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**HOW MIGHT  
ANTITRUST APPLY  
TO BIG TECH?**

**POLICY REPORT**

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Over the past few years, there has been a considerable shift in the debate over the business activities of the nation's largest technology companies and the role federal and state governments should play in monitoring those activities. Whereas commentators and policymakers on both sides of the spectrum once favored a relatively hands-off approach to regulating "Big Tech," many have begun urging more aggressive tactics.<sup>1</sup> This debate has become particularly acute in the field of antitrust, with increasing numbers of observers calling on enforcement agencies to "break up" Big Tech.<sup>2</sup>

Commentators on the left have voiced concern about the size and power of Big Tech and the concentration of power in the hands of a select few companies.<sup>3</sup> Commentators on the right have expressed similar concerns, while also accusing tech companies of censoring speech or treating liberal and conservative political views inconsistently.<sup>4</sup> For the time being, at least, vigorously enforcing antitrust laws against Big Tech seems to be one of the few issues on which both sides of the political spectrum agree.

But what does that mean, exactly—enforcing antitrust laws against Big Tech? This paper seeks to answer that question for readers who have some familiarity with antitrust law, but who are not experts in the subject. It also analyzes how recent legislative proposals could impact antitrust enforcement for the nation's large tech companies.

When it comes to antitrust enforcement, the archetypal example many people think of is Standard Oil, which the federal government broke up into constituent pieces over a century ago.<sup>5</sup> Exxon, Mobil, Chevron, and other household names were the result of this division. But breaking up a company is not the only—or even the usual—remedy for an antitrust violation.<sup>6</sup> Far more common is an injunction against the unlawful activity, sometimes accompanied by a fine or damages award. Mere size alone also is not sufficient to prove a violation. As Professor Herbert Hovencamp of the University of Pennsylvania Law School recently explained, antitrust laws "cannot be interpreted as limitations on political power, large size, or some common law or criminal offense . . . *unless* those bad acts serve to injure competition."<sup>7</sup>

Thus, when it comes to Big Tech, the fact that a company has dominant market share or outsized influence in a particular sector is only one piece of the antitrust puzzle. To be liable, the company must *also* have engaged in some form of anticompetitive behavior in an effort to acquire, maintain, or extend its dominant position or prevent new competitors from entering the market.<sup>8</sup> Such

unlawful behavior could include, for example, requiring distributors to pre-load the company's products or set them as the default option on a company-owned platform with dominant market share, entering into agreements with other market actors that shut off distribution channels for competitors, or acquiring emerging competitors. Any court-ordered remedy will also necessarily depend on the nature of the violation.<sup>9</sup> Thus, if the unlawful behavior consisted of agreements shutting off distribution channels, the remedy might be an injunction prohibiting such agreements. If, on the other hand, the violation centered around anticompetitive acquisitions, the remedy might involve the forced divestiture of some or all of those acquisitions.<sup>10</sup>

With these principles in mind, it becomes apparent that calls to "break up" Big Tech do not necessarily reflect how antitrust enforcement would actually play out in practice.<sup>11</sup> Rather, any remedy ordered by a court would depend on the type of anticompetitive conduct at issue and the court's judgment regarding what type of action is needed to stop (and if necessary redress) such conduct. This in turn means that to understand how antitrust laws might apply to Big Tech, it is necessary to understand what sorts of anticompetitive behavior each company is alleged to have engaged in.

The four Big Tech companies that have received the lion's share of antitrust attention are Google, Facebook, Apple, and Amazon. Last fall, the Department of Justice, joined by 11 states, filed a lawsuit against Google alleging that Google has unlawfully maintained monopolies in internet search and search advertising and has entered into agreements with other companies to ensure dominant status for its search engine on mobile devices.<sup>12</sup> Shortly thereafter, two separate coalitions of states filed separate suits against Google alleging additional unlawful monopolistic activity.<sup>13</sup> Facebook, too, has been hit with suits by the Federal Trade Commission (FTC) and by 48 states alleging that the company has violated antitrust laws in seeking to maintain and expand its market share.<sup>14</sup> Amazon faces multiple investigations in both the United States and the EU regarding its use of data on third-party sellers that transact business through Amazon's digital marketplace,<sup>15</sup> and the company was recently sued by the District of Columbia over its practice of prohibiting third-party sellers from offering their products for lower prices on other sites.<sup>16</sup> Lastly, app developers have brought multiple

lawsuits against Apple claiming that the tech giant uses app-store fees and other means to stifle competition and unlawfully favor its own home-grown suite of products.<sup>17</sup>

Each of these four companies has a different business model and has pursued different strategies to build and maintain market share. So the types of potential anticompetitive behavior, and accompanying potential antitrust violations, vary by company. Recent legislative proposals, if enacted, also have the potential to broaden the grounds for liability, and remedies, that might apply. Below is a summary of each company's potential bases for liability, followed by an analysis of how recent legislative proposals could alter the landscape.

## Google

Google is, of course, best known for its search engine, which has an extraordinarily high share of the global internet search market—around 90 percent.<sup>18</sup> But Google operates much more than just its search engine. Indeed, Google has nine products with over one *billion* monthly active users: Android, Chrome, Gmail, Google Drive, Google Maps, Google Play, Google Photos, Google Search, and YouTube.<sup>19</sup> Given the intersecting nature of these different products—e.g., a consumer could open Chrome on an Android device and be directed by Google Search to Google Maps for directions to a friend's house—there is tremendous potential for Google to seek to leverage its dominant share in one product market to enhance or secure its share in another product market in a way that hinders competition.

One potential example of this—and a practice that Google's competitors have alleged for years<sup>20</sup>—could be prioritizing other Google products in Google Search results, if doing so could be shown to have anticompetitive consequences. Google could give priority to YouTube in video search results, or to Google Shopping in shopping

search results. Similarly, when a user types in the name of a restaurant, Google could display its own restaurant reviews above Yelp reviews. Or it could display its own reviews to the side of search results, along with a link to Google Maps in case the user wants directions to the restaurant. It is important to note that evidence of search manipulation alone likely would not be enough to establish an antitrust violation. There would also need to be evidence that such manipulation harmed competition in the adjacent product market (i.e., the market for shopping sites, travel sites, etc.).<sup>21</sup> Some commentators have suggested that establishing such harm could be difficult, given the innovations and efficiencies that integrating services across product markets can produce.<sup>22</sup> Nevertheless, Google's alleged manipulation of search results has received significant attention from antitrust regulators.<sup>23</sup> Google maintains that it operates its search algorithm fairly and consistently, that it does not give its own products undue preference in the algorithm, and that when it displays its own products to the side of search results, it does so for the convenience of users.<sup>24</sup> Critics challenge all of these claims.

Another example of potentially anticompetitive behavior by Google is requiring Android distributors to pre-load Chrome as the default web browser on Android devices and set Google Search as the default search engine. According to critics, this constitutes an attempt by Google to use its dominant share in the mobile device operating system market to exclude competitors from the browser and search markets, because users rarely change the default browser or search engine on their device.<sup>25</sup> Critics also allege that Google engages in anticompetitive behavior by sharing billions of dollars of ad revenue each year with Apple in return for Apple setting Google Search as the default search engine on Apple's Safari browser.<sup>26</sup> Although paying a competitor to give preference to one's own products is not necessarily an antitrust violation, Google's revenue-sharing agreements with Apple and other companies could qualify as anticompetitive if it could be shown that such agreements prevent other competitors from entering the internet search marketplace.

One final way in which Google's business practices could threaten competition relates to Google's dominant position in the market for buying and selling ad space on websites. Google owns the leading system advertisers use to *buy* ad space on websites, the leading system website publishers use to *sell* ad space, and the leading exchange



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on which those buying-and-selling transactions occur. According to critics, Google has engaged in a variety of exclusionary tactics to secure its dominant position on both sides of the internet advertising equation, including by requiring publishers wishing to do business with the millions of advertisers who use Google's system to purchase ad space to use Google's system to *sell* ad space, and by prohibiting publishers wishing to sell ad space through Google's system from selling through competitors' systems as well.<sup>27</sup> Critics also allege that Google exploits its dominant position in internet advertising to charge above-market fees for its services.<sup>28</sup>

As to each of these types of alleged anticompetitive conduct, injunctive relief prohibiting the conduct likely would be the most straightforward remedy. Whether further structural remedies—such as spinning off various Google products—would be called for likely would depend on, among other things, whether Google's intersecting product lines can operate competitively in the absence of such anticompetitive conduct or whether there is reason to believe the intersecting nature of Google's products is itself anticompetitive.<sup>29</sup>

## Facebook

Of the four Big Tech companies at the center of the antitrust debate, Facebook's allegedly anticompetitive behavior is perhaps the most straightforward to explain. Over the past decade or so, Facebook has engaged in a number of high-profile acquisitions that critics allege were intended to stifle competition and consolidate Facebook's dominant position in social networking.<sup>30</sup> Foremost among these were Facebook's 2012 acquisition of Instagram and 2014 acquisition of WhatsApp. At the time of acquisition, Instagram had achieved success as a social networking platform focused on photo editing and sharing and was poised to emerge as a potential threat to Facebook's dominant position. At the time of its acquisition, WhatsApp in turn was growing rapidly as a platform for private messaging in competition with Facebook's own messaging service. Critics allege that Facebook purchased these and other services that posed emerging competitive threats in order to maintain its dominant market share.<sup>31</sup>

Facebook also has history of creating or remaking its products to match rising competitors. In 2016, for example, it launched Instagram Stories, a Snapchat-like feature that deletes posts after 24 hours.<sup>32</sup> In 2020, it launched Instagram Reels, a feature that allows users to create and share short multi-clip videos, similar to TikTok.<sup>33</sup> To the extent such efforts have the effect of stifling or excluding competition by leveraging Facebook's dominant position

to cut off new market entrants before they are able to establish a foothold, such efforts could also serve as the basis for potential antitrust liability.<sup>34</sup>

One additional way in which Facebook's business activities could come into conflict with antitrust laws is through the conditions that Facebook places on access to its programming interface. According to critics, Facebook prohibits (or formerly prohibited) third-party app developers that wish to send or receive data from Facebook's social networking platform to agree not to provide the same core functions Facebook provides (e.g., photo sharing, messaging) or integrate with competing social networks as a condition of access to Facebook's interface.<sup>35</sup>

Because Facebook's allegedly anticompetitive behavior involves acquisitions of potential competitors, it is perhaps the Big Tech company most likely to face divestiture (i.e., "break up") as a remedy in the event a court finds a violation. But even in that scenario, the remedy would most likely be limited to undoing the allegedly anticompetitive acquisition (or acquisitions), rather than mandating broader structural changes to Facebook as an entity.<sup>36</sup>

## Amazon

Amazon possesses a dominant position in the market for online retail in the United States, a position that has only been strengthened by the shutdowns and social distancing that have accompanied COVID-19. According to estimates, Amazon accounts for 40 to 50 percent of all online retail in the United States, more than six times greater than the next-largest e-seller, Walmart.<sup>37</sup>

The nub of antitrust concerns related to Amazon lies in the fact that Amazon sells both its own, "private-label" products on its website, as well as products from other, "third-party" sellers. In this way, Amazon is much like a grocery or department store, in that it offers a mix of its own brands (sometimes called "store brands" in a grocery store) and independent brands for sale. Amazon owns over 100 private-label brands, some of which have the name "Amazon" in the title (e.g., AmazonBasics, Amazon Essentials) and some of which do not (e.g., Mama Bear, Happy Belly).<sup>38</sup>

There are three basic concerns that arise from Amazon's mix of private-label and third-party sales offerings. First, similar to Google, Amazon could favor its own product brands in search results over third-party sellers, or give its own brands exclusive merchandising space, in a way that hinders competition. Amazon strenuously denies preferencing its own brands and, like Google, states that its search algorithm operates fairly and consistently across brands.<sup>39</sup>

Second, Amazon has access to vast quantities of sales data regarding third-party products. Amazon could, if it wanted, use that data to inform brand and pricing strategies for its own, private-label products. For example, Amazon could use data regarding what size, quantity, color, or flavor of a given third-party product sells best to determine what sizes, quantities, colors, or flavors to offer for a corresponding private-label product. Amazon could also use third-party seller data to determine which price points work best for which products, what new private-label products to launch, and how best to undercut competitors. Amazon says that internal company policy prohibits using individual third-party seller data to enhance Amazon's private-label sales efforts,<sup>40</sup> but the possibility of (and incentive for) anticompetitive self-dealing remains. Amazon's use of third-party seller data has been the primary focus thus far of antitrust investigations into the company's business practices.<sup>41</sup>

The third concern related to Amazon's sale of both private-label and third-party products is the possibility that Amazon could charge third-party sellers excessive fees for access to its online marketplace in order to drive up the price of third-party products and thus make Amazon's own product offerings more attractive. Critics claim that third-party sellers have little negotiating power over fees with Amazon because of Amazon's dominant market position, thus making the possibility of anticompetitive fees a very real threat.<sup>42</sup>

An additional antitrust concern relates to Amazon's use of so-called "most-favored-nation" clauses in contracts with third-party sellers that prevent such sellers from offering their products at lower prices on other websites, including the sellers' own websites.<sup>43</sup> In the view of critics, not only do such clauses help preserve Amazon's dominant market position, but they also result in higher prices for consumers across the online marketplace because they eliminate price competition and create an artificially high price floor that incorporates the fees Amazon charges third-party sellers.<sup>44</sup>

In the event a court were to find an antitrust violation based on one or more of the above categories of potentially anticompetitive conduct, it is possible that one remedy could be to spin off some (or all) of Amazon's private-label brands or to prevent Amazon from selling private-label products. Injunctive relief prohibiting anticompetitive self-dealing, or the use of most-favored-nation clauses, however, is probably the likelier remedy.<sup>45</sup> Some commentators have also suggested appointing a board composed of Amazon officials and third-party seller representatives to monitor Amazon's pricing, product selection, and distribution practices.<sup>46</sup>



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## Apple

Apple's potential antitrust issues consist of something of a mix of the issues applicable to Amazon and Google. First, similar to Amazon, Apple charges fees from app developers and subscription services that offer products through its app store. The app fees, which apply both to paid apps and to in-app purchases, are 30 percent of the purchase price for "large" developers (i.e., those with \$1 million or more in annual sales) and 15 percent for "small" developers (i.e., those with less than \$1 million in annual sales). The subscription fees, in turn, are 30 percent of the subscription price during the first year of the subscription and 15 percent during the second and subsequent years.<sup>47</sup>

Critics allege that these fees are excessive and constitute "monopoly rents" that Apple is able to extract only because it controls access to its app store.<sup>48</sup> And Apple has not hesitated to punish app developers that have attempted to circumvent its fee system. Last year, it removed the popular video game Fortnite from its app store after Fortnite's developer, Epic Games, began allowing players to download the game's virtual currency directly from Epic rather than through the app store.<sup>49</sup> Epic immediately filed suit claiming that Apple had acted anticompetitively in removing Fortnite from its store, and the case garnered national headlines when Apple CEO Tim Cook faced pointed questioning from the judge regarding Apple's recent adjustments to its app fees and surveys showing that nearly 40 percent of app developers were dissatisfied with the app store.<sup>50</sup>

Second, and also similar to Amazon, at the same time it charges these fees, Apple offers its own suite of apps and subscription services, including apps such as Apple Books and iMovie, and subscription services like Apple TV+ and Apple News+.<sup>51</sup> Critics argue that the fees prevent competing app developers and subscription services (such as Netflix) from lowering their prices, discourage new market entrants, and allow Apple to undercut competition by offering its home-grown products at a lower price.<sup>52</sup>

Some subscription services have been able to bypass the Apple subscription fee by directing subscribers to login (and pay) directly through the subscription service’s website rather than through the app store (or iTunes).<sup>53</sup>

Third, similar to Google, Apple pre-loads many of its own apps (e.g., Apple Podcasts) on iPhone, thereby arguably disadvantaging competing app developers. Apple also pre-loads its app store, which critics allege helps Apple maintain a monopoly on app sales, distribution, and payment processing. Alternative app stores exist, but are dwarfed in market share by Apple’s store.<sup>54</sup>

As with the other Big Tech companies, in the event a court were to find an antitrust violation by Apple, it is possible the court could order Apple to spin off some of its apps or subscription services. As before, however, injunctive relief is more likely.

## Recent Legislative Proposals

Thus far this paper has provided an overview of how antitrust liability might apply to Big Tech under existing law. The relationship between antitrust and Big Tech has received significant attention from policymakers, and a number of bills have been introduced in recent months that would broaden the ability of enforcement officials to bring suit against the nation’s large tech companies. Most notably, the House Judiciary Committee recently voted out a package of bills that would impose new, far-reaching restrictions on Big Tech and authorize enforcement agencies to seek substantial additional penalties. Although it is unclear at this point how far the bills will advance,<sup>55</sup> a brief summary of the bills and how they would impact Big Tech may prove helpful in illuminating where antitrust enforcement may be headed.

The House Judiciary package included six bills. Four of the bills would impose a number of new requirements on online platforms with 50 million or more active monthly users in the United States and a market cap of at least \$600 billion, a group that includes each of the four Big Tech companies discussed in this paper—Google, Facebook, Amazon, and Apple.<sup>56</sup>

The first bill, the American Choice and Innovation Online Act,<sup>57</sup> would prohibit platforms meeting the usage and market cap thresholds above from engaging in various forms of “discriminatory conduct,” including preferencing the platform’s own “products, services, or lines of business” over those of other companies (including through search rankings); restricting or impeding access to or interoperability with the platform’s features, services, or operating system; using non-public data obtained through sales or other business activities on the platform to support

its own products or services; impeding the ability of users to uninstall preinstalled applications; or interfering with a user’s pricing of goods or services on the platform.<sup>58</sup> In order to avoid liability, a platform would have to prove by clear and convincing evidence that the prohibited conduct did not “harm . . . the competitive process,” was necessary to protect user privacy, or was necessary to prevent violation of another law.<sup>59</sup> The bill provides for civil penalties of up to 30 percent of the platform’s revenue during the period of violation (or up to 15 percent of the platform’s revenue during the prior calendar year), as well as private damages suits by injured parties.<sup>60</sup> It also states that if a court determines the violation resulted from a “conflict of interest related to the covered platform’s concurrent operation of multiple lines of business,” the court should consider “requiring divestiture” of the lines of business that gave rise to the conflict.<sup>61</sup>

The second bill, the Ending Platform Monopolies Act,<sup>62</sup> would go even further and make it unlawful for an online platform meeting the usage and market cap thresholds above to “own, control, or have a beneficial interest” in any other “line of business” that uses the platform to sell or provide products or services.<sup>63</sup> The bill would also prohibit the platform from owning or controlling any other line of business that would give the platform the incentive (and ability) to preference the platform’s own “products, services, or lines of business” over those of a competitor on the platform.<sup>64</sup> The bill provides for civil penalties similar to the American Choice and Innovation Online Act and additionally states that it may be enforced in the same manner and by the same means as other antitrust laws.<sup>65</sup>

The third bill in the package would impose strict merger restrictions on platforms meeting the usage and market cap thresholds. Titled the Platform Competition and Opportunity Act,<sup>66</sup> it would prohibit such platforms from acquiring another company unless the platform is able to prove by clear and convincing evidence that the acquired company does not compete with the platform, constitute a nascent or potential competitor, enhance the platform’s market position, or enhance the platform’s ability to *maintain* its market position.<sup>67</sup> The bill provides that it may be enforced in the same manner and by the same means as other antitrust laws,<sup>68</sup> and also creates a private right of action for individuals injured by conduct prohibited under the bill.<sup>69</sup>

The fourth bill, the Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act,<sup>70</sup> would require platforms to make user data portable (i.e., transferable) to users or to businesses selected by a user, and also make their programming interfaces interoperable

with competing services.<sup>71</sup> The bill additionally directs the FTC to issue platform-specific interoperability standards and to create a technical advisory committee to assist in the standards-setting process, and authorizes civil penalties and injunctive relief against violators.<sup>72</sup>

The two final bills in the House Judiciary package would apply more broadly than to just Big Tech. The Merger Filing Fee Modernization Act<sup>73</sup> would update the filing fees for mergers for the first time in over 20 years to give the Department of Justice and FTC more money for antitrust enforcement. Among other things, the bill would reduce the filing fee for small mergers from \$45,000 to \$30,000 while simultaneously increasing the filing fee for large mergers from \$280,000 to a maximum of \$2.25 million.<sup>74</sup> The State Antitrust Enforcement Venue Act,<sup>75</sup> in turn, would exempt antitrust suits filed by state attorneys general from statutory provisions that allow a special judicial panel to transfer litigation to a different venue in certain circumstances.<sup>76</sup> Antitrust suits filed by the U.S. Department of Justice already enjoy a similar exemption.<sup>77</sup>

Enactment of any of the first four bills—which are designed to apply to Big Tech and little else (based on the definitions in the bills and usage and market cap criteria)<sup>78</sup>—could usher in sweeping changes to enforcement efforts against the four companies discussed in this paper. Each bill targets varying aspects of the companies’ business models, and appears designed to halt one or more of the criticized activities described above.

The American Choice and Innovation Online Act has perhaps the broadest sweep. It would outlaw everything from preferencing one’s own products in search rankings (a criticism that has been lodged repeatedly against both Google and Amazon) to impeding access to a platform’s operating system or programming interface (a key complaint against Facebook and Apple) to interfering with pricing decisions on the platform (a central basis of the District of

Columbia’s suit against Amazon and app developers’ suits against Apple).<sup>79</sup> Although the bill would not prohibit preinstalling software applications (such as Chrome or various Apple apps) that are designed and owned by the platform, it would prohibit placing restrictions on users’ ability to *uninstall* such default applications (thus limiting Google’s and Apple’s ability to prevent workarounds).<sup>80</sup> And it would prohibit using non-public data obtained through sales or other business activities on the platform to “offer or support” the platform’s own products or services (a key complaint against Google, Facebook, and Amazon).<sup>81</sup> Indeed, the bill would touch virtually all of the activities described earlier in this paper, with the exception of acquiring emerging competitors (which is covered by the Platform Competition and Opportunity Act).

Significantly, the bill would also eliminate the requirement that enforcement officials show that the challenged conduct was anticompetitive. As explained above, to make out an antitrust violation under federal antimonopoly law, the party bringing suit must establish that the defendant sought to acquire or maintain its market share through anticompetitive behavior.<sup>82</sup> The American Choice and Innovation Online Act, however, contains no such requirement. To the contrary, it shifts the burden onto the *platform* to prove that the challenged conduct is *not* anticompetitive (or is otherwise necessary to protect user privacy or prevent violation of another law).<sup>83</sup> The bill also authorizes extremely steep fines—up to 30 percent of the platform’s *revenue* during the period of violation (or 15 percent of the platform’s revenue during the prior calendar year)—that are in addition to other forms of relief (including treble damages) available under other laws.<sup>84</sup> Lastly, the bill expressly instructs courts to “consider requiring divestiture” as a remedy in the event a violation occurs as a result of a conflict of interest related to the platform’s operation of multiple business lines.<sup>85</sup> All of these provisions, if enacted, would make it substantially easier for enforcement officials to establish antitrust violations against Big Tech, would significantly broaden the grounds on which officials could bring suit, could lead to much more severe penalties in the event a violation is found, and could even make break-up a more likely outcome (although still probably not very likely in most situations). In short, the bill would profoundly affect antitrust enforcement against Google, Facebook, Amazon, and Apple.

The Ending Platform Monopolies Act likely would have a similarly wide-reaching effect. In contrast to the American Choice and Innovation Online Act, which focuses on conduct, the Ending Platform Monopolies Act



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focuses on structure. As noted, it would prevent the four Big Tech companies from owning or controlling any other line of business that uses the company’s platform to sell products or services, or even any other line of business that would give the company the *incentive* to preference its own products or services over those of competitors on the platform.<sup>86</sup> Although the bill does not mandate divestiture of the other line of business in the event of a violation, it authorizes the same extremely harsh fines as the American Choice and Innovation Online Act,<sup>87</sup> which presumably would lead to voluntary divestiture to avoid further fines. The bill would also substantially broaden the potential bases for antitrust liability for Big Tech, given that it does not require any showing of anticompetitive effects, or even any particular *conduct* (whether anticompetitive or not).<sup>88</sup> In that sense, the Ending Platform Monopolies Act would constitute a significant shift in antitrust enforcement—at least when it comes to Big Tech—as it would move the law closer to a view that “big is bad,” separate and apart from whether a particular “big” firm is engaging in harmful conduct. Google, Amazon, and Apple all would likely be strongly impacted by the bill, as they all either sell products or services on their platforms directly (e.g., Google’s ad services, Amazon’s private-label brands, Apple’s homegrown apps) or own lines of business that give them the incentive to preference their own products or services over those of competitors.

The Platform Competition and Opportunity Act likewise would move antitrust law closer to a view that “big is bad” (at least when it comes to Big Tech) by preventing Google, Facebook, Amazon, and Apple from acquiring any other companies unless they can show—by clear and convincing evidence—that the company is not a competitor and that acquiring the company would not enhance their market position or ability to maintain their market position.<sup>89</sup> This again would constitute a marked shift from current law, under which the burden is on the party *challenging* the acquisition to show that it would “substantially . . . lessen competition” or “tend to create a monopoly.”<sup>90</sup> The bill is forward-looking, so it would not, for example, provide a basis for unwinding Facebook’s acquisitions of Instagram or WhatsApp. But it would place severe constraints on future acquisitions and cut off the ability of Big Tech to prevent emerging competitive threats through an acquisition-based strategy.

The ACCESS Act is the narrowest of the four Big Tech-focused bills, but would still have a significant impact on Facebook, as well as Google and Apple. By requiring platforms to make user data portable,<sup>91</sup> the bill would make it easier for Facebook users to move their

profiles to other social media platforms, and by requiring interoperability,<sup>92</sup> the bill would limit the capacity of all three companies to restrict or condition app developers’ ability to access their platforms. Unlike the other bills, the ACCESS Act does not say that it may be enforced in the same manner and by the same means as other antitrust laws, but it does authorize the FTC to seek substantial civil penalties, as well as injunctive relief to prevent or restrain violations.<sup>93</sup> It also tasks the FTC with setting platform-specific interoperability standards,<sup>94</sup> thereby giving the agency a direct say in what sort of conduct is and is not lawful on the part of each platform. Thus, although the bill covers narrower subject matter than the other three Big Tech-focused bills, it arguably gives enforcement officials the greatest direct control over what the companies may lawfully do.

## Conclusion

Each of the four Big Tech companies discussed above faces varying types of potential antitrust exposure based on the company’s structure and business practices. Regulators, litigators, policymakers, and the general public alike will continue to have a strong interest in ensuring that these companies do not use their dominant market positions to hinder competition or impede innovation. The debate over antitrust and Big Tech is likely to continue for quite some time.

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## Endnotes

- 1 See, e.g., Majority Staff, H. Jud. Comm. Subcomm. on Antitrust, Commercial & Admin. Law, Investigation of Competition in Digital Markets: Majority Staff Report & Recommendations (Oct. 2020), [https://judiciary.house.gov/uploadedfiles/competition\\_in\\_digital\\_markets.pdf?utm\\_campaign=4493-519](https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519); Rep. Ken Buck, H. Jud. Comm. Subcomm. on Antitrust, Commercial & Admin. Law, The Third Way (Oct. 2020), [https://buck.house.gov/sites/buck.house.gov/files/wysiwyg\\_uploaded/Buck%20Report.pdf](https://buck.house.gov/sites/buck.house.gov/files/wysiwyg_uploaded/Buck%20Report.pdf); see also Maëlle Gavet, *What's Next for Silicon Valley?*, Harv. Bus. Rev. (Sept. 30, 2020), <https://hbr.org/2020/09/whats-next-for-silicon-valley>.
- 2 See, e.g., Editorial, *Break up Big Tech*, Pittsburgh Post-Gazette (Oct. 9, 2020), <https://www.post-gazette.com/opinion/editorials/2020/10/09/Break-up-Big-Tech-monopolies-Ama-zon-Google-Facebook-Apple-antitrust/stories/202010090042>.
- 3 E.g., Majority Staff, H. Jud. Comm. Subcomm. on Antitrust, Commercial & Admin. Law, *supra* note 1.
- 4 E.g., Buck, *supra* note 1; Orrin G. Hatch, *Reining in the Techno-Oligarchy*, Newsweek (Feb. 10, 2021), <https://www.newsweek.com/reining-techno-oligarchy-opinion-1567990>.
- 5 *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).
- 6 See Herbert Hovenkamp, *Antitrust Remedies for Big Tech*, The Reg. Rev. (Jan. 18, 2021), <https://www.theregview.org/2021/01/18/hovenkamp-antitrust-remedies-big-tech>.
- 7 *Id.* Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, the principal federal antimonopoly provision, makes it unlawful to “monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States,” *id.* Courts have long held that a violation of this provision requires both “the possession of monopoly power” and “an element of anticompetitive conduct.” *Verizon Commc’ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407 (2004) (emphasis in original). Section 7 of the Clayton Act, 15 U.S.C. § 18, additionally prohibits mergers or acquisitions whose effect is “substantially to lessen competition, or to tend to create a monopoly,” *id.* As Makan Delrahim, former Assistant Attorney General for the U.S. Department of Justice’s Antitrust Division, pithily put it, “Big is not bad. It’s big behaving badly that’s bad.” Carlo Versano & Hope King, *Is Facebook a Monopoly? It’s Complicated, Says Antitrust Regulator*, Cheddar (Apr. 29, 2019), <https://cheddar.com/media/assistant-attorney-general-makan-delrahim-on-elizabeth-warrens-calls-to-break-up-big-tech>.
- 8 See U.S. Dep’t of Justice, Competition and Monopoly: Single-Firm Conduct Under Section 2 of the Sherman Act: Chapter 2 (June 25, 2015), <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2> (“[A]ntitrust law does not regard as illegal the mere possession of monopoly power where it is the product of superior skill, foresight, or industry. Where monopoly power is acquired or maintained through anticompetitive conduct, however, antitrust law properly objects.” (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966))); see also *Verizon Commc’ns*, 540 U.S. at 407.
- 9 See Hovenkamp, *supra* note 6; see also Noah Joshua Phillips, Comm’r, Fed. Trade Comm’n, *We Need to Talk: Toward a Serious Conversation About Breakups*, Remarks at the Hudson Inst. 3-5 (Apr. 30, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1517972/phillis\\_-\\_we\\_need\\_to\\_talk\\_0519.pdf](https://www.ftc.gov/system/files/documents/public_statements/1517972/phillis_-_we_need_to_talk_0519.pdf).
- 10 See generally U.S. Dep’t of Justice, Merger Remedies Manual (Sept. 2020), <https://www.justice.gov/atr/page/file/1312416/download>.
- 11 As noted, recent legislative proposals could impact how the antitrust laws apply to Big Tech. The final section of this paper analyzes how antitrust enforcement against Big Tech could change if those proposals are enacted.
- 12 *United States v. Google LLC*, No. 1:20-cv-3010 (D.D.C.) (filed Oct. 20, 2020). Three additional states (California, Michigan, and Wisconsin) joined the Department of Justice’s complaint after it was filed.
- 13 *Colorado v. Google LLC*, No. 1:20-cv-3715 (D.D.C.) (filed Dec. 17, 2020); *Texas v. Google LLC*, No. 4:20-cv-957 (E.D. Tex.) (filed Dec. 16, 2020).
- 14 *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 (D.D.C.) (filed Dec. 9, 2020); *New York v. Facebook, Inc.*, No. 1:20-cv-3589 (D.D.C.) (filed Dec. 9, 2020). Shortly before this paper went to press, the judge presiding over both suits granted Facebook’s motions to dismiss the suits. See Mem. Op., ECF No. 73, *FTC v. Facebook*, No. 1:20-cv-3590 (June 28, 2021); Mem. Op., ECF No. 137, *New York v. Facebook*, No. 1:20-cv-3589 (June 28, 2021). The judge gave the FTC 30 days to refile its complaint to address pleading deficiencies the judge identified related to the FTC’s claim that Facebook holds a monopoly over personal social networking services. See Mem. Op. at 2, 53, ECF No. 73, *FTC v. Facebook*, No. 1:20-cv-3590. The judge did not give the state plaintiffs leave to refile, as the judge based the dismissal of the states’ suit on the length of time the state plaintiffs had waited to bring suit. See Mem. Op. at 2, 66-67, ECF No. 137, *New York v. Facebook*, No. 1:20-cv-3589. A spokesperson for the state plaintiffs said the state plaintiffs were reviewing the judge’s decision and “considering our legal options,” which include possible appeal. Salvador Rodriguez, *Judge Dismisses FTC and State Antitrust Complaints Against Facebook*, CNBC (June 28, 2021), <https://www.cnbc.com/2021/06/28/judge-dismisses-ftc-antitrust-complaint-against-facebook.html>.
- 15 See, e.g., Tyler Sonnemaker, *Amazon is Reportedly Facing a New Antitrust Investigation into Its Online Marketplace Led by the FTC and Attorneys General in New York and California*, Bus. Insider (Aug. 3, 2020), <https://www.businessinsider.com/amazon-antitrust-probe-ftc-new-york-california-online-marketplace-2020-8>; Annie Palmer, *EU Investigates Amazon: What It Means for U.S. Antitrust Probes*, CNBC (Nov. 11, 2020), <https://www.cnbc.com/2020/11/11/eu-investigates-amazon-what-it-means-for-us-antitrust-probes.html>.
- 16 *District of Columbia v. Amazon.Com, Inc.*, No. 2021-CA-1775B (D.C. Super. Ct.) (filed May 25, 2021).
- 17 See, e.g., Jason Perlow, *Apple’s Antitrust Fight Could Spell the End of iOS as We Know It*, ZDNet (Sept. 16, 2020), <https://www.zdnet.com/article/why-apples-antitrust-fight-could-spell-the-end-of-ios-as-we-know-it>.
- 18 *Search Engine Market Share in 2021*, Oberlo, <https://www.oberlo.com/statistics/search-engine-market-share#:~:text=Handling%20over%2090%20percent%20of,done%20through%20the%20internet%20giant> (last visited June 26, 2021).
- 19 Harry McCracken, *How Google Photos Joined the Billion-User Club*, Fast Company (July 24, 2019), <https://www.fastcompany.com/90380618/how-google-photos-joined-the-billion-user-club>.
- 20 See, e.g., Khushbu Shah, *Yelp Accuses Google of Manipulating Search Results Again*, Eater.com (July 10, 2014), <https://www.eater.com/2014/7/10/6189783/yelp-accuses-google-of-manipulating-search-results-again>.
- 21 See Cong. Research Serv., R45910, Antitrust and “Big Tech” 22-23 (2019), <https://fas.org/sgp/crs/misc/R45910.pdf>; see also Daniel A. Crane, *Search Neutrality as an Antitrust Principle*, 19 Geo. Mason L. Rev. 1199, 1201 (2012) (“Just because a search engine is dominant vis-à-vis other search engines, it does not necessarily have the power to promote or demote adjacent websites to its advantage and in a way that seriously affects the overall competitiveness of the adjacent market.”). Recent legislative proposals, if enacted, could ease or eliminate this requirement. See *infra* at 6-8 (discussing the American Choice and Innovation Online Act and Ending Platform Monopolies Act).
- 22 See, e.g., Pedro Caro de Sousa, *What Shall We Do About Self-Preferencing?*, Competition Pol’y Int’l, June Chron. 2020, at 3-4, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3659065](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3659065); see also Cong. Research Serv., *supra* note 21, at 20-23 (identifying potential obstacles to a finding of antitrust liability based on Google’s alleged self-preferencing in search results).
- 23 In 2017, for example, the EU fined Google \$2.7 billion for manipulating shopping search results in a way that officials believed unduly favored Google’s own shopping service over competitors. See Tony Romm, *Europe Has Fined Google \$2.7 Billion for Manipulating Search Results*, Vox (June 27, 2017), <https://www.vox.com/2017/6/27/15878980/europe-fine-google-antitrust-search>.

- 24 *How Search Algorithms Work*, Google, <https://www.google.com/search/howsearchworks/algorithms> (last visited June 26, 2021); *see also* Adrienne Jeffries & Leon Yin, *Google's Top Search Result? Surprise! It's Google*, *The Markup* (July 28, 2020), <https://themarkup.org/google-the-giant/2020/07/28/google-search-results-prioritize-google-products-over-competitors> (containing statement from Google spokesperson Lara Levin responding to allegations of search bias).
- 25 *See* Complaint, *United States v. Google LLC*, No. 1:20-cv-3010 (D.D.C.).
- 26 *See id.*; Complaint, *Colorado v. Google LLC*, No. 1:20-cv-3715 (D.D.C.).
- 27 *See* Complaint, *Texas v. Google LLC*, No. 4:20-cv-957 (E.D. Tex.). Google recently agreed to pay \$270 million in fines as part of a settlement with French antitrust regulators regarding alleged anticompetitive self-dealing by Google between its ad sales and ad purchasing services. Adam Satariano, *Google to Pay \$270 Million to Settle Antitrust Charges in France*, *N.Y. Times* (June 7, 2021), <https://www.nytimes.com/2021/06/07/technology/google-france-antitrust-ads.html>.
- 28 *See* Complaint, *Texas v. Google*, No. 4:20-cv-957.
- 29 *See* Phillips, *supra* note 9, at 16 (“To argue for breakup as a remedy [in an anticompetitive conduct case], one must show, at a minimum, that the market structure contributed to the harmful conduct, that the breakup is very likely to enhance competition and benefit consumers by eliminating the bad conduct, and that behavioral alternatives do not offer equal or greater expected benefits at equal or lower costs.”).
- 30 *See* Complaint, *FTC v. Facebook, Inc.*, No. 1:20-cv-3590 (D.D.C.); Complaint, *New York v. Facebook, Inc.*, No. 1:20-cv-3589 (D.D.C.).
- 31 *See* Complaint, *FTC v. Facebook*, No. 1:20-cv-3590; Complaint, *New York v. Facebook*, No. 1:20-cv-3589. As noted above, *see supra* note 14, shortly before this paper went to press, the judge presiding over both suits granted Facebook’s motions to dismiss the suits. The judge gave the FTC 30 days to refile its complaint, while the state plaintiffs indicated they were evaluating their legal options following the judge’s decision, which include possible appeal. *See id.*
- 32 Michelle Castillo, *Facebook Copies Snapchat: Examples*, *CNBC* (May 10, 2017), <https://www.cnbc.com/2017/03/09/facebook-copies-snapchat-examples.html>.
- 33 Katie Paul, *Facebook Launches TikTok-Like Product Inside Instagram*, *Reuters* (Aug. 5, 2020), <https://www.reuters.com/article/us-facebook-instagram-tiktok/facebook-launches-tiktok-like-product-inside-instagram-idUSKCN2511VD>.
- 34 EU and UK regulators have also recently launched an investigation into whether Facebook is improperly using data collected from classified ad services that advertise on Facebook to compete against those services using its Facebook Marketplace service, which allows users to buy and sell items from other users. *See* Jon Porter, *EU and UK Open Antitrust Investigations into Facebook Marketplace*, *The Verge* (June 4, 2021), <https://www.theverge.com/2021/6/4/22456313/facebook-marketplace-european-commission-formal-antitrust-investigation-eu-uk>.
- 35 *See* Complaint, *FTC v. Facebook*, No. 1:20-cv-3590. In his decision granting Facebook’s motion to dismiss the FTC’s complaint, *see supra* note 14, the judge rejected Facebook’s imposition of such access restrictions as a potential basis for liability on the ground that Facebook had stopped implementing such restrictions several years before the FTC filed suit. *See* Mem. Op. at 3, 33-50, ECF No. 73, *FTC v. Facebook*, No. 1:20-cv-3590 (June 28, 2021).
- 36 *See* U.S. Dep’t of Justice, *supra* note 10, at 3 (stating that remedies for an unlawful merger should be “no more intrusive than necessary to cure the competitive harm”).
- 37 Wayne Duggan, *Latest E-Commerce Market Share Numbers Highlight Amazon’s Dominance*, *Yahoo! Fin.* (Feb. 4, 2020), <https://finance.yahoo.com/news/latest-e-commerce-market-share-185120510.html>.
- 38 *Explore Our Brands*, *Amazon*, <https://www.amazon.com/?ie=UTF8&node=17602470011> (last visited June 26, 2021).
- 39 As noted above, *see supra* at 3, establishing antitrust liability based on manipulation of search results likely would require evidence that the manipulation harmed competition in adjacent product markets.
- 40 *See* Letter from Brian Huseman, Vice President of Pub. Pol’y, Amazon, to Members of the H. Jud. Comm. (May 15, 2020), <https://d39w7f4ix9f5s9.cloudfront.net/cc/e6/540046ec457e9c5f9dd7c6fe8736f/response-to-hjc-seller-data-5.15.2020.pdf>.
- 41 *See, e.g.*, Sonnemaker, *supra* note 15.
- 42 *See, e.g.*, Shaoul Sussman, *How Amazon’s Pricing Policies Squeeze Sellers and Result in Higher Prices for Consumers*, *ProMarket* (Aug. 23, 2019), <https://promarket.org/2019/08/23/how-amazons-pricing-policies-squeeze-sellers-and-result-in-higher-prices-for-consumers>.
- 43 *See* Complaint, *District of Columbia v. Amazon.Com, Inc.*, No. 2021-CA-1775B (D.C. Super. Ct.).
- 44 *See id.*
- 45 *See* Robert W. Crandall, *The Failure of Structural Remedies in Sherman Act Monopolization Cases*, *AEI-Brookings J. Ctr. for Reg. Studies* (Mar. 2001), [https://www.brookings.edu/wp-content/uploads/2016/06/03\\_monopoly\\_crandall.pdf](https://www.brookings.edu/wp-content/uploads/2016/06/03_monopoly_crandall.pdf) (finding that “structural relief” in monopolization cases has been quite rare where the monopolistic behavior did not involve mergers or conspiring with other firms).
- 46 *See* Hovenkamp, *supra* note 6.
- 47 Sarah Perez, *Apple Dropping App Store Fees to 15% for Small Businesses with Under \$1 Million in Revenues*, *TechCrunch* (Nov. 18, 2020), <https://techcrunch.com/2020/11/18/apple-to-reduce-app-store-fees-for-small-businesses-with-under-1-million-in-revenues>.
- 48 Lisa Eadicicco, *Mark Zuckerberg Took a Dig at Apple by Accusing It of Charging “Monopoly Rents” and Blocking Competition, Report Says*, *Bus. Insider* (Aug. 28, 2020), <https://www.businessinsider.com/facebook-mark-zuckerberg-says-apple-monopoly-app-store-2020-8>.
- 49 Brian Fung & Shannon Liao, *Apple’s in a War for the Future of the App Store. Here’s What’s at Stake*, *CNN Business* (Sept. 25, 2020), <https://www.cnn.com/2020/09/25/tech/apple-fortnite-epic-games-lawsuit/index.html>.
- 50 James Clayton, *Apple v. Epic: Tim Cook Appears on the Stand in Epic Legal Row*, *BBC News* (May 21, 2021), <https://www.bbc.com/news/technology-57199547>; Adi Robertson, *Tim Cook Faces Harsh Questions About the App Store from Judge in Fortnite Trial*, *The Verge* (May 21, 2021), <https://www.theverge.com/2021/5/21/22448023/epic-apple-fortnite-antitrust-lawsuit-judge-tim-cook-app-store-questions>.
- 51 *Apple Apps on the App Store*, *Apple*, <https://apps.apple.com/us/developer/apple/id284417353?mt=12> (last visited June 26, 2021).
- 52 Nick Statt, *Apple’s Biggest App Store Critics Are Not Impressed with Its New Fee Cut for Small Developers*, *The Verge* (Nov. 18, 2020), <https://www.theverge.com/2020/11/18/21573109/epic-tim-sweeney-apple-app-store-fee-cut-reduction-criticize>.
- 53 Ingrid Lunden, *Netflix Tests a Bypass of iTunes Billing in 33 Markets*, *TechCrunch* (Aug. 21, 2018), <https://techcrunch.com/2018/08/21/netflix-itunes-2>.
- 54 Chance Miller, *Apple Hit with Antitrust Lawsuit by Cydia, the “App Store for Jailbreakers”*, *9to5Mac* (Dec. 10, 2020), <https://9to5mac.com/2020/12/10/cydia-apple-app-store-lawsuit>.
- 55 The tech industry is expected to strongly oppose any further movement on the bills, and some Republicans have registered opposition to giving Biden administration antitrust officials more power. *See* John D. McKinnon & Julie Bykowitz, *Google, Facebook, Amazon Among Those Set to Fight House Big Tech Antitrust Package*, *Wall St. J.* (June 24, 2021), <https://www.wsj.com/articles/house-judiciary-committee-passes-final-piece-of-big-tech-antitrust-package-11624562811>. Notably, only one of the bills in the House Judiciary package received a majority of Republican votes in committee, and that bill dealt solely with the narrow issue of venue transfer. None of the bills imposing sweeping new restrictions targeted at Big Tech garnered more than three Republican votes. *See infra* notes 57, 62, 66, 70, 73, 75.

- 56 *See Largest Tech Companies by Market Cap*, CompaniesMarketCap.com, <https://companiesmarketcap.com/tech/largest-tech-companies-by-market-cap> (last visited June 26, 2021). Five other tech companies—Microsoft, Tencent, Tesla, Alibaba, and TSMC—also have market caps of least \$600 billion, *see id.*, although some may not qualify as “online platforms” under the definitions set forth in the bills, *see, e.g.*, American Choice and Innovation Online Act, H.R. 3816, 117th Cong. § 2(g)(10) (2021) (defining “online platform” as a “website, online or mobile application, operating system, digital assistant, or online service” that enables users to generate content that can be viewed by others on the platform; facilitates the sale, purchase, or shipment of goods or services between and among consumers; or enables user search queries that “access or display a large volume of information”).
- 57 H.R. 3816. The bill is sponsored by Representative David Cicilline (D-R.I.) and has 14 bipartisan co-sponsors (9 Democrats and 5 Republicans). It advanced out of committee by a vote of 24-20, with 21 Democrats and 3 Republicans voting aye.
- 58 *Id.* § 2(a)-(b).
- 59 *Id.* § 2(c).
- 60 *Id.* §§ 2(f)(1), 6. The bill additionally provides that it may be enforced in the same manner and by the same means as the FTC Act and Clayton Act. *Id.* § 2(h).
- 61 *Id.* § 2(f)(2)(D).
- 62 H.R. 3825, 117th Cong. (2021). The bill is sponsored by Representative Pramila Jayapal (D-Wash.) and has 12 bipartisan co-sponsors (7 Democrats and 5 Republicans). It advanced out of committee by a vote of 21-20, with 19 Democrats and 2 Republicans voting aye.
- 63 *Id.* § 2(a).
- 64 *Id.* § 2(b).
- 65 Specifically the FTC Act and Clayton Act. *Id.* § 3.
- 66 H.R. 3826, 117th Cong. (2021). The bill is sponsored by Representative Hakeem Jeffries (D-N.Y.) and has 13 bipartisan co-sponsors (9 Democrats and 4 Republicans). It advanced out of committee by a vote of 23-18, with 20 Democrats and 3 Republicans voting aye.
- 67 *Id.* § 2. Senator Josh Hawley’s (R-Mo.) Trust-Busting for the Twenty-First Century Act, S. 1074, 117th Cong. (2021), similarly seeks to sharply limit the ability of Big Tech firms to acquire competitors, albeit through a different approach. Senator Hawley’s bill would prohibit any company with a market cap exceeding \$100 billion from acquiring another company where the effect of the acquisition “may be to lessen competition in any way.” *Id.* § 3. (As noted above, *see supra* note 7, the current standard under the Clayton Act—regardless of the size of the acquiring company—is whether the acquisition would “substantially . . . lessen competition” or “tend to create a monopoly,” 15 U.S.C. § 18.) Senator Hawley’s bill would also make it a presumptive “unfair or deceptive act or practice” under the FTC Act for a “dominant digital firm” (as designated by the FTC) to acquire another company worth more than \$1 million. *See* S. 1074, § 4.
- 68 Specifically the FTC Act and Clayton Act. H.R. 3826, § 5.
- 69 *Id.* § 7.
- 70 H.R. 3849, 117th Cong. (2021). The bill is sponsored by Representative Mary Gay Scanlon (D-Pa.) and has 17 bipartisan co-sponsors (10 Democrats and 7 Republicans). It advanced out of committee by a vote of 25-19, with 22 Democrats and 3 Republicans voting aye. Senator Mark Warner (D-Va.) introduced a previous version of the bill in 2019. *See* Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, S. 2658, 116th Cong. (2019). Senator Warner’s bill did not receive committee action. As of the time writing, Senator Warner has not reintroduced the bill.
- 71 H.R. 3849, §§ 3-4.
- 72 *Id.* §§ 6(c), 7, 9, 10. The bill provides that a violation shall be considered an “unfair method of competition” under Section 5 of the FTC Act. *Id.* § 2.
- 73 H.R. 3843, 117th Cong. (2021). The bill is sponsored by Representative Joe Neguse (D-Colo.) and has 21 bipartisan co-sponsors (13 Democrats and 8 Republicans). It advanced out of committee by a vote of 29-12, with 24 Democrats and 5 Republicans voting aye.
- 74 *Id.* § 2. A Senate companion bill was recently reported out of the Senate Judiciary Committee. *See* Merger Filing Fee Modernization Act, S. 228, 117th Cong. (2021).
- 75 H.R. 3460, 117th Cong. (2021). The bill is sponsored by Representative Ken Buck (R-Colo.) and has 10 bipartisan co-sponsors (8 Republicans and 2 Democrats). It advanced out of committee by a vote of 34-7, with 20 Democrats and 14 Republicans voting aye. Senator Mike Lee (R-Utah) has introduced a companion bill in the Senate with two Democratic co-sponsors, S. 1787, 117th Cong. (2021). The Senate bill has not yet received committee action.
- 76 H.R. 3460, § 2.
- 77 *See* 28 U.S.C. § 1407(g).
- 78 *See supra* note 56.
- 79 H.R. 3816, 117th Cong. § 2(a)-(b) (2021).
- 80 *Id.* § 2(b)(5).
- 81 *Id.* § 2(b)(3).
- 82 *See supra* at 2 & nn. 7-8.
- 83 H.R. 3816, § 2(c).
- 84 *Id.* § 2(f)(1).
- 85 *Id.* § 2(f)(2)(D).
- 86 H.R. 3825, 117th Cong. § 2 (2021).
- 87 *Id.* § 3(c).
- 88 Again, under current antimonopoly law, to make out a violation, the party bringing suit must establish that the defendant engaged in anticompetitive conduct in an effort to acquire, maintain, or extend its dominant position or prevent new competitors from entering the market. *See supra* at 2 & nn. 7-8.
- 89 H.R. 3826, 117th Cong. § 2(a)-(b) (2021).
- 90 15 U.S.C. § 18; *see also supra* note 7.
- 91 H.R. 3849, 117th Cong. § 3 (2021).
- 92 *Id.* § 4.
- 93 *Id.* §§ 9-10.
- 94 *Id.* § 6(c).



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