

United States Senate
WASHINGTON, DC 20510

July 23, 2020

The Honorable William P. Barr
Attorney General
United States Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530

Dear Attorney General Barr:

We write to raise serious concerns regarding Google LLC's (Google) proposed acquisition of Fitbit, Inc. (Fitbit).¹ We are aware that the Antitrust Division of the Department of Justice is investigating this transaction and has issued a Second Request to gather additional information about the acquisition's potential effects on competition.² Amid reports that Google is offering modest, short-term concessions to overseas enforcers to avoid a full-scale investigation of the transaction in Europe,³ we write to urge the Division to continue with its efforts to conduct a thorough and comprehensive review of this proposed merger and to take any and all enforcement action warranted by the law and the evidence.

It is no exaggeration to say that Google is under intense antitrust scrutiny across the globe. As you know, the company has been under investigation for potential anticompetitive conduct across a number of product markets by the Department and numerous state attorneys general, as well as by a number of foreign competition enforcers, some of which are also reviewing the proposed Fitbit acquisition. Competition concerns about Google are widespread and bipartisan.

Against this backdrop, in November 2019, Google announced its proposed acquisition of Fitbit for \$2.1 billion, a staggering 71 percent premium over Fitbit's pre-announcement stock price.⁴ Fitbit—which makes wearable technology devices, such as smartwatches and fitness trackers—has more than 28 million active users submitting sensitive location and health data to the company. An early pioneer in the wearables sector, Fitbit has struggled to compete with Apple and others in recent years, slumping to just three percent share of the wearables market worldwide.⁵ Although Google has insisted that the acquisition is about wearables hardware, not consumer data, Fitbit's flagging hardware business alone does not seem to justify the substantial premium over Fitbit's stock price that Google has agreed to pay.

¹ Fitbit Press Release, "Fitbit to Be Acquired by Google," (Nov. 1, 2019), <https://investor.fitbit.com/press/press-releases/press-release-details/2019/Fitbit-to-Be-Acquired-by-Google/default.aspx>.

² Josh Kosman, "Feds ramp up probe of \$2.1B Google-Fitbit deal amid privacy worries," N.Y. POST (Apr. 3, 2020), <https://nypost.com/2020/04/03/feds-ramp-up-probe-of-2-1b-google-fitbit-deal-amid-privacy-worries/>.

³ See Foo Yun Chee, "EU regulators seek feedback on Google's Fitbit data pledge," REUTERS (July 15, 2020), <https://www.reuters.com/article/us-fitbit-m-a-alphabet-eu/eu-regulators-seek-feedback-on-googles-fitbit-data-pledge-idUSKCN24G21S>.

⁴ Gerrit De Vynck, "Google to buy Fitbit for \$2.1 billion to boost its hardware business," BLOOMBERG (Nov. 1, 2019), <https://www.bloomberg.com/news/articles/2019-11-01/google-to-buy-fitbit-for-2-1-billion-to-boost-hardware-business>.

⁵ International Data Corporation, "Earwear and Wristbands Drive First Quarter Growth in the Worldwide Wearables Market, Says IDC," (May 28, 2020), <https://www.idc.com/getdoc.jsp?containerId=prUS46432620>.

Google's revenue model is driven by the company's ability to monetize user data. And despite the troubles of its hardware business, Fitbit has and continues to collect sensitive activity-monitoring data from its millions of users. Accordingly, the Division should be extremely skeptical of unenforceable promises by Google not to employ Fitbit user data to support Google's advertising and other businesses. The Division should also be wary of the risk that Google could use Fitbit's data to lessen competition or foster monopoly positions in markets in which it is already dominant or approaching dominance.

The proposed acquisition of Fitbit by Google raises a number of potential competitive concerns, including, but not limited to, the following:

- **The acquisition could lessen competition or tend to create monopolies in markets for certain ad technology services related to display advertising, many of which Google already dominates.** Google already has market power in a number of advertising services markets that deliver, place, and serve digital display advertising. Google's dominance in these markets is enabled by its unmatched supply of consumer data, which allows it to target ads to consumers more effectively than its rivals. Adding Fitbit's consumer data to Google's could further diminish the ability of companies to compete with Google in these ad technology markets and could raise barriers for potential competitors to enter these markets, further entrenching Google's dominance. In addition, Google's acquisition of Fitbit's consumer data—even if Google does not use it for advertising services—forecloses Google's competitors or potential competitors from using the data to compete against Google.
- **The acquisition could lessen existing competition in the wearables hardware market.** Google currently enables wearables users to interface with Google systems, including Google Maps and its Android operating system. Google also offers a smartwatch operating system called Wear OS that is used by other wearables manufacturers. With the acquisition of Fitbit, Google may have the incentive and ability to foreclose or degrade the ability of non-Fitbit wearables to interoperate with Google services, limiting their attractiveness to consumers in comparison to Fitbit products. It could also foreclose access to the Wear OS operating system for competing wearables manufacturers or degrade its quality.
- **The acquisition could eliminate potential competition between Google and Fitbit in the wearables market.** Google has not yet released its own wearable product, but it is a likely potential entrant. In addition to having its own wearables operating system, Google reportedly acquired access to smartwatch technology as recently as last year.⁶ The proposed acquisition would eliminate the possibility of Google entering the wearables market to compete against Fitbit.
- **The acquisition could lessen competition for certain data-driven health technology services.** Google is active in emerging markets to use data and machine learning

⁶ Corrine Reichert, "Google's \$40M purchase of Fossil tech was for hybrid smartwatches, report says," CNET (Sept. 16, 2019), <https://www.cnet.com/news/googles-40m-purchase-of-fossil-tech-was-for-hybrid-smartwatches-report-says/>.

technology to provide services to the health care sector.⁷ Fitbit’s user data would be a useful input to such efforts, and could enable Fitbit—or Fitbit and a partner company—to enter these markets to compete with Google. The proposed acquisition would eliminate this possibility.

- **The acquisition could lessen competition in markets for online search and search advertising.** Google already has a virtual monopoly in online search and search advertising, positions that are supported by Google’s unrivaled access to consumer data. The addition of Fitbit’s user data could serve to help maintain Google’s dominance in these markets.
- **The acquisition could lessen competition to provide privacy features.** Whereas Fitbit has a reputation for safeguarding users’ data privacy, Google is better known for its success in collecting and monetizing consumers’ personal data. Google’s acquisition of Fitbit may reduce the incentives of competing wearables to safeguard user privacy and offer privacy-enhancing features.

To address concerns about Google’s potential use of Fitbit’s consumer data and to avoid an in-depth “Phase II” merger investigation by the European Commission, it has been reported that Google has offered the European antitrust authorities an enforceable pledge that it will not use Fitbit user data for Google’s ad business and that it will not transfer the data to Google’s other lines of business for five years.⁸ While such a data usage commitment would likely be a necessary part of any reasonable remedy, it seems inadequate as a stand-alone solution. First, to the extent that the competition concerns listed above prove to be well-founded, simply ring-fencing Fitbit’s user data would not restore the pre-merger state of competition. Secondly, a mere five-year commitment not to use Fitbit’s user data for its other businesses seems far too short a time to protect competition in the intermediate term, much less the long term. It gives us pause that Google seems more than willing to wait five years before adding Fitbit’s cache of sensitive user information to its existing hoard of consumer data.

Over the years, Google has completed more than 100 strategic acquisitions—including purchases of DoubleClick, AdMob, YouTube, Waze, and many other firms—virtually all without significant enforcement action by federal antitrust enforcers. In retrospect, it seems clear that some of these acquisitions likely contributed to Google’s enduring dominance in advertising technology, online search, and other markets. We are deeply troubled by the possibility that past reluctance to address potential threats to competition in their incipiency though aggressive merger enforcement may have contributed to current concerns about potential anticompetitive conduct by Google in these markets, resulting in the antitrust scrutiny that the company is attracting from federal, state, and international enforcers today.

That is why it is essential that the Department conduct a thorough review of the proposed Google/Fitbit merger, taking into account the various ways it could affect competition in the long

⁷ See, e.g., Rob Copeland, “Google’s ‘Project Nightingale’ Gathers Personal Health Data on Millions of Americans,” WALL STREET JOURNAL (Nov. 11, 2019), <https://www.wsj.com/articles/google-s-secret-project-nightingale-gathers-personal-health-data-on-millions-of-americans-11573496790>.

⁸ See Foo Yun Chee, “EU regulators seek feedback on Google’s Fitbit data pledge,” REUTERS (July 15, 2020), <https://www.reuters.com/article/us-fitbit-m-a-alphabet-eu-regulators-seek-feedback-on-googles-fitbit-data-pledge-idUSKCN24G21S>.

term across multiple markets. We encourage the Department to be skeptical of any proposed remedies that do not appear adequate to protect competition from the likely effects of the proposed acquisition and urge the Department to take any enforcement action that may be warranted based on the evidence and the law, including federal litigation to block the merger, if appropriate.

We stand ready to support the Department's efforts to protect competition and consumers in these critical markets. Thank you for your urgent attention to this matter.

Sincerely,



Amy Klobuchar
United States Senator



Richard Blumenthal
United States Senator



Cory A. Booker
United States Senator



Mazie K. Hirono
United States Senator



Sherrod Brown
United States Senator



Mark R. Warner
United States Senator



Elizabeth Warren
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