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The American Innovation and Choice Online Act

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SUMMARY

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The American Innovation and Choice Online Act

The competitive practices of large technology companies have attracted considerable congressional attention in recent years. In October 2020, a House subcommittee concluded a 16-month investigation into the market power of four of the largest platform operators: Facebook, Google, Amazon, and Apple. The inquiry culminated in a 450-page report recommending a range of measures to address the allegedly anticompetitive conduct of these "Big Tech" firms.

While the subcommittee's report prompted a range of proposals, attention has turned to bills targeting discriminatory conduct by the tech giants. The relevant legislation—the American Innovation and Choice Online Act (AICOA)—would prohibit Big Tech platforms from favoring their own products and services in various ways.

There are different versions of the legislation. During the first session of the 117th Congress, the House Judiciary Committee ordered a version of the AICOA to be reported to the full House. Bills embodying the legislation are also under active Senate consideration in the second session. In January 2022, the Senate Judiciary Committee approved S. 2992, which it reported to the full Senate in March. Senator Amy Klobuchar—S. 2992's sponsor—later released a different version of the AICOA on May 25, 2022. The May 25 draft indicates that Senator Klobuchar intends to introduce it as an amendment in the nature of a substitute, if the Senate takes up the bill. This report provides an overview of the versions of the AICOA pending in the Senate, while noting certain key differences between versions of the bill pending in the House and Senate.

S. 2992 would apply special rules to "covered platforms." Under the May 25 draft, covered platforms would include online platforms that exceed certain thresholds for U.S.-based active users; exceed certain thresholds for annual sales, market capitalization, or worldwide active users; and occupy positions as "critical trading partners."

The legislation would prohibit operators of covered platforms from engaging in 10 categories of conduct. Three of the offenses would require regulators to establish that a platform operator's conduct resulted in material harm to competition. In particular, the legislation would bar operators of covered platforms from:

- Preferencing their own products or services over those of other business users of their platforms in a manner that would "materially harm competition";
- Limiting the ability of business users to compete with the operators' own offerings in a manner that would "materially harm competition"; and
- Discriminating in the application of their terms of service among similarly situated business users in a manner that would "materially harm competition."

The remaining seven offenses involve a variety of other issues, including platform interoperability, use of user data, and restrictions on the uninstallation of software applications. These offenses would not require regulators to prove competitive harm, but defendants would be allowed to rebut a *prima facie* case by establishing an *absence* of such harm.

The legislation would also offer defendants several other affirmative defenses involving user privacy, data security, and platform functionality. Enforcement authority would rest with the Department of Justice, the Federal Trade Commission, and state attorneys general.

Contents

Covered Platforms 2
Unlawful Conduct 6
Sections 3(a)(1)-(3): Self-Preferencing, Limitations on Business Users, and Discrimination That Would "Materially Harm Competition" 6
Self-Preferencing 7
Material Harm to Competition 8
Content Moderation 9
Sections 3(a)(4) and 3(a)(7): Interoperability and Access to Data 10
Section 3(a)(5): Tying 12
Section 3(a)(6): Use of Data 13
Section 3(a)(8): App Preinstallation and Steering 14
Section 3(a)(9): Self-Preferencing (Again) 14
Section 3(a)(10): Retaliation for Reports to Law Enforcement 15
Affirmative Defenses 15
Enforcement 17
Conclusion 18

Contacts

Author Information 18

The competitive practices of large technology platforms have attracted considerable congressional attention in recent years. In October 2020, a House subcommittee concluded a 16-month investigation into the market power of four of the largest platform operators: Facebook, Google, Amazon, and Apple. The inquiry culminated in a 450-page report recommending a range of measures to address the allegedly anticompetitive conduct of these "Big Tech" firms.[1]

The subcommittee's report prompted a flurry of legislative activity.[2] The 117th Congress has featured bills that would impose vertical separation requirements,[3] acquisition restrictions,[4] interoperability and data-portability mandates,[5] and a specialist regulator[6] on Big Tech.

While these proposals cover a diverse range of topics, attention has turned to bills targeting discriminatory conduct by the tech giants.[7] The relevant legislation—the American Innovation and Choice Online Act (AICOA)—would prohibit Big Tech platforms from favoring their own products and services in various ways.[8] The prohibitions would move significantly beyond existing antitrust doctrine and could have important ramifications for the shape of the digital economy.[9]

There are different versions of the legislation. During the first session of the 117th Congress, the House Judiciary Committee ordered a version of the AICOA—H.R. 3816—to be reported to the full House.[10] Bills embodying the legislation are also under active consideration in the Senate in the second session. In January 2022, the Senate Judiciary Committee approved S. 2992, which it reported to the full Senate in March.[11] Senator Amy Klobuchar—S. 2992's sponsor—later

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[1] INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMM. ON ANTITRUST, COM. AND ADMIN. L. OF THE H. COMM. ON THE JUDICIARY, 116TH CONG. (2020). This report lists the Big Tech firms in the same order as the subcommittee's report. Since the publication of the subcommittee's report, Facebook has changed its name to Meta Platforms, Inc.

[2] *See* CRS Report R46875, *The Big Tech Antitrust Bills*, by Jay B. Sykes.

[3] H.R. 3825, 117th Cong. (2021).

[4] S. 3197, 117th Cong. (2021); H.R. 3826, 117th Cong. (2021).

[5] H.R. 3849, 117th Cong. (2021).

[6] S. 4201, 117th Cong. (2022); H.R. 7858, 117th Cong. (2022).

[7] *See, e.g.*, Lauren Feiner, *Lawmakers Are Racing to Pass Tech Antitrust Reforms Before Midterms*, CNBC (June 4, 2022), https://www.cnbc.com/2022/06/04/lawmakers-racing-to-pass-tech-antitrust-tech-reforms-before-midterms.html.

While "discrimination" can be a value-laden term, this report uses that language in a purely descriptive sense to refer to conduct by a vertically integrated firm that preferences the firm's own offerings over those of its rivals. That conduct is "discriminatory" in this sense does not necessarily entail any conclusions about its competitive effects. *See* Erik Hovenkamp, *The Antitrust Duty to Deal in the Age of Big Tech*, 131 YALE L.J. 1483, 1544 n.290 (2022) (collecting academic literature debating the circumstances in which platform discrimination is anticompetitive); *cf.* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 621-28 (2011) (discussing the varied output effects of different types of price discrimination).

[8] *See* Brendan Bordelon & Josh Sisco, *Schumer's Office Says He Plans to Hold Vote on Tech Antitrust Bill*, POLITICO (Aug. 4, 2022), https://www.politico.com/news/2022/08/04/schumer-tech-antitrust-bill-00049890.

[9] *See, e.g.*, Letter from Fiona M. Scott Morton, et al., to Sen. Amy Klobuchar & Sen. Charles Grassley 5 (July 7, 2022), https://som.yale.edu/sites/default/files/2022-07/AICOA-Final-revised.pdf (supporting the AICOA on the grounds that it "significantly strengthens" the antitrust laws vis-à-vis Big Tech platforms); Ryan Bourne & Brad Subramaniam, *The "Big Tech" Self-Preferencing Delusion*, CATO INST. 2 (Feb. 24, 2022), https://www.cato.org/sites/cato.org/files/2022-02/briefing-paper-136.pdf (opposing the AICOA and arguing that it would "fundamentally alter business conduct on covered platforms").

[10] H.R. 3816, 117th Cong. (2021).

[11] S. 2992, 117th Cong. (2022) (reported with an amendment in the nature of a substitute) [hereinafter "Reported Version"].

released a different version of the AICOA on May 25, 2022.[12] The May 25 draft indicates that Senator Klobuchar intends to introduce it as an amendment in the nature of a substitute if the Senate takes up the bill.

This report provides an overview of versions of the AICOA pending in the Senate. The report's discussion applies to both the reported version of S. 2992 and Senator Klobuchar's draft amendment, unless specifically noted. While the report focuses on versions of the legislation pending in the Senate, it contains several textboxes highlighting key differences between S. 2992 and H.R. 3816.

Covered Platforms

The AICOA would apply special rules to "covered platforms." The May 25 draft defines that term to mean "online platforms"[13] that exceed certain thresholds for U.S.-based active users; exceed certain thresholds for annual sales, market capitalization, or worldwide active users; and occupy positions as "critical trading partners."[14]

The bill would authorize the Department of Justice (DOJ) and Federal Trade Commission (FTC) to jointly designate firms that meet these criteria as covered platforms.[15] However, the legislation does not limit its prohibitions to entities that have been formally designated. Rather, the bill appears to contemplate the possibility that regulators will enforce its prohibitions against non-designated entities that nevertheless qualify as covered platforms.[16]

Under the May 25 draft, the term "covered platform" would mean an online platform that:

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[12] The May 25 version of the legislation is available at https://www.klobuchar.senate.gov/public/_cache/files/b/9/b90b9806-cecf-4796-89fb-561e5322531c/B1F51354E81BEFF3EB96956A7A5E1D6A.sil22713.pdf [hereinafter "May 25 Draft"].

[13] The May 25 version of the bill contains a definition of the term "online platform" that appears intended to exclude financial-services and telecommunications companies from the legislation's scope. *See* May 25 Draft § 2(a)(9) (2022). The bill defines the term "online platform" to mean a website, online or mobile application, operating system, digital assistant, or online service that "enables":

- A user to generate or share content that can be viewed by other users or to interact with other content on the platform;
- The offering, advertising, sale, purchase, or shipping of products or services between and among consumers or businesses not controlled by the platform operator; or
- User searches or queries that access or display a volume of information.

Id. § 2(a)(9)(A). The definition explicitly excludes services that provide the capability to transmit data to and receive data from "all or substantially all internet endpoints" by wire or radio. *Id*. § 2(a)(9)(B). In contrast, the reported version of the bill would define the term "online platform" to include websites, online or mobile applications, operating systems, digital assistants, or online services that "*facilitate*[] the offering, advertising, sale, purchase, *payment*, or shipping of products or services, including software applications, between and among consumers or businesses not controlled by the platform operator." S. 2992, 117th Cong. § 2(a)(9)(B) (Reported Version) (emphasis added). Unlike the May 25 draft, the reported version of the bill would not specifically exclude telecommunications companies.

[14] May 25 Draft § 2(a)(5)(B).

[15] S. 2992, 117th Cong. § 3(d) (Reported Version); May 25 Draft § 3(d). For additional discussion of the designation process and other issues related to the bill's enforcement, see "Enforcement" *infra*.

[16] *See, e.g.*, S. 2992, 117th Cong. § 2(a)(5)(B)(ii)(I) (Reported Version) (defining a "covered platform" to include certain firms with large numbers of U.S.-based active users "during the 12 months preceding a designation . . . *or* the 12 months preceding the filing of a complaint for an alleged violation of this Act") (emphasis added).

- Has at least 50 million U.S.-based monthly active users or 100,000 U.S.-based monthly active business users at any point during the 12 months preceding a designation decision or the filing of a complaint for a violation of the bill;
- Is owned or controlled by an entity with:
  - Annual sales exceeding $550 billion at any point during the two years preceding a designation decision or the filing of a complaint;
  - An average market capitalization exceeding $550 billion over any 180-day period during the two years preceding a designation decision or the filing of a complaint; or
  - At least one billion worldwide monthly active users during the 12 months preceding a designation decision or the filing of a complaint; and
- Is a "critical trading partner" for the sale or provision of any product or service offered on or directly related to the platform.[17]

The AICOA defines the term "critical trading partner" to mean a person that has the ability to "restrict or materially impede" a business user's access to its users, customers, or a tool or service needed to effectively serve its users or customers.[18]

Depending on the interpretation of the "critical trading partner" requirement, the legislation may encompass a range of popular platforms, including:

- Facebook (a social network), Instagram (a photo-sharing service), and WhatsApp (a messaging application)—all of which are controlled by Meta Platforms;
- Google Search (a search engine), YouTube (a video-sharing platform), Google Ads (an online advertising platform), Android OS (a mobile operating system), and the Google Play Store (a software application store)—all of which are controlled by Alphabet;
- Amazon Marketplace (an e-commerce marketplace) and Amazon Web Services Marketplace (an online software store);
- Apple's App Store (a software application store) and iOS (a mobile operating system);
- Azure Marketplace (an online software store), LinkedIn (an employment-oriented social network), Microsoft Store on Xbox (an online video-game store), and Microsoft Windows (a group of operating systems)—all of which are controlled by Microsoft; and
- TikTok (a video-sharing service), which is controlled by the Chinese firm ByteDance.[19]

The bill's supporters have argued that the criteria governing a firm's status as a covered platform are reasonable proxies for the type of "gatekeeping" power that often raises competition

[17] May 25 Draft § 2(a)(5)(B). The reported version of the bill would apply the same criteria as the May 25 version to platforms controlled by publicly traded companies. *See* S. 2992, 117th Cong. § 2(a)(5)(B) (Reported Version). However, instead of the relevant sales and market-capitalization thresholds, the reported version would apply an earnings threshold of $30 billion to platforms controlled by non-publicly traded companies. *Id*. § 2(a)(5)(C) (Reported Version).

[18] S. 2992, 117th Cong. § 2(a)(6) (Reported Version); May 25 Draft § 2(a)(6).

[19] Leah Nylen, *Tech Antitrust Bill Threatens to Break Apple, Google's Grip on the Internet*, BLOOMBERG (July 26, 2022), https://www.bloomberg.com/graphics/2022-tech-antitrust-bill/.

concerns.[20] Critics have contended that the thresholds are arbitrary and that a firm's market capitalization, annual sales, and user base have little relevance for its ability to harm competition.[21]

The legislation's "critical trading partner" requirement arguably addresses some of this concern about arbitrariness.[22] However, that requirement would need to be interpreted by the DOJ, the FTC, and the courts. As noted, S. 2992 defines the term "critical trading partner" to mean an entity with the ability to "restrict or materially impede" a business user's access to its customers or necessary inputs.[23] The bill does not contain further clarification of this language, which is not drawn from antitrust case law. Existing antitrust doctrine instead emphasizes *market power*, which is a requirement for most forms of antitrust liability.[24] Plaintiffs typically establish market power by showing that a defendant occupies a large share of a properly defined antitrust market.[25] In brief, defining an antitrust market involves an evaluation of the range of reasonable substitutes for a given product or service.[26]

The relationship between S. 2992's "critical trading partner" requirement and these standards from existing doctrine is not entirely clear. The core concern of market-power analysis—the availability of reasonable substitutes—seems relevant to whether a platform has the ability to "restrict or materially impede" a business user's access to customers or inputs. It is notable, however, that the AICOA does not employ the familiar language of market power.

The choice to use new language that lacks an accepted meaning may reflect an intent to adopt less demanding standards than those in the market-power case law. Some commentators have expressed dissatisfaction with aspects of the relevant doctrine. For example, critics have argued that the Supreme Court's 2018 decision in *Ohio v. American Express*[27]—which adopted special market-definition rules for "two-sided" markets—may hamper antitrust enforcement against tech

[20] *See, e.g.*, Adam Conner & Erin Simpson, *Evaluating 2 Tech Antitrust Bills to Restore Competition Online*, CTR. FOR AM. PROGRESS (June 2, 2022), https://www.americanprogress.org/article/evaluating-2-tech-antitrust-bills-to-restore-competition-online/.

[21] *See, e.g.*, Aurelien Portuese, *The Revised (But Uncorrected) Version of the Klobuchar Bill*, INFO. TECH. & INNOVATION FDN. (June 21, 2022), https://itif.org/publications/2022/06/21/the-revised-but-uncorrected-version-of-the-klobuchar-bill/.

[22] *See* Scott Morton, et al., *supra* note 9, at 1 (arguing that the AICOA is "carefully targeted in that its prohibitions apply only to platforms deemed 'critical trading partners'").

[23] S. 2992, 117th Cong. § 2(a)(6) (Reported Version); May 25 Draft § 2(a)(6).

[24] *See, e.g.*, John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. 1169, 1173 (2018) (explaining that market power "is central to antitrust because it distinguishes firms that can harm competition and consumers from those that cannot"). A firm possesses market power when it has the ability to profitably charge prices above competitive levels for a sustained period of time. MARKET POWER HANDBOOK: COMPETITION LAW AND ECONOMIC FOUNDATIONS, AM. BAR ASS'N 1 (2d ed. 2012). Many economists contend that proper assessments of market power involve quality considerations. *See id*. at 1 n.3. Thus, market-power analysis may require inquiries into a firm's ability to degrade the quality of its offerings without facing a meaningful risk of consumer substitution. *See generally* John M. Newman, *Antitrust in Zero-Price Markets: Applications*, 94 WASH. U. L. REV. 49 (2016); John M. Newman, *Antitrust in Zero-Price Markets: Foundations*, 164 U. PA. L. REV. 149 (2015).

[25] MARKET POWER HANDBOOK, *supra* note 24, at 18. Plaintiffs can also establish market power with direct evidence of supra-competitive prices, but this can be a difficult task. *See id*. at 20.

[26] *See id*. at 61-63. More technically, market definition typically involves analysis of the cross-elasticity of demand between different products—that is, the extent to which the quantity demanded of one product will change in response to a change in the price of another product. *Id*. at 64.

[27] 138 S. Ct. 2274 (2018).

platforms.[28] Other scholars have criticized the market-definition paradigm more generally.[29] Senator Klobuchar—S. 2992's sponsor—has introduced other antitrust legislation that appears to reflect both points of view.[30]

This all suggests that the AICOA's "critical trading partner" requirement is not intended to incorporate current market-power doctrine wholesale. Nevertheless, the extent to which preexisting antitrust principles would influence the interpretation of the "critical trading partner" language remains an open question. One observer has characterized the bill as repudiating *any* analysis of market power and criticized it on that basis.[31] However, the legislation might instead prompt courts to dispense with some of the more demanding elements of current doctrine without completely abandoning certain general principles that inform it.

These types of interpretive issues recur throughout the bill and could present regulators and courts with difficult questions if the legislation becomes law.

Comparing Different Versions of the AICOA: S. 2992 and H.R. 3816

In June 2021, the House Judiciary Committee ordered the committee version of the AICOA—H.R. 3816—to be reported with amendments to the full House. While parts of H.R. 3816 overlap with S. 2992, the bills also differ in several respects.

Like S. 2992, H.R. 3816 would apply special rules to "covered platforms." H.R. 3816, 117th Cong. § 2 (2021). There is some similarity in the criteria used to determine a firm's status as a covered platform: the bills contain the same thresholds for monthly active U.S. users and the same "critical trading partner" standard. *See* S. 2992, 117th Cong. §§ 2(a)(5)(B)(ii)(I), 2(a)(6) (2022) (Reported Version); May 25 Draft §§ 2(a)(5)(B)(i), 2(a)(6) (2022); H.R. 3816, 117th Cong. §§ 2(g)(4)(B)(i), 2(g)(5).

There are differences with respect to the other criteria. Under H.R. 3816, the relevant sales and market-capitalization thresholds would be $600 billion, as opposed to $550 billion under S. 2992. *See* S. 2992, 117th Cong. § 2(a)(5)(B)(ii)(II)(aa) (Reported Version); May 25 Draft § 2(a)(5)(B)(ii)(I); H.R. 3816, 117th Cong. § 2(g)(4)(B)(ii).

Likewise, while S. 2992 could apply to entities that fall below the relevant sales and market-capitalization thresholds if they have more than one billion worldwide monthly active users, H.R. 3816 would not. *See* S. 2992, 117th Cong. § 2(a)(5)(B)(ii)(II)(bb) (Reported Version); May 25 Draft § 2(a)(5)(B)(ii)(II); H.R. 3816, 117th Cong. § 2(g)(4)(B)(ii).

There are also two differences related to designation decisions. First, S. 2992 would allow the DOJ and FTC to jointly designate firms that meet the specified criteria as covered platforms, while H.R. 3816 appears to permit either agency to do so independently. S. 2992, 117th Cong. § 3(d) (Reported Version); May 25 Draft § 3(d); H.R. 3816, 117th Cong. § 2(d). Second, designation decisions under S. 2992 would be valid for seven years, as opposed to 10 years under the House committee-reported bill. S. 2992, 117th Cong. § 3(d)(1)(C) (Reported Version); May 25 Draft § 3(d)(1)(C); H.R. 3816, 117th Cong. § 2(d)(3).

[28] Lina M. Khan, *The Supreme Court Case That Could Give Tech Giants More Power*, N.Y. TIMES (Mar. 2, 2018), https://www.nytimes.com/2018/03/02/opinion/the-supreme-court-case-that-could-give-tech-giants-more-power.html.

[29] *See* Louis Kaplow, *Why (Ever) Define Markets?*, 124 HARV. L. REV. 437 (2010).

[30] *See* S. 225, 117th Cong. §§ 9, 13 (2021).

[31] Erik Hovenkamp, *Proposed Antitrust Reforms in Big Tech: What Do They Imply for Competition and Innovation?*, COMPETITION POLICY INT'L ANTITRUST CHRONICLE (forthcoming 2022).

Unlawful Conduct

The AICOA would prohibit covered platforms from engaging in 10 categories of conduct.[32] Under the May 25 version of the legislation, firms that violate the bill's prohibitions would be liable for up to 10% of their total U.S. revenue for the period in which the violation occurred.[33]

The bill makes "material harm" to competition an element of three of the offenses.[34] For the remaining seven categories, defendants would be allowed to rebut a *prima facie* case by showing that their conduct would *not* result in "material harm" to competition.[35] The legislation would also offer several other affirmative defenses for all 10 offenses.[36]

This section provides an overview of the bill's prohibitions, their relationship to current antitrust doctrine, and related interpretive issues. The bill's affirmative defenses are discussed later in the report.[37]

Sections 3(a)(1)-(3): Self-Preferencing, Limitations on Business Users, and Discrimination That Would "Materially Harm Competition"

Sections 3(a)(1)-(3) of the AICOA would prohibit covered platforms from engaging in certain forms of conduct in a manner that would "materially harm competition."[38]

- Section 3(a)(1) would prohibit operators of covered platforms from preferencing their own products, services, or lines of business over those of other business users of their platforms in a manner that would "materially harm competition."[39]
- Section 3(a)(2) would prohibit operators of covered platforms from limiting the ability of business users to compete with the operators' own offerings in a manner that would "materially harm competition."[40]
- Section 3(a)(3) would prohibit operators of covered platforms from discriminating in the application of their terms of service among similarly situated business users in a manner that would "materially harm competition."[41]

Much of the commentary surrounding the bill has focused on the types of conduct that may trigger liability under these provisions. Some of the practices that commentators have flagged as potentially prohibited include:

[32] S. 2992, 117th Cong. § 3(a)(1)-(10) (2022) (Reported Version); May 25 Draft § 3(a)(1)-(10) (2022).

[33] May 25 Draft § 3(c)(6)(B). Under the reported version of S. 2992, violators would be liable for up to 15% of their total U.S. revenue for the period in which the violation occurred. S. 2992, 117th Cong. § 3(c)(5)(B) (Reported Version).

[34] S. 2992, 117th Cong. § 3(a)(1)-(3) (Reported Version); May 25 Draft § 3(a)(1)-(3).

[35] S. 2992, 117th Cong. § 3(b)(2)(A) (Reported Version); May 25 Draft § 3(b)(2).

[36] S. 2992, 117th Cong. § 3(b)(1)-(2) (Reported Version); May 25 Draft § 3(b)(1).

[37] *See* "Affirmative Defenses" *infra*.

[38] S. 2992, 117th Cong. § 3(a)(1)-(3) (Reported Version); May 25 Draft § 3(a)(1)-(3).

[39] S. 2992, 117th Cong. § 3(a)(1) (Reported Version); May 25 Draft § 3(a)(1).

[40] S. 2992, 117th Cong. § 3(a)(2) (Reported Version); May 25 Draft § 3(a)(2).

[41] S. 2992, 117th Cong. § 3(a)(3) (Reported Version); May 25 Draft § 3(a)(3).

- Google Search's display of Google Maps content with search results, in addition to its favorable placement of other Google verticals;[42]
- Amazon advantaging its own products in search results on its Marketplace or favoring itself over third-party merchants in managing its "Buy Box";[43]
- Apple's preinstallation of certain software applications (apps) on its mobile devices;[44] and
- Microsoft's prioritization of its own video games in Microsoft Store on Xbox.[45]

Whether S. 2992 would in fact proscribe this conduct would depend on the application of key terms like "preference," "limit," and "materially harm competition."

In addition to these behaviors—which principally advantage a platform operator over its rivals—the legislation may bar certain forms of "secondary line" discrimination.[46] In particular, some commentators have argued that Section 3(a)(3)'s prohibition of discriminatory terms-of-service enforcement may limit firms' ability to remove unwanted content from their platforms.[47]

The following subsections review these issues.

Self-Preferencing

The bill's prohibition of self-preferencing may raise particularly complex questions. Many forms of conduct by a vertically integrated firm arguably "preference" the firm's own offerings over those of its rivals. Interpreted literally, that language could encompass any actions that treat a platform's own products more favorably than those of competitors.[48] If the term "preference" is given this type of expansive meaning, Section 3(a)(1)'s "materially harm competition" requirement would likely do much of the work defining the provision's boundaries.

At the same time, the concept of self-preferencing may also have internal limits that could complicate the bill's enforcement. Several commentators have argued that proving "preferential" conduct would require regulators to establish some baseline level of neutral treatment from which a defendant has deviated.[49] In this view, self-preferencing would not encompass a platform

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[42] Neil Bradley, *Congressional Price Hike? How the American Innovation and Choice Online Act Raises Prices on Consumers*, U.S. CHAMBER OF COMMERCE (June 21, 2022), https://www.uschamber.com/finance/antitrust/congressional-price-hike-how-the-american-innovation-and-choice-online-act-raises-prices-on-consumers.

[43] Hovenkamp, *supra* note 7, at 1546-47; Nylen, *supra* note 19. Amazon's "Buy Box" is an icon that allows consumers to either place items in their carts or buy them with a single click. Third-party merchants compete with one another and with Amazon to "win" the Buy Box for a given product at any point in time. Winners are chosen based on factors that include price and reliability in fulfillment. *See* Brian Connolly, *How to Win the Amazon Buy Box in 2021*, JUNGLE SCOUT (Jan. 4, 2021), https://www.junglescout.com/blog/how-to-win-the-buy-box/.

[44] Randy Picker, *How Would the Big Tech Self-Preferencing Bill Affect Users?*, PROMARKET (June 16, 2022), https://www.promarket.org/2022/06/16/how-would-the-big-tech-self-preferencing-bill-affect-users/; *but see* Hal Singer, *Rep. Cicilline's Nondiscrimination Bill Would Offer a Lifeline to Independent App Developers*, PROMARKET (July 2, 2021), https://www.promarket.org/2021/07/02/antitrust-self-preferencing-preinstallation-app-developers-apple/ (arguing that similar language in the House version of the AICOA would not prohibit app preinstallation).

[45] Nylen, *supra* note 19.

[46] "Secondary line" competitive injury occurs when a company's discriminatory conduct disadvantages some of its customers relative to others in a manner that harms competition. *See* HOVENKAMP, *supra* note 7, at 632.

[47] *See* note 62 *infra*.

[48] *See* Hovenkamp, *supra* note 31.

[49] For versions of this argument, see Thomas A. Lambert, *Addressing Big Tech's Market Power: A Comparative*

operator's favorable treatment of its own offerings when they *deserve* such treatment (*i.e.*, when a platform operator's offerings are better than the alternatives).[50]

Section 3(a)(1) may thus require regulators and courts to grapple with challenging conceptual questions.[51] While cases in which a firm overrides its ordinary algorithmic protocols to disadvantage rivals may be fairly straightforward instances of self-preferencing, other fact patterns could raise thornier interpretive and evidentiary issues.[52]

Material Harm to Competition

The "materially harm competition" requirement in Sections 3(a)(1)-(3) has also generated discussion. The AICOA's supporters have identified that requirement as a key limiting principle in response to allegations of overbreadth.[53] The bill's opponents have countered that this terminology—which does not have an established meaning in antitrust doctrine[54]—is likely to create significant uncertainties about the bill's application.[55] In turn, S. 2992's proponents have answered that the bill's novel language is intended to strengthen existing law, which they argue has proven inadequate to grapple with anticompetitive conduct by tech platforms.[56]

Like other parts of the bill, the "materially harm competition" standard would have to be fleshed out in practice. The AICOA would direct the DOJ and FTC to issue guidelines outlining their interpretation of that language.[57] Those guidelines could give regulated entities some clarity as to

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Institutional Approach, 75 SMU L. REV. 73, 98-99 (2022); Daniel A. Crane, *Search Neutrality as an Antitrust Principle*, 19 GEO. MASON L. REV. 1199 (2012); Geoffrey A. Manne & Joshua D. Wright, *If Search Neutrality is the Answer, What's the Question?*, 2012 COLUM. BUS. L. REV. 151 (2012).

[50] Lambert, *supra* note 49, at 98-99. A product could conceivably be "better" than the alternatives in the sense that it is generally superior, or in the narrower sense that it works better with a platform operator's other offerings. For example, Apple might argue that its App Store is "better" than rival stores in the sense that the App Store is categorically superior, or in the sense that it works better on the iOS operating system.

[51] *See generally* Lawrence Solum, *Legal Theory Lexicon: Baselines*, LEGAL THEORY BLOG (Mar. 2, 2009), https://lsolum.typepad.com/legaltheory/2009/03/legal-theory-lexicon-baselines.html.

[52] *See* Crane, *supra* note 49, at 1207-08.

[53] *See, e.g.*, Aaron Schur, *The Critiques Against the American Innovation and Choice Online Act Miss the Mark*, PROMARKET (July 18, 2022), https://www.promarket.org/2022/07/18/the-critiques-against-the-american-innovation-and-choice-online-act-miss-the-mark/; Scott Morton, et al., *supra* note 9, at 6; Bill Baer, *Why Amazon is Wrong About the American Innovation and Choice Online Act*, BROOKINGS INST. (June 14, 2022), https://www.brookings.edu/blog/techtank/2022/06/14/why-amazon-is-wrong-about-the-american-innovation-and-online-choice-act/; Conner & Simpson, *supra* note 20.

[54] While Section 7 of the Clayton Antitrust Act prohibits mergers and acquisitions that threaten "substantially" to lessen competition, 15 U.S.C. § 18, neither the antitrust statutes nor the case law employ the concept of "material" harm to competition.

[55] *See, e.g.*, Alden Abbott, *AICOA: An Affront to the Rule of Law*, TRUTH ON THE MARKET (June 29, 2022), https://truthonthemarket.com/2022/06/29/aicoa-an-affront-to-the-rule-of-law/; A. Douglas Melamed, *Why I Think Congress Should Not Enact the American Innovation and Choice Online Act*, COMPETITION POLICY INT'L (June 19, 2022), https://www.competitionpolicyinternational.com/why-i-think-congress-should-not-enact-the-american-innovation-and-choice-online-act/; COMMENTS OF THE AM. BAR ASS'N ANTITRUST L. SECTION REGARDING THE AM. INNOVATION AND CHOICE ONLINE ACT (S. 2992) BEFORE THE 117TH CONGRESS at 6 (Apr. 27, 2022), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/at-comments/2022/comments-aico-act.pdf [hereinafter "ABA COMMENTS"]; Bourne & Subramaniam, *supra* note 9, at 7.

[56] Scott Morton, et al., *supra* note 9, at 2 (characterizing the novelty of the "materially harm competition" standard as a "feature, not a bug" of the AICOA); Conner & Simpson, *supra* note 20.

[57] S. 2992, 117th Cong. § 4 (2022) (Reported Version); May 25 Draft § 4 (2022).

the standard's scope,[58] but would not be legally binding.[59] As a result, the judiciary would likely unpack the legislation's meaning over time, presumably operating under the assumption that the "materially harm competition" standard is intended to be more restrictive than certain aspects of general antitrust doctrine.[60]

Content Moderation

Commentators have also debated Section 3(a)(1)(3)'s possible effects on content moderation by covered platforms. As discussed, that provision would prohibit operators of covered platforms from discriminating in the enforcement of their terms of service among similarly situated business users in a manner that would "materially harm competition."[61]

Some observers have concluded that this language may restrict firms' ability to remove unwanted content from their platforms.[62] To those concerned about alleged discrimination against conservative viewpoints, this is a virtue.[63] To those worried about discouraging tech platforms from policing hate speech and disinformation, it is a cause for unease.[64]

Whether Section 3(a)(1)(3) would in fact prohibit certain forms of content moderation is unclear. As discussed, the "materially harm competition" standard is novel, making it difficult to confidently predict whether it would reach discriminatory content moderation.

Several commentators have argued that it is unlikely that courts would find that content-moderation decisions have the requisite anticompetitive effects.[65] Others view such an outcome as plausible and have raised concerns that the bill may chill content moderation regardless.[66]

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[58] Scott Morton, et al., *supra* note 9, at 2 (arguing that the agencies' guidelines will help resolve any uncertainties about the meaning of the "materially harm competition" standard).

[59] S. 2992, 117th Cong. § 4(d) (Reported Version); May 25 Draft § 4(d).

[60] In particular, Sections 3(a)(1)-(3) seem intended to repudiate the permissive rules that currently govern unilateral refusals to deal. *See* Verizon Commc'ns Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). Those rules would likely apply to much of the conduct targeted by Sections 3(a)(1)-(3), if such conduct was challenged under existing law. For an overview of this case law, see Hovenkamp, *supra* note 7, at 1495-1502.

[61] S. 2992, 117th Cong. § 3(a)(1)(3) (Reported Version); May 25 Draft § 3(a)(1)(3).

[62] *See, e.g.*, Letter from Sen. Brian Schatz, et al., to Sen. Amy Klobuchar (June 14, 2022), https://www.freepress.net/sites/default/files/2022-06/senate-letter-asking-klobuchar-for-content-moderation-fix-on-s2992.pdf; Jane Bambauer & Anupam Chander, *Bills Meant to Check Big Tech's Power Could Lead to More Disinformation*, WASH. POST (June 6, 2022), https://www.washingtonpost.com/outlook/2022/06/06/antitrust-bills-big-tech-hate-speech-disinformation/; Maria Curi, *Tech Antitrust Bill Stokes Content-Moderation Worries*, BLOOMBERG LAW (May 12, 2022), https://news.bloomberglaw.com/privacy-and-data-security/tech-antitrust-bill-stokes-lawmaker-content-moderation-worries.

[63] *See, e.g.*, Michael R. Davis, *Conservatives Must Use Antitrust to Rein In Big Tech Monopolies*, FOX NEWS (July 12, 2022), https://www.foxnews.com/opinion/conservatives-must-use-antitrust-rein-big-tech-monopolies.

[64] *See, e.g.*, Bambauer & Chander, *supra* note 62; Mark MacCarthy, *Two Ways to Improve Senator Klobuchar's Needed Antitrust Legislation*, BROOKINGS INST. (Feb. 8, 2022), https://www.brookings.edu/blog/techtank/2022/02/08/two-ways-to-improve-senator-klobuchars-needed-antitrust-legislation/.

[65] *See, e.g.*, Schur, *supra* note 53; Gilad Edelman, *The Weak Argument Jeopardizing Tech Antitrust Legislation*, WIRED (June 16, 2022), https://www.wired.com/story/american-innovation-choice-online-act-democrats-argument/; Conner & Simpson, *supra* note 20.

[66] *See, e.g.*, Letter from Samir Jain, et al., to Sen. Amy Klobuchar and Sen. Charles Grassley (Mar. 9, 2022), https://cdt.org/wp-content/uploads/2022/03/S2292-CDT-letter-3-9-22-FINAL.pdf.

The provision's interaction with Section 230 of the Communications Decency Act and the First Amendment—both of which insulate firms from liability for certain forms of content moderation—may also raise complicated legal questions that are beyond the scope of this report.[67]

Sections 3(a)(4) and 3(a)(7): Interoperability and Access to Data

Section 3(a)(4) of the bill would impose interoperability requirements on covered platforms. The provision would make it unlawful for operators of such platforms to "materially restrict, impede, or unreasonably delay" a business user's ability to access or interoperate with features that are available to the operators' own competing products or services.[68]

Section 3(a)(7) would address the related issue of access to data generated by business users on covered platforms. The provision would make it unlawful for operators of covered platforms to "materially restrict or impede" a business user from accessing data it generates on such platforms or data that platform users generate by interacting with a business user's products or services.[69]

Like the remaining prohibitions discussed below, these provisions would not require regulators to establish that a platform's conduct harmed competition. Rather, *absence* of competitive harm would be an affirmative defense. Defendants could rebut a *prima facie* case under Sections 3(a)(4) and 3(a)(7) by establishing that their conduct had not and would not result in "material harm to competition."[70] The legislation would also offer several other affirmative defenses involving user privacy, data security, and preservation of platform functionality that are discussed below.[71]

Interoperability requirements like Section 3(a)(4) are a response to the network effects that give large tech platforms powerful incumbency advantages.[72] In markets characterized by strong network effects, a platform's services become more valuable as more people use the platform.[73] Network effects can thus operate as entry barriers that make it difficult for newcomers to compete with an established firm. Such effects create a dilemma: upstart tech platforms may not be as attractive to consumers as an incumbent because upstarts lack similarly large user bases, which they cannot attain without being attractive to consumers.[74] This phenomenon makes many digital

[67] It is unclear, for example, whether courts would be hesitant to apply the AICOA to content-moderation decisions in light of these protections. For an overview of Section 230 of the Communications Decency Act, see CRS Report R46751, *Section 230: An Overview*, by Valerie C. Brannon and Eric N. Holmes. For a discussion of the First Amendment issues involved in regulating content moderation by social-media companies, see CRS Report R45650, *Free Speech and the Regulation of Social Media Content*, by Valerie C. Brannon; CRS Legal Sidebar LSB10618, *Trial Court Rules State Social Media Law Likely Unconstitutional*, by Valerie C. Brannon.

[68] S. 2992, 117th Cong. § 3(a)(4) (2022) (Reported Version); May 25 Draft § 3(a)(4) (2022). Unlike the reported version of the bill, the May 25 draft contains an exemption for cases in which such access would lead to a "significant cybersecurity risk." May 25 Draft § 3(a)(4).

[69] S. 2992, 117th Cong. § 3(a)(7) (Reported Version); May 25 Draft § 3(a)(7).

[70] S. 2992, 117th Cong. § 3(b)(2)(A) (Reported Version); May 25 Draft § 3(b)(2).

[71] *See* "Affirmative Defenses" *infra*.

[72] *See* Michael Kades & Fiona Scott Morton, *Interoperability as a Competition Remedy for Digital Networks*, WASH. CTR. FOR EQUITABLE GROWTH 1-2 (Sept. 23, 2020).

[73] DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 392-93 (4th ed. 2005).

[74] *See* REPORT, COMM. FOR THE STUDY OF DIGITAL PLATFORMS, MARKET STRUCTURE AND ANTITRUST SUBCOMM., GEORGE J. STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE, UNIV. OF CHI. BOOTH SCH. OF BUS. 17 (July 1, 2019), https://research.chicagobooth.edu/-/media/research/stigler/pdfs/market-structure-report.pdf.

markets susceptible to "tipping"—once one platform reaches a certain scale, its network advantages reinforce themselves and cement its dominance.[75]

In theory, interoperability mandates may be able to mitigate these effects.[76] For example, such requirements could prevent a covered platform from cutting off rival app developers from the tools needed to access their platforms—a strategy that a powerful firm could use to preserve its dominant position or leverage that position into adjacent markets.[77]

Broader interoperability duties could also facilitate competition by allowing consumers who do not directly use a dominant network to indirectly benefit from its scale. For example, if interoperability requires Facebook to allow users of other social networks to communicate with its users, then upstart social networks may find it easier to attract customers.[78] Whether Section 3(a)(4) would entail such duties would depend on the details surrounding its implementation.

Section 3(a)(7)'s data-access requirement would address related issues. By allowing business users to access data involving their activities and customers on covered platforms, the provision could mitigate the switching costs that can diminish consumers' willingness to abandon an incumbent platform in favor of a smaller rival.[79]

Interoperability requirements also have their skeptics, however. Depending upon their details, such requirements may prove costly to implement.[80] They may also dampen investment incentives by forcing firms to share the fruits of their innovation with rivals.[81] Additionally, specific types of interoperability may create privacy concerns and data-security risks.[82] While the AICOA's affirmative defenses attempt to address these latter concerns, defendants would bear the burden of establishing their applicability.[83]

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[75] Kades & Scott Morton, *supra* note 72, at 7-9; UNLOCKING DIGITAL COMPETITION, REPORT OF THE DIGITAL COMPETITION EXPERT PANEL, HER MAJESTY'S TREASURY 4 (Mar. 2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/785547/unlocking_digital_competition_furman_review_web.pdf. In such cases, competitive pressures must come from outside the relevant market—for example, from firms that create new markets via disruptive technologies. In the jargon, competitive dynamics in tipped markets shift from "competition *in* the market" to "competition *for* the market," which may not be forthcoming for extended periods of time. UNLOCKING DIGITAL COMPETITION, *supra* note 75, at 4, 38-41.

[76] Kades & Scott Morton, *supra* note 72, at 12.

[77] The FTC has alleged that Facebook used this strategy when it withheld critical tools from certain rival app developers, including a rival social network called Path. *See* FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 6 (D.D.C. 2021). A House subcommittee also found that Apple has denied certain application programming interfaces and device functionalities to competing developers. INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 354.

[78] Kades & Scott Morton, *supra* note 72, at 11-12.

[79] *See* Fiona M. Scott Morton, et al., *Equitable Interoperability: The "Super Tool" of Digital Platform Governance*, YALE TOBIN CTR. FOR ECON. POLICY, Discussion Paper No. 4 at 26 (July 13, 2021).

[80] ABA COMMENTS, *supra* note 55, at 14.

[81] *See, e.g.*, Howard A. Shelanski, *Unilateral Refusals to Deal in Intellectual and Other Property*, 76 ANTITRUST L.J. 369, 380 (2009).

[82] *See, e.g.*, Krisztian Katona, *AICOA's Data Security, Privacy, and Content Moderation Issues Call for Risk Assessment*, DISRUPTIVE COMPETITION PROJECT (June 7, 2022), https://www.project-disco.org/privacy/060722-aicoas-data-security-privacy-and-content-moderation-issues-call-for-risk-assessment/; Josh Withrow, *The Revised American Innovation and Choice Online Act (AICOA) is Still Fundamentally Flawed*, R ST. INST. (May 26, 2022), https://www.rstreet.org/2022/05/26/revised-antitrust-bill-remains-fundamentally-flawed/.

[83] *See* "Affirmative Defenses" *infra*.

Section 3(a)(5): Tying

Section 3(a)(5) of the legislation would prohibit certain tying arrangements, whereby firms offer one product on the condition that customers purchase a separate product as well. The provision would make it unlawful for an operator of a covered platform to condition access to or preferred placement on the platform on the purchase or use of other products offered by the platform operator that are not "part of or intrinsic to" the platform.[84]

Section 3(a)(5) resembles existing tying doctrine, with certain key differences. Under current law, a plaintiff can prevail on a tying claim by showing that:

1. The defendant offered two distinct products;
2. The defendant conditioned the sale of one product (the tying product) on the purchase of the other product (the tied product);
3. The defendant possessed sufficient economic power in the tying product market to coerce purchasers into acceptance of the tied product; and
4. The defendant's conduct affected a non-trivial amount of interstate commerce.[85]

Some courts have also required plaintiffs to demonstrate that a tying arrangement had anticompetitive effects in the tied product market.[86]

Unlike this test, Section 3(a)(5) does not contain an explicit market-power requirement. As discussed, the AICOA instead uses certain quantitative criteria and a "critical trading partner" standard to identify the platforms that would be subject to its prohibitions.[87]

Section 3(a)(5) would also depart from the tying test employed by some federal courts of appeals that requires proof of anticompetitive effects.[88] Instead of requiring regulators to prove such effects, S. 2992 would allow defendants to rebut a *prima facie* case under Section 3(a)(5) by establishing an absence of competitive harm.[89]

Section 3(a)(5) has attracted special attention because of its possible impact on Amazon Prime—a subscription service that offers Amazon customers fast shipping of eligible products, among other benefits.[90] An Amazon executive has argued that Section 3(a)(5) would prohibit the firm from requiring third-party merchants to use Amazon's fulfillment services as a condition of

[84] S. 2992, 117th Cong. § 3(a)(5) (2022) (Reported Version); May 25 Draft § 3(a)(5) (2022).

[85] HOVENKAMP, *supra* note 7, at 435 (summarizing the test employed by most federal circuit courts of appeals).

[86] *Id.* at 435-36.

[87] *See* "Covered Platforms" *supra*.

[88] *See, e.g.*, Kaufman v. Time Warner, 836 F.3d 137, 141 (2d Cir. 2016); Amey, Inc. v. Gulf Abstract & Title Inc., 758 F.2d 1486, 1503 (11th Cir. 1985); Driskill v. Dallas Cowboys Football Club, Inc., 498 F.2d 321, 323 (5th Cir. 1974).

[89] S. 2992, 117th Cong. § 3(b)(2)(A) (Reported Version); May 25 Draft § 3(b)(2).

[90] Compare Fact Sheet: How the American Innovation and Choice Online Act (S. 2992) Would Break Amazon Prime and Reduce Access to Amazon Basics, CHAMBER OF PROGRESS (Nov. 29, 2021), https://progresschamber.org/fact-sheet-how-the-american-innovation-and-choice-online-act-s-2992-would-break-amazon-prime-and-block-amazon-basics/ (arguing that S. 2992's tying prohibition would eliminate the logistics model that makes Amazon Prime possible), with Sen. Chuck Grassley, Q&A: Reining in Unbridled Big Tech (June 10, 2022), https://www.grassley.senate.gov/news/news-releases/qanda-reining-in-unbridled-big-tech (arguing that S. 2992 "explicitly does not impact subscription services, such as Amazon Prime").

participating in Prime.[91] According to the company, such a rule would harm consumers because it would prevent Amazon from being able to guarantee prompt delivery of Prime packages.[92]

The AICOA contains a provision that appears to be directed at this concern. The bill contains a rule of construction that insulates firms from liability triggered "solely" by offering a "fee-for-service subscription that provides benefits to covered platform users."[93]

Section 3(a)(5)'s effect on Amazon Prime and other services likely to fall under the act's coverage may ultimately depend on the meaning of the term "solely" in this rule of construction. For example, while the rule might insulate Amazon from certain types of claims involving Prime, this limiting language may preserve the possibility of liability for specific ways that Amazon structures the Prime program. In such cases, Amazon may need to rely on the general affirmative defenses discussed below.[94]

Section 3(a)(6): Use of Data

Section 3(a)(6) of S. 2992 would prohibit operators of covered platforms from using non-public data generated by business users or the customers of business users to support their own competing products or services.[95]

The provision appears to respond to concerns that tech platforms have used their unique access to user data to identify and imitate popular offerings. For example, in October 2020, a House subcommittee concluded that Amazon had used third-party seller data to find profitable opportunities to develop its own private-label products.[96] Apple has also allegedly used information from app developers to build competing offerings and integrate certain functionalities into its iOS operating system.[97]

Challenges to such practices have traditionally sounded in intellectual-property (IP) law rather than antitrust, to the extent that they involve possible patent infringement.[98] The two bodies of law stand in some tension: while antitrust safeguards competition, IP law offers temporary monopolies over protected technology to incentivize innovation.[99]

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[91] Brian Huseman, *Antitrust Legislation and the Unintended Negative Consequences for American Consumers and Small Businesses*, AMAZON (June 1, 2022), https://www.aboutamazon.com/news/policy-news-views/antitrust-legislation-and-the-unintended-negative-consequences-for-american-consumers-and-small-businesses.

[92] *See id*.

[93] S. 2992, 117th Cong. § 3(c)(7)(A)(vi)(II) (Reported Version); May 25 Draft § 3(c)(8)(A)(vi)(II).

[94] *See* "Affirmative Defenses" *infra*.

[95] S. 2992, 117th Cong. § 3(a)(6) (Reported Version); May 25 Draft § 3(a)(6).

[96] INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 274-82.

[97] *See, e.g.*, *id*. at 361-64; Reed Albergotti, *How Apple Uses its App Store to Copy the Best Ideas*, WASH. POST (Sept. 5, 2019), https://www.washingtonpost.com/technology/2019/09/05/how-apple-uses-its-app-store-copy-best-ideas/.

[98] Herbert J. Hovenkamp, *Monopolizing and the Sherman Act*, Faculty Scholarship at Penn Law 52 (Jan. 2022), https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=3772&context=faculty_scholarship.

[99] Herbert Hovenkamp, *The Intellectual Property-Antitrust Interface*, *in* 3 ISSUES IN COMPETITION LAW AND POLICY 1979, 1979 (2008). Many commentators and judicial decisions have discussed the different strategies of IP law and antitrust for promoting economic welfare. *See, e.g.*, SCM Corp. v. Xerox Corp., 645 F.2d 1195, 1203 (2d Cir. 1981) ("The conflict between the antitrust and patent laws arises in the methods they embrace that were designed to achieve reciprocal goals. While the antitrust laws proscribe unreasonable restraints of competition, the patent laws reward the inventor with a temporary monopoly that insulates him from competitive exploitation of his patented art.").

Some commentators have argued that the innovation concerns driving IP law may extend to certain *non-patented* technology that tech platforms stand accused of copying.[100] For example, when a platform copies non-patented technology that nevertheless requires significant investment in innovation, the platform's conduct arguably raises the same free-rider problems that motivate IP law.[101]

In addition to these innovation issues, anti-copying measures like Section 3(a)(6) may be motivated by fairness considerations.[102]

In practice, however, these animating principles would not necessarily play a direct role in Section 3(a)(6)'s application. S. 2992 would allow a defendant to rebut a *prima facie* case under that provision by proving an absence of harm to *competition*—not innovation or fairness.[103] As noted, those goals can pull in different directions.

Depending on the interpretation of the relevant language, the burden to prove an absence of competitive harm may be fairly easy to satisfy. A platform's entry into a new market—whether it involves copying a rival product or not—will typically *increase* the type of competition that antitrust protects.[104] To the extent that Section 3(a)(6) is motivated by concerns other than competition, then, the affirmative defense for an absence of competitive harm may narrow the provision's scope in ways that are inconsistent with its theoretical underpinnings.

Section 3(a)(8): App Preinstallation and Steering

Section 3(a)(8) of the AICOA would make it unlawful for the operator of a covered platform to "materially restrict or impede" platform users from uninstalling preinstalled apps or changing default settings that steer users to the platform operator's products or services.[105] Such restrictions would be permissible, however, when necessary for the security or functioning of the platform or to prevent data from being transferred to the government of the People's Republic of China or a foreign adversary.[106]

The provision is a response to concerns that Apple and Google—which control the leading mobile operating systems, iOS and Android—have used app preinstallation, default settings, and related contractual restrictions to favor their own apps over rivals.[107]

Section 3(a)(9): Self-Preferencing (Again)

Section 3(a)(9) of the May 25 draft would prohibit operators of covered platforms from using their platform interfaces (including search or ranking functionalities) to treat their own products

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[100] *See* Sam Bowman, *Amazon's Tightrope: Balancing Innovation and Competition on Amazon's Marketplace*, TRUTH ON THE MARKET (Apr. 27, 2020), https://truthonthemarket.com/2020/04/27/amazons-tightrope-balancing-innovation-and-competition-on-amazons-marketplace/.

[101] *See id*.

[102] *See generally* Francesco Ducci & Michael Trebilcock, *The Revival of Fairness Discourse in Competition Policy*, 64 ANTITRUST BULLETIN 79 (2019).

[103] S. 2992, 117th Cong. § 3(b)(2)(A) (2022) (Reported Version); May 25 Draft § 3(b)(2) (2022).

[104] *See* Hovenkamp, *supra* note 99, at 1979 ("As a general proposition, the more firms that offer a product the more competitive will be its output and price.").

[105] S. 2992, 117th Cong. § 3(a)(8) (Reported Version); May 25 Draft § 3(a)(8).

[106] S. 2992, 117th Cong. § 3(a)(8)(A)-(B) (Reported Version); May 25 Draft § 3(a)(8)(A)-(B).

[107] *See* INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, *supra* note 1, at 352-58, 379.

or services more favorably than those of other business users "in a manner that is inconsistent with the neutral, fair, and non-discriminatory treatment of all business users."[108]

The provision appears to overlap with Section 3(a)(1)'s self-preferencing prohibition, but there are three apparent differences.

- ***First***, unlike Section 3(a)(1), Section 3(a)(9) would not require regulators to establish competitive harm.
- ***Second***, Section 3(a)(9)'s prohibition is limited to a platform operator's use of its platform interface, while Section 3(a)(1) is not.
- ***Third***, Section 3(a)(9) would require regulators to establish that a platform operator's conduct was "inconsistent with the neutral, fair, and non-discriminatory treatment of all business users," while Section 3(a)(1) does not include such a requirement.[109]

Section 3(a)(10): Retaliation for Reports to Law Enforcement

Section 3(a)(10) of the AICOA would make it unlawful for the operator of a covered platform to retaliate against business users that raise good-faith concerns with law-enforcement authorities about actual or potential violations of law.[110]

Comparing Different Versions of the AICOA: S. 2992 and H.R. 3816

While S. 2992 would bar operators of covered platforms from engaging in 10 categories of conduct, H.R. 3816 contains 13 prohibitions. *See* S. 2992, 117th Cong. § 3(a)(1)-(10) (2022) (Reported Version); May 25 Draft § 3(a)(1)-(10) (2022); H.R. 3816, 117th Cong. § 2(a)-(b) (2021). The additional offenses in the House committee-reported bill involve restrictions on business users' communications with platform users, interference with business users' pricing of their products and services, and specific types of interoperability. *See* H.R. 3816, 117th Cong. § 2(b)(6), (b)(8)-(9).

Although several of the other prohibitions in S. 2992 and H.R. 3816 overlap, there are also key differences. Unlike S. 2992—which would make harm to competition an element of three offenses—none of H.R. 3816's prohibitions would require proof of competitive harm as part of a plaintiff's case-in-chief. S. 2992, 117th Cong. § 3(a)(1)-(3) (Reported Version); May 25 Draft § 3(a)(1)-(3); H.R. 3816, 117th Cong. § 2(a)-(b).

Affirmative Defenses

Section 3(b) of the bill would provide operators of covered platforms with several affirmative defenses.

Section 3(b)(1) of the May 25 draft would offer an affirmative defense to all of the bill's prohibitions for conduct that is "reasonably tailored and reasonably necessary, such that the conduct could not be achieved through materially less discriminatory means, to":

- Prevent a violation of, or comply with, federal or state law;

[108] May 25 Draft § 3(a)(9). The reported version of the bill would prohibit operators of covered platforms from using their platform interfaces to favor their products or services "relative to those of another business user than under [sic] standards mandating the neutral, fair, and nondiscriminatory treatment of all business users." S. 2992, 117th Cong. § 3(a)(9) (Reported Version).

[109] May 25 Draft § 3(a)(1), (a)(9).

[110] S. 2992, 117th Cong. § 3(a)(10) (Reported Version); May 25 Draft § 3(a)(10).

- Protect safety, user privacy, the security of non-public data, or the security of a covered platform; or
- Maintain or substantially enhance the "core functionality" of a covered platform.[111]

As discussed, Section 3(b)(2) would offer an affirmative defense to the prohibitions in Sections 3(a)(4)-(10) for conduct that "has not resulted in and would not result in material harm to competition."[112]

Defendants would bear the burden of proving these defenses by a preponderance of the evidence (*i.e.*, by proving that the relevant propositions are more likely true than not true).[113]

The bill's proponents have argued that the defenses appropriately place the burden to defend potentially anticompetitive conduct on platform operators, who have more information about their products than regulators.[114] The May 25 version of the legislation also relaxed certain language in previous iterations of Section 3(b)(1) in response to criticism that the earlier defenses would have been overly difficult for defendants to establish.[115]

Critics have contended that even the less demanding language in the May 25 draft may chill platforms' efforts to promote privacy and data security. In particular, these commentators have argued that platforms often engage in duplicative efforts to protect customers, which may leave them vulnerable to claims that they could achieve their goals through "materially less discriminatory means."[116]

Comparing Different Versions of the AICOA: S. 2992 and H.R. 3816

The affirmative defenses in H.R. 3816 differ from those in S. 2992. As discussed, S. 2992 would allow defendants to rebut a *prima facie* case under Sections 3(a)(4)-(10) by proving an absence of "material harm to competition" by a preponderance of the evidence. *See* S. 2992, 117th Cong. § 3(b)(2)(A) (2022) (Reported Version); May 25 Draft § 3(b)(2) (2022). In contrast, the corresponding defense in H.R. 3816 would require defendants to prove an absence of harm to "the competitive process" by clear and convincing evidence. H.R. 3816, 117th Cong. § 2(c)(1) (2021).

The clear-and-convincing-evidence standard is more stringent than a preponderance-of-the-evidence burden. The latter requires evidence that makes it more likely than not that a proposition is true. *See, e.g.*, United States v.

[111] May 25 Draft § 3(b)(1). The parallel defense in the reported version of the bill would allow defendants to rebut a *prima facie* case under Sections 3(a)(1)-(3) by showing that their conduct was "narrowly tailored, nonpretextual, and reasonably necessary" to achieve any of the goals identified in the May 25 version. S. 2992, 117th Cong. § 3(b)(1) (Reported Version). For the other seven offenses, the reported version of the bill would allow defendants to rebut a *prima facie* case by showing that their conduct "was narrowly tailored, could not be achieved through less discriminatory means, was nonpretextual, and was reasonably necessary" to achieve any of those same goals. S. 2992, 117th Cong. § 3(b)(2)(B) (Reported Version).

[112] S. 2992, 117th Cong. § 3(b)(2)(A) (Reported Version); May 25 Draft § 3(b)(2).

[113] *See* S. 2992, 117th Cong. § 3(b)(1)-(2) (Reported Version); May 25 Draft § 3(b)(4); United States v. Watkins, 10 F.4th 1179, 1184-85 (11th Cir. 2021).

[114] Scott Morton, et al., *supra* note 9, at 3-4.

[115] *See, e.g.*, Letter from Aurelian Portuese to Sen. Dick Durbin, et al., 3 (Jan. 19, 2022), https://www2.itif.org/2022-ITIF-letter-S2992.pdf (criticizing an earlier iteration of Section 3(b) for establishing "insurmountable thresholds" for the relevant affirmative defenses); Letter from Timothy Powderly to Sen. Dick Durbin, et al., 2 (Jan. 18, 2022), https://9to5mac.com/wp-content/uploads/sites/6/2022/01/Apple-letter-full.pdf (criticizing an earlier iteration of Section 3(b) for establishing "a nearly insurmountable test"). For the relevant language in the reported version of the bill, see note 111 *supra*.

[116] *See, e.g.*, Lawrence J. Spiwak, *The Third Time is Not the Charm: Significant Problems Remain With Senator Klobuchar's Antitrust Reform Bill*, THE FEDERALIST SOC'Y (June 7, 2022), https://fedsoc.org/commentary/fedsoc-blog/the-third-time-is-not-the-charm-significant-problems-remain-with-senator-klobuchar-s-antitrust-reform-bill.

Watkins, 10 F.4th 1179, 1184-85 (11th Cir. 2021). By contrast, the clear-and-convincing-evidence test demands that the evidence makes a contention "highly probable." Colorado v. New Mexico, 467 U.S. 310, 316 (1984). According to a large empirical study, many judges regard 75% probability as a reasonable approximation of the clear-and-convincing-evidence standard. *See* C.M.A. McCauliff, *Burdens of Proof: Degrees of Belief, Quanta of Evidence, or Constitutional Guarantees?*, 35 VAND. L. REV. 1293, 1328-29 (1982).

The House committee-reported bill would also offer affirmative defenses related to privacy and data security. Defendants could rebut a *prima facie* case under H.R. 3816 by establishing by clear and convincing evidence that their conduct was "narrowly tailored, could not be achieved through less discriminatory means, was nonpretextual, and was necessary" to prevent a violation of law, protect user privacy, or protect non-public data. H.R. 3816, 117th Cong. § 2(c)(2). While the evidentiary standards differ, the substantive language in this defense is similar to—but not identical with—parallel affirmative defenses in the reported version of S. 2992. *See* note 111 *supra*. As discussed, Senator Klobuchar's May 25 draft relaxed the relevant language in several respects.

Unlike both bills in the Senate, H.R. 3816 would not offer an affirmative defense related to the maintenance or enhancement of platform functionality. The House committee-reported bill would, however, offer a defense that does not appear in either version of S. 2992. Specifically, defendants could rebut a *prima facie* case under H.R. 3816 by establishing by clear and convincing evidence that their conduct "increases consumer welfare." H.R. 3816, 117th Cong. § 2(c)(3).

Enforcement

S. 2992 would grant enforcement authority to the DOJ, the FTC, and state attorneys general.[117] The bill does not contain a private right of action.

As discussed, the legislation would empower the DOJ and FTC to jointly designate firms that meet the relevant criteria as covered platforms.[118] Such designations would be valid for seven years, though the DOJ and FTC would be allowed to reevaluate designation decisions upon receiving a request showing that a platform no longer meets the relevant criteria.[119] Designated platforms would also be permitted to seek judicial review of their designations.[120]

Section 4 of the bill would direct the DOJ and FTC to jointly issue guidelines outlining their interpretation of the "materially harm competition" standard in Section 3(a) and the affirmative defenses in Section 3(b), in addition to their policies regarding civil penalties.[121]

Under the May 25 version of the legislation, firms that violate the bill's prohibitions would be liable for up to 10% of their total U.S. revenue for the period in which the violation occurred.[122] In cases of recurring violations, the legislation would authorize courts to order a firm's chief executive officer to forfeit any compensation received during the 12 months preceding the filing of a complaint.[123]

[117] S. 2992, 117th Cong. § 3(c)(1) (Reported Version); May 25 Draft § 3(c)(1).

[118] S. 2992, 117th Cong. § 3(d)(1) (Reported Version); May 25 Draft § 3(d)(1).

[119] S. 2992, 117th Cong. § 3(d)(1)(C), (d)(2) (Reported Version); May 25 Draft § 3(d)(1)(C), (d)(2).

[120] S. 2992, 117th Cong. § 3(d)(3) (Reported Version); May 25 Draft § 3(d)(3).

[121] S. 2992, 117th Cong. § 4(a) (Reported Version); May 25 Draft § 4(a).

[122] May 25 Draft § 3(c)(6)(B). Under the reported version of S. 2992, violators would be liable for up to 15% of their total U.S. revenue for the period in which the violation occurred. S. 2992, 117th Cong. § 3(c)(5)(B) (Reported Version).

[123] S. 2992, 117th Cong. § 3(c)(5)(D) (Reported Version); May 25 Draft § 3(c)(6)(D).

Comparing Different Versions of the AICOA: S. 2992 and H.R. 3816

The versions of the AICOA pending in the Senate and the House would adopt different enforcement schemes. As discussed, the May 25 version of S. 2992 would authorize penalties of up to 10% of a defendant's total U.S. revenue over the course of a violation. May 25 Draft § 3(c)(6)(B) (2022). Under H.R. 3816, by contrast, violators would face penalties of up to (1) 15% of their total U.S. revenue for the previous calendar year, or (2) 30% of the U.S. revenue of entities "affected or targeted" by the offending conduct, calculated over the course of a violation. H.R. 3816, 117th Cong. § 2(f)(1) (2021).

H.R. 3816 also explicitly contemplates that divestiture orders may be appropriate remedies for violations of the bill. The legislation provides that, if a court determines that a violation arises from a "conflict of interest" related to a platform operator's control of multiple business lines, the court "shall consider" and "may order" divestiture of the business lines giving rise to the conflict. H.R. 3816, 117th Cong. § 2(f)(2)(D). S. 2992 does not contain an analogous provision, but instead makes clear that it does not "prevent or limit" regulators from seeking equitable relief. S. 2992, 117th Cong. § 3(c)(5)(C)(ii)(V) (Reported Version); May 25 Draft § 3(c)(6)(C)(ii)(V).

One of the most significant differences involves the legislation's would-be enforcers: H.R. 3816 includes a private right of action for treble damages, while S. 2992 does not. H.R. 3816, 117th Cong. § 6(a).

Conclusion

The AICOA reflects many of the concerns about digital competition that have occupied congressional attention over the past several years. It also implicates difficult questions involving innovation, privacy, data security, and online speech. Regardless of whether S. 2992 or H.R. 3816 ultimately becomes law, the issues motivating the bills may continue to garner legislative interest.

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