

Competition in the Digital Advertising Ecosystem

Before the Senate Judiciary Committee Subcommittee on Competition Policy, Antitrust, and Consumer Rights

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In response to a letter dated May 17, 2023 from Senator Richard Durbin (D-IL) following my Senate Testimony¹ at a hearing held on May 3, 2023 entitled “Competition in the Digital Advertising Ecosystem,”² I am writing to provide answers in response to questions for the record from Committee members of the Senate Judiciary Committee.

Question from Senator Mike Lee

1. How would the AMERICA Act aid Attorneys General in their fight to protect competition in digital advertising.

Answer from Professor Roger Alford

As discussed in my written testimony, we are fortunate to be addressing this proposed legislation within the context of vigorous litigation against Google for its abuse of its monopoly power in the ad tech market. Two lawsuits are particularly noteworthy. The 2020 Texas lawsuit against Google, for which I consult for the state of Texas, is joined by a bipartisan group of sixteen other state attorneys general and the 2023 DOJ lawsuit against Google, joined by a bipartisan group of seventeen state attorneys general.³ These lawsuits underscore the fundamental concern that government enforcers share about Google’s abuse of power. We can hope and expect that the outcome of those cases will correct at least some of the core problems in the ad tech market.

While litigation is appropriate and necessary to curb Big Tech abuse of power, it is not sufficient. Former Attorney General William Barr has written forcefully on the merits of regulating Big Tech platforms. During my tenure at the Department of Justice, it was clear that Barr took the problem of Big Tech monopoly practices seriously. That is reflected most notably in the DOJ filing the first major Big Tech antitrust case against Google in October 2020. But Barr was the first to concede that “unlike regulatory power—which allows proactive supervision of, and setting rules for, an

¹ Roger Alford, *Competition in The Digital Advertising Ecosystem*, (May 3, 2023), <https://www.judiciary.senate.gov/download/2023-05-03-testimony-alford>.

² The Impact of Consolidation and Monopoly Power on American Innovation, (Dec. 15, 2021), <https://www.judiciary.senate.gov/meetings/the-impact-of-consolidation-and-monopoly-power-on-american-innovation>.

³ Complaint, *United States v. Google, LLC*, Civil Action No.: 1:23-cv-108, (Jan. 24, 2023) (“DOJ Complaint”); Fourth Amended Complaint, *Texas v. Google, LLC*, Civil Action No.: 1:21-cv-06841-PKC, (May 5, 2023) (“Texas Complaint”).

entire market—antitrust addresses only wrongdoing by particular actors.”⁴ Successful litigation against Google will only solve part of the problem. In his memoir, Barr cited two reasons why targeted regulation of Big Tech is important as a complement to antitrust litigation. First, these markets are subject to powerful network effects and naturally prone to monopolization. Second, these digital markets impact not only competition but also other fundamental concerns such as the collection of personal data and the free flow of information and public discourse. According to Barr,

For these reasons, relying solely on ad hoc, judge-imposed remedies against individual players for specific misconduct on a case-by-case basis will not result in a rational, coherent approach to the multifaceted problems caused by the unchallenged supremacy of a few tech giants. I have natural reservations about imposing a regulatory framework on market activities, as most conservatives do, but the reality is that some markets, or market conditions, require a degree of regulatory intervention. In the case of Big Tech’s major platforms, it is hard to see how the challenges they pose to competition, privacy, and the free flow of information can be addressed in the absence of a regulatory framework.⁵

In short, litigation against Google is narrow and targeted to address the monopoly abuses of one company. The AMERICA Act legislation is also narrow and targeted, particularly in comparison to other antitrust legislation proposed in the last congressional session. But the legislation attempts to future proof the online digital advertising industry by imposing reasonable guard rails on the behavior of all medium and large online advertising brokers. And it does so but borrowing concepts relating to conflicts of interest and transparency that have been applied in other contexts so that government enforcers and courts can rely upon the standards established in those other industries to establish standards for this industry.

It is worth noting that Senators Lee and Klobuchar have dramatically impacted the course of the Texas litigation with the successful passage of the State Antitrust Enforcement Venue Act.⁶ As a result of that legislation, Google’s strategy of dramatically delaying the outcome of litigation by State Attorneys General has been thwarted, with a JPML panel on June 6, 2023 remanding the *Texas v. Google* case back to the Eastern District of Texas for expedited trial after languishing for years as part of consolidated multidistrict litigation in the Southern District of New York.

Question from Senator Mike Lee

2. How would you expect competition in the digital advertising market to change were the AMERICA Act enacted?
 - a. How might this impact or improve competition in other markets?

Answer from Professor Roger Alford

The digital advertising market is uncompetitive because of, among other things, Google’s

⁴ WILLIAM P. BARR, ONE DAMN THING AFTER ANOTHER: MEMOIRS OF AN ATTORNEY GENERAL, 441 (2022).

⁵ Id. at 444; see also Chris Strohm, *Beyond Trump, Barr Takes on China and Big Tech in New Memoir*, BLOOMBERG, (Mar. 7, 2022).

⁶ See Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. gg, Title III, § 301, 136 Stat. 4459, 5970 (Dec. 29, 2022).

monopoly abuse of power. Google’s exclusionary conduct has caused a wide range of anticompetitive effects, including higher prices, reduced output, lower quality services, reduced innovation, the exit of rival firms, and foreclosed entry into the market. The AMERICA Act directly addresses this problem by requiring Google (and other present or future dominant market actors) to choose whether they will be a buy-side broker, a sell-side broker, or an exchange. Similar to the financial markets, it imposes behavioral remedies such as best interest duties, best execution duties, transparency obligations, and the elimination of conflicts of interest to enhance market competitiveness. With these changes one can expect that Google will no longer hold or abuse its monopoly power in the online advertising market, and that there will be reduced prices, higher quality, more innovation, and more competitors. This will directly benefit consumers, particularly publishers and advertisers.

The AMERICA Act is focused first and foremost on consumers in the online advertising market. But there will be broader benefits in other markets as well. Most notably downstream consumers will benefit because publishers and advertising will no longer pass through higher prices of their products and services. Moreover, this market is an information market, and so the collection and use of personal data and the privacy implications that arise from such practices will be directly improved by the AMERICA Act. Introducing competition in the online advertising market means that it will be more difficult for Google and similar market actors to leverage their market power and the information they gather to steer consumers away from their competitors and toward their own products and services. Finally, ending the abuse of monopoly power makes it extraordinarily difficult for many publishers to have a viable business model for disseminating information, which enhances the proliferation of “news deserts” and diminishes the value and quality of public discourse. As former Attorney General William Barr put it, “The power of hegemonic online platforms to constrain what people hear, see, and say is incompatible with our system of government.... [T]he government has a legitimate interest in promoting multiple sources of news and information, and there is no reason to think that interest doesn’t apply to today’s digital markets.”⁷ In this sense, society writ large is harmed by the status quo in the online advertising market.

Question from Senator Marsha Blackburn⁸

1. It is critical that smaller players in this industry are incentivized to grow and invest in light of a divestiture threshold. If a larger company must divest its assets, will smaller companies be incentivized to buy those assets if they could later be required to divest as well?
 - a. Allowing businesses to vertically integrate can be efficient and help save money that can ultimately be passed along as cost savings to consumers.

⁷ BARR, *supra* note 4, at 446.

⁸ A similar question from Senator Lee was asked of my consulting colleague Dina Srinivasan, who also testified at the same Senate Judiciary Committee hearing. We have collaborated in our answers to this question.

Sometimes, however, this integration can also be harmful to consumers. At what point does that integration become harmful to consumers?

Answer from Professor Roger Alford

There are small players at multiple levels in the online advertising market. Similar to antitrust laws, this legislation focuses primarily on harm to consumers, particularly publishers and advertisers, the vast majority of whom are small- and medium-sized companies. In terms of small companies that are exchanges or provide buy-side or sell-side brokerage services, there is a regulatory safe harbor, with no obligations for companies with less than \$5 billion in digital advertising revenue. Only companies with digital advertising revenue in excess of \$20 billion are subject to divestiture obligations, and companies in between the \$5 billion and \$20 billion thresholds have limited behavioral obligations such as best interest duties, best execution duties, the elimination of conflicts of interest, and transparency obligations. The regulatory safe harbor threshold is high, and any company that has \$5 billion in digital advertising is not a small company. Moreover, large companies that meet the \$5 billion threshold will have significant resources to ensure compliance with the AMERICA Act. Those obligations are not unduly burdensome, simply ensuring that large brokerage companies with billions in revenue act in the best of their clients, execute orders in a reasonable manner, and provide relevant information to their own customers. One can analogize it to the regulatory obligations in the financial markets, where the regulatory burdens on small, medium, and large brokerage firms are more significant than those imposed in the AMERICA Act, and yet these companies have successfully competed in those markets. I concur with former Attorney General William Barr in this regard, who, as quoted above, states that conservatives should “have natural reservations about imposing a regulatory framework on market activities,” and yet nonetheless recognize that the challenges imposed by the anticompetitive forces in the online advertising market “require a degree of regulatory intervention.”⁹ The multi-level thresholds in the AMERICA Act minimize the risk of overregulation in this market and will help rather than harm small companies that fall within the safe harbor.

The AMERICA Act would not eliminate benefits from vertical integration in the online advertising market. Google’s dominance in multiple segments of the online advertising market has harmed publishers and advertisers and downstream consumers. The benefits of vertical integration are typically analyzed on one side of a transaction, either the buy-side or the sell-side. Some large digital advertising companies that simultaneously represent the sell- and buy-sides such as Google have proposed the idea that double representation “promotes efficiency traditionally associated with vertical integration, including the reduction of double marginalization.”¹⁰ In essence, Google is arguing that vertical integration benefits consumers because Google has a dominant position on all sides of the market: the buy-side, the sell-side, and the exchange in the middle. However, the antitrust cases brought by the Texas Attorney

⁹ BARR, *supra* note 3, at 444.

¹⁰ DANIEL S. BITTON & STEPHEN LEWIS, CLEARING UP MISCONCEPTIONS ABOUT GOOGLE’S AD TECH BUSINESS, at 12 (May 5, 2020), <https://perma.cc/WT2W-DD74>.

General and the Department of Justice have revealed the falsity of such statements.¹¹ But that is not how the benefits of vertical integration typically function. As discussed in my written testimony, vertical integration can be beneficial if it eliminates double marginalization between, for example, the profits margins of the wholesaler and retailer. Google has monopoly power in multiple segments of the online advertising market. Google is not eliminating double marginalization, it is *enhancing* triple marginalization. The combination of unmanaged conflicts of interests and the lack of transparency in trading has instead fueled rampant trading abuses and the misuse of inside information, leading to out-of-control costs for publishers and advertisers. To illustrate, the Texas Attorney General’s investigation into and complaint against Google revealed numerous secret auction manipulations with names like Project Bernanke that manipulated advertisers’ bids and siphoned money from publishers causing immensurate harm to advertisers, publishers, and competition in the markets for trading intermediaries.¹² The AMERICA Act’s approach to managing conflicts of interests aligns with how regulators globally protect competition in the markets for stock exchanges and brokers. Across the world, lawmakers safeguard competition by requiring exchanges to give all traders non-discriminatory access to the marketplace, by identifying and managing intermediary conflicts of interest, and by requiring trading disclosure.¹³

Question from Senator Thom Tillis¹⁴

1. Under the AMERICA Act:
 - a. How would small businesses that use online advertising be impacted?
 - b. Would small businesses still have the same access to affordable advertising services?

Answer from Professor Roger Alford

As outlined in my written testimony and my discussion above, small businesses that use online advertising would benefit from passage of the AMERICA Act. The AMERICA Act would increase competition in online advertising and decrease the cost to trade. The cost of ads would necessarily decrease. Thus, small businesses would have more choice around which buy-side brokerage services to use and the amount of money they spend to purchase ads would go down.

As a result of the abuse of monopoly power and the absence of meaningful competition in the online advertising market, advertisers are charged significantly higher intermediary fees that they

¹¹ Complaint, United States v. Google, LLC, Civil Action No.: 1:21-cv-108, (Jan. 24, 2023) (“DOJ Complaint”); Fourth Amended Complaint, Texas v. Google, LLC, Civil Action No.: 1:21-cv-06841-PKC, (May 5, 2023) (“Texas Complaint”).

¹² Texas Complaint, *supra* note 3, at 103-122.

¹³ See generally Resolution on IOSCO Objectives and Principles of Securities Regulation and Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation, Presidents Comm. of the Int’l Org. of Securities Comm’ns (May 2017), <https://perma.cc/UG65-KS23> (summarizing that one key role of the securities regulator, or an industry self-regulatory organization, is to avoid, eliminate, disclose, or otherwise manage conflicts of interest); Carlo V. di Florio, *Conflicts of Interest and Risk Governance*, S.E.C. (Oct. 22, 2012), <https://perma.cc/L3RW-NY9W> (providing an overview of the importance of conflicts of interest management to securities regulation and the interplay between the existence of conflicts and increased market risk).

¹⁴ These exact same questions from Senator Tillis were asked of my consulting colleague Dina Srinivasan, who also testified at the same Senate Judiciary Committee hearing. We have collaborated in our answers to these questions.

otherwise would in a competitive market. By enhancing competition in the online advertising market, the AMERICA Act would cause their advertising expenses to go down from what they are today. The Act would also give small businesses more options in terms of which ad services to use.

Question from Senator Thom Tillis

2. How would the AMERICA Act help or hurt smaller ad organizations who operate within the online advertising economy? If so, how?

Answer from Professor Roger Alford

As outlined in my written testimony and my discussion above, there are small players at multiple levels in the online advertising market. Similar to antitrust laws, AMERICA Act is focused primarily on harm to consumers, particularly publishers and advertisers, the vast majority of whom are small- and medium-sized companies. As a result of the elimination of monopolies and increased competition in the online advertising market, the price of intermediary services would go down for small ad organizations, and the quality of services would increase. The result for smaller ad organizations is more choice, lower fees, and greater revenue.

Question from Senator Thom Tillis

3. Other than Google, who are the major players – including emerging players – in the online advertising economy?

Answer from Professor Roger Alford

Other than Google there are few major or emerging players in the online advertising economy. On the sell-side of the market, and with respect to publisher ad serving software, Google has over 90 percent of the market and its market power is entrenched.¹⁵ Over the course of the last several years, all other major players have either severely diminished market share or exited the market. According to the DOJ Complaint, “there are no reasonable substitutes for publisher ad servers.”¹⁶ On the buy-side of the market, and with respect to ad buying software for small advertisers, Google’s share of the market is also absolute. Small advertisers in particular have little option but to use Google’s buying tool Google Ads to purchase display ads belonging to the likes of [cite name of publisher] trading on exchanges. As a result of Google’s dominance, the ad exchanges in the middle also have few viable competitors. Many former rivals in the exchange market, have either severely diminished market share or exited the market.¹⁷ Moreover, Google is able to coerce its publisher and small advertiser customers to transact on the Google ad exchange though tying on the sell-side and secret auction manipulations on sell- and buy-sides.

¹⁵ DOJ Complaint, supra note 3, at 7, 45, 68; Texas Complaint, supra note 3, at 42-43, 54.

¹⁶ DOJ Complaint, supra note 3, at 125.

¹⁷ DOJ Complaint, supra note 3, at 100; Texas Complaint, supra note 3, at 135, 175-78.

Question from Senator Thom Tillis

4. What can and should be done to increase transparency within the online advertising economy?

Answer from Professor Roger Alford

The lack of transparency within the online advertising economy is a significant anticompetitive harm. Those harms resulting from the lack of transparency are outlined in the DOJ and Texas Complaints.¹⁸ Passage of the AMERICA Act is the best way to ensure increased transparency. Market actors with over \$5 billion in digital advertising revenue will be subject to transparency obligations, while smaller companies may choose to voluntarily comply in response to changing market conditions. The AMERICA Act imposes two kinds of transparency obligations. First, upon request from brokerage customers, it obligates buy-side and sell-side brokerages to supply information sufficient to permit brokerage customers to verify compliance of the brokerage with its best interest and best execution duties. The specific type of information required under the AMERICA Act differs depending on whether the broker is on the sell-side or the buy-side, but in essence for the former it requires information with respect to each unique digital advertising space for sale, details on the bids submitted, the data collected from the brokerage customer, the brokerage's bid order practices, and the brokerage's compensation. For the latter it requires information with respect to bids won by the buy-side brokerage customer, the brokerage's bid order practices, and the brokerage's compensation. Second, similar to financial markets, it requires sell-side and buy-side brokerages to publish quarterly reports on their routing practices with respect to the ten venues to which the largest number of bid requests or bid responses were routed for execution.

Without the AMERICA Act, litigation against the abuse of monopoly power by certain Big Tech companies such as Google will seek to include transparency as part of the remedies for anticompetitive conduct. The prayers for relief in both the DOJ and Texas complaints request remedies to restore competition that would include transparency obligations similar to those outlined above.¹⁹ In the absence of regulation or successful litigation, major actors with market power could voluntarily decide to promote greater transparency. But without significant competitive pressure, thus far they have chosen not to do so.

¹⁸ DOJ Complaint, *supra* note 3, at 116-123; Texas Complaint, *supra* note 3, at 174-182.

¹⁹ DOJ Complaint, *supra* note 3, at 140; Texas Complaint, *supra* note 3, at 228-29.