

**NATIONAL
TELECOMMUNICATIONS AND
INFORMATION ADMINISTRATION
DEPARTMENT OF COMMERCE**

Docket No. 230103-0001

**COMMENT OF
THE ANTITRUST DIVISION OF THE
UNITED STATES DEPARTMENT OF JUSTICE**

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The Antitrust Division of the United States Department of Justice (“Antitrust Division”) welcomes the opportunity to submit its views to the National Telecommunications and Information Administration (“NTIA”) in response to its Request for Comment (“RFC”) addressing issues at the intersection of privacy, equity, and civil rights.¹ NTIA’s examination of these topics in the digital economy in many ways overlaps with the Antitrust Division’s efforts to protect competition in digital markets. Promoting competition in digital markets and ensuring they are accessible and safe for consumers is critical to our economy. We commend NTIA’s thoughtful request for comments and offer the Antitrust Division’s competition-focused perspective for consideration.

The Antitrust Division is committed to promoting competition and ensuring economic opportunity and fairness for all by enforcing the federal antitrust laws and by advocating for sound competition policies. Competition in a market results in higher quality products and services. Fair competition is critical to a healthy democracy that promotes consumers’ choice and protects workers.² Competitive markets help ensure a fair and equal opportunity for all.

Markets also convey information necessary for businesses to compete and for consumers to make informed choices.³ Access to information and consumer choice is even more important at a moment when, as NTIA points out, more and more commerce and much of American life is defined by the digital economy.⁴ Thus, the Antitrust Division’s goal of promoting competition in digital markets works in tandem with NTIA’s goal of ensuring that the digital marketplace works for all Americans.

Safeguarding competition is essential to ensuring economic opportunity and fairness for all. A lack of competition harms the American economy and the American people – workers, consumers, and businesses alike. Among other harms, a lack of competition in the digital economy enables dominant firms to impose terms and conditions that are often exploitative of individual privacy.⁵ It also facilitates the processing, sale, and use of personal data in ways that

¹ *Privacy, Equity, and Civil Rights Request for Comment*, 88 Fed. Register 3714 (Jan 20, 2023).

² *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4-5 (1958) (“The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.”).

³ *See id.*

⁴ *See* 88 Fed. Register at 3715-17 (Jan 20, 2023). *See also E-commerce as share of total retail sales in the U.S. 2013-2025*, STATISTA, <https://www.statista.com/statistics/379112/e-commerce-share-of-retail-sales-in-us/> (“In 2020, e-commerce sales accounted for over 14 percent of all retail sales in the United States and were forecast to rise to nearly 22 percent by 2025.”); Andrew Perrin and Sara Atske, *About three-in-ten U.S. adults say they are ‘almost constantly’ online*, PEW RESEARCH CENTER, available at <https://www.pewresearch.org/fact-tank/2021/03/26/about-three-in-ten-u-s-adults-say-they-are-almost-constantly-online/> (“Overall, 85% of Americans say they go online on a daily basis. That figure includes the 31% who report going online almost constantly, as well as 48% who say they go online several times a day and 6% who go online about once a day.”).

⁵ *See* Laura Alexander, *Privacy and Antitrust at the Crossroads of Big Tech*, American Antitrust Institute, (Dec. 16, 2021) p. 14, <https://www.antitrustinstitute.org/work-product/aai-issues-report-antitrust-and-privacy/> (“When faced with a monopoly, or uniform industry policies, consent may not reflect real choice.”) (citing Nicholas Economides & Ioannis Lianos, *Restrictions on Privacy and Exploitation in the Digital Economy: A Market Failure Perspective*, 17 J. OF

are harmful, deceptive, or unlawful.⁶ As NTIA states in its RFC, these two phenomena “can lead to disparate impacts for marginalized or disadvantaged communities.”⁷

Competitive markets, on the other hand, can produce privacy benefits.⁸ For example, in a competitive market, privacy-conscious consumers could choose between competing digital products or services based upon the strength of their privacy protections. Robust competition can also break down a dominant firm’s exclusive grip on mass quantities of data. For instance, choice among more market players can prevent harms that can result from cyberattacks that expose millions of Americans’ sensitive information held by a single entity. As one scholar has noted, “[t]he threat that consumers will abandon a given company’s products and cut off its access to their data, is only as strong as the alternatives available to the consumers.”⁹ That choice matters because monopolists often wield both ends of the double-edged privacy sword to maintain their dominant positions and shore up the moat they have built around their products. One end is aimed at consumers who, by and large, are forced to accept lax privacy standards.¹⁰ The other is aimed at competitors and other firms that are reliant upon the dominant firm’s products or services to offer their own.¹¹

When it comes to the processing, sale, and use of personal data, both American workers and consumers are vulnerable to potential abuses.¹² Location tracking is an important case study. For decades, employers have used GPS tracking devices that record their employees’

COMPETITION L. & ECON. 765 (2021) (detailing the various information asymmetries that persist regarding the collection of personal data).

⁶ See Economides & Lianos, *supra* note 5, at 770 (explaining how due to information asymmetries between the data controller and the data subject, the user may not be aware that their data was harvested in the first place, or that it might be processed for a different purpose or sold to third parties, even without that broad consent) (“The exploitation of personal data may also result from economic coercion on the basis of the user’s resource-dependence or lock-in with the user having no other choice than to consent to the harvesting and use of their data, to enjoy the consumption of a specific service provided by the data controller or its ecosystem.”).

⁷ 88 Fed. Register at 3715 (Jan 20, 2023).

⁸ See Alexander, *supra* note 5, at 16 (citing Economides & Lianos, *supra* note 5, at 838 (noting indirect benefits to privacy from increased competition)).

⁹ See Alexander, *supra* note 5, at 6 (“A lack of competition, and of viable alternatives to a given company’s products and services, neutralizes this force that might otherwise curtail, to an extent, surveillance capitalists’ extraction and exploitation of personal data. This dynamic is why the fact that tech markets are often subject to network effects and tipping, where dominant players have no meaningful rivals and consumers are locked in by high collective switching costs, is a critical concern of both antitrust enforcers and privacy advocates; network effects and tipping in tech markets are a threat to privacy because they act to undermine the competition that serves as a check on what is an otherwise unlimited incentive faced by surveillance capitalists to extract and exploit consumer data.”) (citing Maurice E. Stucke & Allen P. Grunes, *No Mistake About It: The Important Role of Antitrust in the Era of Big Data*, UNIVERSITY OF TENNESSEE-KNOXVILLE, COLLEGE OF L., Research Paper #269, at 3 (May 2015), available at <https://ssrn.com/abstract=2600051> (“[C]ompanies undertake data-driven strategies to obtain and sustain competitive advantages.”)).

¹⁰ See Stucke & Grunes, *supra* note 12, at 8 (“Given that privacy trade-offs are so clearly a concern for the vast majority of Americans, it is noteworthy that there are no viable alternatives to the Internet giants that provide free services, but only at a heavy cost to user privacy.”).

¹¹ In March 2022, the Department of Justice submitted its views in support of legislation like the American Innovation and Choice Online Act, a bill that would disallow digital platforms from using privacy as a pretext to block competition. See Views on S. 2992 and H.R. 3816 the American Innovation and Choice Online Act, DEP’T OF JUSTICE (Mar. 28, 2022), <https://www.justice.gov/ola/page/file/1527276/download>.

¹² See 88 Fed. Register at 3716-17 (Jan 20, 2023).

movements, both on and off the job.¹³ Today’s methods of data collection – including AI-enhanced surveillance devices – present even more serious concerns. So too do modern methods of data processing, which draw on artificial intelligence and algorithm-based decision-making, which “makes it possible for employers to analyze, sell or otherwise share, and act on the voluminous data that new technologies generate.”¹⁴ Data privacy laws and regulations designed to protect workers can help to address the information asymmetry that currently exists between employers and employees, which, in turn, can protect competition in the labor market by leveling the playing field.

We encourage NTIA, other policymakers, and the public to consider the many ways in which competition can promote civil rights, equity, and privacy in the digital marketplace. Consolidation in digital markets harms consumers, workers, and businesses alike. A multifaceted and interdisciplinary approach is essential.

We look forward to working together across government and with the public to protect competition and civil rights for the benefit of the American people.

Respectfully Submitted:

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¹³ See Richard A. Bales, Katherine V.W. Stone, *The Invisible Web: AI & Electronic Surveillance in the Workplace*, 41 Berkeley Journal of Employment & Labor Law 1, 17 (2020) (describing various technologies employed to surveil employees); see also Kaveh Waddell, *Why Bosses Can Track Their Employees 24/7*, THE ATLANTIC (Jan. 6, 2017).

¹⁴ See MEMORANDUM, Jennifer A. Abruzzo, General Counsel, NAT’L LABOR REL. BOARD, *Electronic Monitoring and Algorithmic Management of Employees Interfering with the Exercise of Section 7 Rights* (Oct. 31, 2022), available at <https://apps.nlr.gov/link/document.aspx/09031d45838de7e0>.