NetChoice

Promoting Free Speech and Free Enterprise on the Net

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Comments of NetChoice on DOJ & FTC Draft Vertical Merger Guidelines and Nomination of Carl Szabo as a speaker at Antitrust Workshops

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NetChoice[1] is a trade association fighting to protect free expression and free enterprise online.

Described by Politico as "Silicon Valley's most aggressive lobbying presence in Washington," we advocate at the local, state, national, and international levels, working with the tech industry, lawmakers, and academia.

Nomination of Carl Szabo as a speaker at Antitrust Workshops

Carl Szabo is Vice President & General Counsel for NetChoice. As Vice President and General Counsel, Carl analyzes tech-related legislative and regulatory initiatives relevant to online companies. He monitors and analyzes Federal and state legislation including online taxation and privacy issues. Carl is also an adjunct professor of privacy law at the George Mason Antonin Scalia Law School.

Carl is well published on antitrust and has testified before the US Congress and state legislatures on antitrust issues related to tech. Carl has also appeared on television and radio to discuss these issues.

Carl also works at the NTIA Privacy Multi-Stakeholder process, speaks on panels about burdens to free speech and free enterprise, and testifies before state legislatures on proposed legislation.

[1] NetChoice is a trade association of e-Commerce and online businesses, at www.netchoice.org The views expressed here do not necessarily represent the views of every NetChoice member company.

Before joining NetChoice, Carl was an intellectual property attorney at the lawfirm of Wildman, Harrold, Allen & Dixon where he advised clients on privacy, Internet, e-commerce, and contractual matters. He also worked at the lawfirms of Venable and Arnold & Porter.

Carl also worked on copyright, trademark, and anti-piracy both for Motion Picture Association of America (MPAA) and the Entertainment Software Association (ESA).

Before law school, Carl worked at the Federal Trade Commission (FTC) on the staff of Commissioner Orson Swindle, where he helped create and implement the FTC's Consumer Information Security Outreach Plan and assisted the White House in establishing the National Strategy for Cyber Security.

Carl obtained his J.D. and Communications Law Certificate from the Catholic University of America, magna cum laude, and Carl obtained his B.A. in Economics, Managerial Studies, and Policy Studies from Rice University. Carl is licensed to practice law in Washington, DC and is a Certified Information Privacy Professional (CIPP/US).

Summary of NetChoice Comments of NetChoice on DOJ & FTC Draft Vertical Merger Guidelines

NetChoice does not support the Agencies' decision to replace the 1984 Non-Horizontal Merger Guidelines because new guidelines are unnecessary. First, the Agencies have challenged only one vertical merger on average per year since 2000.[2] Second, the AT&T-Time Warner acquisition case was the Agencies' first vertical merger challenge to go before a court in over 40 years.[3] These numbers suggest there is little need for issuing new guidelines and do not justify the likely parade of unintended consequences that will follow from the proposed changes.[4]

But should the Agencies decide to move forward with new guidelines, NetChoice agrees with former FTC Commissioner Joshua Wright, who said any new guidelines "must be transparent, predictable, and consistent in the right way."[5]

The Draft Vertical Merger Guidelines take a step toward transparency in some spots but introduce legal and economic uncertainty overall. To remedy these shortcomings, the Agencies should:

1. **Presume that vertical mergers between parties with less than 40% market share are legal.**
2. **Presume vertical mergers will result in an elimination of double marginalization.**
3. **Eliminate analysis of "related products."**
4. **Adopt the D.C. Circuit Court's burden-shifting framework.**
5. **Include behavioral remedies.**

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[2] Joshua Wright, *The FTC's Hearings on Competition & Consumer Protection in the 21st Century*, COMMENT OF THE GLOBAL ANTITRUST INSTITUTE 11 (Sept. 6, 2018).
[3] *Id.*
[4] *Id.*
[5] *Id.* at 13.

Goals for the Guidelines

- **Promote innovation, efficiency, and domestic and global competitiveness**

NetChoice agrees with the Antitrust Modernization Commission, which said the Agencies should "ensure that merger enforcement policy is appropriately sensitive to the needs of companies to innovate and obtain the scope and scale needed to compete effectively in domestic and global markets."[6] And NetChoice agrees with the Commission's recommendation that the Agencies "should give substantial weight to evidence demonstrating that a merger will enhance efficiency," and "give substantial weight to evidence demonstrating that a merger will enhance consumer welfare by enabling the companies to increase innovation."[7]

- **Provide analytical clarity for U.S. courts, practitioners, and companies**

The Guidelines must be drafted with sound economic principles in mind. This means that the Guidelines should be clear, rooted in economic literature, and helpful to U.S. courts, practitioners, and companies.

Without clear standards and economic analysis, staffers and courts run the risk of returning to a time when antitrust issues were analyzed by gut instinct or by considerations other than consumer welfare. Indeed, "courts once found vertically integrated firms violated the Sherman Act because less efficient rivals were 'harmed' by the integrated firm's ability to offer lower prices to consumers."[8] Under current doctrine, that finding would never hold merit, but with unclear guidelines, such thinking could resurface.

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[6] Antitrust Modernization Commission, REPORT AND RECOMMENDATIONS 10 (2007), https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[7] *Id.*

[8] *Does America Have a Monopoly Problem? Examining Concentration & Competition in the U.S. Economy*, *Hearing Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Judiciary Comm.*, 116th Cong. 9 (2019) (statement of Joshua Wright), https://www.judiciary.senate.gov/imo/media/doc/Wright%20Testimony.pdf (citing *United States v. New York Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949)).

Recommendations

1. **The guidelines should presume that vertical mergers between parties with less than 40% market share are legal.**

The 20% figure should be 40% and the guidelines should presume legality; otherwise, the Draft Guidelines, as written, will introduce ambiguity and uncertainty into the Agencies' evaluation of vertical mergers. First, as FTC Commissioner Rebecca Slaughter noted in her dissenting statement about the Draft Guidelines, the 20% threshold was set "without evidentiary support."[9] Her observation seems particularly relevant given that the 20% mark is lower than the Agencies' current enforcement focus, U.S. court decisions, and international standards. By contrast, the 40% figure has evidentiary support.

Second, as written, the 20% figure runs the risk that it "will be interpreted as a trigger for competitive concern."[10] Although the guidelines first state the Agencies are unlikely to challenge mergers when the market shares are less than 20%, they then say—in the very next sentence—"[i]n some circumstances, mergers with shares below the thresholds can give rise to competitive concerns." This later sentence suggests that (1) mergers with market shares above 20% give rise to anticompetitive problems, and (2) even mergers with market shares below 20% can be anticompetitive. Courts, practitioners, and companies are thus left to guess what "circumstances" will trigger scrutiny and how that scrutiny will be applied.

As former FTC Commissioner Josh Wright, Judge Douglas Ginsburg, and others have recently pointed out, "[t]here is no sound economic reason to believe 20 percent share in the relevant market or the related market is of any particular importance to predicting competitive effects."[11]

Left as is, the 20% threshold would return antitrust enforcement to the 1960s—the last time the Agencies or the courts used such a low number, and before the government grounded its antitrust policies in empirical findings and economic theory.[12] Back then, the Supreme Court found that antitrust enforcement was appropriate even when the parties had less than 4% market share.[13] So, without a higher threshold and without a presumption of lawfulness, the Draft Guidelines risk a return to an era in which theory trumped empirical evidence and in which consumer welfare was not a guiding light.

The 20% threshold also conflicts with actual antitrust policy in the United States. The FTC, for example, has focused antitrust enforcement on firms that operate in **highly concentrated** markets.[14] The U.S. Supreme Court, in a vertical-restraint case about exclusive dealing, held that § 1 of the Sherman

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[9] Commissioner, Rebecca Kelly Slaughter, Federal Trade Commission, *Statement Concerning FTC-DOJ Draft Vertical Merger Guidelines* 3 (Jan. 10, 2020), https://www.ftc.gov/system/files/documents/public_statements/1561721/p810034slaughtervmgabstain.pdf

[10] Joshua Wright et al., *Connecting Vertical Merger Guidelines to Sound Economics* (Feb. 6, 2020), https://truthonthemarket.com/2020/02/06/wright-vmg-symposium/.

[11] *Id.*

[12] Herbet Hovenkamp, *The Draft Vertical Merger Guidelines are an Important Step for the Economic Analysis of Mergers* (Feb. 6, 2020), https://truthonthemarket.com/2020/02/06/hovenkamp-vmg-symposium/.

[13] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[14] *See, e.g.*, Complaint, *In the Matter of Broadcom Limited*, No. 171-0027 (Aug. 17, 2017); Complaint, *In the Matter of The Coca-Cola Company*, 101-0107 (Nov. 3, 2010).

Antitrust Act is not triggered when the market share is 30% or below.[15] Likewise, lower courts that reviewed vertical mergers found that mergers between firms with 30-40% market share do not present antitrust concerns.[16]

The 20% mark is even lower the European Union's vertical merger guidelines, which state that it is "unlikely to find concern in non-horizontal mergers . . . where the market share post-merger of the new entity in each of the markets concerned is below 30%."[17]

If U.S. firms are held to a lower standard of 20% market share, they will face greater uncertainty when considering potential mergers. Not only will firms have to guess when their merger proposal may trigger government review, but also they will have to guess how U.S. courts may analyze it. This uncertainty will handicap U.S. firms, especially against their European-based competitors.

2. The guidelines should presume vertical mergers will result in an elimination of double marginalization.

The Draft Guidelines identify the elimination of double marginalization (EDM) as a benefit of vertical mergers. Indeed, they state that EDM may "benefit both the merged firm and buyers of the downstream product or service." But the Agencies undercut this benefit by placing the burden on the merging parties to "demonstrate whether and how the merger eliminates double marginalization."

By shifting the burden from the government to the parties, the Agencies unnecessarily increase uncertainty among businesses. The Agencies should therefore presume vertical mergers will result in EDM and assign to themselves the responsibility of showing that a vertical merger is anticompetitive.

Doing otherwise will discourage mergers, which means consumers will be deprived of cheaper goods and services.

3. The guidelines should eliminate analysis of "related products."

The Draft Guidelines introduce consideration of "related products"—a new term and concept that's poorly defined and that undermines the Agencies' goal of publishing more transparent merger guidelines.

First, although the Draft Guidelines adopt the "relevant market" definition used in the Horizontal Merger Guidelines, the definition is made meaningless by inclusion of "related products." By emphasizing merger effects on related products, the Agencies expand their discretion to block merger proposals and do so without giving stakeholders an understanding of what the Agencies—and courts—should look at and when, or how much weight such effects should be given.

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[15] *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984).
[16] *Sterling Merchandising, Inc. v. Nestle, S.A.*, 656 F.3d 112, 123-24 (1st Cir. 2011) ("foreclosure levels are unlikely to be of concern where they are less than 30 or 40 percent"); *United States v. Microsoft Corp.*, 87 F. Supp. 2d 30, 52-53 (D.D.C. 2000) (foreclosure rate must be closer to 40%).
[17] European Comm'n, *Guidelines on the Assessment of Non-Horizontal Mergers Under the Council Regulation on the Control of Concentrations Between Undertakings*, 2008 O.J. (C 265) ("The Commission is unlikely to find concern in non-horizontal mergers, be it of a coordinated or of a non-coordinated nature, where the market share post-merger of the new entity in each of the markets concerned is below 30 % and the post-merger HHI is below 2,000").

Second, the concept of related products is an unnecessary addition to vertical mergers. Related products seem to be a form of "second markets." And in Commissioner Wilson's words, the concept is meant to be a "looser requirement" than is analysis of second markets, but the Draft Guidelines do not explain why that would be the case.

The Agencies define related products broadly, explaining that they relate to products that are upstream or downstream from the relevant market. Examples the Agencies gave include an input, a means of distribution, or access to a set of customers. This definition—and the Draft Guidelines in general—fail to explain the connection between related products and the relevant market. By including related products, the Agencies will have the power to challenge a deal that affects only related products and that presents no harm to the relevant market. That power is at odds with the Agencies' current practice—which, they state, is what the Draft Guidelines are meant to capture—and is at odds with prevailing antitrust thought.

4. The guidelines should adopt the D.C. Circuit Court's burden-shifting framework.

The Agencies declined to allocate the burden of proof on challenges to vertical mergers. This decision is consistent with the Agencies' decision not to spell out the burden of proof in horizontal mergers, but is inconsistent with the Agencies' actual enforcement practices.

Since 1962, when the Supreme Court decided *Brown Shoe Company v. United States*, the government has had the burden of showing that the proposed merger is likely to substantially lessen competition.[18] In 1990, the D.C. Circuit Court of Appeals fleshed out this requirement by adopting a burden-shifting framework for horizontal mergers.[19] The same court recently extended that framework to vertical merger cases, which the DOJ did not challenge.[20]

Under this framework, (1) the government bears the initial burden of proving a prima facie case that the proposed merger will substantially decrease competition in the relevant market. Then (2) the burden shifts to the defendant, who must show that the merger's procompetitive effects outweigh the alleged anticompetitive effects. After that, (3) the government must refute the defendant's evidence and persuade the court that the merger should be blocked.

This framework is sensible, and the Agencies should adopt it across the board, but especially in vertical-merger cases. Unlike horizontal mergers, vertical mergers produce no immediate changes in the relevant market share and therefore pose fewer risks to competition.[21] Given this, the courts require the government to make a "'fact-specific' showing that the proposed merger is 'likely to be anticompetitive.'"[22] Because vertical-merger cases are driven primarily by facts, stakeholders must understand who bears the burden of production and when.

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[18] *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

[19] *United States v. Baker Hughes,* 908 F.2d 981, 982–83 (D.C. Cir. 1990).

[20] *United States v. AT&T, Inc.*, 916 F.3d 1029, 1032 (D.C. Cir. 2019)

[21] *Id.* at 1032 ("But unlike horizontal mergers, the government cannot use a short cut to establish a presumption of anticompetitive effect through statistics about the change in market concentration, because vertical mergers produce no immediate change in the relevant market share.") (citing Dept. of Justice & Fed. Trade Comm'n, *Non-Horizontal Merger Guidelines* § 4.0 (June 14, 1984)).

[22] *Id*.

The D.C. Circuit Court's burden-shifting framework, which emphasizes facts, is an efficient method for producing and analyzing relevant facts. And like the DOJ did in *United States v. AT&T, Inc.*, the Agencies should adopt the framework and give courts nationwide, as well as practitioners advising businesses on mergers, clarity, consistency, and stability. In turn, this will allow the law to develop on a steady path, with incremental developments, rather than with potential circuit splits and confusion among lawyers.

5. **The guidelines should include behavioral remedies.**

The Agencies regularly use behavioral or conduct remedies in other antitrust cases. But the Draft Guidelines are silent on whether and when such remedies are appropriate in vertical-merger cases. The Agencies should therefore revise the Draft Guidelines to follow the DOJ's own observation that "conduct remedies can be an effective method for dealing with competition concerns raised by vertical mergers."[23]

6. **The guidelines should define the scope of which theories of harm the Agencies will consider.**

The Draft Guidelines focus on three types of harm—(1) foreclosure; (2) raising rivals' costs; and (3) access to confidential information. The Draft Guidelines also provide examples of these harms, which give stakeholders insight into the Agencies' thinking. The harms are also consistent with mainstream economic thinking and are easily understood factual situations.

But the Agencies undermine that transparency and guidance by including the caveat that they may "consider any reasonably available and reliable evidence to address the central question of whether a vertical merger may substantially lessen competition." This catch-all renders meaningless the specific harms the Draft Guidelines adopt. The Draft Guidelines do not define what the Agencies will consider "reasonably available" or "reliable," and they do not put any limits on what theories of harm the Agencies will adopt or pursue.

Without defining the scope of acceptable theories of harm—or what evidence will be relevant to the Agencies' considerations—the caveat undermines the document's purpose. And it threatens to turn the Guidelines into a free-for-all analysis, in which new, untested theories from the academy make their way into antitrust enforcement. At the very least, the Agencies should make clear that acceptable theories of harm must be backed by empirical evidence that shows harm to consumer welfare.

Bottom Line

As written, the Draft Guidelines will likely have unintended negative consequences for the U.S. economy. The consumer-welfare model has served the U.S. economy and consumers well, especially in the technology industry. Below is a recap of NetChoice's findings on why stricter antitrust enforcement is neither warranted nor desirable in technology.

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[23] U.S. DEP'T OF JUSTICE, *Antitrust Division Policy Guide to Merger Remedies* 12 (June 2011), https://www.justice.gov/sites/default/files/atr/legacy/2011/06/17/272350.pdf.

- **New developments in markets and in business-to-business and business-to-consumer relationships show robust competition and innovation**

The online environment is robust and healthy, and market players are numerous. For consumers, prices are low; for small businesses, opportunity and entrepreneurship are growing. And these results are because competition is robust.

Today, American consumers have more choices and more information than ever. Historically, consumers had to rely upon only a handful of nearby businesses from which to purchase products and services. These businesses could set prices higher than competitors located further away, and customers had a difficult time researching the comparative value and quality of options.

Today, thanks to the internet, consumers have access to a smorgasbord of products, businesses, and information about pricing. With a couple of clicks customers can find the lowest prices for goods they want. No longer limited to just nearby stores, the internet enables customers to buy from hundreds of thousands of stores across the country.

Online services have evolved to help consumers find the lowest prices. Websites such as Slickdeals[24] help consumers find active discounts. Services such as Honey[25] enable real-time price comparison and coupon testing at checkout. Today, customers can easily find the products they want at the lowest prices.

For businesses, the internet has reduced barriers to entry and increased their potential marketplace. Now an art student can easily sell paintings from her studio to anyone around the world, without first obtaining access to dealers and conceding markups to galleries. A parent can sell their children's old toys in a large market rather than relying on a one-day neighborhood yard sale. Anyone can compete with any business, big or small.

There is no dearth of competition. The marketplace has never been more competitive.

- **Large platforms help small businesses**

Anti-business advocates claim that "big is bad." But for America's small and mid-size businesses, the bigger the platform the better for reaching larger audiences.

Consider the local custom furniture store. Just fifteen years ago businesses like this could barely afford to place an ad in a local newspaper, let alone on TV or radio. ***Thanks to large online platforms, for less than ten dollars a small business can reach thousands of potential customers and target them more accurately than ever.***

Large online platforms have given new growth opportunities to America's small businesses. Consider the app stores on the Apple and Android platforms. Developers can reach markets of millions of customers. And the costs for a developer to distribute an app are intentionally low, to empower small developers to compete. Fifteen years ago, this was only possible through significant outlays for

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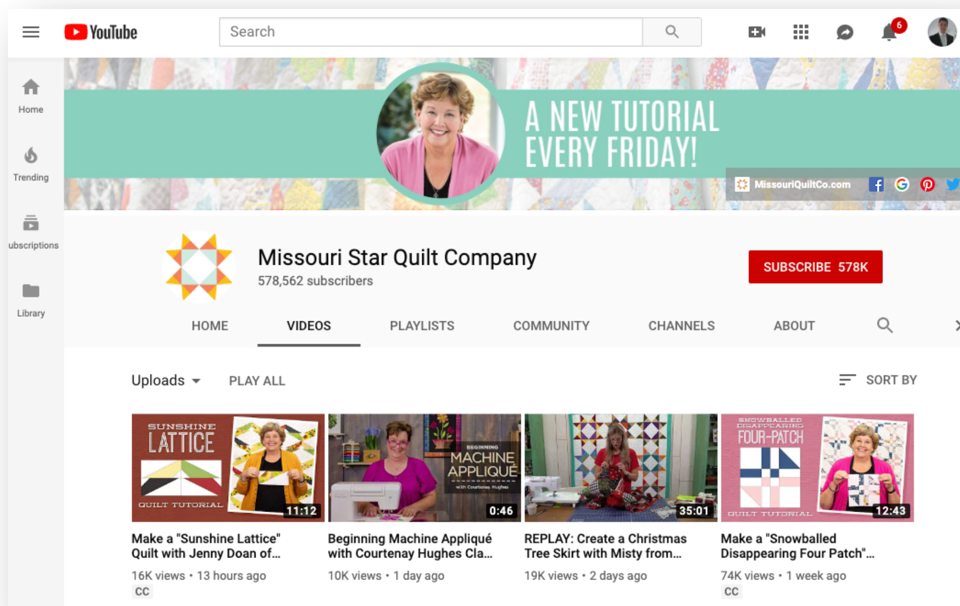
[24] Slickdeals.net.

[25] JoinHoney.com.

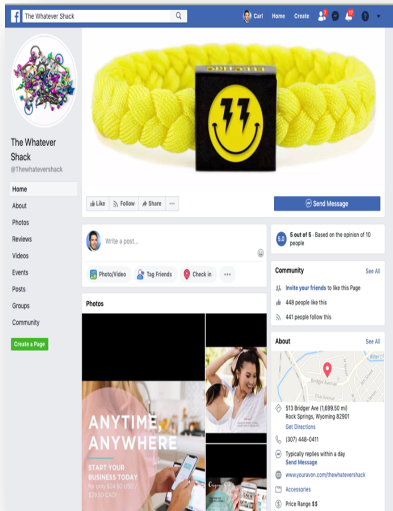
advertising, distribution, and logistics to move software to customers. And even if developers decide to not publish their apps in the Android or Apple marketplaces, they can make their services available via device websites.

Or consider how the platforms Etsy and eBay enable small sellers to find customers across the country and even around the world.

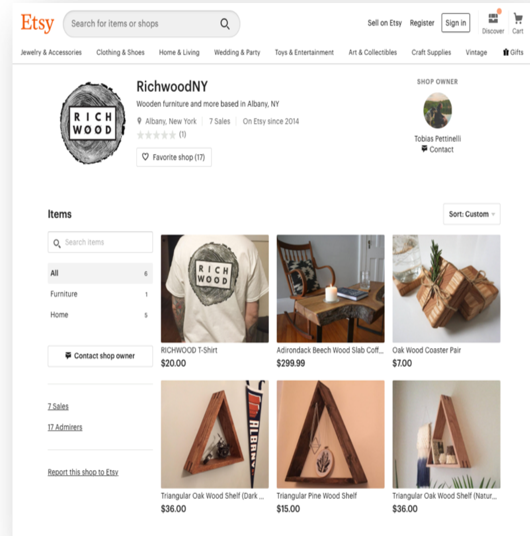
These benefits are the result of allowing online platforms to grow and flourish because America's antitrust law has relied upon the consumer welfare standard to regulate that growth.



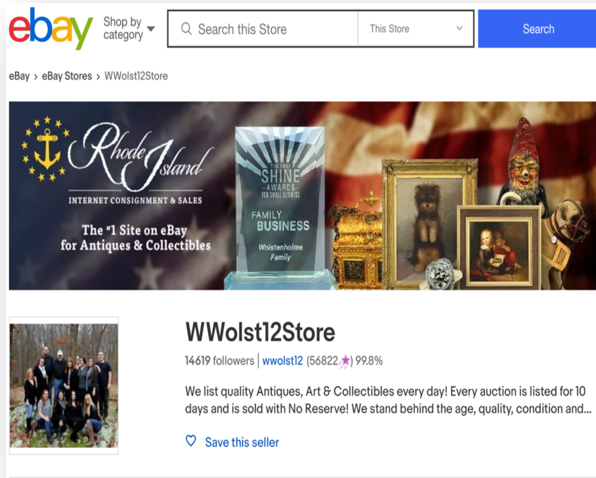
Missouri Star Quilt Company in Hamilton, MO uses YouTube to advertise to customers across the country.



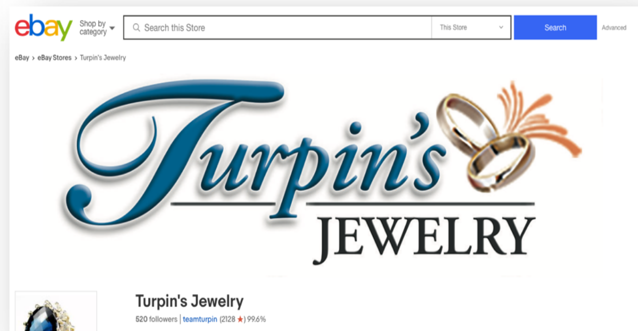
The Whatever Shack in Rock Springs, WY uses



In Albany, NY, woodworker RichwoodNY uses Etsy to find customers from across the country



William Wolstenholme in Cumberland, RI uses



Turpin's Jewelry in Dillard, GA uses eBay to find customers from across the country

Polling shows that Americans oppose government limitations on business acquisitions and Americans do not see consumers as the chief beneficiaries of big-tech breakups

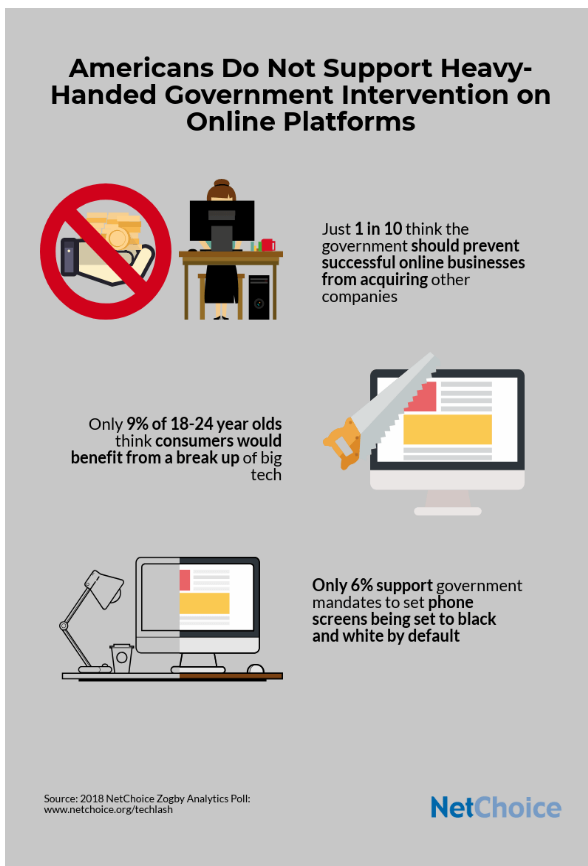
Polling of Americans conducted by Zogby Analytics and commissioned by NetChoice found overwhelming opposition to limitations on acquisitions by large online platforms.[26] And the polling found overwhelming concern with breaking-up large online platforms.

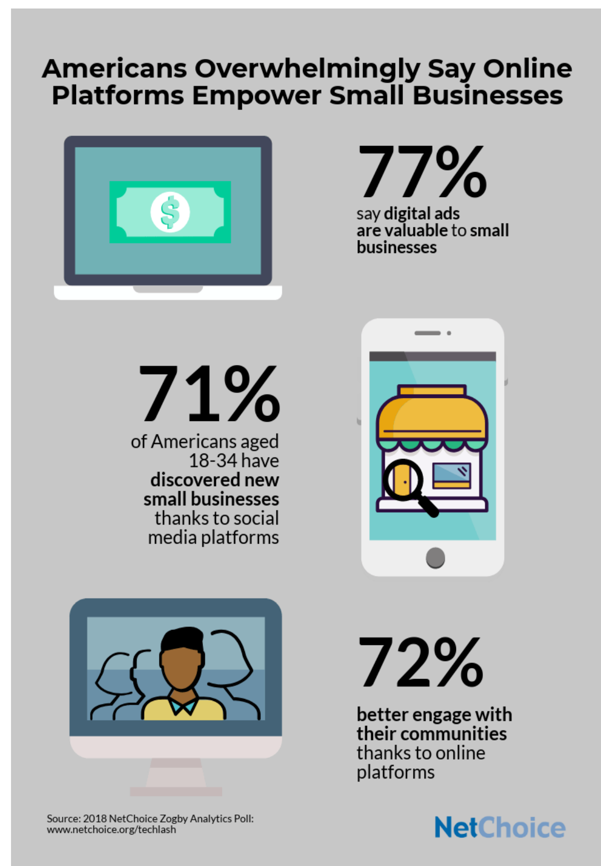
Question: ***Some groups are calling for the break-up of large tech businesses. Who do you believe would most benefit from a break-up?***

- 28% of those with an opinion said, "Consumers" would most benefit.
- 53% of those with an opinion said, "Traditional industries competing with tech businesses" and "Anti-business groups" would most benefit.

Question: ***If an online business becomes successful, should the government prevent them from acquiring any tech startups that seek to be acquired?***

- 86% of those with an opinion said "No"





That same polling shows that:

- Only 10% of Americans think the government should prevent successful online businesses from acquiring other companies.

[26] *See* NetChoice.org/TechlashPoll.

Americans said that the government should most focus its anticompetitive resources on sectors *other than tech*.

When asked:

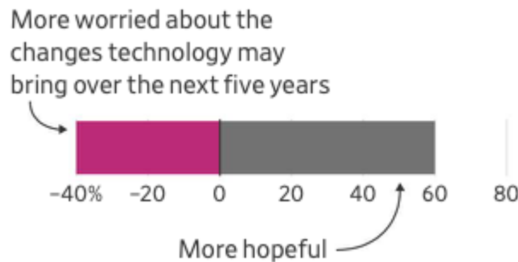
- Only 5% of Americans say the government should most focus its anticompetitive enforcement on tech platforms.[27]

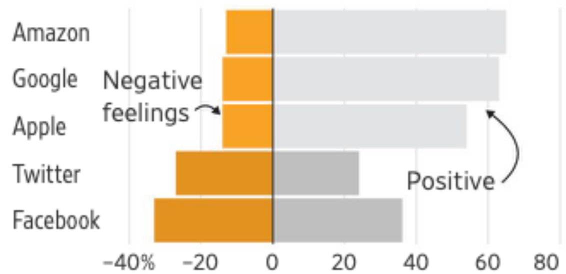
To compare:

- 29% of Americans say the government should most focus its anticompetitive enforcement on pharmaceutical companies, and
- 11% of Americans say the government should most focus on the electricity and gas industry.

These findings are also seen in an NBC poll, "***By a more emphatic 68% to 28%, respondents said such decisions [about big-tech breakups] should be left to the free market rather than government***."[28]

While a *Wall Street Journal* - NBC poll shows that a majority of users have privacy concerns, there are other findings that are far more relevant to today's hearing. For example, their polling shows that Americans have very positive feelings about the large platforms (see image below).[29]





- **Disruptive and generational changes in technology provide new avenues for competition**

With rapid innovation and growth of online platforms, we've seen a breakdown of barriers for new entrants into established markets, which forces existing businesses to innovate and compete.

Despite claims that "consumers are locked into large platforms," public opinion and consumer behavior shows just the opposite. Think back to 20 years ago, when Fortune Magazine featured this article:

> **How Yahoo! Won the Search Wars[30]**
> *Once upon a time, Yahoo! was an Internet search site with mediocre technology. Now it has a market cap of $2.8 billion. Some people say it's the next America Online.*

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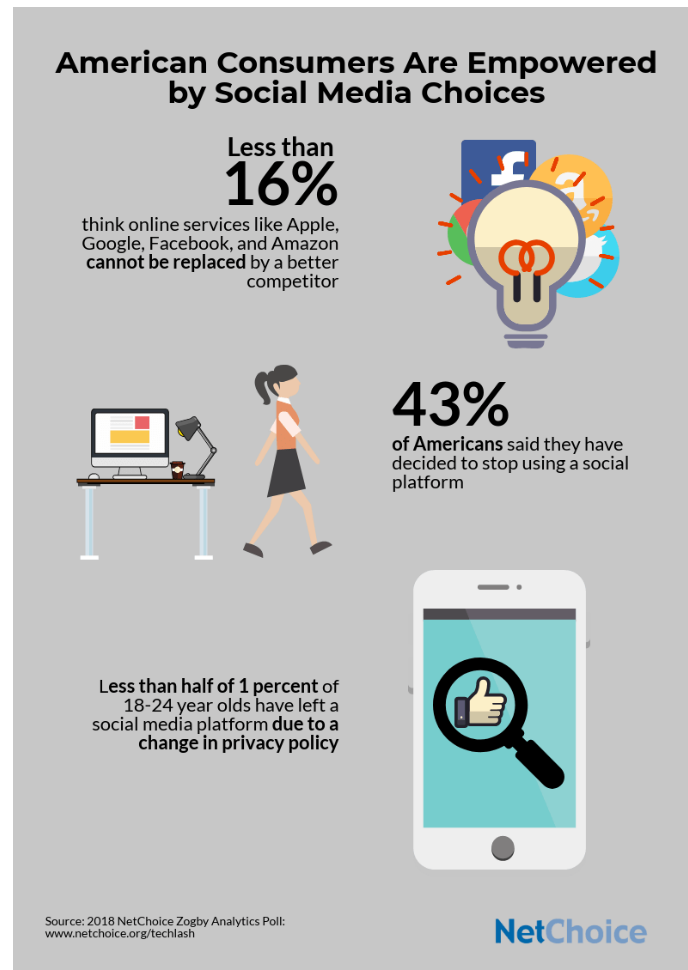
[27] *Id*.
[28] John Harwood, *Americans Don't Support Sen. Elizabeth Warren's Plan to Break Up Big Tech: Poll*, CNBC (Apr. 5, 2019).
[29] John D. McKinnon and Danny Dougherty, *Americans Hate Social Media but Can't Give It Up, WSJ/NBC News Poll Finds*, WALL ST. JO. (Apr. 5, 2019).
[30] Stross, Randall, *How Yahoo! Won the Search Wars*, in FORTUNE MAGAZINE (Mar 2, 1998), https://archive.fortune.com/magazines/fortune/fortune_archive/1998/03/02/238576/index.htm.

Let's leave aside, for now, questions of whether Yahoo! will be around in ten years or whether there's any way its stock might be a good investment. This much is clear: Yahoo! has won the search-engine wars and is poised for much bigger things.



According to a survey by Mediamark Research last year, in a typical month more than 25 million people use Yahoo!. Some months, 40 million people visit. More people go to Yahoo! than to Netscape or AOL. More people search at Yahoo! than watch MTV, Nickelodeon, or Showtime in any given week. More people check out Yahoo! than read the typical issue of Time, Newsweek, or Life. Simply put, that's why some people think Yahoo! may make wads and wads of money in the future by selling ads. Observes Oppenheimer & Co. analyst Henry Blodget: "I have yet to find a flat surface attractive enough to grab the attention of 40 million pairs of eyeballs but not attractive enough to spend big money advertising on."
Gathering eyeballs has been the company plan since its inception. It turns out that this pack of Net-besotted, Yahoo!ing-their-brains-out, twenty- and thirty-something Web surfers have real business savvy, and **their near-flawless execution and brilliant marketing have eviscerated the competition.** (emphasis added)

It's hard to believe now, but online search was dominated by Yahoo when Google arrived as the 8th search competitor in the late 1990s.

In 2006, MySpace had more daily visitors than Google – but was later overtaken by Facebook. As stated by Ryan Bourne in Cato Policy Analysis:

> "Will Myspace ever lose its monopoly?" asked Victor Keegan in the *Guardian*'s technology section in early 2007. The journalist was riffing off a TechNewsWorld article by John Barrett that claimed Myspace was not just a monopoly, but a natural one. The arguments for such claims were similar to those made about Facebook today Importantly, the Myspace history shows that the very network effects that lead to massive growth can also lead to a rapid demise when a superior product comes along. All social networks face a difficult balancing act between providing an attractive and innovative user experience, on the one hand, and monetizing the platform by competing for the real "customers"—digital advertisers—on the other. The Myspace example shows the degree of interdependence between the two. Getting the balance wrong can have significant consequences.[31]

Truth is, nobody can predict what the tech landscape will look like in five or ten years, and today's leaders must adapt – or risk the same fate as MySpace.

When looking online for products, ***more online shoppers start their product searches on Amazon than on Google***.[32] For general searches, we've seen rapid growth of new search engines like DuckDuckGo.[33] For travel searches we have Expedia, Travelocity, Orbitz, and Kayak. And when searching for local restaurants and vendors, Americans choose from TripAdvisor, UrbanSpoon, Angie's List, and Yelp.

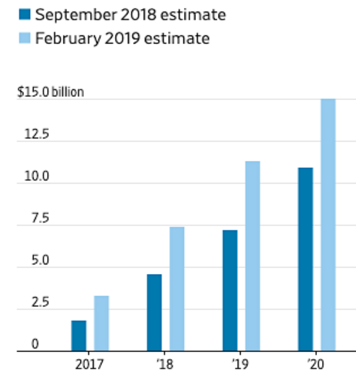
Despite Yelp's present leadership in this search category, the company says in its latest earnings report, "***We compete in rapidly evolving and intensely competitive markets, and we expect competition to intensify further in the future with the emergence of new technologies and market entrants***."[34]

Innovative new features easily attract consumer attention, and competition is truly only a click away. Nationwide polling conducted by Zogby Analytics and commissioned by NetChoice[35] showed consumers can and do leave platforms when better options are available.

> ***Question: Do you think that the services offered by online platforms like Apple, Google, Facebook, and Amazon can be replaced if a better competitor comes along?***
>
> - 70% of those with an opinion said "Yes"

[31]Bourne, Ryan, *Is This Time Different? Schumpeter, the Tech Giants, and Monopoly Fatalism*, in CATO POLICY ANALYSIS (Jun 17, 2019), https://www.cato.org/publications/policy-analysis/time-different-schumpeter-tech-giants-monopoly-fatalism.
[32] Krista Garcia, *More Product Searches Start on Amazon*, EMARKETER (Sept. 7, 2018) ("Nearly half (46.7%) of US internet users started product searches on Amazon compared with 34.6% who went to Google first, according.").
[33] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, SEARCH ENGINE JOURNAL (Oct. 11, 2018).
[34] Yelp Inc., 10-Q, May 2019.
[35] *See* Zogby Analytics survey of 1222 adults in the United States conducted from August 6, 2018 to August 8, 2018.

Online advertising is competitive and new competitors are growing fast



Wall St. Journal, Amazon's Ad Business May Be Growing Faster Than Thought

Antitrust regulators should first explain why they are limiting their advertising market analysis to an "online environment." Rather than look only at the *online* market, regulators should expand their analysis and market definition to cover *all* advertising – including television, radio, and newspapers.
Regulators need to look at consumers as multi-taskers – surfing the web on their phones while watching a sporting event, for example. In that scenario there is overlap in online and offline advertising markets.

However, if regulators incorrectly limit their antitrust analysis to only *online* advertising, they will readily discover that the online market is competitive and open to new entrants. While Google and Facebook remain the two largest online advertising platforms, neither has anywhere near a monopoly share of ad dollars. According to eMarketer, Google has 32% share of US ad revenue while Facebook has 20%.

Moreover, Amazon's service is catching up fast. From the Wall Street Journal:[36]

> Amazon's ad revenue is expected to increase to $15 billion in 2020, or just under 10% of the digital ad market share in the U.S., from $11.3 billion in 2019 and an 8.8% share, according to the latest forecast.

With such prolific diversity among advertising platforms, ad exchanges, and ad networks, it is clear that competition is robust. And using Amazon as an example, growth for new competitors is happening.

Big Tech critics have failed to make their case

Proponents of breaking-up tech companies via new theories of antitrust have failed to substantiate their allegations – even though the burden of proof rests with these accusers. Consider Sen. Elizabeth Warren's *Medium* post,[37] where she proclaims Facebook and Google as "monopolies" while ignoring their actual market share and growing competition in every market they serve.

With less than 20 million U.S. users, Facebook's messaging tool WhatsApp is much smaller than Apple's iMessage, which connects over 90 million American consumers.
TikTok, a fairly new competitor in the social media market, has over half a billion users worldwide.

And in search, Google's competition is a click away as we see the rapid ascent of new general search engines like DuckDuckGo[38] and Google competes with tailored search like Yelp for restaurants and AngiesList for services.

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[36] Alexandra Bruell, *Amazon's Ad Business May Be Growing Faster Than Thought*, WALL ST. JO. (Feb. 20, 2019).
[37] Elizabeth Warren, Senator, *Here's How We Can Break up Big Tech*, MEDIUM (Mar. 8, 2019).
[38] Matt Southern, *DuckDuckGo Traffic Up 50% from Last Year, Hits New Record of 30M Daily Searches*, SEARCH ENGINE JOURNAL (Oct. 11, 2018).

These American businesses are not consumer-harming monopolies as some claim but are social networking services that have earned global success in a competitive marketplace.

American success stories, such as Google, Apple, and Facebook, empower small businesses to reach new customers all over the world like never before. From online marketplaces, to app stores, to photo sharing services, these platforms allow individuals to connect with the world in ways only dreamt of twenty years ago.

We have seen other anti-business proclamations without facts from Tim Wu, who fails to make a substantive case throughout his book, *The Curse of Bigness*, despite having 300 pages in which to do so.

The consumer welfare standard looks to overall consumer welfare and economic efficiency as the main factors when engaging in antitrust analysis.

Consider one of Wu's first points. He cites indexes showing fewer large firms as evidence of consolidation. But Wu ignores similar indexes showing the resurgence in *small* firms.

The Kauffman Index of Growth Entrepreneurship shows that entrepreneurship is at its highest levels since 2008. Main street growth and startup activity are likewise up.[39] The US Bureau of Labor Statistics found self-employment is up since 2014 and is projected to grow at 7.9%—faster than the projected rate for all workers.[40] This shows the inherent danger in making snap-decisions that ignore market changes over time.

In essence, there is a direct correlation between the growth of small entrepreneurs and online platforms like eBay, Facebook, and Google. These platforms are helping small businesses the same way a large retailer operates as an anchor for a shopping center or mall.

The larger these platforms grow means the more customers small businesses can reach with better targeting and lower costs. ***To America's entrepreneurs, bigger is better when finding a platform for the most effective advertising.*** 58% of Americans, and 73% of those between 18 and 24 years old, say online platforms helped them discover a small business they had not previously known.[41]

Tim Wu sees a world where one business controls the market and once it has dominance, it raises prices on consumers and businesses. Take for example the oil industry, the example around which Wu bases his theory.

But under the existing consumer welfare standard, if big oil uses market power to raise prices, that would violate our existing antitrust standards. Moreover, Wu ignores President Teddy Roosevelt's apprehension about the break-up. Roosevelt lamented, "I do not see what good can come from dissolving the Standard Oil Company into 40 separate companies."[42]

Biographer Ron Chernow captured Roosevelt's conflicting instincts about breaking up America's largest oil company:

> In retrospect, it seems clear that the ambiguous signals from the White House reflected more than duplicity on Roosevelt's part, for he was genuinely reluctant to wield the big stick against Standard Oil. He preferred compromise to antitrust cases, which were

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[39] Kauffman Indicators of Entrepreneurship, https://indicators.kauffman.org.

[40] BUREAU OF LABOR AND STATISTICS, *Small-Business Options: Occupational Outlook for Self-Employed Workers* (2018), https://www.bls.gov/careeroutlook/2018/article/self-employment.htm.

[41] *See* NetChoice.org/TechlashPoll.

[42] Crane, *All I Really Need to Know About Antitrust I Learned in 1912*, Iowa Law Review Vol. 100:2025, 2030.

> slow, time-consuming, and fiendishly difficult to win. He wanted to supervise the trusts, not break them up and sacrifice their efficiency, and he was searching for some conciliatory overture from his adversaries, a suggestion that they would accept government oversight and voluntarily mend their ways.[43]

Wu also cites actions against AT&T and IBM as evidence of antitrust failures. So, while Wu thinks he has found a slam-dunk argument against the consumer welfare standard, he actually shows that the current antitrust system and standards work effectively.

Back in 2010, Tim Wu complained[44] that Facebook's size alone precludes new entrants. Yet Wu's prognostications missed emerging Facebook competitors Twitter, Snapchat, Reddit, YouTube, and LinkedIn. And since 2010, we've seen the rise of additional social media competitors like Twitch, TikTok, Pinterest, and Tumblr.

Likewise, Tim Wu and Sen. Warren complain about businesses giving preference to their own products ahead of others. But it's become expected for retailers – online and off – to offer their own brands to consumers seeking lower cost alternatives from a producer they trust.

For example, Costco features its Kirkland brand in stores. Safeway features its O Organics and Signature Cafe brands. Kohl's is known for its Tony Hawk brand while Macy's has over 20 of its own private label brands. Trader Joe's and Aldi markets prominently feature their proprietary products.

If the prosecutor fails to prove their case, as Sen. Warren, Tim Wu, and their allies have, then governmental action cannot be justified.

- **Reviewing merger consent decrees**

When the termination date of a merger or acquisition consent decree is approaching, that is a prime opportunity to do a second review of market conditions and company conduct. The overseeing agency should review the current market and identify whether the concerns that gave rise to the earlier consent decree remain relevant. If those concerns are no longer relevant, the consent decree should be allowed to expire.

However, if pre-acquisition or pre-merger concerns remain, or the company shows evidence of anti-competitive behavior, then the consent decree should be extended.

For example, the approved merger of Ticketmaster and Live Nation was subject to a 10-year consent decree that expires in 2020.[45] This approved vertical merger allowed the dominant ticketing platform to merge with the largest promoter of concerts.

When reviewing the Ticketmaster-Live Nation transaction in 2010, the Department of Justice raised concerns that "This loss of competition likely would result in higher prices for and less innovation in

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[43] RON CHERNOW, TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR. 522 (2004).
[44] Tim Wu, *In the Grip of the New Monopolists*, WALL ST. JO. (Nov. 13, 2010).
[45] *United States v. Ticketmaster Entertainment, Inc.*, Case: 1:10-cv-00139 (U.S.D.C. 2010).

primary ticketing services."[46] The DOJ was prescient: in the decade since that merger, Ticketmaster continues to maintain a market share of 70-80% in primary ticket sales.[47]

Ticketmaster and Live Nation are now expanding efforts to control event ticketing transactions, by restricting how fans sell or give away their tickets. They are preventing resale of tickets on non-Ticketmaster platforms, using their dominance in primary ticket sales to prohibit competition with respect to ticket resales.

In addition to using terms and conditions, technology, and business conditions with their partners to restrict transferability of tickets amongst consumers,[48] Ticketmaster-Live Nation also uses threats of retaliation to dominate the ticket market and impede competition.[49]
Any objective review of Ticketmaster-Live Nation would conclude that the consent decree is not working. This is a prime example of where oversight agencies should use their merger review powers to maintain a competitive marketplace that serves consumer interests and institute remedies that will ensure competition in the ticket industry.

Congress should proceed carefully when hearing calls to "break-up" technology businesses – no matter how loudly a few are complaining. Instead, Congress should retain and protect the model on which consumers and business have relied and it has and will continue to work – the consumer welfare standard for antitrust

We thank you for your consideration.

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[46] *Id.*
[47] *Id.*
[48] *See* Ticketmaster Credit Card Entry, *available at* https://www.ticketmaster.com/h/credit-card-entry.html ("Can I sell Credit Card Entry tickets? That's up to the artist, team, or venue! If they give the green light you'll see a Sell button when you click the order number under Order History in My Account.").
[49] *See, e.g.*, Jem Aswad, *Department of Justice 'Looking Into Accusations' Against Live Nation, Report Claims*, VARIETY (Apr. 1, 2018) ("'They have been reviewing complaints that Live Nation, which manages 500 artists, including U2 and Miley Cyrus, has used its control over concert tours to pressure venues into contracting with'").