

7 July 2022

## The American Innovation and Choice Online Act

Dear Senators Klobuchar and Grassley:

We believe the American Innovation and Choice Online Act (“American Innovation”) would improve competition in digital markets, prevent further enhancement of market power, increase innovation, and benefit consumers. It therefore should become law in the U.S. We have read a one-paragraph letter to Senators from a group of antitrust scholars opposing the bill and find it unconvincing. The economic analysis driving our conclusion that the bill ought to be enacted as law is detailed below.

Large digital platforms have obtained market power over the last fifteen years due, in part, to insufficiently effective antitrust enforcement and to underlying economic conditions that are conducive to concentration and significant barriers to entry. These economic factors include network effects, economies of scale and scope, the role of data, and consumer behavior.<sup>1</sup>

Today, these platforms have become entrenched while at the same time they serve as the essential gatekeepers of economic, social, and political activity on the internet. Evidence is mounting that their control of these critical gateways is stifling competition and innovation to the detriment of consumers and businesses. American Innovation’s approach is carefully targeted in that its prohibitions apply only to platforms deemed “critical trading partners”—meaning they have the power to deprive business users of access to customers or access to inputs necessary for those users to run their businesses.<sup>2</sup> The result is that American Innovation’s restrictions apply to the platforms whose market positions confer undue gatekeeping power, and no others. It is an appropriate expression of democracy for Congress to enact pro-competitive statutes to maintain the vibrancy of the online economy and allow for

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<sup>1</sup> See generally Fiona M. Scott Morton, et al., [Report of the Market Structure and Antitrust Subcommittee](#), FINAL REPORT: STIGLER COMMITTEE ON DIGITAL PLATFORMS, 34-40 (2019). See also Amelia Fletcher, et al., [Consumer Protection for Online Markets and Large Digital Platforms](#), TOBIN CENTER FOR ECONOMIC POLICY, 10-11 (2021) (explaining that consumer protection, which facilitates competition, is especially important in digital markets because features such as the tendency to tip, consumer behavior, and the role of data make them more vulnerable to the abuse of market power); Jacques Crémer, et al., [Fairness and Contestability in the Digital Markets Act](#), TOBIN CENTER FOR ECONOMIC POLICY, 8 (2021) (“Network effects, especially when coupled with strong economies of scale, severely limit competition: each type of platform service will tend to be provided by one firm, or, if with enough product differentiation, by a few firms.”).

<sup>2</sup> See American Innovation and Choice Online Act, S. 2992, 117th Cong. § 2(a)(6) (2022).

continued innovation that benefits non- platform businesses as well as end users.

American Innovation prohibits harmful conduct in two distinct ways. The first part of the bill announces three broad prohibitions that forbid classes of conduct (discrimination, self-preferencing, and limiting ability to compete) by large platforms that “would materially harm competition.”<sup>3</sup> The second part of the bill (which we discuss below) lists a series of narrower prohibitions, which have proof requirements different than the ones applicable to the three broad prohibitions.

Use of the phrase “material harm to competition” is a change from the language in existing statutes.<sup>4</sup> Most of the academic criticism of this bill expresses antipathy toward this new and different language, and protests that it is ambiguous.

But different language is a feature, not a bug, of this bill. The decline of antitrust enforcement in the U.S. is well known, pervasive, and has left our jurisprudence unable to protect and maintain competitive markets. There are many sources detailing this trend; an excellent summary can be found in a prior letter to Congress that was signed by several of the same people who now object to American Innovation.<sup>5</sup> These findings have overwhelming empirical support in the economics literature, which is only growing over time.<sup>6</sup> For this reason, it is necessary to strengthen competition laws. This bill will strengthen competition enforcement only in the context of digital platforms, an important but relatively narrow step.

To clarify to courts and policymakers that Congress wants something different (and stronger), new terminology is required. The bill’s language would open up a new space and move beyond the standards imposed by the Sherman Act, which has not effectively policed digital platforms in recent decades. The new law would mandate that the FTC and DOJ, the two expert agencies in the area of competition, together create guidelines to help courts interpret the law.<sup>7</sup> Any uncertainty about the meaning of words like “competition” will be resolved in those guidelines and over time with the development of caselaw. This is the same method by which other statutes acquire definitive meaning and is consistent with our common-law tradition.

A second concern feeding the undercurrent of discomfort on the part of critics is that a single

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<sup>3</sup> See § 3(a)(1)-(3).

<sup>4</sup> See, e.g., Clayton Act § 7, 15 U.S.C. § 18.

<sup>5</sup> Jonathan B. Baker, et al., Joint Response to the House Judiciary Committee on the State of Antitrust Law and Implications for Protecting Competition in Digital Markets (April 30, 2020), [https://judiciary.house.gov/uploadedfiles/joint\\_submission\\_from\\_michael\\_kades\\_and\\_antitrust\\_expert\\_coalition.pdf](https://judiciary.house.gov/uploadedfiles/joint_submission_from_michael_kades_and_antitrust_expert_coalition.pdf).

<sup>6</sup> See, e.g., *id.* nn.5-7, 21; Zack Cooper, Stuart Craig, Martin Gaynor & John Van Reenen, *The Price Ain’t Right? Hospital Prices and Health Spending on the Privately Insured*, 134 Q. J. ECON. 51 (2019); José Azar, Steven Berry & Ioana Elena Marinescu, *Estimating Labor Market Power* (2019), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3456277](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3456277).

<sup>7</sup> American Innovation and Choice Online Act, S. 2992, 117th Cong. § 4 (2022). The law directs the FTC and the Antitrust Division to publish the guidelines in draft form, to be followed by a period of public comment. See *id.* § 4(c), Critics of the bill, including those who signed the June 20 letter, are therefore not without recourse. Indeed, given the fast-changing nature of the technology sector, the agencies—which are bound to revise the guidelines at least every four years (*See id.*)—likely will be more receptive to arguments specificity than Congress. The agencies *must* update the guidelines periodically. Congress doesn’t *have to* do much of anything very specific other than approve budgets; it certainly has no obligation to enact any new laws, let alone amend them.

small competitor who cannot survive in the marketplace might be able to sue to make big platforms accommodate it, thereby harming the quality of products and services available to consumers. The first response to this concern is that only the federal agencies and state attorneys general would have standing to bring cases under the law, so frivolous private litigation will not occur. Second, the outcome that critics fear would require the agencies to contend, and courts to accept, that somehow, by hosting robust, open, and non-discriminatory competition in which some competitors do not succeed, the platform is “materially harming competition.” This is, of course, not plausible, which greatly reduces the likelihood a court would so hold.

The related concern that courts may overlook past learning and begin ruling in favor of plaintiffs that are simply unsuited for the rough and tumble of competition, is overblown. Current judges, attorneys, academics, and experts have been trained in the current language of competition and tend to think about competition questions through that lens—a lens that extends little sympathy to plaintiffs. Forty years of constantly receding antitrust enforcement due to the influence of the Chicago School and its cramped view of what counts as injury to competition laid the groundwork for a string of more recent cases—well known to the antitrust bar simply by reference to single-word party names (*AmEx* and *Qualcomm*, for example) in which, despite evidence to the contrary, courts have struggled to find harm to competition.<sup>8</sup>

When courts apply the FTC and DOJ guidelines to the new law, judges will continue to look to existing jurisprudence and related literature for explanations of concepts necessary to understanding all manner of harms to competition, concepts such as market definition, foreclosure, or barriers to entry. The same judges who are called upon to render decisions under the existing, insufficient, antitrust regime, will also be called upon to render decisions under the new law. They will be the same people with the same worldview. The goal of the new language, made more precise through guidelines, is to move courts in a more enforcement-oriented direction. But a judiciary weighted with years of experience and jurisprudence will have significant inertia, and it is therefore unduly optimistic to imagine outcomes under the new law would veer drastically away from past understandings of core concepts like harm to competition. Claims of legal “chaos” are therefore unjustified.

As mentioned, the second part of American Innovation lists additional categories of specifically prohibited conduct (restricting interoperability, restricting business access to data, conditioning access on other services, etc.). Critics reading this list may imagine their favorite products and services will be banned. But American Innovation provides a powerful defense that forecloses any thoughtful concern of this sort: conduct otherwise banned under the bill is permitted if it would “maintain or substantially enhance the core functionality of the covered platform.”<sup>9</sup> A well-run platform presumably makes almost every decision with the goal of maintaining or enhancing its functionality, and therefore good faith business decisions will be protected.

Indeed, given that defense, one might wonder how the bill will effectively restrain the conduct it

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<sup>8</sup> *Ohio v. Am. Express Co.*, 138 S. Ct. 2274 (2018); *F.T.C. v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020).

<sup>9</sup> See American Innovation and Choice Online Act, S. 2992, 117th Cong. § 3(b)(1)(C) (making this an element of affirmative defenses applicable to the first three categories of prohibited conduct); *id.* § 3(b)(2)(B)(iii) (making this an element of affirmative defenses applicable to the remaining seven categories of prohibited conduct).

aims to prohibit. The functionality defense is subject to a requirement that “the conduct could not be achieved through materially less discriminatory means.”<sup>10</sup> In other words, the improved functionality (and therefore the innovation the bill is trying to protect and increase) trumps any violation of the behaviors on the list—*unless* there is another way to achieve the same innovation that is materially less discriminatory to competitors. Critically, and as is typical with elements of an affirmative defense, it is up to the platform itself to convince the court that its conduct is not pretextual and meets the other requirements of the defense. In other words, platforms will not be permitted to cloak anticompetitive conduct with a claim of innovation if that innovation could be implemented in a way that leaves the playing field more level. Because platforms have the most information about their own businesses and their innovations, they should have no problem defending legitimately pro-competitive decisions.

Scholars of antitrust enforcement in the U.S. understand that the current level of competition enforcement against corporations is weak and needs to be increased. American Innovation’s liability standards purposefully differ from the past in order to do a better job than current antitrust statutes of identifying and stopping anticompetitive conduct. The new language in the bill, however, continues to call upon familiar concepts. Anything unfamiliar almost certainly will be the subject of joint FTC-DOJ guidelines to be issued within 270 days of the bill’s enactment; those guidelines will include enforcement policies relevant to conduct that may materially harm competition and agency interpretation of the affirmative defenses.<sup>11</sup> The use of terms and concepts that are familiar, in combination with guidelines addressing anything new, should generate incremental, but positive, change rather than anything radical or abrupt.

In this sense the bill is a nice middle ground. Critics on both the right and left extremes of antitrust scholarship can find things about the bill to criticize, which, in itself, indicates it occupies space in the center. Specifically, some conservative antitrust skeptics claim the bill is *divorced entirely* from the traditional requirement of competitive harm. That view is inaccurate, as we explained above.

Some critics on the left prefer “bright-line rules.” They contend that establishing liability should not require analysis of market facts, product characteristics, and consumer behavior, which can demonstrate whether and how competition has been harmed.<sup>12</sup> But we think the

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<sup>10</sup> *Id.* § 3(b)(1)

<sup>11</sup> *Id.* § 4(a) (The FTC and DOJ “shall jointly issue agency enforcement guidelines outlining policies and practices relating to conduct that may materially harm competition under section 3(a), agency interpretations of the affirmative defenses under section 3(b), and policies for determining the appropriate amount of a civil penalty to be sought under section 3(c), with the goal of promoting transparency, deterring violations, fostering innovation and procompetitive conduct, and imposing sanctions proportionate to the gravity of individual violations”). Critiques asserting the bill should be opposed because the “may materially harm” standard is vague, or because it is not yet known how courts and agencies will construe the affirmative defenses, *uniformly*, to our knowledge, ignore the bill’s mandate that the DOJ and FTC promptly issue guidelines on these precise topics. A recent letter signed by a group of antitrust scholars, *see infra* note 21, makes no mention of the guidelines, and nor do any of the supporting materials to which the letter links.

<sup>12</sup> *See generally* Sarah Miller, *Last Week’s Big Tech Antitrust Hearings Sent An Unmistakable Message – Change is in the Air for America’s Corporate Giants*, THE APPEAL (Aug 6, 2020), <https://www.economicliberties.us/our-work/last-weeks-big-tech-antitrust-hearings-sent-an-unmistakable-message-change-is-in-the-air-for-americas-corporate-giants/>. *See also* *Restoring Antimonopoly Through Bright-Line Rules*, OPEN MARKETS (April 26, 2019), <https://www.promarket.org/2019/04/26/restoring-antimonopoly-through-bright-line-rules/>; Sandeep

bill's requirement of analysis is a good feature; it helps courts and agencies ensure that the law punishes harmful conduct only.

Moreover, the law shifts the burden so that, for some categories of prohibited conduct, the platform must demonstrate that its conduct did *not* cause competitive harm in order to make out an affirmative defense. This change significantly strengthens the law. When the burden is on the plaintiff, as it is today in an antitrust case, the plaintiff must obtain all the data it needs to portray marketplace truths and make the case. But, of course, a platform that has broken the law has no interest in aiding that discovery or bringing useful facts and data forward. If the platform outmaneuvers the government in the discovery process, the court will make decisions based on that biased record. Placing the burden on the platform, by contrast, means that when it has not broken the law, it has both the ability and incentive to find evidence of the issue in question and present it convincingly. If the platform cannot manage to do this, likely that proof is not available, and the platform should be liable. This process lowers the cost and increases the probability of finding liability when conduct violates the law, as has been noted by some signatories of the letter criticizing the bill.<sup>13</sup>

Another important reason to support this bill that has not been highlighted in the public discussion is the ability of the expert agencies to incorporate additional protections into the guidelines. In this sense, the bill is not a pure antitrust law but also safeguards other benefits to consumers and businesses. For example, effective competition requires consumer protection so that consumers are aware of the quality of the product or service they are choosing, enabling them to take advantage of an entrant with a better offer without being exploited or defrauded; the complementarity between consumer protection and competition can be addressed in guidelines.<sup>14</sup> Another example is that the openness created by a platform access requirement increases competition, but may create security risks, and guidelines can play a role in balancing these issues. Agency guidelines can be updated over time to reflect changes in technology or clarify issues that courts have found to be confusing.

The European Digital Markets Act (DMA) and Digital Services Act (DSA) have just become law in the European Union.<sup>15</sup> American Innovation gives the U.S. a role in the regulation of these important global platforms, many of which were founded in the U.S. Without American

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Vaheesan, *Antitrust Litigation Isn't Enough. Biden Needs to Go Further*, WIRED (December 18, 2020), <https://www.wired.com/story/antitrust-litigation-isnt-enough-biden-needs-to-go-further/>.

<sup>13</sup> "Getting it right" is especially important in connection with a law like this one, for which it is legitimate to consider the risk of overenforcement, and especially when that potential overenforcement is bad for everyone because it can stifle innovation and increase costs that ultimately are borne by consumers.

<sup>14</sup> See generally Fletcher, et al. *supra* note 1, at 3-9 (setting forth the economic and competition policy rationales for consumer protection).

<sup>15</sup> The DMA was accepted by political agreement in March 2022; the final text is expected to be available by October 2022. For the current draft of the DMA, see *Digital Markets Act (DMA)*, European Commission (2022), [https://ec.europa.eu/competition-policy/sectors/ict/dma\\_en](https://ec.europa.eu/competition-policy/sectors/ict/dma_en). And for additional comparison of U.S. and European proposals for digital platform regulation, see Monika Schnitzer, et al., *International Coherence in Digital Platform Regulation: An Economic Perspective on the US and EU Proposals*, (Digital Regulation Project, Working Project, 2021), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3923604](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923604); Andreas Schwab, *The EU ushered in a new era of digital regulation. Will the US follow suit?*, The Parliament Magazine (June 30, 2022) <https://www.theparliamentmagazine.eu/news/article/eu-new-era-digital-regulation-will-us-follow-suit#.Yr6zmY2yrgM.twitter>.

Innovation, the role of protecting competition and innovation in the digital sector outside China will be left primarily to the European Union, abrogating U.S. leadership in this sector.

Further, American Innovation is a practical option because it covers much of the same ground as the provisions in the DMA. Because the large platforms will be preparing to comply with the DMA and DSA in 2023 and will be coming into full compliance in 2024,<sup>16</sup> their European operations can naturally comply with American Innovation. Consumer gains from American Innovation will come at minimal additional cost to platforms—other than the loss of undeserved monopoly profit—because any necessary new functionalities or interfaces will already have been created and deployed in Europe. Moreover, the existence of the European laws profoundly alters the costs and strategies of the covered platforms. Without American Innovation, large platforms might prefer to run a business model in the U.S. that discriminates against, or blocks entry of, new competitors and complementors—even though they must maintain a competitive platform in Europe. Such a situation could cause the center of gravity for innovation and entrepreneurship to shift *from* the U.S. *to* Europe, where the DMA would offer greater protections to start ups and app developers, and even makers and artisans, against exclusionary conduct by the gatekeeper platforms.

Finally, we address the criticism that American Innovation will inadvertently make content moderation difficult because some of the prohibitions purportedly could be read, in what we consider to be strained ways, to cover and therefore prohibit some varieties of content moderation. Even if some of the prohibitions could be read in the strained ways these critics fear, the bill is structured to protect against this sort of misuse. In particular, the requirement that there be competitive harm in this scenario serves an important role in determining liability.

The mere possibility a litigant might attempt to pigeonhole incidents of purported censorship into a definition plainly not intended to cover such conduct, or that an activist judge might condone such misreading, is not a sufficient reason to oppose American Innovation. If laws will be intentionally misconstrued, it may not be worthwhile enacting any laws at all, as mischief of the sort critics envision could be made using any law, new or old. Rather, offering comments on a bill we believe will confer widespread benefits on the American people presupposes that courts do something other than simply exercise raw power. Courts decide, and they will continue to decide on, the law, in light of the evidence.

Perhaps this bill could be made better if we lived in a perfect world. But we believe the perfect should not be the enemy of the good, especially when change is so urgently needed. Current antitrust law is, and has been, ineffective. The risk of requiring perfection in the next law is another decade, or five or six, in which platforms amass ever greater market power, harming consumers and society.

We offer these reasons to explain why we disagree with critics, including the authors of a letter

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<sup>16</sup> Digital Markets Act—The New Era of EU Digital Regulation for Big Tech, Akin Gump Strauss Hauer & Feld LLP (June 1, 2022), <https://www.akingump.com/en/news-insights/digital-markets-actthe-new-era-of-eu-digital-regulation-for-big-tech.html>.

recently addressed to members of the Senate that says: “this bill is not well-designed to accomplish this goal. As presently drafted, it would very likely reduce innovation, [sic] and harm consumers.”<sup>17</sup> That critical letter is not convincing; it contains no explanation or justification of the signatories’ joint views. After considering the recent experience of U.S. antitrust enforcement, present problems in the digital economy, and action in Europe, we find their opposition unjustified. Accordingly, we express our strong support for the American Innovation and Online Choice Act.

Sincerely yours,

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Disclosures: The authors have consulted for companies covered under the proposed bill and for government agencies in the U.S. or abroad on digital platform issues.

cc: Sen. Richard Blumenthal  
Rep. Ken Buck  
Rep. David Cicilline  
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<sup>17</sup> Letter to “Senators” from “Professors of law, economics, and business” at 1 (circulated June 20, 2022) (PDF on file with authors).