

## Competition in the Digital Advertising Ecosystem

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

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In reply to Senator Richard Durbin’s (D-IL) letter dated May 17, 2023, and building on my testimony from the May 3, 2023 Senate hearing ‘Competition in the Digital Advertising Ecosystem,’ I present below both the questions posed by members of the Senate Judiciary Committee and my corresponding answers.

### Question from Senator Blackburn

- 1. Consumer data is ultimately what these adtech companies seek to collect and monetize. As Congress considers ways to address issues with competition in this market, what are ways that Congress can simultaneously work to protect consumer data?**
  - a. Can the financial industry offer a model for such data protection?**

Already embedded within the AMERICA Act is a clear directive that emphasizes a commitment to consumer privacy.<sup>1</sup> I commend Senator Lee for championing such a proactive stance. While digital advertising is at the forefront of these conversation, it is by no means the only sector that must address concerns over protecting consumer data. Many industries have charted this territory. The financial sector, in particular, has navigated these waters, enforcing interoperability while balancing consumer privacy, thus positioning itself as a potential model for data protection practices in the online advertising market.

### Questions from Senator Lee

- 1. How do you respond to Prof. Henderson’s contention that the differences between digital ads and stocks mean that digital advertising exchanges should not be governed the way stock exchanges are?**

Congress is considering regulating advertising exchanges as it regulates exchanges that trade shares of stock because of the similarities between the structure of the two exchange markets. To protect competition between stock exchanges and the broker intermediaries trading on those exchanges, lawmakers identify and manage conflicts of interest, require brokers to make trading disclosures, and require exchanges to provide brokers with fair access to their trading venue.<sup>2</sup> The same toolbox can be used to solve competition problems in ad markets, consisting of ad exchanges and broker intermediaries.<sup>3</sup> Professor Henderson’s narrow focus on differences between the items

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<sup>1</sup> Advertising Middlemen Endangering Rigorous Internet Competition Accountability (AMERICA) Act, S. 1073, 118th Cong. § 2 (2023).

<sup>2</sup> See generally Dina Srinivasan, *Why Google Dominates Advertising Markets: Competition Should Lean on the Principles of Financial Market Regulation*, 24 STAN. TECH. L. REV. 55 (2020).

<sup>3</sup> *Id.*

traded on the exchanges—online ads and equities—is therefore misguided.<sup>4</sup>

Neither should Congress refrain from regulating ad exchanges and ad brokers on the ground that the stock market is important, but the ad market is not, as Professor Henderson suggests.<sup>5</sup> Advertising markets play a critical role in American entrepreneurship, innovation, and democracy. As I stated in my testimony, “entire sectors of the U.S. economy depend on being able to buy and sell online ads, and this includes entrepreneurs who buy ads to reach new customers and grow their businesses. It also includes content creators and media businesses selling ads to fund their operations and keep subscription prices for consumers low.”<sup>6</sup> When competition in online ad markets is broken, it harms the bottom line of news publishers like *The Washington Post* too, which has broader implications to our democracy.

**2. I have heard the argument that the AMERICA Act would eliminate benefits from vertical integration that exist in digital advertising. Has vertical integration in digital advertising actually helped advertisers, publishers, and consumers?**

Vertical integration in digital advertising has only harmed advertisers, publishers, and consumers. While some digital advertising companies that simultaneously represent the sell- and buy-sides propose that double representation “promotes efficiency traditionally associated with vertical integration, including the reduction of double marginalization,”<sup>7</sup> the antitrust cases brought by the Department of Justice and many state attorneys general reveal the falsity of such statements. Conflicts of interests and the lack of transparency has fueled rampant trading abuses and the misuse of inside information, leading to out-of-control costs for publishers and advertisers.<sup>8</sup> Secret auction manipulations with names like Project Bernanke manipulated advertisers’ bids and siphoned money from publishers causing harm to publishers, advertisers, and competition.<sup>9</sup>

**3. Were the AMERICA Act signed into law, would structural separation of the largest ad tech firms meaningfully impede the ability for different ad tech companies and parts of the ad tech stack to interoperate?**

The digital advertising industry has already addressed interoperability challenges by establishing standardized protocols, such as protocols established by the Interactive Advertising Bureau for real-time bidding, to allow for seamless interaction among intermediaries. These standards are widely adopted and serve as a testament to the industry’s capability to ensure consistent communication and operation. Smaller players in the online advertising industry regularly utilize and interoperate through this protocol, demonstrating that structural separation of the largest ad tech firms would not significantly hinder interoperability across different segments of the ad tech stack.

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<sup>4</sup> Professor M. Todd Henderson, Competition in the Digital Advertising Ecosystem, Testimony before the Senate Judiciary Subcommittee on Competition Policy, Antitrust, & Consumer Rights (May 3, 2023) (written statement of M. Todd Henderson, Michael J. Marks Professor of Law, University of Chicago Law School).

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

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

<sup>7</sup> Daniel S. Bitton & Stephen Lewis, *Clearing Up Misconceptions About Google’s Ad Tech Business*, GOOGLE WHITE PAPER (May 5, 2020), <https://perma.cc/WT2W-DD74>.

<sup>8</sup> Complaint, United States v. Google LLC, No. 1:23-cv-00108 (E.D. Va. Jan. 24, 2023) [hereinafter DOJ Complaint]; Third Amended Complaint, State of Texas et al. v. Google LLC, No. 1:21-md-03010-PKC, (S.D.N.Y. Nov. 12, 2021) [hereinafter Texas Complaint].

<sup>9</sup> Texas Complaint, *supra* note 8, at 109-28.

#### **4. How would smaller ad tech companies benefit from the AMERICA Act?**

The AMERICA Act promises to level the playing field for smaller ad tech companies. The Act would ensure that dominant exchanges and brokers are required to transact through their smaller counterparts when these counterparts provide a superior price point. This not only encourages competition but also open avenues for growth and prominence for smaller players in the industry.

#### **Questions from Senator Tillis<sup>10</sup>**

##### **5. 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?**

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 of intermediary fees, thereby decreasing the cost of advertising. 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.

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

The AMERICA Act promises to level the playing field for smaller ad tech companies. The Act would ensure that dominant exchanges and brokers are required to transact through their smaller counterparts when these counterparts provide a superior price point. This not only encourages competition but also open avenues for growth and prominence for smaller players in the industry.

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

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.<sup>11</sup> Over the course of the last several years, all other major players have either severely diminished their market share or exited the market. According to the DOJ Complaint, “there are no reasonable substitutes for publisher ad servers.”<sup>12</sup> 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 many major websites trading on exchanges. The middle side of the market that consists of ad exchanges is theoretically more competitive. Other players including exchanges such as PubMatic exist, but they have smaller market shares. Many former rivals in the exchange market, such as OpenX, WPP, ADSDAQ, Microsoft’s AdECN, and Yahoo’s AdBrite, have either severely diminished their

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<sup>10</sup> These exact questions from Senator Tillis were asked of me and my consulting colleague, Roger B. Alford. We have collaborated in our answers to those questions.

<sup>11</sup> DOJ Complaint, *supra* note 8, at 7, 45, 68; Texas Complaint, *supra* note 8, at 42-43, 54.

<sup>12</sup> DOJ Complaint, *supra* note 8, at 125.

market share or exited the market.<sup>13</sup>

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

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 Complaint filed against Google by the United States Department of Justice and seventeen states,<sup>14</sup> and the Complaint filed against Google by the state of Texas and sixteen other states.<sup>15</sup>

Passage of the AMERICA Act will dramatically improve that transparency and is the best way to ensure increased transparency. 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, it requires sell-side and buy-side brokerages to publish quarterly reports on their routing practices to trading venues for execution.

Without the AMERICA Act, major actors with market power will likely continue to promote less transparency to obfuscate trading abuses and high costs for consumers.

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<sup>13</sup> DOJ Complaint, *supra* note 8, at 100; Texas Complaint, *supra* note 8, at 135, 175-78.

<sup>14</sup> DOJ Complaint, *supra* note 8, at 116-123.

<sup>15</sup> Texas Complaint, *supra* note 8, at 174-182.