



April 17, 2020

The Honorable Jerrold Nadler
Chairman
U.S. House Committee on the Judiciary
Washington, DC 20515

The Honorable Doug Collins
Ranking Member
U.S. House Committee on the Judiciary
Washington, DC 20515

RE: Competition in the Digital Marketplace

Dear Members of the Committee:

The Americans for Financial Reform Education Fund (AFR Education Fund) and Demand Progress Education Fund (DPEF) appreciate the opportunity to comment on antitrust policy and the digital marketplace. AFR Education Fund is a coalition of more than 200 national, state, and local groups who have come together to advocate for reform of the financial industry. Members of AFR Education Fund include consumer, civil rights, investor, retiree, community, labor, faith based, and business groups. DPEF is a fiscally-sponsored project of New Venture Fund, a 501(c)3 organization. DPEF and our more than two million affiliated activists seek to protect the democratic character of the internet — and wield it to render government accountable and contest concentrated corporate power.

We applaud the Committee on its investigation into the relationship between dominant platforms and online competition. Both DPEF and AFR Education Fund support the partition of banking and commerce as a key regulatory principle, as it reduces systemic risks, strengthens consumer protections, and prevents undue concentrations of corporate power.¹ Along with our allies, DPEF specifically supports the break-up of “Big Tech” monopolies, such as Amazon,

¹ Saule T. Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265, 275 (2013)

Google, and Facebook, as well as reforms that would prevent other companies from amassing similar power.² Historically, commercial firms that also engage in financial services tend to use such enterprises to fund risky business activities, heightening the moral hazard of bailout, while simultaneously failing to deal fairly with customers or competitors.³

Recently, sophisticated commercial firms have once again attempted to breach this separation, whether through mergers and acquisitions, applications for special banking charters, or general arbitrage. We are especially concerned about the activities of dominant technology platforms, which already use their “platform privilege” not only to analyze users, but to acquire and appropriate from competitors that rely on the infrastructure they supply.⁴ For example, European regulators have fined Google for using its monopoly over desktop and mobile search to prioritize its own products.⁵ Amazon uses its own digital marketplace to bury competitors in terms of search, product review, advertising, and marketing.⁶

Given this history, we call for regulators to more thoroughly review all tech acquisitions of financial services companies.⁷ Beyond this, we also encourage the Committee to pay special attention to payments provision and surveillance as a potential anti-competitive business activity and special banking charters as anti-competitive regulatory carve-outs. Perhaps most importantly, we urge the Committee to treat financial surveillance as an anti-competitive technology, generally. The systematic monitoring of financial activity allows dominant platforms to become even more extractive and more powerful. With a more comprehensive perspective on consumer behavior, dominant platforms can more easily take over adjacent markets, engage in predatory pricing, self-deal, increase the monetary value of their advertising, and accumulate more economic power.

² Press Release, Demand Progress, *Grassroots Coalition Launches Campaign Calling on 2020 Presidential Candidates to Break Up Amazon, Facebook, Google and Other Big Technology Monopolies* (Dec. 18, 2019), <https://demandprogress.org/grassroots-coalition-launches-campaign-calling-2020-presidential-candidates-break-ama-zon-facebook-google-big-technology-monopolies/>

³ See, e.g., Arthur E. Wilmarth, Jr., *Wal-Mart and the Separation of Banking and Commerce*, 39 CONN. L. REV. 1539, 1569 (2007); Elizabeth J. Upton, *Chartering Fintech: The OCC's Newest Nonbank Proposal*, 86 GEO. WASH. L. REV. 1392, 1411 (2018); Graham Steele, *Facebook's Libra cryptocurrency is part of a disturbing financial trend*, WASH. POST (Aug. 12, 2019), <https://www.washingtonpost.com/outlook/2019/08/12/facebook-libra-cryptocurrency-is-part-disturbing-financial-trend/>

⁴ *Competition in Digital Technology Markets: Examining Self-Preferencing by Digital Platforms: Hearing Before the Subcomm. on Antitrust, Competition Policy and Consumer Rights of the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (Testimony of Sally Hubbard), available at <https://www.judiciary.senate.gov/imo/media/doc/Hubbard%20Testimony.pdf>

⁵ Leo Kelion, *Google hit with record EU fine over Shopping service*, BBC News (June 27, 2017), <https://www.bbc.com/news/technology-40406542>

⁶ Hubbard, *supra* note 4, at 9.

⁷ See, e.g., Hugh Son, *LendingClub buys Radius Bank for \$185 million in first fintech takeover of a regulated US bank*, CNBC (Feb. 18, 2020), <https://www.cnbc.com/2020/02/18/lendingclub-buys-radius-bank-in-first-fintech-takeover-of-a-bank.html>

Congress Should Structurally Separate Payments and Platforms

We are especially concerned by the encroachment of dominant platforms into the payments space. As payment transactions illuminate the social links between fund senders and recipients, companies that already collect similar social data find payments data extremely valuable. They can use the integrated information to both enhance existing products and offer new services (like credit scoring) to new groups of consumers.⁸

At the moment, some Big Techs intend to create not only payment systems, but corporate currencies. Most notably, Facebook and twenty-seven corporate partners have formed a non-profit in Geneva, Switzerland, the Libra Association, which they intend to use to create new blockchain-based retail payment tools (Libra coins), establishing a parallel financial services economy.⁹ Notably, Facebook is already building its own mobile wallet for this economy: meaning it intends to compete within infrastructure it controls.

As TenCent has demonstrated in China, combining a payments network with a massive social media platform allows powerful companies to generate extreme pricing power within captive ecosystems.¹⁰ As European antitrust regulators have argued, data collection also increases the likelihood of product “tying”: conditioning the purchase of a product over which a company exercises monopoly power on the purchase of a related product as a means of selling this related product.¹¹ Because corporate currencies are literally means of paying for other products, they could render the ability to tie and bundle products together limitless.¹²

Moreover, as unregulated payment platforms threaten the safety and soundness of our existing financial systems, Congress should act to more comprehensively regulate all “shadow

⁸ BANK FOR INTERNATIONAL SETTLEMENTS, BIG TECH IN FINANCE: OPPORTUNITIES AND RISKS, BANK FOR INTERNATIONAL SETTLEMENTS ANNUAL ECONOMIC REPORT, <https://www.bis.org/publ/arpdf/ar2019e3.htm>

⁹ See LIBRA ASS’N MEMBERS, WHITE PAPER v 2.0, 3-4 (2020), <https://libra.org/en-US/white-paper/>; Nick Statt, *Facebook’s Calibra is a secret weapon for monetizing its new cryptocurrency*, THE VERGE (June 18, 2019), <https://www.theverge.com/2019/6/18/18682838/facebook-digital-wallet-calibra-libra-cryptocurrency-kevin-weil-david-marcus-interview>

¹⁰ Jacky Wong, *The Next Level for China’s Tencent: Global Domination*, WALL ST. J (Nov. 13, 2019) <https://www.wsj.com/articles/the-next-level-for-chinas-tencent-global-domination-11573655785>; In 2012, Mark Zuckerberg explicitly stated he wanted to create a payment product to exercise pricing power over third-party developers. MATT STOLLER, LIBRA BASICS: WHAT IS FACEBOOK’S CURRENCY PROJECT?, OPEN MKTS INST. (updated July 19, 2019), <https://openmarketsinstitute.org/reports/libra-basics-facebooks-currency-project/>

¹¹ WILSON C. FREEMAN AND JAY B. SYKES, “ANTITRUST AND ‘BIG TECH’”, CONG. RESEARCH SERV., R49510, 15-17 (2019), <https://fas.org/sgp/crs/misc/R45910.pdf>

¹² Indeed, competitors have already alleged that Facebook used an older payment system, Facebook Credits, to instigate *per se* unlawful tying arrangements. *Kickflip, Inc. v. Facebook, Inc.*, 999 F. Supp. 2d 677, 689 (D. Del. 2013)

payment platforms” — projects that store consumer funds, potentially in long-term custody, outside of FDIC-insured banks.¹³ Otherwise, unprotected mobile wallet balances could become so expansive and interconnected to the rest of the financial system that regulators would face severe pressure to bailout tech companies in jeopardy: yet another unfair business advantage. Legislation that would designate the ‘deposit-like’ obligations of dominant platforms as “deposits”, prohibiting them from issuing such obligations absent approval by banking regulators¹⁴ would be a positive response to this danger.

Congress and Regulators Should Withhold Special Banking Charters from Tech Companies

We are also concerned that tech companies are attempting to take advantage of a loophole in the Competitive Equality Banking Act of 1987 to create subsidiary Industrial Loan Companies (ILCs). Although these state-chartered banks benefit from federal deposit insurance and other public protections, ILCs and their parent companies circumvent critical federal supervision and regulation, posing unique risks to consumers, small businesses, and the financial system as a whole.¹⁵ In 2006, in response to opposition from community banks, consumer advocates, and labor unions, the Federal Deposit Insurance Corporation (FDIC) placed a moratorium on Industrial Loan Charters, freezing applications from Walmart, Home Depot, and a subsidiary of Warren Buffett’s Berkshire Hathaway.¹⁶

After a nearly fourteen year moratorium, the FDIC recently approved ILC charters for two fintech companies: Varo Money and Square Financial Services. One might anticipate that larger companies, like Amazon, will follow suit in seeking such charters.¹⁷ We not only oppose the approval of these applications, but join the Federal Reserve Board of Governors in recommending that Congress repeal the ILC loophole, so that non banks are not increasingly able to engage in banking services while evading the comprehensive regulation imposed on

¹³ See Dan Awrey and Kristin van Zwieten, *Mapping The Shadow Payment System* (October 7, 2019). SWIFT INSTITUTE WORKING PAPER NO. 2019-001, available at: <https://ssrn.com/abstract=3462351>

¹⁴ For discussion of this general principle, see, e.g. John Crawford, *A Better Way to Revive Glass-Steagall*, 70 STAN. L. REV. ONLINE 1, 3 (2017)

¹⁵ Letter from Ams. for Fin. Reform to FDIC (Oct. 10, 2017), available at <https://ourfinancialsecurity.org/2017/10/letter-regulator-afr-opposes-fdic-insurance-square-inc/>; Letter from Ams. for Fin. Reform to FDIC (Jul. 19, 2017), available at <https://ourfinancialsecurity.org/2017/07/letter-regulators-afr-opposes-sofis-deposit-insurance-application/>

¹⁶ Crawford, *supra* note 14, at 8.

¹⁷ See, e.g., Ron Shevlin, *Amazon's Impending Invasion Of Banking*, FORBES (July 8, 2019), <https://www.forbes.com/sites/ronshevlin/2019/07/08/amazon-invasion/#1bcfa8477921>

traditional banks and bank holding companies. Similarly, we also oppose all plans by the Office of the Comptroller of the Currency to issue special charters to fintech companies.¹⁸

Congress Should Constrain Corporate Data Collection

In the context of current technology, dividing banking and commerce demands special attention to financial surveillance. Dominant platforms grow by expanding their platforms' user base and information access, securing revenue by selling products directly to their users or by selling access to their users to third parties.¹⁹ Their business model depends upon enabling direct, *monitored* interactions between more and more users. Firms learn from these interactions in order to deploy yet another range of services that generate further activity. This increased activity then generates more data. In a nutshell: the scale of surveillance determines growth.

As U.S. legal scholars and European antitrust authorities have concluded, data begets market power, but market power also allows dominant platforms to continually extract data in unfair ways.²⁰ For instance, companies like Facebook notoriously use "social plug-ins" (such as Facebook "Like" buttons) to track users on third-party websites and monitor their off-site transactions.²¹ By centralizing this sensitive information, Facebook can further mine data and determine the maximum prices consumers and competitors are willing to pay for various services. (One could easily imagine Facebook using Libra payment buttons to accomplish similar functions). Similarly, Amazon already provides the cloud-computing systems that serve as the "technological backbone" of many fintech firms, which grants Amazon access to data other companies are structurally unable to obtain.²² The company could easily take advantage of this data to unfairly compete with its existing fintech business partners.

Unfortunately, U.S. antitrust regulators have often failed to take such surveillance into proper account.²³ But the Federal Trade Commission (FTC) has important tools at its disposal. Specifically, the Sherman Antitrust Act of 1890 (Sherman Act) authorizes the FTC to break up a conglomerate when it is monopolizing or attempting to monopolize a market. This section was

¹⁸ Comment from Ams. for Fin. Reform to OCC (Jan. 15, 2017), available at <https://ourfinancialsecurity.org/wp-content/uploads/2017/01/FINAL-AFR-Comment-to-OCC-re-FinTech-White-Paper-1-15-2017.pdf>

¹⁹ See, e.g., BANK FOR INTERNATIONAL SETTLEMENTS, *supra* note 8.

²⁰ Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 518 (2019)

²¹ Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1004 (2019)

²² John Detrixhe, *Amazon is invading finance without really trying*, QUARTZ (Nov. 1, 2017),

<https://qz.com/1116277/amazons-aws-cloud-business-is-reshaping-how-the-financial-services-industry-works/>

²³ See, e.g., Frank Pasquale, *Privacy, Antitrust, and Power*, 20 GEO. MASON L. REV. 1009, 1010 (2013); In two scholars' review case law uncovered zero instances of antitrust liability premised on remedying privacy injuries. Gregory Day & Abbey Stemler, *Infracompetitive Privacy*, 105 IOWA L. REV. 61, 89 (2019)

memorably used to sue Microsoft in the late 1990s.²⁴ The FTC also retains expansive power to interpret the antitrust provision of Section 5 of the FTC Act, which prohibits “unfair competition”, generally.²⁵ Using this authority, the FTC should establish presumptions of illegality for competitively suspect practices,²⁶ including certain surveillance practices, either through enforcement activity or through rulemaking.

While the FTC does have some tools at its disposal, no overarching federal privacy law currently curbs the collection, use, and sale of personal data among corporations.²⁷ Ultimately, however, Congress should take action to minimize data collection to that which is narrowly tailored to permitted usages, so that many of the aforementioned anti-competitive practices become commercially unfruitful.²⁸

In sum, we urge the Committee to promote the tradition of separating deposit taking and payment systems from other commercial activities, by extending that set of principles to dominant platforms, especially online marketplaces and social networks.

Thank you for the opportunity to comment on this issue. If you have any questions, please contact Raúl Carrillo (Fellow, AFR Education Fund; Policy Counsel, DPEF) at raul@ourfinancialsecurity.org.

Sincerely,
Americans for Financial Reform Education Fund
Demand Progress Education Fund

²⁴ Kelly Ranttila, *Social Media and Monopoly*, 46 OHIO N.U. L. REV. 161, 167 (2020)

²⁵ Sandeep Vaheesan, *Resurrecting "A Comprehensive Charter of Economic Liberty": The Latent Power of the Federal Trade Commission*, 19 U. PA. J. BUS. 645, 661–63 (2017)

²⁶ *Id.* at 676–77

²⁷ BERKELEY MEDIA STUDIES GROUP ET AL., THE TIME IS NOW: A FRAMEWORK FOR COMPREHENSIVE PRIVACY PROTECTION AND DIGITAL RIGHTS IN THE UNITED STATES, Citizen.org, (last visited Mar. 31, 2020), <https://www.citizen.org/sites/default/files/privacy-and-digital-rights-for-all-framework.pdf>

²⁸ See, e.g., Woodrow Hartzog and Neil M. Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 BOSTON COLLEGE LAW REVIEW (forthcoming 2020), available at: <https://ssrn.com/abstract=3441502>; Press Release, SenateDemocrats.gov, *Privacy and Data Protection Framework* (Nov. 18, 2019), available at https://www.democrats.senate.gov/imo/media/doc/Final_CMTE%20Privacy%20Principles_11.14.19.pdf