

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 consumer fairness.

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 their substantial remedies, including injunctive relief to block mergers and 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 these laws apply 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, Federal Trade Commission, Consumer Financial Protection Bureau (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 three 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

1. Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).

2. *Id.*

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 part of a broader initiative to make the consumer financial services industry more competitive.⁸ The CFPB focuses heavily on CFS firms’ use of customers’ personal financial data and “unfair” fees.⁹ A climate of heightened competition enforcement has developed, with an increasing focus on digital markets and technology’s impact on competition.

3. *Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Virtual Remarks for the 2022 International Bar Association Competition Conference*, DOJ (Sept. 10, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-virtual-remarks> [https://perma.cc/9LBK-4LK9].

4. *Id.*

5. See Memorandum from Lina M. Kahn, Chair, Fed. Trade Comm’n, to Comm’n Staff and Comm’rs (Sept. 22, 2021) (on file with Federal Trade Commission) (“[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 *Assistant Attorney General Jonathan Kanter Delivers Keynote Speech at Georgetown Antitrust Law Symposium*, DOJ (Sept. 13, 2022), <https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-keynote-speech-georgetown-antitrust> [https://perma.cc/4DG8-23XN] (“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. Rohit Chopra, *Promoting Competition in Our Financial Markets*, CONSUMER FIN. PROT. BUREAU (July 11, 2022), <https://www.consumerfinance.gov/about-us/blog/promoting-competition-in-our-financial-markets/> [https://perma.cc/QLY9-CV6B].

8. *Consumer Fin. Prot. Bureau CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance*, CONSUMER FIN. PROT. BUREAU (May 24, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/> [https://perma.cc/H2SS-WWBK].

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, Deputy Assistant Att’y Gen., U.S. Dep’t of Just., Remarks Prepared for Discussion at University of Michigan Law School (Oct. 14, 2020) (on file with U.S. Department of Public Affairs).

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

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, or attempt to monopolize, or combine or conspire 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 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 Nonetheless, the stated maximum fines can also be increased under certain circumstances.¹⁸

10. Fed. Trade Comm’n, *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws> [<https://perma.cc/Q2FJ-KAK9>] (last visited Mar. 16, 2023) (explaining only the FTC can enforce the FTC Act).

11. *Id.*

12. 15 U.S.C. § 1.

13. 15 U.S.C. § 2.

14. *The Antitrust Laws*, supra note 10.

15. See *Standard Oil Co. of N.J. v. U.S.*, 221 U.S. 1, 98–100 (1911) (establishing the “rule of reason”).

16. *The Antitrust Laws*, supra note 10.

17. *Id.*

18. *Id.* (noting that “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.”).

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, as discussed above, the Clayton Act provides for a private right of action with treble damages.

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. Practical Implications of Antitrust Litigation.

The potential exposure in antitrust suits is enormous. To quote leading antitrust scholars: “[t]he legality of particular behavior challenged under the antitrust laws is often unclear, the sanctions for illegality severe, the risks indefinite, and the litigation costly for all parties and for the legal system.”²⁸ As a starting point, by statute, damages in civil antitrust cases

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. HOVENKAMP & AREEDA, *supra* note 21, at ¶ 315.

are trebled, and a prevailing plaintiff also receives attorneys' fees. Nine-figure settlements or judgments and fee awards in the tens of millions are not uncommon.²⁹

Litigation costs in antitrust cases can also be staggering. This results in part from the fact that, "[d]iscovery in antitrust cases can be especially voluminous, covering issues related to supply chains, pricing, product development and marketing, competitive intelligence, shareholder meetings (if relevant), and emails sent in the ordinary course of business."³⁰ Even the Supreme Court has warned that "it is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, . . . but quite another to forget that proceeding to antitrust discovery can be expensive."³¹ And, "the existence of one-way fee shifting means that plaintiffs often can issue burdensome requests while the defendant has no incentive to reciprocate."³²

Furthermore, antitrust suits are expert-intensive.³³ The typical antitrust suit has an economist for market definition, an economist for damages valuation, and an industry specialist for competition-related rationales. The costs associated with just this "basic" slate of experts are massive and are the types of expenses not commonly encountered in CFS cases based on statutes like the Truth in Lending Act.³⁴

The massive potential exposure combined with litigation costs can lead to *in terrorem* settlements, requiring early case assessment and careful lawyering by experienced counsel.³⁵ To minimize the likelihood of litigation,

29. See, e.g., Jon Solomon, *NCAA Ordered to Pay \$46 Million in Ed O'Bannon Legal Fees*, CBS SPORTS (July 13, 2015) ("A federal magistrate judge . . . ordered the NCAA to pay nearly \$46 million to Ed O'Bannon's lawyers in attorney fees and legal costs for their court victory.").

30. *Antitrust*, GEORGETOWN LAW, <https://www.law.georgetown.edu/your-life-career/career-exploration-professional-development/for-jd-students/explore-legal-careers/practice-areas/antitrust/> [https://perma.cc/XH9E-4EJJ] (last visited Aug. 23, 2023).

31. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007).

32. William H. Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898–99 (2003).

33. David Cross & Rob Manoso, *How To Handle Experts Like An Expert In Antitrust Trials*, LAW360 (Apr. 26, 2023, 12:00 PM), <https://www.law360.com/articles/1598649/how-to-handle-experts-like-an-expert-in-antitrust-trials> [https://perma.cc/48LS-KZRX] ("Expert testimony is a central feature of most antitrust trials. It often involves challenging technical issues that are not easily digested by judges and juries, such as econometric analysis.").

34. 15 U.S.C. §§ 1601–1667f.

35. Brief for the United States as Amicus Curiae Supporting Petitioners, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (No. 05-1126). ("Meritless antitrust suits, . . . if not promptly dismissed, [] create economic inefficiencies, chill pro-competitive conduct, and act as a drain on the economy because they force

CFS firms should consult antitrust counsel habitually to ensure that they are not unwittingly violating the antitrust laws.

By way of just one example, in the FX Benchmark Antitrust Litigation,³⁶ class plaintiffs brought claims against numerous financial institutions including Barclays Bank PLC, Citigroup Inc., Deutsche Bank AG, JPMorgan Chase & Co., Royal Bank of Scotland Group PLC and UBS AG, alleging they had conspired to fix prices in the foreign exchange market in violation of Sections 1 and 3 of the Sherman Act.³⁷ The plaintiffs alleged that the Defendants manipulated the FX market in violation of the Commodity Exchange Act.³⁸ The case went on for a decade. Credit Suisse prevailed at trial this year, but “[c]laims against 15 of the defendants ha[d] been settled” over the course of that decade “for sums **totaling \$2.3 billion.**”³⁹ Roughly \$300 million of that recovery was in attorneys’ fees alone.⁴⁰

C. 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.⁴¹ 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.⁴² This means that, until recently, it was much harder to regulate anticompetitive conduct by digital platforms.⁴³

parties either to expend substantial resources to defend themselves or to succumb to *in terrorem* settlement demands.”).

36. In Re Foreign Exch. Benchmark Rates Antitrust Litig., 74 F. Supp. 3d 581 (S.D.N.Y. 2015).

37. 15 U.S.C. §§ 1, 3.

38. 7 U.S.C. § 1, *et seq.*

39. Emilie Ruscoe, *Credit Suisse Investors Call It Quits On Forex-Rigging Suit*, LAW360 (Apr. 28, 2023, 9:56 PM), <https://www.law360.com/articles/1602204/credit-suisse-investors-call-it-quits-on-forex-rigging-suit> [https://perma.cc/4NCB-CCMQ].

40. Perry Cooper, *Forex-Rigging Settlements Yield \$300M for Class Counsel*, BLOOMBERG LAW (Nov. 8, 2018, 2:59 PM), <https://news.bloomberglaw.com/class-action/forex-rigging-settlements-yield-300m-for-class-counsel> [https://perma.cc/49G3-CTG9].

41. 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.”).

42. John M. Newman, *Antitrust in Digital Markets*, 72 VANDERBILT L. REV. 1497, 1498 (2019) (“Antitrust law has largely failed to address the challenges posed by digital markets.”).

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

The federal agencies have recently refined their efforts to measure the market power of digital firms,⁴⁴ leading to new uses of the antitrust laws 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 and 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.⁴⁵

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.⁴⁶ President Biden's director of the

44. OECD, *THE EVOLVING CONCEPT OF MARKET POWER IN THE DIGITAL ECONOMY*, OECD COMPETITION POLICY ROUNDTABLE Note 5 (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.

45. 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. *Cnty. Fin. Servs. Ass'n of Am., Ltd. v. Consumer Fin. Prot. Bureau*, 51 F.4th 616 (5th Cir. 2022), *cert. granted*, 143 S. Ct. 978 (2023) (No. 22-448). We await further action from the Supreme Court.

46. Consumer Fin. Prot. Bureau, <https://www.consumerfinance.gov/about-us/the-bureau/> [<https://perma.cc/C3ZM-V44H>] (last visited Nov. 28, 2022).

CFPB, Rohit Chopra, is a former antitrust enforcer.⁴⁷ Director Chopra has broadened the CFPB's mission to include the effect of various business practices on fair competition in the CFS industry.⁴⁸ 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,⁴⁹ which 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.⁵⁰

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."⁵¹ The CFPB published a request for comment⁵² to

47. Ryan Tracy & Andrew Ackerman, *How a D.C. Bureaucrat Amassed Power Over Businesses, Banks and Consumers*, WALL ST. J. (June 9, 2022), <https://www.wsj.com/articles/rohit-chopra-biden-regulation-cfpb-fdic-ftc-11654713281> [<https://perma.cc/KK58-FNXP>].

48. *See 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. POST (Feb. 10, 2022, 1:18 PM), <https://www.washingtonpost.com/washington-post-live/2022/02/10/transcript-path-forward-consumer-protection-with-rohit-chopra/> [<https://perma.cc/86S6-6GY5>] (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.").

49. Consumer Fin. Prot. Bureau, *CFPB Launches New Effort to Promote Competition and Innovation in Consumer Finance*, CONSUMER FIN. PROT. BUREAU (May 24, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-launches-new-effort-to-promote-competition-and-innovation-in-consumer-finance/> [<https://perma.cc/H2SS-WWBK>].

50. *Id.*

51. Consumer Fin. Prot. Bureau, *Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees*, CONSUMER FIN. PROT. BUREAU (Jan. 26, 2022), <https://www.consumerfinance.gov/about-us/newsroom/consumer-financial-protection-bureau-launches-initiative-to-save-americans-billions-in-junk-fees/> [<https://perma.cc/LZJ7-P44W>].

52. The FTC has also shown a recent interest in junk fees. *See* Fed. Trade Comm'n, *Federal Trade Commission Explores Rule Cracking Down on Junk Fees*, FED. TRADE COMM'N (Oct. 20, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/10/federal-trade-commission-explores-rule-cracking-down-junk-fees> [<https://perma.cc/XGH3-DAFY>].

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.”⁵³ 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[.]”⁵⁴

On June 29, 2022, the CFPB issued an advisory opinion that federal law prohibits debt collectors from charging “pay-to-pay” fees.⁵⁵ “Federal law generally forbids debt collectors from imposing extra fees not authorized by the original loan,” said CFPB Director Rohit Chopra.⁵⁶ 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.”⁵⁷

The CFPB issued guidance in October 2022 to help banks avoid charging illegal junk fees on deposit accounts.⁵⁸ Specifically, the CFPB identified depositor and overdraft fees as oftentimes illegal under the Consumer Financial Protection Act. Depositor fees are fees a bank charges when a customer attempts to deposit a check that bounces.⁵⁹ 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.”⁶⁰ 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.”⁶¹

53. Consumer Financial Protection Bureau Launches Initiative to Save Americans Billions in Junk Fees, *supra* note 51.

54. *Id.*

55. Consumer Fin. Prot. Bureau, *CFPB Moves to Reduce Junk Fees Charged by Debt Collectors*, CONSUMER FIN. PROT. BUREAU (June 29, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-moves-to-reduce-junk-fees-charged-by-debt-collectors/> [<https://perma.cc/4XB9-JGFZ>].

56. *Id.*

57. *Id.* (emphasis added).

58. Consumer Fin. Prot. Bureau, *CFPB Issues Guidance to Help Banks Avoid Charging Illegal Junk Fees on Deposit Accounts*, CONSUMER FIN. PROT. BUREAU (Oct. 26, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-issues-guidance-to-help-banks-avoid-charging-illegal-junk-fees-on-deposit-accounts/> [<https://perma.cc/6KVK-2SNC>].

59. *Id.*

60. Bulletin 2022-06: Unfair Returned Deposited Item Fee Assessment Practices, 87 Fed. Reg. 66941 (Nov. 7, 2022).

61. Consumer Fin. Prot. Bureau Unanticipated overdraft fee assessment practices, CONSUMER FINANCIAL PROTECTION CIRCULAR 2022-06 (Oct. 26, 2022),

In March 2023, the CFPB released a special edition of its Supervisory Highlights reporting on “unlawful junk fees uncovered in deposit accounts and in multiple loan servicing markets, including in mortgage, student, and payday lending.”⁶² 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.’”⁶³

This focus on junk fees extends to enforcement actions. In September 2022, 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.”⁶⁴ 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.⁶⁵ 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.”⁶⁶

2. Late fees.⁶⁷

Like junk fees, late fees have long attracted scrutiny from regulators and plaintiffs’ lawyers, but these fees are now being looked at through a com-

https://files.consumerfinance.gov/f/documents/cfpb_unanticipated-overdraft-fee-assessment-practices_circular_2022-10.pdf [https://perma.cc/F6B8-NECS].

62. Consumer Fin. Prot. Bureau, *CFPB Uncovers Illegal Junk Fees on Bank Accounts, Mortgages, and Student and Auto Loans*, CONSUMER FIN. PROT. BUREAU (Mar. 8, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-uncovers-illegal-junk-fees-on-bank-accounts-mortgages-and-student-and-auto-loans/> [https://perma.cc/3QFC-LFMX].

63. Consumer Fin. Prot. Bureau, *Supervisory Highlights: Junk Fees Special Edition*, SUPERVISORY HIGHLIGHTS ISSUE 29, at 2 (2023), https://files.consumerfinance.gov/f/documents/cfpb_supervisory-highlights-junk-fees-special-edition_2023-03.pdf [https://perma.cc/2WW9-H69H].

64. Consent Order, In the Matter of Regions Bank, No. 2022-CFPB-0008 (Sept. 8, 2022).

65. Consumer Fin. Prot. Bureau, *CFPB Orders Regions Bank to Pay \$191 Million for Illegal Surprise Overdraft Fees*, CONSUMER FIN. PROT. BUREAU (Sept. 28, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-regions-bank-pay-191-million-for-illegal-surprise-overdraft-fees/> [https://perma.cc/3YAN-4NMT].

66. *Id.*

67. 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*

petition lens. In March 2022, the CFPB issued a Credit Card Late Fees report.⁶⁸ 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).⁶⁹

On June 22, 2022, the CFPB announced a review of the credit card industry's penalty policies.⁷⁰ 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).⁷¹ 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."⁷² The Federal Reserve's rule "prohibited generating more revenue from late fees than was necessary to cover the cost of late payment."⁷³ However, 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."⁷⁴

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.⁷⁵ Director Chopra delivered prepared remarks on the Advanced Notice of Proposed Rule-

Credit-Card Late Fees, WALL ST. J. (Feb. 1, 2023, 3:06 PM), <https://www.wsj.com/articles/biden-administration-to-propose-rule-to-lower-credit-card-late-fees-11675243257> [<https://perma.cc/2WSK-8YTB>].

68. COHEN ET AL., CFPB, CREDIT CARD LATE FEES (2022), <https://www.consumerfinance.gov/data-research/research-reports/credit-card-late-fees/> [<https://perma.cc/Z4KG-SG99>].

69. *Id.* at 2.

70. Consumer Fin. Prot. Bureau, *CFPB Initiates Review of Credit Card Company Penalty Policies Costing Consumers \$12 Billion Each Year*, CONSUMER FIN. PROT. BUREAU (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/> [<https://perma.cc/DG29-Q5EV>].

71. Bureau of Consumer Fin. Prot., *Credit Card Late Fees and Late Payments*, CONSUMER FIN. PROT. BUREAU (June 22, 2022), https://files.consumerfinance.gov/f/documents/cfpb_credit-card-late-fees_anpr_2022-06.pdf [<https://perma.cc/763K-B6DB>].

72. CFPB *Initiates Review of Credit Card Company Penalty Policies Costing Consumers \$12 Billion Each Year*, *supra* note 70.

73. *Id.*

74. *Id.*

75. *Id.*

making, 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.”⁷⁶ In a March 5, 2024 press release, Director Chopra announced that the CFPB was finalizing the rule “after an extensive process, consideration of thousands of comments, and a great deal of research into the credit card market.”⁷⁷

3. Buy now, pay later.⁷⁸

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.”⁷⁹ 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

76. Prepared Remarks of Director Chopra on Credit Card Late Fees ANPR Press Call, CFPB (June 22, 2022) (emphasis added), <https://www.consumerfinance.gov/about-us/newsroom/prepared-remarks-of-director-chopra-on-credit-card-late-fees-anpr-press-call/> [https://perma.cc/Z55J-K3QB]; see also CFPB Enhances Tool to Promote Competition and Comparison Shopping in Credit Card Market, CFPB (Mar. 21, 2023), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-enhances-tool-to-promote-competition-comparison-shopping-credit-card-market/> [https://perma.cc/C8WG-QRZ4] (“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.”).

77. Consumer Fin. Prot. Bureau, *Statement of CFPB Director Rohit Chopra on the Final Rule to Close the Credit Card Late Fee Loophole*, CONSUMER FIN. PROT. BUREAU (Mar. 5, 2024), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-the-final-rule-to-close-the-credit-card-late-fee-loophole/#:~:text=We%20are%20finalizing%20a%20rule,who%20are%20charged%20late%20fees> [https://perma.cc/YL52-YN32].

78. 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, *Buy Now, Pay Later—And Comply with FTC Act Immediately*, FTC (Sept. 26, 2022), <https://www.ftc.gov/business-guidance/blog/2022/09/buy-now-pay-later-and-comply-ftc-act-immediately> [].

79. BUY NOW, PAY LATER: MARKET TRENDS AND CONSUMER IMPACT 3 (2022), https://files.consumerfinance.gov/f/documents/cfpb_buy-now-pay-later-market-trends-consumer-impacts_report_2022-09.pdf [https://perma.cc/4RAG-6PKF].

that detailed the findings from those orders.⁸⁰ 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 2021.⁸¹

The report and 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.⁸² 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 that own the largest volume of consumer data, and reduce long-term innovation, choice, and *price competition*.”⁸³

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

80. *Id.* at 4–5.

81. *Id.* at 31.

82. Consumer Fin. Prot. Bureau CFPB Study Details the Rapid Growth of “Buy Now, Pay Later” Lending, CONSUMER FIN. PROT. BUREAU (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> [<https://perma.cc/AVC3-WFSG>]:

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.

In a March 2023 follow-on report, the CFPB articulated similar concerns. https://files.consumerfinance.gov/f/documents/cfpb_consumer-use-of-buy-now-pay-later_2023-03.pdf.

83. *Id.* (emphasis added).

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.⁸⁴ 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.⁸⁵ The resulting order required Hello Digit “to pay redress to its harmed customers,” and it fined “the company \$2.7 million for its actions.”⁸⁶ The CFPB explained that Hello Digit falsely guaranteed no overdrafts, broke promises to make aggrieved customers whole, and pocketed interest that should have gone to consumers.⁸⁷

In October 2022, the CFPB sued another CFS firm, ACTIVE Network.⁸⁸ ACTIVE Network is a payment platform used to sign up for community activities.⁸⁹ In the press release announcing the lawsuit, Director Chopra explained, “the CFPB’s investigation revealed 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.”⁹⁰ In July, the CFPB ordered Bank of America “to pay more than \$100 million to customers for systematically double-dipping on fees imposed on customers with insufficient funds in their account, withholding reward bonuses explicitly promised to credit card customers, and misappropriating sensitive

84. See, e.g., CFPB, POLICY STATEMENT ON ABUSIVE ACTS OR PRACTICES 16–7 (2023) (internal citations omitted), https://files.consumerfinance.gov/f/documents/cfpb_policy-statement-of-abusiveness_2023-03.pdf [<https://perma.cc/S3N7-EJHT>] (“Consumers are often unable to protect their interests in selecting or using a consumer financial product or service where companies have out-sized 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.’”).

85. Consumer Fin. Prot. Bureau *CFPB Takes Action Against Hello Digit for Lying to Consumers About Its Automated Savings Algorithm* CONSUMER FIN. PROT. BUREAU (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/> [<https://perma.cc/N3J2-6NYZ>].

86. *Id.*

87. *Id.*

88. Rohit Chopra, *Statement of CFPB Director Rohit Chopra on Complaint Against ACTIVE Network*, CFPB (Oct. 18, 2022), <https://www.consumerfinance.gov/about-us/newsroom/statement-of-cfpb-director-rohit-chopra-on-complaint-against-active-network/> [<https://perma.cc/M4Y6-H3RU>].

89. *Id.*

90. *Id.*; see Consumer Fin. Prot. Bureau *CFPB Takes Action Against Choice Money for Remittance Failures*, CONSUMER FIN. PROT. BUREAU (Oct. 4, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-takes-action-against-choice-money-for-remittance-failures/> [<https://perma.cc/TX3X-XW3N>].

personal information to open accounts without customer knowledge or authorization.”⁹¹

Additionally, the CFPB has recently shown interest in CFS firms’ 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. Thus, CFS firms should consult with competition counsel to ensure 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 would not have fallen within the ambit of competition law before 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;⁹² 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.”⁹³ In response, the CFPB sent letters to the CEOs of the nation’s biggest credit card companies,⁹⁴ asking them to explain their payment reporting practices. The CFPB was concerned the practice could impact consumers and their ability to access credit at the most competitive rates.⁹⁵

91. Consumer Fin. Prot. Bureau *CFPB Takes Action Against Bank of America for Illegally Charging Junk Fees, Withholding Credit Card Rewards, and Opening Fake Accounts*, CONSUMER FIN. PROT. BUREAU (July 11, 2023), <https://www.consumerfinance.gov/about-us/newsroom/bank-of-america-for-illegally-charging-junk-fees-withholding-credit-card-rewards-opening-fake-accounts/> [<https://perma.cc/58FR-6B3X>].

92. John McNamara, *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/> [<https://perma.cc/H9DS-HVQ4>].

93. *Id.*

94. These companies include JP Morgan Chase, Citibank, Bank of America, Capital One, Discover, and American Express. *Id.*

95. *Id.*

In February 2023, the CFPB reported on its findings from the inquiry.⁹⁶ The Bureau found that “[c]ompanies suppressed data to limit competition” in an attempt to make it harder for competitors to “offer their more profitable and less risky customers better rates, products, or services.”⁹⁷ 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.”⁹⁸ 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 [the CFPB’s] findings.”⁹⁹

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.”¹⁰⁰ 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.”¹⁰¹ 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.*¹⁰²

96. John McNamara, *Why the Largest Credit Card Companies are Suppressing Actual Payment Data on Your Credit Report*, CFPB (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/> [<https://perma.cc/VDA7-X96B>].

97. *Id.*

98. Letter from CFPB to JPMorgan Chase, Citibank, Bank of America, Capital One, Discover, and American Express 5 (Feb. 16, 2023) (on file with author).

99. McNamara, *supra* note 95.

100. Consumer Fin. Prot. Bureau CFPB Kicks Off Personal Financial Data Rights Rulemaking, CONSUMER FIN. PROT. BUREAU (Oct. 27, 2022), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-kicks-off-personal-financial-data-rights-rulemaking/> [<https://perma.cc/G5EB-U845>].

101. *Id.*

102. *Id.* (emphasis added).

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.¹⁰³ In the Report to Congress, 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."¹⁰⁴ 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."¹⁰⁵

The overlap between the use of customer data and competition law is complex. In some scenarios, competition law requires firms to share in resources and facilities deemed "essential." This is known as the essential facility doctrine.¹⁰⁶ Some antitrust enforcers view customer data as an "essential facility" that ought to be shared.¹⁰⁷ 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 to Congress 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 unlaw-

103. KAHN ET AL., FTC REPORT TO CONGRESS ON PRIVACY AND SECURITY (2021), https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf [<https://perma.cc/DX7Q-X29E>].

104. *Id.* at 3.

105. *Id.* at 4.

106. *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir. 1984), *aff'd* 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.").

107. Alden F. Abbott, Gen. Couns. U.S. Fed. Trade Comm'n, Presentation at Penn Wharton China Center (July 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543858/big_data_and_competition_policy_china_presentation_2019.pdf [<https://perma.cc/R8FN-PMC8>].

fully.”¹⁰⁸ 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.”¹⁰⁹

In August 2022, the FTC announced it was exploring potential rules to crack down on harmful commercial surveillance and lax data security.¹¹⁰ 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.”¹¹¹

3. *Private litigation.*

In addition to this increased regulatory focus, several putative class actions were filed against the prominent CFS firm Plaid in 2020.¹¹² Plaid is a platform that connects users’ 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.”¹¹³ 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.”¹¹⁴

A federal judge approved a \$58 million settlement between Plaid and the classes.¹¹⁵ 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.¹¹⁶

108. KAHN ET AL., *supra* note 102, at 4.

109. Statement from Lina Kahn, Chairman, Fed. Trade Comm’n, Regarding the Report to Congress on Privacy and Security, Commission File No. P065401 4 (Oct. 1, 2021) (on file with Federal Trade Commission).

110. Fed. Trade Comm’n, *FTC Explores Rules Cracking Down on Commercial Surveillance and Lax Data Security Practices*, FED. TRADE COMM’N (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> [https://perma.cc/XGH3-DAFY].

111. *Id.*

112. Consolidated Amended Class Action Complaint & Demand for Jury Trial, *In re Plaid Inc. Privacy Litig.*, No.: 20-cv-03056 (N.D. Cal. Aug. 8, 2020).

113. *Id.* at 1.

114. *Id.* at 2.

115. Order Granting Final Approval of Class Action Settlement, *Cottle et al. v. Plaid, Inc.*, No. 20-cv-03056-DMR, at 4 (N.D. Cal. July 20, 2022).

116. *Id.*

4. Takeaway for CFS firms.

Technology firms' use of customer data has been largely unregulated for the past several decades. Nonetheless, 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 their practices are compliant and/or adaptable to changing standards.

C. 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 Act and Sherman Act may be enjoined under Section 5 of the FTC Act, which prohibits “unfair methods of competition.”¹¹⁷ 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.”¹¹⁸ Among other behaviors, Section 5 enables the FTC to challenge, in their incipiency, practices that, if allowed to continue, would harm competition.¹¹⁹ Courts have held that “unfair methods of competition” include any violation of the antitrust laws.¹²⁰ The FTC has historically challenged: (1) conduct that violates other antitrust laws;¹²¹ (2) invitations to collude and facilitating practices;¹²² (3) exchanges of competitively-sen-

117. 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.

118. 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. Lending Club was forced to disgorge more than \$17 million dollars to consumers. *Federal Trade Commission Returns More Than \$9.7 Million To Consumers Harmed by LendingClub's Deceptive Hidden Fees*, FTC (Aug. 11, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/08/federal-trade-commission-returns-more-97-million-consumers-harmed-lending-clubs-deceptive-hidden-fees> [<https://perma.cc/G7QU-W6YP>].

119. HOVENKAMP & AREEDA, *supra* note 21, at ¶ 302h2.

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

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

122. *See, e.g.*, *In the Matter of Nat'l Ass'n of Music Merchs, Inc.*, No. 001-0203 (F.T.C. 2009).

sitive information;¹²³ (4) anticompetitive courses of conduct;¹²⁴ and (5) abuses of standard-setting processes.¹²⁵

Antitrust practitioners and scholars have long debated the degree to which Section 5 extends beyond the scope of the antitrust laws,¹²⁶ but the courts have yet to clearly delineate Section 5's outer boundaries.¹²⁷ This creates a muddied 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.¹²⁸ The Commission may challenge unfair methods of competition through administrative hearings governed by Section 5 of the Act.¹²⁹ 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, or about to violate, the FTC Act.¹³⁰

The FTC cannot assess prison terms or damages.¹³¹ The agency most frequently seeks an injunction, called a "cease and desist" order, directing the defendant to stop engaging in a certain anti-competitive practice.¹³² The FTC also has the authority to bring an action in court to levy fines for violating an existing cease and desist order, or for "knowing violations" of

123. See, e.g., *In the Matter of Bosley, Inc. and Aderans Am. Holdings, Inc.*, No. 121-0184 (F.T.C. 2013).

124. Fed. Trade Comm'n, *FTC Settles Charges of Anticompetitive Conduct Against Intel*, FED. TRADE COMM'N (Aug. 4, 2010), <https://www.ftc.gov/news-events/news/press-releases/2010/08/ftc-settles-charges-anticompetitive-conduct-against-intel> [<https://perma.cc/6P3C-RCM5>].

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

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

127. *Compare* *FTC v. Sperry & Hutchinson Co.*, 405 U.S. 233, 239–44 (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, 142 (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).

128. HOVENKAMP & AREEDA, *supra* note 21, at ¶ 302c.

129. 15 U.S.C. §§ 45(b), (c).

130. HOVENKAMP & AREEDA, *supra* note 21, 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, 1352 (2021).

131. HOVENKAMP & AREEDA, *supra* note 21, at ¶ 302e.

132. *Id.*

the FTC Act and antitrust laws.¹³³ Generally, a “knowing violation” is a practice previously found by the Commission to be illegal.¹³⁴

While at Yale Law School, Lina Khan published a student note about platform monopoly¹³⁵ that significantly impacted the national antitrust discussion.¹³⁶ Although the positions Ms. Khan advocated were criticized by some antitrust scholars,¹³⁷ Ms. Khan was nominated as a Commissioner of the FTC only four years after graduating from law school¹³⁸ and made Chair soon after.¹³⁹

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.¹⁴⁰ The FTC rescinded the statement in 2021. Chair Khan stated 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.”¹⁴¹ Chair Khan further emphasized “[w]ithdrawing the 2015 State-

133. Fed. Trade Comm’n, *Notices of Penalty Offenses*, FED. TRADE COMM’N, <https://www.ftc.gov/enforcement/penalty-offenses> [<https://perma.cc/4XTA-LBBR>] (last visited Nov. 7, 2022) (updating notice of penalty offenses regularly).
134. *Id.*

135. Platform monopoly is monopolistic control exerted over a digital platform, such as Amazon. In recent decades, challenges have arisen from antitrust enforcers regarding how to measure the market power of a platform monopolist and address abuses of market power. Digital platforms present difficult issues of market definition to which the Sherman and Clayton Acts have not been well-adapted.

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

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

138. *President Biden Announces His Intent to Nominate Lina Khan for Commissioner of the Federal Trade Commission*, WHITE HOUSE (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/> [<https://perma.cc/5MV3-BURE>].

139. *Lina M. Khan Sworn in as Chair of the FTC*, FTC (June 15, 2021), <https://www.ftc.gov/news-events/news/press-releases/2021/06/lina-m-khan-sworn-chair-ftc> [<https://perma.cc/ENM5-72H2>].

140. Statement from Donald S. Clark, Secretary, Fed. Trade Comm’n, on Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act (Aug. 13, 2015) (on file with Federal Trade Commission).

141. Statement of Lina M. Kahn, Chair, Fed. Trade Comm’n, joined by Rohit Chopra and Rebecca Kelly Slaughter, Comm’rs, Fed. Trade Comm’n, on the Withdrawal of the Statement of Enforcement Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act 1 (July 1, 2021) (on file with Federal Trade Commission).

ment is only the start of our efforts to clarify the meaning of Section 5 and apply it to today's markets."¹⁴²

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.¹⁴³ She explained that she did not believe the FTC Act was constrained by any efficiencies analysis or consumer welfare measures, and instead emphasized, "Congress distinguished between *fair* and *unfair* methods of competition and charged the FTC with fleshing out that distinction based on its expertise."¹⁴⁴ She continued, "I believe it is clear that respect for the rule of law requires us to reactivate our standalone Section 5 enforcement program."¹⁴⁵

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."¹⁴⁶ 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."¹⁴⁷ 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.¹⁴⁸ The statement further makes clear 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-pretexual, 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.¹⁴⁹

Lastly, the policy statement provides a list of "non-exclusive" examples of conduct the FTC considers unfair methods of competition, which un-

142. *Id.* at 7.

143. Remarks from Lina M. Kahn, Chair, Fed. Trade Comm'n, as Prepared for Delivery at Fordham Annual Conference on International Antitrust Law 2 (Sept. 16, 2022) (on file with Federal Trade Commission).

144. *Id.* at 2–3.

145. *Id.* at 4.

146. Statement from Federal Trade Commission on Policy Regarding the Scope of Unfair Methods of Competition Under the Federal Trade Commission Act, File No. P221202 1 (Nov. 10, 2022) (on file with Federal Trade Commission).

147. *Id.* at 8.

148. *Id.* at 9.

149. *Id.* at 11–2 (internal citations omitted).

surprisingly includes every known antitrust violation, and even some conduct that falls outside the other antitrust laws.¹⁵⁰

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.”¹⁵¹ However, business groups, such as the United States Chamber of Commerce, and technology advocates “condemned the statement as a power grab by the FTC.”¹⁵²

4. Takeaway for CFS firms.¹⁵³

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 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.¹⁵⁴ The complaint alleges that this behavior constitutes violations of Section 5 of the FTC Act.”¹⁵⁵

150. *Id.* at 12–6.

151. Leah Nylén & Daniel Papsun, *FTC Plans to Clamp Down on Unfair Competition by Companies*, BLOOMBERG LAW (Nov. 10, 2022, 12:06 PM), <https://news.bloomberglaw.com/antitrust/ftc-plans-to-clamp-down-on-unfair-competition-by-companies> [<https://perma.cc/6AD6-66J8>].

152. *Id.*

153. 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 settled with Mastercard over e-wallet routing. *FTC Orders an End to Illegal Mastercard Business Tactics and Requires it to Stop Blocking Competing Debit Card Payment Networks*, FTC (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> [<https://perma.cc/78VL-ZKBM>].

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.*

154. Complaint, In the Matter of CREDIT KARMA, LLC, No. 202 3138, at 5 (FTC Sept. 1, 2022).

155. *Id.*

The accompanying consent order required the company to pay \$3 million for aggrieved customers and required that Credit Karma stop making such claims.¹⁵⁶

By way of example, the FTC sued Facebook in 2020 under Section 5 of the FTC Act, among other statutes.¹⁵⁷ Facebook's Motion to Dismiss was granted on June 28, 2021, but Chair Khan was given leave to submit an amended complaint.¹⁵⁸ The FTC did so. In the amended complaint, Facebook's acquisition of nascent competitors and leveraging of its network are considered anticompetitive acts under Section 5.¹⁵⁹

Chair Khan has released several public statements demonstrating her focus 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.¹⁶⁰ There, Chair 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."¹⁶¹

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.

156. Consent Order, In the Matter of CREDIT KARMA, LLC, No. 202 3138 (FTC Sept. 1, 2022).

157. *FTC Sues Facebook for Illegal Monopolization*, FTC (Dec. 9, 2020), <https://www.ftc.gov/news-events/news/press-releases/2020/12/ftc-sues-facebook-illegal-monopolization> [<https://perma.cc/GJ97-589F>].

158. Order Dismissing Charges Without Prejudice, *FTC v. Facebook, Inc.*, No. 20-03590 (D.D.C. June 28, 2021).

159. Amended Complaint, *FTC v. Facebook, Inc.*, No. 20-03590 (D.D.C. Dec. 9, 2020).

160. Comment from Lina M. Kahn, Chair, Fed. Trade Comm'n, Regarding CFPB's Inquiry into Big Tech Payment Platforms, No. CFPB-2021-0017-0002 (Dec. 21, 2022).

161. *Id.* at 1.