

November 13, 2019

Chairman Joseph J. Simons
Commissioner Rohit Chopra
Commissioner Noah Joshua Phillips
Commissioner Rebecca Kelly Slaughter
Commissioner Christine S. Wilson
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chairman Simons and Commissioners Chopra, Phillips, Slaughter and Wilson:

We write to urge the Federal Trade Commission to block Google's proposed acquisition of Fitbit. If this acquisition is approved, Google will further consolidate its monopoly power over Internet-based services. It will increase its already massive store of consumer data, including highly sensitive health and location information. Through its vast portfolio of internet services, Google knows more about us than any other company, and it should not be allowed to add yet another way to track our every move. This transaction should not be permitted because Google already holds a dominant position in the digital marketplace, health data is critical to the future of that marketplace, and the data protection concerns stemming from the acquisition will have far-reaching consequences including a dramatic erosion of consumer privacy.

This proposed acquisition should set off alarm bells at the FTC. It was, of course, Google that moved to consolidate user data across 60 different Internet-based services back in 2012,¹ over the objection of consumer groups, members of Congress, state attorneys general and even the Chairman of the FTC. And the outcome was predictable: competition diminished, innovation diminished, and data protection diminished.

Google's prior acquisition of Doubleclick also deserves close scrutiny before the FTC considers whether to allow this acquisition to go forward. In that case, Google failed to uphold representations that it made to the Commission regarding the personal data gathered by DoubleClick.² On that basis alone, the Commission should reject this proposal. Google has acquired more than 200 firms, many of which implicate personal privacy.³ Those deals should also be reexamined.

Antitrust enforcers need to determine how the acquisition of Fitbit's data will strengthen Google's existing monopolies in search, advertising, and smartphone operating systems. It would be incorrect to define the relevant market as fitness wearables when examining anti-competitive effects of the acquisition. That analysis would miss relevant anti-competitive harms of the acquisition, a mistake made when assessing the Facebook/Instagram deal as well as the Amazon/Whole Foods deal. These regulatory reviews defined the relevant markets as photo-sharing applications and groceries. Enforcers cannot make the same mistake again by ignoring the consolidation this acquisition would cause within the health data marketplace. A review of contemporary business practices for the use of consumer data will reveal health information is broadly integrated into the range of products and services in which Google already dominates.

¹ "Google Consolidates Privacy Policy; Will Combine User Data Across Services." January 24, 2012.
<<https://techcrunch.com/2012/01/24/google-consolidates-privacy-policy-will-combine-user-data-across-services/>>

² "Google Consolidates Privacy Policy; Will Combine User Data Across Services." January 24, 2012.
<<https://techcrunch.com/2012/01/24/google-consolidates-privacy-policy-will-combine-user-data-across-services/>>
<<https://www.washingtonpost.com/archive/local/2012/08/google-will-pay-225-million-settle-ftc-charges-it-misrepresented/>>

³ "List of mergers and acquisitions by Alphabet."
<https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet>

Much like Google's Android acquisition allowed it to extend its desktop search monopoly to mobile devices, so too would an acquisition of Fitbit allow Google to extend its search monopoly to wearable devices. Google's goal is to be a ubiquitous gatekeeper that forecloses competitive threats to any of the markets it monopolizes. Google has eight business lines with over a billion users each⁴, and this acquisition would fortify Google's monopoly power by dominating yet another portal to the consumer.

The commission's repeated failures to address both the antitrust and privacy dimensions of Google's ever-expanding hold over the digital marketplace has placed U.S.—and global—consumers and competitors at serious risk. It should not repeat this pattern of failure again.

The hubris of the executive team to pursue an acquisition of the size, a proposed \$2.1 billion, while under federal and state antitrust investigations is astonishing. During their historic antitrust probes, Microsoft and IBM stopped such acquisition activity, which should indicate that we are now in an era of unprecedented disregard for legal authority. Google Senior Vice President, Rick Osterloh announced the agreement, saying it was an “opportunity to invest even more in Wear OS as well as introduce Made by Google wearable devices into the market.”⁵ These words should worry customers. Google has demonstrated its unwavering plan to acquire consumer data, regardless of its source, having recently been fined \$170M for collecting children's personal data through its subsidiary YouTube.⁶ Google should not gain control of Fitbit's sensitive and individualized health data that can be integrated with data from its current services to entrench its monopoly power.

If the acquisition is approved, a pending FDA stamp of approval for Fitbit would give Google even more influence in healthcare data and technology. Fitbit is already on track for FDA clearance,⁷ as one of nine companies chosen to pilot the FDA's Software Precertification (Pre-Cert) Program. Pre-Cert would “provide more streamlined and efficient regulatory oversight of software-based medical devices developed by manufacturers who have demonstrated a robust culture of quality and organizational excellence.” Based on the FDA overview, the pre-certified status would allow companies access to “participate in a streamlined premarket review and opportunities to collect and leverage real-world post-market data, which encourages innovation, timely patient access, and safety and effectiveness over the product life cycle.”⁸ A Gartner analyst and Senior Director, Alan Antin, noted the dangers of the acquisition in propelling Google into new industries. “This is really more like a long term play. Fitbit has, because of tens of millions of users, quite a database of health information. It instantly gets Google a big footprint.”⁹

Despite Google's promise to be transparent about the data collected from Fitbit,¹⁰ the latest reporting of Google's ‘Project Nightingale,’ which revealed the company's undisclosed partnership with one of the

⁴ “Google Drive will hit a billion users this week.” July 25, 2018. <<https://techcrunch.com/2018/07/25/google-drive-will-hit-a-billion-users-this-week/>>

⁵ “Helping more people with wearables: Google to acquire Fitbit.” November 1, 2019. <<https://www.blog.google/products/hardware/agreement-with-fitbit/>>

⁶ “YouTube fined \$170m for collecting children's personal data.” September 14, 2019. <<https://www.theguardian.com/technology/2019/sep/04/youtube-kids-fine-personal-data-collection-children->>

⁷ “Fitbit Selected to Participate in FDA's New Digital Health Software Precertification Pilot Program.” September 26, 2017. <<https://investor.fitbit.com/press/press-releases/press-release-details/2017/Fitbit-Selected-to-Participate-in-FDAs-New-Digital-Health-Software-Precertification-Pilot-Program/default.aspx>>

⁸ “Digital Health Software Precertification (Pre-Cert) Program.” July 18, 2019. <<https://www.fda.gov/medical-devices/digital-health/digital-health-software-precertification-pre-cert-program>>

⁹ “A Google Fitbit means new possibilities and questions for the smartwatch.” November 1, 2019. <<https://www.cnet.com/news/a-google-fitbit-means-new-possibilities-and-questions-for-the-smartwatch/>>

¹⁰ “Google bought Fitbit. What does that mean for your data privacy?” November 1, 2019. <<https://www.pbs.org/newshour/economy/making-sense/google-bought-fitbit-what-does-that-mean-for-your-data-privacy>>

largest health care systems in the United States, Ascension, indicates a different practice of secrecy. The project gave Google access to millions of patients' medical records without the knowledge or consent of the patients or their doctors.¹¹

Our antitrust laws were specifically enacted to prevent monopolies in their incipiency. The Celler-Kefauver Act authorized prohibitions against anti-competitive conglomerate mergers, such as Google-Fitbit. As the Supreme Court has stated that "Congress decided ... not only to prohibit mergers between competitors, the effect of which 'may be substantially to lessen competition, or to tend to create a monopoly' but to prohibit all mergers having that effect."¹²

We have the choice to accept a future where Google is at the center of all services, or directly regulate its monopoly power. Your job is to protect American consumers from such power, and we urge you to act.

Sincerely,

Sarah Miller
Senior Vice President,
Open Markets Institute

Josh Golin
Executive Director, Campaign for a
Commercial-Free Childhood

Jeffrey Chester
Executive Director, Center for Digital
Democracy

Susan Grant
Director of Consumer Protection and Privacy,
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Robert Weissman
President, Public Citizen

James P. Massar
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Marc Rotenberg
President, EPIC

Tracy Rosenberg
Executive Director, Media Alliance

David Rosen
Communications Officer on Regulatory Affairs,
Public Citizen

Linda Sherry
Director of National Priorities, Consumer Action

¹¹ Google's 'Project Nightingale' Gathers Personal Health Data on Millions of Americans." November 11, 2019.
<<https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790>>

¹² U.S. Supreme Court United States v. Von's Grocery Co., 384 U.S. 270 (1966).
<<https://supreme.justia.com/cases/federal/us/384/270/>>