To: Members of the House Judiciary Committee
From: Will Yepez, Policy and Government Affairs Associate, National Taxpayers Union
Date: June 17, 2021
Subject: NTU's Views on Upcoming Committee Markup

I. Introduction and Key Taxpayer Considerations

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we write to express our views on five antitrust bills before the Committee. NTU believes these bills contain provisions that would harm consumers and the economy.

We acknowledge, and in some cases share, concerns about how the "Big Tech" platforms make decisions that impact free expression online. However, the policy changes in this package of bills will not address those concerns and instead stand to cause tremendous damage to innovation, growth, and U.S. competitiveness in the digital economy.

We wish to share our topline considerations for taxpayers regarding these bills. They are:

- Adopting a European approach to competition policy will stifle U.S. leadership in tech, perhaps paving the way for China.
- Banning many of the common business practices (e.g. self-preferencing, vertical integration) targeted by these bills would eliminate many products and services that consumers love.
- The bar for "covered platforms" only affects the few largest tech companies now, but will affect many more as the digital economy grows.
- Many of these policies, such as mandated interoperability and bans on acquisitions, threaten to simultaneously calcify existing platforms via regulation and to discourage investment and innovation.

For these reasons, as well as reasons described below, NTU strongly urges Committee members to reject these bills, as they represent a massive increase in regulation and bureaucratic interference into the free market.

II. Merger Filing Fee Modernization Act of 2021

This bill would massively increase the funding for both the Antitrust Division of the Department of Justice (DOJ) and Federal Trade Commission (FTC), increase the filing fee for larger mergers, and index filing fees to inflation. The proposed funding increase is $63.5 million more than the DOJ requested and $87.8 million more than the FTC requested for FY 2021. While the four other bills under consideration focus on large online platforms, the proposed increase in funding could be used to augment government intervention in any sector of the economy. Some funding increase may be necessary, but lawmakers should ensure that taxpayer dollars aren't being wasted by an inefficient enforcement system. NTU recommends lawmakers streamline antitrust enforcement with the passage of the One Agency Act before a substantial increase in funding.

At first glance, the lowering of filing fees for smaller mergers is a positive change. However, this change could be undercut by the proposal indexing fees to inflation. With the threat of inflation rising, this seemingly positive change could be undone in a matter of years. The filing fee should be proportionate to the work required by the agency, and it is likely that some of the changes in this legislation exceed this standard. Careful consideration should be made that these fees are not overly restrictive or burdensome.

III. ACCESS Act

The ''Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act" mandates that "covered platforms" make user data readily accessible and downloadable (data portability) and that they must also make their data interfaces accessible and useable by any competing business (interoperability).

Interoperability in particular is a good ideal that can be technically difficult to achieve, and which may come at the expense of users' data privacy and security. In practical terms it would effectively deny consumers the choice between closed, integrated systems like Apple's, which some prefer to an environment like Windows or Android that allows third parties more leeway to develop compatible products on their own at some cost to security and stability.

Forced interoperability could also force exactly the kind of sharing of user-generated data for which Facebook was so harshly criticized (and fined by the FTC) in the incident involving Cambridge Analytica in 2016.

The bill also leaves it to the FTC to define what data must be made accessible, and prohibits covered platforms from making *any changes* to these interoperable systems without the changes being reviewed and approved by the FTC's technical advisors, aided by a brand new Bureau of Digital Markets to be created and staffed within the commission. This not only gives the unelected FTC commissioners tremendous power over defining the future development of all large-scale online services, but the technical advisory commission tasked with evaluating whether to approve these changes would include representatives from competing businesses but not the "covered platforms," creating a potential built-in "competitor's veto."

IV. Ending Platform Monopolies Act

The Ending Platform Monopolies Act would make it unlawful for a covered platform to control other lines of business that "gives rise to a conflict of interest" and would even allow the DOJ and FTC to collect civil penalties from "an officer, director, partner, or employee" of a covered platform. The broad definition of a "conflict of interest" being the "incentive and ability" to self-preference would untether regulators from having to prove any harm to consumers or the competitive process and authorize antitrust enforcers to dismantle some of America's most successful companies. This would create widespread issues for consumers and stifle innovation.

Consumers would bear much of the consequences of this legislation in the form of diminished product offerings and less convenience. Under this European-style framework, Apple Music, Prime Video and other other services consumers enjoy would become a thing of the past. Consumers benefit from the convenience of these offerings, and the vertical integration that this legislation would deem unlawful is common in retail, grocery, video streaming, and other industries. Limiting consumer choice is antithetical to the goal of creating more competition, and overtly discriminating against a small subset of companies for a common and pro-competitive practice.

This legislation would also harm startups and competition. The proposal would restrict the ability of the large online platforms to compete with each other, and instead they would be pitted against smaller startups. Similarly, other companies utilize the technology developed by these larger platforms to build out their own services. For example, Uber utilizes Google Maps to enhance their service. Incorporating products developed by these larger platforms helps other smaller companies avoid wasting resources on building redundant products and provides a streamlined service for consumers. The siloing of lines of business would have far-reaching consequences.

V. American Innovation and Choice Online Act

The American Innovation and Choice Online Act creates a series of new antitrust restrictions on business practices by the "covered platforms" that are deemed "unlawful discriminatory conduct" by the Judiciary Committee's Majority Report of last year. The bill also provides antitrust enforcement teeth against companies that do not comply with the ACCESS Act's interoperability and data portability mandates.

One of the main concepts targeted by this bill is the practice of "self-preferencing," defined as "any conduct" on a platform that "advantages the covered platform operator's own products, services, or lines of business over those of a competing business or potential competing business that utilizes the covered platform." Banning this would prevent search engines, like Google or Bing, app store searches, or Amazon, from giving their own products any display advantage in their search results.

In tandem with prohibitions on discrimination "among similarly situated persons that utilize the covered platform," this bill would effectively eliminate the ability of these search features to make product recommendations at all, as well as to integrate their own features such as Google Maps, Facebook Marketplace, or Amazon's recommended deals. Non-discrimination also prevents these platforms from making decisions about what products, content, or apps to exclude from their platforms, which would make it more difficult for them to block fraudulent or malicious software from being offered to their users.

These banned practices are a key part of what makes these online services useful, not only to consumers but also to the thousands of smaller businesses who are enabled by these platforms to reach a far wider customer base than they ever could on their own.

VI. Platform Competition and Opportunity Act

The Platform Competition and Opportunity Act of 2021 would prevent a covered platform from merging with or acquiring any company unless the covered platform can provide "clear and convincing" evidence the transaction would not harm competition, now or in the future. Forcing a company to prove a negative in this way creates a guilty-until-proven-innocent standard that would effectively ban all covered platforms merging or acquiring any company. This would be harmful for startups and stifle the innovation these smaller companies provide.

Startups have a failure rate of 90 percent, and a 2020 report found that 58 percent of startups plan to be acquired. The exit strategy of being acquired helps startups attract investors, and the money brought in from a buyout can be used to fund new projects. Banning all mergers and acquisitions (M&A) also ignores the important capital investments made in this sector. The 2021 Investment Heroes report published by the

Progressive Policy Institute shows eight out of the 10 top companies on the list were in the tech, e-commerce, and broadband sectors. It goes on to explain that the capital investments made by these companies were "critical" to "keeping people working and propping up the economy" during the COVID-19 pandemic. Arbitrarily banning M&As for this sector will harm startups and diminish the United States' standing as the global leader in the technology sector.

The M&As from established companies and new entrants provide important consumer benefits. Startups can focus on more niche markets that can then be brought to consumers at scale and with better technology from established companies. For example, Uber acquired alcohol delivery service, Drizly, with plans to integrate the service with their UberEats app. AOL and Yahoo had a market capitalization of over $200 billion and $150 billion respectively at their peaks, but a failure to innovate and stay relevant resulted in a precipitous drop with these companies being sold this year for under $5 billion. Innovation is synonymous with survival for companies in the technology space, and M&As are an important avenue to keep up with a dynamic market. The technology and e-commerce markets are not zero-sum markets and should not be treated as such.

VII. Contact Information

NTU appreciates the Committee's consideration of our views on this important matter and we stand ready to work with you during the 117th Congress.

Should you have any questions about the policy issues discussed in this memo, please do not hesitate to reach out to NTU's Will Yepez at wyepez@ntu.org or NTU Foundation's Director of Technology Policy Josh Withrow at jwithrow@ntu.org.