

May 14, 2020

Congressman David Cicilline
Chairman
Subcommittee on Antitrust, Commercial,
and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

Congressman Jim Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial,
and Administrative Law
2449 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

Public Knowledge is honored to participate in the Committee's investigation into the major digital platforms. Our antitrust laws should be reformed to better protect both consumers and competition. We offer some proposals below, as well as several relevant attachments by Public Knowledge experts further expounding on these ideas.

While the reforms below would all improve our current antitrust standards, antitrust cannot be the sole tool to address all the thorny issues that the platforms present. The best solution would be a new digital platform-focused agency to regulate the platforms. Because antitrust cannot do enough by itself to expand competition and innovation, such an agency is needed to rein in potential abuses by dominant platforms.

Antitrust Reforms

Antitrust laws should be recalibrated to adjust the balance between overenforcement and underenforcement. Currently, antitrust court decisions express too much concern about potential overenforcement, and as a result we get less enforcement than is needed. This is based on flawed Chicago School reasoning that assumed inefficient monopolies mistakenly allowed to be created or maintained would be quickly dealt with by the entry of new and efficient competitors. This idea is not supported by evidence. Instead, the true villain is underenforcement, especially in fast moving industries that already tend towards monopoly like digital platforms. As the 2019 Stigler Competition in Digital Platforms Report stated, "Underenforcement is likely to be costlier than previously thought because, among other things, market power of large technology platforms is more enduring. False negatives [underenforcement] are almost certainly more common than previously thought because certain types of conduct that were previously thought to be benign are now

understood to be anticompetitive.”¹ Public Knowledge supports the following concrete reforms.

Under current doctrine, **unilateral refusals to deal** are notoriously difficult to litigate. In antitrust case law, this is exhibited by the narrowing of *Aspen Skiing* by *Trinko*.² To prove a unilateral refusal to deal, an enforcer today must prove facts almost exactly analogous to the fact pattern of *Aspen Skiing*. This allows the platforms considerable leeway to deny their rivals interoperability and important data. A dominant platform can raise rivals’ costs and push them out of the market through this behavior. Given the platforms’ function as distribution platforms, this doctrine is particularly limiting to enforcers.

Another area of possible reform is the **predatory pricing** law. Platforms have extremely low marginal costs—it costs very little for the additional search query, social media user or online sale. When the marginal cost is almost zero, it’s very difficult to meet the legal burden of showing that prices are below cost. Another requirement sometimes applied under current law is that only competitors equally efficient to the defendant are protected. An already dominant platform, with an already locked-in user base, benefits enormously from its scale, while rivals still scaling up cannot yet achieve the same efficiency. However, these smaller (and thus less efficient) competitors are often the only source of actual or potential competition, so it’s incredibly important to protect their ability to compete. The major platforms are so varied that they even have the ability to take losses in one sector in order to push out a rival that might only be competing in that single vertical. Improvements to this area of the law could include expanding the notion of recoupment and closely scrutinizing loyalty discounts.

The recent *American Express*³ decision imposed new **market definition requirements** for plaintiffs bringing a case against a vertical restraint. In other cases, and previously in vertical restraint cases, plaintiffs could show market power directly by showing harm to competition. “This holding was based on the notion that vertical restraints almost always enhance efficiency and almost never harm competition. Scholars over the past 30 years have demonstrated that that notion is false and therefore, that vertical restraints must be

¹ George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report (Jul. 1, 2019), 79, <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C> (hereafter “Stigler Report.”)

² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

³ *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

evaluated individually on the specific facts.”⁴ Therefore, just as in other antitrust cases, it’s important that the law not require circumstantial evidence like defining the relevant market when direct evidence is available. It would also be useful to clarify in light of *American Express* that harms to one market cannot be justified by benefits to another market, even in the case of two sided markets.

In certain situations, **burdens of proof** should be rebalanced to favor antitrust plaintiffs after their initial preliminary showing. For example, courts should not be allowed to presume efficiencies from vertical transactions. Vertical mergers are a hallmark of the platform industry and have been a key factor in entrenching the dominance of several platforms. There are several presumptions Congress could put in place to better protect consumers from anticompetitive vertical mergers. Presumptions facilitate more efficient enforcement actions while still allowing merging companies the opportunity to disprove them in extenuating circumstances. In particular, a **dominant platform presumption** would presume anticompetitive any merger between a dominant platform and a firm with either a substantial likelihood of becoming a competitive rival or in an adjacent market. Other presumptions against categories of vertical mergers are also needed.⁵ Shifting the burden of proof is also one important goal of the *Anticompetitive Exclusionary Conduct Prevention Act*, introduced in the Senate by Senators Klobuchar, Blumenthal, and Booker. The Act would shift that burden of proof so that companies with substantial market power (greater than 50% market share or equivalent) have the burden of showing any exclusionary conduct does not present “an appreciable risk of harming competition.” This is another important reform PK supports.

The following bills, already introduced in the Senate, would all represent tangible improvements to competition policy.

The **Monopolization Deterrence Act of 2019 (S. 2237)** would allow enforcers to seek a monetary penalty from Sherman Act Section 2 violators up to 15 percent of their total US revenue.

⁴ Stigler Report, at 77, *citing* Steven C. Salop, *Revising the Vertical Merger Guidelines: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century* (Nov. 1, 2018), https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf; Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 *YALE L.J.* 1742 (2018).

⁵ See attached, PK & OTI Comments on Draft Vertical Merger Guidelines.

The **Anticompetitive Exclusionary Conduct Prevention Act of 2020 (S. 3426)** would make it easier to stop exclusionary conduct with “an appreciable risk of harming competition” and would eliminate unnecessary market definition requirements.

The **Merger Enforcement Improvement Act (S. 306)** would increase merger filing fees, as well as increase funding to the antitrust enforcement agencies and would require the FTC and GAO to conduct studies on the efficacy of merger settlements and overlapping investor control.

The **Consolidation Prevention and Competition Promotion Act (S. 307)** would clarify that “monopsony” power falls under the purview of the Clayton Act and would shift the burden to the merging parties in “mega-mergers.”

The Need for a Platform-Specific Competition Regulator

While changes to antitrust law would improve how we deal with platforms, antitrust is simply not enough. We will still need targeted regulations to open up platform markets to competition.

A new expert regulator equipped by Congress with the tools to promote entry and expansion in these markets could actually expand competition to benefit consumers, entrepreneurship, and innovation. The regulatory authority could be housed within an existing agency, such as the FTC, or it could be a new expert body, focused on digital markets. Most important are the pro-competition regulatory tools with which Congress must equip such an agency.

Interoperability: First, the agency should be authorized to require dominant platforms to be interoperable with other services, so competitors can offer their customers access to the dominant network. Allowing interconnection to the dominant network was a crucial component of the breakup of AT&T, and it can create competition against Facebook, with or without a break-up. Online platforms that benefit from network effects and control an important market bottleneck⁶ may be appropriate targets for an interoperability rule. An expert regulator is especially useful for a tool like this because it will require technical

⁶ Here we adopt the definition from the Stigler Report. “Bottleneck power’ describes a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.” Stigler Report, at 9.

detail, frequent updates, and complaint resolution to make sure the interoperability requirement is working as intended.

The ACCESS Act, already introduced in the Senate, would also represent a tangible improvement to competition policy. The ACCESS Act would require large communications platforms to make their services interoperable with competitors. It would also allow users to easily port their data between platforms and to delegate custodial services to act in their best interest to manage their data stored by the platforms. This would be a key tool to mitigate the massive network effects and scale advantages dominant platforms currently enjoy.

Non-Discrimination & Un-Bundling: Online platforms know that companies that use their platform can “disintermediate” them by connecting directly with the consumer, effectively cutting out the platform middleman. This means their customers, the companies that use the platform, are also potential competitors. In some cases those companies are actual direct competitors, like when the same company owns a platform and one of the competitors on the platform. (This is the example of the Amazon Marketplace where many retailers, including Amazon, compete for customers.) As a result of this competitive dynamic, platforms might discriminate against companies that pose a competitive threat, or use data to disadvantage them. Congress should authorize a regulator to monitor and ban discrimination by digital platforms with bottleneck power, either discrimination in favor of their own services or discrimination against their competitors that use the platform. Similarly, the agency should be authorized to ban certain “take it or leave it” contract terms that require any company doing business with a dominant digital platform to turn over its customer data for the dominant platform to use however it pleases. This effectively bundles the service the companies need with data sharing they may not want to participate in. By prohibiting these practices, we can give potential competitors a fighting chance.

Merger Review: Another major concern with digital platforms is their acquisition of potential competitors. Acquisitions of potential or nascent competitors are often small, even falling below the value threshold for pre-merger notification of the competition authorities under the Hart Scott Rodino (HSR) Act. It is very difficult to effectively assess how likely such companies in adjacent markets are to truly be potential competitors to the acquiring digital platform. The small size or lack of pre-existing direct competition of these types of mergers can make it much harder for antitrust enforcement agencies to block them, even if there are indications the merger may be anticompetitive. Markets move quickly and a competitor’s window of opportunity to gain traction against the incumbent

is short, making mergers an even more effective tactic at preventing competition, and making effective merger enforcement even more important.

Thus, the regulator should also have the power to review and block mergers, concurrently with the existing antitrust agencies. For particularly important industries, like communications, energy, and national security, we have an expert agency merger review process in addition to antitrust. Similarly, the most powerful digital platforms occupy a special role in our economy and society and face inadequate competition. They too require merger review under a new and different standard, in addition to traditional antitrust review.

The new regulator would have a different standard than the antitrust agencies. This standard should place a higher burden on dominant platforms to demonstrate overall benefits to society that antitrust enforcers do not have the tools to thoroughly measure. It should only review mergers involving platforms with bottleneck power. It should only allow those mergers that actually expand competition and do not impede market entry by new potential competitors. And, there should be no size limit for mergers to warrant pre-merger review by the agency. Any acquisition by a platform with bottleneck power should be reviewed for its competitive impact. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain. Mergers that provide no clear competitive benefit would be blocked. The standard also must take account of the particular ways that competition happens in digital platforms. For example, non-horizontal mergers may be particularly harmful here due to the economies of scope in data-driven platforms, as well as the importance of interoperability between complementary products.

Congress must use all the tools at its disposal to address the broad challenges presented by the power of digital platforms. This includes improvements to the existing antitrust laws, as well as new laws and rules specifically focused on digital platforms. Only then will we be able to enjoy the benefits of a competitive marketplace for our communities, consumers, citizens, entrepreneurs, and workers.

Public Knowledge is continuing our in-depth research into this industry and would welcome the opportunity for further conversation with the Committee on this important issue. Thank you for your attention.

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Sincerely,

Charlotte Slaiman
Competition Policy Director
Public Knowledge

Appendix I

**Testimony of Gene Kimmelman, Senior Advisor – Public Knowledge
Before the U.S. Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
*Competition in Digital Technology Markets: Examining Self-Preferencing by
Digital Platforms*
March 10, 2020**

Digital platforms are today’s marketplace, library, and public square. Yet key elements of these markets are dominated by one or two firms. As experts across the globe examine digital platform markets, they have identified problems of persistent market power and very little entry or expansion.² If this is accurate and sustained, the likely results will be less innovation, limited consumer choice, and lower quality products.³ The United Kingdom’s Competition and Markets Authority (CMA) recently released its interim report on digital advertising markets. At this preliminary stage, it found—in the UK—that Google has significant market power in search advertising, general search, and parts of the ad ecosystem.⁴ It also found that Facebook has such power over social networks.⁵ While this may not apply precisely to the U.S. market, it certainly should set off alarm bells that we need to assess what antitrust can do, how it needs to change, and which other policy tools are needed to generate robust competition in our exploding digital marketplace.

There are many vertical relationships and platform rules that favor one combination of services over another which may cause heartburn for a specific company but do not violate the antitrust laws. Many of these relationships and rules can result in synergies that benefit the competitive process and consumers. However, self-preferencing and other forms of anti-competitive discrimination are often harmful to competition and consumers.

Self-Preferencing in Digital Platforms

Self-Preferencing in the Ad Exchange

In the complex digital ads marketplace, the CMA report found that Google “holds a strong position at each level” of what it calls the “ad tech stack.”⁶ To simplify somewhat, the levels are the ad exchange where bidding takes place and ad slots are awarded, the publisher ad server tool that allows publishers access to the exchange, and the demand side platform tool that allows advertisers access to the exchange. By owning the leading exchange and leading access tools for

² “[T]raditional competition tools are compromised when dealing with various examples of market failure brought about by a combination of shifting market boundaries, indirect network effects, customer acquiescence and information asymmetries with their digital providers, and varying levels of dependency on key players which undermine the exercise of effective countervailing bargaining power.” Peter Alexiadis & Alexandre de Streel, *Designing an EU Intervention Standard for Digital Platforms* (EUI Working Papers, RSCAS 2020/14) 19 https://cadmus.eui.eu/bitstream/handle/1814/66307/RSCAS%202020_14.pdf?sequence=1&isAllowed=y.

³ See Fiona Scott Morton, *Reforming U.S. antitrust enforcement and competition policy*, Washington Center for Equitable Growth (Feb. 18, 2020) <https://equitablegrowth.org/reforming-u-s-antitrust-enforcement-and-competition-policy/>.

⁴ See Appendix A for highlights from the report. In the UK, the CMA has found in its interim report that Google likely has greater than 90% market share at the Publisher Ad Server level, 50–70% of the Demand Side Platform purchases, and 40–60% of the Supply Side Platform sales. Competition and Markets Authority, *Online platforms and digital advertising: market study interim report* 197 (Dec. 18, 2019) https://assets.publishing.service.gov.uk/media/5dfa0580ed915d0933009761/Interim_report.pdf.

⁵ *Id.* at 107.

⁶ *Id.* at 150.

each side of the auction,⁷ Google has the opportunity to use self-preferencing in multiple ways. The report describes claims that Google has used different strategies to give its own publisher and advertiser tools better access over competing tools.⁸ This may be a method to get more advertisers and publishers to use Google’s tools. If they use a competing ad tool, they know their bids will likely be disadvantaged by Google. This type of behavior would allow Google to charge higher prices for advertisers than they might in a more competitive market and allow Google to pay less out to publishers for the right to advertise on their content. The abuse of power could reduce the quality of ad services by limiting advertiser control over the types of content their ad runs near, known as “brand safety,” less accurate or usable analytics to assess the effectiveness of ads or popularity of publisher content, and less effective protections against bots and other sources of click fraud. This is the type of conduct that antitrust enforcers should investigate to determine if it rises to the level of illegality.⁹ If Google has caused these harms, enforcers must determine whether a non-discrimination rule may be enough, or whether a more severe structural remedy is needed to remedy the abuse of market power.

Self-Preferencing in Interoperability

Digital platforms have many tools that could be used to restrict competition. Platforms can refuse to make their own services—which may reach a vast customer base—interoperable with those of nascent competitors, while at the same time enabling such interoperability with the services they own and control. This disparity in access to customers often delivers a crippling blow to small players entering the market. One potential example of this was Facebook’s “Find My Friends” feature. The feature allowed a user of other social networks to quickly interface with Facebook to “find their friends” on that social networking site. They could then add their Facebook friends to non-Facebook sites with just one click of a button. Good for consumers and good for competition. Unfortunately, Facebook discontinued the feature for upstart competitors, such as the video app Vine and the messaging app MessageMe.¹⁰

Cross-posting is another important interoperability feature. This allows users to easily send their social media posts, at the time of posting, to another platform in addition to the one they are using. If users prefer one platform but have many friends on another platform, they can use cross-posting to reach those friends on the other platform. Facebook currently offers cross-posting between Facebook and Instagram, two companies that it owns. It also offers cross-

⁷ CMA Interim Report, *supra* note 4, at 199.

⁸ *Id.* at 203-215.

⁹ Put another way, “[i]nsofar as a dominant undertaking operates a digital platform that is open to all traders, acts of discrimination, self-preferencing and other related acts of leveraging may be unlikely to generate efficiencies which outweigh the restrictions to competition arising from such acts.” An issue certainly arises when “customers switching between platforms is not viable or attractive, especially where access to key competitive data is not available to all operators.” Alexiadis & de Stree, *supra* note 2, at 32.

¹⁰ Adi Robertson, *Mark Zuckerberg personally approved cutting off Vine’s friend finding feature*, THE VERGE (Dec. 5, 2018) <https://www.theverge.com/2018/12/5/18127202/mark-zuckerberg-facebook-vine-friends-api-Block-parliament-documents>.

posting with Twitter, but not with other companies. Entrepreneurs considering entering the market for social networking know they cannot count on cross-posting with Facebook. This makes entry harder for those potential competitors.

The CMA interim report concludes:

The Facebook ‘family’ of apps further insulates Facebook.com from competitive pressure. We have also received some evidence demonstrating that new entrants may, in some circumstances, be reliant on Facebook. This appears to primarily occur through . . . providing access to the Facebook social graph, or cross-posting capabilities. By permitting and then restricting other social media platforms’ access to these APIs, Facebook may be able to affect the competitive constraints it faces.¹¹

Interoperability can be enormously beneficial to both consumers and competition, yet is rarely in the economic self-interest of an already dominant digital platform like Facebook. The solution to this is simple: mandate interoperability by law. Congress should pass the bipartisan ACCESS Act, championed by Senators Warner, Hawley, and Blumenthal to open up competition for social networks.

Preferencing Owned Products on the Platform

Another potential competitive issue arises when a platform sells its own products on the platform it controls. When companies face a competitor that is also the market referee setting its own rules for competition, the competitive dangers are not hard to grasp.

Two examples best illustrate this problem. Although originally just an online bookstore, Amazon has grown into a massive online market known as “the Marketplace.”¹² Amazon is also a retailer, selling directly on the Marketplace in competition with the other retailers. The Amazon retailer could unfairly benefit from its vertical relationship with the Amazon Marketplace if Amazon puts a thumb on the scale to make sure it is among the first to appear in search results, get more space on the page, or are more likely to win the coveted “Buy Box,” where consumers click to purchase.

Similarly, Apple’s iOS operating system works most fluidly with Apple’s own apps. Email on an iPhone defaults to Apple’s Mail app, directions to Apple’s Maps, in the latest iOS’s shortcut menu, hitting the “play” button will default to Apple Music or iTunes over Spotify, etc. Although

¹¹ CMA Interim Report, *supra* note 4, at 107.

¹² As recently as 2019, eMarketer pegged Amazon’s market share at 38% of the retail ecommerce market after a revision down from 47%. Amazon has not been forthcoming with more reliable information. Matt Day & Spencer Soper, *Amazon U.S. Online Market Share Estimate Cut to 38% From 47%*, BLOOMBERG (June 13, 2019), <https://www.bloomberg.com/news/articles/2019-06-13/emarketer-cuts-estimate-of-amazon-s-u-s-online-market-share>.

some consumers would prefer to stay in the Apple ecosystem, the potential harm could be akin to tying or bundling in antitrust: consumers are pushed into imperfect choices on ancillary products and services. Apple appears to hear an outcry from app developers complaining about these issues and is reportedly considering changes.¹³

Even if such preferencing is more convenient for some consumers in the short run, the impact on competition may harm consumers with fewer choices, lower quality products, and higher prices in the long run. Investigations can establish whether these concerns are valid, whether they are doing more harm than enabling benefits, and if they rise to the level of an antitrust violation. Congress should also establish a framework to protect competition and consumers from this potential conflict of interest for dominant platforms that act as a gatekeeper.¹⁴

Data & Self-Preferencing

Digital platforms often require that in exchange for access to their platform, companies must give the platform access to some of their important data. Sometimes this is actually required to provide the service, sometimes it is not. Either way, this could have harmful anticompetitive effects if the platform is a gatekeeper distribution system where access to the platform can make or break a company's commercial viability.

One popular example might be Amazon. Amazon competes as a retailer on its own ecommerce Marketplace. Competing retailers must share with Amazon certain data about their products and customers in order to use the platform. The data advantage this grants Amazon over rivals, together with the tools of self-preferencing available to the platform, can enable a platform to compete unfairly by better predicting consumer behavior. In the case of a bottleneck or gatekeeper platform, this would be a powerful barrier to entry. Any retailer that might one day impose competitive pressure on the platform itself could be easily identified through the data and limited by the self-preferencing power.

The CMA report found that Facebook also has a significant data advantage over competitors. This makes advertising on Facebook much more appealing than advertising on another large publisher site. These publishers, like the New York Times or BuzzFeed, are competing with Facebook for advertising, but they also rely on Facebook as a distribution tool for their content.

¹³ Mark Gurman, *Apple to reveal new home-grown apps, software features at WWDC*, BLOOMBERG (May 6, 2019) <https://www.bloomberg.com/news/articles/2019-05-06/apple-wwdc-2019-ios-13-macos-10-15-watchos-6-tvos-features>.

¹⁴ See Appendix B for details on this framework. For a description of “bottleneck power,” see George J. Stigler Center for the Study of the Economy and the State, Committee for the Study of Digital Platforms Market Structure and Antitrust Subcommittee Report (Jul. 1, 2019) <https://research.chicagobooth.edu//media/research/stigler/pdfs/marketstructurereport.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>. For a description of “gatekeeper power,” see Digital Competition Expert Panel, *Unlocking digital competition* (Mar. 13, 2019) https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

Facebook gets some data about how users interact with their content. CMA describes how Facebook's own terms and conditions for publishers on their site govern which company gets access to which sources of data. Due to Facebook's strong market position and barriers to entry and expansion like network effects, the CMA interim report found that Facebook has market power.¹⁵ The CMA expects this market power may allow Facebook to extract more data from consumers, which it can use in ways that are valuable to Facebook, but consumers likely do not fully understand.¹⁶ And the CMA found that Facebook has significant market power over advertisers.¹⁷ It may be that this also allows Facebook to extract more data and money from advertisers as well. If so, this would be another appropriate area for Congress to protect business proprietary data.

Self-Preferencing to Prevent Future Competition

Crucially, self-preferencing can be used as a tool to prevent future competition. It is very difficult to compete against a gatekeeper platform, but one of the few methods available is to start in one "vertical," one service that the platform provides like a voice assistant or travel service, and expand from there. A potential competitor must identify a lucrative vertical—one with expansion potential—and then thrive there so that it can expand or build business relationships with nearby verticals to provide an alternative to the platform. If the potential competitor's vertical is dependent on a platform owned by the gatekeeper it is trying to compete against, the platform can use its self-preferencing power to prevent that potential competitor from ever getting the scale it needs to compete.

Some have argued that Google's purchase and subsequent treatment of the maps and directions app Waze may have been one such example. Waze may have had the opportunity to become a meaningful independent competitor to the Google Maps app. But the importance of the Waze acquisition was not just about competition for mapping applications. Maps and directions are an important source of location data, useful for building an advertising competitor. And, maps and directions are an important "vertical" that can be used for expansion to one day build an offering that could actually exert competitive pressure on Google. One can imagine a world where companies swallowed by Google like Waze and ITA get together with Expedia, TripAdvisor, or similar firms, either by contract or acquisition, to offer a complete travel search experience for users. People in that world might still use Google for a lot of their searches, but for lucrative travel-related searches likely to turn into an expensive purchase, there might be stronger competition from this alternative. Of course, it is hard to prove what might have happened, but specialized search companies growing organically or working with each other and complimentary service providers could provide the best path to challenge dominant platforms. Merger enforcement and exclusionary conduct enforcement should pay closer attention to this

¹⁵ CMA Interim Report, *supra* note 4, at 108.

¹⁶ *Id.* at 108.

¹⁷ *Id.* at 226.

potential source of competition. However, to maximize opportunities for such competition to develop, we need more than antitrust; this is also an area where new pro-competition regulatory tools could be employed to require merging parties to demonstrate that their transaction will expand competition.

Digital Platform Markets

Not all self-preferencing is problematic. A frequently heard refrain is that CVS is free to give the CVS brand acetaminophen premier placement in the store over Tylenol. Consumers may be well served by this, since the CVS brand is likely cheaper and chemically identical. The reason this example is different from self-preferencing by dominant digital platforms is the platforms' dominance and the fact that digital platform markets are prone to tipping toward monopoly.¹⁸ In markets where competition is largely aiming to take down and try to replace a monopoly, it is critical to promote all sources of competition. Even the threat of competition from a potential competitor can exert pressure on a monopoly to behave. Unfortunately, it is easy to quash such small nascent threats without incurring the ire of the antitrust agencies.

Experts have identified economic characteristics of digital platform markets that lead them towards tipping and make competition against these gatekeepers extremely difficult. In these markets, network effects, economies of scope and scale, and taking advantage of consumer behavior like through defaults, are powerful and may be exacerbated by the platforms themselves to prevent consumers from shifting to competitors. Both the Stigler Committee on Digital Platforms Report (the "Stigler Report") and the UK's Digital Competition Expert Panel (the "Furman Report"), examined these economic characteristics of digital platforms in depth.

Network effects. Users prefer to be where other users are, sellers prefer to sell where there are a lot of consumers to buy their products, and advertisers want to submit their bids to the exchange that has a lot of publishers where they can show their ads. Digital platforms exhibit network effects when they have locked in a significant user base. The more dominant a digital platform is, the more enticing it will be to additional users. This can create a market where the dominance of a platform reinforces itself as it grows its user base. Network effects deter users from switching to a new service, making entry and expansion to compete against an entrenched incumbent more difficult.

Economies of scope and scale. Economists have a term, marginal cost, signifying the additional cost to produce one more good. Digital platforms, once they reach adequate market scale, have very low marginal costs. While there is certainly some cost to increasing scale (additional server

¹⁸ Another important difference is that there may be network effects at the product level, not just at the platform level. For example, Google may want to direct more users to Google Flights not only to get more advertising revenue, but also to improve Google Flights with more search and click data from users.

space, etc.) it is much less than the costs incurred by new entrants. The additional search query, Facebook user or Amazon sale is thus very easily profitable for a company. This problem is also seen in the main currency of online platforms: data. Certain types of data can provide specific unique insights about tastes, preferences, and behavioral prompts and is thus incredibly valuable for a platform to pitch to advertisers. The more of this data that a company has on you, the more valuable you are as an advertising target. And the more valuable you are as an advertising target, the more that advertisers will pay platforms to reach you.¹⁹ As companies grow larger and start being your home for more services—from flights, to email, to search, to maps—the company can assemble a holistic digital portrait of you. When a smaller company tries to compete in just one of those verticals, its data is much less valuable than that of a behemoth. Similarly, as a company gets access to more of these data streams on more and more people, the value of that aggregated data also increases significantly. It can make more accurate inferences with data about more people. In the digital advertising market, this means that a large company with access to many data streams can run a very effective ads platform: it has the most detailed data and can best predict who will click on which ad. Smaller competitors have a tougher time obtaining such detailed data, so they cannot offer the same level of targeting, which advertisers demand.²⁰

Single-homing. Consumers do not have time to compare the results of two search engines or read through page three of their search engine results page each time they need information. In the ideal competitive utopia, consumers would constantly be evaluating their options and choose the one that has the best combination of quality and cost-effectiveness. Instead, we naturally rely on shortcuts to find the best options in an efficient manner. That normal behavior makes it harder for digital platform competitors to demonstrate better alternatives. Consumers tend to default to one service, known as single-homing. Even if it only takes a few seconds, many users will not change default settings that come with their phone. Powerful incumbent platforms may also make design choices to exacerbate this inclination, nudging people to stay put.

Antitrust Solutions

Given these fundamental forces driving the digital marketplace, it is not surprising that we would have very few firms capable of becoming full-scale competitors in online search, social networking and similar markets. However, this also means that if any of the dominant firms are misbehaving, putting their thumbs on the scale to unfairly exclude or limit the growth of competitors, it must be challenged under the antitrust laws. While it is difficult to say whether any one company has violated the law without access to the internal documents of the companies, there is enough public information to indicate that the Federal Trade Commission,

¹⁹ Also, this high rate of payment incentivizes the platform to serve up engaging content to keep you in their ecosystem to serve you as many ads as possible. *See e.g.*, The Center for Humane Technology, <https://humanetech.com/problem/>. This is a potential quality harm.

²⁰ Even if a smaller competitor could amass enough data to have accurate ads, it would be difficult to prove this to customers, since Google and Facebook could limit access to outside analysis of their advertising metrics.

the Department of Justice, and state attorneys general should proceed with their current investigations to identify and remedy any violations. This includes allegations by industry participants that exclusive contracts and self-preferencing have harmed the competitive environment.

For example, some competitors assert that Google created impediments for specialized search products that could become a competitive threat in lucrative areas where consumers are more likely to make a valuable purchase, like local search, travel, shopping, and finance. This is something that antitrust enforcers should investigate.

Publishers, including newspapers and other sources of web content, are also very concerned that Google is engaged in anticompetitive conduct that prevents other ad exchanges and tools from competing, leading to lower rates of return for their ad inventory. This is something that antitrust enforcers should investigate.

Facebook engaged in a series of acquisitions of smaller companies in adjacent markets, including the acquisition of Instagram at the moment of Facebook's transition from desktop to mobile devices. It is important to know whether this series of acquisitions may have been designed to buy up potential competitors rather than just competing. This is something that antitrust enforcers should investigate.

Mergers also intersect with the problem of self-preferencing. Dominant platforms may purchase a company that competes or could compete on its platform, giving the platform an opportunity to self-preference and distort competition on the platform. This makes it much harder for independent competitors to stay afloat and provides fewer options for consumers. Without that competitive pressure, dominant firms may innovate less, reduce quality, raise prices, and offer less favorable terms and conditions to users. Merger enforcement must also take the potential vertical challenge from companies that compete on the platform more seriously.

Perhaps even more important are mergers with small nascent competitors, where it may be difficult for agencies and courts to identify anticompetitive impacts and agencies must investigate technology trends to properly enforce. These cases may take extra time to investigate, and it is important that the uncertainty, almost inherent in this type of merger, not be a barrier to enforcement. One option would be to establish a dominant platform presumption as part of the upcoming Vertical Merger Guidelines being considered at the FTC and DOJ.²¹ Other policy tools will also be needed to consider how acquisitions by platforms of very small companies can exacerbate platform dominance.

²¹ See Public Knowledge & Open Technology Institute, *Comments on the draft vertical merger guidelines* (Feb. 26, 2020) <https://www.publicknowledge.org/documents/comments-to-doj-and-ftc-on-vertical-merger-guidelines/>.

Over the last forty years, antitrust jurisprudence has become increasingly hostile to previously accepted enforcement practices.²² To deal with today’s market problems and new understanding of market dynamics, this must change. We must sharpen the tools of antitrust to better take on digital platforms.

Senator Klobuchar’s recently introduced bill, the Anticompetitive Exclusionary Conduct Prevention Act, cosponsored by Senator Blumenthal, is exactly the kind of legislation needed to modernize antitrust enforcement. She has long been a leader in proposing smart fixes to antitrust, and this bill continues that effort. The bill has several targeted fixes which would make it harder for companies to get away with anticompetitive exclusionary conduct, increase civil penalties for antitrust violations, and eliminate unnecessary hoops to establish an antitrust case. This will bring our antitrust laws more up-to-speed with modern economic findings and reverse many misguided limits placed on this doctrine by the courts.²³ The bill makes several important changes in response to a slew of antitrust decisions out of step with modern economic reasoning that have handicapped rigorous enforcement such as *Trinko* and *American Express*.²⁴

Regulatory Tools

Even if current antitrust investigations successfully identify and remedy antitrust violations by dominant platforms, that will not be enough to overcome the natural tendency for these markets to tip toward monopoly, and therefore more oversight is needed to protect consumers and give them the benefits of competition.²⁵ Fundamentally, antitrust waits for illegal conduct and seeks to remedy that conduct. For gatekeeper platforms, significant market power is sustained without effective entry or expansion thanks in part to the powerful position that dominant platforms hold in our economy and market forces that reinforce their advantages. Long-term innovation and competition will require tools—like those used to open the telecommunications market to competition after the breakup of the AT&T monopoly—to sustain the work that effective antitrust enforcement can achieve.

This means it is up to Congress to take the baton and enact meaningful reform to rein in the power of these platforms. We need a new expert agency, focused on digital platforms and

²² See Fiona Scott Morton, *Competitive edge: there is a lot to fix in antitrust enforcement today*, Washington Center for Equitable Growth (July 18, 2018) <https://equitablegrowth.org/there-is-a-lot-to-fix-in-u-s-antitrust-enforcement-today/>.

²³ Academics like Jonathan Baker have long advocated for antitrust law to do more to address exclusionary conduct. See Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 *Antitrust Law Journal* 527 (2013).

²⁴ *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004); *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018).

²⁵ In situations where “markets may have already ‘tipped’ before effective intervention is possible, or they may be characterized by market failure rather than abusive strategic market behavior, or even because customer inertia reinforces entrenched market positions . . . it may be *ex ante* regulation rather than competition law that is best placed and most effective to address competition concerns.” Alexiadis & de Streel, *supra* note 2, at 17.

equipped with pro-competition regulatory tools. Congress should lay out a non-discrimination framework, bolstered by pro-competition tools like interoperability, data controls, and merger review concurrent with the antitrust agencies, administered by a regulatory authority expert in digital platforms.²⁶ This, together with Senator Klobuchar’s bill sharpening the tools of the antitrust laws, is the best way to address the harmful instances of self-preferencing by digital platforms that appear to be going on now or may happen in the future. If Congress waits to see the results of the antitrust investigations currently ongoing, which could take years, the marketplace will suffer. The time to act is now. We must get started right away building the regulatory tools necessary to jump-start and sustain competition against dominant digital platforms.

Conclusion

Today’s exploding digital marketplace is characterized by a tendency to tip toward monopoly in an environment with inadequate public policy tools available to counteract this trend. Lack of public duties to protect personal information, the inadequacies of current antitrust jurisprudence and a vacuum in sector-specific regulation over the dominant tech platforms leaves society at enormous risk. Network effects and economies of scale, when connected to the enormous power of data control in the hands of the leading tech platforms is likely harming innovation, preventing the growth of healthy competition, and enabling the exploitation of personal privacy. We therefore propose, in addition to strong antitrust enforcement, the creation of a federal agency agile enough to handle the oversight of data abuses, gaps in competition policy, and capable of establishing corporate duties that promote fair market practices.

²⁶ See Appendix B. Public Knowledge has examined a broad array of solutions to address these and other important policy concerns. To that end, I highly recommend “The Case for the Digital Platform Act” by Harold Feld, available at www.DigitalPlatformAct.com.

Appendix II

**Letter to Chairman Cicilline and Ranking Member Sensenbrenner
Charlotte Slaiman – Competition Policy Director, Public Knowledge
July 15, 2019**



July 15, 2019

Congressman David Cicilline
Chairman
Subcommittee on Antitrust, Commercial,
and Administrative Law
2233 Rayburn House Office Building
Washington, DC 20515

Congressman Jim Sensenbrenner
Ranking Member
Subcommittee on Antitrust, Commercial,
and Administrative Law
2449 Rayburn House Office Building
Washington, DC 20515

Chairman Cicilline and Ranking Member Sensenbrenner,

We commend you on committing to this investigation into Online Platforms and Market Power. Online platforms play an incredibly important role in our economy, our access to information, and economic opportunity. Yet, they have no dedicated regulatory authority as so many other important industries do. We urge you to identify through this investigation what types of antitrust enhancements and regulatory tools are needed to jump-start competition in these important industries.

Incumbent online platforms benefit from natural economic characteristics that protect their market dominance, causing a slew of competition policy concerns. Companies like Amazon and Facebook benefit from “network effects,” meaning that as the number of users goes up, so do the benefits to users of being on the platform. In other words, all else equal, you benefit more by joining the social media platform your friends are on than you do by joining a newer or smaller social network without your friends. Many digital platforms benefit from economies of scale because their software has almost no marginal cost for adding users. Many digital platforms also benefit from economies of scope because data is much more valuable when aggregated and analyzed as a group instead of viewed as single pieces of information. If Google provides my email and my maps, including traffic data, then Google can tell me when to leave for my flight so I arrive on time. By contrast, a competitor’s maps app that doesn’t have access to my email doesn’t even know that I have a flight to catch. Incumbent online platforms also benefit from behavioral ticks like “[bounded rationality](#),” where consumers use shortcuts rather than carefully choosing the best option each time. Most of us don’t check multiple online stores every time we buy oven mitts—we just go to the same store we usually go to. Similarly, we don’t use Bing every few months to see if it’s finally caught up to Google’s search engine—we just assume that it hasn’t and keep returning to Google Search.

The combination of these characteristics makes it incredibly difficult for small companies to grow and new companies to compete against incumbent dominant platforms. Without dynamic competition, where new competitors actually pose a threat to the market position of incumbents, economists expect less innovation, higher prices, and lower product quality. Some harms are more obvious: less consumer choice and limited opportunity for entrepreneurship.

To address a problem this large, we believe Congress must evaluate all the tools that could prevent our digital marketplace from tipping toward monopoly. Congress should stay engaged in oversight of the Federal Trade Commission (FTC) and Department of Justice (DOJ) to ensure these agencies are enforcing the law to the best of their ability and that they have the resources they need to take on and win difficult cases. Antitrust law also needs improvement to address the narrowing it has suffered from decades of judicial pushback and inconsistent enforcement. Third and most important, we need a new regulator to address the competition problems that antitrust cannot solve.

The New Digital Authority

A new expert regulator equipped by Congress with the tools to promote entry and expansion in these markets could actually expand competition to benefit consumers, entrepreneurship, and innovation. The regulatory authority could be housed within an existing agency, such as the FTC, or it could be a new expert body, focused on digital markets.

Interoperability: First, the agency should be authorized to require dominant platforms to be interoperable with other services, so competitors can offer their customers access to the dominant network. Allowing interconnection to the dominant network was a crucial component of the breakup of AT&T, and it can create competition against Facebook, with or without a break up. Online platforms that benefit from network effects and control an important market bottleneck¹ may be appropriate targets for an interoperability rule. A regulator is especially useful for a tool like this because it will require technical detail, frequent updates, and complaint resolution to make sure the interoperability requirement is working as intended.

Non-Discrimination & Un-Bundling: Online platforms know that companies that use their platform can “disintermediate” them by connecting directly with the consumer, effectively cutting out the platform middleman. This means their customers, the companies that use the platform, are also potential competitors. In some cases those companies are actual direct

¹ Here we adopt the definition from the Stigler Competition Report on Digital Platforms and Market Power, “‘Bottleneck power’ describes a situation where consumers primarily single-home and rely upon a single service provider, which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.” Stigler Competition Report on Digital Platforms and Market Power, 2019, 9, available at <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf?la=en&hash=E08C7C9AA7367F2D612DE24F814074BA43CAED8C>.

competitors, like when the same company owns a platform and one of the competitors on the platform. (This is the example of the Amazon Marketplace where many retailers, including Amazon, compete for customers.) As a result of this competitive dynamic, platforms might discriminate against companies that pose a competitive threat, or use data to disadvantage them. Congress should authorize the new regulator to monitor and ban discrimination by digital platforms with bottleneck power in favor of their own services and against their competitors who rely on their platform to reach customers. Similarly, the agency should be authorized to ban certain “take it or leave it” contract terms that require any company doing business with a dominant digital platform to turn over its customer data for the dominant platform to use however it pleases. This effectively bundles the service the companies need with data sharing they may not want to participate in. By prohibiting these practices, we can give potential competitors a fighting chance.

Mergers: The regulator could also have the power to review and block mergers, concurrently with the existing antitrust agencies. The new regulator would have a different standard that is more appropriate to the economics of online platforms. It should block mergers involving platforms with bottleneck power that do nothing to actually expand competition in markets. It should place a higher burden on dominant platforms than is used for antitrust. This would prevent increased concentration of power when the company being purchased is too small or the competitive consequences are too uncertain.

Effective Enforcement of Current Antitrust Law

Under current law, our antitrust agencies can and must do more. Antitrust enforcement agencies should develop a better understanding of zero-price markets. Many online platforms offer their services to consumers “for free,” in other words without a monetary price. But these services are not really free: consumers barter for these services with their attention and their data. The platforms use that attention and data to generate revenue from advertisers. A market with barter transactions is subject to the antitrust laws just like any other market. However, since money prices are more common and easier to quantify, antitrust economists have developed sophisticated tools to analyze money prices. We lack equally sophisticated tools for analyzing changes in barter markets. Enforcers can and should develop and employ better measures of barter transactions such as quality-based pricing for use under current law. They simply need the resources and a leadership interested in doing so.

Antitrust enforcement agencies should prioritize merger enforcement against acquisitions of potential and nascent competitors, as well as vertical mergers and acquisitions. They must think broadly about market trends to identify anticompetitive acquisitions. Online platforms pose unusual challenges for antitrust merger enforcement. To the extent that platforms are in winner-take-all or winner-take-most markets, mergers will take place largely between dominant incumbents and very small, nascent, or potential competitors, and between dominant incumbents

and firms with complementary rather than competing products. It makes sense that the types of mergers easiest to challenge under antitrust law, horizontal mergers among large direct competitors, are rare here.

The agencies should closely scrutinize the conduct of dominant online platforms, and bring Sherman Act Section 2 cases where appropriate. They must recognize the special economics of platforms and the ways that competition happens and does not happen in those types of markets in order to identify the importance of and anticompetitive impact of their conduct. Of course, in order to be successful an online platform needs to create an ecosystem that is valuable by attracting not only individual users but also businesses, for example to buy ads or sell products on the platform. This may apply some pressure to the platform to offer businesses a system that works well for them. Once a platform achieves some dominance though, it may no longer be subject to those same dynamics. The businesses that used to rely on the platform may become competitors to the platform as they seek to disintermediate them with direct connections to customers. Shifts in business practices to limit opportunities for these businesses may harm competitors, and thereby be subject to antitrust law.

Changes to Antitrust Law

Antitrust law must recalibrate the balance it strikes between the risks of overenforcement and underenforcement. Underenforcement has been the far more pernicious failing in recent decades. Certain types of business conduct that were previously thought to be benign are now understood to be anticompetitive.² Knowing this, Congress should revise aspects of antitrust doctrine that were adopted explicitly in order to minimize the risk of overenforcement, and change presumptions to offer less demanding proof requirements on antitrust plaintiffs, especially where facts are difficult to observe or prove directly and indirect proof is available.

Current antitrust precedent in a number of areas needs to be updated to reflect market realities of today. These include unilateral refusals to deal, predatory pricing, two-sided markets, and anticompetitive product design.³ Perhaps most importantly, antitrust law should be revised to relax, in appropriate cases, the proof requirements imposed upon plaintiffs or to reverse burdens of proof. Burdens of proof might be switched by adopting rules that will presume anticompetitive harm when the plaintiff makes a preliminary showing, then shifting the burden to the defendant. The law could also state when plaintiffs should have a lower burden of proof in matters to which the defendants have greater knowledge and better access to relevant information. In particular, mergers between dominant firms and substantial competitors or likely future competitors should be presumed to be unlawful, with an opportunity for rebuttal by defendants. Also, courts should not be permitted to presume efficiencies when a company purchases a business with a vertical, complementary role, but rather require strong supporting

² See Stigler Report for more information on these types of conduct.

³ *Id.* at 74-78.

evidence showing that the claimed efficiencies are merger-specific and verifiable. These proof requirements are likely to be important in the application of antitrust standards to online platforms.

Even with these changes, online platforms will continue to present some particular challenges for antitrust enforcement. These markets are prone to tipping and the resulting market power is durable, so even effective antitrust enforcement is unlikely to achieve truly competitive markets. These markets move quickly. Antitrust litigation does not. Innovation is particularly important in online platforms, as this industry and its complements were sources of significant disruptive innovation in the past. But innovation effects of anticompetitive conduct or mergers are particularly difficult for economists to model, making it difficult to base a merger challenge or conduct case largely on innovation effects.

This is why Public Knowledge advocates for a new expert regulator with additional regulatory tools beyond antitrust to create real competition on and against online platforms. We urge you to consider these ideas as you proceed with your consideration of policies to address problems in the digital marketplace. Thank you again for your attention to this important issue.

Sincerely,

/s/ Charlotte Slaiman

Charlotte Slaiman

Competition Policy Counsel

Public Knowledge

CC: Chairman Nadler and Ranking Member Collins

Appendix III
Comments on the Draft Vertical Merger Guidelines
Public Knowledge & Open Technology Institute
February 26, 2020

Public Knowledge and New America’s Open Technology Institute submit these comments in response to the request for public comment regarding the Federal Trade Commission’s and Department of Justice’s Draft Vertical Merger Guidelines.¹ We support the decision to revisit the non-horizontal merger guidelines that were last published in 1984. Since then, there has been much more antitrust scholarship on mergers generally and vertical mergers specifically, as well as real-world examples that should inform the new guidelines.

While the FTC and DOJ have made the right decision to revise the guidelines, the current draft has important shortcomings that should be addressed. In particular, we recommend revising the guidelines to include: (1) rebuttable anticompetitive presumptions; (2) application to all non-horizontal mergers; (3) an evaluation of previous vertical mergers and their enforcement impact; and (4) an extended deadline for first-round public comments and a second round of reply comments.

In addition to these written comments, Charlotte Slaiman of Public Knowledge and Joshua Stager of the Open Technology Institute would welcome the opportunity to participate as speakers at the workshops scheduled for March 11 and March 18, 2020.

I. The Guidelines Should Include Anticompetitive Presumptions

Vertical mergers in concentrated markets are often anticompetitive. As a result, certain anticompetitive presumptions are warranted in some types of cases. Presumptions can help the agencies and merging parties save valuable resources at every stage of a transaction’s review. Presumptions also provide a certain level of business certainty to merging parties so that they can make informed decisions about their legal risks.

The agencies should adopt *rebuttable* presumptions that can be invoked when at least one of the markets is concentrated and therefore competitive harm is more likely, and when certain other key criteria are met.² None of the presumptions are based solely on market shares and concentration.³ All of the presumptions would be rebuttable by evidence showing that anticompetitive effects are unlikely.⁴

¹ *Draft Vertical Merger Guidelines*, DOJ and FTC (rel. Jan. 10, 2020).

² Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton, *Five Principles for Vertical Merger Enforcement Policy*, Georgetown Law Faculty Publications and Other Works (hereafter “*Five Principles*”) (Summer 2019), at 16, available at: <https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=3166&context=facpub>; see also *Recommendation and Comments on the Draft Vertical Merger Guidelines*, Jonathan B. Baker, Nancy L. Rose, Steven C. Salop, and Fiona Scott Morton (hereafter “*Comments of Baker, Rose, Salop, Morton*”) (filed Feb. 24, 2020), at 18-20.

³ *Five Principles*, at 17.

⁴ *Id.*

The Commission should adopt a **dominant platform presumption**. This would be a presumption that a merger is anticompetitive if a dominant platform acquires a firm with a substantial probability of entering into competition with it absent the merger, or if that dominant platform company acquires a competitor in an adjacent market.⁵ Competition against platforms occurs differently than in other types of markets and is often harder. Entering from an adjacent market is one of the few viable ways to compete against a dominant platform.⁶ As a result, it is important that mergers between dominant platforms and adjacent markets receive extra scrutiny.

For purposes of this presumption, a dominant platform could be defined as a firm with bottleneck power, as discussed in the Stigler Digital Platforms and Market Power Report and the UK Digital Markets Competition Report (also known as “The Furman Report”). According to the Stigler Report, “‘bottleneck power’ describes a situation where consumers primarily single-home and rely upon a single service provider (a ‘bottleneck’), which makes obtaining access to those consumers for the relevant activity by other service providers prohibitively costly.”⁷ The Furman Report describes gatekeepers as companies that “have a high degree of control and influence over the relationship between buyers and sellers, or over access by advertisers to potential buyers.”⁸ These platforms are often important routes to market for other firms. Bottlenecks also benefit from market characteristics that tend to impede entry and lead to foreclosure, such as high switching costs for users, bundled services (either by contract or technology), and the inertia of defaults. Digital businesses that have this incentive and ability to develop and preserve a single-homing environment should be considered dominant platforms and therefore subject to the presumption.

Platforms often face “competition for the market” rather than dynamic and ongoing competition.⁹ This type of competition is especially hard for new entrants and can be easily thwarted. Dominant platforms will often be in a better position to identify potential competitors that have a chance of unseating the incumbent than regulators. The threat to the dominant incumbent is existential, but the chances of success for the new entrant may be low. This makes proving the likely anticompetitive effect of the merger especially difficult at the same time that protecting the potential competition is especially important. This is a situation where a presumption can provide a real competitive benefit to the market, as it incentivizes the dominant platform to compete rather than purchase the potential competitor. This presumption is similar to the elimination of potential entry presumption, but due to the network effects and economies of

⁵ *Id.*; see also *Comments of Baker, Rose, Salop, Morton*, at 18-19.

⁶ Stigler Committee on Digital Platforms, Final Report, Stigler Center for the Study of the Economy and the State (Sept. 2019) (hereafter “Stigler Report”), available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf>.

⁷ *Stigler Report*, at 84.

⁸ *Unlocking digital competition: Report of the Digital Competition Expert Panel* (Mar. 2019) (hereafter “Furman Report”), at 41, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf.

⁹ *Stigler Report*, at 88.

scale that protect dominant platforms from competition,¹⁰ the need to prove that an adjacent market is a potential competitor is lifted.

Dominant platforms also have particular foreclosure capabilities for adjacent markets, which create incentives similar to vertical mergers in non-platform markets. A platform with market power could substantially disadvantage firms in an adjacent market by refusing to interoperate with them. If a platform purchased one adjacent market firm, it would then benefit from preferencing the owned firm over competing adjacent market firms, either by denying interoperability or making interoperability difficult, thereby diverting substantial business to the owned firm.

We can use the acquisition of Instagram by Facebook as an example. Though Instagram and Facebook may already have been horizontal competitors at the time of the merger, some have indicated that the two companies, one focused on mobile devices and photo sharing, the other focused on desktop devices and general social networking, may in fact have been in different markets.¹¹ If the FTC determined that in fact the two were not horizontal competitors, it could have been a useful time for a dominant platform presumption.

An **input foreclosure** presumption is another important anti-competitive presumption to include in the guidelines. When a company buys its input supplier, the merger may or may not be substantially likely to reduce competition.¹² But if the supplier produces a *critical* input, and if the market they're selling in (the input market) is *concentrated*, and if the merged company could divert substantial business to itself through a refusal to deal with competing customers, then a presumption that the merger would be substantially likely to reduce competition is warranted.¹³

This is because this situation allows the new merged firm to exercise market power. The new merged firm likely has the incentive and ability to fully withhold, or offer to sell only on unfavorable terms, the critical input from buyers that have now become competitors in the post-merger world.

¹⁰ *Five Principles*, at 17.

¹¹ There is no discussion of this question in the public closing documents, so we have no reliable indications of how the agency analyzed this merger. See *FTC Closes Its Investigation Into Facebook's Proposed Acquisition of Instagram Photo Sharing Program*, Press Release, Federal Trade Commission (Aug. 22, 2012), available at: <https://www.ftc.gov/news-events/press-releases/2012/08/ftc-closes-its-investigation-facebooks-proposed-acquisition>.

¹² *Five Principles*, at 16.

¹³ This should also apply facing the other direction, as distribution can be considered a critical input for a manufacturer, such that what we typically think of as a downstream firm could also be considered an upstream firm, and vice versa. *Id.*

An illustrative example is the purchase of NBCUniversal, primarily a television content company, by Comcast, primarily a multi-channel video programming distributor (MVPD), in 2011. In that case, the FCC, applying its public interest standard, analyzed the merger much as an antitrust enforcer would, looking at possible input foreclosure.¹⁴ The FCC found that a post-merger Comcast/NBCU would have the power to disadvantage downstream rivals—competing MVPDs—by permanently cutting off a rival from access to NBCU video programming, or even temporarily withholding that access.¹⁵ It also found that the merged company could raise its rivals’ costs by increasing the price of video programming to MVPD competitors.¹⁶ The FCC then asked whether the exclusion of rivals would result in harm to competition and concluded that successful exclusion using one of these strategies would likely permit a merged Comcast/NBCU to obtain or maintain market power in the downstream MVPD market.¹⁷ The FCC found that the merged firm would have the ability to “exclude all Comcast’s rivals” from its programming.¹⁸ In the end, the FCC approved a consent decree that it argued would remedy these problems, but as advocates argued at the time, it did not prove sufficient to remedy the complete competitive harm created by the merger.¹⁹

A presumption of anticompetitiveness in cases of input foreclosure would work in a similar way. Enforcers would have to show that the video programming market was concentrated, and that video programming was a critical input for MVPDs. They would have to show that a merged NBC/Comcast could divert substantial business—in this case subscribers to cable television—from competitors to itself by refusing to offer its programming to rival MVPDs. If enforcers could prove those three things, the burden would shift to Comcast to rebut the presumption that the merger is anti-competitive. Having such a presumption in place would not necessarily mean that a merger like Comcast/NBCU would not be settled with a consent decree. However, shifting the burden would make it possible to more easily block some anti-competitive mergers and to achieve stronger and more effective remedies if a consent decree was ordered. For example, the DOJ may have been able to require Comcast to commit to better arbitration requirements and/or stronger limits on most favored nation clauses (MFNs).

¹⁴ Jonathan Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis* (2011), at 37, available at: https://transition.fcc.gov/osp/projects/baker_vertical_mergers.pdf.

¹⁵ *Id.* at 37.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 38.

¹⁹ Commissioner Michael Copps correctly identified the problem with the consent decree, “I believe loopholes remain that will allow Comcast-NBCU to unduly pressure both distributors, especially small cable companies, and content producers who sit across the table from the newly-consolidated company during high-stakes business negotiations for programming and carriage.” (Dissenting Statement of Commissioner Michael J. Copps, *In the Matter of Applications of Comcast Corporation, General Electric Company and NBC Universal, Inc. For Consent to Assign Licenses and Transfer Control of Licensees*, MB Docket 10-56, FCC 11-4 (rel. Jan. 18, 2011) (hereafter “*Comcast/NBCU Order*”, available at: <https://www.fcc.gov/proceedings-actions/mergers-transactions/comcast-corporation-and-nbc-universal-mb-docket-10-56>).

A similar anti-competitive presumption should apply in the case of **customer foreclosure**. Like input foreclosure, this deals with customers and suppliers, but in this case, rather than selling a critical input, the merging firm need only be a *substantial* purchaser of an input produced in a *concentrated* market.²⁰ Similar to input foreclosure, the merged firm must also be able to divert a substantial amount of business through refusing to deal.²¹ Again, in this type of case we expect the new merged firm can exercise market power. The new merged firm likely has the incentive and ability to refuse to buy, or offer to buy only on unfavorable terms, from input suppliers that have now become competitors in the post-merger world, and the merged firm represents a substantial part of their business.

This also came up in the context of the Comcast/NBCU merger. Though the FCC has a different legal standard, their economic analysis appears similar to the concept of customer foreclosure in antitrust law. The FCC considered a range of exclusionary strategies that Comcast might employ, including refusing to carry a rival programming network on Comcast's distribution system; placing a rival network in a less advantageous service tier where fewer users would pay for access to it, or making it difficult for subscribers to find the rival network by giving it a less advantageous channel number.²² These exclusionary strategies could harm the rival programming networks by reducing their viewership thereby making them less attractive to advertisers. The FCC concluded, "As a result, these unaffiliated networks may compete less aggressively with NBCU networks, allowing the latter to obtain . . . or maintain market power with respect to advertisers seeking access to their viewers."²³ In a similar analysis at the DOJ or FTC, we might expect similar results under the antitrust laws.

Non-horizontal mergers should also be presumed anti-competitive if the merger **eliminates a potential entrant** to a concentrated market. This can be defined as one merging firm having a substantial probability of entering into the other firm's market in the absence of merger, when the market losing the potential entrant due to the merger is concentrated.²⁴ This would be a two component test, the first component is substantial probability of entry in the absence of the merger, and the second component is concentration in the potential entry market. Even the threat of entry can put competitive pressure on a concentrated market.

The **elimination of a maverick** firm should also lead to a presumption that a merger is anti-competitive. A maverick is defined as a firm that has prevented or substantially constrained coordination by its competitors in a concentrated market.²⁵ If a firm with a vertical relationship to the maverick, either a customer of the maverick's products or an input supplier to the

²⁰ *Five Principles*, at 16.

²¹ *Id.*

²² Baker, *Comcast/NBCU: The FCC Provides a Roadmap for Vertical Merger Analysis*, at 39.

²³ *Comcast/NBCU Order*, at ¶ 116.

²⁴ *Five Principles*, at 16.

²⁵ *Id.*

maverick, purchases the maverick, the constraining influence of the maverick could be eliminated, which would lead to higher prices.²⁶ This is because it would likely be in the interest of the new merged firm to cease the maverick firm's maverick behavior since it would now benefit from coordination in that market. The mechanism by which this change takes place may not be obvious, so an example is helpful. Perhaps the maverick firm is an input supplier being purchased by a customer. Ordinarily the customer would benefit from having a maverick in the upstream market. However, once the customer owns the maverick, it now benefits from a lack of competition in the upstream market, as it can absorb the increased revenues in the upstream market.

II. The Guidelines Should Apply to All Non-Horizontal Mergers

The previous guidelines were named Non-Horizontal Merger Guidelines rather than Vertical Merger Guidelines. This is an important and valuable distinction. Not all non-horizontal mergers are vertical, yet other types of non-horizontal mergers may also have anti-competitive effects. The Commission should explicitly clarify that the guidelines apply broadly to non-horizontal mergers and not only to vertical mergers.

Mergers of complementary products in particular share economic similarities to vertical mergers. It will not be a good use of resources for agencies to have to prove that the merger they are concerned about is actually vertical rather than complementary in order to benefit from these new guidelines. One key component of a vertical merger is that a company engaged in a vertical line of business often has an easier time entering a market than other companies. This is similar for complementary products, as products that are complementary today can quickly become competitors.

Limiting the application of these guidelines to cases where the agency can prove a vertical relationship would leave out many merging firms in non-horizontal markets, where a similar analysis should nonetheless apply. Especially in communications and internet-related markets, where products and services change often, it can be difficult to identify whether the two merging parties are "at different stages of the same supply chain," as the draft guidelines require in footnote 2. However, the merger still shares important characteristics with vertical mergers and should be subject to the same guidelines.

In today's economy, it is common to have mergers that would not necessarily be characterized as vertical yet where a vertical merger analysis should still apply.²⁷ For example, we can imagine a situation where an Internet service provider ("ISP") buys a programming company that offers a video streaming channel directly to consumers. If the consumer then buys Internet service from

²⁶ *Id.*

²⁷ *Comments of Baker, Rose, Salop, Morton*, at 5.

the ISP and contracts directly with the programming company for the video channel, is this a vertical relationship? It may not be so clear. Yet the economic analysis should apply in the same way. As such, the guidelines should include vertical as well as non-horizontal mergers to address mergers, such as the aforementioned example, that involve complementary products.

III. The Guidelines Should Include An Evaluation Of Past Enforcement Impact

The guidelines would benefit from an evaluation of how markets have fared after the approval of vertical mergers. At a minimum, past enforcement impact should inform the future direction of the Commission's work. Commenters have participated in several vertical transaction reviews, each of which can contribute to the Commission's record and understanding of the impacts of vertical mergers.

AT&T's 2015 acquisition of DirecTV demonstrates how promised efficiencies can fail to materialize in vertical mergers. AT&T claimed that the merger would produce efficiencies that would incentivize the deployment of new broadband service to millions of new customers. Specifically, AT&T committed to deploy fiber-to-the-home broadband to 12.5 million new locations and Fixed Wireless Local Loop services to 13 million rural households, all by the end of 2019.²⁸ This efficiency claim played a significant role in the transaction's approval, as it was viewed as a public interest benefit that could help close America's digital divide.²⁹

However, AT&T appears to have wildly overestimated the merger's efficiencies. According to latest estimates, AT&T has only deployed Fixed Wireless Local Loop to 2.7 million households—a far cry from the 13 million household commitment.³⁰ When asked in 2017 if AT&T would honor this commitment, a spokesman merely replied that the commitment was not binding.³¹ AT&T is even more opaque in its fulfillment of the fiber-to-the-home pledge. The company recently claimed it now “markets” fiber to 14 million locations.³² However, *marketing* and *deployment to the home* are not synonymous, and AT&T is reportedly deeming any location within 1,000 feet of its fiber network as being served.³³ The Federal Communications Commission does not recognize this 1,000-foot threshold, and it is unclear how many locations

²⁸ *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), <https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction>.

²⁹ *Id.*

³⁰ *Fixed Wireless Internet Providers*, BroadbandNow, <https://broadbandnow.com/Fixed-Wireless-Providers>.

³¹ Jon Brodtkin, *AT&T's wireless home Internet, with 160GB cap, is now in 18 states*, Ars Technica, (Sept. 28, 2017), <https://arstechnica.com/information-technology/2017/09/atts-10mbps-wireless-replacement-for-slow-dsl-comes-to-nine-more-states/>.

³² AT&T, *Quarterly Report Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934*, (Nov. 5, 2019), <https://otp.tools.investis.com/clients/us/atnt2/sec/sec-show.aspx?Type=html&FilingId=13718698&CIK=0000732717&Index=10000>.

³³ Bruce Kushnik, *AT&T's 1000 Foot Violation of AT&T-DirecTV Merger Conditions?*, HuffPost, (June 14, 2016), https://www.huffpost.com/entry/atts-1000-foot-violation_b_10449612.

are merely close to AT&T's fiber network rather than directly connected as the commitment entailed.

It is clear that, since the transaction closed, AT&T has given DirecTV preferential treatment over third-party content providers. At the time, experts voiced concerns that if the merger was allowed, AT&T would give anticompetitive preference to DirecTV content on its network.³⁴ In 2017, the FCC concluded that AT&T's free data or "zero rating" plan for DirecTV content likely violated the agency's net neutrality rules.³⁵ Pointedly, this plan runs afoul of the pledge that AT&T made, just two years prior, to adhere to net neutrality rules as a condition of the DirecTV merger.³⁶

Throughout the past four years of broken promises and unrealized efficiencies, the video service that AT&T acquired through the merger has suffered greatly. By the end of 2019, AT&T had 20.4 million video subscribers—down from 25.4 million when the merger closed in 2015.³⁷ According to industry press, DirecTV "keeps tanking" as it hemorrhages subscribers and faces investor calls to divest from AT&T.³⁸ Much of this was foreseeable from the get-go due to the inherent incentives of the market. Clearer, more specific guidelines could have helped the Department of Justice to either block this merger or obtain more effective conditions.

AT&T offers yet another instructive example with its **2018 acquisition of Time Warner**. This transaction closed less than two years ago, yet it has already provided ample evidence that relying on AT&T's price reduction claims in lieu of clear market structure-based guidelines was a failed approach. In 2018, AT&T told a federal judge that "the evidence overwhelmingly showed that this merger is likely to enhance competition substantially, because it will enable the merged company to reduce prices ... There is no sound evidence from which the Court could fairly conclude that retail pay-TV prices are likely to increase."³⁹ Moreover, AT&T specifically argued that "certain merger efficiencies will begin exerting downward pressure on consumer prices almost immediately." Instead, AT&T raised the price of its video streaming service within

³⁴ Tom Wheeler to Sens. Edward J. Markey, Al Franken, Ron Wyden, Bernard Sanders, Elizabeth Warren, Tammy Baldwin, Richard Blumenthal, (Jan. 11, 2017), <https://ecfsapi.fcc.gov/file/60001076101.pdf>.

³⁵ FCC, Letter to Senator Markey (Jan. 11, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0111/DOC-342982A1.pdf.

³⁶ *FCC releases order approving AT&T-DIRECTV Transaction*, Federal Communications Commission, (July 28, 2015), <https://www.fcc.gov/document/fcc-releases-order-approving-att-directv-transaction>.

³⁷ Jon Brodtkin, *AT&T loses another 1.2 million TV subscribers as DirecTV keeps tanking*, Ars Technica, (Jan. 29, 2020), <https://arstechnica.com/information-technology/2020/01/att-loses-another-1-2-million-tv-subscribers-as-directv-keeps-tanking/>.

³⁸ *Id.*

³⁹ *United States of America v. AT&T et al.*, Case 1:17-cv-02511-RJL, (D.C. 2018), https://www.courtlistener.com/recap/gov.uscourts.dcd.191339/gov.uscourts.dcd.191339.121.0_1.pdf.

weeks of the transaction closing.⁴⁰ Eight months later, AT&T imposed a second price increase.⁴¹ Six months after that, the company increased prices yet again.⁴² Also within months of the transaction closing, AT&T engaged in a dispute with Dish Network that ultimately led to AT&T withholding HBO content from Dish for the first time in 40 years.⁴³ The loss of HBO could drive consumers to leave Dish's rival streaming service in favor of AT&T's—precisely what AT&T told the federal judge it would not do. Clearer vertical merger guidelines should specify the economic expectations in a situation like this so that agencies and courts are not relying on promises of companies to defy economic expectations. These price hikes and distribution disputes have created, in short order, a compelling record of the dangers of vertical mergers, particularly in oligopoly markets such as broadband service.

Comcast's purchase of NBCUniversal in 2011 is another transaction that the FTC and DOJ should take into account while developing new guidelines. This merger offers clear lessons in why new, specific and clear non-horizontal merger guidelines would be useful and effective. The Justice Department and the FCC approved Comcast/NBCU in 2011 with a relatively complex set of conditions, obtained under both the antitrust laws and the FCC's public interest authority, addressing the company's video and broadband services. For years, Comcast evaded and outright violated the conditions as enforcers struggled to monitor the company's conduct. For example, Comcast failed to “visibly offer and adequately market” a standalone broadband plan, as the 2011 consent decree required, resulting in an unprecedented \$800,000 fine and FCC investigation.⁴⁴ Comcast also violated a condition to carry all unaffiliated news networks in the same “neighborhood” of channels by discriminating against Bloomberg, a news network that competed with Comcast-owned CNBC.⁴⁵ Both violations were uncovered by complaints from consumer groups and a well-resourced company; they do not necessarily constitute the full extent of Comcast's violations. They do, however, offer instructive examples of why enforcers should be skeptical of promises that companies will behave differently than the market structure suggests they will.

⁴⁰ Jon Brodtkin, *AT&T promised lower prices after Time Warner merger—it's raising them instead*, Ars Technica, (July 2, 2018), <https://arstechnica.com/information-technology/2018/07/att-promised-lower-prices-after-time-warner-merger-its-raising-them-instead/>.

⁴¹ Todd Spangler, *DirectTV Now Prices Going Up by \$10 per Month for All Customers, AT&T Rolling Out Two New Reformatted Packages*, Variety, (Mar. 11, 2019), <https://variety.com/2019/digital/news/directv-now-price-increases-10-dollars-new-packages-1203160152/>.

⁴² Jon Brodtkin, *AT&T hits online TV customers with second big price increase this year*, Ars Technica, (Oct. 18, 2019), <https://arstechnica.com/information-technology/2019/10/att-hits-online-tv-customers-with-second-big-price-increase-this-year/>.

⁴³ Chaim Gartenberg, *AT&T and Dish's HBO battle is the bleak future of cable and streaming*, The Verge, (Nov. 2, 2018), <https://www.theverge.com/2018/11/2/18055780/att-dish-hbo-battle-warnermedia-cable-streaming-battle-future>.

⁴⁴ *FCC Resolves Comcast NBCU Investigation*, Federal Communications Commission, (June 27, 2012), <https://www.fcc.gov/document/fcc-resolves-comcast-nbcu-investigation>.

⁴⁵ *FCC Affirms Bloomberg v. Comcast News Neighborhooding Decisions*, Federal Communications Commission, Sept. 26, 2013, <https://www.fcc.gov/document/fcc-affirms-bloomberg-v-comcast-news-neighborhooding-decisions>.

The Comcast/NBCU conditions have since expired, but Comcast’s potential for market abuse has not. Within months of the conditions’ expiration, Comcast faced complaints that it was using its content ownership to harm competitors. The American Cable Association, a lobbying group for smaller video and broadband providers, argued that Comcast now poses “an even bigger threat to competition than in 2011” and a bigger threat than the AT&T/Time Warner merger.⁴⁶ “When it was subject to the 2011 conditions, Comcast/NBCU at least thought twice about engaging in anticompetitive acts,” the group wrote.⁴⁷ “Without a leash, it can engage in a much wider range of bad behavior and, if it gets caught, merely use its deep pockets to play out the clock or, at worst, ask for forgiveness.”⁴⁸ The letter echoed concerns raised by Senator Richard Blumenthal, D-Conn., who in 2017 urged the Justice Department to investigate the expiring Comcast/NBCU conditions and to consider unwinding the merger.⁴⁹ The agencies should consider whether stronger guidelines would have helped DOJ to devise a more effective way to prevent the harms identified in the DOJ Complaint.

Just as these examples are useful in these comments for explaining the presumptions, it will be useful for the final guidelines to have an accompanying commentary document explaining how the guidelines relate to recent precedents. The FTC endeavored to do this in 2006 with the Commentary on the Horizontal Merger Guidelines.⁵⁰ The FTC and DOJ should consider providing a similar commentary to accompany the new Non-Horizontal Merger Guidelines.

IV. The FTC and DOJ Should Extend The Comment Deadline And Solicit Reply Comments

The FTC and DOJ should extend the deadline for public comments and create a second round of reply comments. The FTC and DOJ publicly announced the draft guidelines on Jan. 10 along with a 30-day comment period. Reflecting the concerns of many, including Commissioner Chopra⁵¹, the FTC and DOJ extended this deadline by two weeks. While we welcome this extension, we must acknowledge that six weeks is simply not sufficient time for individuals,

⁴⁶ Matthew W. Polka to Assistant Attorney General Makan Delrahim, (Nov. 6, 2018), <https://www.americancable.org/wp-content/uploads/2018/11/181106-DOJ-Letter-re-Comcast-NBCU-w-Appendix-FINAL.pdf>.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Sen. Richard Blumenthal to Assistant Attorney General Makan Delrahim, (Dec. 13, 2017), <https://www.blumenthal.senate.gov/imo/media/doc/12.13.17%20Letter%20to%20DOJ%20Antitrust%20re%20Comcast-NBCU.pdf>.

⁵⁰ *Commentary on the Horizontal Merger Guidelines*, Department of Justice and Federal Trade Commission (March 2006), available at <https://www.ftc.gov/sites/default/files/attachments/merger-review/commentaryonthehorizontalmergerguidelinesmarch2006.pdf>.

⁵¹ Statement of FTC Commissioner Rohit Chopra (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561727/p810034chopravmgabstain.pdf.

organizations, and scholars to adequately rethink 36 years of new antitrust scholarship, court decisions, case studies, and the future of vertical merger enforcement.

The FTC and DOJ announced they will be holding two joint public workshops on the Draft Vertical Merger Guidelines in March. While we support these workshops, we believe it would have been more productive and valuable for the agencies and commenters alike if the comment deadline occurs *after* these workshops. If the goal is to have guidelines that are rigorously developed and robustly vetted, it would make sense to allow potential commenters to attend the workshops, participate in an exchange of ideas, and then file their comments. Accordingly, the FTC and DOJ should extend the current deadline beyond these two workshops.

In addition, the FTC and DOJ should create a second round of comments to allow commenters to reply to issues raised in the first round. Revising the guidelines is a significant endeavor that will significantly impact the public interest. The public should be given ample opportunity to weigh in on such an important matter, to read arguments presented in the record, and to express support or offer criticism. This additional level of engagement promotes transparency and gives the agencies important additional context. A reply-comment round is also consistent with decades of public comment precedent, such as the process established by the Administrative Procedure Act. The FTC and DOJ do not need to speed through this process.

V. Conclusion

For the reasons described above, the FTC and DOJ should move forward with new guidelines in a manner that best reflects the reality of vertical and non-horizontal mergers today. This includes acknowledging the failed enforcement of previous vertical mergers; incorporating anticompetitive presumptions in addition to the competitive presumptions; ensuring the revised guidelines apply to all non-horizontal mergers; and allowing for an adequate public comment period. If adopted, these recommendations will create stronger guidelines that benefit the agencies and the public interest alike.

Appendix IV

**Testimony of Harold Feld, Senior Vice President – Public Knowledge
Before the U.S. House of Representatives Committee on Small Business
A Fair Playing Field? Investigating Big Tech’s Impact on Small Business
November 14, 2019**

**HEARING ON
“INVESTIGATING BIG TECH’S IMPACT ON SMALL BUSINESS”**

Harold Feld, Senior Vice President
Public Knowledge

Chairman Velazquez, Ranking Member Chabot, thank you for inviting me here to testify today on this important issue.

No one can doubt that digital platforms, including “big tech” platforms such as Google, Amazon, and social media platforms such as Facebook, have created enormous opportunities for small businesses. Not only have these services allowed small businesses to extend their existing reach, but they have also created exciting new opportunities for entirely new small businesses. YouTube (owned by Google) and Twitch (owned by Amazon) have allowed tens of thousands of people to make their living through content creation, forming small businesses employing others.¹ Online shopping sites such as Amazon, Etsy and eBay have not only expanded the reach of traditional merchants, but also created new business opportunities for resellers and local distributors that suit local community needs. The Ultra-Orthodox Jewish Communities of Lakewood and Brooklyn, for example, has found that signing up as Amazon partners offers them flexibility that is well suited to the religious restrictions of Sabbath and religious holidays.²

At the same time, the dominance of a handful of massive companies in online retail, online search, online video and social media creates enormous problems for small businesses. These problems can be divided into two categories. First, small businesses face potential obstacles when they potentially compete with digital platforms. For example, there have been repeated reports that Amazon harvests information from third party vendors to develop competing products.³ (Amazon claims it does not do this and has no incentive to do so.) There is evidence from leaked emails that Facebook used its control over application programming interfaces (APIs) to block competitors and extort concessions from app developers once it reached dominance in the social media market.⁴ In 2017, the European Commission antitrust authority found that Google violated EU antitrust laws by favoring its affiliated content in its “Google shopping” service.⁵

¹ See David J. Bland, *What is the Business Model for a Twitch Streamer?*, Medium (April 19, 2017). Available at: <https://medium.com/precoil/what-is-the-business-model-for-a-twitch-streamer-f3b9e5351666>

² See Leticia Miranda, *America’s Orthodox Jews Are Selling a ton of Products You Buy on Amazon*, BuzzFeed (September 4, 2019). Available at: <https://www.buzzfeednews.com/article/leticiamiranda/amazon-orthodox-jews>.

³ Julie Cresswell, *How Amazon Steers Shoppers to Its Own Product*, New York Times (June 2018); Greg Ip, *The Antitrust Case Against Facebook, Google and Amazon*, The Wall Street Journal (Jan. 2018),

⁴ See Bill Goodwin, Sebastian Klovig Skelton & Duncan Campbell, *How Facebook’s ‘Switcheroo’ Plan Concealed Scheme To Kill Popular Apps*, ComputerWeekly.com (November 6, 2019). Available at: <https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealed-scheme-to-kill-popular-apps>.

⁵ See EC Competition Antitrust Page 39740. Available at: https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39740

Importantly, however, small businesses that use digital platforms as necessary inputs for their businesses can face enormous costs and barriers to entry even when they do not compete against the platform. Giant platforms, lacking competition and focused on maximizing their own revenue and preserving their own quality of service, can cause havoc with small businesses through poorly implemented decisions or imposing cumbersome and expensive processes. For example, rivals have been known to sabotage each other on platforms such as Amazon and YouTube with fake complaints, forcing small businesses to undertake expensive and complicated appeals processes.⁶ Changes in monetization policies or search algorithms can cause small businesses – through no fault of their own – to experience a sudden unanticipated drop in revenue.⁷ Changes in policy by giants such as Amazon can force smaller platforms such as Etsy to change their own policies to compete, shifting costs to the small merchants that use these rival platforms.⁸

In other words, giant platforms present a danger to small businesses not simply when they deliberately try to put them at a disadvantage. Like the proverbial bull in the china shop, giant digital platforms are simply incapable of controlling how even their rational business decisions can have unanticipated and disastrous impacts on the small businesses dependent on them. It therefore lies with Congress to set necessary safeguards that balance providing a stable and competitive environment for small businesses while preserving the valuable features of digital platforms.

Lessons From The Physical World and the Last 150 Years of Communications Policy.

In the physical world, there is a well-developed body of law to prevent both deliberate anticompetitive conduct and to prevent providers of necessary business inputs from distorting the market. For example, there is an entire body of commercial real estate law that prevents landlords from unilaterally changing the terms on small businesses with no notice. A shopping mall owner could not, for example, simply lock a merchant out of their store for some presumed violation of the shopping mall's policy. But most digital platforms can – and do – shut down online merchants or impose various other penalties for purported infractions without any sort of notice or appeal process.⁹ There are rules that govern necessary inputs such as telecommunications or electricity so that providers of these vital services cannot squeeze merchants dependent on them into agreeing to onerous terms and conditions. But there are no such rules in the digital space. To the

⁶ Josh Dzieza, *Prime and Punishment, Dirty Dealing in the \$175 Billion Amazon Marketplace*, The Verge (Dec. 2018). Available at: <https://www.theverge.com/2018/12/19/18140799/amazon-marketplace-scams-seller-court-appeal-reinstatement>.

⁷ *YouTube shooting spotlights creators' frustrations with monetization policy changes*, CBS News (April 7, 2018). Available at: <https://www.cbsnews.com/news/youtube-shooting-spotlights-recent-changes-to-companys-ad-revenue-sharing/>.

⁸ Kaitlyn Tiffany, *Was Etsy too good to be true?*, Vox (September 4, 2019). Available at: <https://www.vox.com/the-goods/2019/9/4/20841475/etsy-free-shipping-amazon-handmade-josh-silverman+&cd=1&hl=en&ct=clnk&gl=us>.

⁹ Ari Levy, *Amazon sellers say they were unfairly suspended before Prime Day, and now have two bad choices*, CNBC (July 17, 2018). Available at: <https://www.cnbc.com/2018/07/12/amazon-sellers-removed-before-prime-day-two-bad-choices.html>.

contrary, small businesses are left vulnerable in the online world in ways they have not been in the real world for over a century.

Below, I discuss important reforms Congress should consider to protect small businesses in cyberspace comparable to those they enjoy today in the physical world. While we must increase antitrust enforcement and improve antitrust law, we must also recognize the limits of antitrust law.

In my book *The Case for the Digital Platform Act*,¹⁰ I argue that the rise of digital platforms reflects the latest iteration of disruptive communications technology. In the 150 years since the telegraph revolutionized every aspect of society from commerce to foreign relations to news reporting, society observed how dramatic changes in communications technology produce equally dramatic and disruptive changes in society. This should come as no surprise. At heart, all human interaction that creates society and commerce is communication. When society changes the nature of how people communicate, then society also changes the nature of how people do business. At the same time, however, society's fundamental values guide how people address these challenges. Our commitment to democracy, competition, consumer protection and public safety provide the necessary foundation for how our laws respond to the challenges these new communication technologies create.

Below, I summarize the relevant sections and recommendations for the committee. First, I discuss the importance of defining digital platforms and distinguishing between “dominant” and “non-dominant” platforms. Behavior that is neutral, or even pro-consumer or pro-competitive, when done by a small business in a competitive environment can be harmful when done by a dominant firm. This is particularly true in the digital platform space because of the enormous network effects that dominant digital platforms enjoy and the susceptibility of digital markets to “tipping.”¹¹ Next, I make specific recommendations for legislative remedies that Congress could adopt, either individually or as part of a package, to create a new “digital authority” as recommended both in *The Case for the Digital Platform Act* and by several recent expert reports. I will focus specifically on measures to protect small businesses from anti-competitive conduct by platforms, certain pro-competitive regulations such as interoperability, how “filter bubbles” and other problems with search and recommendation algorithms harm small businesses, and protections against arbitrary treatment. Finally, I will discuss how antitrust law can and cannot promote a digital environment in which small businesses can thrive.

Defining Digital Platforms and What Constitutes “Dominance” In The Digital Platform Space.

Nearly every business today incorporates digital technology. Additionally, numerous businesses with radically different business models claim for various reasons to be “platforms” or digital platforms. Should the law treat businesses such as Google

¹⁰ Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms* 17 (2019).

¹¹ Tipping refers to the tendency of certain markets to become uncontestable once they reach a sufficient level of concentration. Several expert reports have observed that digital platform markets seem particularly susceptible to tipping. See Jean-Pierre H. Dubé et al., *Tipping and Concentration in Markets with Indirect Network Effects*, 29 *Marketing Science* 2 at 199 (2010).

Search and other online businesses such as Netflix, or internet access providers such as Verizon or Comcast, the same? What distinguishes a would-be digital platform such as WeWork from a genuine digital platform such as Twitter? Defining what makes this particular sector of the economy unique makes clear the impact of “big tech” (as distinguishable from “big business” generally) on small businesses. In the last year, in addition to my own analysis, three separate expert reports have reached similar conclusions on what distinguishes digital platforms from other businesses.¹²

First, digital platforms do not provide internet access themselves. Instead, they are available through the internet. This radically changes the cost structure and enables rapid growth not possible for physical networks such as ISPs. Second, digital platforms enjoy powerful network effects. There is some argument as to what factors are most significant in creating these network effects, but they include: the ability of the platform to enable multisided markets and self-organizing subnetworks networks (e.g., users can be simultaneously buyers and sellers, can create multiple distinct groups, and can engage in multiple activities on the same platforms simultaneously); platforms can use personal information to manipulate users without their knowledge; and platforms can achieve a sufficient head start over rivals that it becomes almost impossible for new entrants to directly challenge the dominant platform (“tipping point economies”).

These factors also create tremendous benefits for users. Collecting personal information enables platforms to customize features for enhanced service efficiency. Delivering service via the internet enables platforms to provide “always on” service (even if, as in the case of online shopping, goods and services may be delivered offline, they may be ordered at any time). The ability of users to self-organize and to simultaneously occupy multiple roles on the platform enables users (and small businesses) to enjoy unique business and social opportunities. At the same time, however, these attributes create the potential for tremendous competitive harms.

The Difference Between Net Neutrality and Search Neutrality. For political reasons, industry lobbyists over the years have sought to conflate internet access providers and “edge” providers such as digital platforms. These two businesses have radically different cost structures and business models. While the history of telecommunications (including broadband) provides useful information about networked industries centered on human speech, rote mechanical application of rules governing one business to the other is a recipe for disaster. It would be like applying the same regulations to airplanes and buses because “both are passenger vehicles for transportation.”

The difference between digital platforms that *use* the internet and broadband providers that offer *access to* the internet is best illustrated by the difference between

¹² See Jacques Crémer et al., *Competition Policy for the Digital Era*, European Commission (2019). Available at: <https://ec.europa.eu/competition/publications/reports/kd0419345enn.pdf>; Digital Competition Expert Panel, *Unlocking Digital Competition*, Her Majesty’s Treasury (2019). Available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf; Fiona Scott Morton et al., *Stigler Committee on Digital Platforms*, Chicago Booth Stigler Center for the Study of Economy and the State (2019). Available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>.

what “neutrality” means in the internet access context and the search context. As a principle of ensuring reliability and avoiding anticompetitive conduct, the basic concept of non-discrimination works reasonably well. But consider the difference in application between an internet service provider and a search engine.

An ISP simply delivers information from one location to another – classic telecommunications, generally referred to as “common carrier.” For “neutrality” to apply in this context, the ISP needs to reliably deliver the information without any artificial distinction in service. The user buys transmission, the ISP provides it. Nothing more is required for the system to function, and the users on either end of the connection desire nothing more than that the system work in the same reliable way every time. Now consider a search engine. What would it mean for a search engine to be a “common carrier”? The entire point of a search engine is to help a user sort through the billions of potential pieces of information available so that the user can find the most relevant information. This is entirely different from the function the user wants from the ISP, where the user already knows the information they want transmitted. It is like the difference between the telephone and an information directory. A person used to dial “411” to speak to a human being to help them sort through information to find the phone number, and the human at the information desk would then use the phone system to connect him.

This does not mean that concepts of “nondiscrimination” or “neutrality” have no application to search (either in a search engine such as Google or a recommendation algorithm such as a Facebook newsfeed). It is simply that they must express themselves in very different ways, and that mechanically applying the definition of “neutrality” from telecommunications to digital platforms would be a disaster. In the context of digital platforms such as search, as I discuss in greater detail below, nondiscrimination requires a certain level of transparency as to the nature of the search criteria and prohibiting self-dealing or deception. For example, Amazon was accused recently of altering its recommendation algorithm to make recommendations based on what products would be most profitable to Amazon, rather than on correlations with consumer preferences.¹³ This violates “neutrality” to the detriment of small businesses trying to compete directly with the platform.

As this illustration shows, trying to compare the behavior of infrastructure providers such as ISPs or cloud storage providers to those of digital platforms is a recipe for bad policy outcomes. Legislative solutions should be designed to level the playing field between small businesses and big tech, not between big tech and big telecom.

Measuring the Cost of Exclusion. One of the difficulties in addressing market power is how to measure dominance. The term “digital platforms” covers a wide range of businesses, with giant platforms potentially able to impact or influence small businesses in ways traditional antitrust law has difficulty defining. Additionally, for a remedy to protect small businesses effectively, it must either blunt the impact of a dominant

¹³ See Dana Mattioli, *Amazon Changed Search Algorithm in Ways That Boosts Its Own Products*, The Wall St. Journal (Sept. 16, 2019). Available at: <https://www.wsj.com/articles/amazon-changed-search-algorithm-in-ways-that-boost-its-own-products-11568645345>

platform's actions or reduce the market power of a digital platform so that new entrants can compete.

Additionally, behaviors that are anticompetitive in dominant firms may be procompetitive in smaller firms. Again, rote mechanical application of the same rules and standards does not produce fairness or a "level playing field." The law imposes additional obligations on dominant firms as a remedy to their exceptional market power and as a mechanism for promoting competition. Once the market becomes competitive and the previously dominant firm becomes non-dominant, the additional safeguards imposed to limit abuses of market power can be removed. But it requires a reasonable test of dominance to avoid removing these safeguards prematurely – especially in a market subject to tipping, such as this one.

I have proposed the cost of exclusion from the platform (COE) as the appropriate measure of dominance. As I explain in greater detail in *The Case for the Digital Platform Act*, once a platform achieves a sufficient size, businesses suffer a significant, non-transient harm from losing access to the platform (either losing literal access through deplatforming, or by effectively disappearing as a result of being degraded in search results and disappearing from recommendations as a consequence of anticompetitive discrimination). The measurable cost of exclusion from the platform can be considered a measure of a platform's market power. If a small business can walk away from a platform with little loss of potential business, then the platform should not be considered dominant. On the other hand, if losing access to the platform can mean a significant drop in revenue or significant increase in expense, then the platform has significant market power and should be considered dominant.

Use of COE illustrates why small businesses require protection even from unintended consequences of dominant firms. When YouTube changes its monetization policy, for example, the impact is felt by tens of thousands of small content creators.¹⁴ Facebook's decision to prioritize "quality engagement" rather than extreme content in its newsfeed and recommendations had enormous impact on news outlets that had – for better or worse – optimized their headlines and coverage around Facebook's previous algorithm.¹⁵ Even though moving away from an emphasis on "engagement" that placed greater value to more extreme content over more informative content was a positive change made in response to widespread criticism, the way in which it was done created significant disruption for thousands of news outlets and content creators unprepared for the change.

Finally, recent actions by Amazon illustrate how dominant firms can directly target vulnerable small businesses to offload costs and to deny small businesses access to competing platforms at more favorable terms. For example, Amazon has been accused of

¹⁴ Ben Bours, *YouTube's Latest Shake-Up Is Bigger Than Just Ads*, Wired (January 18, 2018). Available at: <https://www.wired.com/story/youtube-monetization-creators-ads/>

¹⁵ Marlene Awaad, *Facebook is Changing its Algorithm (Again) To Stop Fake News*, Wired (April 10, 2019). Available at: https://www.google.com/search?q=facebook+algorithm+to+look+at+quality+engagement&tbm=nws&ei=OSLkXcjuMJCE5wLEsbDwBw&start=20&sa=N&ved=0ahUKEwiI7_mF2ePIAhUQwIkKHcQYDH44ChDw0wMIeQ&biw=1251&bih=609&dpr=1

penalizing sellers when their products are available for lower prices on Walmart.com.¹⁶ This summer, Amazon imposed a new refund policy that requires merchants who do not ship through Amazon to accept returned merchandise in the same way sellers who use Amazon do. This leaves businesses that feel they cannot leave Amazon with two choices: eat the cost or switch to Amazon’s delivery service.¹⁷

To be clear, this does not mean that dominant firms should be locked into the same technology or same set of algorithms forever. Rather, this highlights the need to impose due process obligations on dominant platforms to ensure that small businesses have the stability they need to thrive.

Measures to Promote Competition: The Case for the Digital Platform Act.

Several recent reports have urged creation of a new “digital authority” to promote competition in the digital platform space.¹⁸ Public Knowledge similarly believes that the digital platform sector is sufficiently important to the economy and to society generally to require a specialized agency empowered to affirmatively promote competition, protect consumers, ensure a robust marketplace of ideas, and protect public safety. Congress has historically moved cautiously in expanding sector specific regulation. Our recommendations are therefore designed to work individually as well as in combination.

Data portability. One important feature in digital platform dominance is the collection and use of personal data from customers. This is particularly important for small businesses trying to maintain relationships with customers. Requiring platforms to honor requests from customers to move data to other platforms in usable formats has been recommended by many experts as a way to enhance competition.¹⁹ In the small business context, it would enable customers to move information from the platform to the small business if the customer chooses, decreasing dependence on the platform intermediary, in addition to moving information to businesses that directly compete with the platform.

Open APIs, licensing essential patents, and interoperability. Interoperability is critically important for application developers. Disturbing reports of Facebook’s “Switcheroo” plan detail how Facebook initially encouraged application developers to

¹⁶ Eugene Kim, *Amazon is testing a new program that lets it control third-party product prices as its pricing policy draws criticism*, CNBC (August 8, 2019). Available at: <https://www.cnbc.com/2019/08/08/amazon-new-program-sold-by-amazon-amid-pricing-policy-scrutiny.html>

¹⁷ Spencer Soper, *Amazon is accused of forcing up prices for independent merchants in antitrust complaint*, Los Angeles Times (November 8, 2019). Available at: <https://www.latimes.com/business/technology/story/2019-11-08/amazon-antitrust-complaint>

¹⁸ See Fiona Scott Morton et al., *Stigler Committee on Digital Platforms*, at 18; Digital Competition Expert Panel, *Unlocking Digital Competition*, at 8; Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms*, at 188 (2019).

¹⁹ See Fiona Scott Morton et al., *Stigler Committee on Digital Platforms*, at 16; Jacques Crémer et al., *Competition Policy for the Digital Era*, at 58-60; Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms*, at 78- 81; Chris Riley, *Competition Through Interoperability*, Medium (Oct. 2017). Available at: <https://medium.com/@mchriscriley/competition-through-interoperability-3ed34a5c55f1>.

invest in Facebook applications with the understanding that they would have continued access to the necessary application interfaces.²⁰ Once Facebook achieved dominance, it used its power over these developers to extract concessions, such as requiring the app developers to spend over \$300,000 in advertising on Facebook’s mobile platform or lose access.²¹

Public Knowledge proposes eliminating significant barriers to interoperability for competitors and for businesses using a platform as an essential input. For example, content creators should be able to use the same applications to create content for diverse platforms such as YouTube, Twitch and Facebook without worrying that one of the important platforms will take steps to force them into proprietary applications. The history of the telecommunications industry shows that interconnection creates competition and creates stability for small businesses, since they can use interconnected competitors to access reliably their customers on competing platforms.

For the same reason, Public Knowledge recommends that companies that hold patents or copyrights that are essential to industry standards be required to license their intellectual property on fair, reasonable and non-discriminatory terms (FRAND). This does not mean that intellectual property holders must make their IP available for free. But FRAND licensing has been an important tool to prevent firms from using their IP to freeze out potential competitors or impose terms that prevent others from developing new, disruptive business models.²²

Restricting use of information collected from commercial rivals and prohibiting “most favored nation” clauses. When small businesses use digital platforms, they expose some of their most sensitive proprietary information to the platform. Indeed, for the relationship to work, the platform must “know” details such as the popularity of a specific product, whether or not there are returns, and customer billing information. A platform may also legitimately require proof of quality control and proof of capacity to meet specific demand thresholds. Nothing prevents platforms from using this information to develop rival products and services and compete directly with the small businesses that use the platform. Indeed, there are persistent accusations that platforms such as Amazon engage in precisely this kind of behavior.²³

Even without using information gleaned from the commercial relationship between the small business and the platform, dominant platforms can use their market power to require that small businesses provide them with terms as favorable as (or better than) those given to any rival platform. These “most favored nation” (MFN) policies prevent small businesses from taking advantage of efforts by potential competitors to compete against the dominant platform. The policies force small businesses to maintain

²⁰ Bill Goodwin et al., *How Facebook’s ‘Switcheroo’ plan concealed scheme to kill popular apps*, Computer Weekly (November 6, 2019). Available at: <https://www.computerweekly.com/feature/How-Facebooks-Switcheroo-plan-concealed-scheme-to-kill-popular-apps>

²¹ *Id* (“In one of the most extreme examples, Facebook proposed that developers would lose access to Facebook’s valuable data feeds unless they spent at least £250,000 a year advertising their apps on Facebook’s mobile advertising platform.”).

²² European Commission Decision No. IP/14/489 (Apr. 29, 2014).

²³ Eugene Kim, *Amazon has been promoting its own products at the bottom of competitors’ listings*, CNBC (October 2, 2018). Available at: <https://www.cnbc.com/2018/10/02/amazon-is-testing-a-new-feature-that-promotes-its-private-label-brands-inside-a-competitors-product-listing.html>.

higher prices even if the would-be competing platform offers superior terms in other respects. The ability of large platforms to conduct massive internet searches across multiple potential sales platforms gives the dominant platform an overwhelming advantage against any small business attempting to take advantage of competition between digital platforms.

Public Knowledge therefore proposes measures that have demonstrated effectiveness in the communications market. First, Public Knowledge proposes limitations on the use of proprietary information collected by the platform as part of its business dealings with small businesses. This type of information is known in communications law as “customer proprietary network information” (CPNI).²⁴ CPNI recognizes that although the network must “know” certain types of highly proprietary information to function, the law can limit the ability of the rival network to use this information for purposes other than the contracted service.²⁵

Second, Public Knowledge proposes prohibiting punitive MFN clauses, or other mechanisms that prevent small businesses from finding alternatives to the dominant platform. Allowing small businesses to move freely between platforms without fear of reprisals is critical to maintaining a competitive environment and limiting the ability of dominant platforms to abuse small businesses dependent on them. It also promotes the development of competition, since dominant platforms cannot use their market power to prevent small businesses from patronizing rivals and enhancing their likelihood of success.

Non-discrimination, transparency and ‘black box testing.’ A repeated concern by small businesses and consumers alike is that platforms may favor content for reasons having nothing to do with consumer preferences. Whether it is Google Search, or Amazon’s search engine and recommendations, or any other ordering and presentation of information, the platform has tremendous opportunity to discriminate in a number of ways without the consumer knowing. The most obvious concern is favoring affiliated products or down-ranking rivals. But platforms may also take money to prioritize search without disclosing this fact.

At the same time, businesses have incentive to “game the system” and try to manipulate search results. In the United States, “search engine optimization” (SEO), essentially the business of trying to get to the top of Google’s search page, is a multibillion dollar business.²⁶ Bad actors have routinely used understanding of how YouTube and Facebook optimize their recommendation and news feed algorithms for “engagement” to promote content designed to radicalize or undermine democratic discourse. Creating a truly transparent system to verify non-discrimination is therefore highly inadvisable.

²⁴ See 47 U.S.C. §222.

²⁵ See 47 U.S.C. §222; Harold Feld, *CPNI Is More Than Just Consumer Privacy -- How To Apply It to Digital Platforms*, Wetmachine (July 30, 2018). Available at: <https://wetmachine.com/tales-of-the-sausage-factory/cpni-is-more-than-just-consumer-privacy-how-to-apply-it-to-digital-platforms/>

²⁶ TJ McCue, *SEO Industry Approaching \$80 Billion, But All You Want Is More Web Traffic*, Forbes (July 30, 2018). Available at: <https://www.forbes.com/sites/tjmccue/2018/07/30/seo-industry-approaching-80-billion-but-all-you-want-is-more-web-traffic/#7128f8247337>

In that case, the best solution is “black box testing.”²⁷ Where a party has reason to believe that search and recommendation results are manipulated to discriminate in an inappropriate fashion, the party would file a complaint with the enforcing agency. The enforcing agency would then be given access to the code for testing purposes. The enforcing agency would then determine whether or not reasonable grounds exists to open an investigation. The complaining party would not get access to the code, thus avoiding the ability of parties to use the complaint process as a pretext to gain access to proprietary algorithms to reverse engineer them.

Product unbundling and structural separation. When the combination of products creates both a powerful incentive to engage in anticompetitive conduct and the structure of the company makes it difficult to otherwise police anticompetitive conduct, it makes sense to consider product unbundling and structural separation. Historically, these two remedies represent a range from requiring separate accounting within an intact firm to wholly separating the company into affiliated firms with entirely separate governance (even if they remain commonly owned). Typically, structural separation is created under the supervision of a court or an agency to ensure that it successfully creates lines of division that reduce or eliminate the incentive to favor one’s own product and make it possible to police non-discrimination easily.

For example, beginning in the 1970s and continuing until Congress passed the Telecommunications Act of 1996, the Federal Communications Commission (FCC) required that incumbent telephone networks (first the AT&T monopoly, then the “Baby Bells”) only offer certain types of service through a separate affiliate. For example, AT&T offered an alarm service. To ensure that it competed on equal terms with rival alarm companies, AT&T was required to offer this alarm service through an entirely separate affiliate, with separate corporate headquarters and separate facilities and workforce. Because AT&T was required to tariff the cost of interconnection with its phone network,²⁸ the FCC could make sure that AT&T the phone company offered the same rate to every alarm company – including AT&T’s own affiliate.

Product unbundling works somewhat differently from structural separation. With product unbundling, a seller has a suite of products it may wish to sell as a unit, but regulators require it “unbundle” and sell the components separately. For example, in the 1990s, the United States required that local telephone companies sell unbundled access to various elements of the local network at regulated wholesale prices to potential competitors. The theory was that this would allow competition to emerge as competitors initially gained access to customers by leasing unbundled elements from the local

²⁷ Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms*, 111 (2019).

²⁸ A tariff is a regulated rate determined by a regulator (through a public rate-setting proceeding), based on the cost of providing the regulated service and a reasonable rate of return. It is a public document, and any similarly situated party is entitled to the same regulated rate. The rate regulator, such as the FCC, also has the power to hear and investigate complaints that the provider is engaging in price or service discrimination. Here, AT&T was required to offer all companies that wanted to interconnect with its network to provide alarm service the same government approved price, subject to investigation and enforcement by the government if it tried to favor its own affiliate.

monopoly provider, which would provide them with revenue to build out independent networks where economically feasible.

To illustrate with examples in the digital platform space, requiring Amazon to separate its retail business “Amazon Essentials” from its online merchant platform and operate them as entirely separate companies (even while allowing them to remain commonly owned) would be an example of structural separation. Alternatively, requiring Amazon to separate various services it currently requires third party sellers to take as a bundle and allowing them to pick which ones they wish to use would be an example of unbundling.

Structural separation and unbundling can be a very effective means of introducing competition and providing a level playing field for small businesses. The difficulty of implementing these regimes, however, should not be underestimated. Both structural separation and unbundling require ongoing regulatory supervision to ensure that the platform follows the rules. While the need for pervasive monitoring and supervision can be reduced in a well-designed system, it cannot be wholly eliminated as the economic factors that drove the consolidation in the first place will, absent some countervailing force, drive the separated pieces to reconsolidate.

Break ups and the Starfish problem. Sometimes, the only way to restore competitive balance to the marketplace is by breaking up a company into separate components. A successful break up will identify and separate the “natural monopoly” component for specific regulation, while simultaneously separating out those lines of business that reinforce the existing monopoly or monopolies.

The AT&T break-up is generally acknowledged as the most successful break-up in the last 50 years. It illustrates both the potential rewards of dismantling a set of interconnected and reinforcing monopolies and the enormous investment required to do so. The final litigation that concluded in the settlement breaking up AT&T into a long-distance company, an equipment manufacturing company, an information/yellow pages publisher and regional bell operating companies (“RBOCS,” aka the “Baby Bells”) took ten years and the combined efforts of the Department of Justice and the FCC. The FCC conducted multiple proceedings to ensure that the break-up did not disrupt the phone system, and preserved service in rural areas subsidized by AT&T’s regulated monopoly rates. Even after the break-up in 1984, the FCC continued to regulate AT&T long-distance as a dominant carrier until 1995.²⁹

Once the Telecommunications Act of 1996 removed legal barriers to the telecommunications monopoly reconstituting itself, the market proceeded on a steady march to concentration. While not a monopoly, the current communications market has been described as an “oligopoly on steroids.”³⁰ The same fundamental economic factors that created the AT&T monopoly once again drove the communications market to concentration – a process which continues unabated with the recent acquisition of Sprint

²⁹ Harold Feld, *The Case for the Digital Platform Act: Market Structure and Regulation of Digital Platforms* 100 (2019) (citing Federal Communications Commission (FCC), 1995, *In re: Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, Order, FCC 95-427 11 FCC Rcd 3271 (1995)).

³⁰ Gene Kimmelman and Mark Cooper, *A communications oligopoly on steroids*, Washington Center for Equitable Growth (2017). Available at: <https://equitablegrowth.org/wp-content/uploads/2017/07/071817-kimmelman-cooper2.pdf>

by T-Mobile. Broadband, which was supposed to provide the competitive antidote, is divided in most markets between a higher-speed cable offering and a lower speed DSL offering from the legacy telephone company.

This reconstituted communications oligopoly 35 years after the break-up of the original “Ma Bell,” is an example of the “starfish problem.” Tear up a starfish and it simply regrows the missing limbs. While not all monopolies suffer from the starfish problem, this natural regeneration of concentration will occur in any market where the underlying economic structure of the market itself drives toward concentration. For this reason, although vigorous antitrust investigation and enforcement against dominant platforms is necessary, even the largest platforms can not simply be broken into pieces as a means of solving existing competition problems. Before any break-up, Congress must carefully consider what regulatory framework will prevent the market from simply returning to its highly concentrated state.

The Importance of Due Process.

Due process does not extend simply to government action.³¹ Small businesses depend on a wide body of law protecting their rights to notice in the physical world. If a small business rents a storefront or space in a shopping mall, a body of commercial real estate law protects the business from arbitrary changes by the landlord and protects the shopkeeper from certain abusive behaviors. A small business can contract for critical inputs such as electricity or telecommunications or water service, confident that these utilities are subject to special regulation because society recognizes their vital importance as an input to small businesses.

Again, the point is not to replicate commercial real estate law or public utility law in the digital space. To the contrary, as I have repeated throughout this testimony, mechanical rote application of traditional law to digital platforms is a recipe for disaster. But the basic principle that both economic efficiency and fundamental fairness entitle small businesses to due process before losing access to essential services or experiencing dramatic changes in contract terms applies equally in cyberspace as in physical space. Distinguishing between dominant firms and non-dominant firms gives a starting point for discussion. When the decision of a single company can impact the bottom line of tens of thousands of small businesses, basic notice and protection become more urgent than when the stakes are lower. In the same vein, the nature of the notice and protections due should depend on the level of potential impact.

For example, Amazon has such a complicated and arcane set of rules around its appeals process that an entire cottage industry has developed to help small businesses navigate through it.³² The problem extends outside of Amazon. Users routinely complain that they do not understand platform policies, nor do they feel well treated by their appeal

³¹ See John Bergmayer, *Even Under Kind Masters: A Proposal to Require that Dominant Platforms Accord Their Users Due Process*, Public Knowledge, 22 (May 2018). Available at: https://www.publicknowledge.org/assets/uploads/blog/Even_Under_Kind_Masters.pdf.

³² Amazon Account Suspension Appeals, Riverbend Consulting. Available at: https://www.riverbendconsulting.com/what-we-do/account-appeals/?gclid=EA1aIQobChMI9o_vkOvk5QIV2IVaBR1D7gZPEAAAYASAAEgIjLvD_BwE

process.³³ And, as mentioned above, content creators and third party sellers often find themselves given short “take it or leave it” notice for major changes imposing significant cost. Finally, in the cut-throat world of online retail, small business competitors may “hack” the processes of platforms to sabotage their rivals.³⁴

A recent high-profile case on YouTube involving creator Lindsay Ellis illustrates how the lack of an appeals process can have significant impact for small businesses. Lindsay Ellis creates content for YouTube, and employs four people in her production studio.³⁵ As part of a video essay critical of Disney’s effort to obscure its problematic history on racism, Ellis included a 5 second clip from the original animated Dumbo containing offensive lyrics from “the Song of the Roustabouts.” UMG holds the copyright to the Song of the Roustabouts. When YouTube’s Copyright ID system identified the 5-second clip as part of a song belonging to UMG, it did not conduct a fair use analysis. YouTube offered UMG the option to monetize Ellis’ work by inserting advertising in Ellis’ video. This not only unjustly allowed UMG to profit from Ellis’ intellectual property (the use of the clip clearly falling into the category of fair use), but interfered with Ellis’ sponsorship contract with Audible, which prohibits internal advertising in Ellis’ video essays that it sponsors. When Ellis complained to YouTube, she was informed that YouTube provided no appeal process and that she would need to go to court to vindicate her fair use claim.

The point here is not that YouTube should not have a Content ID system. The point is that by failing to provide an appeal system, YouTube has privileged the complainant over the defendant and privileged large businesses that can afford expensive litigation over small businesses that cannot. Indeed, under applicable law, had UMG ordered YouTube to take down Ellis’ video as infringing, Ellis would have been entitled to issue a counter-notice to YouTube to restore the video pending court review.³⁶ But because YouTube has decided to give the complaining rights holder an option to monetize the alleged infringement rather than demand a takedown, Ellis’ statutory due process right has been abrogated.

As this example illustrates, a decision that a platform believes will benefit small businesses (providing a copyright complainant with an option other than takedown) can actually prove harmful to small businesses without appropriate due process. As this example also illustrates, there is no clear solution. Ideally, competition would prevent any single platform from becoming dominant, so that unintended consequences on one platform would not have broad impact and best practices could emerge as a function of competition between platforms. Absent this, however, Congress must consider how to encourage or require platforms to develop processes that treat small businesses fairly.

³³ Eugene Kim, *Amazon’s updated suspension policy still has sellers worried about getting inexplicably booted*, CNBC (July 20, 2019). Available at: <https://www.cnbc.com/2019/07/20/amazons-updated-suspension-policy-still-has-sellers-worried.html>

³⁴ Ari Levy, *This Amazon seller lost \$400,000 in sales after being attacked by self-proclaimed ‘virus of Amazon’*, CNBC (November 17, 2017). Available at: <https://www.cnbc.com/2017/11/17/amazon-seller-targeted-virus-of-amazon.html>

³⁵ The facts of this case and relevant citations are provided in my blog post: *Lindsay Ellis and the Future of Content in Europe*, Wetmachine.com (November 6, 2019). Available at: <https://wetmachine.com/tales-of-the-sausage-factory/lindsay-ellis-and-the-future-of-content-in-europe/>

³⁶ See 17 U.S.C. §512.

Small Businesses, Social Media, and the Problem of Filter Bubbles.

Small businesses rely on social media both directly and indirectly. Small businesses may themselves be content producers or offer businesses that rely directly on social media platforms. More commonly, small businesses use social media platforms to communicate with potential customers and to attract interest. A viral video or Tweet can drive business and increase search optimization. One of the contributing factors to the success of the Instant Pot was the organic growth of its Facebook community as a place to exchange recipes and generally encourage people to feel that owning an Instant Pot made them part of a community.³⁷

But small businesses may find themselves stymied by the tendency of recommendation algorithms to recommend to people increasingly homogenous content. Dubbed “filter bubbles,” this phenomena challenges the ability of new content providers to find an audience. As legal scholar Cass Sunstein has argued, traditional media have an “architecture of serendipity.”³⁸ Go to a movie theater and you will see marquis for all the movies playing at the theater, even if you might not normally look for movies of that particular genre. Flip through television channels and you may stumble across an unexpectedly interesting TV show. Peruse the shelves of a bookstore and you may discover books from authors you never knew existed.

Increasingly, this experience cannot happen on digital platforms – to the detriment of small businesses. Recommendations are typically based on a combination of personal information (what the individual has previously watched before) and aggregate information (“people who liked this also liked that”). As the algorithm becomes more familiar with the individual user, its recommendations focus on content more and more similar to what the user watched previously, or what similarly situated people watched previously. Unlike the physical world, where the possibility of discovering something new *increases* with the length of time spent searching, the possibility of discovering something genuinely different actually *decreases* the longer someone uses the service. Addressing this “filter bubble” problem is complicated. Forcing users to look at content they do not want to see “for their own good” will create resentment. But the entire point of an “architecture of serendipity” is that the user actually *would* enjoy the content if they had the opportunity to discover it under circumstances that replicated browsing a bookstore or other situation where a person is searching for new content.

One approach I recommend is called the “wobbly algorithm.” Algorithms generate a probability curve of content the user is likely to find engaging. Generally, given the limited space available, the algorithm recommends only a few choices at the very peak of the curve. What if, on some random number of recommendations, the algorithm recommended items slightly lower down the curve on either side? These would still fall within a general range of interest for the user, but they would not move in the same inexorable straight line as always selecting from the peak of the curve. Over time, this “wobbly algorithm” would introduce a significantly wider variety of content, but still falling within the range of content likely to appeal to the specific user.

³⁷ Tom Huddleston, Jr., *How Instant Pot Became A Kitchen Appliance with a Cult Following and a Best Seller on Amazon*, CNBC (Nov. 26, 2018). Available at: <https://www.cnbc.com/2018/11/26/how-instant-pot-became-a-kitchen-appliance-with-a-cult-following.html>

³⁸ Cass Sunstein, *#Republic: Divided Democracy in the Age of Social Media* (2017).

Special Concerns Relating to App Stores.

Many application developers have a beneficial relationship with the platform they develop for. By making platforms more useful and versatile, they provide value to the platform owner itself, and to users. Platforms, in turn, provide them with a customer base, distribution, technical and payment services, and other things. In recent years, app stores have made it easier than ever for users to install software while being assured that it is secure, and security techniques like sandboxing and code-signing can protect user data and device integrity.

However, the relationship doesn't always go smoothly, especially when the interests of the platform owner and the app developer may not align--for example, when the app developer creates apps that compete with those produced by the platform itself. At these times, the very techniques that are used to benefit users and developers in most cases can become tools used for anticompetitive purposes.

The conflict between platforms and application developers has several flashpoints. Platform owners may privilege their own apps by preinstalling them on devices, and making it impossible to change certain defaults. Platform developers control the app stores that developers need to access to reach users, and could simply deny access to the store for alleged violations of the rules. App store rules themselves may be anticompetitive--and first-party apps might not even have to follow them. Platforms create the APIs that developers need to interact with, and these APIs in part determine the capabilities of apps. The APIs that developers are permitted to interact with may not give third-party apps the same functionality as first-party apps, and using the "private APIs" that platform owners can make free use of may be enough to block an app from an app store. Even the content guidelines that platforms establish may be problematic, if they prevent users from accessing lawful or politically sensitive content that is otherwise lawful.

The solution to these problems, however, cannot be to sacrifice user convenience and security by giving up the benefits that app stores and secure platforms provide. Instead, major platforms should prioritize the interests of users, and do a better job of creating an equal playing field for third-party developers. For example, a platform's own app store should not be the only way to install software on a device. With the safeguards provided by security techniques like sandboxing, code-signing, and app notarization in place,³⁹ users should be able to "sideload" software from the web. Public APIs should allow third-party apps to be fully competitive with platform-provided apps. Third-party apps that provide access to media like music, movies, and ebooks should not have to use platform-provided billing systems that make it impossible for developers to turn a profit. Additionally, while it is appropriate for the creators of major platforms to

³⁹ Sandboxing limits the amount of access that apps have to user data, data created by other apps, and system resources, sometimes allowing such access only in response to specific user actions. Code-signing is a cryptographic feature that ensures that an app comes from a specific developer, and prevents code from running if it has been modified after having been signed. Notarization is similar to code-signing, but involves the platform owner signing an app after checking it for malware and other issues. Both code-signing and app notarization allow an app to be remotely prevented from running if it is discovered to be malicious. Apps distributed through app stores are typically signed. Platforms can decide whether to require that apps be signed in some way, or can encourage if not require that apps be signed through certain user interface design choices.

provide users with a functional “out of the box” experience by preloading certain basic apps like email and a web browser, users should be able to change their defaults, and other apps (e.g., a video streaming service) should have to compete on a level playing field in the app store.

While policies like this can go a long way toward promoting competition and user choice while protecting security, a recent concrete example may illustrate why a sector-specific regulator is needed--to deal with specific factual scenarios it is unreasonable to expect Congress to have legislated about in advance, and where antitrust remedies may not be adequate.

In iOS 13, Apple limited the ability of third-party apps to gather location information in the background. While this may have some unintentional side effects on some categories of app, as a general matter this can be seen as an improvement to user privacy, and even a method to prolong an iPhone's battery life. However, Apple's own Maps app is not affected by this rule change—not because Apple has allowed the Maps app to collect location information in the background, but because location information for “Routing & Traffic” and “Improve Maps” is collected not by the Maps app but by the system itself. To opt out of this data collection, users have to go into the Settings app, chose “Privacy,” then “Location Services,” then “System Services” to locate the appropriate setting. By contrast, users have to use the Settings app to opt in to allow a third-party app to continually collect location data in the background--the app itself cannot offer that option at all. But the solution to this isn't to simply ask that Apple allow for indiscriminate data collection by apps--it is to require that Apple follow the same rules for data collection that it imposes on third parties, or to require that it makes the (non-personally identifiable) data that it collects available to third-party apps so that they can make the same use of it that Apple itself does.

This example shows that, with digital platforms, issues of privacy, security, competition, and even user experience can all arise together from a single decision. Deciding in advance as a matter of policy to optimize for one at the expense of the others would lead to a bad outcome. Thus, a unified approach is needed, and a single digital platform regulator would be best-suited to provide it.

The Role of Antitrust.

Traditionally, small businesses have benefited from pro-competition laws and rules, as well as strong antitrust enforcement, that kept consolidated power in check. This allowed small businesses greater room to thrive and provided them with a variety of options to choose from for their necessary inputs and paths to market. Over the last forty years, a de-regulatory spirit swept away many of these pro-competition policies, and the antitrust laws have been increasingly narrowed by judicial precedents based on economics that is now called into question.⁴⁰ Antitrust law needs targeted improvements in order to fulfill this important role again.

At the same time, America's antitrust agencies need to increase enforcement of our antitrust laws. The FTC, DOJ, and state attorneys general are investigating the dominant platforms for potential antitrust violations. This is a positive step. It's imperative that our antitrust enforcers scrutinize these companies to discover whether

⁴⁰ Jonathan B. Baker et. al, *Unlocking Antitrust Enforcement*, 127 Yale L.J, 7, 1742 (2018). Available at: <https://www.yalelawjournal.org/collection/unlocking-antitrust-enforcement>

they have committed violations of the antitrust laws and stop and remedy any violations that have occurred. It's important that the FTC, DOJ, and State Attorneys General devote the appropriate resources to make these investigations successful.

But digital platforms are a special case. Economists have identified digital platform markets as being particularly prone to tipping, with or without antitrust violations.⁴¹ As a result, antitrust will only go so far towards building competition in an industry where there is currently very little competition. Antitrust enforcement must wait until anticompetitive conduct occurs, and remedies are limited to correcting the impacts of that anticompetitive conduct. Antitrust enforcers rarely get the opportunity to restructure industries in the big and continuing ways that are needed. A comprehensive regulatory plan is required to fully address the problems of competition in digital platforms.

Thank you and I am prepared to answer any questions at this time.

⁴¹ Fiona Scott Morton et al., *Stigler Committee on Digital Platforms*, Chicago Booth Stigler Center for the Study of Economy and the State at 34 (2019). Available at: <https://research.chicagobooth.edu/-/media/research/stigler/pdfs/digital-platforms---committee-report---stigler-center.pdf?la=en&hash=2D23583FF8BCC560B7FEF7A81E1F95C1DDC5225E>