

December 21, 2021

VIA ELECTRONIC SUBMISSION

<https://www.regulations.gov>

Bureau of Consumer Financial Protection
1700 G Street NW
Washington, DC 20552

Re: Notice and Request for Comment Regarding the CFPB’s Inquiry Into Big Tech Payment Platforms (Docket No. CFPB–2021–0017)

The Electronic Transactions Association (“ETA”) respectfully submits these comments in response to the Bureau of Consumer Financial Protection (“CFPB” or “Bureau”) “Inquiry Into Big Tech Payment Platforms” (“Inquiry”). Pursuant to this Inquiry, the Bureau has issued orders (the “Orders”) to several companies requiring the production of significant amounts of documents and information relating to their payments and other financial products and services.

As the leading trade association for the payments industry, ETA represents over 500 payments and fintech companies (including several of the companies that received Orders) that provide consumers and small businesses access to safe, reliable, innovative, and effective payments technologies. Our members support the Bureau’s mission of protecting consumers and appreciate the opportunity to provide comments in connection with the Inquiry. In Section I, we provide information on the payments industry, including how ETA’s members use data to fight fraud and provide safe and reliable payments products and services. In Section II, we offer suggestions for how the Bureau might use its market monitoring authority in these kinds of inquiries to gather helpful information without disrupting industry and consistent with due process and other administrative best practices.

I. The Payments Industry Uses Data to Fight Fraud and Offer Consumers and Small Businesses Safe, Reliable, Innovative, and Cost-Effective Products and Services

Based on our review of the Orders, it appears that one of the Bureau’s primary areas of interest is the extent to which the recipients gather and use consumer and other information in connection with payments and related financial services. ETA’s members provide payment processing, merchant acquiring, money transmission, and other payments-related services for consumers and businesses. Our members use merchant and transactional data to provide a wide range of products and services

designed to enhance and secure electronic payments and related transactions, including to reduce fraud and authenticate transactions.

These activities are carried out within a comprehensive legal and regulatory framework that governs payments and related financial products and services. There are numerous federal and state laws and regulations that govern activities such as money transmission, customer due diligence, credit reporting, information security, data protection, privacy, and prohibitions on unfair, deceptive, or abusive acts or practices. Of particular relevance, the use of financial information in the electronic transactions industry is governed by federal law, including the Gramm-Leach-Bliley Act, while other data and its uses are governed by robust state privacy regimes, including the California Consumer Privacy Act, as well as self-regulatory programs, including the Payment Card Industry Data Security Standard (“PCI-DSS”), which sets forth requirements designed to ensure companies that process, store, or transmit credit card information maintain a secure environment for such data. In addition, most payments companies work closely with banks and other regulated financial services providers, which means they are often contractually obligated to comply with additional bank regulatory requirements.

Within this regulatory framework, the payments industry has done a remarkable job in developing cutting-edge products that pair enhanced customer experience with robust security measures to help consumers connect with merchants, make payments, and move money. Each year consumers and businesses spend nearly ten trillion dollars in card and other types of payments. This infrastructure is sophisticated, secure, and fast – processing over 270,000 transactions per minute. Indeed, consumers continue to choose electronic payments over cash and checks because of the fraud liability protections afforded by electronic payments.

In addition to fraud liability protection, the payments industry has taken the lead in developing additional fraud mitigation and data security protection best practices, including, for example:

- The payments industry developed the PCI-DSS for handling the safety of cardholder data. The PCI-DSS has become a leading data security standard across the payments and related industries.
- The payments industry has introduced point-to-point encryption (P2PE) and the tokenization of data to minimize or eliminate the exposure of unencrypted data in connection with purchases.
- The payments industry is continually developing new authentication methods to verify and authenticate transactions and minimize potentially fraudulent transactions.

- The payments industry continues to develop responsible and effective tools for monitoring and analyzing payment data for suspicious activity, including machine learning and artificial intelligence technologies. In addition, the payments industry continues to fight fraud through robust underwriting and monitoring policies and procedures. For its part, ETA has published various guidelines that provide underwriting and diligence best practices for merchant and risk underwriting, including the “Guidelines on Merchant and ISO Underwriting and Risk Monitoring” and “Payment Facilitator Guidelines.”

These are just some of the tools that the payments industry has developed in recent years that leverage data to fight fraud, protect consumers, and ensure the integrity of the payments ecosystem. These efforts have been remarkably successful in minimizing fraud while allowing consumers to use fast, reliable, and safe payment options to access cutting-edge products and services. This innovation was never more apparent than during the initial days of the COVID-19 pandemic when the payments industry played a critical role in helping consumers pay for goods and services, helping consumers and businesses quickly and securely receive federal aid, and providing innovative ways for merchants to continue to transact with consumers.

While payments are heavily regulated, when looking across the entire payments landscape and comparing it to the broader financial services industry, there may be differences in the application of existing laws and regulations across industry players. ETA believes entities should be regulated based on the risk profile presented by payments activities to ensure consumer protection, the safety and soundness of the payments system, and overall financial stability. ETA is committed to ensuring that consumers enjoy robust protections when utilizing electronic payments.

In sum, the payments industry has taken the lead in developing best practices to protect consumer data while ensuring industry has the flexibility to innovate, such as the development of P2P payments, secure digital wallets, and simplifying payment acceptance for small businesses. As such, ETA strongly encourages the Bureau to be sensitive to the risk of stifling creativity and innovation in the market that could occur if future rules for payments products and services are developed without an appreciation of differences in products and services and consumer needs. This may also lead to unforeseen costs to consumers or, worse, loss of access to tools to participate in financial empowerment. As technology and innovation continue to shape how payments products are created and how these products are delivered and employed by customers, regulation in this space must remain adaptable and should neither impose rigid rules that have the effect of unnecessarily restraining innovation or the many benefits the payments industry provides to consumers and businesses, nor fail to acknowledge the protections that industry already provides and will continue to provide.

II. The Bureau's Use of its Market Monitoring Authority

Through the Orders, the Bureau has directed the recipients to produce a significant amount of information, including highly confidential information, in response to over fifty questions relating to all aspects of the recipients' business activities. ETA supports the Bureau's desire to protect consumers; indeed, our members are fully committed to consumer protection and we look forward to partnering with the Bureau to further that goal. We are concerned, however, with the breadth of the Bureau's Orders, which were issued under the market monitoring authority contained in the Rulemaking provision of the Bureau's authorizing legislation, specifically under 12 U.S.C. § 5512(c)(4)(B)(ii). We therefore provide the following comments and urge the Bureau to use its market monitoring authority judiciously, consistent with 12 U.S.C. § 5512(c)(4)(B)(ii), and in a manner that does not impose undue burdens on companies.

Under the Dodd-Frank Act, the Bureau has numerous tools at its disposal in addition to its market monitoring authority that it can use to gather information from industry, including voluntary requests for information ("RFIs"), notices of proposed rulemakings, workshops, and, when necessary, civil investigative demands ("CIDs"). Each of these authorities is intended for a specific purpose, and in each case the Bureau is subject to the bounds established by statute and the due process guardrails established under traditional administrative procedures and best practices.

Accordingly, we suggest that when the Bureau exercises its market monitoring authority under 12 U.S.C. § 5512(c)(4)(B)(ii), it informs the public and the recipients of the orders of the specific issues that the Bureau is exploring and how the inquiry supports the Bureau's statutory functions as specified in 12 U.S.C. § 5512(c)(1). The Bureau's requests for information should be narrowly tailored to assist in those functions. If the Bureau seeks to obtain information more generally from market participants, as noted above it has other tools at its disposal. We therefore encourage the Bureau to provide the public with additional explanations for how the information requested fits within the Bureau's delimited statutory authority to gather information under 12 U.S.C. § 5512(c)(4)(B)(ii).

We also provide the following suggestions with respect to the Orders issued, particularly given their breadth, and the confidential nature of some of the material requested:

- The Bureau should implement procedures that ensure the protection of trade secrets and other sensitive information submitted in response to orders. To the extent the Bureau requests detailed information about a recipient's business activities (as is the case with the Orders), it is critical that the Bureau protect the information and confirm that such productions of information are exempt

from public disclosure under the Freedom of Information Act (FOIA) and that the Bureau take sufficient steps to ensure that any information included in any report is sufficiently anonymized such that confidential information is not shared widely with potential competitors or the public at large. If the Bureau's position is that some or all of the information may be subject to future disclosure, then the Bureau needs to make this position clear so that recipients are able to assess the potential risks in providing certain sensitive information. (We note that the Bureau has adopted rules governing the confidentiality and protection of information submitted in response to examination requests or CIDs, and similar rules or procedures would be appropriate in connection with orders.)

- Given the purpose of the market monitoring authority, the Bureau should not share information gathered with other federal or state agencies, except in very limited circumstances. In the event any information is shared, the receiving agency should ensure the protection of any trade secrets and other sensitive information. Moreover, any sharing of such information with other agencies would need to be done in a manner consistent with the limits of those agencies' own statutory authority and should only occur if the receiving agency protects the information consistent with FOIA and other considerations. That is particularly true here where the amount of information requested is so broad and includes sensitive business data.
- The Bureau should engage early with industry to reasonably narrow information requests and should provide recipients with reasonable and flexible deadlines for the production of documents and information. With respect to the Orders, for example, the Bureau is requesting an enormous amount of information that will likely require the recipients to spend significant amounts of time and financial resources in gathering, reviewing, and producing materials. Given that the Bureau's information gathering authority is limited, it is reasonable for the Bureau to take a more flexible approach when setting deadlines, especially where it is not clear that the information gathering exercise is connected to any specific rulemakings.
- The Bureau's issuance of orders should be limited to gathering information directly related to the Bureau's specified functions.
- The Bureau should adopt rules or procedures that allow recipients to challenge or appeal orders (similar to the due process afforded to recipients of CIDs).
- The Bureau should ensure that when orders are issued to numerous companies, or to companies that represent a substantial portion of an industry, that the Bureau complies with the requirements of the Paperwork Reduction

Act (PRA).

In closing, ETA and its members recognize and appreciate the Bureau's desire to gather information for particular statutory purposes and support its mission to protect consumers in the financial services industries. Our members play an important role in providing consumers and businesses with safe, reliable, innovative, and cost-efficient payments products and services, and we share the same goals of protecting consumers from fraud and other unlawful practices. The Bureau's organizing statute authorizes it to exercise its authority "for the purposes of ensuring that . . . markets for consumer financial products and services operate transparently and efficiently to facilitate access and innovation" (12 U.S.C. § 5511(b)(5)). ETA members have been recognized by consumers and regulators alike for the innovation that they have brought to these markets and the access they have provided to small businesses. While the Bureau seeks to better understand these products and services, we encourage the Bureau to implement appropriate safeguards to limit the burden imposed on recipients to ensure that the Bureau does not hinder further innovation and expansion of access.

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We appreciate your taking the time to consider these important issues. If you have any questions or wish to discuss any issues, please contact Scott Talbott, Senior Vice President, Government Affairs, stalbott@electran.org.

Respectfully submitted,

Jodie Kelley, CEO

Electronic Transactions Association