

**VI. *Facebook, Apple, and Other Tech Platforms’ Investigation for Use of Financial Data by the Consumer Financial Protection Bureau***

**A. Introduction**

In October 2021, the Consumer Financial Protection Bureau (“CFPB” or “Bureau”) launched an investigation into Big Tech companies offering digital payment services, including Apple, Amazon, Google, and Facebook.<sup>1</sup> The CFPB ordered these companies to produce information to help the Bureau better understand personal financial data use and access management.<sup>2</sup> The CFPB enumerated its specific concerns as: (1) data harvesting: Big Tech companies’ use of data for behavioral targeting or sale to third parties; (2) access restrictions: the potential for exclusion of certain merchants from the payment platform leading to adverse impacts on consumer choice; and (3) other consumer protections: how these companies are protecting customers under the Electronic Fund Transfer Act and the Gramm-Leach-Bliley Act.<sup>3</sup> One of the Bureau’s stated goals is to monitor for consumer risks and to make its findings public in order to provide consumers with a fuller understanding of those risks.<sup>4</sup>

As such, in August 2022, the CFPB published a report based on the findings of the investigation.<sup>5</sup> This report outlined the background of the 2021 orders, the rapid growth of the pertinent payment systems, and emerging uses, such as super apps and “Buy Now, Pay Later (BNPL).”<sup>6</sup> The report then goes in depth discussing potential consumer risks, though it does not clarify whether it has identified most of these

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<sup>1</sup> *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans*, CFPB (Oct. 21, 2021), <https://www.consumerfinance.gov/about-us/newsroom/cfpb-orders-tech-giants-to-turn-over-information-on-their-payment-system-plans/>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (“The CFPB has the statutory authority to order participants in the payments market to turn over information to help the Bureau monitor for risks to consumers and to publish aggregated findings that are in the public interest.”).

<sup>5</sup> *See generally* CONSUMER FINANCIAL PROTECTION BUREAU, THE CONVERGENCE OF PAYMENTS AND COMMERCE: IMPLICATIONS FOR CONSUMERS (2022).

<sup>6</sup> *Id.* at 3.

risks as having come to fruition in any of the companies it has been investigating.<sup>7</sup> Finally, the CFPB states its intentions to propose rules to give consumers greater control of their own data, investigate Buy Now, Pay Later and whether regulatory oversight is necessary, and limit fraud losses as Big Tech firms continue to move into the payment space.<sup>8</sup>

Most recently, in November 2023, the CFPB expanded upon its concern regarding consumer choice.<sup>9</sup> More specifically, it highlighted the fact that Apple blocks access to third party payment apps for its tap-to-pay feature, only allowing tap payments through Apple Pay itself.<sup>10</sup> The Bureau is concerned Google may follow suit, though this is not currently the case.<sup>11</sup> Two years after launching the investigation, the CFPB officially proposed a rule which would bring all large nonbank digital payment companies under its authority under the Consumer Financial Protection Act and require these companies to comply with the same rules as banks and credit unions.<sup>12</sup>

## B. Background

The Consumer Financial Protection Bureau was established in 2010 when President Obama signed the Dodd-Frank Wall Street Reform and Consumer Protection Act.<sup>13</sup> The Act was a response to the

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<sup>7</sup> *Id.* at 16-18 (“Given the prevalence of machine learning and algorithmic optimization in modern business, companies increasingly have the capability to leverage consumer financial data to achieve outcomes that may take significant financial advantage of consumers . . . . The Bureau intends to carefully monitor and scrutinize these practices for potential fair lending risks . . . .”).

<sup>8</sup> *Id.* at 19.

<sup>9</sup> See generally *CFPB Report Highlights Role of Big Tech Firms in Mobile Payments*, CFPB, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-report-highlights-role-of-big-tech-firms-in-mobile-payments/> (Sep. 7, 2023).

<sup>10</sup> *Id.* (“Apple’s iPhone and other iOS devices do not permit third-party payment apps to access the NFC technology that is necessary to execute tap-to-pay contactless payments.”).

<sup>11</sup> *Id.*

<sup>12</sup> *CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps*, CFPB, <https://www.consumerfinance.gov/about-us/newsroom/cfpb-proposes-new-federal-oversight-of-big-tech-companies-and-other-providers-of-digital-wallets-and-payment-apps/> (Nov. 7, 2023).

<sup>13</sup> *Building the CFPB*, CFPB, <https://www.consumerfinance.gov/data-research/research-reports/building-the-cfpb/>.

financial crisis of the preceding years and was intended “to address the failures of consumer protection” and to “heighten government accountability by consolidating in one place responsibilities that had been scattered across the government,” meaning the CFPB would have centralized authority to regulate in spaces involving the financial protection of consumers.<sup>14</sup> In the fourteen years since its inception, the CFPB’s focus has turned to protecting consumers from the increased presence of Big Tech firms in the financial space, whose practices and purpose are a relatively new obstacle for regulators to tackle.<sup>15</sup>

These entities, particularly the biggest players such as Apple and Google, have become just as involved in a given consumer’s everyday transactions as some banks, with some Big Tech firms handling over 5 million transactions per year.<sup>16</sup> Despite the pure volume of transactions, these entities are still considered nonbanks for regulatory purposes.<sup>17</sup> This means that, under existing frameworks, Big Tech companies (including those with greater pull in the banking space than most banks) are free to grow and, in their eyes, innovate without the burden of being regulated in the same way as traditional banks.<sup>18</sup> The Center for Data Innovation echoed these sentiments in its comments to the CFPB on proposed regulation, arguing that treating Big Tech firms as banks will prevent these companies from continuing to innovate freely—a suggestion that scholars have dismissed.<sup>19</sup>

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<sup>14</sup> *See id.*

<sup>15</sup> *See generally* CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans, *supra* note 1 (describing the CFPB’s investigation of payment data practices as part of its broader effort to ensure adequate consumer protection).

<sup>16</sup> CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps, *supra* note 12.

<sup>17</sup> *Id.*

<sup>18</sup> *See generally* Rory Van Loo, *Making Innovation More Competitive: The Case of Fintech*, 65 UCLA L. REV. 232 (2018) (“If allowed to grow unchecked, fintechs or the big banks acquiring them may reach the kind of digital market dominance seen in Google, Facebook, and Amazon, thereby increasing systemic risk.”).

<sup>19</sup> *See Comments to the CFPB on the Larger Participant Rule*, Information Technology & Innovation Foundation, <https://itif.org/publications/2024/02/07/comments-to-cfpb-on-larger-participant-rule/> (Feb. 7, 2024); Van Loo, *supra* note 18, at 239 (“...the main drivers of fintech innovation have been the thousands of startups attracting billions of dollars in investment each year.”).

### C. Data Harvesting

Data privacy concerns are often rooted in the worry that one's data will be misappropriated outside of the consumer-provider relationship.<sup>20</sup> While Big Tech companies themselves “may be using this data for behavioral targeting,” they may also be profiting off the sale of this data to third parties without the consent of the consumer.<sup>21</sup> All of this often results in the phenomenon known as digital resignation, which is a feeling of helplessness which occurs when “people desire to control the information digital entities have about them but feel unable to do so.”<sup>22</sup>

The CFPB has pushed to bring Big Tech companies under the “financial institution” umbrella for the sake of rulemaking, but what exactly does this mean?<sup>23</sup> In a 2022 summary of an Outline of Proposals and Alternatives, the CFPB clarified that it considers financial institutions and credit card issuers collectively to be “covered data providers” whose actions are subject to the authority of the Bureau.<sup>24</sup> If Big Tech companies are encompassed in that purview, then the CFPB's proposal would require these companies to make consumer financial data “available to a consumer, upon request,” as is consistent with section 1033(a) of the Dodd-Frank Act.<sup>25</sup>

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<sup>20</sup> See *CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps*, *supra* note 12.

<sup>21</sup> *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans*, *supra* note 1.

<sup>22</sup> Nora A. Draper & Joseph Turow, *The corporate cultivation of digital resignation*, *NEW MEDIA & SOCIETY* 1, 1 (2016).

<sup>23</sup> See *CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps*, *supra* note 12 (“The rule proposed today would ensure that these nonbank financial companies . . . adhere to the same rules as large banks, credit unions, and other financial institutions already supervised by the CFPB.”).

<sup>24</sup> HIGH-LEVEL SUMMARY AND DISCUSSION GUIDE OF OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION FOR SBREFA: REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS, 4 (Oct. 27, 2022) (hereinafter: “Summary”).

<sup>25</sup> SMALL BUS. ADVISORY REV. PANEL FOR REQUIRED RULEMAKING ON PERSONAL FINANCIAL DATA RIGHTS: OUTLINE OF PROPOSALS AND ALTERNATIVES UNDER CONSIDERATION, 3 (Oct. 27, 2022) (hereinafter: “Outline”) (*quoting* Dodd-Frank Wall Street Reform and Consumer Protection Act, section 12 U.S.C. § 1033(a) (2010)).

It is not that data should not be shared at all, but that it should be the choice of the consumer to share data with a third party, such as a competing service provider, a choice the consumer would gain under this proposal.<sup>26</sup> The proposal highlights how providers, unsupervised, are able to hold data hostage and retain customers through the manufactured inconvenience to the consumer in switching providers.<sup>27</sup> The Proposed Rule would force providers to “earn [and retain] their customers through competitive prices and high-quality service,” driving home the implicit point that this is not only a consumer rights issue, but an antitrust issue.<sup>28</sup> In fact, amidst regulatory developments abroad (including the Netherlands, South Korea, and Australia) regarding antitrust concerns, Apple has been ordered “to face a private class action led by three credit union card issuers” in the United States for allegedly “violat[ing] the federal Sherman Antitrust Act by thwarting competition for Apple Pay.”<sup>29</sup>

It is worth noting that, perhaps unexpectedly, Apple appears to be in support of more openness regarding data sharing between financial service providers, having already taken advantage of the United Kingdom’s Open Banking framework to integrate shared financial data into Apple Pay.<sup>30</sup> This beta feature requires consumer consent, displaying card balance on the Apple Pay interface shared by banks and credit card providers only after the consumer gives iOS permission to access the information.<sup>31</sup> Some have pointed out that Apple’s interest in opening up banking data, as well as its relatively ethical approach to consumer

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<sup>26</sup> See *Id.* at 4 (describing the relationship between data privacy and competition between providers).

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> James Pothen, *Apple’s payments regulation woes mount*, PAYMENTS DIVE (Nov. 2, 2023), <https://www.paymentsdive.com/news/apple-pay-payment-regulation-cfpb-digital-wallet-global/698686/>.

<sup>30</sup> See Jonny Evans, *Open Banking comes to iOS as Wallet gains UK account access*, APPLE MUST (Sept. 28, 2023), <https://www.applemust.com/open-banking-comes-to-ios-as-wallet-gains-uk-account-access/> (“Apple is about to make Apple Pay in its Wallet app much more useful for UK customers with built-in access to bank account data inside the app. This is based on the Open Banking framework supported by most UK banks which lets you check your account at multiple entities from within any banking app.”).

<sup>31</sup> See *id.*

financial data, seems to be unique in the Big Tech space.<sup>32</sup> Whether Apple's stance comes from a place of ethics or the simple fact that they are the largest Big Tech player in the digital payment space and therefore likely stand to benefit the most from open data sharing in the US, it is clear that not all Big Tech companies view consumer-informed data sharing as an obstacle to growth and innovation.<sup>33</sup>

#### D. Access Restrictions

Data harvesting concerns overlap with access restriction concerns to the extent that "access" is understood to mean access to consumer financial data.<sup>34</sup> In addition to data privacy, the CFPB is concerned that digital payment service providers could "limit consumer choice and stifle innovation by anticompetitively [sic] excluding certain businesses."<sup>35</sup> This worry has already been realized in part, with Apple blocking third party apps in the United States from accessing its tap-to-pay option, reserving the feature exclusively for Apple Pay itself.<sup>36</sup> Additionally, Apple's regulatory struggles overseas are rooted in its approach to digital payments in third party apps.<sup>37</sup> The company has not only completely blocked the use of alternate digital payment services in third party apps in the South Korea and the Netherlands, but its 30% commission charge in the latter country has been ruled as excessive by

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<sup>32</sup> See Jonny Evans, *The regulators are coming for Apple Pay*, COMPUTER WORLD (Nov. 8, 2023, 8:28 AM), <https://www.computerworld.com/article/3710091/the-regulators-are-coming-for-apple-pay.html> ("The CFPB also seems to want to prevent upstart tech payments companies from gathering and abusing personal financial data. (Apple does less of this, others may not be quite so ethical.)").

<sup>33</sup> See generally *Open Banking comes to iOS as Wallet gains UK account access*, *supra* note 30; *The regulators are coming for Apple Pay*, *supra* note 32.

<sup>34</sup> C.F.P.B. DOC. NO. 2023-0052, 12 CFR pt. 1001 & 1033, at 72 (2023) (hereinafter: "Required Rulemaking").

<sup>35</sup> *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans*, *supra* note 1.

<sup>36</sup> See *CFPB Report Highlights Role of Big Tech Firms in Mobile Payments*, *supra* note 9 ("Apple's iPhone and other iOS devices do not permit third-party payment apps to access the NFC technology that is necessary to execute tap-to-pay contactless payments. Apple's proprietary payment app, Apple Pay, is the only option for tap-to-pay payments on iOS devices.")

<sup>37</sup> See generally Pothen, *supra* note 29.

regulators.<sup>38</sup> The CFPB has acknowledged the power dynamic involved here, as smaller businesses are at the mercy of Big Tech and may see an adverse impact on their revenues if their access to new technology is restricted.<sup>39</sup>

Small businesses are not an afterthought here, seeing as the “Dodd-Frank Act requires the CFPB to comply with SBREFA, which imposes additional procedural requirements for rulemakings, including this [small business] consultative process, when a rule is expected to have a significant economic impact on a substantial number of small entities.”<sup>40</sup> One option the CFPB has considered proposing and running by small businesses is “that covered data providers would be required to make available all the information... through online financial account management portals” which they refer to as “third-party access portals.”<sup>41</sup> Such requirements would help to level the playing field somewhat between Big Tech giants and smaller entities whose business has increasingly become reliant upon the services offered by Apple, Google, and others.<sup>42</sup>

Big Tech and its pundits have honed in on innovation as a key rebuttal to proposed regulation. In its comments to the CFPB’s proposed regulation, TechNet categorizes the Bureau’s approach to regulating Big Tech as “one-size-fits-all,” arguing the Proposed Rule fails to strike a balance between consumer protection and “continuing to allow innovation to flourish.”<sup>43</sup> TechNet accordingly urged the CFPB to reconsider the entire Proposed Rule to attempt to find that balance, though it did not elaborate on how exactly innovation would be limited and what the CFPB could do to address the issue.<sup>44</sup> In its aforementioned com-

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<sup>38</sup> *Id.* (“A Dutch regulator has ruled that the Cupertino, California-based company is charging too much in commissions for subscription-based apps like Tinder...”).

<sup>39</sup> *See* Required Rulemaking, *supra* note 34, at 218 (“Finally, restrictions on secondary use of data may reduce revenues for some third parties, leading to changes in product offerings or pricing.”).

<sup>40</sup> Outline, *supra* note 25, at 5.

<sup>41</sup> *See* Summary, *supra* note 24, at 9.

<sup>42</sup> *See id.* (describing policies that are intended to have this effect).

<sup>43</sup> *TechNet Submits Comments to the CFPB on its Proposed Rule on Large Participants in Payment Markets*, TECHNET, <https://www.technet.org/media/technet-submits-comments-to-the-cfpb-on-its-proposed-rule-on-large-participants-in-payment-markets/>, (Jan. 9, 2024).

<sup>44</sup> *See id.*

ments to the CFPB, the Center for Data Innovation outlined more specific concerns regarding the Proposed Rule.<sup>45</sup> The Center for Data Innovation requested that the CFPB: (1) parse through each product type and provide a report for each type regarding consumer risk; (2) raise its threshold for defining a “large participant” from the proposed \$5 million per year transaction threshold; (3) create individualized regulations for different product types; and (4) remove language that eliminates a carveout for retailers offering financial services at checkout to prevent retailers avoiding these services “to escape CFPB supervision.”<sup>46</sup>

While the Center for Data Innovation’s requests seem reasonable, particularly points (1), (3), and (4), they appear to be related tangentially at best to fostering innovation, which is ostensibly the Center’s primary concern.<sup>47</sup> At a glance, it seems likely the CFPB could rework its Proposed Rule to ease those three concerns without materially impacting the reach or effects of the regulation. As far as the poorly supported arguments regarding innovation, scholars seem to feel the exact opposite as Big Tech supporters do, with Rory Van Loo offering that “[d]espite the participation of large technology companies, the main drivers of fintech innovation have been the thousands of startups attracting billions of dollars in investment each year.”<sup>48</sup> While Big Tech seems to have made “innovation” its buzz word in the fight against regulation, there seems to be little evidence that FinTech innovation as a whole will be significantly impacted by the Proposed Rule.

### E. Other Consumer Protections

Finally, the CFPB wants to ensure that Big Tech companies emphasize consumer protection and comply with laws like the Electronic Fund Transfer Act and the Gramm-Leach-Bliley Act.<sup>49</sup> The EFTA, fittingly, governs electronic transactions and was introduced in 1978 to regulate such exchanges as cash payments began to decline.<sup>50</sup>

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<sup>45</sup> See *Comments to the CFPB on the Larger Participant Rule*, *supra* note 19.

<sup>46</sup> See *id.*

<sup>47</sup> See *id.* (“The Center commends the CFPB for recognizing innovation and technology’s role in advancing digital consumer financial products.”).

<sup>48</sup> Van Loo, *supra* note 18, at 239.

<sup>49</sup> See *CFPB Orders Tech Giants to Turn Over Information on their Payment System Plans*, *supra* note 1 (“The orders seek to understand the robustness with which payment platforms prioritize consumer protection under laws such as the Electronic Fund Transfer Act and the Gramm-Leach-Bliley Act.”).

<sup>50</sup> See generally Electronic Fund Transfer Act, 15 U.S.C. § 1693 (1978).

The Gramm-Leach-Bliley Act, meanwhile, covers financial institutions and their handling of consumer financial information, specifically regarding the transfer of such information to third parties.<sup>51</sup> If the CFPB is successful in its push to recognize certain Big Tech companies as financial institutions, the EFTA and Gramm-Leach-Bliley Act will be at the core of rulemaking efforts.<sup>52</sup>

The CFPB has made it clear that “covered data providers” under its proposal are subject to the Gramm-Leach-Bliley Act.<sup>53</sup> In this context, the proposed third-party access portals would be governed by the Gramm-Leach-Bliley Act as long as the interested parties are considered financial institutions for the purposes of the new rules.<sup>54</sup> It is important to see laws like the Gramm-Leach-Bliley Act and EFTA as backbones to reinforce new regulations as opposed to past standards which have to change with the times; the CFPB has specified that its Proposed Rule will not interfere with the rights guaranteed by such laws, namely the right to digital error resolution and protection from unauthorized transfers afforded by the EFTA.<sup>55</sup>

## F. Conclusion

Consumers increasingly need protection in the world of digital resignation where the illusion of choice does not prevent feelings of helplessness.<sup>56</sup> If the CFPB can successfully label Big Tech companies

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<sup>51</sup> See generally Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, §§ 6821-6827 (1999).

<sup>52</sup> See Outline, *supra* note 25, at 11. (“The data providers that would be directly affected by the proposals under consideration include depository and nondepository financial institutions that provide consumer funds-holding accounts or that otherwise meet the Regulation E definition of financial institution.”).

<sup>53</sup> See Summary, *supra* note 24, at 13 (“With respect to the security of third-party access portals, the CFPB believes that nearly all—if not all—covered data providers must already comply with either the Safeguards Rule or Guidelines issued under the Gramm-Leach-Bliley Act (GLBA), as well as the prohibition against unfair practices.”).

<sup>54</sup> See *id.*; CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps, *supra* note 12.

<sup>55</sup> See Required Rulemaking, *supra* note 34, at 22. (“This proposed rule would not alter a consumer’s statutory right under EFTA to resolve errors through their financial institution.”).

<sup>56</sup> See Draper & Turrow, *supra* note 22.

who offer digital payment services as financial institutions, the data privacy laws which govern them will help combat this issue.<sup>57</sup> Corporations like Apple are too powerful to be left unregulated when it comes to merchant access to payment services as well as third-party payment services' access to physical payment methods.<sup>58</sup> The CFPB's Proposed Rule changes have a chance to limit the otherwise unilateral power that some of these Big Tech giants have exercised.<sup>59</sup> In modern times, Big Tech firms in the digital payment space must be considered financial institutions for the purposes of both the EFTA and Gramm-Leach-Bliley Act; under the CFPB's plan, these laws will not only be in effect, but contextualized and strengthened to suit the novel problem of Big Tech's growth in the financial services space.<sup>60</sup>

Still, when looking at the big picture, it is difficult not to feel as though the Proposed Rule leaves something to be desired. Perhaps this is due to the fact that, for all its discussion about consumer protection, there is relatively little discussion of the actual consumer. Undoubtedly, proposals such as the "third-party access portal" would represent important strides in modern consumer protection.<sup>61</sup> However, a larger stride would be taking suggested solutions like this a step further and emphasizing consumer education to maximize the impact of new frameworks. Requiring consumer consent to share data is a worthwhile pursuit, but only if the average consumer understands what they are (or are not) consenting to, why it is important, and what their data will be used for; otherwise, that "consent" has meaning only to the corporations who are able to gain access to information based on the consumer's ignorance.<sup>62</sup>

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<sup>57</sup> See Summary, *supra* note 24, at 4.

<sup>58</sup> See CFPB Proposes New Federal Oversight of Big Tech Companies and Other Providers of Digital Wallets and Payment Apps, *supra* note 12 ("The rule proposed today would ensure that these nonbank financial companies—specifically those larger companies handling more than 5 million transactions per year—adhere to the same rules as large banks, credit unions, and other financial institutions already supervised by the CFPB.").

<sup>59</sup> See generally Summary, *supra* note 24 (highlighting potential impacts of the Proposed Rule).

<sup>60</sup> See Required Rulemaking, *supra* note 34, at 22 (describing the applicability of the EFTA and other acts).

<sup>61</sup> See Summary, *supra* note 24, at 9 (providing an overview of the proposed third-party access portal).

<sup>62</sup> See Draper & Tullow, *supra* note 22, at 8 ("Pollach points to the challenges of determining whether the construction of privacy policies represents

This logic can be applied to an array of the proposed solutions. Consumers are not inherently helpless, but have been placed in a position where they struggle to help themselves. The CFPB should not be handing the consumer a proverbial fish, but teaching the consumer how to fish for themselves. That is to say, a primary goal in consumer protection should be to keep consumers informed so they are able to protect themselves. If the CFPB's Proposed Rule can be combined with an increased emphasis on consumer education, digital resignation will become a much less daunting enemy. Once consumers have an understanding of their rights, their role in their own data protection, and their importance to the corporations and banks that seem so powerful, it is unlikely that Big Tech will be able to operate the same way in the financial data space. Instead, the power can be returned to the consumers and the competition of a *true* free market: one revolving around quality service and fair prices instead of manufactured confusion and inconvenience.

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intentional efforts to occlude corporate practices. Nevertheless, she argues, the resulting confusion functions to inhibit informed consent and provides companies with access to information they would be otherwise unlikely to obtain”).

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