inc.*, No. 001-0203 (F.T.C. 2009).

136 *In the Matter of Bosley, Inc. and Aderans America Holdings, Inc.*, No. 121-0184 (F.T.C. 2013).

137 FTC, *FTC Settles Charges of Anticompetitive Conduct Against Intel* (Aug. 4, 2010), https://www.ftc.gov/news-events/news/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel.

138 *In the Matter of Motorola Mobility LLC and Google Inc.*, No. 121-0120 (F.T.C. 2013).

139 Hovenkamp & Areeda, *supra* note 21, at ¶ 302h1.

140 *Compare FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233 (1972) (interpreting Section 5 broadly and holding that it gave the FTC significant authority to enjoin business activities that it deemed unfair), with *E.I. du Pont De Nemours & Co. v. FTC*, 729 F.2d 128 (2d Cir.1984) (vacating the FTC's order that had found multiple behaviors to be in violation of Section 5; holding that under the Act the Commission must show (1) evidence of anticompetitive intent or purpose on the part of the defendants; or (2) the absence of any competitive justification for the practices).

141 HOVENKAMP & AREEDA, *supra* note 29, at ¶ 302c.

142 15 U.S.C. §§ 45(b), (c).

143 HOVENKAMP & AREEDA, *supra* note 29, at ¶ 302e. Recently, the FTC was stripped of its ability to seek disgorgement under 13(b) by decision of the Supreme Court. AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341 (2021).

144 HOVENKAMP & AREEDA, *supra* note 29, at ¶ 302e.

145 *Id.*

146 FTC, *Notices of Penalty Offenses* (updated regularly) (accessed on Nov. 7, 2022), https://www.ftc.gov/enforcement/penalty-offenses.

147 *Id.*

148 Platform monopoly is monopolistic control exerted over a digital platform, such as Amazon. How to measure the market power of a platform monopolist, and address abuses of that power, has been a challenge in recent decades for antitrust enforcers. Digital platforms present difficult issues of market definition that the Sherman and Clayton Acts have not been well-adapted to.

149 Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710 (2017).

150 Herbert Hovenkamp, *Whatever Did Happen to the Antitrust Movement?*, FACULTY SCHOLARSHIP AT PENN LAW (2018).

151 White House, *President Biden Announces his Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission* (Mar. 22, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/22/president-biden-announces-his-intent-to-nominate-lina-khan-for-commissioner-of-the-federal-trade-commission/.

152 FTC, *Lina M. Khan Sworn in as Chair of the FTC* (June 15, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc.

153 FTC, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

154 FTC, *Statement of Chair Lina M. Khan Joined by Commissioner Rohit Chopra and Commissioner Rebecca Kelly Slaughter on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* at 1(July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

155 *Id.* at 7.

156 FTC, *Remarks of Chair Lina M. Khan As Prepared for Delivery Fordham Annual Conference on International Antitrust Law & Policy* (Sept. 16, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/KhanRemarksFordhamAntitrust20220916.pdf.

157 *Id.* at 2–3.

158 *Id.* at 4.

159 FTC, *Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act*, File No. P221202 at 1 (Nov. 10, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/P221202Section5PolicyStatement.pdf.

160 *Id.* at 8.

161 *Id.* at 9–10.

162 *Id.* at 11–12 (internal citations omitted).

163 *Id.* at 12–16.

164 Leah Nylen & Daniel Papscun, *FTC Plans to Clamp Down on Unfair Competition by Companies*, BLOOMBERG LAW (Nov. 10, 2022), https://news.bloomberglaw.com/antitrust/ftc-plans-to-clamp-down-on-unfair-competition-by-companies

165 *Id.*

166 Although not an FTC Act Section 5 matter, it is important to note an increased focus on the CFS industry by the FTC generally: in December 2022, the FTC entered into a settlement with Mastercard over e-wallet routing. FTC, *FTC Orders an End to Illegal Mastercard Business Tactics and Requires it to Stop Blocking Competing Debit Card Payment Networks* (Dec. 23, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/12/ftc-orders-end-illegal-mastercard-business-tactics-requires-it-stop-blocking-competing-debit-card. In the FTC's complaint, the Commission alleged that Mastercard had been forcing merchants to route debit card payments through its payment network and had blocked the use of competing debit payment networks. *Id.* More specifically, the Commission alleged that "Mastercard used its control over a process called 'tokenization' to block the use of competing payment card networks[.]" According to the FTC, both practices "violated provisions of the 2010 Dodd-Frank Act known as the Durbin Amendment and its implementing rule, Regulation II." *Id.*

Under the FTC consent order, when a competing network receives a "token" to process a payment, Mastercard would be required to provide the company with the customer's payment info and would be prevented from "taking any action to prevent competitors from providing their own payment token service or offer tokens on Mastercard-branded debit cards[.]" *Id.*

167 Complaint, *In the Matter of CREDIT KARMA, LLC*, No. 202 3138, at ¶¶ 17–18 (FTC filed Sep. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/CK%20Complaint%209-1-22%20%28Redacted%29.pdf.

168 *Id.* at ¶ 19.

169 Consent Order, *In the Matter of CREDIT KARMA, LLC*, No. 202 3138 (FTC filed Sep. 1, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/FINAL%20CK%20Order%209-1-22.pdf.

170 FTC, *FTC Sues Facebook for Illegal Monopolization* (Dec. 9, 2020), https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization.

171 Order Dismissing Charges Without Prejudice, *FTC v. Facebook, Inc.*, No. 20-03590 (D.D.C. filed Dec. 9, 2020), https://www.ftc.gov/system/files/documents/cases/072_2021.06.28_mtd_order.pdf.

172 Substitute Amended Complaint, *FTC v. Facebook, Inc.*, No. 20-03590 (D.D.C. filed Dec. 9, 2020), https://www.ftc.gov/system/files/documents/cases/ecf_75-1_ftc_v_facebook_public_redacted_fac.pdf.

173 FTC, *Lina Khan's Public Comment RE: CFPB's Inquiry into Big Tech Payment Platforms* (Docket No. CFPB-2021-0017-0002) (Dec. 21, 2022), https://www.ftc.gov/system/files/documents/public_statements/1599099/cover_letter_and_comment_of_chair_lina_khan_re_cfpbs_inquiry_into_big_tech_payment_platforms.pdf.

174 *Id.* at 1.

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