

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

NEIL L. BRADLEY
EXECUTIVE VICE PRESIDENT &
CHIEF POLICY OFFICER

1615 H STREET, NW
WASHINGTON, DC 20062
(202) 463-5310

June 22, 2021

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Nadler and Ranking Member Jordan:

The Chamber writes regarding several bills your committee is scheduled to consider during the June 23 markup.

We strongly oppose four bills: H.R. 3849, the “Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021,” H.R. 3826, the “Platform Competition and Opportunity Act of 2021,” H.R. 3816, the “American Choice and Innovation Online Act,” and H.R. 3825, the “Ending Platform Monopolies Act.”

We oppose as currently drafted H.R. 3460, the “State Antitrust Enforcement Venue Act of 2021.” Finally, the Chamber supports H.R. 3843, the “Merger Filing Fee Modernization Act of 2021.” We explain our views in greater detail below:

H.R. 3849, “Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act of 2021”

The Chamber strongly opposes this bill. We support the end goal of increased interoperability and portability in the marketplace, but this bill is poorly drafted and would inappropriately rely on antitrust law instead of regulation to accomplish this goal. The bill fails to identify data sets that represent high switching costs, instead broadly lumping together data while inadequately providing for legitimate privacy and security concerns. This legislation mandates interoperability, but only for a select few companies and does so without consideration for technical challenges associated with implementation.

Making data sets interoperable and portable is not as simple as the regulation that empowered consumers to take their phone numbers with them if they switch phone companies. The bill also violates long standing U.S. government standard setting policy, putting government in the driver’s seat for writing technical standards. This bill should go back to the drawing board and contemplate a regulatory approach that incentivizes interoperability and portability targeted at those data sets that represent a high switching cost to consumers, not simply taking a legislative approach that targets companies.

H.R. 3826, “Platform Competition and Opportunity Act of 2021”

H.R. 3816, “American Choice and Innovation Online Act”

H.R. 3825, “Ending Platform Monopolies Act”

We strongly oppose each of these bills, which have not received a hearing in this committee and were drafted with selective input from the business community and other key stakeholders.

Antitrust laws are those of general application and should remain so. The Chamber opposes writing special antitrust laws for specific companies or industries. Efforts to speak to specific industry concerns is a role reserved for regulation.

Antitrust laws are also not regulation. They are designed to evaluate business conduct to determine whether such conduct in the aggregate produces more harm than good for the consumer. In contrast, regulation seeks to have government put a finger on the scale in an effort to encourage, if not dictate, certain market outcomes.

These three bills are regulatory efforts disguised as changes to the antitrust laws. For this reason, the Chamber strongly opposes them. They are unrecognizable as a matter of antitrust law. Antitrust law is solely focused on protecting the economic well-being of consumers. However, all these bills place the welfare of competitors over what is in the best interest of consumers.

If these bills were to become law, our antitrust laws would for the first time recognize that harm caused to a competing business would be an antitrust violation. In a truly competitive marketplace, competitors should be engaged in a fierce battle for consumers, which means that efforts to beat a competitor generally produces a great benefit to the consumer. However, each of these laws sidelines the interest of the consumer and replaces it with the interest of the competitor.

Further, antitrust law must remain guided by economic analysis in order to measure the total effect on the consumer. Antitrust law evaluates consumer harm in comparison to the benefits such business conduct produces for consumers and is intended to ensure identified harms are outweighed by consumer accrued benefits rather than to prohibit all harm. These bills trample on the role of economic analysis by focusing exclusively on alleged harms while failing to take into account positive benefits.

All these bills introduce a flawed notion that antitrust law should be concerned with the interest of competitors, while also inappropriately focusing the law on alleged harm without proper evaluation of any corresponding consumer benefits. This approach is anathema to antitrust law, and we strongly encourage you to reject each of these bills.

H.R. 3460, “State Antitrust Enforcement Venue Act of 2021”

We have serious concerns with this bill as currently drafted. This legislation could create a morass of litigation where, despite common issues of fact, antitrust defendants could find themselves simultaneously defending themselves against private litigants, the federal government, and 50 different states in dozens of different courtrooms around the country and upending the current multidistrict litigation system as it pertains to antitrust litigation. The framework this legislation creates appears ripe for gamesmanship and could force large settlements over even unmeritorious claims. These problems are particularly acute due to states

often employing private, outside contingency fee counsel who are incentivized to maximize profits from litigation, rather than to protect consumers or competition.

In addition, state parens patriae antitrust actions often seek fundamentally different remedies than those brought by the federal enforcement agencies. State actions seeking monetary damages are far more akin to private class action lawsuits. Accordingly, we urge you to oppose H.R. 3460 as it is currently drafted.

H.R. 3843, “Merger Filing Fee Modernization Act of 2021”

We support this bill as it aligns with our repeated endorsement of the need to provide the federal antitrust agencies with resources to enforce the law. While merger filing fees do not directly fund antitrust enforcement, we recognize that there has long been a loose affiliation between filing fees and agency appropriations.

Helpfully, this bill also changes the fees associated with different merger filing thresholds to ensure larger transactions that may require closer antitrust consideration pay more than smaller transactions that are highly unlikely to raise antitrust concerns. This change makes perfect sense and we would note a version of this legislation has passed the Senate.

Legitimate policy debates that have arisen from the digitization of our economy are worthy of thoughtful discussion, and we should continue to do so as a matter of regulation, not antitrust legislation. The five bills we oppose would, if ultimately enacted, degrade the core principles of antitrust law, damage American economic vitality, and unfairly expand overlapping litigation. The Chamber appreciates your consideration of our views.

Sincerely,

A handwritten signature in blue ink, appearing to read "Neil L. Bradley", with a stylized flourish at the end.

Neil L. Bradley

cc: Members of the Committee on the Judiciary