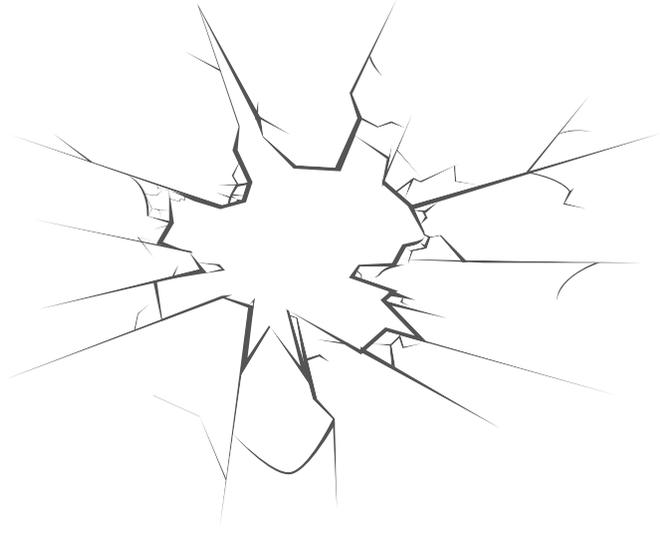


Senators, Experts:

AMERICAN INNOVATION AND CHOICE ONLINE ACT HAS SERIOUS FLAWS



(S. 2992 AND H.R. 3816)

Senators Klobuchar, Grassley, and others recently introduced S. 2992, "The American Innovation and Choice Online Act" (AICOA) in the Senate.

The bill has been moved out of the committee, yet senators and experts have expressed strong concerns with the lack of debate around this bill, and concerns around content moderation, consumer welfare, cybersecurity, the negative effects on American consumers and businesses, international competitiveness, national and cyber security and government overreach. **These flaws have yet to be addressed by cosponsors.**

S.2992 has not received the public airing it deserves, and critical Senators have been left out of the drafting process

Sen. Dianne Feinstein (D-CA)

"I will oppose this bill today. I strongly believe it would have been helpful for this bill to receive the benefit of a full committee hearing before we voted on it, in order to discuss these concerns and hope that might still be the case."

Sen. John Cornyn (R-TX)

"I am struck by the bipartisan nature of the questions and concerns that have been raised here today. I think a lot of that has to do with the fact that this bill has never had a full committee hearing. A number of us on a bipartisan basis asked the Chairman for a full committee hearing so we can better understand what both the intended and unintended consequences of this legislation are."

Sen. Mike Lee (R-UT)

"I believe strongly that we've got to first do no harm and in order to determine that we are doing no harm we must understand the legislation. This thing has not received the airing that it needs."

Sen John Kennedy (R-LA)

"I am a co-sponsor of the bill. But this bill is going to change, change dramatically. Hopefully for the better. I expect to be in that room when these changes are made. Or else, I will be off this bill faster than you can say big tech."

S.2992 would make it difficult to reign in hate speech and harmful content on digital platforms

Sen. Alex Padilla (D-CA)

"This is particularly troubling - this bill may hamper the efforts of platforms to address the spread of hate speech, and misinformation, and disinformation online that have caused so many recent problems for our democracy. For example, Section 3(a)(3) on page 9, makes it illegal for covered platforms to discriminate in the application or enforcement of their terms of service among 'similarly situated business users.' Now this provision can be a gift to bad actors seeking to prevent platforms from blocking business users that pedal hate speech. Or imagine election disinformation."

Carmen Scurato

Free Press

"This provision could require platforms to host hate speech and other harmful content targeting Black and Brown people, the LGBTQIA+ community, women, immigrants, Indigenous people and other targeted populations. It opens the door to arguments that covered platforms are unlawfully discriminating against hate-and-disinformation purveyors by taking them down. State AGs and future FTC officials charged with enforcing this bill could easily but falsely paint apps like Parler or businesses like Infowars as 'similarly situated' to other apps and sites that remain available on the covered platforms."

S.2992 would take away products that consumers like

Senator Mike Lee (R-UT)

"How will the interoperability requirements impact cybersecurity and privacy? Will judges interpret the bill to protect consumers – or individual competitors? It's an important question given that U.S. antitrust law, our competition policies in this country, have always focused, to our great benefit, on protecting competition itself. Protecting competition, with an eye towards the consumer. The minute we start focusing on competitors rather than competition and consumers, is the minute we could really end up with a very different product and we really have to be careful about doing that."

Sen. Alex Padilla (D-CA)

"I respect that many consumers like the convenience of self-preferencing that enables them to type something into a search engine and receive answers to their queries right then and there without having to go through additional clicks or additional links. This is now a staple feature across search engines today. Now this may be a simple example, but a lot of what has powered technological innovation over the last couple of decades has been the power and convenience of integrated services working together to the consumer's benefit. But given the broad language in this bill, here's a question: Is this committee willing to trust regulators and courts to crack down on harmful self-preferencing practices while allowing activity that benefits consumers?"

Grover Norquist Americans for Tax Reform

"S. 2992 shifts antitrust law away from the long-held consumer welfare standard, which protects consumers from harm, toward a European-style approach that protects individual competitors in a given market. This legislation bans companies over a government-determined size from selling or providing private-label products on their own platforms, a practice beneficial to consumers but negatively branded as 'self-preferencing.'"

S.2992 would increase the threat of cybersecurity attacks on Americans

Sen. John Cornyn (R-TX)

"I think we've all learned that unvetted access to data, hardware and services raises cybersecurity concerns. Not every potential user that does want to interoperate with a platform will have the level of cybersecurity that Americans deserve. The Federal Bureau of Investigation, National Security Agency, and Cybersecurity and Infrastructure Security Agency at the Department of Homeland Security have issued a joint threat alert warning that Chinese state-sponsored cyber actors target the United States repeatedly - I think that's common knowledge. This bill would make those targets more vulnerable."

Sen. Patrick Leahy (D-VT)

"The bill makes it too difficult for online platforms to adequately protect consumers' privacy."

Sen. Jon Ossoff (D-GA)

"Striking the appropriate balance between privacy and cybersecurity in this legislation is important. And what I want to offer is a second-degree amendment, Senator Lee, to yours that we toughen the standard slightly that these tech companies have to meet in order to invoke this affirmative defense where privacy or security functionality is concerned."

S.2992 would stifle American innovation, disadvantage small businesses and decrease the competitiveness of American businesses

Sen. Chris Coons (D-DE)

"I have significant concerns to balance about whether or not this bill achieves the right balance between the costs and inefficiencies between litigation and compliance and potentially unintended negative consequences on the competitiveness globally of our digital democracy principles on the world stage and whether or not we are achieving enough progress on combating anti-competitive behavior on the other."

Sen. Mike Lee (R-UT)

"I also worry that quite perversely and unintentionally it may actually entrench the very four companies which it's aimed, by creating a strong incentive to simply cease doing business with third parties. This could crush thousands of small businesses and it could actually worsen the state of competition in online markets."

Sen. Patrick Leahy (D-VT)

"I have other issues I would like to work on with cosponsors of the bill, such as unintended economic consequences for small businesses who rely greatly on online platforms — there are many small businesses in Vermont."

Doug Kelly

American Edge Project

"Rather than passing legislation that handcuffs America's most innovative technology companies, Washington lawmakers should focus on bolstering our domestic innovation and slowing China's theft of American technology. There's too much at stake to get this wrong."

Tracy Hernandez

Los Angeles County Business Federation (BizFed)

"The proposed antitrust bills being debated by Congress are antithetical to sensible, bipartisan pandemic recovery strategies that prioritize job creation, business growth and innovative competitiveness on the international stage. This package of bills neglects the needs of millions of small business owners and third-party sellers who depend on unrestricted access to online platforms to market their products. Passing any one of these bills would depress employment, jeopardize the future of California's technology jobs and deny consumers fair access to competitively-priced, high-quality products."

Karen Kerrigan

Small Business & Entrepreneurship Council

"Unfortunately, in its current form, S.2992 will disrupt and curtail market access for many small businesses, and alter the digital tools they have come to rely upon for survival during the ongoing pandemic. The national competitiveness and national security issues that Senators also brought forward during committee markup are quite significant. In our view, these significant issues are not fixable on the Senate floor."

S.2992 would harm American national security

Sen. John Cornyn (R-TX)

"Mr. Chairman, I'm concerned about the potential national security consequences of this bill. I'm worried that it will harm American business and reward our adversaries, most notably the People's Republic of China. The last thing that we should be doing is weakening America's ability to compete in a global economy. I worry that this bill, by disadvantaging American companies, will basically be a big gift to the People's Republic of China. It serves our homegrown companies up on a platter and does nothing to impact the bad conduct of our adversaries."

Sen. Tom Cotton (R-AR)

"I have concerns with provisions in the bill that could require data sharing between American companies and bad actors under the control of the Chinese Communist Party. I don't think that's the intent of the bill or the drafters based on our conversation but I do think we can improve that language to make it safer for our companies and citizens."

Robert O'Brien

Former White House National Security Advisor

"Cloaked in antiquated interpretations of U.S. antitrust law, these bills hand increased authority to bureaucrats at the Federal Trade Commission and lay the groundwork for dismantling America's most successful technology companies—the ones at the forefront of the race to retain U.S. dominance in fields such as quantum and AI. Chinese firms like Alibaba, Huawei, and Baidu are seeking to supplant U.S. companies and would have an open field world-wide and in America if these bills pass."

Klon Kitchen, American Enterprise Institute

Jamil Jaffer, National Security Institute

"Foreign tech companies will not be bound by these rules and so, if passed, S.2992 will hamstring American companies while leaving global competitors with greater agility. This bill is about more than a few U.S. tech companies being brought down a peg; it's about us voluntarily ceding critical technological and economic advantage to countries like China at a time when leading in key technologies and tech markets is critical for our nation's long-term thriving."

Tatyana Bolton and Brandon Pugh

R Street Institute

"On the whole, it is difficult for security experts to encourage resilience and diligence for platforms and networks along with the uptake of strong cybersecurity practices. It is even harder to convince businesses that cyber risk is a business risk, or encourage them to develop products with security in mind. While this is not a strict cybersecurity bill, it adds obstacles and restrains the application of security safeguards by platforms, which creates adverse incentives."

"This bill would punish companies with a business model that focuses on security. From a policy perspective, we should encourage—not discourage—more companies to include more stringent security for all products, especially software that is sold at scale to millions of users. Forced interoperability, narrow requirements and obstacles for security updates through requirements for affirmative defense, as well as patchy security exclusions, create a recipe for weaker cybersecurity and should be reconsidered, amended or removed before any further movement on this legislation."

Graham DuFault

The App Association

"Limiting the universe of bad actors subject to removal to those that appear on lists 'maintained by the Federal Government' is laughably inadequate and irresponsible cybersecurity policy. The new language only protects token cybersecurity activity, shielding platforms if they rely on the lists of prohibited persons and businesses from the federal government. Cybercriminals adapt quickly and take a variety of measures to prevent detection. Requiring platforms to wait for threat identification and addition to a federal government list gives criminals an enviable new advantage and would expose consumers to a fresh wave of new threats that mobile devices can easily avoid at present."

S.2992 would disadvantage a small handful of companies, putting Congress in the position of picking winners and losers in the market

Sen. Alex Padilla (D-CA)

"Why distinguish between Amazon Marketplace and Walmart Marketplace if the practices are comparable? A 10 billion dollar company vs a 100 billion dollar company - they both have economic significance. If the concern is that self-preferencing - the activity, the practice - is bad, when these few companies do it because of their dominance, then isn't it also bad when other large firms beyond these five adopt these same practices?"

Sen. Dianne Feinstein (D-CA)

"I'm very concerned about the bill this committee is considering. It's not really the type of legislation that we usually consider, where the rules are laid out and everyone is expected to comply. Instead, it's specifically designed to target a small group of companies, most of which are headquartered in my home state of California. If the conduct this bill seeks to prevent is unfair and improper, I believe that conduct should be prevented from anyone who engages in it, not only a small handful of companies."

Matt Schruers

Computer & Communications Industry Association

"Rather than explore antitrust reform across the economy, this bill singles out a handful of successful U.S. companies, picking winners and losers, at a time when consumers are frustrated with higher prices and fewer options in other segments of the economy."

Wayne Brough

R Street Institute

"In fact, AICOA restricts covered platforms' ability to compete and eliminates many practices that are clearly pro-consumer. For example, self-preferencing is prohibited by the covered platforms. This includes activities such as a covered platform offering its own store-brand or "private label" products to compete with other brands sold on the platform. Under these rules, Amazon Basics would be potentially limited in its ability to compete with its rivals."

"Yet, private labels exist throughout the world of retail and are not covered by this bill. Target, for example, has 48 private labels, and generates roughly a third of its income through the sale of its private label products. Walmart, Costco and all major grocery stores sell private labels that often provide the low-cost option for consumers. This head-to-head competition is a driving factor in keeping prices low and enhancing consumer welfare. The bill does not explain why "Kirkland" is acceptable, but "Amazon Basics" is not."

S.2992 would give the federal government significant power over private businesses

Sen. Tom Cotton (R-AR)

"I'm afraid that this bill leaves a lot of discretion to the Federal Trade Commission to define unfair conduct. I have real concern giving any agency that much power and discretion."

Patrick Hedger

Taxpayers Protection Alliance

"What is perhaps most concerning about this bill is that it would grant sweeping new powers to the FTC. The bill would give FTC broad discretion to determine which antitrust cases to take up under the bill and would give the FTC the power to bring enforcement action themselves. Because businesses are inherently always looking out for their own interests, the FTC could soon find a wide license to regulate anything and everything on a whim."