

Nightmare on Main Street:

The Effects of 'Populist Antitrust' on America's Small Businesses

Policy Analysis

August 2021

CATALYST RESEARCH

Introduction

Antitrust Regulation in the Biden Era

Since the election of President Biden in November 2020, a broader, even radical, view of private markets competition commonly called “Populist Antitrust” (also “Hipster Antitrust” or the “New Brandeis movement”), which seeks to overhaul U.S. competition law completely, has rapidly spread through Washington. The president has appointed or nominated Populist Antitrust advocates for key roles at the White House National Economic Council (Tim Wu), the Federal Trade Commission (FTC) (Lina Khan), and most recently, the Department of Justice (DOJ) Antitrust Division (Jonathan Kanter). Across town, members of Congress - most notably Rep. David Cicilline on the Judiciary Committee, Sens. Amy Klobuchar (a Democrat), and Josh Hawley (a Republican), proposed Populist Antitrust legislation.

Why now? Besides a favorable political climate (for Democrats), there is a feeling among a small but influential group of academics, policymakers, and regulators that so-called “big tech” companies are “too big.” While the courts do not view size as an offense in itself, Populist Antitrust does, equating size and success with anticompetitive behavior and implicit consumer harm. Whereas traditionally, large companies were recognized as providing consumer benefits, including lower prices and more choices, Populist Antitrust flips economics on its head and views size as harmful to consumers.

Consequences of Populist Antitrust for Small Business

Much has been written about the potential implications of Populist Antitrust by legislators, regulators, legal experts, big business lobbyists, and national journalists. But the perspective of the small- and medium-sized businesses (SMBs) - that together drive about half of the country’s economy - has been pushed aside. In America, all issues are small business issues, including antitrust laws aimed at leading technology companies.

COVID-19 dramatically accelerated SMB digital transformation, as they relied heavily on digital tools to operate their businesses, including using digital hiring and training platforms, digital advertising technologies, and e-commerce and online marketplace sales tools. This reliance of small businesses on digital tools for survival during the pandemic has been called the “Digital Safety Net” in an extensive survey of SMB leaders that found:

- 98% of small businesses say digital tools are helpful in running their business
- 81% changed their business to incorporate new digital tools and strategies due to the pandemic
- 37% (roughly 11 million) would have closed all or part of their business during the pandemic without access to digital tools
- 93% intend to maintain or increase their use of digital tools after the pandemic
- 63% prefer to get training related to using digital tools in their business from the private companies who make the tools

Congress and regulators have yet to address the important question about broad and unintended consequences of Populist Antitrust on U.S. SMBs (not to mention millions of SMBs in Europe and elsewhere that also rely on these tech companies and their digital tools). This independent analysis should serve to inform ongoing conversations and start new ones as it supports stakeholders and policymakers as they undertake this important effort.

The New Populist Antitrust Legislation

The Investigation

The seeds for the spread of Populist Antitrust through Washington were planted as far back as February 2018, with the formation of the Congressional Antitrust Caucus by Rep. Cicilline asserting that “industry consolidation” was causing lower wages and higher prices. At the time, Rep. Cicilline’s party was in the minority, but almost exactly a year later (January 2019), he became Chairman of the House Judiciary Committee’s powerful Antitrust, Commercial and Administrative Law Subcommittee (“Antitrust Subcommittee”). A roughly 16-month long investigation titled Investigation of Competition in Digital Markets ensued and was released in April 2021 with this official statement that laid out a vision for the future work of the Antitrust Subcommittee, the DOJ, and the FTC:

“Amazon, Apple, Google, and Facebook each hold monopoly power over significant sectors of our economy. This monopoly moment must end. I’m grateful to my colleagues on both sides of the aisle who worked with me over the past two years to compile this Report, which makes clear that Congress and the antitrust enforcement agencies must step up to restore a competitive marketplace, enhance innovation, and protect our democracy. Now that the Judiciary Committee has formally adopted our findings, I look forward to crafting legislation that addresses the significant concerns we have raised.”

Rep. Cicilline's investigation was ostensibly about digital markets (which are complex and involve hundreds of companies), but in actuality it was targeted at four so-called "dominant online platforms" - Google, Apple, Facebook, and Amazon ("GAFA"). In the simplified view of Rep. Cicilline, as stated in a [recent New York Times interview](#), "there's no question they're too big."

The Legislation

Rep. Cicilline and colleagues next developed the four pieces of legislation below. At the time of writing, there are no immediate plans to put them to a vote, as there is general acknowledgment - even by Cicilline himself - that [there is still work to be done](#). Members of his own party, [the New Democrat Coalition](#), [raised serious concerns](#) stating, "The scope and impact of these bills could have a tremendous impact on the products and services many American consumers currently enjoy and the competitiveness of our innovation economy." And many California-based Democrats [share these concerns](#). However, Congress may vote on some or all of the proposals in the coming weeks.

Ending Platform Monopolies Act (H.R. 3825): "To promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses."

What this means: This could force large digital companies to split different lines of business into different companies. For example, Amazon might have to turn its owned stores and products, its fulfillment technologies and services, and its third party seller marketplace into three separate companies (which may not even be technically possible for them to do). Google might have to separate Workspace (small business email, files, and cloud storage), YouTube, Google Ads and search into separate businesses, creating a logistical nightmare of login/security and interoperability issues for everyone currently using multiple platforms from the same parent company. Size, scale and interconnectedness across business lines unquestionably leads to efficiencies that translate to better services and lower prices for users. Breaking companies apart would have the opposite effect.

American Choice and Innovation Online Act (H.R. 3816): "To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes."

What this means: This could have very wide-ranging implications, including everything from how Apple runs its app store (security, profitability and fees, and more), to how Google displays Google Maps and Google My Business customers in search results, to how Amazon can sell its own "house brand" products. White label goods have been common in every marketplace since the dawn of commerce (e.g., department stores selling house brands alongside designer labels).

This legislation would create separate rules for online marketplaces than brick and mortar ones and could eventually subsume the online stores and marketplaces of companies such as Walmart and Target that behave in much the same way but are not widely considered “dominant tech companies” and are thus under less scrutiny...at the moment.

Platform Competition and Opportunity Act of 2021 (H.R. 3826): “To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.”

What this means: At the least, this would have a chilling effect on the technology mergers and acquisitions (M&A) space, primarily harming innovative startups. (There is already evidence of this happening during 2021.) Startups naturally want to sell their business to the highest bidder. Arbitrarily blocking large companies from acquiring startups, simply because they are large, will drive down prices and rob startups of selling for their full value. And while the legislation as-written only applies to companies with over 50M monthly platform users or 100,000 business customers and a market capitalization of over \$600B, these figures are arbitrary and over time will capture more and more of the marketplace, making it difficult or impossible for startups to receive fair market value.

Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 (H.R. 3849): “To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.”

What this means: While “data portability” is attractive on its surface, it is more complex than transferring something simple like a phone number from one carrier to another. There are legal, privacy, and technical issues with implementing it. The digital ecosystem is powered by data and data science. Will this proposal lead to platforms having less data to analyze to power digital ads and other products and services? And if so, whom would that benefit? Additionally, the legislation only applies to certain companies but not others that had consumer data one would wish to move from one platform to another.

While these proposed bills do not specifically target individual private companies, the House Antitrust Subcommittee’s investigation, public statements by Rep. Cicilline and others, and the parameters of the bills make it clear that GAFAM are the primary targets of this effort. We note that groups representing the business and technology industry, including the U.S. Chamber of Commerce, the Computer & Communications Industry Association (CCIA), the Information Technology and Innovation Foundation (ITIF), and NetChoice, have strongly opposed the above legislation.

However, when evaluating these proposals, it is imperative to better understand the unintended downstream effects on small businesses, many still recovering from the economic and social effects of the COVID-19 pandemic, and relying on digital platforms, services, and tools more than ever before to operate their company. In this paper we take a “meta-view” of how these bills - as part of broader Populist Antitrust efforts - would have unintended consequences on the U.S. small business community.

Summary of Dimensions and Grades

As an initial entry point to analyze and “grade” aspects of Populist Antitrust’s effects on U.S. SMBs, the [Data Catalyst Institute \(DCI\)](#) examined four dimensions of the problem, graded them on a scale of A, B, C, D, or F, and then compiled an overall grade. Here, we expand the discussion of DCI’s work. We aim to use this initial analysis as a foundation for more detailed work about the interaction between antitrust enforcement and small business economics.

Overall Grade: C-

Dimensions of analysis:

Precedent - We analyzed the degree to which decades of antitrust enforcement, legal and regulatory precedent are adhered to (vs. purposely straying from such precedent). (Grade: F)

Rationality - We considered whether proposed bills or actions are rational and logically consistent given what is known about markets and companies (vs. irrational and illogical conclusions that contradict each other). (Grade: B)

Markets - We inquired whether market definition and dominance are well-considered concepts in these bills (vs. asserting domination of a market based on only anecdotes and casual observations). (Grade: C)

Quantification - We observed to what degree these bills allege harms quantified into dollars, businesses, or persons affected (vs. harms being asserted and assumed). (Grade: C)

Analysis of Dimensions and Grades

Precedent

Our Analysis

For decades, the gold standard of antitrust law and theory was the objective framework of the consumer welfare standard. Simply put, it asks: does a business practice or transaction harm consumers? With the consumer welfare standard, corporate behavior and its effects on consumers can be observed and measured, and if wrongdoing seems to have occurred, remedies can be sought through a regulatory or legal process.

Advocates of Populist Antitrust would instead like to apply an alternative, inverse form of analysis to antitrust, in which policymakers and regulators imagine an ideal market in some area of interest (personal social networking, for example) and then take action to force businesses into that mold. Rather than the government having the burden of showing a business practice or deal is “bad,” companies would have to proactively prove to the government that their actions are “good.” In a 2018 profile of (now FTC chair) Lina Khan, the New York Times described the rejection of the established consumer welfare standard as “reframing decades of antitrust law.”

Relevance to SMBs

With shifting ideals across time, political leaders, and industries, it’s impossible to know what the standard is for businesses under Populist Antitrust. Nevertheless, anything determined to fall outside that ideal would, in effect, instantaneously become illegal. Amazingly, this can also be applied retroactively to old business deals - approved at the time by the same government regulatory agencies. And the more power that the DOJ and FTC have to act on these ideas, the more chaos and inefficiency will exist for corporations in America.

That very same chaos and inefficiency will trickle down to SMBs who rely on the products and services GAFAM and other companies offer them at relatively low prices. What if, for example, the FTC were to eventually force Facebook to spin off Instagram as an independent company, a decade after it was acquired as a 13-person startup? SMBs using Facebook and/or Instagram might be worse off by that decision. Post-spinoff, Instagram would lose the benefits of Facebook integration, the shared data between the two brands, infrastructure (cybersecurity, accounting, tax, etc.), and access to capital. Instagram would lose a significant amount of its value to SMBs and it’s not inconceivable that it could fail, or perhaps be acquired by a different buyer with other ideas for it.

The above is just one scenario of many that could and probably would occur. Ultimately, a government rejection of antitrust precedent will result in chaos and uncertainty for SMBs.

Our Grade: F

Rationality

Our Analysis

Allowing preconceived notions, emotions, anecdotes, and competitors to primarily drive antitrust-related conclusions, rather than hard facts based on rigorous economic analysis, results in irrational and unpredictable inconsistencies.

As one example of such irrationality, the Mercatus Center asks, “What happens when a desire to protect small businesses gets in the way of a mandate to ensure innovation? Should a court back the small businesses that can’t keep up or the firm that is gaining market share because of superior products or customer experiences?” And since different administrations and regulators might see things differently, the landscape is volatile and unpredictable.

There are other examples of irrationality already evident from legislators’ and regulators’ work thus far. As pointed out in a recent article in The Atlantic, it is puzzling that with all the interest in “big tech” that Microsoft - a company well-known in antitrust circles, with a current market cap of \$2.1T - is under virtually no scrutiny at all. The article notes that, “if bigness alone is enough to draw scrutiny, Microsoft must draw it.” This is not arbitrarily based on size, either - Microsoft acquired Skype for \$8.5B in 2011 (roughly the same timeframe that Facebook acquired Instagram), and now it’s virtually dead, replaced by Microsoft Teams. Was that a so-called “killer acquisition” to crush emerging competition? We don’t know, but it’s curious that no one at the FTC - which originally cleared the deal - seems to be interested in finding out. That similar deals between large tech companies and small but exciting companies/competitors are being scrutinized unevenly suggests that the Populist Antitrust process isn’t based on rational and unbiased factors.

Finally, when “every company is a tech company,” when will big companies with obvious footprints in tech undergo the same antitrust scrutiny? For example: Walmart, with a market cap of about \$400B (it is also the largest company in the world by both revenue and employees), has its hands in robotics, artificial intelligence, blockchain, and is now selling e-commerce technology to other retailers in partnership with Adobe, a \$300B tech company. With vaguely defined terms in the proposed legislation like “online platform” and “net annual sales”, will large companies in the financial, retail, and other industries receive the same scrutiny as GAFA?

Relevance to SMBs

SMBs require stability to stand a chance. New arbitrary standards create uncertainty and chaos. When those standards can change based on legislators' and regulators' whims, the situation becomes volatile and unpredictable, too. All of that is bad for SMBs that rely on major tech companies that are the targets of Populist Antitrust.

For example, the American Choice and Innovation Online Act ([H.R. 3816](#)) would create new restrictions on how online marketplaces sell products that would in turn result in irrational choices and outcomes that would be bad for SMBs that sell in Amazon's popular marketplace. Amazon may simply shut down its third-party marketplace due to newfound risk/liability, in favor of selling its own products and wholesaling other major brands. That hardly seems like a better outcome for SMB sellers or consumers. Or, Amazon might somehow (it is technically challenging, as everything is intertwined) spin off its third-party seller marketplace into a new company, which would have less access to Amazon's funding and logistics infrastructure, eventually resulting in higher costs for the SMBs using it.

In addition, Amazon provides fulfillment services for thousands of third-party sellers and is required to ensure delivery deadlines for Amazon Prime products. Would the proposed law prohibit Amazon from ranking Amazon Prime products higher in search results because that would be "discriminatory" against non-Prime products? Amazon has risen to the heights it has because it is a one-stop shop for consumers that can shop for thousands if not millions of different items, many of which can be delivered within two days, benefiting consumers and SMB sellers alike. Changing the way Amazon operates will almost certainly diminish the value of the platform for both.

Additionally, the proposed legislation only applies to companies that have 50M users or 100,000 business users, a market cap of more than \$600B, and are a "critical trading partner" for others that use their platform (which at the moment is just GAFAM + Microsoft), who's to say that will stay exactly the same for (say) the next decade? Perhaps Congress will decide that the \$600B bar is too high, and lower it to \$300B to ensnare more companies. Or maybe the stock markets will broadly keep climbing and rather than just GAFAM + Microsoft there will be 40 companies that will now be regulated in this way - retailers, financial institutions, and more. Good for lawyers, not good for SMBs.

We also know arbitrary thresholds on laws often incentivize companies to change their business models to stay below those thresholds, such as less investment in certain lines of business, a freeze on M&A, different accounting strategies, etc. What happens if companies decide to limit their business customers to under the 100,000 government limit, and limit those sales to larger ones to maximize revenue. Why help millions of tiny businesses when it puts a target on your back?

Our Grade: B

Markets

Our Analysis

Defining markets in antitrust is critical, because the question of whether a company dominates a market or competes unfairly within it is dependent on the definition of what the market is in the first place. The Antitrust Subcommittee's report Investigation of Competition in Digital Markets singles out "digital" markets as distinct from physical markets (traditional brick and mortar stores) or hybrid markets that span online and offline. Is there a difference, though?

Populist Antitrust advocates are very concerned about "tech companies" or "digital companies," but conceptually, there isn't much difference between them and other companies. In many cases, what people commonly call "tech companies" are simply companies that have digitized more quickly than competitors (is Uber a tech company or a highly-digitized transportation dispatch company?). Both Amazon and Walmart have physical stores, online stores, third-party marketplaces, "house brands," and spend large amounts on technology. Why is one perceived as a "technology company" and the other as a "traditional retailer"? The history of the companies and preconceived notions that don't match up with objective facts.

Markets also should not be defined arbitrarily in order to fit with preconceived notions of company wrongdoing - but that's already happening. While we discuss this further under "Quantification" below, the FTC brought a case against Facebook for supposedly dominating the market for Personal Social Networking (PSN) Services, which was essentially a market invented expressly for this lawsuit. The case was almost immediately dismissed by the U.S. District Court for the District of Columbia because the FTC didn't establish what the market was exactly, or Facebook's market share within that market. Defining markets in such a way that a target company is a "monopolist" in that market is insincere, unfair, and not the best approach to regulating what may be genuine concerns with very large companies or particular markets.

Relevance to SMBs

While a company is under serious scrutiny by regulators, or actively being sued by them, it may be loath to invest in certain areas, roll out new products or initiatives, and complete planned deals, all of which can have trickle-down effects on SMBs.

Early indications from Populist Antitrust supporters and the Antitrust Subcommittee's proposed bills strongly suggest that, as a government strategy, regulators will make the crime fit the punishment at all costs. This may change, however, with pushback from the courts as in the Facebook case.

Our Grade: C

Quantification

Our Analysis

Followers of Populist Antitrust are reluctant to conduct quantitative analysis relative to the consumer welfare standard in order to assess potential market dominance and consumer harm. Rather, they rely on more anecdotal evidence that frequently asserts causal links between corporate behavior and consumer harm, without actually rigorously proving the link or ruling out alternative explanations.

In order to actually understand marketplace competition and consumer harm, antitrust law should be guided by independent economic analyses that are impartial and objective, and consistent across companies and industries. They must also take into account reasonable tradeoffs between different business actions, and also the net good/bad resulting from positive benefits vs. any consumer harm (i.e., “the good outweighs the bad”). Populist Antitrust has a tendency to look only at what they consider bad, and their remedy is to simply prohibit it, without understanding the complete dynamics of the system. Clearly, this lack of quantification can result in chaos and uncertainty, because reasonable people won’t be able to agree on which markets have too much economic concentration, or what’s to blame if that is indeed the case.

For instance, as Prof. Joshua Wright notes while discussing a report he authored for the Organisation for Economic Co-operation and Development (OECD), many claims of Populist Antitrust cited as evidence of wrongdoing “do not survive and are plagued by a combination of measurement problems, weak inference, and lack of identification.” As one example, the Populist Antitrust claim that the consumer welfare standard has resulted in a lack of enforcement, yielding a concentration of market power lies on a foundation of studies that examined concentration across broad sectors such as “retail” rather than relevant antitrust markets. Thus, these studies didn’t actually analyze effects on competition at all.

And while certainly one can quantify that “big tech” companies have grown bigger of late, that is not the same as demonstrating that this bigness has snuffed out competition, or even proving that there is too much concentration in the industry. To the contrary, one could argue that the situation is the exact opposite:

- Digital companies including Zoom, BigCommerce, Monday.com, SquareSpace, ZipRecruiter, DoorDash, ZoomInfo, and Snowflake all had initial public offerings (IPOs) during the last two years - and many of their offerings compete with GAFAs’ offerings.

- There are currently 712 “unicorn” tech startups (private companies with valuations of \$1 billion or higher) with a cumulative valuation of \$2.337 trillion. Over 300 of them became unicorns just in 2020 and 2021; about two-thirds of these new unicorns are U.S.-based companies.
- Global venture capital (VC) funding of tech startups hit an all time high in Q1 2021 at \$125 billion. VC funding also remained strong throughout the pandemic, with about \$60-90 billion invested per quarter.

These statistics hardly paint a picture of the disappearance of competition and innovation; unlike Vanderbilt’s railroads, GAFAM has plenty of well-funded competition. As noted tech commentator Benedict Evans recently wrote in an article about the proposed antitrust legislation, “People in tech agree on very little, but everyone would agree we’re in the hottest market for tech startup creation in history - any relevant data would tell you that tech startup creation has actually risen by three to four times in the last decade.”

Relevance to SMBs

Populist Antitrust advocates for and uses a less predictable approach than a consumer welfare standard based in economic terms and the measurement and quantification of harm. Lacking quantification and relying largely on qualitative anecdotal evidence would result in standards, investigations, lawsuits, and consequences that are more difficult to anticipate and predict, and thus, plan for.

For SMBs, a less predictable, less quantified standard for antitrust investigations means far more uncertainty. This uncertainty will ultimately harm SMBs as they conduct strategic planning related to the use of digital innovations in their business, and will have deleterious effects on aspects of their business operations and day-to-day sales and marketing tactics to the extent that their tech vendors are forced by the government to change their offerings.

While advocates of Populist Antitrust yearn for making their case with powerful prose, our view is that opposing counsels will push back forcefully on this and judges will, one way or another, require quantification of markets, dominance and harm. This has, in fact, already happened during the Biden administration and may be a signal of similar situations to come.

At the end of June 2021, U.S. District Court for the District of Columbia dismissed (at least for the time being) an FTC antitrust case brought against Facebook in December 2020 dealing in part with its 2012 and 2014 acquisitions of Instagram and WhatsApp (which the FTC approved at the time). The reason for the abrupt dismissal? Simply, the FTC did not establish that Facebook had a monopoly in what the government called Personal Social Networking (PSN) Services.

The court particularly points out the FTC's lack of rigorous analysis and quantification:

"The Complaint is undoubtedly light on specific factual allegations regarding consumer-switching preferences. These allegations – which do not even provide an estimated actual figure or range for Facebook's market share at any point over the past ten years – ultimately fall short of plausibly establishing that Facebook holds market power."

"The FTC's Complaint says almost nothing concrete on the key question of how much power Facebook actually had, and still has, in a properly defined antitrust product market. It is almost as if the agency expects the Court to simply nod to the conventional wisdom that Facebook is a monopolist."

Our Grade: C

Why Populist Antitrust is a Nightmare for Main Street

The pandemic inadvertently changed how Americans think about and utilize technology: video conferencing classes for students, apps to get food and supplies delivered, e-commerce to drive sales, and more. Digital transformation was no longer optional. For SMBs facing government restrictions, reduced foot traffic, and other limitations, these digital tools were literally a lifeline for survival - the Digital Safety Net.

As a natural consequence, the companies supplying these digital tools (e.g., GAFA but also many others such as Zoom, DoorDash, and Shopify) broadly grew larger during the pandemic. It wasn't a diabolical scheme - these companies create innovative and valuable products and services whose value went up during a crisis, while prices stayed largely unchanged. Both individual consumers and small businesses had a "menu" of products and services to choose from, some in suites of offerings from larger companies, and they chose those that met their needs and budgets.

We are currently living in an "inter-COVID world," a confusing environment in which in many places COVID-19 is relatively under control, but due to local or international flare-ups, the virus is still a concern and restrictions on things like travel and dining will still have effects on commerce for the foreseeable future. (According to the Global Business Travel Association, for instance, a full recovery of business travel is not expected until 2025.) Thus, most SMBs will continue to heavily rely on digital tools to hire and train people, drive sales, and optimize operations.

Our analysis concludes that if Populist Antitrust and the proposed legislation becomes the driver for antitrust regulation, it would create a more extreme “VUCA” (volatile, uncertain, chaotic, and ambiguous) business environment for SMBs, due to the widespread and evolving effects over a period of many years on GAFAs and possibly other companies that provide critical digital services to them. This would be, in a nutshell, small business’ worst nightmare.

Consequences of Populist Antitrust for SMBs

What would be some of the consequences of Populist Antitrust on SMBs? For one, it would hamstring SMB recovery from the pandemic. With the most onerous societal restrictions related to the pandemic only just recently being lifted during May-June 2021 in most areas of the U.S., this new legislation couldn’t be coming at a worse time for small businesses. Consider a future in which GAFAs are smaller, less integrated across business units, have diminished reach, and in some cases have diminished product quality due to a decrease in investment or interest. In that future, SMBs with limited budgets and limited or no technology staff will experience a number of pain points that will slow their growth and innovation.

- They will have to increase their number of technology vendors, resulting in more user agreements, more data sharing with different companies, more passwords, and more frustration.
- They will pay more for services because each vendor will have to recoup its own individual transaction costs and overhead.
- They will be more likely to make mistakes with customer and business data, and experience more frustration when each service upgrades independently and causes problems with other services.
- They will spend more time on technology and less time on the core business of developing products, selling and servicing customers, and training employees.

Second, beyond the tactical aspects of SMB operations listed above that could be disrupted if GAFAs offerings are disconnected from each other, some aspects of the newly proposed legislation would, in effect, rewrite some of the rules, regulations and standards of the large tech platforms and digital tools and begin to create ambiguous or even absurd situations. Some of these would wreak havoc on SMB strategies, including how SMBs brand themselves or their products and services, their approach to marketing, their sales strategies, the mechanisms by which they fulfill orders, and more. Some effects would be seen almost immediately, while other effects would slowly manifest themselves over time. As the Connected Commerce Council, an advocate for digitally-driven SMBs points out, if you change the model, you change the math.

Finally, this legislation would also have a chilling effect on M&A in the name of preventing so-called “killer acquisitions” done specifically to reduce competition for the acquirer from the

acquired. Because technology infuses so many different sectors, larger companies would be unlikely to pursue (if not be outright banned from) deals in areas as diverse as communications infrastructure, artificial intelligence, video games, and biotechnology. While some view tech M&A as broadly anticompetitive, the overwhelming majority of deals are truly beneficial to SMBs.

- Acquisitions as a lifeline: A stagnated or nearly failed company unable to sell its products or access additional capital can try to have their innovations live on within a larger company; this kind of M&A is, frankly, a lifeline to many risk-taking innovative companies.
- “Acquihire” as a side benefit: Even if the smaller company’s innovations are killed off - typically because of straightforward business reasons like return on investment or product-market fit and not for anticompetitive reasons - the acquired company founders and employees frequently have already obtained employment at the larger technology companies (sometimes called “acqui-hiring”), which has its own obvious benefits.
- Reinvestment back into small business entrepreneurship: Investors in the small acquired companies can break even or come out ahead, which obviously earns them capital that is then often applied to future investments in younger innovative small companies. Founders and employees who have equity in the company frequently parlay such windfalls into new entrepreneurial ventures as well.
- Acquisitions as a badge of prestige: Being acquired by a well-regarded company - or frankly any company - is considered a prestigious “exit” within the culture of the technology industry. And for companies not wishing to go bankrupt, stay private forever, or IPO, it’s the only reasonably good option.

Conclusions

While some antitrust reform may very well be necessary, and particular products, services, partnerships, and acquisitions do deserve extra scrutiny, the House antitrust bills currently - as many others have pointed out - are written poorly and would have unintended consequences. Among those being negatively affected are SMBs not only in the U.S. but around the world, as large tech companies such as GAFAM provide valuable services to businesses in diverse industries and nations. As this antitrust legislation is being discussed by legislators and regulators, it is critical that they take into consideration the important voice of small business owners, managers, and employees who now rely on digital tools to keep businesses afloat, keep people employed, and with any luck, help them to thrive again.

In our view, radical antitrust reform that throws out the consumer welfare standard isn’t even necessary to deal with any legitimate concerns about large technology companies, other very large businesses, and digital platforms, marketplaces, software, and tools. Rather, hard work needs to be done to better fit new economic concepts around the flow of data, tradeoffs associated with “free” online services, and global digital commerce into existing models in order to adapt them for a new age of digitally-driven business.

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