

June 28, 2021

The Honorable Rostin Behnam
Acting Chairman
Commodity Futures Trading Commission
Three Lafayette Centre
1155 21 51 St. NW
Washington, DC 20581

Dear Acting Chairman Behnam:

I write to request that the Commodity Futures Trading Commission (CFTC) investigate Google's "Project Bernanke" and other practices for abusive manipulation of the online advertising market.

Google's Abusive Behavior in Digital Advertising

Today, digital advertising is traded on online exchanges known as ad exchanges. Ad exchanges sit between advertisers and publishers, who use ad-buying and ad-selling software respectively. Specifically, advertisers use ad-buying software to manage advertising budgets and to bid on impressions that are likely to yield the highest return on their investment. At the same time, online publishers use ad-selling software to allocate their ad inventory where it will maximize revenue. The problem is that for more than a decade, Google has controlled the dominant ad exchange, the dominant ad-buying tools, and the dominant ad-selling tools. The situation has been ripe for manipulation, and there is now strong evidence that Google has taken advantage of its position.

I am particularly concerned about revelations of a secret Google program, Project Bernanke.¹ Court documents have revealed the nature of this scheme whereby Google gathered bid data through its ad exchange, AdX, from other market participants and then used that data to give its own ad-buying systems, DV360 and Google Ads, an advantage over their ad-buying competitors. Because Google was able to learn from rival ad buyers' previous bidding data, its ad-buying tools gained a competitive advantage that ultimately boosted their win rates.² Google's ad-buying products thus became more attractive than those offered by rivals, killing off other competing ad buyers that could not deliver advertisers the same win rates as Google.

¹ The Verge, "Google Reportedly Ran Secret 'Project Bernanke' That Boosted Its Own Ad Buying System Over Competitors," Kim Lyons, April 11, 2021, <https://www.theverge.com/2021/4/11/22378296/google-secret-project-bernanke-ad-buying-competitors-texas>.

² A "win rate" is the rate at which an ad-buying platform wins an ad impression when it submits a bid.

Approximately 86 percent of online display advertising in the United States is bought and sold in real time on trading venues called ad exchanges.³ Currently, Google operates the largest ad exchange and dominates the market for tools that publisher-buyers and advertiser-sellers must use to trade. Google’s dominance of these markets for advertisement makes their behavior even more concerning. The House Antitrust Subcommittee already noted the danger of Google’s conflicts of interest in its Digital Markets Report released in 2020.⁴ These concerns appear well-founded.

Court documents about Project Bernanke explain that Google made hundreds of millions of dollars every year through its secret market-abuse strategy.⁵ While state and federal enforcers are investigating this activity for potential violations of the antitrust laws, the activity raises additional concerns that I believe may be within the CFTC’s jurisdiction and warrant close scrutiny.

Display Advertising is a Commodity under the Commodity Exchange Act

I believe digital advertising likely falls within the CFTC’s mandate. The Commodity Futures Trading Commission Act (CFTCA) was enacted as an amendment that expands the Commodity Exchange Act (CEA) by “bring[ing] under Federal regulation *all . . .* commodities, goods, and services traded on exchanges.”⁶

As commodities and futures fall under its jurisdiction, the CEA and its amendments under the Dodd-Frank Act charge the CFTC with:

Ensur[ing] the financial integrity of all transactions subject to this Act and the avoidance of systemic risk; protect[ing] all market participants from fraudulent or other abusive sales practices and misuses of customer assets; and promot[ing] responsible innovation and fair competition among boards of trade, other markets and market participants.⁷

As you well know, the definition of a commodity under the CEA has proven flexible enough to include new products and technologies as the economy evolves. The CFTC has a long, successful track record of bringing new, previously unimagined markets under its jurisdiction, such as futures based on specific weather events. For example, the CEA has long regulated “livestock” beyond the species specifically enumerated in the statute as subject to futures trading.⁸ In recent years, the CFTC has successfully argued that the CEA grants jurisdiction to regulate

³ Stanford Technology Law Review, “Why Google Dominates Advertising Markets,” Dina Srinivasan 24. 55, 56, December 7, 2020, <https://www-cdn.law.stanford.edu/wp-content/uploads/2020/12/Srinivasan-FINAL-Why-Google-Dominates-Advertising-Markets.pdf>.

⁴Majority Staff of the Subcommittee on Antitrust, Commercial and Admin Law of the H. Comm. On the Judiciary, 116th Congr., Report on the Investigation of Competition in Digital Markets, at 379–80 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf.

⁵ Wall Street Journal, “Google’s Secret ‘Project Bernanke’ Revealed in Texas Antitrust Case,” Jeff Horwitz & Keach Hagey, April 11, 2021, <https://www.wsj.com/articles/googles-secret-project-bernanke-revealed-in-texas-antitrust-case-11618097760>.

⁶ S.REP. NO. 93-1131, at 2-3, 1974 U.S.C.C.A.N. at 5844-45.

⁷ CEA § 3(b).

⁸ See Memorandum of Decision, *CFTC v. My Big Coin Pay*, No. 18-CV-10077 (D. Mass., Sept. 26, 2018).

cryptocurrencies like Bitcoin as well.⁹ Display advertising impressions that Google sells on its ad exchanges may similarly fall within the definition of “commodities” under the CEA.¹⁰

To the extent that digital advertising impressions are commodities, Google’s manipulation of ad sales on its exchanges likely falls within the CFTC’s purview under the CEA. Today, the advertising market is functionally unregulated. It is a market worth hundreds of billions of dollars per year, and it is the main revenue driver for some of the country’s largest companies.¹¹

Importantly, if the CFTC determines that the ads Google sells on its ad exchanges are commodities, the CFTC has the authority to investigate under the its general jurisdiction rather than its exclusive jurisdiction over futures.¹² Thus, CFTC action would not preempt or interfere with other enforcement actions against Google.¹³

Like high-frequency traders, ad exchanges provide in real time a platform for the sale of ad inventory each time a web page loads. Tens of billions of digital advertisements are traded on ad exchanges every day in the US.¹⁴ The market for digital advertising has become perhaps the most actively traded commodity exchange in the world.

The market is subject to private regulation, however, by the dominant player in the market—Google. Google exercises that regulatory power to benefit itself and to exploit other market participants, both large and small. As the December 2020 complaint filed by 11 State Attorneys General in the Eastern District of Texas aptly put it:

Imagine if the financial markets are controlled by one monopoly company, say Goldman Sachs, and that company then owns the [New York Stock Exchange], which is the largest financial exchange, that then trades on that exchange to advantage itself, eliminate

⁹ *Id.*; see also Press Release, CFTC, Federal Court Finds that Virtual Currencies Are Commodities (Oct. 3, 2018), <https://www.cftc.gov/PressRoom/PressReleases/7820-18>; see also J. Paul Forrester & Matthew Bisanz, *Virtual Currencies as Commodities?*, HARV. L. SCH. F. CORP. GOVERNANCE (Dec. 3, 2018), <https://corpgov.law.harvard.edu/2018/12/03/virtual-currencies-as-commodities/>.

¹⁰ CEA § 1a(9), 7 U.S.C. § 1a(9) (“All other goods and articles . . . and all services, rights, and interests . . . in which contracts for future delivery are presently or in the future dealt in.”).

¹¹ The advertising industry generates approximately \$629 billion in revenue each year, 44 percent of which comes from digital advertising alone. *Vault*, “Advertising,” <https://www.vault.com/industries-professions/industries/advertising#:~:text=The%20advertising%20industry%20is%20a,that%20spending%20in%20digital%20advertising> (last visited May 5, 2021); see also, Statista, “Google: Annual Advertising Revenue 2001-2020,” Joseph Johnson, February 5, 2021, <https://www.statista.com/statistics/266249/advertising-revenue-of-google/>.

¹² The CEA conferred “exclusive jurisdiction over a limited, discrete set of items related to the making of futures contracts. Specifically, these items included “(1) accounts involving contracts of sale of a commodity for future delivery, (2) agreements involving the same, (3) transactions involving the same, and (4) transactions subject to regulation by the CFTC pursuant to section 23 of this title (dealing with so called margin or leverage contracts).” *F.T.C. v. Ken Roberts Co.*, 276 F.3d 583, 589 (D.C. Cir. 2001).

¹³ For example, manipulations of the London Interbank Offered Rate and foreign exchange instruments, have featured concurrent criminal cartel investigations by the Antitrust Division of the Department of Justice. David Yeres, Robert Houck, Tim Cornell & John Friel, “Futures & Derivatives Law Report,” 39 *J. L. INV. & RISK MGMT.* 1, 5 (Jan. 2019).

¹⁴ *Wired* “Should Google’s Ad Market Be Regulated Like the Stock Market?,” Gilad Edelman, August 31, 2020, <https://www.wired.com/story/google-ad-market-regulated-like-stock-market/>.

competition, and charge a monopoly tax on billions of daily transactions. That is the world of online display advertising today.¹⁵

The allegations around Project Bernanke, if true, would constitute deeply troublesome market manipulation by Google. To ensure that it maintains its dominant position, Google appears to be using its control over the exchanges to prevent other ad-buying tools from gaining market share against it. Google is not hiding this fact. In its court filings in Texas, Google acknowledges that Project Bernanke used customer bid data submitted in the past to make it more likely that Google Ads would win ad auctions “that would otherwise be won by other buying tools.”¹⁶ This behavior raises serious concerns about the fairness and transparency of these ad exchanges.

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I call on the CFTC to investigate Project Bernanke as a potential violation of the CEA. The CFTC has the authority to investigate and file a manipulation claim against any person it believes (i) had the ability to influence the price of a commodity, (ii) specifically intended to create an artificial price, (iii) created an artificial price, and (iv) engaged in conduct that caused the artificial price.¹⁷ Google’s conduct through Project Bernanke fits this description. Other conduct by Google may also fit this description and would also be within the CFTC’s power to investigate these potential violations.¹⁸ Given the power of a company like Google to unilaterally manipulate the online advertising market, it is critical that the CFTC ensures these new digital commodities are traded fairly and without harmful manipulation.

I thank you for your attention to this urgent matter.

Sincerely,



Elizabeth Warren
United States Senator

¹⁵ Complaint, Texas, et al. v. Google LLC at ¶ 33 (E.D. Tx. 2020) (No. 4:20cv957) (hereafter “Texas Complaint”).

¹⁶ MLex Market Insight, “Google Acknowledges it Foresaw Possibility of Probe of ‘Jedi Blue’ Advertising Deal with Facebook,” Michael Acton & Mike Swift, April 7, 2021, <https://www.mlex.com/GlobalAdvisory/DetailView.aspx?cid=1279161&siteid=257&rdir=1>.

¹⁷ CEA § 9(a)(2).

¹⁸ For example, the Last Look and Average Revenue Share programs discussed in the Texas Complaint. Complaint, Texas, et al. v. Google LLC at ¶ 33 (E.D. Tx. 2020) (No. 4:20cv957) (hereafter “Texas Complaint”).