



July 29, 2020

The Honorable David N. Cicilline
Chairman, House Judiciary
Subcommittee on Antitrust,
Commercial, and Administrative Law
2141 Rayburn House Office Building
Washington, D.C. 20515

The Honorable F. James Sensenbrenner
Ranking Member, House Judiciary
Subcommittee on Antitrust,
Commercial, and Administrative Law
2141 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Cicilline and Ranking Member Sensenbrenner:

New America's Open Technology Institute (OTI) appreciates the opportunity to submit a statement for the record for the hearing entitled, "Online Platforms and Market Power, Part 6: Examining the Dominance of Amazon, Apple, Facebook, and Google," being held by the Subcommittee on Antitrust, Commercial, and Administrative Law. OTI works at the intersection of technology and policy to ensure that every community has equitable access to digital technologies that are open and secure, and their benefits. OTI commends the Chairman's leadership and looks forward to the results of the subcommittee's investigation.

This statement describes examples of conduct that OTI believes are illustrative of larger patterns in the industry, and offers policy recommendations for addressing these patterns. OTI recommends that antitrust enforcers expand their understanding of consumer welfare to better reflect platform market dynamics and that Congress pass comprehensive privacy legislation with strong data portability requirements.

I. Platform Dominance Has Degraded Consumer Welfare and Led to Excessive Concentrations of Economic Power

As the dominant platforms have amassed market power, they have become increasingly unaccountable to the public and to the government. Rampant misinformation, civil rights violations, and privacy intrusions are all evidence of the digital market's failure to promote consumer welfare. Americans do not understand the extent to which their personal data are collected and used, and feel powerless to protect their privacy and civil rights online. Platforms obfuscate the true costs of using their services and market consolidation has decreased the platforms' incentives to act in the best interests of consumers.

Attempts by regulators and the public to check the power of tech giants have been largely ineffective. The FTC and DOJ have not updated their antitrust enforcement strategies to address the differences between the tech industry and traditional industry. Although the DOJ and FTC recently updated their vertical merger guidelines, as discussed below, the new guidelines miss the mark and fail to address the harms presented in digital markets. This institutional resistance to challenge acquisitions by Amazon, Apple, Facebook, and Google has allowed these

companies to become so dominant as to become immune to reform efforts. The outsized market power of the firms has made consumer protection actions fall flat. Even the FTC’s \$5 billion settlement with Facebook¹ was not enough to affect the company’s bottom line.²

Consolidation in the tech industry is driven by Silicon Valley’s venture capital funding model that incentivizes startups to build their company with a strategy to sell to one of the dominant firms. This singular focus on exit strategy entrenches the market power of dominant firms and stunts the development of innovative companies before they have the opportunity to disrupt incumbents.³ The deference antitrust regulators typically give to vertical mergers has been inappropriate for the tech industry due to both the incentives of the venture capital funding model and of business models reliant on vast amounts of user data. The dominance of the major tech platforms has degraded consumer welfare by violating user privacy and civil rights.

A. Vertical Mergers Have Harmed User Privacy

Privacy is a competition issue. Antitrust regulators have applied inadequate scrutiny to vertical mergers in the tech industry and have neither accounted for the ways in which collecting massive amounts of consumer data can create anti-competitive effects nor for the negative impacts of such mergers on user privacy. Acquisitions have led to less privacy for users of the acquired product, and to less privacy overall when companies combine that user data with data sets in other categories of their business.

Platforms are able to merge the user data of the companies they acquire with user data from other product verticals to further entrench their market dominance. Google’s recent proposed acquisition of FitBit is a key example of this practice. OTI joined an international coalition of twenty civil society organizations in releasing a common statement outlining the groups’ serious concerns regarding Google’s intention to acquire Fitbit.⁴ The coalition said: “Regulators must assume that Google will in practice utilise the entirety of Fitbit’s currently independent unique, highly sensitive data set in combination with its own.” Merging FitBit’s

¹ Lesley Fair, “FTC’s \$5 Billion Facebook Settlement: Record-Breaking and History-Making,” Federal Trade Commission, July 24, 2019, <https://www.ftc.gov/news-events/blogs/business-blog/2019/07/ftcs-5-billion-facebook-settlement-record-breaking-history>.

² Open Technology Institute, “FTC Announces Historic, Yet Insufficient, Settlement with Facebook for Privacy Violations.” New America, July 24, 2019. <https://www.newamerica.org/oti/press-releases/ftc-announces-historic-yet-insufficient-settlement-facebook-privacy-violations/>.

³ Lemley, Mark A. and McCreary, Andrew, Exit Strategy (December 19, 2019). Stanford Law and Economics Olin Working Paper #542, <https://ssrn.com/abstract=3506919>.

⁴ “OTI and Coalition Urge Global Regulators to Closely Scrutinize Google/Fitbit Merger.” New America. Open Technology Institute, July 2, 2020. <https://www.newamerica.org/oti/press-releases/oti-and-coalition-urge-global-regulators-closely-scrutinize-googlefitbit-merger/>.

sensitive health data with Google’s data—including patient health records⁵—would enable Google to build more detailed user profiles for both its current and future products.⁶ Regulators should press Google on how it plans to integrate FitBit data with other data sets and use that information to expand into healthcare verticals.

B. Dominant Platforms Have Failed to Protect Civil Rights

The dominant platforms have been resistant to making changes to protect the civil rights of their users. Targeted advertising business models disincentive platforms from moderating harmful misinformation and preventing discriminatory ad placement.⁷ The majority of users think misinformation online is a major problem, and 79 percent of U.S. adults feel that steps should be taken to restrict made-up news and information online.⁸ However, the market power of platforms is so large that they are generally not responsive to public pressure to improve civil rights protections and stem misinformation. Although the First Amendment strictly limits the extent to which the government can regulate how platforms moderate content, anti-discrimination laws should apply to the behavior of online platforms, such as when a platform serves an employment or housing ad in a discriminatory manner.⁹ Moreover, in the antitrust context, enforcers should recognize and address the civil rights harms caused by the dominance of certain platforms.¹⁰

Facebook’s resistance to address civil rights concerns is an example that illustrates how dominant platforms are often not incentivized to implement reforms in the best interests of users. The company has instituted some positive changes in response to settling multiple lawsuits

⁵ Copeland, Rob. “Google’s ‘Project Nightingale’ Gathers Personal Health Data on Millions of Americans.” *Wall Street Journal*, November 11, 2019.

<https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790>.

⁶ Becky Chao, “Pressure on Google Is Ramping Up. Could the Antitrust Probes Help Address Privacy Harms?,” *New America* (Open Technology Institute, June 24, 2020),

<https://www.newamerica.org/weekly/pressure-google-ramping-could-antitrust-probes-help-address-privacy-harms/>.

⁷ Maréchal, Nathalie, and Ellery Roberts Biddle. Rep. *It’s Not Just the Content, It’s the Business Model: Democracy’s Online Speech Challenge*. Ranking Digital Rights, March 17, 2020.

<https://www.newamerica.org/oti/reports/its-not-just-content-its-business-model/>.

⁸ Mitchell, Amy, Jeffrey Gottfried, Galen Stocking, Mason Walker, and Sophia Fedeli. “Americans Think Made-up News and Videos Create More Confusion than Other Types of Misinformation.” *Pew Research Center’s Journalism Project*, May 30, 2020.

<https://www.journalism.org/2019/06/05/3-americans-think-made-up-news-and-videos-create-more-confusion-than-other-types-of-misinformation/>.

⁹ Overton, Spencer. “State Power to Regulate Social Media Companies to Prevent Voter Suppression .” *University of California, Davis Law Review* 53 (2020): 1793–1829.

https://lawreview.law.ucdavis.edu/issues/53/4/53-4_Overton.pdf.

¹⁰ Miller, Joe. “Race, Competition & the Tech Marketplace: Questions Washington Elites Don’t Want Congress to Ask.” *Medium*, July 28, 2020.

https://medium.com/@joemillerjd_17144/race-competition-the-tech-marketplace-questions-washington-elites-dont-want-congress-to-ask-a5849db4207e.

brought by civil rights organizations and undergoing an extensive two-year civil rights audit at the urging of civil society groups. However, the final audit report outlined a variety of remaining discriminatory practices. The auditors found that Facebook has made “painful decisions over the last nine months with real world consequences that are serious setbacks for civil rights,” including policy and enforcement gaps related to voter suppression and misinformation.¹¹ The auditors have recommended a series of concrete actions to address the harms, but there are no enforcement mechanisms to ensure Facebook implements the recommendations.

The #StopHateForProfit campaign organized an advertiser boycott in response to the misinformation and stoking of racial violence on Facebook.¹² In response, Mark Zuckerberg stated that the boycott’s threat to a percent of Facebook’s revenue will not cause the company to change its policies.¹³ Facebook feels immune from this public and market pressure because almost 76 percent of Facebook’s ad revenue comes from small businesses that do not have the brand recognition to be able to afford to boycott the platform.¹⁴

The prevalence of these issues is by no means limited to Facebook. Google’s search engine and ad buying portal is also rife with racially biased content. A recent investigation by *The Markup* found that Google’s keywords planner—the tool advertisers use to decide which search terms to use for their ads—suggested primarily pornographic terms in response to searches for “Black girls,” “Latina girls,” and “Asian girls” and suggested no pornographic terms for “White girls.”¹⁵ In addition, in 2017 *Buzzfeed News* found that Google’s ad platform permitted advertisers to target users using discriminatory terms, and its automated ad targeting tools even suggested some terms. For example, entering “white people ruin” as a potential advertising keyword returned automated suggestions to run ads next to searches including “black people ruin everything.”¹⁶

These civil rights harms are exacerbated on platforms such as Facebook and Google, as these companies rely on business models which seek to monetize user data by maximizing engagement and retaining user attention. As a result, algorithmic systems including ad targeting and delivery, content ranking, and recommendation systems on these platforms are calibrated so that they optimize for and tend to promote sensationalized content, which can often be harmful in

¹¹ Murphy, Laura W., and Megan Cacace. Rep. *Facebook’s Civil Rights Audit – Final Report*, July 8, 2020. <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>.

¹² Stop Hate for Profit, June 17, 2020. <https://www.stophateforprofit.org/>.

¹³ Sonnemaker, Tyler. “Mark Zuckerberg Reportedly Said Facebook Is 'Not Gonna Change' in Response to a Boycott by More than 500 Advertisers over the Company's Hate-Speech Policies.” *Business Insider*, July 1, 2020. <https://www.businessinsider.com/zuckerberg-facebook-not-gonna-change-due-to-advertising-boycott-report-2020-7>.

¹⁴ Wagner, Kurt. “A Facebook Ad Boycott Is Gaining Steam, but Small Business Can't Just Quit the Social Media Giant so Easily.” *Financial Post*. June 24, 2020. <https://financialpost.com/technology/facebook-ad-boycott-gains-steam-small-business-cant-quit-easily>.

¹⁵ Yin, Leon, and Aaron Sankin. “Google Ad Portal Equated ‘Black Girls’ with Porn.” *The Markup*, July 23, 2020. <https://themarkup.org/google-the-giant/2020/07/23/google-advertising-keywords-black-girls>.

¹⁶ Spandana Singh, *Special Delivery How Internet Platforms Use Artificial Intelligence to Target and Deliver Ads*, February 18, 2020, <https://www.newamerica.org/oti/reports/special-delivery/>.

nature, with the aim of retaining user attention and accruing more revenue through avenues such as advertising.¹⁷

The fomentation of racial animosity online is detrimental to consumer welfare, as well as our society. Antitrust enforcers would be wise to consider these dynamics as a factor in their analysis. A definition of consumer welfare that does not include racial discrimination and misinformation as harms is ill-equipped to understand the power of platforms.

II. Stronger Antitrust Enforcement and Data Regulation are Needed to Promote Competition and Protect Users

A. Modernize Antitrust Law, Doctrines, and Guidelines

Current antitrust doctrine largely relies on an analysis of “consumer welfare” that often centers on an understanding of harm as short-term price increases.¹⁸ But antitrust enforcement must have a broader understanding of consumer harm in order to regulate the digital market effectively. Because the business models of many tech companies are built on data, an antitrust approach must center on the connection between data and competition. Merger guidelines already consider non-price based harms including reduced product quality, reduced product variety, reduced service, and diminished innovation.¹⁹ These harms should be expanded and redefined to match the realities of the digital market.

Earlier this month, the FTC and DOJ released new Vertical Merger Guidelines that govern how the antitrust agencies evaluate vertical mergers.²⁰ Unfortunately, the agencies rushed the development of the new Guidelines—the first update in 36 years—and discouraged adequate public participation. The results are disappointing: the new Guidelines do not sufficiently reflect the reality of digital markets and largely reiterate outdated thinking from 1984.²¹ The agencies also failed to adopt OTI’s recommendation to establish a dominant platform presumption.²² We

¹⁷ Singh, *Special Delivery*.

¹⁸ Khan, Lina M. “Amazon’s Antitrust Paradox.” *The Yale Law Journal* 126, no. 3 (January 2017): 564–907. <https://www.yalelawjournal.org/note/amazons-antitrust-paradox>.

¹⁹ Horizontal Merger Guidelines, U.S. Department of Justice and Federal Trade Commission, August 19, 2010, <http://perma.cc/SQ8H-AB7P>.

²⁰ Vertical Merger Guidelines (2020), U.S. Department of Justice and Federal Trade Commission, https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

²¹ “OTI Says New Merger Guidelines ‘Miss the Mark.’” *New America*. Open Technology Institute, July 1, 2020. <https://www.newamerica.org/oti/press-releases/oti-says-new-merger-guidelines-miss-the-mark/>.

²² Slaiman, Charlotte, and Joshua Stager. Publication. *Comments on the Draft Vertical Merger Guidelines*. Public Knowledge and Open Technology Institute, February 26, 2020. https://newamericadotorg.s3.amazonaws.com/documents/VMG_Comments-_PK__OTI.pdf.

support the American Antitrust Institute’s call for the agencies to withdraw the new Guidelines and start over.²³

B. Mandate Data Portability to Remove Barriers to Entry

Data portability is the ability of a user of an online service to extract an archive of the data they’ve provided to that service or that the service has collected about them, in a structured, commonly used and machine-readable format, suitable for transfer to a different service of that person’s choosing.²⁴ Data portability serves purposes for the end user, direct competitors, and other market participants. It allows users to transport their data to another service and to use the data for their own purposes (e.g., backing up their photos and files onto a harddrive). And it allows competitors to both provide similar services and build innovative services using the same data. OTI developed the Data Portability Act,²⁵ proposed legislative language intended to guide deliberations in Congress. The model bill builds on the data portability provisions in Europe’s General Data Protection Regulation and the California Consumer Protection Act to encourage the free flow of data between online services.

Data portability reduces switching costs: the difficulties associated with moving from one service provider to another. The success of phone number portability provides a useful model for this aspect of data portability. Studies of the effects of mobile number portability in the EU have demonstrated the policy promotes consumer welfare and lowers the market price of wireless service.²⁶

In addition to the reduction of switching costs, data portability has two additional features that promote competition. First, user data can be used by multiple competing services simultaneously allowing users to try and compare the offerings of different companies. For example, a user who stored her photos in Google could port them to Flickr and choose to continue storing them in Google or choose to delete them from the Google account. Second, porting data from one company to another could allow the data to be used in ways not contemplated by the first company. This allows users to explore innovative offerings not offered by incumbents.

²³ “AAI Says New Vertical Merger Guidelines ‘Fall Short,’ Suggests Next Administration Start Over.” American Antitrust Institute, June 30, 2020.
<https://www.antitrustinstitute.org/aai-says-new-vertical-merger-guidelines-fall-short-suggests-next-administration-start-over/>.

²⁴ Schulman, Ross. “A Tech Intro to Data Portability.” New America. Open Technology Institute, June 15, 2018.
<https://www.newamerica.org/oti/blog/tech-intro-data-portability/>.

²⁵ Null, Eric, and Ross Schulman. “The Data Portability Act: More User Control, More Competition.” New America. Open Technology Institute, August 19, 2019.
<https://www.newamerica.org/oti/blog/data-portability-act-more-user-control-more-competition/>.

²⁶ Cho, Daegon, Pedro Ferreira, and Rahul Telang. “The Impact of Mobile Number Portability on Price, Competition and Consumer Welfare,” September 29, 2016,
<http://pedro-ferreira.org/wp-content/uploads/2016/10/Mobile-Number-Portability.pdf>.

Tech companies have made significant progress toward data portability. Apple, Facebook, and Google (as well as Microsoft and Twitter) are all contributors to the Data Transfer Project “to create an open-source, service-to-service data portability platform so that all individuals across the web could easily move their data between online service providers whenever they want.”²⁷ Amazon is notably absent from this initiative. Antitrust enforcers should assess the degree to which a company limits data portability and use that as a metric by which to identify anticompetitive behavior.²⁸

There are tensions between data portability and privacy,²⁹ but strong user privacy protections can address these tensions and build user trust. OTI envisions and recommends that data portability requirements would be incorporated into comprehensive privacy legislation. Without strong privacy rights, users will be more likely to keep their data with brands they recognize rather than to lesser known companies, further entrenching platform dominance.

C. Enact Comprehensive Privacy Legislation

Beyond the specific areas covered by a sectoral privacy law such as HIPAA or FERPA, U.S. law generally relies on a “notice and consent” framework to protect consumer privacy. But this framework does not give individuals real choices about how their data are used and is insufficient to protect user privacy.³⁰ There is a growing consensus among stakeholders to abandon this model in favor of a new approach that places restrictions on how data can be used and gives users enforceable rights over their personal information.

When Congress began contemplating passing comprehensive privacy legislation in 2018, OTI as part of a group of 34 civil rights, consumer, and privacy organizations released public interest principles for privacy legislation:³¹

1. Privacy protections must be strong, meaningful, and comprehensive.
2. Data practices must protect civil rights, prevent unlawful discrimination, and advance equal opportunity.

²⁷ “Data Transfer Project,” 2018. <https://datatransferproject.dev/>.

²⁸ Chao, Becky, and Ross Schulman. Rep. *Promoting Platform Interoperability*. Open Technology Institute, May 13, 2020. <https://www.newamerica.org/oti/reports/promoting-platform-interoperability/>.

²⁹ Bankston, Kevin, Eric Null, and Ross Schulman. “Competition and Consumer Protection in the 21st Century: The Intersection Between Privacy, Big Data, and Competition.” Comments of New America’s Open Technology Institute, August 20, 2018. https://d1y8sb8igg2f8e.cloudfront.net/documents/OTI_Final_FTC_portability_comments_Question_4_fixed.pdf.

³⁰ Park, Claire. “How ‘Notice and Consent’ Fails to Protect Our Privacy.” New America. Open Technology Institute, March 23, 2020. <https://www.newamerica.org/oti/blog/how-notice-and-consent-fails-to-protect-our-privacy/>.

³¹ “Principles for Privacy Legislation.” New America. Open Technology Institute, November 13, 2018. <https://www.newamerica.org/oti/press-releases/principles-privacy-legislation/>.

3. Governments at all levels should play a role in protecting and enforcing privacy rights.
4. Legislation should provide redress for privacy violations.

Privacy and competition are often framed as opposing goals that require tradeoffs, and this may be true in some instances. But this framing fails to consider that a major source of the power of the dominant platforms is the scale of their data collection. Germany’s competition regulator has recognized this, and has characterized Facebook’s data as “the essential factor for establishing the company’s dominant position.”³² If there were restrictions on how companies could use data, smaller companies could compete with dominant firms based on the merits of their service rather than the amount of user data collected. Therefore, OTI recommends that the subcommittee consider how privacy legislation could further its goals of promoting competition and consumer welfare in the tech industry.

III. Conclusion

Promoting competition in the tech industry will require Congress and antitrust agencies to reevaluate antitrust enforcement strategies in light of the characteristics unique to platform markets. As Chairman Cicilline said at an OTI event, “portability is not a substitute for the robust enforcement of antitrust and consumer protection laws. The benefits of data portability and social networks will be lost if we continue to allow dominant platforms to perpetuate their stranglehold over commerce through serial acquisitions of potential and future competitors.”³³ Congress will be most effective at mitigating the harms of outsized market power with a regulatory strategy that combines modernized antitrust enforcement with data portability and privacy protections.

Thank you again for your efforts to hold online platforms accountable and protect users in digital markets. We welcome any feedback or questions about these matters.

Sincerely,

/s/ Christine Bannan
Policy Counsel

³² “Bundeskartellamt Prohibits Facebook from Combining User Data from Different Sources.” Bundeskartellamt, July 2, 2019.

https://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2019/07_02_2019_Facebook.html.

³³ “A Deep Dive Into Data Portability: How Can We Enable Platform Competition and Protect Privacy at the Same Time?” New America. Open Technology Institute, June 6, 2018.

<https://www.newamerica.org/oti/events/deep-dive-data-portability-how-can-we-enable-platform-competition-and-protect-privacy-same-time/>.