

**Todd Henderson**

**Questions for Response - “Competition in the Digital Advertising Ecosystem”**

**U.S. Senate Committee on the Judiciary**

**Subcommittee on Competition Policy, Antitrust, and Consumer Rights**

**June 2, 2023**

Sen. Lee

***Q: Your recent white paper, “Ads Aren’t Stocks, or How Bad Analogies Make Bad Law,” appears to have been written in your capacity as an academic affiliate with the International Center for Law & Economics (ICLE). At the hearing, you testified that you were not appearing on behalf of Google. However, ICLE is a longstanding beneficiary of funding from Google. Have you received any support, monetary or nonmonetary, from ICLE or any other source in exchange for or connected to your authorship of this white paper or any other commentary on the digital ads ecosystem? If so, please identify each instance.***

**A:** All my papers and books are supported by philanthropy from foundations, organizations, and individuals. I have a long history of association with ICLE, as well as with other independent research organizations that promote the law & economics approach to legal scholarship. I receive compensation for writing papers and conducting research, but no monies that I receive in any way impact the arguments I make or conclusions I reach; no entity has any veto power or editorial control over my work. I was not compensated in any way for the public commentary (written and oral) I made on matters related to adtech. I volunteered my time and paid all my own expenses to work with Congress on this matter. I am not privy to the details of ICLE’s fundraising operations.

***Q: At the hearing, you raised the concern that imposing regulatory requirements on ad tech companies may require further government intervention in the industry. I share this concern, which is why the AMERICA Act does not create any new rulemaking or regulatory body. Instead, it provides greater transparency so that customers can police the market. In addition, would you agree that, when faced with a complex and concentrated marketplace, structural separation can be a cleaner and more effective solution instead of intrusive regulation?***

**A:** My contention is that structural separation is not needed to address perceived conflicts of interest. The advertising market comprises business entities that are competent parties capable of determining whether and to what extent its counterparties’ conflicts or potential conflicts are an issue that needs remediation.

The proposed legislation would not simply impose new transparency requirements, which may be perfectly benign. It also demands that firms who provide services to buyers and sellers of digital advertising have a legal duty to act in a customer’s “best interest,” enforced by the U.S. Justice Department and state attorneys general. This requirement was modeled on similar

standards in securities regulation (specifically, Reg NMS Rule 611, the “order protection rule”). Indeed, such rules exist in securities precisely because brokers may own exchanges and otherwise act on behalf of clients when there are real or potential conflicts of interest.

It is this latter requirement that I fear would require massive government intervention to enforce, and that is likely impossible to enforce effectively. While stocks have intrinsic value and just a single price for a potential investor at any given moment of trading, the multiplicity of factors that determine the relative value of a digital ad—to be served to a particular viewer at a particular location and a particular point in time—are legion. There is no referent “correct” price and therefore there cannot possibly be a determinable “best” price.

It is difficult to conceive of how the DOJ could possibly police a standard equivalent to NBBO in digital advertising. Doing so in securities markets requires a massive effort by an administrative agency stocked with specialists. The costs of this run into the billions. And yet, even in securities markets, only about half of all trades happen at national best bid offer (NBBO) price, and regulators acknowledge various reasons why this may be appropriate. This work is beyond the capacity and ken of lawyers at the DOJ and state attorneys general offices.

***Q: Would you agree that legislation addressing specific, discrete issues is preferable to broadly-applicable, wide-ranging legislation?***

**A:** I don’t think I’d agree with that framing in the abstract. Antitrust law is broadly applicable and wide-ranging. But it has also developed objective standards over years of case-by-case jurisprudence to ensure that it is deployed to address concrete harms to consumers or to competition. Where there are specific, discrete issues of competition, as is suggested here, I see no reason why existing antitrust law—or related doctrines regarding unfair, deceptive, or abusive acts or practices—could not already be employed to address them. There may also be cause for legislation prescribing *per se* rules, but I have not seen that case made persuasively with respect to issues arising in the digital-advertising market.

Sen. Grassley

***Q: I’ve heard concerns that the bill’s upper \$20B threshold that triggers divestitures is too low and at this level will not help small ad tech companies to grow and compete more effectively as the bill intends. Do you agree? Why or why not?***

**A:** Antitrust should seek to prohibit conduct that is harmful to consumers or to competition, regardless of the size or sector. Big is not inherently bad, and it should not be public policy to punish successful firms simply because of their size.

Sen. Tillis

**Q: 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?**

**A:** As I mentioned in my written statement, over the past decade, the price of digital advertising has fallen steadily, while output has risen—the opposite of what we’d expect to see in a market that was insufficiently competitive. I am concerned about the effects the bill could have on small businesses’ ability to continue to access advertising technology and particularly whether the effort to crack down on the most successful adtech firms will impinge on the innovation cycle that small businesses have used effectively to reach a global audience. According to the Small Business & Entrepreneurship Council, more than two-thirds of U.S. small businesses say they would lack a cost-effective means to advertise without online advertising.<sup>1</sup> SBE also finds that efficient and cost-effective online advertising across a range of websites, apps, and technologies saves American small businesses an estimated \$163 billion annually, with businesses with the lowest revenues reporting the heaviest reliance on online advertising.<sup>2</sup>

A new report from Connected Commerce Council further demonstrates that 80% of small-business advertisers report that digital ads have helped their companies compete with much larger competitors.<sup>3</sup> CCC finds that small-business advertisers have grown 39% over past two years due to digital advertising, that 82% say digital ads have allowed them to reach target customers more efficiently than traditional offline ads, and that 30% of small-business advertisers earn more than \$650,000 in annual revenue attributable to digital ads.<sup>4</sup> Congress should proceed cautiously before acting to disrupt that ecosystem, which has been the lifeblood of U.S. small business.

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

**A:** It isn’t clear how it would help and there is always the potential that it could hurt. The medical principle—first, do no harm—should be a watchword for legislators too. The adtech market has been crucial for small publishers who earn their living selling ad space. The report from the Connected Commerce Council that I referenced in the last answer found that more than half (57%) of small publishers earned more than \$50,000 annually from selling digital ads, and 40% of small publishers said that selling digital ads drove more than half their overall

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<sup>1</sup> *Online Advertising Delivers BIG Benefits for Small Businesses*, SBE COUNCIL (Sep. 10, 2019), <https://sbecouncil.org/2019/09/10/online-advertising-delivers-big-benefits-for-small-businesses>.

<sup>2</sup> *Id.*

<sup>3</sup> *Maximum Impact: How Digital Ads Level the Playing Field for U.S. Small Businesses*, CONNECTED COMMERCE COUNCIL (2023), available at <https://connectedcouncil.org/wp-content/uploads/2023/03/Maximum-Impact-How-Digital-Ads-Level-the-Playing-Field-for-U.S.-Small-Businesses-2023.pdf>.

<sup>4</sup> *Id.*

revenue.<sup>5</sup> Of those small publishers the CCC surveyed, 71% said they would not have been able to launch and sustain their businesses without digital ads and 79% said that digital ads have helped their company compete with much larger publishers.<sup>6</sup> The market works well for these firms. Indeed, 63% predicted that they would generate more revenue from digital ads this year than they did last year, with an average estimated increase of 35%.<sup>7</sup>

**Q: Other than Google, who are the major players – including emerging players – in the online advertising economy?**

**A:** Other firms that are considered established leaders in the digital-advertising market include The Trade Desk, MediaMath, Amobee, Adobe, and Adform, while more recent entrants to the market include Beeswax, Centro, Mediaocean and Zeta Global.<sup>8</sup> Facebook, Magnite, AT&T, Comcast, and even Disney are also significant players.<sup>9</sup> Other tech giants like Amazon, Microsoft, Apple, and ByteDance (the Chinese firm that owns TikTok) are growing their global advertising businesses far more quickly than Google.<sup>10</sup> Retailers like Dollar Tree, Walgreens, Walmart, CVS, Target, Kroger, Best Buy, and The Home Depot have also entered the fray and rolled out their own ad networks and technology.<sup>11</sup> And the sector has been attracting investment rapidly,<sup>12</sup> with more than 20 publicly traded adtech companies today<sup>13</sup>—up from just four in 2017.<sup>14</sup>

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<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Allison Schiff, *Google, The Trade Desk, MediaMath, Amobee, Adobe and Adform Lead The Pack In Gartner's 2020 Ad Tech Magic Quadrant*, ADEXCHANGER (Sep. 30, 2020), <https://www.adexchanger.com/ad-exchange-news/google-the-trade-desk-mediamaath-amobee-and-adform-lead-the-pack-in-gartners-2020-ad-tech-magic-quadrant>.

<sup>9</sup> Tim Peterson, *How Disney Is Using Its Audience Data and Hulu's Ad Tech to Compete with Google, Meta and Amazon*, DIGIDAY (Mar. 3, 2022), <https://digiday.com/future-of-tv/how-disney-is-using-its-audience-data-and-hulus-ad-tech-to-compete-with-google-meta-and-amazon>.

<sup>10</sup> Ethan Cramer-Flood, *Winter Is Here for Advertising, but It Will Be Mild and a Rebound Is Near*, EMARKETER (Jan. 9, 2023), <https://www.insiderintelligence.com/content/worldwide-digital-ad-spending-2023>.

<sup>11</sup> Allison Schiff, *Dollar Tree Launches Its Retail Media Network (We May Have Just Hit Peak Retail Media Network)*, ADEXCHANGER (Apr. 15, 2021), <https://www.adexchanger.com/ecommerce-2/dollar-tree-launches-its-retail-media-network-we-may-have-just-hit-peak-retail-media-network>.

<sup>12</sup> Sara Fischer, *The Ad Tech Industry's Record Rebound*, AXIOS (Jan. 11, 2022), <https://www.axios.com/2022/01/11/ad-tech-industry-record-rebound>.

<sup>13</sup> Ronan Shields, *Can Wall Street's Ad Tech Love Affair Last?*, DIGIDAY (Nov. 16, 2021), <https://digiday.com/marketing/can-wall-streets-ad-tech-love-affair-last>.

<sup>14</sup> @tkawaja, TWITTER (Apr. 23, 2021, 9:41 AM), <https://twitter.com/tkawaja/status/1385227341656465409>.

**Q: What can and should be done to increase transparency within the online advertising economy?**

**A:** To the extent that there are specific concerns about transparency into potentially inappropriate conflicts of interest in the adtech market, what is most important is that those be addressed industrywide and not applied only to a handful of players. But it is not clear to me that the sorts of conflicts alleged to exist in the adtech market are not already sufficiently transparent. Plenty of markets involve vertical integration with conflicts of interest, but do not require the kind of physical separation or fiduciary duties proposed by the AMERICA Act. Participants in ad markets are not unsophisticated consumers. They are businesses, who should be presumed competent to negotiate for themselves what level of transparency they need from their vendors. Even very small businesses hire lawyers, deal with various bureaucracies, engage with suppliers and customers in complex legal and business situations, and must think critically about a range of issues at least as challenging as advertising. Regulators are already empowered to act where there are allegations of genuinely deceptive or unfair business practices, and that should remain the focus.

Respectfully submitted,



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Professor M. Todd Henderson