“The Impact of Consolidation and Monopoly Power on American Innovation”

Written Testimony of
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Submitted to the
Subcommittee on Competition Policy, Antitrust, and Consumer Rights
of the
Committee on the Judiciary
United States Senate
December 15, 2021

Chair Klobuchar, Ranking Member Lee, and members of the subcommittee, thank you for the invitation to testify today.

My name is Bettina Hein and I am a serial software entrepreneur who has built technology companies in both the United States and Europe. Most recently, I am the founder and CEO of juli – an artificial intelligence-powered digital health and wellness startup based in Boston, Massachusetts that helps our customers manage chronic conditions. juli is my third software company. I am also the founder of Pixability, a video advertising company also based in Boston, and co-founder of SVOX, a Switzerland-based speech technology company.

I’d like to begin by thanking you, Madame Chair, for your leadership regarding entrepreneurship and innovation issues as the co-chair of the Senate Entrepreneurship Caucus. In particular, your work regarding the unique barriers and challenges that confront women entrepreneurs – and there are many! – is especially appreciated.

Also, while I know it’s not the specific purview of this subcommittee, since this is the Judiciary Committee, I would be remiss if I didn’t respectfully urge the passage of immigration reform – and specifically the creation of a Startup Visa. As you may know, the United States is one of the few industrialized countries without a specific visa category to attract and retain foreign-born entrepreneurs.

I was born in Germany, built my first company in Switzerland, and then launched Pixability in 2008 and juli in 2019 in the United States. My experience as an immigrant entrepreneur has been one of all-too frequent uncertainty and anxiety about my visa status, despite starting two successful U.S. companies and creating jobs for many Americans. Though juli is an American company, I run it from Switzerland – where I am speaking to you from now – in part because of continuing visa complications. If the United States is to remain a global innovation leader, such circumstances need to change. Nothing could be more ‘America First’ than taking steps to ensure that the world’s best and most innovative entrepreneurs launch their companies in the United States rather than somewhere else.

Turning to the topic of this hearing, I want to begin by emphasizing that I am not a policymaker or an antitrust attorney. I am an entrepreneur – a three-time entrepreneur – and I am here to share with you my perspective regarding the likely impact of acquisition restrictions and other market interventions on entrepreneurs like me.

Acknowledging that the intention of the legislation is to address the size and influence of large technology platforms, it is my view – based on the specifics of the bill and ramifications that followed the enactment of similarly sweeping legislation – that the risk of unintended consequences of this legislation is very high, and that those unintended consequences will disproportionately impact and potentially damage the nation's entrepreneurial ecosystem.

Thriving entrepreneurship is critical to a strong and growing economy – and, therefore, to the post-COVID recovery. Repeated research in recent years has demonstrated that new businesses – "startups" – account disproportionately for the innovations that drive productivity growth,[1] economic growth,[2] and net new job creation.[3]

But entrepreneurship is also risky – a third of new businesses fail by their second year, half by their fifth. For fragile startups, there are three principal outcomes: fail, go public, or be acquired. Failure is the most common outcome. Many entrepreneurs dream of taking their company public, but most startups never achieve the scale that going public requires.

Acquisition, therefore, is by far the most likely avenue for entrepreneurs and their employees to realize the value of what they have created through years of hard work and sacrifice. In a typical year, ten times as many startups are acquired as go public.[4] According to a recent report by Silicon Valley Bank, nearly 60 percent of startups expect to be acquired.[5]

Importantly, acquisitions also enable startup investors to reclaim their invested capital, realize any gains, and recycle their capital into the next generation of startups, fueling the ongoing process of innovation-led economic growth and job creation.

With these realities in mind, the **Platform Competition and Opportunity Act** is of great concern. By severely restricting and even potentially banning the acquisition of startups by larger companies, the legislation will profoundly undermine the incentive for entrepreneurs to take the personal and financial risk of launching a new company, and short-circuit the process by which value-creating innovation helps fund the next generation of new businesses.

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[1] "High Growth Young Firms: Contribution to Job, Output, and Productivity Growth," John Haltiwanger, Ron S. Jarmin, Robert Kulick, and Javier Miranda, Working Paper 2017-03, Center for Administrative Records Research and Applications, U.S. Census Bureau Washington, D.C.

[2] "Declining Business Dynamism in the United States: A Look at States and Metros," Robert E. Litan and Ian Hathaway, the Brookings Institution, May 2014.

[3] "The Role of Entrepreneurship in U.S. Job Creation and Economic Dynamism," Ryan Decker, John Haltiwanger, Ron Jarmin, and Javier Miranda, Journal of Economic Perspectives, Volume 28, Number 3, Summer 2014, pp.3–24.

[4] National Venture Capital Association, 2019 Yearbook.

[5] 2020 Global Startup Outlook, SVB.

As a serial entrepreneur, I understand in a very personal way the threat the legislation poses to the startup ecosystem. In 2001, I started SVOX, a Switzerland-based company that developed text-to-speech software for automotive and mobile device applications. After years of hard work, my partners and I sold the company to Nuance Communications for $125 million.

In 2006, I moved to Cambridge, Massachusetts, earned a master's degree in technology management from M.I.T., and then, in 2008, launched Pixability, a pioneer in video marketing software and services that now employs 85 people in Boston. On the eve of the pandemic, I founded juli. For the third time in my career, I have launched an investor-financed company that will have to return the invested capital – by either going public or getting acquired.

But if my investors are unable to liquidate their investment to reclaim capital and potential gains – through either an IPO or an acquisition – they won't risk their capital by investing in my company in the first place. And without investors, there is no juli – or the services we provide to our customers, or the economic activity my colleagues and I have generated, or the American jobs that we have created. Indeed, without investors, there is no startup ecosystem.

I want to make clear that I am very much aware that, as currently written, the bill restricts acquisitions only among companies with a market capitalization of $600 billion or more. As an entrepreneur, that gives me little comfort, for several reasons:

- First, what is the significance of $600 billion? Have any economic analyses been conducted to show that a market capitalization of $600 billion is the appropriate demarcation of the restrictions imposed by the bill? Have any hearings like this one been conducted to solicit the input of experts to determine any rigorous analytic support for that conclusion?

- Second, that number could easily change, either before this legislation is finalized or in subsequent years. The definition of a "systemically significant financial institution" was defined in the Dodd Frank Act of 2010 and then changed in 2018. Indeed, within 24 hours of the introduction of the bill, there were charges by the press and among antitrust advocates that $600 billion is far too high and should be lowered to capture other large companies with digital platforms.

- More fundamentally, activity restrictions aimed at only four or five companies will introduce enormous structural distortions into the marketplace. Sound public policy should apply clearly and transparently to all market participants – not single out a few by establishing an arbitrary Rubicon of legislative and regulatory scrutiny.

But there is an even more serious and insidious risk posed by the bill – that it will accomplish exactly the opposite of what it intends by tilting regulatory circumstances decidedly in the favor of the larger companies it targets. The risk of this unintended effect is very real because it has happened before, and more than once.

In 2002, in the wake of corporate accounting scandals involving large corporations such as Enron, Tyco, and WorldCom, Congress passed the Sarbanes-Oxley Act to enhance the quality and reliability of financial data reported by publicly traded companies. Section 404 of the Act requires companies to disclose the findings of an external audit of the scope, adequacy, and effectiveness of the company's internal control structure and procedures for financial reporting. Though just 170 words in length, section 404 has accounted for the majority of the cost of complying with Sarbanes-Oxley, estimated to be well over $1 million annually. The substantial cost and burden of complying with section 404 has amounted to a major obstacle for many new and rapidly growing companies hoping to access the capital markets to secure the financing they need to continue growing and creating jobs.

In an interview with Bloomberg, in March of 2012, Steve Case, co-founder and former chief executive of America Online, said: "When AOL went public 20 years ago, we only raised $10 million. Nobody could do that now because of the cost of Sarbanes-Oxley."[6]

Indeed, in testimony before the House Financial Services Committee in June of 2012, David Weild, former vice chairman of Nasdaq, noted that small company IPOs valued at $50 million or less plummeted by 92 percent in the six years following enactment of Sarbanes-Oxley.[7]

For me personally, Sarbanes-Oxley meant giving up – for now – on my girlhood dream of running a public company.

The Dodd Frank Act of 2010 provides a similar warning. That legislation was enacted to reign in the size and risk to the economy posed by large banking companies following the financial crisis of 2008 and the Great Recession that followed. Ten years after enactment, large banks are bigger and more profitable than ever and account for a larger share of the industry than ever. Meanwhile, more than 2,000[8] community banks have disappeared and lending to small businesses has decreased significantly.[9]

The **Platform Competition and Opportunity Act** risks similar unintended consequences. By dramatically increasing the regulatory hurdle and compliance costs of acquisitions, the Act would benefit large incumbent companies who have the money and teams of lawyers to navigate the new legal landscape. Many smaller acquirers would be shut out – particularly if the $600 billion threshold is lowered, as is reasonable to expect.

And narrowing of the acquisition market to only the largest companies would drive down prices for smaller companies like mine. In this way – ironically – the bill would likely deepen and widen the competitive moat protecting large incumbent companies from smaller and more innovative challengers.

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[6] "Case Wants to Build Startup Culture in America," Bloomberg News, March 13, 2012.

[7] Testimony of David Weild, Senior Advisor, Grant Thornton LLP, before the U.S. House of Representatives Financial Services Committee Capital Markets and Government Sponsored Entities Subcommittee, June 20, 2012.

[8] FDIC Community Banking Study, December 2020.

[9] "Small Business Lending Declined after Dodd-Frank Passed" Steve Maas, National Bureau of Economic Research, The Digest: No. 6, June 2018.

Some may argue that the legislation does not explicitly prevent acquisitions, even by the large digital platforms – it only requires that they prove to regulators that the acquiree does not compete with the acquiring company, now or in the future.

As an entrepreneur, I have several practical criticisms of that standard. First, proving whether something may or may not happen in the future – especially given the accelerating pace of change in our modern economy – is an absurdly hypothetical and impossible exercise. Who could have predicted as recently as 2006, that a device called the iPhone – introduced to the world by Steve Jobs in January of the following year – would so fundamentally transform not only the global telephone market, but the way we work, get our news, take and share photographs, navigate our cars, monitor our home security, do our banking, trade stocks, and so many other aspects of life?

More fundamentally, and more punitive to entrepreneurs like me, the costs of meeting such a standard will be in the many millions of dollars – potentially tens or even hundreds of millions of dollars. Large acquirers will "pay" for those costs by simply reducing the value of transactions – in other words, by reducing what they are willing to pay for my company. This not only penalizes me and my colleagues in the value of that transaction, but also reduces the capital we have to invest in our next startup.

Finally, large companies will use the new uncertainty surrounding acquisitions against entrepreneurs when negotiating transaction values. Currently, large companies often justify a lower price for an acquiree due to uncertainty regarding the status of a startup's intellectual property or tax assets like net operating losses – uncertainty created by Congress by way of the Tax Reform Act of 1986 in an attempt to address so-called "loss trafficking" by acquiring companies. Startups are powerless to push back against such claims because larger companies have vastly greater resources. It is easy to imagine how acquisition uncertainty will be used by large companies to justify lower acquisition prices.

In short, large technology companies won't be hurt by this legislation – entrepreneurs like me will be. And given the economic importance of startups to innovation, economic growth, job creation, and expanding opportunity, the U.S. economy and American families, workers, consumers, and investors will also be hurt.

Madame Chair, and Ranking Member Lee, to protect competition and innovation, we don't need the blunt sledge-hammer of sweeping legislation with all its risks of market distortions and unintended consequences. Rather, we need a surgeon's scalpel to carefully dissect, understand, and appropriately address the unique circumstances, details, and market implications that each proposed acquisition entails – and that scalpel resides with the regulators.

The FTC's suit, filed on December 1st, to block the acquisition of chip designer Arm by Nvidia is the most recent example of the current system working precisely as it should.[10]

[10] https://www.ftc.gov/news-events/press-releases/2021/12/ftc-sues-block-40-billion-semiconductor-chip-merger

The far better course of action, therefore, is to significantly increase the frequency and capacity of existing regulatory scrutiny by augmenting the resources of the Federal Trade Commission and the Justice Department's Antitrust Division, which already have the authority to block anti-competitive mergers. Indeed, between 2010 and 2020, the government prevailed in 79 percent of mergers challenged in federal court.[11]

Thriving entrepreneurship is the essential pathway to faster economic growth, job creation, and opportunity expansion the American people need and deserve – particularly in the wake of the Covid-19 pandemic. Legislation that would severely restrict a major avenue of exit for entrepreneurs and their investors, strengthen the competitive position of large incumbents, and reduce the value of acquired startups like mine risks major damage to America's entrepreneurial ecosystem and the post-Covid recovery.

Thank you very much for the opportunity to participate in today's important hearing.

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[11] "Judicial Response to the 2010 Horizontal Merger Guidelines," Carl Shapiro and Howard Shelanski, Review of Industrial Organization, pp. 51-79, January 24, 2021.