CLRC Tech Platforms Working Group's Report

This section of the report addresses whether California should enact specific antitrust legislation aimed at the tech sector and/or tech platforms. Generally, the term "Big Tech" refers to the largest U.S. technology platforms, including: Alphabet (Google), Apple, Meta (formerly known as Facebook), Amazon, and Microsoft.[1] Critics of Big Tech assert that these platforms maintain their market dominance through a variety of anticompetitive acts, including acquisitions, that have not been adequately addressed under existing antitrust law.[2]

By way of background, it is universally acknowledged that California's technology sector is world class. It has been an incubator for tech startups for decades.[3] California is home to many of the largest tech companies in the world, including Alphabet, Apple, and Meta.[4] Because of California's significant technology sector, it has tens of thousands of employees connected to the tech industry throughout the State. For example, data from the Computing Technology Industry Association ("CompTIA") indicates that California has the largest "tech workforce" of any state in the U.S.[5] Nearly 1.5 million California employees are "tech" employees, outpacing second-place Texas by more than 600,000 jobs.[6] Data from CompTIA also indicates

[1] *See* Massimo Motta, Martin Peitz, Big tech mergers, Information Economics and Policy, Volume 54, 2021, available at https://www.sciencedirect.com/science/article/pii/S0167624520300111.

[2] Critics contend that at least the following single-firm conduct has allowed Big Tech to maintain anticompetitive market dominance: bundling, exclusive dealing, most-favored nation clauses, non-competes with employees, price discrimination, self-preferencing products on platforms, data mining, and below-cost pricing. Many of these are described by Working Group 1's Report on Single-Firm Conduct.

[3] In 2022, San Francisco ranked number one in the United States for incubating startups, with 14,000 of them calling San Francisco home. Los Angeles was close behind, coming in at number three in the United States, with about 6,000 startups calling Los Angeles home. And California does not enforce non-compete clauses in employment contracts, thereby fostering a culture of innovation, which many believe further drives California's start-up culture. *See Telstra Ventures, "Year 3: Insights to America's Emerging Tech Hubs,* (Mar. 2, 2023), available at: https://telstraventures.com/wp-content/uploads/2023/03/Emerging-TechHub-Report-2022.pdf.

[4] Big Tech generally refers to Google, Amazon, Facebook, Amazon, and to an extent, Microsoft.

[5] *See* State of the Tech Workforce, Computing Technology Industry Association ("CompTIA"), at p. 11, (March 2023), available at: https://www.cyberstates.org/pdf/CompTIA_State_of_the_tech_workforce_2023.pdf.

[6] *Id.*

that as measured by "the dollar value of goods and services produced during a given year," the tech industry accounts for 16.7% of the California economy.[7]

Thus, the technology sector in general, and Big Tech in particular, is responsible for billions of dollars in economic activity annually in California.[8] In assessing Big Tech's dominance, comparisons have been made between their annual revenues, on the one hand, and the gross domestic product of specific jurisdictions, on the other.[9] As an example, for the fiscal year ending in 2021, Amazon reported $469.8 billion in net sales, Apple reported $297 billion in net sales, Google reported $257 billion in revenue, and Facebook reported $118 billion in revenue—nearly a combined $1.14 trillion.[10] By comparison, California's GDP in 2021 was $3.37 trillion.[11] If revenues and sales were equated to GDP, then, these Big Tech companies themselves would have accounted for nearly one third of California's GDP in 2021.

As described in more detail below, critics of Big Tech suggest that companies like Apple, Alphabet (Google), and Meta (Facebook) have used their enormous size and alleged market power to stifle competition through various mechanisms, including: self-preferencing their own products, excluding potential competitors (innovators) from access to their platforms, using contract clauses to maintain and reinforce their market power, and serial acquisitions of smaller companies to prevent competitive threats and maintain their dominance.[12] Separate from whether those assertions are

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[7] *Id.* at 12.

[8] Forbes list of Fortune 500 companies, by annual revenue, for the year 2022 names Apple and Google (Alphabet) as the third and eighth largest companies in the world, with Facebook (Meta) at number 27.

[9] *See Big Tech's power, in 4 numbers*, Kyle Daly, AXIOS (July 27, 2020), available at: https://www.axios.com/2020/07/27/big-techs-power-in-4-numbers.

[10] *See Amazon.com Announces Fourth Quarter Results* (Feb. 2, 2023), available at: https://ir.aboutamazon.com/news-release/news-release-details/2023/Amazon.com-Announces-Fourth-Quarter-Results/default.aspx; *Apple Inc. Condensed Consolidated Statements of Operations*, available at: https://www.apple.com/newsroom/pdfs/FY21_Q4_Consolidated_Financial_Statements.pdf; *Alphabet Announces Fourth Quarter and Fiscal Year 2021 Results* (Feb. 1, 2022), available at: https://abc.xyz/assets/investor/static/pdf/2021Q4_alphabet_earnings_release.pdf?cache=d72fc76; *Meta Reports Fourth Quarter and Full Year 2021 Results* (Feb. 2, 2022), available at: https://s21.q4cdn.com/399680738/files/doc_financials/2021/q4/FB-12.31.2021-Exhibit-99.1-Final.pdf.

[11] *Gross Domestic Product by State and Personal Income by State, 4th Quarter 2022 and Year 2022*, Bureau of Economic Analysis (Mar. 31, 2021), available at: https://www.bea.gov/sites/default/files/2023-03/stgdppi4q22-a2022.pdf.

[12] *Investigation of Competition in Digital* Markets – *Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary* (2020), at 12–17, available at:

legally valid, there can be no doubt that Big Tech firms acquire companies at an astonishing pace, having procured over 70 companies in 2019 and 2020.[13] Only a fraction of these acquisitions were reported to the Federal Trade Commission ("FTC") and Department of Justice ("DOJ") because many did not meet the reporting thresholds under existing federal law.[14]

Given Big Tech's substantial impact on California's economy, and the criticisms of Big Tech's dominance by those who allege these "walled garden"[15] platforms stifle competition, the question is whether the Legislature should consider adopting specific legislation to "reign in" these companies.

The range of options for the Legislature to consider fall into three broad categories: (1) enact no new legislation and maintain the status quo; (2) amend California's antitrust laws generally, without specifically focusing on tech platforms; and (3) enact specific legislation addressing tech platforms.[16] Each of these options are further described below.

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https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. The report found that numerous businesses that were interviewed described how dominant online platforms exploited their gatekeeper power to dictate terms and extract concessions that no one would reasonably consent to in a competitive market. Those intereviewed businesses depended on the gatekeepers to access users and markets. Additionally, the report found that Big Tech acquired hundreds of companies in the last ten years, and in some cases, acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand their dominance.

[13] Diana L. Moss, "Update on Digital Technology: The Failure of Merger Enforcement and Need for Reform," AMERICAN ANTITRUST INSTITUTE (Mar. 3, 2021), available at: https://www.antitrustinstitute.org/wp-content/uploads/2021/03/Merger-Enforcement_Big-Tech_3.3.21_F.pdf.

[14] *Id.*

[15] A "walled garden" refers to an online platform that is "closed," such that the platform's provider has total (or near total) control over the content, applications, and rules within the platform. See "Online platforms and digital advertising – Market Study final report," United Kingdom Competition & Markets Authority (July 1, 2020), at 155 n. 225, available at: https://assets.publishing.service.gov.uk/media/5fa557668fa8f5788db46efc/Final_report_Digital_ALT_TEXT.pdf.

[16] Of course, there is also a fourth option where the Legislature could decide to amend the existing antitrust laws and enact new legislation addressing tech platforms, essentially a combination of option two and three in this report.

1. ***Enact no new legislation and maintain the status quo.***

Proponents of this approach suggest that existing antitrust law can address any "real" concerns with tech platforms, and there is no need for new legislation because increased antitrust enforcement could lead to undesirable outcomes that stifle legitimate competition. In this view, the modern era of federal antitrust decisions covering the past 40 years or so (*e.g.*, *Trinko*, *Linkline*, *etc.*) has correctly made it more difficult to successfully challenge single-firm conduct or monopolization, including against tech platforms. This view is based on earlier experiences, particularly in the late 1960s and 1970s, when antitrust enforcement was far more permissive in allowing cases to proceed to trial. In the view of those who support a more "restrained" approach to antitrust enforcement, this earlier era was deeply criticized for "overreach" and supposedly stifling the ability of large companies to compete, while at the same time purportedly protecting inefficient smaller competitors who used the courts as a weapon when they could not effectively compete in the market.[17] Under this view, which is often traced to the so-called "Chicago School"[18] of antitrust scholarship, over-enforcement by government and private parties is a perversion of antitrust law and market forces; it is better to default to under-enforcement, particularly when it comes to single firm conduct because, in their view, antitrust courts are ill-equipped to micromanage day-to-day market decisions.[19] Those in this camp contend that competition in the internet era moves quickly and concerns about

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[17] The Department of Justice Antitrust Division's lawsuit against IBM is an example that commentators often point to as illustrative. The Department began investigating IBM in 1967, brought suit in 1969, and the case ultimately went to trial in 1975, lasting more than six years, before the Division ultimately dropped its case. Critics of the litigation have asserted that IBM's alleged conduct was actually "efficient" and in an "innovative, high-technology market" that should have been left alone from litigation. *See*, *e.g.*, *Antitrust Excitement in the New Millennium: Microsoft, Mergers, and More*, Carol B. Swanson, Okla. L. Rev. 285, 311 (2001).

[18] Chicago School advocates believed that antitrust enforcement, particularly lawsuits challenging vertical restraints and monopolization, was distorting "legitimate" competition in the market. To correct these alleged distortions, Chicago School theorists advanced legal presumptions (adopted by the Supreme Court and lower courts) that served to protect antitrust defendants from liability. "They include the one-monopoly rent theory, which presumes that firms cannot increase their profits by using vertical restraints such as tying and bundling to extend their monopoly power into adjacent markets; the related presumption that vertical mergers are unlikely to harm consumers; the beliefs that predatory pricing is unlikely to be a profitable strategy and that prices above short-run average variable cost are necessarily procompetitive; and the presumption that antitrust enforcement risks costly false positive errors of overenforcement, while monopoly power is temporary so that false negatives are unlikely." *See* Gilbert, Antitrust Reform: An Economic Perspective.

[19] *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) ("Enforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited").

firms perceived to have had market power in the early to mid-2000s are no longer significant firms in today's tech platform marketplace (e.g., AOL, Yahoo), suggesting that the market itself can address most concerns involving tech platforms.[20]

Proponents of this view suggest that tech-platform specific legislation may stifle innovation. They note that reduced innovation should be of particular concern to the State of California, given that California is the current home of many of the leading tech platforms (*e.g.*, Google, Apple, and Meta). Moreover, proponents of maintaining the status quo posit that additional regulation may make California less hospitable to business than other states or countries.

The view that the market itself can address most concerns is met with strong disagreement by other antitrust scholars, often referred to as "neo-Brandeisians," who have achieved greater prominence in recent years. These scholars argue that federal antitrust decisions over the past 40 years have made it too difficult to address the consolidation of market power, particularly when it comes to Big Tech. In the neo-Brandeisian view, modern federal antitrust case law is unmoored from the original intent of the Sherman Act and the Clayton Act, *i.e.*, to prevent undue concentration of market power. The views of many of these scholars is reflected in certain findings of an influential 2020 U.S. House Antitrust Subcommittee staff report addressing, among other things, the need for more robust antitrust enforcement, including specific legislation directed at Big Tech. They contend that whatever the arguments might have been from the early 2000s that new upstart tech companies could displace larger competitors with new innovative products and services, those days are over. In their view, Big Tech (Google, Amazon, Apple, and Meta) have effectively created "walled gardens"; to have any hope of competing in the modern era, upstart

[20] In December 2023, a jury found in favor of Epic Games on its antitrust claims against Google regarding the Google Play Store. Specifically, the jury found that Google: (1) monopolized the Android App Distribution and the Android In-App Billing Services for Digital Goods and Services Transactions Markets in violation of Section 2 of the Sherman Act; and (2) engaged in unreasonable restraints of trade in violation of Section 1 of the Sherman Act and California law. *In re Google Play Store Antitrust Litig.*, Case No. 20-cv-05671-JD (N.D. Cal.), Dkt. 606. Proponents of the view that no new legislation is required to address antitrust concerns posed by Big Tech are likely to point to the *Epic* verdict as support that existing antitrust law is adequate to address such concerns. Proponents of the view that new legislation is required are likely to point to *Epic Games, Inc. v. Apple, Inc.* to show that a relatively similar set of facts before a different judge resulted in a completely different decision by the district court. *See Epic Games, Inc. v. Apple Inc.*, 559 F.Supp.3d 898 (N.D. Cal. 2021) (finding that Apple's restrictions with respect to gaming transactions on its platform were not unlawful restraints of trade under the Sherman Act and that Apple was not liable as a monopolist under the Sherman Act). Epic did succeed on its Unfair Competition Law Claim and Apple was ordered by the court to stop enforcing its in-app, anti-steering provision.

companies must have access to Big Tech platforms to achieve the economies of scale needed to effectively compete in today's world.

Further, as addressed above (in earlier portions of this report), proponents of new legislation note that antitrust case law of the last 40 years has inordinately focused on the consumer welfare standard, *i.e.*, higher prices.[21] They contend that additional legislation is needed to make clear that control of consumer data and privacy should also constitute harms that antitrust law is meant to address.[22] They also contend that merger enforcement has been too lax in recent decades—allowing Big Tech firms to acquire nascent competitors before they reach the point of becoming actual or potential competitive threats.[23] In the view of these scholars, legislation is needed to specifically address consolidation in the tech marketplace. Proponents of additional legislation would also note that California is often at the forefront of protecting competition and consumers (not dominant firms), as is evident from its innovative data protection law (California Consumer Privacy Act) and its broader competition laws (the Cartwright Act and the Unfair Competition Law).

[21] Neo-Brandeisians generally object to a consumer welfare standard that is focused solely on price, as it ignores the historical underpinnings of the federal antitrust laws. These scholars assert that the antitrust laws were enacted to address broader societal concerns, specifically the concentration of power. Neo-Brandeisian scholars assert that modern antitrust enforcement, influenced by Chicago School theory, is thus unmoored from the original purpose of the antitrust laws. As a result, case law over the last 40 years has allowed the unconstrained accumulation of economic power and increased concentration. *See, e.g., Gilbert*.

[22] It should be noted that some courts have already found that the loss of data and privacy do constitute harm to competition or antitrust injury, even under existing law. *E.g.*, *Klein v. Facebook*, *Inc.*, 580 F. Supp. 3d 743, 803–04 (N.D. Cal. 2022); *Fed. Trade Comm'n v. Facebook*, *Inc.*, 581 F. Supp. 3d 34, 55–56 (D.D.C. 2022).

[23] On December 18, 2023, the DOJ and FTC issued new merger guidelines, which revised previous guidelines. In the 2023 guidelines, the FTC and DOJ specifically state that mergers can violate the law when the mergers: (1) increase the risk of coordination, (2) eliminate a potential entrant in a concentrated market, (3) entrench or extend a dominant position, (4) are part of a series of multiple acquisitions (which may trigger a review of the whole series together), among others. Particularly of note in the new guidelines is the focus on how entrenchment of a dominant position can be achieved, either through increased switching costs, interference with the use of competitive alternatives, or depriving rivales of network effects. Additionally, the guidelines explicit focus on multi-sided platform issues, within the context of mergers, can be argued as a direct response to the Big Tech issues. *See* Merger Guidelines, US DOJ and FTC, (December 18, 2023), available at: https://www.ftc.gov/system/files/ftc_gov/pdf/2023_merger_guidelines_final_12.18.2023.pdf.

2. ***Enact new legislation addressing single firm conduct (monopolization) under California law but without a specific focus on tech platforms***.

As addressed above (in the portion of this report addressing single firm conduct), the Cartwright Act does not presently address single firm conduct (*i.e.,* monopolization or attempted monopolization). Thus, with few exceptions addressed by the Unfair Practices Act, claims of single firm conduct by firms in California have necessarily relied on Section 2 of the federal Sherman Act (which covers single-firm conduct in the form of monopolization and attempted monopolization).[24] Section 2 of the Sherman Act is very broad in its language and thus has been used to cover virtually every manner of industry, from traditional brick and mortar to modern online companies. Early in the internet era (late 1990s and early 2000s), there was some debate about whether traditional antitrust statutes were sufficient to address software companies operating on the internet.[25] The prevailing view from that debate was that the existing federal antitrust statutes were prophylactic enough to address competition online.

Today, even among those who want to see more vigorous antitrust enforcement against the large tech platforms, some advocates would argue that specific legislation targeting tech platforms may be unnecessary. These advocates argue that it may be possible to avoid specific Big Tech-focused legislation, so long as existing law allows for increased flexibility in the application of existing competition law principles (*e.g.*, for relevant market definition and measuring market power) to arguably new facts and circumstances (*e.g.*, to so-called "zero price" products that may not feature a monetary price measured in dollars).

Advocates of this approach may also assert that existing antitrust law is sufficient, so long as certain modern federal antitrust decisions (such as *Brooke Group*, *Trinko*, and the like) are reversed through legislative action. For example, the House Antitrust Subcommittee recommended legislatively overriding *Spectrum Sports* (specifically its requirement that a monopoly leveraging claim require "actual" monopolization of the

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[24] Section 2 of the Sherman also covers conspiracy to monopolize which, with some differences, is generally viewed as being similar to a claim under Section 1 of the Sherman Act. *See Seagood Trading Corp. v. Jerrico, Inc.*, 924 F.2d 1555, 1576 (11th Cir. 1991) ("a section 1 claim and a section 2 conspiracy to monopolize claim require the same threshold showing—the existence of an agreement to restrain trade.").

[25] *See U.S. v. Microsoft*, 253 F.3d 34, 49–51 (D.C. Cir. 2001) (en banc) (referencing "backdrop of significant debate amongst academics and practitioners over the extent to which 'old economy' § 2 monopolization doctrines should apply to firms competing in dynamic technological markets" and affirming trial court's finding that Microsoft engaged in anticompetitive conduct).

second relevant market, *Brooke Group* and *Weyerhauser* (to the extent those cases hold that proving predatory pricing or buying requires "proof of recoupment"), and *Trinko* and *Linkline* (to the extent they make more difficult claims based on "essential facilities" and "refusal to deal" theories").[26] Or it may be possible to avoid Big Tech-focused legislation if the Legislature adopts specific legislation addressing single firm conduct – so long as the new legislation incorporates standards that allow for broader enforcement, *i.e.*, do not incorporate many of the Chicago School era requirements that have limited the reach of the federal antitrust laws to single-firm conduct. The pros and cons of new legislation addressing single-firm conduct is addressed in other Working Group's Reports.[27]

3. ***Adopt specific legislation addressing tech platforms***.

Because of the perceived concerns about the market power amassed by the Big Tech platforms and their alleged anticompetitive conduct, numerous pieces of federal legislation, including some on a bipartisan basis, have been introduced in Congress over the last couple of years.[28] Some of the proposals in these bills stem, at least in part, from the comprehensive House Antitrust Subcommittee Report issued in 2020. But these bills also borrow from legislation adopted in the European Union, where there has been a more comprehensive effort to address the market power of the Big Tech platforms. For example, the EU in 2022 enacted the Digital Markets Act, which imposes certain obligations on covered platforms such as allowing interoperability with actual or potential competitors and requiring affirmative user consent for

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[26] *Investigation of Competition in Digital* Markets – *Majority Staff Report and Recommendations, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary* (2020), at 395–98, available at: https://democrats-judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf. Similarly, Senator Amy Klobuchar has stated that "Supreme Court decisions"—specifically naming *Trinko*—"have narrowed the possibility of bring these kinds of cases, which is another argument for making some changes to the laws" to address these decisions. *See Klobuchar Opening Statement at Antitrust Subcommittee Hearing on Competition in the Digital Advertising Marketplace* (May 3, 2023), available at: https://www.klobuchar.senate.gov/public/index.cfm/2023/5/klobuchar-opening-statement-at-antitrust-subcommittee-hearing-on-competition-in-the-digital-advertising-marketplace.

[27] *See* Single-Firm Conduct Working Group Paper.

[28] One such piece of legislation—The State Antitrust Enforcement Venue Act of 2021—has been enacted. The Venue Act excludes state antitrust enforcement actions (such as by State Attorneys General) from consolidation with private actions as part of multi-district litigation (MDL) proceedings. *See United States v. Google LLC*, 2023 WL 2486605, at *3 (E.D. Va. Mar. 14, 2023). Indeed, the Venue Act was recently the basis for remanding the State of Texas's antitrust lawsuit against Google back to Texas, after the action had previously been consolidated with other actions against Google in the Southern District of New York. *See In re Google Digital Advert. Antitrust Litig.*, No. MDL 3010, 2023 WL 3828612, at *1–3 (U.S. Jud. Pan. Mult. Lit. June 5, 2023).

targeted advertising.[29] Brief summaries of the pros and cons of some of the key legislation introduced in Congress that specifically target tech platforms are attached to this section as **Addendum A** (note: other broader legislation will be addressed elsewhere by other working groups).

In general, the legislative proposals contain various provisions to address in different ways an overarching concern that concentrated market power among tech platforms can be used to inhibit or stifle competition. Several proposed federal laws define covered platforms (based on users and size) to specifically target Big Tech. Thus, if the proposed legislation covers a particular Big Tech platform, then it would impose immediate restrictions on that platform's ability to engage in specific conduct deemed to be anticompetitive (*e.g.*, refusal to deal, restrictions on interoperability, leveraging data gathered in one market to monopolize another market, self-preferencing, tying, using data from one product to benefit another business line, and the like). Examples of legislation defining covered platforms based on users and size include:

- The proposed Open App Markets Act ("OAMA"), which would impose specific legal requirements on any person or company who owns or controls an app store with more than 50 million users in the U.S.

- The proposed American Innovation and Choice Online Act ("AICOA"), which would apply only to business lines that serve as critical trading partners, have more than 50 million monthly active U.S. users, more than 100,0000 active U.S. business users, and have sales or market capitalization of more than $550 billion. Additionally, AICOA would ban self-preferencing, discrimination that harms competition, restrictions on interoperability, tying, and using data from a covered platform to support another business line.

[29] The targets of the EU's 2022 Digital Markets Act, for example, are "gatekeepers" that have "significant impact" on the EU market, offer a "core platform service" which is "an important gateway for business users to reach end user", and that do or will foreseeably enjoy an "entrenched and durable position." Regulation (EU) 2022/1925 of the European Parliament and of the Council Regarding Digital Markets Act (Sept. 14, 2022), available at: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.265.01.0001.01.ENG&toc=OJ%3AL%3A2022%3A265%3ATOC. In September 2023, the EU designated six firms as gatekeepers: Alphabet (Google), Amazon, Apple, ByteDance (parent of TikTok), Meta (Facebook), and Microsoft. See *Digital Markets Act: Commission designates six gatekeepers*, European Commission (Sept. 6, 2023), available at: https://ec.europa.eu/commission/presscorner/detail/en/ip_23_4328.

- The proposed Trust-Busting for the Twenty-First Century Act, which would create a category of "dominant digital firms" (firms that provide a website or service through the internet and possess dominant market power in a related market). Under this proposal, the FTC would be empowered to designate a person, partnership, or corporation as a "dominant digital firm" by considering market dominance, how much the firm benefits from government contracts, exclusivity agreements, network effects, and vertical integration. Any acquisition by dominant digital firms of greater than 1 million dollars (including assets) would be presumed to be an unfair or deceptive act or practice. The Act would also ban any dominant digital firm from preferring its own products in search results without disclosing that affiliation to users.

- The proposed Augmenting Compatibility and Competition by Enabling Service Switching ("ACCESS") Act, which would impart certain obligations on large communications platforms (products or services with more than 100 million monthly active users in the U.S.), require interoperability that would benefit users and those would-be competitors that need access to the communications platforms, allow users to transfer their data, and permit users to designate "trusted custodial services" to manage their privacy and account settings.

Many of these pieces of legislation are drafted to specifically cover certain identified companies and exclude others, although changes in the number of users or in market capitalization may mean that companies are added to or removed from the list in any given year. At present, many of these legislative proposals would cover at least the following Big Tech companies: Amazon, Apple, Alphabet (Google), Meta (Facebook), Microsoft, and TikTok. Proponents supporting Big Tech specific litigation argue that general antitrust statutes are too blunt of an instrument to reach nuanced competition and consumer protection issues created by digitial platforms and thus, the need for a specific set of rules to guide businesses.[30]

To date, however, none of the many proposed substantive pieces of legislation have been enacted by Congress. And it remains unclear whether any of the legislation will

[30] *See The Need for Regulation of Big Tech Beyond Antitrust*, Tom Wheeler, Phil Verveer, and Gene Kimmelman, Brookings Institute, (September 23, 2020), available at: https://www.brookings.edu/articles/the-need-for-regulation-of-big-tech-beyond-antitrust/. Furthermore, proponents for tech specific legistlation point to inherently uncertain outcomes in litigation, a reliably lengthy process, and the fact that most litigation is an after-the-fact response, rather than an efficient broad-based set of rules.

be voted on in the current Congress. Similarly, while the State of New York has been debating whether it should expand the scope of its antitrust law, the Donnelly Act—to cover single-firm conduct, adopt European-style "abuse of dominance" standards,[31] and enact a pre-merger notification regime to the New York Attorney General—the legislation passed the New York Senate but has stalled in the Assembly.[32] Accordingly, to the extent the Legislature wishes to adopt antitrust legislation specific to tech platforms, it may be the first in the nation to do so. Doing so would be consistent with the unique position that California has taken with its landmark data protection legislation (California Consumer Privacy Act), as well as its competition laws (the Cartwright Act and the Unfair Competition Law) which are broader than federal law in important respects.[33]

If the Legislature were to decide to enact Big Tech specific antitrust legislation, the following points might be considered as a basic framework for the legislation. However, it should be noted that there is not a consensus among the antitrust

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[31] The "abuse of dominance" standard used in Europe has also been relied upon in Canada for years, with the Canadian Competition Bureau issuing detailed enforcement guidelines. *See* Abuse of Dominance Enforecement Guidelines, Competition Bureau Canada, (March 7, 2019), available at: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/education-and-outreach/abuse-dominance-enforcement-guidelines. Canada has recently examined its own competition rules, examining the abuse of dominance standard, and has issued a report to the Canadian Legislature, which was inviting comments on Canada's competition policy framework and how it fit into the current competitive environment in Canada including digital platforms. The report recommends, among other things, that the abuse of dominance standard should be revised to not allow dominant firms to escape scrutiny even when their conduct simply softens competition (rather than merely injuring a competitor) and should be revised to allow for a more flexibile analysis under the standard, especially when anti-competitive conduct is aimed at emerging competitors in the digital economy. *See* Examining the Canadian Competition Act in the Digital Era, Submission by the Competition Bureau Canada (February 8, 2022), available at: https://ised-isde.canada.ca/site/competition-bureau-canada/en/how-we-foster-competition/promotion-and-advocacy/regulatory-adviceinterventions-competition-bureau/examining-canadian-competition-act-digital-era#sec10.

[32] *See Senate Bill* S933C, The New York State Senate, available at: https://www.nysenate.gov/legislation/bills/2021/S933#:~:text=2021%2DS933A%20%2D%20Summary,the%20state%20anti%2Dtrust%20law (describing bill text and legislative history and status).

[33] *See, e.g.*, *In re Cipro Cases I & II*, 61 Cal. 4th 116, 160 (2015) (California Supreme Court explaining that "the Cartwright Act is broader in range and deeper in reach than the Sherman Act") (cleaned up*); Cel-Tech Commc'ns, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 180, 187 (1999) (California Supreme Court explaining that the UCL is "broad," its coverage is "sweeping," and may prohibit an unfair business practice "even if not specifically proscribed by some other law"); *see also Epic Games, Inc. v. Apple, Inc.*, 67 F.4th 946, 999–1002 (9th Cir. 2023) (Ninth Circuit affirming trial court's finding that Apple's conduct was "unfair" and violated UCL, even though same conduct was not shown to have violated federal antitrust law).

advisors of this working group that specific legislation is needed to address Big Tech or that these are the most effective ways to address concerns about Big Tech. Some within the working group have expressed concern that, at a minimum, more study is needed of the potential impact of the the recommendations below – as they would further expand the scope of California's antitrust laws beyond existing federal law.[34]

- A tech platform covered by the legislation ("covered platform") would have some connection to California, include 50 million or more monthly active U.S. users, more than 100,000 active U.S. business users, and have sales or market capitalization of more than $550 billion.

- It would be deemed presumptively unlawful for a covered platform to engage in any of the following conduct: (a) self-preferencing; (b) discrimination that harms competition; (c) restrictions on interoperability; (d) tying; or (e) using data from the covered platform to support another business line. The presumption can be rebutted by a covered platform as an affirmative defense if the covered platform can show the action is pro-competitive.

- Any acquisition by a covered platform of another technology-based company would be subject to automatic merger review by the California Attorney General, regardless of market size or the value of the acquisition.

[34] California has long held that its antitrust laws, especially the Cartwright Act, are broader in range and deeper in reach than the Sherman Act. *See In Re Cipro Cases I & II*, 61 Cal.4th 116, 160-61 (2015) (*citing Cianci v. Superior Court*, 40 Cal.3d 903, 920 (1985)).

Addendum A

Klobuchar-Grassley Legislation.

In 2022, Senators Klobuchar and Grassley co-authored and introduced the American Innovation and Choice Online Act (AICOA).[35] The legislation specifically targets online platforms. The legislation would apply only to business lines that serve as critical trading partners, have more than 50 million monthly active U.S. users or 1 billion worldwide users, more than 100,000 active U.S. business users, and record net annual sales or market capitalization of more than $550 billion. It bans self-preferencing, discrimination that harms competition, restrictions on interoperability, tying, and using data from a covered platform to support another business lines. It is projected that this legislation would cover Amazon, Apple, Google, Facebook, Microsoft, TikTok, and others.[36]

Proponents argue that the legislation will increase competition, innovation, lower costs, and benefit consumers. The legislation is designed to prevent the major tech platforms from stifling upstart competitors and, they argue, it would allow consumers to better control their own data and privacy settings. It would also better protect small and medium-sized businesses because, proponents argue, it will preclude the major tech companies from using algorithms to protect their own products, require payment to access the platforms, and limit communications with end consumers.[37]

Opponents argue that the legislation is misguided by having government regulation distort traditional market forces particularly because the tech industry evolves quickly

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[35] *The American Innovation and Choice Online Act: What it Does and What it Means*, Tom Romanoff, Bipartisan Policy Center (Jan. 30, 2022), available at: https://bipartisanpolicy.org/explainer/s2992/. While AICOA advanced from the Senate Judiciary Committee in 2022, it has not been enacted. Senators Klobuchar and Grassley re-introduced AICOA in June 2023. See *Klobuchar, Grassley, Colleagues Introduce Bipartisan Legislation To Boost Competition And Rein In Big Tech*, Office of Senator Grassley (June 15, 2023), available at: https://www.grassley.senate.gov/news/news-releases/klobuchar-grassley-colleagues-introduce-bipartisan-legislation-to-boost-competition-and-rein-in-big-tech.

[36] *The American Innovation and Choice Online* Act, Congressional Research Service (Aug. 30, 2022), at 3 (describing likely covered platforms), available at: https://crsreports.congress.gov/product/pdf/R/R47228/4.

[37] The Center for American Progress has described what it views to be benefits of AICOA. *See*

Executive Summary: Evaluating 2 Tech Antitrust Bills to Restore Competition Online (June 7, 2022), available at: https://www.americanprogress.org/article/executive-summary-evaluating-2-tech-antitrust-bills-to-restore-competition-online/.

and is not static. Among other things, these critics argue that the legislation would force the tech companies that created these platforms to turn over technology to less efficient rivals, force the tech platforms to limit innovation, and weaken cybersecurity protections by giving platform access to third parties. These opponents argue that the legislation would turn a given tech platform's great innovations into "dumb pipes" that consumers would no longer support.[38] In particular, Herbert Hovenkamp, a well-cited antitrust scholar, has noted that with respect to AICOA that: (1) while the statute's "materially harm competition" standard is an "antitrust novelty," it is similar to the "substantially lessen competition" standard contained in all of the substantive provisions of the Clayton Act; (2) unlike the antitrust laws, the current version has no provision for enforcement by private parties; (3) AICOA principally departs from current U.S. competition policy by identifying particular firms as "gatekeepers" and applying heightened scrutiny to them; (4) AICOA's focus on "online firms" could mean that companies like Walmart—whose retail business is larger than Amazon's—would not covered by the statute; (5) AICOA focuses on a firm's absolute size, rather than its product market share; and (6) the statute's "critical trading partner" language merely requires that a firm have "the ability to restrict or materially impede" a business user's access to its customers or to some tool that the business user needs to serve its customers, which does not appear to require that the covered firm's trade in a particular product be ***dominant***."[39]

Blumenthal-Blackburn Legislation.

In 2022, Senators Blumenthal and Blackburn co-authored the Open App Markets Act (OAMA). The purpose of the legislation would be to open digital application markets to greater competition, with a particular focus on the "walled gardens" that Apple and Google control through their ubiquitous app stores (the legislation would also cover Microsoft).[40] The legislation would require app stores with more than 50 million U.S. users to allow third party app developers to connect with the users of its app (either through the app or direct outreach). It would also require covered entities to allow

[38] The American Enterprise Institute has described what it views as these flaws in AICOA. See, e.g., *Heading into Markup, Senate Antitrust Bills Risk Hurting the Economy and Consumers*, Mark Jamison (Jan. 20, 2022), available at: https://www.aei.org/technology-and-innovation/heading-into-markup-senate-antitrust-bills-risk-hurting-the-economy-and-consumers/.

[39] Herbert Hovenkamp, *Gatekeeper Competition Policy*, Mich. Tech. L. Rev. (2023).

[40] *See Blumenthal, Blackburn & Klobuchar Introduce Bipartisan Antitrust Legislation to Promote App Store Competition*, Office of Senator Blumenthal (Aug. 11, 2021), available at: https://www.blumenthal.senate.gov/newsroom/press/release/blumenthal-blackburn-and-klobuchar-introduce-bipartisan-antitrust-legislation-to-promote-app-store-competition; *see also The Open Markets Act*, Congressional Research Service (June 8, 2022), available at: https://crsreports.congress.gov/product/pdf/LSB/LSB10752/2.

for alternative payment options and remove self-preferencing restrictions on pricing and communications with users.

Similar pros and cons apply to the Open App Markets Act as the American Innovation and Choice Online Act. Proponents argue that it will open up competition and innovation for independent app developers and benefit consumers (including through greater choice and lower prices); opponents believe that the legislation imposes government overreach and inefficiency into the tech marketplace and would result in "sideloading" third-party apps directly onto a device (without an app store)—a process they claim reduces users' security.[41]

Warren-Graham Legislation.

Recently, in July 2023, Senators Warren and Graham co-authored and introduced the Digital Consumer Protection Commission Act.[42] This legislation proposes to create a new regulatory agency specifically devoted to overseeing the Big Tech platforms. This proposed new Digital Consumer Protection Commission ("the Commission") would be made up of 5 commissioners (including a chair), each appointed by the President and subject to Senate approval, who would serve 5-year staggered terms. The Commission, which would have concurrent jurisdiction along with the DOJ and FTC, would have oversight and rulemaking authority over dominant tech platforms. Among other things, the Commission would have authority to prevent presumptive abuses of dominance (an EU standard that does not require the same burden of proof for monopolization under modern U.S. law) for at least the following: self-preferencing, tying, noncompete agreements, and pre-dispute arbitration agreements.

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[41] *Analyzing the Open App Markets Act*, Tom Romanoff, Bipartisan Policy Center (Feb. 2, 2022), available at:

https://bipartisanpolicy.org/explainer/analyzing-the-open-app-markets-act/ (describing arguments for and against Open App Markets Act).

[42] See *Warren, Graham Unveil Bipartisan Bill to Rein in Big Tech*, Office of Senator Warren (July 27, 2023), available at: https://www.warren.senate.gov/newsroom/press-releases/warren-graham-unveil-bipartisan-bill-to-rein-in-big-tech; *see also* Digital Consumer Protection Commission Act Summary, available at: https://www.warren.senate.gov/imo/media/doc/DCPC%20Section-By-Section.pdf. Two other Senators—Senator Bennett and Welch—in May 2023 introduced a similar proposal to create a Digital Platform Commission. *See*

Bennett, Welch Reintroduce Landmark Legislation to Establish Federal Commission to Oversee Digital Platforms, Office of Senator Bennett (May 18, 2023), available at: https://www.bennet.senate.gov/public/index.cfm/press-releases?id=EC3B3219-5B7A-44C5-B37E-16875515CB2E.

The Commission would also have authority to further define and prohibit other forms of abuses of dominance.

Under the proposed legislation, dominant platforms cannot acquire other companies without showing the acquisition is in the public interest. It also provides that platforms cannot sell consumer data without proper disclosures and mandates, and creates, among other things, duties of care, loyalty, and confidentiality over consumer privacy and data. The legislation also addresses national security concerns over ownership and licensing of platforms operating in the United States. Platforms would have to comply with the Commission's requirements and oversight to maintain a license. The legislation would confer on states, private parties, and federal agencies the jurisdiction to enforce its provisions; however, federal courts would have exclusive jurisdiction over claims brought under the statutory scheme.

The legislation is quite new and so the usual players have generally not yet formally weighed in. But we expect the same policy concerns to be raised by proponents and opponents. Proponents are likely to cheer the legislation as long overdue by empowering a regulatory commission to address the excesses of the large tech platforms. Opponents are likely to raise the same concerns about government overreach, including adding another regulatory agency to oversee antitrust enforcement (beyond the Department of Justice Antitrust Division, Federal Trade Commission, and state Attorneys General).

Hawley Legislation.

In 2021, Senator Hawley authored and introduced the Trust-Busting for the Twenty-First Century Act.[43] It would amend the Sherman and Clayton Acts to potentially increase enforcement and lessen certain evidentiary and legal burdens, including making clear that "direct evidence of anticompetitive conduct" is sufficient to establish an antitrust violation without the need to formally and numerically prove the dominant firm's market share in a particular market. With respect to tech platforms specifically, the legislation would create a category of "dominant digital firms" (firms that provide a service through the internet and possess dominant market power in a related market). The FTC would be empowered to designate dominant digital firms by considering market dominance, how much the firm benefits from government contracts, exclusivity agreements, and vertical integration. Any acquisition by dominant digital firms of greater than $1 million (including assets) would be presumed

[43] *See Senator Hawley Introduced the 'Trust-Busting for the Twenty-First Century Act': A Plan to Bust Up Anti-Competitive Big Businesses*, Office of Senator Hawley (Apr. 12, 2021), available at: https://www.hawley.senate.gov/senator-hawley-introduces-trust-busting-twenty-first-century-act-plan-bust-anti-competitive-big.

to be an unfair or deceptive act or practice, regardless of whether the merger could be characterized as "vertical." It would also ban any dominant digital firm from preferring its own products in search results without disclosing that affiliation to users. A dominant digital firm that loses a federal antitrust lawsuit would also be subject to disgorgement and forfeiture of "all their profits resulting from monopolistic conduct."