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David N. Cicilline, Chairman
Subcommittee on Antitrust, Commercial, and Administrative Law
Committee on the Judiciary
U.S. House of Representatives

Dear Chairman Cicilline:

Garmin applauds the Subcommittee's significant, multi-year efforts to investigate the rise and abuse of market power online. As the Subcommittee recognized in the 2020 Digital Markets Report, online gatekeepers "*not only wield tremendous power, but they also abuse it by charging exorbitant fees, imposing oppressive contract terms, and extracting valuable data from the people and businesses that rely on them.*"¹ These gatekeepers also "*have abused their role as intermediaries to further entrench and expand their dominance.*"² Garmin appreciates the additional focus on these gatekeepers in the Subcommittee's upcoming hearing titled, "Reviving Competition, Part 1: Proposals to Address Gatekeeper Power and Lower Barriers to Entry Online."³ I write to shine light on one aspect of gatekeeper power and provide specific examples from Garmin's experience of two gatekeepers—Google and Apple—both of which can, and do, use their gatekeeper dominance to harm competition.

For more than 30 years, Garmin has pioneered new wireless devices and applications that are designed for people who live an active lifestyle, many of which feature location technology such as Global Positioning System (GPS). Garmin serves five primary markets: auto, aviation, fitness, marine, and outdoor. Since the inception of its business, Garmin has delivered over 235 million products, including more than 15 million products delivered during fiscal 2020. Garmin products have played an important role over the years in the improvement of safety for general aviation, in service to the military in aircraft, vehicles, and troops, and most recently in helping people stay healthy and fit during the COVID-19 pandemic. In its Americas region reporting segment, Garmin employs approximately 6,000 associates and had fiscal 2020 net sales of approximately \$2 billion.

1. Two gatekeepers—Apple and Google—can impede competition in the markets for wrist-worn wearable devices through their super-dominant positions in the smartphone ecosystem

¹ Investigation of Competition in Digital Markets: Majority Staff Report and Recommendations, Subcomm. on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, 2020, at 6, https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

² *Id.*

³ House Committee on the Judiciary, Press Release, House Judiciary Antitrust Subcommittee Announces Series of Hearings on Proposals to Curb the Dominance of Online Platforms and Modernize Antitrust Law, Feb. 18, 2021, <https://judiciary.house.gov/news/documentsingle.aspx?DocumentID=4379>.

Garmin supports the Subcommittee's efforts to review the impact of gatekeepers and barriers to entry on competition. Garmin's comments will focus on how the gatekeepers controlling the smartphone ecosystem, Apple and Google, also act as gatekeepers for wrist-worn wearable devices through their smartphone operating systems (Google's Android and Apple's iOS) and app stores (Google's Play Store and Apple's App Store), which serve as gateways to customers for wrist-worn wearable device manufacturers. The Federal Trade Commission's 2015 Internet of Things report highlighted the growing utilization of internet-connected devices and devices that require a smartphone connection (or have key features only available through apps on a smartphone).⁴ This is particularly true for wrist-worn wearable devices, such as Garmin's fenix, Forerunner, vivoactive, and Venu series, which require a smartphone connection in order to access health and fitness related data, as well as device settings and control.

For Garmin and its rivals, Google and Apple are dominant gatekeepers controlling access to wrist-worn wearable customers who need seamless interoperability with Android and iOS phones as well as access to companion apps via Google's and Apple's app stores for their devices to function. These two companies have absolute control whether these apps are available for consumers to download onto their smartphones, which features are available on those apps, whether and to what extent the smartphone apps interact and share data with both the smartphone and the personal fitness device, and what connected functionality is available to the device itself. Google and Apple thereby control all of the required building blocks for interoperability with the user's phone and the apps they wish to use, including the ability to eliminate or erode the functionality of devices and prevent access to the market altogether. Google and Apple also control the dominant operating systems for wrist-worn wearable devices, Wear OS and WatchOS, which risk becoming a duopoly comparable to the smartphone operating system duopoly. Google's and Apple's operating systems are already used in the vast majority of wrist-worn wearable devices; if Samsung abandons its Tizen operating system in favor of Wear OS, Google's and Apple's combined share based on operating system would approach 90%.

Google's dominance extends further to how consumers find the products that connect to its Android ecosystem. Google has complete control over the placement of rival products in Google Search results, giving Google the ability to "bury" search results for rival products and promote its own. In addition, Google's search engine allows scam artists to purchase search terms that target our customers, which then direct our customers to fraudulent support services offered by unauthorized third parties. Even though Google has the power to stop this kind of fraud, Google's recommended remedy is to purchase those same search terms at a higher cost, which only further enriches Google and encourages the illegal activities of scam artists.

As you noted last year, "*Many of the practices used by these companies have harmful economic effects. They discourage entrepreneurship, destroy jobs, hike costs, and degrade quality. ... Simply put: They have too much power. ... This power staves off new forms of competition, creativity, and innovation.*"⁵

Garmin agrees. Garmin also notes that their dominant Android and iOS ecosystems give Google and Apple full control over the competitive playing field in a wide range of adjacent and downstream markets, such

⁴ FTC Staff Report, Internet of Things: Privacy & Security in a Connected World, at <https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-staff-report-november-2013-workshop-entitled-internet-things-privacy/150127iotrpt.pdf>.

⁵ Office of Congressman David Cicilline, Press Release, Cicilline Opening Statement at Big Tech Antitrust Hearing, at <https://cicilline.house.gov/press-release/cicilline-opening-statement-big-tech-antitrust-hearing>.

as wrist-worn wearable devices. These gatekeepers can and do use that power to benefit their own products that compete with Garmin and other third-party rivals.

2. Both gatekeepers—Apple and Google—have the ability and incentive to harm competition for wrist-worn wearable devices

Google's and Apple's control over other companies' ability to offer products requiring interoperability with their operating systems and the ability to utilize apps is problematic in and of itself. But the situation is aggravated now that both Apple and Google also sell wrist-worn wearable devices directly competing with the companies they can foreclose or impede. The market for wrist-worn wearable devices is exploding, with over 125 million units shipped in the 3rd quarter of 2020 alone.⁶ Big consumer electronics players like Apple and Google see the wearable market as a growth opportunity. Apple Watch is increasingly marketed for fitness and digital health applications in direct competition with many Garmin products. Apple's Health app and its recent launch of its Fitness+ program, marketed by Apple as "*powered by the Apple Watch*" perfectly demonstrate this point.⁷ Google recently closed its acquisition of Fitbit even though the DOJ's Antitrust Division was still actively investigating the acquisition's anticompetitive effects.

Using their tight control of the phone operating system, the app store, and internet search, both Apple and Google now have both the ability and incentive to harm wrist-worn wearable device companies that compete with Apple Watch and Fitbit devices. These super-dominant companies should not be allowed to use their ability to control key inputs and distribution as a sword to eliminate or impede competition.

Apple already today engages in discrimination against non-Apple Watch wrist-worn devices. Below are just a few examples of the types of harms experience by Garmin and other competitors to Apple:

- Unlike users of the Apple Watch, users of Garmin and other non-Apple watch devices must navigate through layers of setup menus to toggle on a 'Notifications' permission for their wrist-worn fitness device to function correctly, something that Apple sets automatically for users of their Watch but will not allow competitors the same privilege.
- Third-party apps on Apple's platform that use location are flagged by iOS with repeated and sternly worded user warning prompts about location services usage, despite the user already granting permission for the app to use location services. This gives the user the false impression that third-party apps are doing something wrong or nefarious. Apple apps are exempted from these prompts.
- The Apple Watch has access to certain phone data and functionalities (e.g., emergency contacts, Apple Maps) that are not offered to third-party wrist-worn fitness devices.
- Apple provides a more customer friendly phone pairing function for the Apple Watch using operating system functions not available to the makers of third-party devices.

These are the same types of harms that Garmin and other third-party rivals can expect from Google now that it is vertically integrated with Fitbit. For example, Google could:

⁶ See Press Release, IDC, Shipments of Wearable Devices Leap to 125 Million Units, Up 35.1% in the Third Quarter, According to IDC, Dec. 2, 2020, *at* <https://www.idc.com/getdoc.jsp?containerId=prUS47067820>.

⁷ See generally <https://www.apple.com/apple-fitness-plus/>. Fitness+ is a subscription-based service from Apple that offers a wide variety of studio-style workouts to users on their Apple devices, including high-intensity interval training, yoga, strength, and others with new workout added regularly. Users receive three months free access with the purchase of an Apple Watch.

- Introduce operating system functions that disable, inhibit, or degrade third-party app and wrist-worn device interoperability with the phone.
- Delay resolving phone operating system bugs that result in interoperability issues affecting rival products that are necessary to restore user experiences.
- Degrade functionality of APIs accessible by third parties and the technical support for such APIs.
- Develop alternative APIs for the same functionalities, with these alternative APIs providing the best, or most seamless, experience being reserved for system APIs available only to the company's own users or only made available to rivals much later.
- Self-preference in relation to new API functionality, giving the company's own products a competitive advantage in introducing new or improved features in its devices or by limiting technical support to third-party device manufacturers in relationship to new APIs.
- Introduce onerous "battery saver" policies that restrict third party apps from running in the background thereby limiting essential functions of wearable devices such as smart notifications or the transfer of the customer's health and fitness data to the phone.
- Discriminate against third parties by providing a measurably worse experience when accessing phone operating system functions, such as location information, by onerous and repeated warnings to the user that causes them to think the third party device is doing something wrong or even nefarious.
- Remove rivals' apps from the Google Play Store for nebulous reasons or delay the approval of rivals' apps to be distributed via the Play Store thereby denying users the full experience and functionality of rival devices.

Google's additional dominance in Internet search and search advertising gives Google even more levers to favor Fitbit products to the detriment of its rivals. The DOJ's recent monopolization complaint against Google describes Google's overwhelming monopoly in search: "*Google in recent years has accounted for nearly 90 percent of all general-search-engine queries in the United States, and almost 95 percent of queries on mobile devices.*"⁸

Google has maintained this search monopoly for years by "*enter[ing] into exclusionary agreements, including tying arrangements, and engaged in anticompetitive conduct to lock up distribution channels and block rivals.*"⁹

Given this overwhelming share of search, and the extraordinary lengths Google has gone to foreclose on other search competition, third-party wrist-worn wearable rivals to Google/Fitbit cannot simply instruct users to use another search engine to find their products.

As the Department of Justice's Antitrust Division recognized in the *U.S. v. Google* complaint, "*As a consequence [of Google's exclusionary practices], countless advertisers must pay a toll to Google's search advertising and general search text advertising monopolies.*"¹⁰ "*Because of Google's user base and scale, the company's search ads have become a 'must have' for many advertisers.*"¹¹

Google can drive consumers to click-through to its own Fitbit products and not click through to rival

⁸ Complaint, United States et al. v. Google LLC, ¶4, at <https://www.justice.gov/atr/case-document/file/1329131/download>.

⁹ *Id.* ¶4.

¹⁰ *Id.* ¶13.

¹¹ *Id.* ¶34 (emphasis added).

products by adjusting where the product pages appear in Google Search results. Pushing rivals' results down by a position or two can steer consumers towards higher ranked Google/Fitbit products.¹²

3. The dominant smartphone companies—Apple and Google—should not be allowed to wield their power as a competitive sword

Dominant digital platforms that others rely on for access to customers and to provide their customers with a full user experience, should not be able to use their dominance as a sword to eliminate competition from their rivals. And yet, even as this issue is squarely in the crosshairs of this Subcommittee and while the Department of Justice is still actively investigating the anticompetitive acquisition, on January 14, 2021, Google acquired Fitbit and became a direct competitor to Garmin.

The remedies Google agreed to in order to obtain approval of the Fitbit acquisition in Europe were not market tested and included numerous drafting “booby traps,” including that they:

- Expressly *allow* Google to discriminate in favor of Fitbit;
- Completely fail to address many foreclosure avenues available to Google, such as via Android support/interoperability, Play Store, and Search and abusive commercial practices such as tying or bundling, exclusive agreements and predatory pricing;
- Cover only foreclosure leveraging a subset of Android APIs (e.g., only those licensed by Google to Android OEMs “without charge for access” and those that are part of the AOSP and therefore by definition already open to the public);
- Do not contain any obligation for Google to keep improvements/new APIs for interoperability-dependent functionalities within AOSP; and
- Include a large number of drafting loopholes, including limiting the commitments to only “consumer” devices for “everyday use.”

Without adequate remedies in place, Google’s dominance in this area will go unchecked and will directly harm competition between the wrist-worn wearable devices that consumers have relied on to stay healthy and fit during the fight against COVID-19.

Garmin applauds the work of the Subcommittee in this area and encourages the Subcommittee to demand that the Antitrust Division of the Department of Justice utilize their authority under Section 7 of the Clayton Act to break up Google’s anticompetitive acquisition of Fitbit to restore the competitive playing field, or, at the very least, impose adequate remedies to prevent Google’s dominant position from destroying competition.

Garmin is pleased to support the Subcommittee’s work in this important area and our team is available to answer any questions you may have.

Sincerely,



Cliff Pemble
President and CEO

¹² See report analyzing 5 million Google Search results, at <https://backlinko.com/google-ctr-stats>.