

April 15, 2024

Open Letter to State Attorneys General from ACT | The App Association

Dear State Attorneys General,

ACT | The App Association is a global trade association for small and medium-sized technology companies. We work with and for our small business members to promote a policy environment that rewards and inspires innovation while providing resources that help them raise capital, create jobs, and continue to build incredible technology. We strive to create an environment that when anyone thinks of technology, they first think of the small and mid-sized businesses like our members, who are the true backbone of innovation.

Since 1998, the App Association has advocated for the interests of the app economy internationally, federally, and increasingly, at the state and local levels. Our team of experts regularly publish analyses of legislation, write letters, issue policy principles,<sup>1</sup> and participate in official policymaking processes in venues around the world including in the United States at the federal and state levels, in the EU, in Latin America, and in the UK. In addition to amplifying our members' voices in policymaking forums, we facilitate direct connections between our members and policymakers, empowering them to advocate for the policies critical to their businesses.

At the state level, we serve on various task forces, lead state bar association programming, and have spoken at various forums across the country to shed light on the tech policy issues most pertinent to small and mid-sized tech companies, independent developers, and startups generally.

We are concerned with the recent influx of antitrust proposals and enforcement actions at the state level. We believe that some of the rationale behind these actions may be a result of the biggest players and the loudest voices being heard over the objections of truly small and mid-sized businesses. Small and mid-sized companies have gained the most from the creation of online marketplaces and, therefore, have the most to lose if government eliminates these options from the distribution channels in the name of antitrust concerns.

### **Antitrust and Competition Concerns**

Over the past several years, regulators and policymakers have been taking a close look at competition in online marketplaces. This scrutiny has put a spotlight on how small businesses work with the largest consumer-facing app stores like Apple's App Store and the Google Play store, but also curated online marketplaces (COMs) like OpenAI (large language model services), Amazon (retail), and Oracle (business). In general, COMs provide wraparound services, often bundled with the core distribution service. The addition of COMs into a variety of markets has made it possible for the smallest, youngest companies to reach millions of potential clients and customers around the globe. In many cases, the bundle of distribution services is relatively more valuable for smaller companies

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<sup>1</sup> ACT | The App Association State Policy Principles - <https://actonline.org/state-priorities/>

than it is for their larger rivals. These more well-resourced companies are generally less dependent on the trustworthiness of the marketplace itself, relying on their own brand and either sourcing complementary services from third parties or making them in-house.

Accordingly, it is important for state enforcement agencies to appreciate that App Association members' interests do not necessarily align with their larger counterparts, at least not to the extent of those that are asking you to intervene in these markets and punish the provision of bundled distribution. While discussions have referenced “small developers” in the abstract, the historic use of “small developers” to refer to billion-dollar companies like Spotify, Match Group, and Epic Games does a massive disservice to our membership and the startup community alike—where the average number of employees is fewer than 25 people. Our members' interests do not align with many of the largest companies on these app stores that are seeking to lower their own distribution costs.

As you are asked to remedy the harms specific competitors experience at the hands of online marketplace owners, we urge you to consider the pro-competitive benefits they bring to smaller businesses and the economy more broadly. Specifically, COMs generally offer a bundle of goods and services by the larger platforms provide including:

- Efficient, cost-effective access to a global market;
- Reduced overhead; and
- Built-in consumer trust.

We find that too many enforcers and regulators turn a blind eye to this bundle of services and support efforts that raise the barrier to entry for more innovators and competitors attempting to enter the global marketplace.

### **California Law Review Commission Study**

In 2022, the California Legislature authorized the California Law Review Commission (CLRC) to study potential revisions to antitrust laws, including outlawing monopolies by single companies, reconsidering antitrust injury analysis in the context of technology companies to reflect innovation and personal freedom, and evaluating other revisions to promote free market competition for Californians. We have serious reservations with many of the recommendations being proposed, which we believe could snap the true backbone of entrepreneurship. For example, one proposal would create a new form of liability for “exclusionary” conduct that “has or had a material risk of harming trading partners due to increased market power, even if those harms have not yet arisen and may not materialize.”<sup>2</sup> The suggested legislative text is a direct attack on the COM model that, again, fundamentally benefits smaller companies doing business on those COMs.<sup>3</sup> Although the proposal rightfully rejects the NY 21<sup>st</sup> Century Antitrust Act, which would establish an EU “abuse of dominance” standard, it is equally problematic for companies that leverage COMs today. Proposals like these must be rejected on the grounds that they would increase overhead costs and raise other

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<sup>2</sup> <https://faculty.haas.berkeley.edu/shapiro/singlefirmCLRC.pdf>.

<sup>3</sup> <https://faculty.haas.berkeley.edu/shapiro/singlefirmCLRC.pdf>.

barriers to entry for small businesses in your state and on the grounds that they would make consumers worse off as a result.

### **A Proposal for Merger Guidelines**

The Uniform Law Commission (ULC) has a proposal that incorporates more attorney general (AG) involvement in pre-merger notification process that we believe does not pose an undue burden on small and mid-sized businesses like our members. We would be happy to share a draft of the language and meet with your office.

### **What Your Office Can Do**

State AGs play a crucial role in advising the legislature on the development of new frameworks to protect consumers and competition. As legislatures in your states consider proposals like these, we strongly encourage you to carefully consider whether they are designed to cater first and foremost to the complaints of large, well-resourced competitors—or if they would truly benefit small businesses that leverage COMs. From our perspective, it is especially important not to mandate the degradation of software distribution. We encourage you to examine how government intervention—whether it’s the restructuring of markets with digital platforms or the creation of detailed regulations, or both—could substantially increase what are currently low entry costs for app makers and small tech-driven companies and create an environment where only well-resourced companies can comply.

We remain committed to our mission and look forward to working with your office to ensure that innovation and entrepreneurship at the small and mid-sized levels will not be axed through “big tech” targeted legislation and antitrust enforcement.

We thank you for your leadership and look forward to connecting with your offices.

Sincerely,

Caleb D. Williamson  
State Public Policy Counsel  
ACT | The App Association