To: Members of the Senate Committee on the Judiciary
From: Will Yepez, Policy and Government Affairs Associate, National Taxpayers Union
Date: February 1, 2022
Subject: NTU Views on the Markup of S. 2710, the Open Apps Markets Act

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I. Introduction and Key Taxpayer Considerations

On behalf of National Taxpayers Union (NTU), the nation's oldest taxpayer advocacy organization, we wish to share some of NTU's views and considerations on the Open Apps Markets Act (S. 2710). This legislation would place restrictions on a "covered company" (a person who controls an App Store on a mobile or a general purpose computing device with more than 50 million U.S. based users) including making it unlawful to require the use of an in-app payment system or to use non-public information to compete with an app, and would mandate interoperability.

Unfortunately, this legislation has several concerning implications for consumers and small businesses. These include:

- Narrowly defining market definition such that it would only target two companies' App Stores when hundreds of app stores exist, as well as browser extensions;
- Mandating interoperability and sideloading which thereby creates serious consumer privacy and security concerns;
- Banning self-preferencing when the practice is both common and can be pro-consumer;
- Enacting a private right of action that could expose the two affected companies to meritless lawsuits; and
- Undermining the consumer welfare standard by using antitrust to boost large developers rather than protect consumers and competition.

In addition to these concerns, we would have hoped the committee would have held one or more hearings on this legislation. While the committee held a hearing on app stores generally, like the American Innovation and Choice Online Act, there was no hearing on the specific legislation prior to a markup. Interoperability is a complex topic, and the ramifications for an interoperability mandate can extend far beyond obvious examples. The impacts of this legislation on consumers deserves to be fully discussed prior to a markup.

II. Changes and Amendments That Could Improve the Legislation

While we strongly urge all committee members to ***oppose*** the bill, NTU still offers suggestions and recommendations that we believe would improve this legislation. They are:

- **Reduce ambiguity in the bill:** This legislation would apply to a covered company that owns an App Store on a mobile device or general computing device, but the term "general computing device" is not defined. For example, would a company's AR/VR App Store be covered by this legislation if they had 50 million U.S. based users? With more companies expanding their technology offerings, Congress should ensure that onerous regulations aren't stifling innovations or creating unnecessary bureaucracies.

  Sec. 3(e) would prevent a covered company from "unreasonably preferencing or ranking the Apps of the Covered Company." While the legislation states "unreasonably preferencing" *includes* ranking schemes or algorithms based on ownership, the bill does not state that is the *only* criteria. Would a covered company displaying their app that is more popular with consumers above a lesser used app be considered a violation? With the private right of action included in this legislation, any developer could sue an App Store operator for displaying the covered platform's app, even if that app is more desired by consumers. While "self-preferencing" can be a pro-consumer practice, if the bill's authors believe self-preferencing an app harms consumers and competition, this ban should apply to every App Store, not just ones on mobile devices with over 50 million users. Instead, it appears this addition is meant to bolster competitors rather than protect consumers.

  Sec. 4 allows for privacy and security protections if a covered platform can prove with clear and convincing evidence that the changes were "narrowly tailored" and could not be achieved by less discriminatory and technically possible means. This would grant Lina Khan's Federal Trade Commission (FTC) significant discretionary power in determining whether a change is "narrowly tailored" or unduly discriminatory. Unfortunately, the ambiguous language would allow unelected bureaucrats to choose winners and losers.

- **Strike Sec. 3(d)(1),(2), sideloading requirements:** Sideloading, the ability to download or install an app without going through the operating system's app store, presents risks for consumers. While some claim mandating sideloading would increase competition, with hundreds of app stores and browser extensions available, robust competition already exists without heavy-handed Congressional action. Ironically, even as this legislation is considered in the Senate, the Biden administration has raised security concerns about similar sideloading proposals by the European Union.

  Additionally, there are serious privacy and security concerns that would accompany a sideloading mandate. Android devices, which do not have the same closed ecosystem as iPhones, were responsible for 47.15 percent of all infected devices, while the iPhone was responsible for less than 1 percent. Understandably, there are trade-offs between a more closed or open ecosystem, but that is a choice for the consumer to make.

Consumers' trust in an App Store's vetting process benefits smaller businesses by providing a reasonable sense of security. However, this legislation would prevent operating systems from placing security checks in place, which could lead to consumers downloading untrustworthy apps, putting consumers at risk. If trust in the vetting process is significantly undermined, consumers could be less likely to choose to download third-party apps they do not recognize, disproportionately harming smaller competitors.

Lawmakers should avoid homogenizing mobile App Stores. While some tech savvy consumers may be willing to risk a more open app ecosystem, others prefer the closed, "walled garden" approach. Forcing Apple to be more like Android does not benefit consumers and could negatively impact consumer privacy and security, and the provisions to protect consumer privacy (as discussed below) are inadequate. Lawmakers should focus on a reasonable federal data privacy standard rather than put consumer privacy at risk.

- **Strike Sec. 3(c), prohibiting the use of non-public business information:** This section would make it unlawful for a covered company to use non-public information to compete with an app. Grocery or retail stores, where self-preferencing is a common business practice, could track consumer shopping habits through inventory reports or loyalty programs and use private labels to compete with name brands. This both increases competition and gives consumers more options. While no company enjoys seeing a competitor build a better mousetrap, limiting consumer choice is the wrong approach to increase competition.

- **Enhance Sec. 4 Privacy Protections:** While it's positive to see exceptions to these burdensome regulations in place to protect consumers' security and privacy, they fall short of their goal of protecting consumers. As previously stated, the ambiguous language in this legislation places significant discretion with federal agencies. Uncertainty from covered platforms on what would constitute a violation of this bill, combined with a private right of action, would make it more difficult for these companies to act to protect consumers.

  Several lawmakers on this committee have expressed concern over apps like TikTok and other apps with ties to foreign governments. This legislation could restrict a platform's ability to vet and remove malicious apps that could threaten consumers' privacy. Instead, when a new security or privacy threat surfaces, a company could find it in their interest to take a hands off approach or wait for government direction rather than acting quickly to protect consumers. Meanwhile, consumers would be at risk.

  Not only does this legislation place the government at the center of business negotiations, but it significantly hampers a company's ability to protect consumers. Lawmakers should make improvements to this section to ensure companies are able to act expeditiously and effectively to protect consumers' privacy and security from threats.

III. Conclusion and Contact Information

While these recommendations are not an exhaustive list of all of NTU's concerns, we believe these are commonsense changes that could meaningfully improve the bill. NTU appreciates the Committee's consideration of our views. We stand ready to work with you on ways to remove barriers to competition, protect consumers, and preserve the U.S. role as the global leader in innovation and new technologies. Should you have any questions about the recommendations in this memo, please do not hesitate to reach out to Will Yepez at wyepez@ntu.org.