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AG SLATERY'S COMMENTS TO THE FTC ON DATA AND PRIVACY

"Tennessee's position is clear: Individuals own their own data."

Nashville, TN- Today Tennessee Attorney General Herbert H. Slatery III called for regulatory intervention that will protect consumers and allow competitors to enter the market currently dominated by a handful of tech platforms. General Slatery made this statement at Creighton University in Omaha, Nebraska to a special session of the FTC as part of a multi-state panel of attorneys general addressing competition and consumer protection issues in the technology sector.

General Slatery's entire statement is included on the next page of this release.

A letter to the FTC from a bipartisan group of 43 attorneys general, including General Slatery, can be found here: <https://www.tn.gov/content/dam/tn/attorneygeneral/documents/pr/2019/pr19-19-comments.pdf>





COMPETITION AND CONSUMER PROTECTION IN THE 21ST CENTURY

FTC – CREIGHTON UNIVERSITY EVENT

June 12, 2019

Tennessee Attorney General Herbert H. Slatery III Comments: The tech platforms we're talking about here – companies like Google and Facebook – have very quickly grown from tiny startups to some of the biggest companies in the world. Google's market capitalization is approaching \$750B; Facebook's is approximately \$502B.

And their fortunes are built on the data they collect. They get data from users, they get data from other internet service providers, and they collate and analyze the data to improve their processes for obtaining yet even more data. They share the data and sell it to advertisers, developers and others. This is their business model. It is not going to change. To grow they have to increase the data they collect and maximize the ways to use it. This data allows the platforms themselves, their advertiser customers, and others to influence users based on highly granular and individualized traits of those users.

Who owns the data? The key question for law enforcers going forward is who owns the data. Does the data created by an individual's online activity belong to whoever collects it by whatever means? Or does it belong to the individual users, only available to tech platforms via the knowing consent of a user?

Tennessee's position is clear: Individuals own their own data. If a platform or any other internet service provider wants to obtain and use that data, they should only be able to do so on the basis of a transparent agreement with the user that clearly advises the user of how his data will be used and who will have access to that data. The tech platforms' answer is that the consumer clicks on the voluminous terms and conditions and accepts this use of data. Please; let's not talk ourselves into believing this is either full disclosure or informed consent. It is neither.

Maine just adopted a new law requiring ISPs to get a consumer's consent before sharing his or her data; it was passed on a bipartisan basis and unanimously in the State Senate. It went further than California's law which gives the consumer the right to opt out. I am sure the Maine statute will be challenged, but what won't be challenged is the concern and consumer sentiment expressed in that legislation.

Market Concentration. The network effects that make increasingly large accumulations of data exponentially more valuable have driven a high degree of concentration in this space. Google had approximately 92% of worldwide internet searches in 2017; the next closest competitor has about 2.5%. Facebook has billions of users. Potential competitors like YouTube and Instagram have been absorbed into the dominant platforms. Opportunities for new market participants to scale up



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and compete with these platforms are increasingly limited. Regulatory barriers to entry in other markets, while intended to protect consumers, may inadvertently bolster the position of the reigning incumbents.

Extreme concentration in the technology industry is bad for the consumer. And it's bad for America. Concentration has stifled innovation, with market distortions in research and development as entrepreneurs avoid competing with Google, Facebook, and other tech titans. When competition and innovation are reduced, (i) consumers inevitably suffer; (ii) the quality of available services diminishes; and (iii) industry leaders eventually leverage their market dominance to extract monopoly prices.

Consumer Welfare Standard. From an antitrust perspective, action against the dominant tech platforms is supported by the existing jurisprudence. Asst. Attorney General Makan Delrahim recently noted that the consumer welfare standard considers “effects on quantity, quality, consumer choice, and innovation.” These aspects of the standard must be emphasized; we should not relegate them to a “back seat” behind price increases.

Even on “zero price” platforms like Google and Facebook, the transparency and privacy provided by the services are key measures of product quality for users. In a market that allowed for more innovation and competition, consumers would have substantially more choice about the degree of privacy their platform of choice afforded. As it stands, in a market defined by extreme concentration, consumers have little meaningful choice beyond the initial choice to participate in the Internet.

Regulatory Response. At the same time, any regulatory response to this concentration must be carefully calibrated to ensure innovation is not stifled. If regulators impose a substantial and costly burden on entering this market, it will backfire. New companies will not be able to afford to comply. And the companies who can afford it, the incumbents, will have an even more entrenched position. So, requests for regulation from the incumbents are somewhat circumspect. Competition is the ultimate solution to the significant problems that stem from extreme concentration in the industry. A successful regulatory intervention needs to protect consumers while allowing alternatives to the current dominant incumbents an opportunity to flourish. Heavy-handed regulation to check the incumbents will inadvertently lock them in at the head of an even less-competitive market.

It will be difficult to construct an appropriately measured governmental response, but a meaningful response is necessary. The leading incumbents already possess an almost insurmountable head start based on the data they have acquired. The aggregation of this data allows them to better attract and retain more users and thereby leverage additional data more powerfully by virtue of network effects. Further, even if the incumbents were to delete all this consumer data, they would still have the benefit of powerful artificial intelligences built on the foundation of their initial vast data collection.



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We are concerned that the data sets on which the leading platforms have built their dominance were obtained at the expense of consumers. In many cases, it appears user data was collected under opaque terms that did not allow users to make a knowing decision to turn over their data, or that user data was collected and used in ways that violated the site's own terms of use, or that user data was collected without any notice to the user that this collection was happening. Users are in the dark as to who has access to their data. Not a person in this room knows how their data is being used, much less the value it creates for the tech platforms.

The leading incumbents leverage their collections of data in anti-competitive ways. Of particular concern is the ability of these incumbents to identify trends well in advance of potential competitors. This allows the incumbents to nip many would-be competitors in the bud by either acquiring them or undermining the most promising competitors before they have scaled up enough to defend themselves. Facebook's acquisitions of Instagram and What's App fit this model. Some have described this as the "investment kill zone."¹ How difficult is it for startups in online search, social media, and e-commerce to get venture capital financing for the first round? Tech companies either copy the services of these startups or they buy the companies before they reach a scale threshold. They may take a minority equity position in the startup to perform due diligence, leading up to an acquisition. That way they will have firsthand knowledge of the intellectual property, the ability of management and actual market experience

As a result of this dynamic, budding entrepreneurs are actively avoiding opportunities to innovate in spaces marked out by the leading incumbents, and most young would-be entrepreneurs now dream of selling out to Google or Facebook rather than of developing a company of their own that could compete with the industry leaders. The overwhelming market dominance of the leading platforms has distorted the market and as a result innovation is stifled and consumers suffer.

Moving Ahead. Going forward, users need to be fully aware of what data is being collected and how that data will be used. To date, users have received services worth significantly less than the value of the user data the platforms receive. In addition, consumers often have little control over the level of privacy protections that will accompany their use of the internet. As a baseline, a regulatory regime should ensure platforms allow users to choose what data is obtained from them. This may require some users who desire particularly high levels of privacy to pay for services, and it may result in reduced levels of service for other consumers who want to limit the scope of their data's exposure. But such a decision would belong to the user, and he or she would make it with full information about the various tradeoffs. Because of the value of certain types of data, platforms could even end up paying some users for the right to collect, use, or distribute data regarding their interactions with the platform.

¹ "American tech giants are making life tough for startups", The Economist, June 2, 2018. Examples are Thumbtack (Google invested but started a competing service); Snap, which Facebook started to compete with after Snap rejected a buyout; Uber competing with Google's Waymo; and Onavo, which allowed Facebook to recognize Instagram's rise. Facebook did the same with teen-oriented app tbh.





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But such prospective measures, while necessary, will do little to promote healthy competition in the existing technology sector. Structural change driven by government may well be necessary to restore a competitive market and allow consumers the benefits of transparency and innovation. Working around the edges of the problem may accomplish nothing. The incumbents have the resources -- and the market position -- to continue anti-consumer behavior even in the face of severe regulatory admonishment. As the European experience shows us, fines do little to deter anti-competitive conduct in this arena. Google has been fined 3 times since 2017 by the European Union for a total of \$9.3B. These costs are just a price of doing business and are eventually passed on to advertisers, developers, and other third parties. Very little change occurs because the basic business model for growth is the same, collecting and using data.

In sum, Tennessee has significant concerns about the practices of the leading tech platforms and the effect of these practices on the market. While any significant action should only be taken after careful consideration and deliberation, it is time for enforcement agencies to start thinking about structural approaches to remedy market distortions caused by the dominant tech platforms. We recommend the Public Comments from our fellow Attorneys General for your serious consideration.

Thank you.