

The Data Catalyst Institute (DCI) supports stakeholders and policymakers as they undertake the important and difficult work of enacting sound, operational public policy governing the use of data by and for consumers and data-focused enterprises. DCI considers and reports on regulatory and legislative proposals to celebrate good policy and identify challenges of many proposals. (DCI has released a series of [detailed ‘Report Cards’ on policy legislation](#) in the U.S., EU, and other jurisdictions.)

Proposals often evolve — before and even after enactment. DCI will monitor amendments, court cases, and other changes to adjust our analyses and conclusions to reflect future changes. Our objective is not to criticize or condemn but rather to support a better, broader understanding among policymakers, the media, and stakeholders in general.

## **Analysis of the House Judiciary Committee Tech Antitrust Legislation and Report Card on ‘Populist Antitrust’**

On June 24, 2021, the House Judiciary Committee [approved several bills](#) that, individually and collectively, are intended to “enhance antitrust enforcement and restore competition online”:

- [Ending Platform Monopolies Act](#)
- [American Choice and Innovation Online Act](#)
- [Platform Competition and Opportunity Act of 2021](#)
- [Augmenting Compatibility and Competition by Enabling Service Switching \(ACCESS\) Act of 2021](#)

We appreciate the Committee’s goals, but this so-called “[Populist Antitrust](#)” (also known as “Hipster Antitrust”) legislation is broadly written and would have many unintended consequences. We are particularly concerned with the bills’ impacts on small businesses. Here, we briefly outline our concerns with each bill and then present our Report Card for Populist Antitrust.

### **House Legislation**

#### **Ending Platform Monopolies Act (H.R. 3825):**

**Purpose:** “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.”

**Impact:** This legislation will force large digital companies to divide different lines of business into different companies, and to change the integrated nature of those lines of business.

**Concern:** Digital platforms’ size, scale and interconnectedness unquestionably lead to efficiencies that produce better services and lower prices for all stakeholders, including small business customers and

individual consumers. Breaking companies apart would detrimentally impact the platforms, but the end result would be higher costs and less effective services for small businesses.

#### **American Choice and Innovation Online Act (H.R. 3816):**

Purpose: “To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.”

Impact: This will have wide-ranging implications, including how app stores operate, how search results are integrated with maps or shopping suggestions, and how online stores position “house brands” in relation to other products.

Concern: Small businesses rely on integrated platforms - including some that would be covered under this bill as written and many that will be covered as the platforms grow larger - to provide a variety of services and value-adds, including data security, payments, logistics and delivery, mapping and advertising. Over-regulation of these efficient and optional services will make small business operations more complex and expensive, and will drive small businesses away from digital business when they should be embracing it to stay competitive.

#### **Platform Competition and Opportunity Act of 2021 (H.R. 3826):**

Purpose: “To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.”

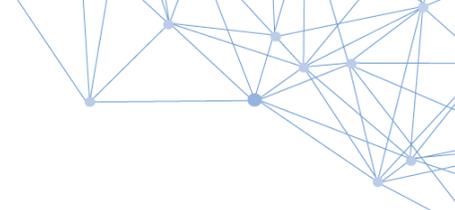
Impact: This bill is intended to inhibit growth and market dominance by the largest platforms, but it will also inhibit the competitive and growth potential of mid-sized platforms that aspire to greatness, and the exit options of small and medium-sized companies. This bill will also overwhelm the merger review teams in the Federal Trade Commission and Department of Justice Antitrust Division, as they will be required to make several new determinations of market definition and dominance, and also to forecast economic impact of potential mergers with uncanny precision that arguably is impossible.

Concern: This would have a chilling effect on the technology mergers and acquisitions (M&A) space, and, thus, investors, startups and innovation. ([There is already evidence of this happening during 2021.](#)) Arbitrarily blocking large companies from acquiring smaller firms will drive down prices and rob investors and smaller companies of their opportunity to sell for their full value.

#### **Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021 (H.R. 3849):**

Purpose: “To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.”

Impact: Consumers (including business consumers) will have a new right to take “their data” with them if they unsubscribe or otherwise stop utilizing a digital platform.



Concern: There are legal, privacy, and technical issues with requiring broad and undefined data obligations. For customers and businesses that remain with a platform after others depart, this bill may diminish the value and service provided by the platforms as they will have less data to analyze, and, thus, less accurate digital ads, search results, and other products and services.

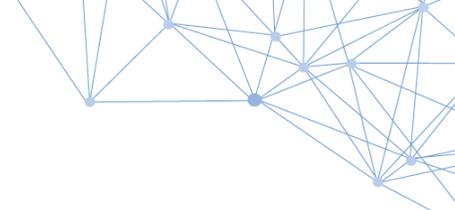
## 'Populist Antitrust' Report Card

Populist Antitrust is broader than just the currently proposed House legislation, as it is already embedded in Senate legislation (e.g., the "[Klobuchar Bill](#)") and will also impact executive actions by, e.g., the White House Council of Economic Advisors, Federal Trade Commission, and Department of Justice Antitrust Division. Thus, this is a Report Card of four aspects of Populist Antitrust specifically in relation to its effects on U.S. small businesses. We aim to use this initial analysis as a foundation for more detailed work about the interaction between antitrust enforcement and small businesses.

### **Overall Grade (effects of Populist Antitrust on small businesses): C-**

Four specific dimensions of analysis:

1. **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)
  - The consumer welfare standard that asks whether a business practice or transaction harms consumers is the long-time "gold standard" of antitrust law and theory. Populist Antitrust diminishes this standard by making it less relevant or irrelevant if an organization is "dominant" according to the prevailing standard of that moment, and if, e.g., an acquisition will make it a stronger company regardless of whether the acquisition also benefits consumers.
  - Populist Antitrust advocates for an inverse framework ("guilty until proven innocent") where companies have to prove to the government that their actions are good, rather than the government having the burden of showing a business behavior is "bad."
  - Shifting and unpredictable standards, particularly when applied retroactively, will produce chaos and inefficiency for large companies that will trickle down to small businesses that rely on their products and services.
2. **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)
  - Populist Antitrust allows preconceived notions, emotions, anecdotes, and competitors to primarily drive antitrust-related conclusions, rather than hard facts based on rigorous economic analysis. This results in irrational and unpredictable inconsistencies.



- SMBs require stability; new arbitrary standards create uncertainty and chaos. When standards change based on legislative and regulatory whims, the economy becomes volatile and unpredictable which negatively impacts all businesses, including SMBs that rely on major tech companies that are the targets of Populist Antitrust.
3. **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)
- 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 market’s definition. Markets should not be defined arbitrarily to fit a preconceived notion of wrongdoing. Additionally, while Populist Antitrust advocates try to define “digital markets” as distinct from physical ones, conceptually, they are the same.
  - While a large 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 negative effects on SMBs.
4. **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)
- Populist Antitrust advocates 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 anecdotal evidence that frequently asserts causal links between corporate behavior and consumer harm without proving the link or assessing alternative explanations. Lacking quantification and relying largely on anecdotal evidence would result in standards, investigations, lawsuits, and consequences that are more difficult to anticipate, predict, and plan for.
  - A less predictable, less quantified standard for antitrust investigations means far more uncertainty. To the extent that SMBs’ technology, marketing, e-commerce, payments, advertising and logistics vendors are forced by the government to change their offerings, this uncertainty will ultimately harm SMBs.

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Keeping pace with shifting markets and regulating technologies before they do harm is an admirable goal. The Data Catalyst Institute (DCI) supports well-intentioned policymakers working for their constituencies, and we recognize that the Judiciary Committee’s antitrust legislation is rooted in good intention. But these bills, as approved by the Committee, will detrimentally and severely impact not only major tech companies, but also the small businesses that leverage “big tech” services to operate and grow, and consumers.

**The Data Catalyst Institute strongly recommends that Members of the House of Representatives reconsider the Judiciary Committee’s antitrust legislation, and, at a minimum, address the downstream implications on America’s small businesses before moving forward.**