

Heading Into 2022, Fintech Antitrust Strategy Isn't Optional

By **Thomas Panoff and William McElhaney** (November 19, 2021)

Antitrust scrutiny of business practices in the fintech industry has mushroomed in recent years as fintech products and companies, both new entrants and existing entities moving into the space, are in the middle of stunning growth.

According to the Bank for International Settlements, the fintech industry has raised an estimated \$1 trillion in equity since 2010.[1]

This pace shows no signs of abating, and likely will increase in 2022. Unsurprisingly, such growth has captured the attention of regulators and private litigants.

At the regulatory level, the U.S. Department of Justice's Antitrust Division, the Federal Trade Commission and the Consumer Financial Protection Bureau have been quite open in identifying the fintech industry as ripe for heightened scrutiny including numerous formal and informal public comments, actual investigations and enforcement matters.

While fintech falls within the jurisdiction of myriad legal and regulatory systems, antitrust regulators have not taken a back seat and follow-on actions by private litigants often are not far behind.

Accordingly, all core fintech players must identify and develop strategies to grapple with the key antitrust issues we will see evolve and emerge as we enter 2022.

In this article, we identify three key themes to pay close attention to in 2022:

1. Regulatory inquiries into privacy and the use of customer data;
2. Product and technology open access issues due to actual or perceived exclusivity in product offerings and functionality, e.g., a fintech offering only certain payment app options versus open access; and
3. The use of employment contract terms perceived to restrict the free flow of employees between competing entities, which federal and state antitrust agencies increasingly believe fall within their ambit and have begun to prioritize.

Privacy And Use of Customer Data

One of the foremost issues for regulators in 2021, and a trend that will no doubt continue in 2022, is the protection of customer privacy and account data. And although there are many lenses through which the government addresses issues in this space, antitrust law is likely to be front and center in 2022.

In a recent report to Congress, the FTC emphasized that it "will spend more time on the overlap between data privacy and competition." [2]



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According to the FTC's report, "[m]any of the largest players in digital markets are as powerful as they are because of the breadth of their access to and control over user data." [3] One should expect any increase in an antitrust-based review of data privacy to apply not just to Big Tech or social platforms, but also to fintech, especially since the lines that previously separated these entities continue to break down.

The payments sector in fintech, in particular, likely will remain a very active area of interest for regulators and private litigants in 2022. This is especially true since everyday transactions that had occurred by check or cash — such as splitting a restaurant bill or paying a babysitter — increasingly are replaced by electronic payments an app or text message.

In October and based on concerns involving market concentration and data privacy in China, the CFPB ordered six U.S.-based technology platforms offering payment services to "to turn over information about their products, plans and practices when it comes to payments." [4] The CFPB was, in large part, motivated by the "network" aspect of the payment systems, noting that "payments businesses are network businesses and can gain tremendous scale and market power, potentially posing new risks and undermining fair competition." [5]

Aside from increased regulatory scrutiny, private litigation in this space likely will continue to be active 2022. In 2020, several putative class actions were filed against a leading fintech that provides services allowing other fintech apps to connect to consumer's bank accounts.

The consolidated class actions alleged that the fintech, "misled and violated the privacy of" the putative class members,

by obtaining data from their financial accounts without authorization, and by obtaining their bank login information through its user interface ... which Plaintiffs allege was designed to have the look and feel of the user's own bank account login screen. [6]

In August 2021, the parties agreed to a \$58 million class-wide settlement. [7]

This litigation helps underscore that fintechs will need to navigate not just increased regulatory scrutiny in 2022, but also increased private litigation that goes to core aspects of their business models.

Product Exclusivity and Technology Open Access Issues

Another key area of inquiry in 2022 will likely involve open access issues, particularly where Big Tech and fintech intersect.

Take the following hypothetical:

You decide to close the checking account that you had at a brick-and-mortar bank for the last 20 years and transition instead to an account at a fintech where you also have a brokerage account. You like the idea of having your accounts in one place, the higher interest rate on your deposit balance at the fintech — or more likely, its bank partner — the ability to invest in crypto assets, and the user-friendly nature of the fintech app.

But when you go to pay the landscaper at your house through the payment app accepted by

your landscaper, you realize that your fintech does not support the payment app chosen by your landscaper and instead only offers a rival peer payment app.

Or imagine that you move your brokerage account to a fintech and then later realize that the mutual fund you wanted to purchase is not available because the fintech limits your option to its own brand of mutual funds or those fund families with which it has an agreement, or it charges a higher fee for the desired mutual fund compared to its own brand of mutual funds.

These and other open access issues will continue to be an area of focus by regulators and litigants in 2022 —especially as the rate of fintech adoption by consumers continues to grow.

Indeed, open access seems to be one of the few areas in government these days when there is a substantial amount of bipartisan support.

For example, on Oct. 18, Sens. Amy Klobuchar, D-Minn., chair of the Senate Judiciary Committee's Antitrust Subcommittee, and Chuck Grassley, R-Iowa, the ranking member on the Judiciary Committee, along with an additional five Republican and five Democrat co-sponsors, introduced the American Innovation and Choice Online Act, S.B. 2992, which would prohibit certain covered platforms from engaging in the following activities deemed as unlawful conduct under the act:

- Preventing another business's product or service from interoperations with the covered platform;
- Requiring a business to buy a covered platform's goods or services for preferred placement;
- Misusing a business's data to compete against the business; or
- Biasing search results in favor of the covered platform.[8]

Although the act is directed more at Big Tech platforms than fintech, it likely would impact the fintech industry too as Big Tech continues either to acquire or partner with fintechs and issues arise, for example, as to whether competing fintechs can operate on the same platform and, if so, if they are placed on a level playing field.

And regardless of pending legislation in Congress that might change the legal landscape for fintech, it is clear that regulators already have an eye on issues related to open access and product offerings.

In particular, in a recent DOJ publication, officials commented on potential competition issues related to so-called techfin — technology companies "that have embedded financial services within their business model to enhance their own products and build new revenue lines."

The publication also discusses how the rise in open banking — i.e., the ability for consumers "to port their financial data" to other providers — might "allow these major tech players to take a dominant position in the financial space." [9]

As the techfin trend continues its rapid growth through Big Tech's acquisition and

incorporation of fintech, or as fintech entities themselves grow in size to be deemed Big Tech in their own right, it is clear that open access and product choice issues will be the center of attention by regulators in 2022.

Anti-Competitive Labor Agreements

Another key area to watch in 2022 in the fintech industry is regulatory review and private litigation challenging no-poach agreements between fintechs that would otherwise compete for employees. No-poach agreements are agreements between companies, either orally or in writing, not to compete for each other's employees.

Recently, the DOJ's Antitrust Division has shown great interest in no-poach cases in other industries more broadly, i.e., outside of fintech, filing numerous statements of interest in private civil litigation^[10] as well as even bringing a criminal prosecution for a no-poach agreement, for which a federal grand jury delivered an indictment in January of this year.^[11]

In a recent statement of interest filed by the DOJ, for example, it argued that the per se rule should apply to no-poach agreements, unless those utilizing the agreements can demonstrate that they are "reasonably necessary to a separate legitimate business transaction or collaboration between the employers, in which case the rule of reason applies."^[12]

Given the fierce competition between fintechs for talent and the high level of lateral movement by employees between fintechs, it is reasonable to assume that fintechs are likely in the crosshairs of the DOJ and other regulators due to their increased efforts to root out no-poach agreements.

And as often occurs, where there has been DOJ enforcement action related to no-poach agreements, private civil litigation tends to follow. In addition, there is reason to believe that classwide damage in fintech no-poach class actions could be substantial, because settlements in the space are often based on a percentage of a company's payroll for employees subject to the agreement, and fintech salaries can be quite high.

Thus, fintech companies should avoid entering into agreements or arrangements that could be construed as no-poach pacts, and if any such agreement is desired, consider carefully with counsel whether it is, as the DOJ says, "reasonably necessary to a separate legitimate business transaction or collaboration" with another company.

Conclusion

As the fintech industry continues its impressive growth in 2022 and as the lines between Big Tech and fintech continue to blur either through organic growth, acquisitions or partnerships, one should expect that fintech will receive increased attention in 2022 and beyond by both regulators and private litigants.

And although data privacy, open access issues and labor agreements likely will be in focus next year, the dynamic and entrepreneurial nature of the fintech space means that the regulatory and litigation-based risks also will continue to evolve along with the industry.

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[1] https://www.bis.org/publ/qtrpdf/r_qt2109c.htm.

[2] FTC Report to Congress on Privacy and Security, Sept. 13, 2021, at 4 (available at: https://www.ftc.gov/system/files/documents/reports/ftc-report-congress-privacy-security/report_to_congress_on_privacy_and_data_security_2021.pdf).

[3] Id.

[4] Statement of the Director Regarding the CFPB's Inquiry Into Big Tech Payment Platforms, Oct. 21, 2021 at 1 (available at: https://files.consumerfinance.gov/f/documents/cfpb_section-1022_directors-statement_2021-10.pdf).

[5] Id.

[6] In re: Plaid Inc. Privacy Litig., No. 4:20-cv-03056 (N.D. Cal.), Dkt. 135-2 at 1.

[7] Id.

[8] Senate Bill 2992, Section 2, (available at: <https://www.congress.gov/bill/117th-congress/senate-bill/2992/text>).

[9] Jill Westmoreland Rose, Kelli Andrews and Karyn Kenny, Introduction to the FinTech Ecosystem, "The future rise of TechFins and open banking," DOJ Journal of Federal Law and Practice, May 2021 at 35-36 (available at: <https://www.justice.gov/usao/page/file/1403671/download>).

[10] Statement of Interest of the United States of America, Seaman v. Duke University (2019) (No. 1:15-cv-462) D/E 325; Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc. (2019) (No. 2:18-cv-00247-SAB) D/E 38.

[11] Indictment, United States v. Surgical Care Affiliates, LLC, No. 21-cr-0011-L (N.D. Tex. Jan. 5, 2021), ECF No. 1, <https://www.courtlistener.com/recap/gov.uscourts.txnd.342829/gov.uscourts.txnd.342829.1.0.pdf>.

[12] Statement of Interest of the United States of America, Seaman v. Duke University (2019) (No. 1:15-cv-462) D/E 325 at 25.

[13] <https://www.justice.gov/atr/antitrust-issues-and-your-small-business/avoiding-antitrust-issues-hiring-and-management>.