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WASHINGTON, D.C. 20580

**Written Testimony of
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**Before the U.S. House of Representatives
Committee on the Judiciary
Subcommittee on Antitrust, Commercial, and Administrative Law**

***Hearing on Online Platforms and Market Power, Part 3:
The Role of Data and Privacy in Competition***

October 18, 2019

Chairman Cicilline, Ranking Member Sensenbrenner, and Members of the Subcommittee, thank you for holding this hearing as part of the bipartisan investigation into online platforms and market power. I am honored to offer my perspective during this critical moment in history.

The data-driven digital marketplace now touches almost every facet of the human experience: in our homes, our workplaces, our schools, our hospitals, our cars, and even our relationships and our understanding of the world. The list is endless.

Around the globe, there is a growing consensus that today's tech titans operating data-intensive platforms pose a threat to innovation and to new business formation. Government studies and reports from the European Commission, the United Kingdom, Australia, and other major economies are raising more questions about whether companies like Google, Amazon, and Facebook are choking off competition.

We cannot and *should not* live in a country where the corporate royalty of the economy can create market conditions that makes it nearly impossible for new businesses to get off the ground or to compete. Without meaningful competition, we will miss out on the promises of the digital economy.

As the Committee continues its investigation, it will be important for members of Congress to evaluate evidence with several things in mind, including:

- (1) Data has certain economic features that are unique and unlike other assets.
- (2) Most online services are not actually "free." While consumers and businesses are not paying with dollars, they are paying with data.

* This testimony represents my own views and not necessarily those of the Commission or any other individual Commissioner.

(3) Competition is not a click away. Today's tech titans are wholly integrated throughout the digital world, such that people and businesses cannot avoid them.

Data as an Asset

Firms throughout the economy are desperate for our data. It's not just the Big Tech companies or telecommunications companies like Comcast, AT&T, and Verizon. Even the automotive industry is recognizing that collecting and monetizing personal data can be extremely lucrative. Data is clearly an economic asset, since it can produce cash flow over time. Data, however, is unlike other assets and instruments of value.

First, it is not a finite resource, like precious metals or minerals. In fact, more personal data is created every second. Our location, our searches, and our conversations can all be catalogued.

Second, data is not "consumed" in the traditional sense. If I use grain to make a loaf of bread, that grain cannot be used for something else. Data is different: it can be copied and shared. When one company monetizes the information that the data provides, other actors can extract value out of it, too.

Third, data gets more valuable as you collect more of it. It has increasing marginal returns. As you collect data across a larger swath of the population, you don't just glean insights on an individual person or business, you can also glean valuable insights on others that interact with them or share common characteristics.

For example, Amazon recently purchased the Whole Foods grocery chain. Amazon can now connect your purchase history online with your purchases in stores. Because the company knows even more about what you buy, it can make more accurate predictions about you. For example, Amazon can more easily predict when you're on a diet, when you're sick, when you're expecting a new baby, or a whole slew of other conditions and life events. This allows companies like Amazon to adjust offerings – and even prices – based on relevant predictions of what you want to buy and how much you're willing to pay for it.

As consumers, workers, and citizens, we do not know the extent to which our personal data is being collected by firms and third parties, so even if we wanted to, we could not choose to provide it to another company. The exclusivity of data collection has given a significant advantage to the companies that have been collecting data the longest, have the ability to collect the most types of data from the most people, or have control over a unique data set. In each of these circumstances, the inability to replicate gives data owners control of a key asset. New entrants face significant barriers to entry because they lack the insights from historical data that they can't reproduce. New companies also lack the ability to collect data on the same scale and scope that incumbents can collect it.

The unique economic features of data have considerable implications for competition. Since data-intensive digital platforms connect buyers and sellers, consumers with advertisers, riders with drivers, and other similar transaction partners, an unregulated market is likely to tip toward a handful of platforms, or even just one. As more users join on a platform, it becomes even more

valuable. For example, take the case of Uber, the ride-hailing app that operates on a closed, proprietary platform. As more riders were lured to the platform, this attracted more drivers, which increased availability. Since it is clunky for riders to check many different apps, their best bet is to use the platform that everyone else is using. This is known as a network effect. Network effects are also strong when it comes to search, social media, and so many other digital services.

Paying with Data, not with Dollars

If you go to a car dealership and exchange your station wagon for a used SUV, that is a trade. You would never say you got the SUV “for free.” But, too often, we mislabel online services as “free.”

Companies like Google and Facebook are not charities. They operate massively profitable behavioral advertising businesses built on extracting enormous amounts of data from users. When you watch a YouTube video or scroll through stories on Instagram, this is not the equivalent of reading a newspaper. The behavioral advertising model relies on constant collection of personal data, even while you’re consuming content. These services do have a price, and you are paying for them with your data.

While the price that people pay in dollars is “zero,” Google and Facebook reap billions of dollars from us. In 2018, Google generated \$116 billion in advertising revenue.¹ That same year, Facebook pulled in \$55 billion.² The profit margins far exceed those in other key industries of the economy. This means that we are handing over extremely valuable assets to these companies. An economist might say that the real price of using these services should be negative – that is, they should be paying us.

The true economic value that is exchanged with digital platforms is hard for consumers and businesses to measure. In addition, consumers and businesses using these platforms have no bargaining leverage, and they participate by “agreeing” to complex and draconian terms of service. Digital platforms can usually change these terms at any time, granting themselves more ability to collect and use data more expansively and more intensely. This is the equivalent of a price hike.

In a competitive market, these price hikes would be hard to impose. But, in an uncompetitive market, companies can focus on blocking new entrants and limiting choice to protect their dominance and pricing power.

Competition is Not a Click Away

Twenty years ago, it seemed almost unimaginable that a few companies could dominate the web. After all, it was open and non-proprietary. With such low barriers to entry, the next innovator could offer up a better online service; competition was just a click away. In 2004, the website that would eventually become Facebook launched, and I was one of its first users. It was a clear

¹ Alphabet Inc., Annual Report at 27 (Form 10-K) (Feb. 5, 2019).

² Facebook Inc., Annual Report at 44 (Form-K) (Jan. 31, 2019).

alternative to MySpace, and importantly, this new social network offered far more privacy, since it allowed users to better control who would see their personal information.

Sadly, many investors and entrepreneurs have come to realize that this isn't really a possibility today. Competition is no longer a click away. Big Tech is now embedded throughout the digital world. These firms have integrated horizontally, vertically, diagonally – and across the web in ways so subtle, you'd need to be able to understand computer code to realize you were being tracked. These platforms have become ubiquitous and unavoidable.

Earlier this year, journalist Kashmir Hill chronicled her attempts to block Google, Amazon, Facebook, Apple, and Microsoft from her life.³ Hill discovered that Amazon controls 23 million IP addresses, preventing her from even accessing certain government websites.⁴ Her ability to communicate, engage in commercial transactions, and access basic information was sharply curtailed. If the internet were truly competitive, people could vote with their feet and select services that offer privacy and anonymity.

Much of this unavoidable surveillance is spurred by the financial incentives of online behavioral advertising, a market big tech firms also dominate. Behavioral advertising promises to target ads to the users most likely to engage with them. Advertisers pay for that engagement – the clicks, likes, video views, and sales conversions. Here, advertisers face the same conundrum as users: participate on Big Tech's terms or not at all. And like users, sitting on the sidelines comes at a high cost. Businesses put themselves at a significant disadvantage if they chose not to advertise. For example, companies that don't advertise on Google may find the link to their website buried after paid ads from their competitors or may not show up when people search for local businesses.

Absent vigorous competition in online advertising, advertisers won't have the leverage to demand transparency. This advertising model has virtually no independent oversight or accountability mechanisms. An advertiser can tune in to watch its television ad or listen to its radio ad, buy a newspaper or magazine to see its print ad, or drive by to look at its billboard ad. With contextual online advertising, advertisers can see the digital ad by visiting the website they pay to advertise on.

But the same is not true when you are, for example, paying to get women who like soccer and green shirts to watch your ad on Instagram. As an advertiser, you don't have access to data on which users watched your ad or whether they match your desired profile. Absent a proactive action off the platform like making a purchase or attending an event, advertisers can't easily verify that the engagement took place. Advertisers have few ways to determine if their ad spends match the value provided. Many wish they could independently verify that they are getting the engagement they are paying for and that they are engaging with real people, not bots and fake accounts.

³ Kashmir Hill, *Goodbye Big Five*, GIZMODO (2019), <https://gizmodo.com/c/goodbye-big-five>.

⁴ Kashmir Hill, *I Tried to Block Amazon From My Life. It Was Impossible*, GIZMODO (Jan. 22, 2019), <https://gizmodo.com/i-tried-to-block-amazon-from-my-life-it-was-impossible-1830565336>.

This is not a theoretical problem. Recently, Facebook agreed to pay millions in a settlement with advertisers, after allegedly inflating the amount of time it said users spent watching videos by allegedly as much as 900 percent.⁵ These inflated numbers didn't just harm advertisers. Many also believe that Facebook's false video metrics convinced news outlets to lay off print journalists so they could heavily invest in capitalizing on a supposedly burgeoning video audience.

Advertisers aren't alone. App developers also have few choices on reaching users. As more of our digital lives go mobile, app stores are now a critical gateway to participate in society and the economy – but app stores don't look anything like an open internet. Operators of app stores impose taxes and regulations on app developers, who are often completely dependent on these stores for distribution. This raises concerns about how operators of app stores might preference their own apps over those created by competing developers.

The Committee's investigation should seek to detail the consequences of this digital dominance. I am particularly concerned that many investors are reluctant to allocate capital to innovators that seek to challenge and disrupt this dominance. Instead, investors tell me they prefer to fund companies that can eventually be sold an incumbent. This distorts digital innovation and the progress that comes along with it.

Taking Action

Last year, the Federal Trade Commission convened a series of hearings examining a range of competition and consumer protection issues in digital markets. The FTC staff has outlined next steps for these hearings, including policy outputs and deliverables.

My top priority is to ensure that our path forward is grounded in reality. In my tenure as commissioner, I have actively advocated for approaching policy and enforcement with rigorous, quantitative understanding of how these markets actually work. The Commission does its best work when it comes to the table with deep knowledge and expertise of a particular market, rather than a superficial or theoretical approach. To this end, I hope that the Commission will pursue work based on Section 6(b) of the Federal Trade Commission Act,⁶ which allows the agency to conduct industrywide investigations and studies and to make its findings available to the public.

Given its authority to prohibit unfair methods of competition and unfair or deceptive trade practices, the FTC is uniquely positioned to tackle the concerns associated with digital platforms. The twin goals of competition and consumer protection are inextricably linked. Most state attorneys general also have statutory authorities related to competition and consumer protection under their “mini-FTC Acts.”

Competition. Antitrust litigation by the FTC, Department of Justice, and state attorneys general can halt exclusionary practices and anticompetitive mergers. If firms engage in behavior for the

⁵ Eriq Gardner, *Facebook to Pay \$40M Under Proposed Settlement in Video Metric Suit*, THE HOLLYWOOD REPORTER (Oct. 7, 2019, 6:33 AM), <https://www.hollywoodreporter.com/thr-esq/facebook-pay-40-million-under-proposed-settlement-video-metrics-suit-1245807>.

⁶ 15 U.S.C. §§ 41-58.

purpose of impeding entry or stifling an upstart, antitrust law should intervene. Many dominant players in the technology industry are extremely acquisitive, gobbling up companies of all sizes. However, if these acquisitions substantially lessen competition, they are unlawful. Unfortunately, antitrust enforcement is slow and costly. In the past, high-profile cases have taken years to investigate and litigate. In today's environment, this is problematic. We need to figure out ways to act more quickly to prevent harms to innovation.

In addition, if enforcers uncover unlawful acquisitions or conduct, it is typical to seek asset divestitures as a remedy – but divestitures and spinoffs may be just one piece of the puzzle. We will also need to think carefully about remedies as they pertain to the unique characteristics of data. As such, remedies that eliminate barriers to entry and open access without sacrificing privacy will be particularly compelling.

When assessing remedies, we have to be mindful of the nuances of how data moves through the digital world. We need to be cautious when applying behavioral remedies that require significant supervision or that might be difficult to assess compliance. Considering the sophistication, scale, and scope of mass data collection, it can be difficult to enforce requirements to limit the use of data, or to give people the right to see and delete their data. Companies are collecting millions of data points at every moment and the government doesn't have the resources or the technical expertise to monitor whether data is being used solely for its intended purpose. And how would a person know if their large data file has truly been deleted? Violations of these requirements are usually only detected when a large-scale disaster happens, or when problems are intermittently brought to light by journalists and whistleblowers.

In light of these challenges, I believe that remedies should not be directed at the data itself, but rather the structural incentives that are leading to the problems in the first place. We have allowed the next generation of the internet to develop as a series of walled gardens that are owned and operated for the benefit of a few dominant players. These companies decide who gets access and who doesn't, and impose taxes and regulations on participants. Behavioral data remedies do little to alter this fundamental structure or to stop privacy-related issues from happening. For example, Facebook immediately and repeatedly violated the FTC's 2012 Order on its data use and sharing practices. The recent proposed settlement gave a lot for Facebook to celebrate. Its business model remained intact, and its executives were all let off the hook. Like an unwieldy schoolyard bully who has been lightly reprimanded, the bad behavior will continue the minute the teacher's back is turned.

In our economic history, we have seen government interventions that facilitate open technology yielded enormous benefits for American consumers. For example, in 1956, the government remedied the anticompetitive conduct of American Telephone & Telegraph (AT&T) and Western Electric by ordering that the system's intellectual property be made available for public use.⁷ This decision unleashed innovation that would eventually lead to the birth of the internet. More recently, the government conditioned the America Online (AOL) and Time Warner merger by requiring that the dominant AOL Instant Messenger chat platform become interoperable,

⁷ *United States v. Western Electric Co.*, Civ. Action No. 17-49 (D.N.J. 1956).

spawning new competition and innovation.⁸ The Microsoft antitrust case demonstrated the power of unbundling dominant operating systems from apps that sit on top of it.

We've also seen this in other industries. Decades ago, we laid the foundation for free and open capital markets by separating banking from commerce, which prevented Wall Street from discriminatory lending practices that would have distorted industries across the economy.⁹ In Hollywood, the big studios were banned from owning cinemas, leading to more access to distribution.¹⁰ Importantly, these structural separations did not require complicated oversight and micromanagement, and we can learn from them as we consider remedies for the marketplace problems of today.

We should also reconsider providing government benefits to companies that continue to abuse them. This could include opening up the intellectual property rights to underlying technologies that power a marketplace. It could also include voiding certain one-sided, take-it-or-leave-it contract terms that are typically enforced by our courts. These benefits provide significant value to companies, and should not continue to benefit those that break the law.

Policymakers should also look at brightline rules and outright bans wherever feasible. Complicated rules often work in favor of those that are already dominant and can pay lawyers to get around them. For example, we should consider whether companies, particularly repeat offenders or dominant players, should be allowed to collect and monetize certain data at all. Historically, we have banned some of this behavior. For example, telephone companies were not allowed to eavesdrop on our phone calls and then sell the information they gleaned.¹¹

Outside of litigation, the FTC can engage in competition rulemaking, defining what constitutes an unfair method of competition.¹² These types of rules don't need to place any substantive obligations on firms, but the rules can spell out what type of conduct is lawful or unlawful, creating more certainty. The rulemaking process also allows a diverse set of stakeholders to participate, rather than just a government plaintiff and a single corporate defendant. Competition authorities around the world have recognized these benefits.¹³ In fact, some have already begun to draft rulemaking that addresses the growing concerns associated with digital platforms.

⁸ Mem. Op. and Order, In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, F.C.C. 01-12, (Jan. 11, 2001).

⁹ We have seen how the weakening of structural separations in banking has led to negative consequences for both financial stability and economic growth. See e.g., Saule Omarova, *The Merchants of Wall Street: Banking, Commerce, and Commodities*, 98 MINN. L. REV. 265 (2013).

¹⁰ Of course, today, this is not the most pressing conflict of interest that we see in Hollywood. New "packaging deals" pioneered by talent agencies appear to be particularly problematic. See *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948).

¹¹ 47 U.S.C. § 222 (c) (1).

¹² Comment of Commissioner Rohit Chopra on Hearing #1 on Competition and Consumer Protection in the 21st Century (Sept. 6, 2018), <https://www.ftc.gov/public-statements/2018/09/comment-commissioner-rohit-chopra-hearing-1-competition-consumer>.

¹³ See, e.g., AUS. COMPETITION & CONSUMER COMM'N, DIGITAL PLATFORMS INQUIRY: FINAL REPORT (2019), <https://www.accc.gov.au/focus-areas/inquiries/digital-platforms-inquiry/final-report-executive-summary>.

Consumer Protection. Competition cannot solve all problems, especially when dominant firms can cheat consumers and businesses. Unfair or deceptive practices can also be motivated by a firm's desire to maintain its monopoly or dominant position.

To halt and redress unfair or deceptive trade practices, the FTC and state attorneys general can investigate, sue, and often seek penalties for unlawful conduct. There is one particular menace in today's marketplace that warrants serious attention from policymakers and regulators: the click-through contract.

When it comes to dominant players with significant market power, consumers and businesses have no bargaining leverage in a take-it-or-leave-it contract. Fortunately, the FTC has a history of banning certain unfair contract terms.¹⁴ New consumer protections in Australia and New Zealand also confront suspicious contract terms. Laws in some jurisdictions specify certain contract terms that are inherently suspect, while also providing a general framework for condemning new terms that may emerge. Understandably, the public has little trust in the efficacy of click-through terms of service, and we will need to evaluate whether existing agreements violate the law or need to be regulated.

Conclusion

Congress must reject the narrow thinking of the past that we hear too often from Washington lobbyists singing from the song sheet of monopolists and other dominant incumbents. Markets do not thrive when the government is completely absent. Our country's history has shown that we can foster innovation and create wealth with rules and laws that promote competition and eliminate conflicts of interest, rather than allowing a handful of actors to dominate and impose their own regulations on the market.

If you believe in the promise of discovery and invention to improve lives and advance human progress, you should be concerned that today's digital market may be choking off new entrants and innovation. Today's landscape is not simply a reflection of engineers and entrepreneurs, it also the result of government policies. If the federal government and the states did not pursue its case against Microsoft over twenty years ago, many of the major players in today's market would not exist. Confronting anticompetitive conduct will not mean the end of digital products and services; it will mean unlocking even greater innovation and entrepreneurship that benefits families and communities around the world with more choices and more opportunity.

¹⁴ Rohit Chopra, Prepared Remarks at the Forum on Small Business Financing (May 8, 2019), https://www.ftc.gov/system/files/documents/public_statements/1519282/opening_remarks_for_small_business_forum.pdf.