



December 21, 2021

By Electronic Submission

The Honorable Rohit Chopra
Director
Consumer Financial Protection Bureau
1700 G Street NW
Washington, DC 20552

Re: Request for Comment Regarding the CFPB's Inquiry into Big Tech Payment Platforms,
Docket No. CFPB-2021-0017

Dear Director Chopra,

The Open Markets Institute appreciates the ability to comment on the Consumer Financial Protection Bureau's ("CFPB" or "Bureau") market monitoring order into the payment platforms of six firms. We commend the Bureau for taking the important first step of information gathering, given the serious concerns Big Tech payment platforms present.

Tech giants like Amazon, Google, Facebook, and Apple have long used anti-competitive conduct and acquisitions to grow and maintain monopoly power, harming consumers, small businesses, and suppliers in the process. Much of the dominance of these corporations is due to having acquired hundreds of other companies, along with the people and services within these companies, in ways that have enabled these giants to build intricate and self-reinforcing networks of essential services.

Big Tech corporations have routinely used their monopoly power to exclude competition in markets that touch or depend on their platforms, becoming giants by violating Sherman Act Section 2's prohibition of illegal monopolization. Consumers and businesses of all sizes now lack bargaining power and alternatives to Big Tech, paving the way for extractive business practices.

Platform monopolists' entry into payments threatens to exacerbate existing problems, by allowing them to extract more data to train their manipulative algorithms and by further fortifying their dominant positions in a number of markets. Big Tech payment platforms can enable financial surveillance, price discrimination, and coercion of small businesses.

Big Tech's entry into payments risks a number of additional harms, including self-preferencing and steering, and unique risks with crypto asset projects. And payment platforms are yet another tool for data extraction and consumer manipulation in Big Tech's ever-growing arsenal. Further, Big Tech payment platforms threaten to heighten the platform monopolists' already dangerous gatekeeper roles. As gatekeepers of content and speech, Big Tech platforms funnel

communications through business models optimized for fear, anger, and polarization and wreak havoc on our democracy. As gatekeepers of commerce, Big Tech platforms set the prices and terms of business, keep out new innovators, and endanger economic liberty.

In a statement regarding the market monitoring order, Director Chopra outlined a series of questions regarding the firms' ability to interfere with markets, extract rents, and coerce, disadvantage or delist competitors. Historically, the platform monopolists have done exactly this. In the following section, we answer those questions and explain that the past conduct of Google, Apple, Facebook, and Amazon shows how we can expect them to behave in the payments market.

Q: Will these companies operate their payment platforms in a manner that interferes with fair, transparent, and competitive markets?

Almost certainly, yes. The platform monopolists of the 21st century have long followed the monopolist's classic playbook, in which they exploit their positions as providers of multiple essential services to bankrupt, supplant, or sideline rivals in every market in which they operate. They first extract revenue and data from every seller and buyer on their platforms, few of whom have any real choice but to deal with them. They then combine this information with the power they possess as operators of essential platforms, to take over entire lines of business that depend on their platforms.

Monopolized tech markets are bad for those who must rely on platforms' services, and bad for those who create a clearly superior product or service and see that product or service stolen from them or choked off in favor of a product owned by the platforms. This state of affairs also deprives consumers of the choice, innovation, quality, and pricing structures that come from real competition.

The number of businesses that are not at the mercy of the platform monopolists is declining every day, as the giants continue to expand into new business lines. Big Tech's entry into *any* new business line is a threat to functional and open markets, and the monopolists' participation in such a critical and sensitive market as the payments market must be highly scrutinized, regulated, and perhaps spun off from the tech platforms as independent firms.

Q: Will the payment platforms be truly neutral, or will they use their scale to extract rents from market participants? If these tech companies enter a market that competes with other providers on the platform, will these providers be removed or otherwise disadvantaged?

A major problem in the age of Big Tech is that platform monopolists are internet gatekeepers that also compete against companies that must get through their gates to reach users. But of course, this is not a fair competition. Rather, tech platforms have *platform privilege* – the incentive and ability to prioritize their own products and services over those of competitors. Tech platforms get to both umpire the game and play in it too.

To know whether the platform monopolists will disadvantage other companies that compete on their payment platforms, we merely need to look at Big Tech’s past and ongoing anticompetitive conduct. Google, Facebook, Apple, and Amazon each have — as a matter of practice — used their monopoly power to give preference to their own offerings and to disadvantage and exclude other providers on their platforms.

For example, DOJ and large coalitions of state attorneys general have brought multiple cases against Google alleging exclusion of competitors in a large number of different product markets. There is no reason to expect Google to change its *modus operandi* for the payments market.

Google has been sued by 37 state attorneys general for, among other things, unlawfully maintaining a monopoly in the Android in-app payment processing market.¹ As explained in a press release, the states allege that “Google forces app developers and app users alike to use Google’s payment processing service, Google Play Billing, to process payments for in-app purchases of content consumed within the app.” Further, “[b]y forcing this tie, Google is able to extract an exorbitant processing fee as high as 30% for each transaction and which is more than ten times as high as the fee charged by Google’s competitors.”

Google’s abuse of dominance in app store payments is also the subject of an investigation in India, with a web startup founder, Murugavel Janakiraman, adeptly explaining that the issue is “the anti-competitive practice of forcing a payment option as well as of forcing out other payment providers.” “If not kept in check,” he continued, “such anti-competitive policies and gatekeeper commissions will be imposed on more and more categories, causing a disastrous effect on competition and prices in India.”

Google has already been found by European enforcers to have used its monopoly power in mobile operating systems to exclude competition in mobile apps. The European Commission fined Google \$5 billion in July 2018 for abusing its dominance by requiring phone-makers using Android, with its 80% percent market share in Europe, to pre-install Google’s apps and not competitors’ apps.² This was the same tactic used by Microsoft when it required computer makers to pre-install its Internet Explorer browser and not Netscape’s Navigator browser, found illegal in *U.S. v. Microsoft*.

Google has also used its monopoly power in search to engage in self-preferencing. At a House Judiciary Subcommittee hearing in spring 2019, Google was asked whether it was true that fewer than 50% of total U.S. mobile and desktop searches on Google Search result in clicks to non-Google websites, as research had shown. Google’s representative did not deny the claim. The

¹ United States District Court, Northern District of California. *State of Utah et. Al. v. Google LLC et. al.*, July 7, 2021,

<https://attorneygeneral.utah.gov/wp-content/uploads/2021/07/Utah-v-Google.1.Complaint-Redacted.pdf>.

² European Commission, “Antitrust: Commission fines Google €1.49 Billion for Abusive Practices in Online Advertising,” March 20, 2019, https://ec.europa.eu/commission/presscorner/detail/en/IP_19_1770.

European Commission fined Google \$2.7 billion in 2017 for abuse of its search platform dominance, finding that, on average, Google buried its competitors in the comparison shopping market on the fourth page of Google search results.

Google can crush almost any entrepreneur who depends on Google's services if Google decides to enter the entrepreneur's market. In recent years, Google has also been accused³ of prioritizing its own reviews,⁴ images,⁵ and travel booking⁶ services in its search results, in ways that effectively destroy competition in these "vertical search" markets.

The European Commission also fined Google nearly \$1.5 billion for abusing its dominance in the market for the brokering of online search advertising.⁷ Google's advertising platform, like its search platform and mobile platform, is not neutral, and self-preferencing to the disadvantage of competitors is simply the way Google does business.

Google is not an outlier among the tech giants. Apple's requirements that iOS app developers use its payment platform and pay a 30% tax to get through its gates to iPhone users has been the subject of major litigation in *Epic v. Apple* and investigations in the U.S., India, and Europe.⁸ The Apple App Store and the Google Play Store clearly demonstrate the anti-competitive practices enabled by Big Tech's involvement in payments.

Amazon, Facebook, and Apple are each facing multiple lawsuits, whether governmental or private, in the U.S. or abroad, seeking to halt illegal, anti-competitive conduct. The extensive House Judiciary page details each platform's self-preferencing over hundreds of pages.⁹ Big Tech platforms are not neutral, and absent major regulatory intervention, Big Tech payment platforms will not be neutral either.

³ Natasha Lomas, "Google fined \$2.7BN for EU antitrust violations over shopping searches," Tech Crunch, June 27, 2021, <https://techcrunch.com/2017/06/27/google-fined-e2-42bn-for-eu-antitrust-violations-over-shopping-searches/>.

⁴ Conor Dougherty, "Inside Yelp's Six-Year Grudge Against Google", NYTimes, July 1, 2017, <https://www.nytimes.com/2017/07/01/technology/yelp-google-european-union-antitrust.html>.

⁵ "Google's EU woes grow as Getty files complaint over photo-scraping in Google Images", Venture Beat, April 27, 2016, <https://venturebeat.com/2016/04/27/getty-google-images-eu-complaint-anti-competition/>.

⁶ Patrick Whyte, "\$5 Billion EU Fine Against Google Brings Travel Back Into the Spotlight", Skift, July 18, 2021, <https://skift.com/2018/07/18/5-billion-eu-fine-against-google-brings-travel-back-into-the-spotlight/>.

⁷ European Commission, "Statement by Commissioner Vestager on Commission Decision to Fine Google €4.34 Billion for Illegal Practices Regarding Android Mobile Devices to Strengthen Dominance of Google's Search Engine," July 18, 2018, https://ec.europa.eu/commission/presscorner/detail/en/STATEMENT_18_4584.

⁸ Aditya Kalra, "EXCLUSIVE Apple hit with antitrust case in India over in-app payments issues", Reuters, September 2, 2021, <https://www.reuters.com/technology/exclusive-apple-hit-with-antitrust-case-india-over-in-app-payments-issues-2021-09-02/>.

⁹ "Investigation of Competition in Digital Markets", Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee of the Judiciary, 2020, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

Q: What factors will these tech companies use when disqualifying or delisting an individual or business from participating on the platform?

Monopolies are undemocratic because they create dangerous concentrations of power that threaten fundamental economic and political liberties. But monopolies also behave as their own private, unaccountable governments, with webs of rules and regulations, arbitrary decision-making, and lack of redress or due process for businesses that are subjected to their rule.

Take, for example, Amazon’s practice of kicking marketplace sellers off its platform without warning, clear explanation, or redress. And businesspeople have said Amazon tied policing against counterfeit products to high-dollar commitments to buy advertising on the platform,¹⁰ which, according to most commonsense definitions, is clearly a form of extortion.¹¹ The CFPB should investigate how Big Tech entry into the payments market can provide the platform monopolists with yet another means for extortion and increase the platforms’ undemocratic reign over market participants.

Q: Will small businesses feel coerced into participating in the payment platform out of fear of being suppressed or hidden in search or product listings?

Almost certainly, yes. Big Tech platforms have centralized the internet so that they are the gatekeepers of speech, content, and commerce. Nearly every single maker, seller, creator, speaker, business, or innovator must get through the gates of a tech platform to go to market, reach consumers or gain an audience. If they cannot be easily found on a tech platform, it’s as if they do not exist at all.

By controlling discoverability, tech platforms can extract monopoly rents and require market participants to use add-on services. Every Amazon marketplace seller, for example, knows that they must use Fulfillment by Amazon shipping services or be buried at the bottom of Amazon search results. Book publishers were allegedly pressured by Amazon to spend thousands of dollars in advertising, or have their books be buried in Amazon search. Newsrooms have been compelled to adapt to whatever format Facebook demanded, whether Facebook Instant Articles

¹⁰ Statement of David Barnett, CEO and Founder of PopSockets LLC, Online Platforms and Market Power, Part 5: Competitors in the Digital Economy, January 15, 2020, <https://docs.house.gov/meetings/JU/JU05/20200117/110386/HHRG-116-JU05-Wstate-BarnettD-20200117.pdf>. (“It was not until December of 2017, in exchange for our commitment to spend nearly two million dollars on retail marketing programs (which our team expected to be ineffective and would otherwise not have pledged), that Amazon Retail agreed to work with Brand Registry to require sellers of alleged PopGrips to provide evidence, in the form of an invoice, of authenticity. As a result, in early 2018, our problem of counterfeits largely dissolved. (Soon thereafter Brand Registry agreed to enforce our utility patent, resulting in the disappearance of most knockoffs.)”)

¹¹ Testimony of Barry C. Lynn, President and Founder, The Open Markets Institute, before the Judiciary Committee of the Ohio Senate on The Nature of Threats Posed by Platform Monopolists to Democracy, Liberty, and Individual Enterprise, October 17, 2019, available at <https://openmarketsinstitute.org>.

or Facebook video, to avoid being de-prioritized — and thus hidden — in the newsfeed. And businesses of all sizes have to pay a hefty tax to Google just to have their websites appear in search results when an internet user searches for them by name.

The tech giants can easily make discoverability on their platform — whether e-commerce, search, social media, video, adtech, app store, or other — contingent on using their payments platform. The maker, seller, creator, speaker, business (whether small or Fortune 500), or innovator will have little choice but to participate, at whatever price and on whatever terms the monopolist dictates.

In addition to the questions Director Chopra identified in his statement about the market monitoring order, we’d like to highlight several other areas of concern regarding Big Tech’s foray into payments, including steering, enhanced surveillance, forced arbitration clauses, and unique risks of crypto asset products.

Steering users to in-house payment mechanisms

When users shop on Amazon.com, they are often prompted with the option to sign up for an Amazon credit card to earn significant savings off their order. The prompts vary, but here are two observed while browsing items on Amazon.com on December 19, 2021:

- “Pay \$XX/month for 12 months (plus S&H, tax) with 0% interest equal monthly payments when you’re approved for an Amazon Prime Store Card”; and
- “Get a \$150 Gift Card: Pay \$0.00 \$24.38 upon approval for the Amazon Prime Rewards Visa Card. No annual fee.”



Amazon Brand – Stone & Beam Casual Striped 100% Cotton Bath Towel, Hand Towel, and Washcloth, Pale Dogwood and White

Visit the Stone & Beam Store

★★★★☆ 86 ratings

Price: **\$24.38** ✓prime & FREE Returns ✓

Get a \$150 Gift Card: Pay **\$0.00** ~~\$24.38~~ upon approval for the Amazon Prime Rewards Visa Card. No annual fee.

Prompt from Amazon.com beneath an item’s purchase price, attempting to steer users to an Amazon Prime Rewards Visa Card, accessed December 19, 2021. Link routes to:

<https://www.amazon.com/gp/cobrandcard/marketing.html>

These sorts of prompts often appear below the item's price. Amazon appears to be leveraging its role as a merchant and its role as a credit card provider in order to attempt to steer users away from other payment methods and towards Amazon-supported payment methods.

Enhanced surveillance capabilities, which will enhance their monopoly power

Facebook's and Google's business models surveil the citizenry and then hyper-target individuals with content and advertising based on that surveillance, using algorithms that boost incendiary content that each individual is susceptible to click, like, or share. As gatekeepers, Facebook and Google filter the world's speech through these destructive business models, helping to create a global crisis of democracy and public health, renting out their manipulation machines to just about anyone who comes along. Despite worldwide efforts to protect users' privacy, including FTC consent decrees that were subsequently violated, these dangerous practices continue to this day. Allowing Big Tech platforms access to new forms of highly sensitive data further increases the dangers they pose.

Since many of our allies are focusing their comments on privacy concerns, Open Markets will focus here on the nexus between those privacy concerns and fair competition. Big Tech's access to new forms of data related to payments will not only threaten fundamental civil liberties, but will also fortify and grow their monopoly power. Privacy and monopoly are intricately related.

Facebook and Google can hyper-target users with digital advertising based on their 360-degree views of what their users read, think, and do, thanks to their ability to track users across millions of websites and even offline. Comprehensive tracking of users is fundamental to their targeted advertising business models, and apart from Big Tech, no other companies have surveillance architecture on a scale that can compete (as long as hyper-targeting is legal, which it shouldn't be). For this reason, Facebook, Google, and Amazon together control 80 to 90 percent of the digital ad market outside of China, according to recent estimates.¹²

Massive data collection allows giants to strengthen their monopoly power and to erect barriers to competitive entry. Facebook, for example, has used its control of data to try to shut out rivals. Leaked internal Facebook documents revealed that CEO Mark Zuckerberg personally kept a list of strategic competitors, who were not permitted to access the Facebook Graph API. Such behavior amounts to a discriminatory refusal to deal, which violates Section 2 of the Sherman Act under current legal standards. If a monopoly refuses to offer a service to a competitor that it offers to others, or if a monopoly has done business with the competitor and then stops for anti-competitive reasons, such behavior amounts to illegal monopolization. In another leaked

¹² Alistair Gray, "Three tech giants control half of advertising outside China", Financial Times, December 6, 2021, <https://www.ft.com/content/bcbc8674-060f-4298-aab8-91e40e00c3f2>.

document, a Facebook employee suggested cutting off a competitor’s access to Facebook’s API and using privacy as a pretense to justify the move.¹³

Amazon uses its data trove not only for advertising, but to compete unfairly. It can snoop into the data of its competitors, which is nearly any retailer or manufacturer, because selling on the e-commerce giant is no longer a matter of choice. Amazon’s access to user data, including which products consumers have even considered purchasing, allows Amazon to precisely target customers with sold-by-Amazon goods or Amazon brands in a way that other brands and sellers on the Amazon platform cannot, further skewing the competitive playing field on the Amazon marketplace.

Monopoly power is also detrimental to privacy. Platform monopolists can abuse consumers’ privacy without losing business to competitors because consumers lack alternatives. Lacking competition, platform monopolists charge monopoly rents on data, collecting data in ways that fall outside of consumer expectations. Privacy is also a dimension of quality, and consumers receive a lower-quality product than they would receive in a competitive market.

Allowing Big Tech to gather highly sensitive and valuable payments data, and to combine it with their existing massive dossiers on every American, will further entrench the platforms’ monopoly power and run counter to federal and state antitrust enforcement efforts aiming to rein in their anti-competitive conduct and combat their harms.

Use of Forced Arbitration in Payment Products

Of the six Big Tech firms named in the Bureau’s market monitoring order, all but Google employ clear forced arbitration clauses and class action bans, which deny users the right to sue in a court of law, instead using private arbitration for dispute resolution, where the outcomes are typically secret and there is no right to appeal. Google utilizes a series of overlapping terms which makes it unclear if forced arbitration governs their payment services.

Firm	Product	Link to terms	Forced Arbitration?	Class Action Ban?
Apple	Apple Pay	https://www.apple.com/legal/applepayments/direct-payments/	yes	yes
Google	Google Pay	https://www.gstatic.com/policies/terms/pdf/20200331/ba461e2f/google_terms_of_service_en.pdf ;	unclear	unclear

¹³ House of Commons Digital, Culture, Media and Sport Committee, UK Parliament, “Disinformation and Fake News: Final Report,” February 14, 2019, <https://publications.parliament.uk/pa/cm201719/cmselect/cmcmums/1791/1791.pdf>.

		https://payments.google.com/payments/apis-secure/u/0/get_legal_document?ldt=buyertos&ldr=US#SafeHtmlFilterIntro		
Facebook	Novi	https://www.novi.com/legal/app/us/terms-of-service?temp_locale=en_US	yes	yes
Amazon	Amazon Pay	https://pay.amazon.com/help/201212430	yes	yes
Square/Block	Cash App	https://cash.app/legal/us/en-us/tos	yes	yes
PayPal	Venmo	https://venmo.com/legal/us-user-agreement/?hide_header&hide_footer#agreement-to-arbitrate	yes	yes

Unique risks with crypto asset projects

Several of the Big Tech firms identified in the market monitoring order have already added support to buy and sell crypto assets through their payment apps. In addition, Facebook has announced plans for a crypto asset pilot project focused on remittances from the United States to Guatemala, utilizing Coinbase for custody, the Pax Dollar as the stablecoin, and Novi as the wallet. For a detailed discussion of the risks in Facebook’s crypto asset pilot, we are attaching to this comment a copy of the November 2021 letter Open Markets sent to the financial regulators.¹⁴

Cash App’s Buy, Sell, and Send Bitcoin Offering

Square’s **Cash App** offers users the ability to buy and sell Bitcoin.¹⁵ The language used in its marketing makes it seem like a consumer-to-consumer payment or consumer financial product: Cash App advertises the ability for users to send Bitcoin (or stocks) to other users as “as easy as

¹⁴ “Open Markets Documents Grave Concerns with Facebook’s Digital Wallet Pilot Program,” Open Markets Institute, November 23, 2021, [https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/619c15925a26166be151cf37/1637619090580/C](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/619c15925a26166be151cf37/1637619090580/Concerns+with+Facebook%E2%80%99s+digital+asset+pilot+project+.pdf)
[oncerns+with+Facebook%E2%80%99s+digital+asset+pilot+project+.pdf](https://static1.squarespace.com/static/5e449c8c3ef68d752f3e70dc/t/619c15925a26166be151cf37/1637619090580/Cconcerns+with+Facebook%E2%80%99s+digital+asset+pilot+project+.pdf).

¹⁵ “Bitcoin”, Cash App, <https://cash.app/help/us/en-us/1016-bitcoin>.

sending cash”, and has been marketing the feature as such in its app and on Twitter.¹⁶ The customer-facing marketing is substantially different than the warnings in its terms of service, which notes the risk of dramatic changes in the value of virtual currency that can lead to “substantial losses including loss of the entire value of the virtual currency.”¹⁷ The fees to send, purchase, and sell Bitcoin are not documented in the terms of service. Instead, they only state that “We may charge fees for Virtual Currency transactions within Cash App” and that the fees will be “shown to you at or prior to you confirming the transaction.” They also note that “We may change the fees at any time, with or without notice to you.”¹⁸ The Bureau should consider soliciting information regarding the specific fee schedules or fee percents that Cash App uses for crypto asset products.

Venmo’s Crypto Asset Offerings

Much like Square, PayPal does not disclose the precise fee, or fee percent, that users will be charged for crypto trading or sending. Their Cryptocurrency FAQ states instead that their fees will be disclosed “[a]t the time you buy or sell crypto assets,” including “the applicable exchange rate” and that the “actual spread may be higher or lower based on market conditions.”¹⁹

This seems to contradict Venmo’s terms of service for the state of Rhode Island, however, which notes that “[y]ou have the right to at least thirty (30) days’ prior notice of a change in our fee schedule or changes to these terms and conditions.”²⁰ The Bureau should consider soliciting information regarding the specific fee schedules or fee percentages that Venmo uses for crypto asset products.

In a “Cash vs. Crypto” article displayed beneath Venmo’s main crypto trading interface, Venmo states that paying for things with a digital wallet allows transfers “directly from your wallet to the seller’s wallet, without the interference of banks or the government.” This language raises questions as it would seem to imply that Venmo believes the transfers, purchase, and sale of crypto assets within Venmo, despite their customer-to-customer nature, are not subject to regulatory oversight.

¹⁶ Cash App (@CashApp), Twitter, December 14, 2021, 12:00 PM, <https://twitter.com/CashApp/status/1470800797705322502>. (“With Cash App, you can now send as little as \$1 in stock or bitcoin. It’s as easy as sending cash, and you don’t need to own stock or bitcoin to gift it. So this holiday season, forget the scented candles or novelty beach towel, and help your cousin start investing.”)

¹⁷ “Cash App Terms of Service”, Cash App, June 23, 2021, <https://cash.app/legal/us/en-us/tos>.

¹⁸ *Id.*

¹⁹ “Cryptocurrency FAQ”, Venmo Help Center, <https://help.venmo.com/hc/en-us/articles/360063753053-Cryptocurrency-FAQ->

(“At the time you buy or sell crypto assets, we will disclose to you the applicable exchange rate and the amount of fees that you will be charged for that transaction. The exchange rate may include an estimated spread of one-half of one percent (0.50%), provided, however, that the actual spread may be higher or lower based on market conditions. We will not separately calculate or disclose the spread we earn on each transaction.”)

²⁰ “Venmo Cryptocurrency Terms and Conditions”, Venmo, April 20, 2021, https://venmo.com/legal/crypto-terms/?hide_header&hide_footer.

- When you pay for things with your blockchain-issued digital wallet, the blockchain transfers crypto directly from your wallet to the seller’s wallet, without the interference of banks or the government.

Screenshot from Venmo app, “Cash vs. Crypto” article, accessed December 19, 2021.

Conclusion

We welcome the Bureau’s market monitoring order, and the transparency we hope it will provide. Big Tech knows the value of our financial data, and how to use it to manipulate our actions and leverage it into predatory practices. We urge the Bureau to continue to take all steps necessary to ensure that consumers are protected from abuses of dominant market power and violations of consumer protection laws.

Sincerely,

Open Markets Institute