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United States Senate

Committee on the Judiciary

Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Hearing on Competition in the Digital Advertising Ecosystem

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Chair Klobuchar, Ranking Member Lee, and distinguished members of the Subcommittee:

Thank you for the opportunity to testify before you today. The Advertising Middlemen Endangering Rigorous Internet Competition Accountability Act (AMERICA Act) is a simple piece of legislation that will fix a major problem at the heart of online markets. For your background, I'm an antitrust scholar, and a fellow with the Thurman Arnold Project at Yale University.[1]

My testimony today is largely drawn from my research published in conjunction with Stanford University, titled Why Google Dominates Advertising Markets: Competition Policy Should Lean on Financial Market Regulation. My opinions are also shaped by my experience working in the industry, helping small businesses across the country, like hospitals, architects, and state governments, to purchase ads online.[2]

The Problem is Simple

The problem the AMERICA Act aims to fix is simple. You see, 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.

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[1] I currently work on matters adverse to the companies that would be affected by the AMERICA Act, including the antitrust case against Google for illegal monopolization of the ad exchange and broker markets brought by a coalition of State attorneys general and led by the Texas Attorney General.

[2] Dina Srinivasan, "Why Google Dominates Advertising Markets: Competition Policy Should Lean on the Principles of Financial Market Regulation," Stanford Technology Law Review 24 (2020): 55.

While people used to buy and sell ads in person, that is no longer the case. Today, ads are bought and sold at lightning speed on sophisticated electronic exchanges called ad exchanges. Ad companies have modeled these exchanges after financial exchanges like the New York Stock Exchange or NASDAQ. As one such company has marketed to its customers, “It’s just like a stock exchange.”[3]

And yet, today, we let the companies that operate ad exchanges and other broker intermediaries operate without any of the common-sense rules that Congress has enforced on Wall Street for nearly a century. There are no rules that manage conflicts of interest. There aren’t even any rules that require exchanges and brokers to be open, honest, and transparent with their customers. That is the problem.

Concrete Examples of How Harm Manifests

I’d like to share a few concrete examples of how the lack of common-sense rules leads to harm and why legislation is so strongly needed.

Without rules governing conflicts of interest, we let the companies that own the major ad exchanges also operate on the sell-side, also operate on the buy-side, and also sell advertising, all at the same time. So, a website could use a broker to sell their ads, and that broker might engage in the equivalent of insider trading and seal the deal with itself on the other end, without the seller even knowing.[4]

For many years, websites and apps in the online economy were at the mercy of the largest broker using deceptive tactics and exploiting information asymmetries when routing their trades to exchanges, resulting in websites and apps making up to 50 percent less revenue than they otherwise would.[5] This harmful behavior not only

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[3] Google, "The DoubleClick Ad Exchange," accessed May 2, 2020, https://static.googleusercontent.com/media/www.google.com/en//adexchange/AdExchangeOverview.pdf. Comparisons between the advertising market and the financial market have frequently been made by advertising industry participants, including Google and others. For instance, Google has also compared it’s buy-side Google Ads (then called AdWords) to an online broker, marketing, “Who participates in the Ad Exchange? Again, imagine the Ad Exchange as a stock exchange. Only the largest brokerage houses actually plug into, say, the NYSE. In the Ad Exchange world, those are: The large online publishers (sellers)—websites like portals, entertainment sites and news sites Ad networks and agency holding companies that operate networks (buyers)—companies that connect web sites with advertisers.” id.; *see also Yishay Mansour et al., "DoubleClick Ad Exchange Auction" (unpublished manuscript, 2012), https://perma.cc/T5L4-JS4Y* (analogizing “like financial exchanges that only let licensed brokers trade, ad exchanges let ad networks trade on the exchange on behalf of individual advertisers.”).

[4] For examples of how some ad exchanges and brokers use inside information to manipulate the outcomes of trades for both publishers and advertisers, consider the allegations raised in the complaint filed by the Texas Attorney General against Google. Texas Attorney General et al. v. Google LLC, Third Amended Complaint, filed January 14, 2022.

[5] Dina Srinivasan, "Google Is Dominating This Hidden Market With No Rules," New York Times, June 21, 2021, https://www.nytimes.com/2021/06/21/opinion/google-advertising-antitrust.html; Lucia Moses, "Header Bidding Is Boosting CPMs as Much as 50 Percent for Some Publishers," Digiday, March 31, 2016, https://digiday.com/media/header-bidding-publishers-boosting-cpms-much-50-percent/.

hurt the bottom line of online businesses, but it also had broader implications for institutions critical to our democracy, such as *The Washington Post*.

Exorbitant Trading Fees

In dollars and cents terms, the burden on the American public is real.

Financial exchanges charge far less than 1 percent on a typical stock trade.

In advertising, with no rules, the brokers, and exchanges in the middle take anywhere between 30 to 50 percent.[6] So when a restaurant gives a $1000 to its broker to buy ads and grow its business, transactions clear in a fraction of a second, but the ads themselves often cost just half that much. When you drive up the overall cost of advertising, this in turn increases the prices of the goods and services being advertised.

The AMERICA Act Fixes the Problem

Now, it is true that the Department of Justice and 31 State attorneys general are pursuing legal action against certain advertising exchanges and brokers for practices the bill would prohibit.[7] We must recognize, however, that litigation takes too long. The outcomes of antitrust cases remain uncertain. Moreover, those cases do not address bad behavior across the industry.

Congress can do a better job. It has a tried-and-true framework for protecting competition on stock exchanges and between brokers. While ads are not like stocks, ad exchanges are "just like stock exchanges," and they serve an essential function in our economy and democracy. The AMERICA Act takes a tried-and-true framework and simply applies it to advertising.

Thank you for your time today and I look forward to answering your questions.

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[6] Ross Benes, "Why Tech Firms Obtain Most of the Money in Programmatic Ad Buys: Some middlemen are having generous paydays," eMarketer, April 16, 2018.

[7] The States that have joined the U.S. Department of Justice antitrust case against Google for the firm's conduct in the electronically traded market for display ads include California, Colorado, Connecticut, New Jersey, New York, Rhode Island, Tennessee, Virginia, Arizona, Illinois, Michigan, Minnesota, Nebraska, New Hampshire, North Carolina, Washington, and West Virginia. The attorneys general for the States of Alaska, Florida, Idaho, Indiana, Kansas, Louisiana, Mississippi, Missouri, Montana, Nevada, North Dakota, South Carolina, and South Dakota, and the Commonwealth of Puerto Rico, have joined the parallel antitrust suit led by the Texas Attorney General.