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**Open Banking for the Select Few:
How a Lack of Regulation Enables Standard Setting that
Forecloses Innovation**

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Open banking is a set of standards that seeks to stimulate financial technology (“FinTech”)¹ and new product offerings through data sharing and open-source technology. This new industry model represents a shift from a legacy system of closed banking in which a traditional bank holds a customer’s data and uses it to offer a family of products to the consumer. The Bureau of Consumer Financial Protection (“Bureau”) has the ability to impose open banking standards through the data sharing regulations established by Section 1033 of the 2010 *Dodd-Frank Wall Street Reform and Consumer Protection Act* (“Dodd-Frank Act”), and over recent years the Bureau has sought information and discussed rulemaking. The pro-competitive implications of Section 1033 rulemaking have been explored most recently by the Biden Administration in the *Executive Order on Promoting Competition in the American Economy*. While regulators in many regions, most notably the United Kingdom, have moved forward with government-imposed open banking standards, in the United States, concrete action towards a set of unified and enforced industry standards has been notably absent.

This paper will discuss the need for open banking mandates in the United States, as well as the balance that regulation must strike between effective data sharing ecosystems and preservation of user privacy. First, I will explore the domestic progression of open banking in the absence of regulation. Further, I will show that a system of control has arisen, one that is facilitated by bank leadership in the standard setting organization Financial Data Exchange. Through this system, it will become evident that the power over standards provided by Financial Data Exchange gives large banks both the ability and incentive to selectively impede innovation. This has led to nascent digital ecosystems and FinTech products that are limited in scope and certain not to detract from extant banks’ competitive positioning. These limited changes come at the expense of new products and services that will benefit consumers through greater competition and breadth of service.

I. An Overview of Open Banking

Open banking allows third parties to access and use customers’ personal data held by banks through regulated methods of authorization.² Customers are able to consent and share their financial and transaction data with third-party providers, who in turn utilize this information to create FinTech products that will open new markets, generate better and more varied financial services, and benefit customers. At its core, open banking is about data access. Legacy banks hold valuable data on clients, and open banking allows customers to share this data through secure interfaces, such as application programming interfaces (“APIs”). These APIs allow third parties to offer services that require, and are built on, a customer’s account data. Importantly, these new products can also create disruption for existing banks. The legacy model of a fully vertically integrated bank that supplies knowledge and information, creates products such as mortgages and loans, and offers these products through physical branches is potentially challenged by open banking capabilities. In coming years, FinTech products are expected to

¹ FinTech is used to describe “any business that uses technology to modify, enhance, or automate financial services for businesses or consumers. *What Is Financial Technology (FinTech)? A Beginner’s Guide for 2022*, COLUMBIA ENGINEERING, <https://bootcamp.cvn.columbia.edu/blog/what-is-fintech/> (last visited Aug. 3, 2022).

² *Open Banking*, ACCENTURE, <https://www.accenture.com/us-en/insights/banking/open-banking> (accessed Apr. 3, 2022).

heighten competition for traditional banking services as API access to banking data allows more competition and a wider breadth of services.³

Open banking is an innovation-driving practice, but it also introduces risks to various stakeholders in the banking space. Chiefly, increased data access by third parties can lead to a greater risk of compromising data leaks or hacks of personal financial information.⁴ The rate of such hacks has accelerated significantly in recent years.⁵ While a significant risk, security breaches are often cited as reasons for banks to take adversarial stances towards open banking. This viewpoint sees open banking as both a threat to banks' extant business model and to customers' well-being. However, open banking advocates claim that banks should see new participants as "collaborators" rather than competitors. Private industry advocates claim that partnerships between existing banks and new FinTech players are positive steps towards creating more effective products while ensuring account security.⁶

II. Mandates in the United Kingdom

The Competition and Markets Authority ("CMA") began exploring open banking standards in August 2016.⁷ The banking system in the United Kingdom is especially concentrated; as of 2020, the four largest banks held more than 50% of United Kingdom deposits.⁸ This eclipses the share of domestic deposits held by even the ten largest banks in the United States in 2021.⁹ Due in large part to issues of concentration, the CMA concluded that deposit holders were reluctant to switch banks, leading to a dearth of innovation as nascent competitors struggled to grow.¹⁰ In the wake of this conclusion, the CMA began implementing

³ Sarah Grotta, *Taking a Vertical or Horizontal Approach to Open Banking*, PAYMENTS JOURNAL (Jan. 16, 2019), <https://www.paymentsjournal.com/vertical-horizontal-approach-to-open-banking/>.

⁴ CYBER DIV., FED. BUREAU OF INVESTIGATION, CYBER ACTORS CONDUCT CREDENTIAL STUFFING ATTACKS AGAINST US FINANCIAL SECTOR (Sep. 10, 2020), <https://www.documentcloud.org/documents/7208239-FBI-PIN-on-credential-stuffing-attacks.html>; Danny Palmer, *Billions of Passwords Now Available on Underground Forums, Say Security Researchers*, ZDNET (July 8, 2020), <https://www.zdnet.com/article/billions-of-passwords-now-available-on-underground-forums-say-security-researchers/>.

⁵ Bree Fowler, *Data Breaches Break Record in 2021*, CNET (Jan. 24, 2022), <https://www.cnet.com/news/privacy/record-number-of-data-breaches-reported-in-2021-new-report-says/>.

⁶ Stan Cole, *How Can Banks Respond to the Open Banking Revolution?*, WORLD FIN. (Mar. 30, 2021), <https://www.worldfinance.com/contributors/how-can-banks-respond-to-the-open-banking-revolution>.

⁷ *What Is the CMA9?*, FREE AGENT, <https://www.freeagent.com/us/glossary/cma9/> (last visited accessed Apr. 4, 2022).

⁸ Nicholas Megaw, *Pandemic Seals Dominance of UK's Biggest Banks*, FIN. TIMES (Aug. 9, 2020), <https://www.ft.com/content/f49190d2-558c-4ee6-90cb-9692ba17de23>. The CMA classifies the relevant market for open banking standards as the nine largest banks, known as the CMA9. See *What Is the CMA9?*, *supra* note 7.

⁹ F. Norrestad, *Market Share of Leading Banks in the United States in 2021, by Value of Domestic Deposits*, STATISTA (Mar. 24, 2022), <https://www.statista.com/statistics/727546/market-share-of-leading-banks-usa-domestic-deposits/>.

¹⁰ Over a five-year period between 2013 and 2017, only 5% of United Kingdom account holders changed banks. Rowland Manthorpe, *To Change How You Use Money, Open Banking Must Break Banks*, WIRED (Oct. 16, 2017), <https://www.wired.co.uk/article/psd2-future-of-banking>; COMPETITION & MKTS. AUTHORITY, MAKING BANKS WORK HARDER FOR YOU (Aug. 9, 2016), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/544942/overview-of-the-banking-retail-market.pdf.

broad reforms. At the core of the new regulation was an “open API standard for banking,” which required large banks to permit their customers to share their banking data with other FinTech companies.¹¹ The main goal of these standards was the unification of financial information. In theory, consumers could now utilize platforms that aggregated account data, compare prices for financial products and services, and more easily share past financial information with potential lenders.¹² Among other reforms, banks were also mandated to share regular metrics on service quality and decrease barriers to switching.

The open API standard was required to be implemented by at least the first quarter of 2018, an ambitious goal. To allow this rapid transformation, the CMA mandated collaboration and contribution from the nine largest banks, which led to the creation of the Open Banking Implementation Entity (“OBIE”). With the help of OBIE, the timeline was largely met by the major players in the industry.¹³

The open banking mandate has led to an unexpected FinTech boom in the United Kingdom, with a KPMG report citing sevenfold investment growth from 2020 to a total of \$37.3 billion in 2021.¹⁴ In addition to the expected benefits from greater competition and the ability for consumers to switch retail banks, the rise of new FinTech services further benefitted consumers. The average consumer now uses multiple FinTech products to manage the majority of their money online.¹⁵ The number of new firms has increased alongside investment, particularly through acquisitions and partial investment by incumbents.

FinTech firms “have set their sights on a broad range of open banking use cases, from payments to credit assessments to carbon tracking, unleashing a new wave of value creation.”¹⁶ Open banking in the United Kingdom was a regulatory response to the lack of options for consumers and the need for improved data privacy, yet it has spurred advancement for both incumbents and the fledgling FinTech sector, ultimately establishing itself as the model for government implemented standards.

¹¹ COMPETITION & MKTS. AUTHORITY, *supra* note 10.

¹² *Id.*

¹³ COMPETITION & MKTS. AUTHORITY, *Update on Open Banking* (Nov. 5, 2021), <https://www.gov.uk/government/publications/update-governance-of-open-banking/update-on-open-banking>.

¹⁴ Karl Flinders, *UK Fintech Investment Sees Sevenfold Increase in a Year*, COMPUTER WKLY. (Feb. 8, 2022), <https://www.computerweekly.com/news/252513093/UK-fintech-investment-sees-sevenfold-increase-in-a-year#:~:text=According%20to%20KPMG's%20latest%20report,2020%20%E2%80%93%20a%2028%25%20increase>.

¹⁵ Amy O'Brien, *UK Fintech Boom: Eight in 10 Brits Use Fintech Apps for Banking and Payments Post-Pandemic*, CITY A.M. (Oct. 13, 2021), <https://www.cityam.com/uk-fintech-boom-eight-in-10-brits-use-fintech-apps-for-banking-and-payments-post-pandemic/>.

¹⁶ Karl Flinders, *European Finance Firms Increase Open Banking Spend*, COMPUTER WKLY. (Dec. 6, 2021), <https://www.computerweekly.com/news/252510511/Finance-firms-increase-open-banking-spend>.

III. The Harms of a Closed System

The most direct harm caused by a lack of clear regulation is to innovation. The CMA’s findings in the United Kingdom – that concentration and difficulty transferring data increase switching costs and stymie the rise of new financial products – are universal. It is important to note here that a closed system does not necessarily mean that banks will remain silos, increasingly digital entities totally closed off from the industry. Rather, within a closed system, extant leaders in the banking industry are able to dictate the terms of how they share data, allowing access only to those who promise not to infringe on existing success. For an example of this, one needs to look no further than Financial Data Exchange (“FDX”), an industry standards group focused on implementing a unified API for effective data sharing. With over 200 member organizations including major banks, consumer advocate groups, and FinTech companies, FDX is the main standards setting body for data sharing in the United States and Canada.¹⁷ United States companies listed as FDX “sustaining members,” a select group who also comprise the board of directors, include the ten largest domestic banks by deposits.¹⁸ In fact, the largest bank not a member of FDX is Goldman Sachs, which as of 2021 held less than 2% of total domestic deposits.¹⁹ Through FDX, large banks are able to dictate the terms by which potential competitors access banking data as well as expressly who is allowed to connect.

FDX does not collect or publish information on non-member access, and non-members are not allowed to contribute to API development or discussion beyond issuing general “feedback” to FDX.²⁰ The organization is deliberately murky about the degree of access given to non-members, but it is clear that in the absence of effective regulation, vertically integrated banks partially implemented open banking. In doing so, these banks became better able to preserve their legacy system in the face of technological changes. Through outsized control of the FDX, major banks have “volunteered” to share and craft API access when it is beneficial but retain no obligation to do so. In this way legacy banks have given themselves the ability to choose winners and losers in the FinTech space, all at the expense of innovation.

Through FDX, banks have sought to support winning FinTech products that further bolster their competitive position. A clear example of this is the partnerships made by FDX

¹⁷ *Our Mission*, FIN. DATA EXCHANGE, <https://www.financialdataexchange.org/FDX/About/FDX/About/About-FDX.aspx?hkey=dffb9a93-fc7d-4f65-840c-f2cfbe7fe8a6> (last visited Aug. 3, 2022).

¹⁸ *Members*, FIN. DATA EXCHANGE, <https://www.financialdataexchange.org/FDX/The-Consortium/Members.aspx?WebsiteKey=deae9d6d-1a7a-457b-a678-8a5517f8a474&hkey=362ecd23-b752-48aa-b104-a99e916276c8&68d365ead072=2#68d365ead072> (last visited Apr. 4, 2022); Norrestad, *supra* note 9.

¹⁹ *Id.*

²⁰ *FDX API License Agreement*, FIN. DATA EXCHANGE, [https://www.financialdataexchange.org/common/Uploaded%20files/Policies/FDX%20API%20License%20Agreement-\(11-13-2019\).pdf](https://www.financialdataexchange.org/common/Uploaded%20files/Policies/FDX%20API%20License%20Agreement-(11-13-2019).pdf) (last visited Apr. 4, 2022); *Financial Data Exchange (FDX) Reports 28 Million Consumer Accounts Use FDX API for Open Finance and Open Banking*, FIN. DATA EXCHANGE (Jan. 24, 2022), <https://financialdataexchange.org/FDX/News/Press-Releases/Financial%20Data%20Exchange%20%28FDX%29%20Reports%2028%20Million%20Consumer%20Accounts%20Use%20FDX%20API%20for%20Open%20Finance.aspx>.

sustaining member banks and Plaid (also a sustaining member).²¹ Already a leading FinTech company, Plaid's desire to implement widespread bank-to-bank payment represents a threat to the lucrative business model enjoyed by credit card companies such as American Express, Discover, MasterCard and Visa (all of which are only standard members in the FDX).²² Visa attempted to buy Plaid, but challenges on antitrust grounds forced the network to drop its attempted \$5.3 billion acquisition.²³ Banks are a key member of the value chain for credit card networks, receiving a small fee for issuing cards to account holders. However, bank profitability pales in comparison to the current and past success of card networks.²⁴ Plaid's bank-to-bank payment model has the potential to establish major banks as increasingly vital components of the payments value chain while disadvantaging incumbent payment card networks. Through the FDX, sustaining member banks and Plaid have the incentive and ability to set API standards that support their future business models at the expense of both FDX's own standard members, payment card networks, while ignoring the needs of other potentially innovative competitors.

IV. Open Banking in the United States

Although different countries and regions vary in the present degree of open banking adoption, there are two general classes. The first group, headlined by European countries such as the United Kingdom, Germany, and France, has used government mandates to implement open banking standards.²⁵ This group is often marked by highly concentrated, mature banking sectors that could be resistant to change or present difficulties for customers attempting to discover new financial options. The United States, in contrast, has looked to the market to drive implementation. But for the same reasons that government intervention was vital to success in the United Kingdom, namely that open banking is a disruptive competitive threat to incumbents, who have raised the specter of privacy concerns, the private implementation in the United States has led to neither the full commitment of retail banks nor the benefits to consumers seen in the United Kingdom. Only recently has the United States begun the process of exploring government initiatives and guidelines for open banking, which is far short of the mandates seen

²¹ *Plaid and U.S. Bank Collaborate to Deliver a Secure Open Finance Experience*, US BANK (May 13, 2021), <https://www.usbank.com/about-us-bank/company-blog/article-library/plaid-and-us-bank-collaborate-to-deliver-a-secure-open-finance-experience.html>; Bill Streeter, *What's Next for Plaid's Complex Relationship with Financial Institutions?*, FIN. BRAND (Sep. 7, 2021), <https://thefinancialbrand.com/121470/whats-next-for-plaids-complex-relationship-with-financial-institutions/>.

²² *Members*, *supra* note 18.

²³ Tim Sloane, *Visa Drops Plaid Acquisition to Avoid Fight with the Justice Department*, PAYMENTS JOURNAL (Jan. 13, 2021), <https://www.paymentsjournal.com/visa-drops-plaid-acquisition-to-avoid-fight-with-the-justice-department/>.

²⁴ The return on assets of credit card issuing banks hovers around the low single digits, while similar metrics for major credit card companies such as Visa and Mastercard are regularly over 15%. McKinsey & Company, *Driving Revenue Growth in Retail Banking*, 6 RETAIL BANKING INSIGHTS (Mar. 2015); *VISA ROA 2010-2022*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/V/visa/roa> (last visited Aug. 3, 2022); *Mastercard ROA 2010-2022*, MACROTRENDS, <https://www.macrotrends.net/stocks/charts/MA/mastercard/roa> (last visited Aug. 3, 2022).

²⁵ Chandana Asif et al., *Financial Services Unchained: The Ongoing Rise of Open Financial Data*, MCKINSEY & COMPANY (July 11, 2021), <https://www.mckinsey.com/industries/financial-services/our-insights/financial-services-unchained-the-ongoing-rise-of-open-financial-data>.

in many other places.²⁶

Section 1033 of the Dodd-Frank Act states that a financial institution should “make available to a consumer, upon request, information... concerning the consumer financial product or service that the consumer obtained... including any information relating to any transaction, series of transactions, or to the account including costs, charges and usage data.”²⁷ The section further states that guidelines for standardized data will be disclosed by the Bureau of Consumer Financial Protection.²⁸ This Act gives the Bureau the ability to mandate the availability of consumer banking data as well as data related best practices. Since the passage of the act in 2010, effective regulation surrounding data access through section 1033 has been explored, but implementation has been delayed and is now not expected until at least 2023.²⁹

The Bureau of Consumer Financial Protection’s November 2020 *Consumer Access to Financial Records* is an advance notice of proposed rulemaking with the goal of soliciting information that would assist in implementation.³⁰ This document connected the issue of data access with competition, stating that “[a]uthorized data access holds the potential to intensify competition and innovation in many, perhaps even most, consumer financial markets... [by enabling] improvements to existing products... [fostering] competition for existing products... [and creating] new types of products and services.”³¹ Further, President Biden’s July 2021 *Executive Order on Promoting Competition in the American Economy* encouraged implementation of Dodd-Frank Section 1033 in order to achieve greater pro-competitive outcomes.³² There is clear interest in creating effective rules surrounding open banking, and the Bureau certainly has the power to issue guidelines for an open banking mandate. However, prolonged delays in this process harm both consumers and FinTech firms. Outlining and implementing good, procompetitive rules is imperative for the healthy development of a data sharing ecosystem, as has been seen in the United Kingdom since 2018.³³

V. Recommendation

The Bureau of Consumer Financial Protection has the clear ability to create data sharing regulations under section 1033 of the Dodd-Frank Act.³⁴ The importance of data sharing to

²⁶ *Id.*; David Strachan, *Open Banking around the World*, DELOITTE, <https://www2.deloitte.com/global/en/pages/financial-services/articles/open-banking-around-the-world.html> (last visited Apr. 3, 2022).

²⁷ 12 U.S.C. § 1033 (2012).

²⁸ *Id.*

²⁹ *CFPB Likely to Delay Data Sharing Rule Until 2023*, JDSUPRA (Jan. 19, 2022),

<https://www.jdsupra.com/legalnews/cfpb-likely-to-delay-data-sharing-rule-7941811/>.

³⁰ *Consumer Access to Financial Records*, 85 Fed. Reg. 71,003 (proposed Nov. 6, 2020).

³¹ *Id.*

³² Exec. Order No. 14,036, 86 Fed. Reg. 36,987 § 2 (July 14, 2021).

³³ *Open Banking Implementation Entity, Three Years since PSD2 Marked the Start of Open Banking, the UK Has Built a World-Leading Ecosystem*, OPEN BANKING, <https://www.openbanking.org.uk/news/three-years-since-psd2-marked-the-start-of-open-banking-the-uk-has-built-a-world-leading-ecosystem/>.

³⁴ 12 U.S.C. § 1033 (2012).

competition has been mentioned across the federal government, including by the White House in the *Executive Order on Promoting Competition in the American Economy*.³⁵ Further, the Bureau's November 2020 advance notice of proposed rulemaking acknowledged the importance of consumer data access and sharing to competition and innovation.³⁶ Yet in the 18 months since this notice, there has been little appreciable movement towards rulemaking.

The Bureau of Consumer Financial Protection should implement an open banking mandate under a model similar to that of the United Kingdom. An implementation entity, whether funded directly by major banks or by other means, would allow industrywide participation. While the aforementioned FDX represents a potential threat to data sharing and innovation when run by private industry participants, it does provide a framework for more pro-competitive regulation. Existing rules from industry leaders can be combined with input from additional participants to quickly build a regulatory body. This would allow for a smooth transition into a mandated system of open banking. Little would change for major banks or consumers. FinTech firms, however, could use the increased access to consumers to innovate and provide new services at scale. And, as in the United Kingdom, the end result of these regulations would be increased competition in commercial banking, greater investment, and ultimately a greater range of products and services at competitive prices.

³⁵ Exec. Order No. 14,036, *supra* note 32.

³⁶ Consumer Access to Financial Records, *supra* note 30.