

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Digital Disruption in Financial Markets – Note by the United States

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United States

1. Introduction

1. The Antitrust Division of the Department of Justice (“DOJ”) and the U.S. Federal Trade Commission (“FTC”) submit this paper as part of the Competition Committee’s review of disruptive innovation involving financial technology. In this paper, we present relevant competition law and policy experiences of the DOJ and FTC as well as relevant aspects of the FTC’s consumer protection work. To provide broader context on issues outside the purview of this Committee, we also include views from a U.S. Department of the Treasury report on innovation in financial services and note that there are a number of efforts in other international forums on these issues outside the area of competition law and policy.

2. U.S. Treasury Report on Nonbank Financials, Fintech, and Innovation

2. The term “fintech” describes technology-enabled innovation in financial services that could improve, automate, and result in new business models in financial services. These new technologies generally provide benefits to consumers, such as expanded access to credit and financial services, speed, convenience, security, and reduced cost of services.

3. In July 2018, the U.S. Department of the Treasury released a report entitled “A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation.” The report provides an overview of innovation and regulation in the U.S. financial sector. The 2008 financial crisis altered the competitive environment in the United States for banks and nonbanks to provide financial services.¹ The financial crisis triggered the adoption of hundreds of new regulations that made certain product segments unprofitable for banks.² This created opportunities for nonbanks to address unmet consumer demands.³ At the same time, with the advent and continued progress of artificial intelligence (AI), machine learning, big data analytics, and other technological capabilities, barriers to entry into financial services have declined for a wide range of startups and other technology-based firms.⁴ These startups and technology firms leverage their experiences and expertise to compete or partner with traditional financial services providers.⁵ Innovation in the financial sector is critical to the U.S. economy. Technological advances in financial services have the potential to expand dramatically access to credit and services

¹ U.S. Dep’t of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation*, July 2018, at 4 <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

² *Id.* at 4.

³ *Id.* at 5.

⁴ *Id.* at 5.

⁵ *Id.* at 56.

for underserved individuals and small businesses; provide improved speed, convenience, and security of using financial services; and reduce the cost of services and increased operational efficiencies.⁶

4. As the report emphasized, innovation is the hallmark of a competitive economy, but it can create challenges for regulators trying to keep pace with a rapidly evolving industry.⁷ In the United States, the financial services and activities of traditional banks and nonbank firms are regulated differently.⁸ Generally, banks operate within a largely federal regulatory regime, which provides for greater regulatory uniformity and efficiency on some dimensions.⁹ The federal banking regulations are largely structured to ensure the safety and soundness of the banks and are heavily focused on bank-specific activities.¹⁰ Nonbank financial services firms, on the other hand, are generally regulated by the states.¹¹ State financial regulators' authorities over the nonbank firms can include firm licensing requirements, safety and soundness regulation, product limitations, interest rate limits, and enforcement authority for violations of state and federal laws.¹² Due to a state-based regulatory regime, some nonbank firms with a national footprint have raised concerns about the difficulty of compliance across a fragmented state-regulatory landscape.¹³ Some have called for the modernization of financial regulations to support innovations while maintaining strong consumer and investor protections and safe-guarding the financial system.¹⁴ The report concluded that these regulatory responses should promote innovation in financial technology while maintain a level playing field for financial system participants.

5. The report also cites a number of initiatives at U.S. financial regulators on innovation in financial services and outlines efforts to address financial innovation in other international forums with mandates that encompass those issues.¹⁵

⁶ *Id.* at 7.

⁷ Note by United States, OECD, *Hearing On Disruptive Innovation*, Jun. 19, 2015, available at <https://www.justice.gov/atr/file/823886/download>.

⁸ U.S. Dep't of the Treasury, *A Financial System That Creates Economic Opportunities: Nonbank Financials, Fintech, and Innovation*, July 2018, at 63 <https://home.treasury.gov/sites/default/files/2018-08/A-Financial-System-that-Creates-Economic-Opportunities---Nonbank-Financials-Fintech-and-Innovation.pdf>.

⁹ *Id.* at 65.

¹⁰ *Id.* at 65.

¹¹ *Id.* at 63.

¹² *Id.* at 63.

¹³ *Id.* at 65.

¹⁴ *Id.* at 9.

¹⁵ *See, e.g., id.* at 169.

3. Department of Justice

6. The Antitrust Division of the Department of Justice (“DOJ”), on several occasions, has conducted competitive analyses that have required it to assess innovations in FinTech. Two significant matters that have implications for FinTech are described below: (1) the TCH Business Review Letter, and (2) *United States v. American Express*.

3.1. TCH Business Review Letter.

7. The DOJ had occasion to consider the competitive effects of a financial technology joint venture arrangement by The Clearing House Payments LLC (“TCH”). TCH, a joint venture of 24 U.S. banks, operates a clearing house and several other payment systems (or “payment rails”) to its members and other depository institutions to facilitate transactions among them. In 2016, in response to the Federal Reserve Board’s initiative to improve the U.S. payment system (described above), TCH proposed to create a new payment rail that would enable the real-time transfer of funds between depository institutions, called the Real Time Payment System (“RTP”). The venture requested a statement of the Department’s enforcement intentions with respect to the creation of RTP pursuant to the Antitrust Division’s business review process.¹⁶

8. The Division’s business review procedure allows individuals to request that the Department issue a statement as to whether it currently intends to challenge the described proposed action under the antitrust laws. *See* 28 C.F.R. § 50.6. This procedure provides a way for businesses to determine how the Division may respond to proposed joint ventures or other business conduct, thus providing greater certainty to businesses as they undertake innovative and other procompetitive actions. It also provides a vehicle for the Division to prospectively share its analytic framework and expand the public’s understanding of competition issues, thus providing private sector actors more broadly with greater notice, clarity, and confidence.¹⁷

9. Based on the information TCH provided, the Division issued a favorable business review letter.¹⁸ TCH indicated that it would create and operate RTP, which would, provide for real-time funds transfers between depository institutions for payroll and other scheduled transfers and thus enable depository institutions to offer faster fund transfers for their end-user customers. According to TCH, RTP would not interfere with the continued use and operation of existing payment rails, including automated clearing houses, wire, and check clearing houses..

10. The Division concluded that the RTP system could yield significant procompetitive benefits, including the introduction of a new, faster payment rail that reduced banks’ and payment service providers’ risks in providing those services, to the benefit of

¹⁶ Letter from Richard Taffet, Esq., Morgan, Lewis & Bockius LLP, to Renata Hesse, Acting Assistant Att’y Gen., U.S. Dep’t of Justice (Oct. 11, 2016) available at <https://www.justice.gov/atr/page/file/998216/download> [Hereinafter, Request]; *see also* Letter from Richard Taffet to Stephanie Beckett, Att’y Advisor, U.S. Dep’t of Justice (Jan. 10, 2017).

¹⁷ DOJ reserves the right to challenge the proposed action under the antitrust laws if the actual operation of the proposed conduct proves to be anticompetitive in purpose or effect.

¹⁸ Letter from Andrew Finch, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Richard Taffet, Morgan, Lewis & Bockius LLP (September 21, 2017) available at <https://www.justice.gov/atr/page/file/998201/download>

consumers. The Division noted that, although many collaborations among significant competitors, such as TCH, have some potential to harm competition, none of TCH's proposed rules seemed to limit rival banks' ability to access RTP in an anticompetitive way; nor was there evidence that TCH was likely to use RTP to harm the rivals of TCH's member banks. DOJ indicated, therefore, that it had no present intention to take antitrust enforcement action against TCH's proposal.

3.2. United States v. American Express.

11. In 2010, the United States, 18 states, as well as a several groups of merchants in separate private actions, filed lawsuits against American Express Company challenging anti-steering provisions in its contracts with merchants that accepted American Express credit cards as violating the antitrust laws. *See United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143, 218 (E.D.N.Y. 2015), *rev'd and remanded sub nom. United States v. Am. Express Co.*, 838 F.3d 179 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). Although the plaintiffs' main allegations in the cases did not involve FinTech as defined in this paper—the allegations focused on the effect of these provisions on competition between rival credit card networks—competition from innovative payment forms was also at issue. For different reasons, both plaintiffs and the defendant pointed to various new payment forms to support their arguments. The plaintiffs argued that the anti-steering provisions made it difficult for several new “merchant-owned payment solutions”—including “a new payment platform that would operate on customers' mobile devices and significantly reduce the participating merchants' payment processing costs”—to gain share by offering merchants low prices. *United States v. Am. Exp. Co.*, 88 F. Supp. 3d 143, 218 (E.D.N.Y. 2015). The district court expressed some skepticism regarding this theory, but it did give it some weight, finding that “novel payment solutions . . . potentially may inject greater diversification into the network services industry.” *Id.* at 218. For its part, American Express argued that the rise of various mobile payment options for consumers—including Square and Google Wallet—meant that the plaintiffs had defined the relevant market too narrowly to focus only on competition between credit card networks. The district court did not follow the defendant's invitation to broaden the relevant market because it viewed these new products, which work on top of a traditional payment network such as a credit or debit card or an automated clearing house (ACH), more as complements than substitutes to credit cards. The court did, however, accept that “electronic wallets like PayPal and Square are recognized by American Express to present unique competitive challenges to its business” because “their services have proven effective at steering customers to debit and ACH and that they interrupt the typically direct relationship between Amex and its cardholders.” *Id.* at 190.

12. The Second Circuit reversed the district court's ruling for the plaintiffs, holding that the district court erred in not defining the relevant market to include both sides of the two-sided payment platform—the merchants who accept credit cards and the cardholders who use them for their purchases. *See United States v. Am. Express Co.*, 838 F.3d 179, 197 (2d Cir. 2016), *aff'd sub nom. Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018). On a petition for certiorari filed by the plaintiff states, the Supreme Court upheld the Second Circuit's holding that the relevant market had to include both the merchant and the cardholder sides of the credit card platform. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2286 (2018).

3.3. Department of Justice Policies.

13. On several occasions, DOJ leaders have expressed the importance of sound competition policy in promoting innovation and competition in financial technology. On March 14, 2019, Assistant Attorney General Makan Delrahim delivered a Keynote Address at the National Diversity Coalition Town Hall Meeting. In his speech, AAG Delrahim noted that the antitrust laws have an important role to play in ensuring that entrepreneurs and small businesses can take advantage of market opportunities. He also highlighted examples of financial applications such as Kabbage and Square to explain how innovations in small businesses' ability to access capital and process payments have benefitted competition. By ensuring that market conditions permit competition on the merits, the Antitrust Division can lay the groundwork for fair competition, while fostering the opportunity for disruptive innovation. See <https://www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-national-diversity>.

14. On May 2, 2018, Principal Deputy Assistant Attorney General Andrew Finch delivered remarks at the event, "Antitrust in the Financial Sector: Hot Issues & Global Perspectives." In his remarks, PDAAG Finch described some of the similarities and differences between antitrust enforcement in the financial sector and in other industries. Among the similarities, PDAAG Finch explained that where competitors agree to restrict competition between them, whether or not they use advanced technology like online trading platforms or algorithms, they violate the antitrust laws. He stated that the agreement to fix prices is the illegal act; the means through which the agreement is carried out is less important. Among the differences between the financial sector and other industries, PDAAG Finch noted that, because employees of banks and financial companies often need to interact with each other and often have significant autonomy to do their work, financial companies may find it more challenging to detect and prevent instances in which their employees contact competitors to reach collusive agreements. See <https://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-andrew-finch-delivers-remarks-antitrust>.

15. On December 13, 2017, Deputy Assistant Attorney General Barry Nigro delivered remarks at The Capitol Forum and CQ's Fourth Annual Tech, Media & Telecom Competition Conference. In his remarks, DAAG Nigro discussed the application of antitrust principles to markets in which data is an important asset and there are network effects. In its merger analysis, he explained that the Antitrust Division investigates any potential lessening of competition that may result from the acquisition of important data, either because the transaction combines substitutable datasets or because it transfers control of critical data on which the acquiring firm's competitors depend and for which there are inadequate alternatives. Aside from a merger context, he explained that U.S. antitrust law generally does not impose a unilateral duty to share one's assets with competitors. While data assets and network effects are facts about the competitive landscape that the Division considers in its antitrust analysis, existing antitrust tools have been adequate to address these issues in the past and remain adequate. See <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-barry-nigro-delivers-remarks-capitol-forum-and-cqs>. As the remarks of DOJ leaders make clear, competition law enforcement must strike a careful balance, in financial services as in other sectors, to allow innovation to flourish while remaining vigilant to protect competition against anticompetitive actions.

4. Federal Trade Commission

16. The Federal Trade Commission (“FTC”) is keenly aware that innovations in financial technologies provide benefits to consumers and businesses,¹⁹ including with respect to how consumers share, spend, and raise money. As previously noted, financial technologies also can lower costs, improve efficiency, expand access to services, and enhance convenience. At the same time, it is important to consumers that FinTech companies, like other businesses, follow baseline consumer protection principles (e.g., avoid deceptive advertising claims, not charge or debit bank accounts without required authorization, protect privacy and data security, etc.). A regulatory environment that provides for the presence and effective enforcement of core consumer protection principles also helps to increase customer confidence in FinTech products and services, and thus help with the wider adoption of FinTech.

17. The FTC’s work in this area, both on enforcement and policy, illustrates the wide range of FinTech products and services, and also the wide range of businesses involved as FinTech providers. Thus the agency’s “FinTech Forums” and related events, with stakeholder input, addressed such issues as artificial intelligence and the provision of financial services; blockchain for payments and contracts; crowdfunding; peer-to-peer payments; non-bank marketplace lenders; mobile payments; and online loans and alternative financial products for small businesses. The FTC has organized information about its FinTech activities both on a business guidance webpage, <https://www.ftc.gov/tips-advice/business-center/credit-and-finance/fintech>, and on a media resource page, <https://www.ftc.gov/news-events/media-resources/consumer-finance/financial-technology>. The FTC’s FinTech policy activities and enforcement actions have reinforced the agency’s view that consumers benefit both from business innovation and from being properly informed about their choices. A summary of this work, including recent FTC enforcement actions, is included as an appendix to this submission.

¹⁹ For recent FTC speeches on antitrust issues in the financial sector, *see, e.g., Antitrust in the Financial Sector*, Remarks at Concurrences by Bruce D. Hoffman, Acting Director of the Bureau of Competition (May 2, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1408262/hoffman_-_antitrust_in_the_financial_sector_5-2-18.pdf; *Opening Remarks by Noah Joshua Phillips*, Federal Trade Commissioner, at FTC Hearing #8: Competition and Consumer Protection in the 21st Century Corporate Governance, Institutional Investors, and Common Ownership (December 6, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1454690/phillips_-_ftc_hearing_8_opening_remarks_12-6-18.pdf; *Prepared Remarks of Rohit Chopra*, Federal Trade Commissioner at FTC Hearing #8: Competition and Consumer Protection in the 21st Century (December 6, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1432481/remarks_of_commissioner_r_chopra_at_ftc_hearing_on_corporate_governance.pdf; and *Taking Stock: Assessing Common Ownership*, Noah Joshua Phillips, Federal Trade Commissioner (June 1, 2018), *available at* https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf.

APPENDIX - FTC FinTech Policy Activities and Enforcement Actions

As consumer interest in cryptocurrencies like bitcoin has grown, scammers have become more active in this area. In response, the FTC has worked to educate consumers and businesses about cryptocurrencies, and filed enforcement actions to hold fraudsters accountable.

1. In the 2018 *Bitcoin Funding Team* case, the FTC obtained preliminary relief against defendants who promoted deceptive money-making chain referral schemes that falsely promised participants could earn large returns by paying cryptocurrency such as bitcoin to enroll. See <https://www.ftc.gov/news-events/press-releases/2018/03/ftc-shuts-down-promoters-deceptive-cryptocurrency-schemes>
2. In an earlier matter, *Butterfly Labs* (2014-16), the FTC brought suit against an operation that deceptively marketed bitcoin mining machines that often arrived damaged or were delivered so late that the technology was obsolete. See <https://www.ftc.gov/news-events/press-releases/2016/02/operators-bitcoin-mining-operation-butterfly-labs-agree-settle>
3. In another FTC case, an app company allegedly claimed that its “Prized” mobile phone app was a rewards program, but in fact, the app used devices’ computing resources to “mine” for virtual currencies like DogeCoin, Litecoin and QuarkCoin. See <https://www.ftc.gov/news-events/press-releases/2015/06/app-developer-settles-ftc-new-jersey-charges-it-hijacked>
4. The FTC has also undertaken outreach and education efforts regarding cryptocurrencies. On June 25, 2018, the agency hosted a public workshop to examine how scammers are exploiting public interest in cryptocurrencies and to discuss ways to empower and protect consumers. In March 2017, the FTC hosted a public FinTech Forum (one of three in a series on financial technologies) focused in part on blockchain technology. See <https://www.ftc.gov/news-events/blogs/business-blog/2017/02/third-fintech-forum-discuss-artificial-intelligence>

Beyond the agencies’ recent efforts to stop cryptocurrency scams, the FTC has also worked to protect consumers in other areas, including those involving Crowdfunding, Peer-to-Peer Payment Systems, and Payment Processors:

1. The FTC has pursued enforcement involving Crowdfunding, the process by which companies and individuals raise money from the public to fund new products, projects or individual needs. Thus in May 2019 the FTC took legal action against the operator of a deceptive crowdfunding scheme who told consumers he was raising money to develop a high-tech backpack and other products, but failed to deliver any of the products and instead used much of the funds for himself. See <https://www.ftc.gov/news-events/press-releases/2019/05/ftc-charges-operator-crowdfunding-scheme>. The FTC brought its first crowdfunding case in 2015. See <https://www.ftc.gov/news-events/press-releases/2015/06/crowdfunding-project-creator-settles-ftc-charges-deception>.
2. The agency has also pursued enforcement in cases involving payment processing. In May 2019, the FTC entered a settlement agreement with the payment processor Allied Wallet for allegedly processing payments for merchants that were engaged in fraud – including several entities that were subject to law enforcement action by the FTC and SEC. In its complaint, the FTC alleged that Allied Wallet helped

merchants hide scams from banks and credit card networks by creating fake foreign shell companies, submitting dummy websites and other false information to banks, and actively evading card network fraud prevention systems. The stipulated final order prohibits the company from processing payments for certain categories of merchants, and imposes stringent monitoring requirements and a \$110 million equitable monetary judgement. See <https://www.ftc.gov/news-events/press-releases/2019/05/operators-payment-processing-firm-settle-charges-assisting>

3. As to peer-to-peer payment systems, in May 2018, the FTC issued a final order against PayPal/Venmo to resolve allegations that it misled consumers by notifying them that funds they received were available to transfer to their bank accounts, without disclosing that funds could still be frozen or removed when Venmo reviewed the consumers' underlying transactions. The agency also alleged that the company misled consumers about privacy and data security protections and violated the Gramm-Leach-Bliley Act's Safeguards and Privacy Rules. See <https://www.ftc.gov/news-events/blogs/business-blog/2018/02/venmo-settlement-addresses-availability-funds-privacy>
4. In addition to its law enforcement efforts, the FTC held a FinTech Forum, in October 2016, that discussed consumer protection issues associated with both crowdfunding and peer-to-peer payment systems. See <https://www.ftc.gov/news-events/events-calendar/2016/10/fintech-series-crowdfunding-peer-peer-payments>

The FTC has also worked to protect consumers in the online lending marketplace:

1. In 2016, the FTC obtained its largest litigated outcome, a \$1.3-billion judgment, against AMG Services, an online lending company conducting a payday lending scheme. Although portions of the case remain on appeal, in June 2018 the FTC and DOJ obtained \$505 million in settlements for consumers in connection with related civil and criminal cases. In its initial complaint, the FTC charged the defendants with deceptively marketing payday loans by claiming that they would only charge consumers for the amount that they borrowed plus a one-time fee. Instead, the defendants automatically renewed consumers' loans and made additional finance charges at each renewal – causing consumers' debts to balloon. See <https://www.ftc.gov/news-events/press-releases/2018/06/statement-ftc-chairman-simons-dojs-remitting-more-500-million-ftc>
2. The FTC reached a settlement agreement with Avant in April 2019, over allegations that the company engaged in deceptive and unfair loan servicing practices, such as imposing unauthorized charges on consumers' accounts and unlawfully requiring consumers to consent to automatic payments from their bank accounts. Avant offers unsecured installment loans for consumers through its website. The FTC charged that in many cases, the company falsely advertised that it would accept payments by credit or debit cards, when in fact it rejected these forms of payments. Avant allegedly insisted that the consumers authorized the charges and refused to provide a refund. See <https://www.ftc.gov/news-events/press-releases/2019/04/online-lending-company-agrees-settle-ftc-charges-it-engaged>
3. In February 2019, the FTC approved a final consent order with online lender SoFi. In the complaint, the FTC alleged that SoFi had misrepresented the amount of money that student loan borrowers would save by refinancing with SoFi. The settlement requires SoFi to have reliable evidence for any of its savings claims. See

<https://www.ftc.gov/news-events/press-releases/2019/02/ftc-approves-final-order-sofi>

4. In November 2018, the agency filed an action against Lending Club Corporation for falsely promising consumers loans with “no hidden fees,” when the company actually deducted hundreds or even thousands of dollars in hidden up-front fees from the loans. See <https://www.ftc.gov/news-events/press-releases/2018/11/ftc-amends-complaint-against-lending-club>
5. In addition to its law enforcement efforts, the FTC also held a FinTech Forum, in June 2016, focused on marketplace lending. See <https://www.ftc.gov/news-events/blogs/business-blog/2016/08/fintech-forum-closer-look-marketplace-lending>

FTC actions have underscored that loan servicing is just as important to consumers as marketing and origination, and the FTC has also held lenders liable for unfair or deceptive servicing practices. In the FTC’s recent action against Avant, cited above, the agency alleged that the company engaged in several violations related to servicing, including failing to process payments in a timely manner, failing to provide accurate payoff quotes, and placing charges on consumers’ bank and credit card accounts without authorization. Moreover, at the May 8, 2019 “Strictly Business” Forum, the FTC discussed recent news reports about concerning collection practices and the use of confessions of judgement as a mechanism to collect payments. The FTC has indicated that it stands ready to take action against any company that uses false threats and misleading or unfair tactics to collect on its loans. See <https://www.ftc.gov/news-events/audio-video/video/strictly-business-ftc-forum-small-business-financing>

Beyond the companies referenced above, the FTC has also brought law enforcement actions against several other companies operating in the financial technologies space to ensure that businesses protect consumers’ privacy and data security. When companies make promises about how they will protect consumers’ personal and financial information, or make representations about with whom they will share such information, they have to keep those promises. See <https://www.ftc.gov/news-events/press-releases/2018/10/federal-trade-commission-gives-final-approval-settlement-uber>. The specific data security measures that are appropriate for any particular company depends on the nature of the business and the sensitivity of the information involved. The FTC developed a “Stick with Security” blog series, and a variety of other business guidance materials, for companies that want to learn more about lessons learned from the FTC’s data security investigations. See <https://www.ftc.gov/news-events/blogs/business-blog/2017/10/stick-security-ftc-resources-your-business>.