

January 18, 2022

# WHAT DOES THE AMERICAN INNOVATION AND CHOICE ONLINE ACT MEAN FOR CONSUMERS AND COMPETITION?

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# INTRODUCTION

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# THE AMERICAN INNOVATION AND CHOICE ONLINE ACT COULD CHILL INNOVATION AND HARM CONSUMERS

Recently, Senators Klobuchar and Grassley introduced the American Innovation and Choice Online Act (“AICOA”) proposing sweeping regulations for a handful of tech companies that operate digital services used by both businesses and consumers.

While the Bill is ostensibly intended to prevent self-promotion and discriminating against competitors, it would end up sweeping up a broad range of ordinary business operations that provide huge benefits to consumers.

The Bill is notable for its combination of very broad and vague language for defining illegal activity; very heavy penalties for companies and corporate officers; and very narrow language for affirmative defense.

Moreover, the Bill makes no mention of consumer benefits as an affirmative defense and hence advances the interests of certain businesses over the interests of consumers and small businesses that use such services.

The problem is that this three-way combination goes far beyond imposing normal compliance costs and regulatory burdens, creating huge financial and business risks for even ordinary business decisions.

In response, well-liked services such as Google Search, Fulfillment by Amazon, and the Apple App Store, will have to be substantially reconfigured and/or limited. These proposed standards would not only undermine the tech companies that would be subjected to the legislation, but inevitably harm its users as well.



# THE AMERICAN INNOVATION AND CHOICE ONLINE ACT COULD CHILL INNOVATION AND HARM CONSUMERS

Consumers could lose out on a range of products and services offered by the targeted companies that would be swept up by the Bill. Just a few of the products and services that could be hampered by the Bill include:

- Search engines that concentrate on delivering the most relevant results to consumers from Google
- Online shopping with massive product catalogs and two-day shipping from Amazon
- Smartphones and a vast library of third-party apps that have revolutionized everyday life from Apple

Consumers would also suffer from reduced innovation, as the targeted companies would have to obtain regulatory pre-approval with every new product to meet the unspecified criteria in §2(a) and (b) of the Bill.

Far beyond its stated goals, the Bill could end up harming consumers by breaking the products and services that they have come to greatly value and depend on.



**CONSUMERS COULD  
LOSE INNOVATIVE  
PRODUCTS AS A  
RESULT OF AICOA**

*Examples*

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# 1. GOOGLE'S SEARCH ENGINE

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# CONSUMERS COULD LOSE MANY OF THE BENEFITS OF GOOGLE'S SEARCH ENGINE AS A RESULT OF THE BILL

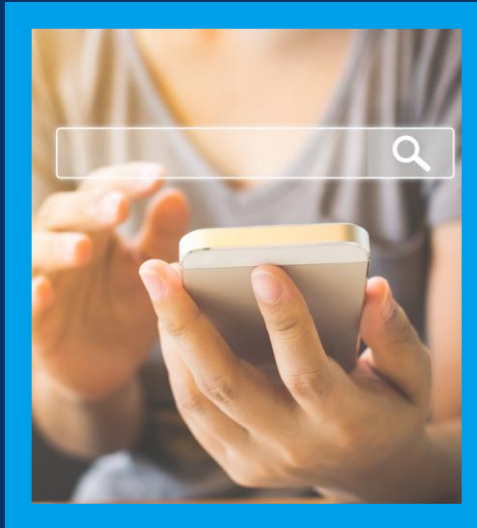
Google's most used product is its search engine and accompanying search advertising. Search has dramatically improved since the 10-blue links that it originally included and is continually evolving as new features are incorporated. These range from features that users can see (such as local results, news, autocomplete and translation) to features that the users cannot see (such as improved safety and spam prevention) through more profound innovations (such as deployment of machine learning technologies).

With such improvements, consumers generate increasing benefits from Google's search engine as one of the main portals to find information on the Internet.

Consumers also benefit from the economic activity Google's search engine facilitates by connecting consumers to businesses:

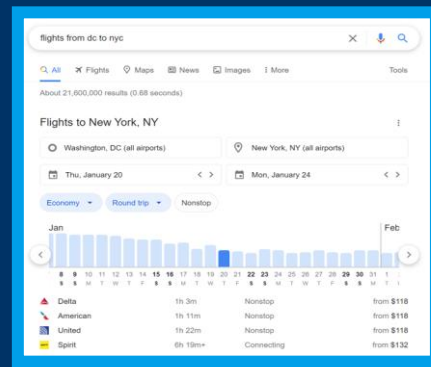
- Google was responsible for over 2 billion monthly connections between consumers and businesses in 2020.
- Over 17 million businesses received connections to consumers through Google in 2020.

Yet the basic functioning of a search engine could be severely hampered by the Bill.

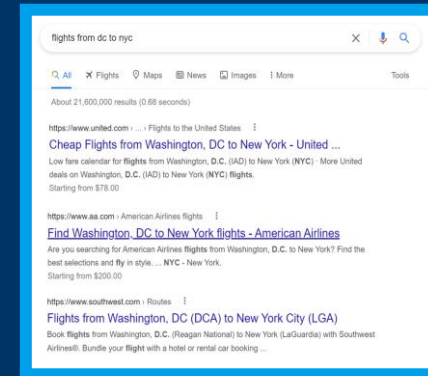


# SEARCH ENGINE FEATURES THAT CONSUMERS LIKE COULD LIKELY BE LIMITED

A simple search for a flight from Washington, D.C. to New York City illustrates the endless controversies that the Bill raises but proposes no solutions.



BEFORE ACIOA



AFTER ACIOA

- The first set, integrated search features, gives users a further search bar and links to websites where comparison shopping for flights can be done may be viewed as “self preferencing” or discrimination in favor of particular sites.
- While the second set, basic links, which provides direct links to websites to purchase tickets, degrades the search product as it displays less information, reduces user engagement and imposes more time consuming interaction may be compliant with the proposed legislation.

Given the large penalties that Google may face for offering integrated search features, the exposure to litigation risk and uncertainties over third party access, Google may be reluctant to provide search features, even if they significantly benefit consumers.



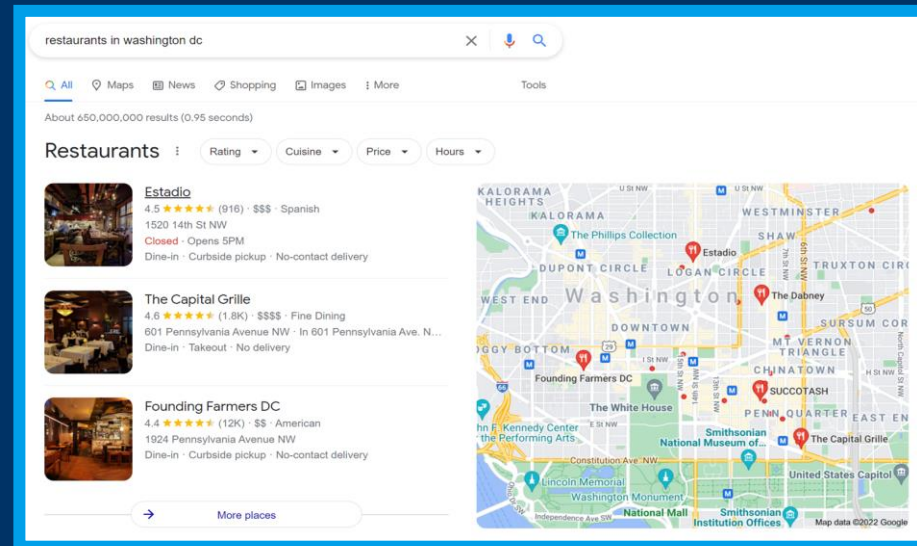
# CONSUMERS COULD LOSE SEARCH RESULTS PRESENTED IN THE USEFUL FORMATS THEY HAVE COME TO EXPECT

Consumer's access to direct results via Google's search engine would be endangered by the Bill for fear that it would be pushing "Google's results" above rival search results.

Consider a consumer searching for "Restaurants in DC."

Under §2(a), Google could be accused of unfair preferencing or discriminating by presenting a single map with restaurant locations instead of providing links to third-parties like Yelp or OpenTable. That's true even if the consumer would prefer the integration of a single map, which avoids the need to navigate two separate search engines.

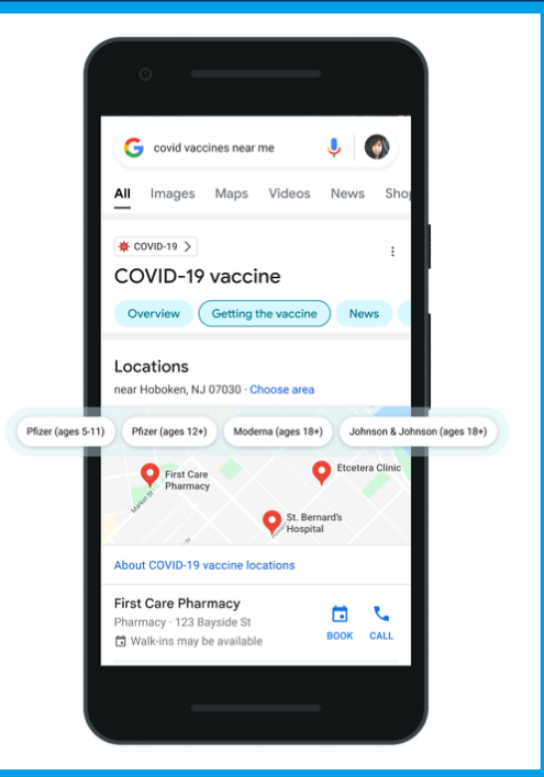
For the billion+ Google searches for restaurants every month, consumers would be left with a more inefficient search experience.



# CONSUMERS COULD LOSE SEARCH RESULTS PRESENTED IN THE USEFUL FORMATS THEY HAVE COME TO EXPECT

Google's ability to display search results on a map of its choosing would also limit its ability to provide important public health information regarding COVID-19.

Requiring Google to demonstrate it would not be "unfairly preferencing" its own COVID-19 search results over other results on rival maps Google could link to would inevitably slow the dissemination of this vital information.



President Biden

@POTUS

United States government official

Google "COVID test near me" to find the nearest site where you can get a test.

10:15 AM · Jan 5, 2022 · The White House

# CONSUMERS COULD LOSE IMPROVEMENTS TO GOOGLE'S SEARCH ENGINE, WHICH COULD BE HAMPERED BY THE BILL

- Consumers could likely lose out on many of the regular improvements Google makes to its search engine as a result of the Bill.
  - Google regularly updates its search engine algorithms to improve the search results it delivers its consumers and offer additional features.
  - While each change may be aimed at improving consumers' experience with Google's search engine, each change would have to be viewed through the lens of what it means for competitors to Google, sparking further investigations and rounds of lawsuits claiming unfair preferencing or discrimination under §2(a) and §2(b) of the Bill.
  - Moreover, §2(d) of the Bill makes no provision for Google to cite benefits to consumer as a defense to the lawsuits, while exposing the company to potentially huge penalties under §2(g).
  - The end result: Fewer consumer-friendly improvements would be made to Google's search engine. Consumers would no longer have the benefit of the thousands of updates to Google's search engine each year.

# THE SEARCH ENGINE AVAILABLE TO CONSUMERS MIGHT LOOK NOTHING LIKE A MODERN SEARCH ENGINE

The search engine that Google would be able to safely offer consumers under the broad and unclear restrictions of the Bill would be severely less useful to consumers.

It might look something like search engines from the mid-1990s, similar to this image of Yahoo! from 1994.

Instead of dynamically answering users' queries and returning results to users in an order that advantages some websites and disadvantages others, Google might be limited to offering a static set of links, each having gone through a vetting process by regulators and the courts.

## Yahoo - A Guide to WWW

[ [What's New?](#) | [What's Cool?](#) | [What's Popular?](#) | [Stats](#) | [A Random Link](#) ]

[Y Top](#) | [Up](#) | [Search](#) | [Mail](#) | [Add](#) | [Help](#)

- [Art\(466\)](#) NEW
- [Business\(6426\)](#) NEW
- [Computers\(2609\)](#) NEW
- [Economy\(743\)](#) NEW
- [Education\(1487\)](#) NEW
- [Entertainment\(6199\)](#) NEW
- [Environment and Nature\(193\)](#) NEW
- [Events\(53\)](#) NEW
- [Government\(1031\)](#) NEW
- [Health\(367\)](#) NEW
- [Humanities\(163\)](#) NEW
- [Law\(163\)](#) NEW
- [News\(185\)](#)



## 2. FULFILLMENT BY AMAZON

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# CONSUMERS COULD LOSE THE BENEFITS OF FAST LOW-COST DELIVERY OF MILLIONS OF PRODUCTS CURRENTLY OFFERED ON AMAZON

Amazon offers a suite of logistics services to third-party sellers through its Fulfillment by Amazon (“FBA”) program. As part of FBA, Amazon provides sellers:

- 24/7 Amazon customer service.
- Fulfillment, warehousing, and shipping services.
- Access to the Amazon Prime customer base on Amazon.com.
- Fulfillment services for other online outlets such as eBay and businesses’ own websites.

Consumers enjoy access to a wide array of products from small businesses that use FBA

- Access to such a logistics network, typically only available to the largest of retailers, has been an engine of growth for the small businesses that use FBA.
- Amazon currently has 1.5 million businesses offering products for sale on Amazon.com.
- In 2020, half of all sales on Amazon.com were through third-party sellers and 2/3 of these used FBA.

Consumers enjoy significant benefits from the fast low-cost delivery and vast product choice that Amazon and its FBA program provide

- In addition to fast low-cost delivery, consumers benefit from lower prices due to competition from FBA sellers.
- Consumers also benefit directly from the variety of products on offer, as the vast array of FBA sellers can better cater to consumers than a traditional retailer that only stocks a limited selection of products.



# CONSUMERS COULD LOSE ACCESS TO PRODUCTS FROM FBA SELLERS IN ANY PRODUCT CATEGORY WHERE AMAZON ALSO SELLS

Yet, under §2(a) of the Bill, Amazon would have to prove that Amazon does not “unfairly preference” itself on any product both Amazon and an FBA seller sell:

- This would include the prices Amazon sets for its FBA services.
- This would also include a number of non-price requirements such as product quality requirements, the requirement to maintain good customer reviews, and required inventory turnover rates.

Determining the correct price and non-price requirements of the FBA program that would put FBA sellers on exactly equal footing as Amazon would be a highly complicated and imprecise exercise for which there would be different answers across the thousands of different product categories Amazon sells and across the millions of different FBA sellers.

Any FBA seller who could not compete against Amazon on the merits could simply claim that it was because of the pricing or terms of the FBA program, opening up Amazon to endless litigation

Facing punishing injunctions and penalties, and without being able to cite consumer benefits in defense, Amazon could be forced by the Bill to reconfigure and substantially limit the FBA program.



# SEVERING AMAZON.COM AND FBA COULD RESULT IN CONSUMERS LOSING ACCESS TO PRODUCTS FROM SMALL BUSINESS FBA SELLERS

One solution that regulators could propose to address any potential discriminatory behavior from Amazon's FBA program would be to break Amazon into two companies—one that included its Amazon.com storefront and sales made by Amazon and another that included its third-party logistics business that provides services to FBA sellers.

But those changes would reduce economies of scale, and make it much harder for Amazon to share the significant economies of scale it has achieved with small businesses through the FBA program

However, this would create massive inefficiencies that would hurt consumers and small businesses:

- Without the economies of scale from combining FBA and Amazon fulfillment operations, Amazon might have to raise FBA seller fees.
- Amazon would have to go through an additional vetting process for FBA sellers in order to give them access to its Prime program.
- Removing FBA from the market will increase costs for small businesses trying to compete with large retailers like Wal-Mart, Target, and Home Depot that have the scale to build out large logistics operations.

Consumers could ultimately lose access to the vast array of products offered by small business FBA sellers.

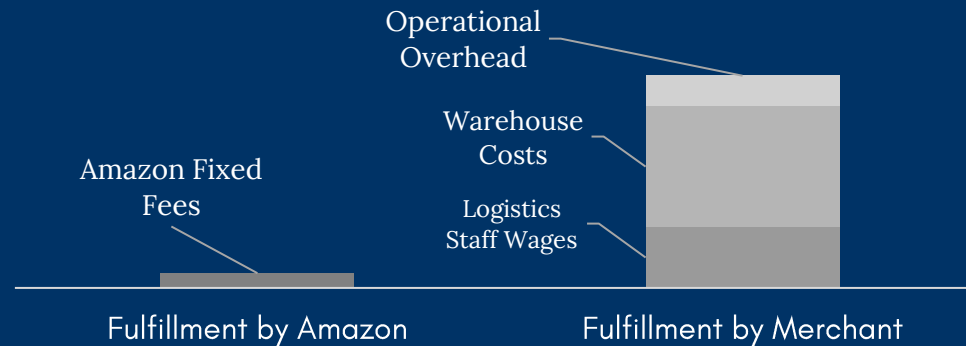




# THE LOSS OF AMAZON'S FBA PROGRAM COULD REDUCE CONSUMERS' ACCESS TO SMALL BUSINESSES

FBA offers sellers access to logistics, warehousing, shipping, and customer service operations on demand and at prices not achievable by small businesses. Without FBA, sellers would face huge cost increases that would make it impossible for them to compete with large retailers:

## Fixed Costs of Distribution Are Lower Using FBA



Consumers could ultimately lose the competition and product choice provided by FBA sellers.





## 3. THE APPLE APP STORE

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# CONSUMERS COULD LOSE ACCESS TO THOUSANDS OF HIGH-QUALITY, SAFE APPS FROM APPLE'S APP STORE

Apple operates the App Store as part of its iOS operating system as a centralized platform for distributing third-party apps to iOS users.

As part of running the App Store, Apple requires developers to submit their apps for review by Apple's App Review team before they are allowed to distribute the app to consumers through the App Store.

The App Review team only approves apps for distribution to consumers that meet its standards for user safety, performance, design, and legal reasons including privacy.

Ensuring that all apps available on the App Store meet minimum standards helps maintain consumers' experience with iOS and ensures consumers that they can download apps and make in-app purchases securely, avoiding scams, intrusions into privacy, and other forms of malware.

Consumers have benefited greatly from the variety of apps available on the App Store:

- From an initial 500 applications available through the App Store at its launch in 2008, the App Store has grown to feature more than 1.8 million apps today.
- Third-party developers earned \$155 billion from the App Store from its inception through 2019 and currently make approximately \$35 billion per year on App Store sales.



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# CONSUMERS COULD LOSE ACCESS TO HIGH QUALITY, SAFE APPS FROM APPLE'S APP STORE

Consumer could lose benefits of the App Review system under the Bill and would be opened to the security risks and privacy intrusions from apps that would have previously been filtered out via the App Review system:

- Almost any app would be allowed to be installed on iOS since under §2(a) of the Bill, Apple could be accused of “unfairly preferencing” or “discrimination” against apps that did not meet Apple’s standard for approval.
- Although Apple could continue to exclude some apps that met security or privacy concerns under §2(d) of the Bill (possibly following investigations and lawsuits as to whether such apps actually caused security or privacy concerns), it would be difficult for Apple to continue to exclude other apps with performance, pricing, or design issues. The Bill provides not even a mention as to these specific reasons for excluding an app from the App Store.
- Worse still, under §2(a) of the Bill, Apple would have to allow not only apps distributed through the App Store, but it would also have to allow alternative app stores on iOS or otherwise allow developers to “sideload” apps or else face investigations about “unfairly preferencing” its own app store.
- This would disrupt the App Store’s gatekeeper role of keeping users safe, as developers could now completely avoid the App Store, further opening users to the risk of malware.

# SIDELOADING WOULD EXPOSE CONSUMERS TO MALWARE AND OTHER SECURITY AND PRIVACY CONCERNS

Consumers face substantial threats from malware as consumers typically have a wealth of personal information kept on their phones.

Apple has been able to provide substantial benefits to consumers by protecting them through the App Store. For example, in 2020, Apple:

- Rejected more than 150,000 apps for being spam, copycat, or misleading to users.
- Rejected more than 215,000 apps for privacy violations.
- Prevented \$1.5 billion in potentially fraudulent transactions.

Malware would not just impact individual consumers, but also companies that encourage users to access corporate networks via their personal devices. Security risks far beyond losing personal pictures and passwords would be introduced.

Malware would also make consumers wary of trying new apps, creating disincentives for small developers to produce apps, thereby decreasing the overall development of third-party apps for iOS devices.

The Bill provides no guidance on how to credit or balance these procompetitive benefits of centralizing app distribution and, therefore, will harm consumers and developers.



# CONSUMERS' PHONES MIGHT START RESEMBLING 'OOS ERA VIRUS-LADEN PCS UNDER THE BILL

When the iPhone and the App Store were first developed in 2007 and 2008, consumers constantly struggled with viruses and other programs that raised security risks and slowed down the performance of their PCs.

The Bill stands to bring us back to an era of computing when users regularly had to run virus scan software and perform PC tune ups to remove unnecessary software.

With the threat of viruses and other malware, users simply could not trust their iPhones to hold their pictures, digital wallets, and other personal information.

This would harm both consumers and developers, especially new ones, who would struggle to get consumers to use unfamiliar apps with the constant threat of malware.





## 4. SMARTPHONES

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# CONSUMERS COULD LOSE THEIR ACCESS TO MANY OF THE FEATURES OFFERED BY SMARTPHONES



Modern smartphones, such as Apple's iPhone and phones using Google's Android operating system, are central features in daily life.

Consumers take for granted the amazing features available to them at their fingertips, such as:

- A powerful camera more advanced than all but the most expensive of digital cameras.
- A mapping system far more useful than the standalone GPS systems that consumers used to buy.
- The ability to text and chat with users all over the world for free via messaging and social apps.
- A massive library of video games that far exceeds what is available on gaming consoles.
- Music apps that give users access to a massive library of music.
- Internet browsers that are as convenient, if not more so, than what is available on a PC.

Such features are available to consumers because applications can be developed on top of the mobile operating systems that power modern smartphones.



# CONSUMERS COULD LOSE THEIR ACCESS TO MANY OF THE FEATURES OFFERED BY SMARTPHONES

Yet, these common features that consumers use every day would become targets of scrutiny under §2(a) and §2(b) of the Bill. For each feature on a smartphone, the phone manufacturer could be accused of “unfair preferencing” or discrimination or “steer[ing]” chosen by the phone manufacturer, with no clear definition from the Bill. This would lead to investigations over each of these design decisions:

- Which mobile mapping app would the phone manufacturer install?
- Would it be possible to integrate search within the map to find restaurants and other businesses? Where would this information be sourced – Yelp, Google, TripAdvisor, others?
- Which messaging app would be preloaded on the phone – SMS, WhatsApp, Facebook Messenger, Discord, others?
- Which video messaging app if any should be installed – FaceTime, WhatsApp, Zoom?
- Would a weather app be installed? Which one?
- How many internet browsers if any should be installed and how would they be chosen?

Phone manufacturers would have to face a tradeoff – open themselves up to litigation and regulatory risks by pre-installing phones with a suite of mobile apps it chooses as default for the consumer or burden consumers with the task of locating and installing even commonly used apps.

Consumers would ultimately lose out if phone manufacturers decided to not include important apps with their phones.

# CONSUMERS MAY HAVE TO PURCHASE PHONES WITHOUT APPS DUE TO THE BILL



**YET THESE COMMON FEATURES THAT USERS TAKE FOR GRANTED WOULD BECOME TARGETS OF SCRUTINY UNDER THE BILL. CONSIDER, FOR EXAMPLE, THE QUESTIONS AND CONTROVERSIES RAISED BY THE MOBILE APPS THAT COME PRE-INSTALLED ON A MOBILE PHONE:**

Smartphone manufacturers could choose to keep their platforms open, but not install default apps.

This would mean each user would have to locate and install almost all apps available on the phone — a complicated and laborious process.



## 5. ECOMMERCE AND USER REVIEWS

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# CONSUMERS COULD LOSE ACCESS TO HELPFUL USER REVIEWS WHEN SHOPPING ONLINE

A huge innovation in ecommerce has been the ability for users to rate and review products and services. This rewards businesses for creating positive customer experiences. It also facilitates purchases by consumers hesitant to buy a product they have never used before:

- 93% of adults in America check reviews before buying products online.
- User reviews are trusted 12 times more than manufacturer descriptions.
- The presence of reviews increases the likelihood of a sale by 270%.

Reviews also help online platforms direct consumers to the best value products in search results and product listings:

- Amazon relies on user reviews to order the products it sells on its platform. Higher reviewed products are typically shown before lower reviewed products since they are more likely to be purchased and to provide a positive customer experience.
- Apple relies on user reviews in ordering apps for download in the App Store.
- Facebook, Google, and Microsoft utilize user reviews in ordering business in search results.
- Yelp's business model is predicated on collecting user reviews and directing consumers to the most highly reviewed businesses.
- Health websites like ZocDoc and Healthgrades use user reviews of doctors to steer patients to the most effective doctors.
- Airbnb and Expedia use user reviews to help connect consumers to lodging.



# CONSUMERS COULD LOSE ACCESS TO HIGH-QUALITY USER REVIEWS WHEN SHOPPING ONLINE

Platforms' ability to leverage user reviews to facilitate transactions between businesses and consumers on the platform could be severely curtailed:

- A key problem with user reviews that platforms manage is the presence of fraudulent reviews. Platforms regularly identify such reviews and remove them and otherwise penalize business users that submit fraudulent reviews.
- Platforms could be accused of removing fraudulent reviews as a means of discriminating against users in violation of §2(a)(3) of the Bill. If platforms could not police reviews, business users would have an incentive to flood their product reviews with fake reviews, thereby making the review system useless.
- Platforms' use of reviews to rank products could lead to accusations of unfair preferencing. A business user not ranked highly by its user reviews could complain, under §2(a) of the Bill, that it is being unfairly discriminated against in favor of incumbent businesses on a platform with many reviews.
- The Bill provides no guidance on these issues, while potentially exposing the platforms to large penalties if they try to manage the reviews for the benefit of consumers and businesses.

Consumers could ultimately lose access to high-quality user reviews if platforms could not manage their user review systems.

# CONSUMERS COULD LOSE SIGNIFICANT VALUABLE INFORMATION FROM USER REVIEWS

Consider the useful information that would be lost if ecommerce platforms such as Amazon and Google could not develop user review systems:

**Customer reviews**  
★★★★☆ 4.4 out of 5  
12,978 global ratings

Star Rating	Percentage
5 star	68%
4 star	16%
3 star	8%
2 star	3%
1 star	5%

By feature

Feature	Rating
Quality of material	★★★★☆ 4.6
Easy to use	★★★★☆ 4.6
Battery life	★★★★☆ 4.5

Read reviews that mention

easy to use remote control highly recommend bluetooth remote  
bluetooth iphone 8 plus selfie sticks battery life well made  
stick and tripod good quality phone holder lightweight

Top reviews from the United States

Aki Rivz  
★★★★☆ Where has this been all my life?  
Reviewed in the United States on March 2, 2018  
Color: Black-Black Verified Purchase

- Real-world pictures of a product give confidence that businesses are presenting their product accurately.
- Product features listed in reviews give consumers a user-based accounting of reasons to make a purchase.
- Overall average ratings give consumers a quick way to quickly understand the quality of a product, facilitating transactions.



## 6. OUTREACH PROGRAMS

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# THE BILL COULD HINDER PLATFORMS' ABILITY TO ENGAGE IN OUTREACH TO HISTORICALLY DISENFRANCHISED GROUPS

For example, Amazon offers a Black Business Accelerator to Black-owned businesses:

- Under this program, Amazon offers Black entrepreneurs financial assistance, access to strategic advisory services, and marketing and promotional support.
- While clearly not intended for anticompetitive purposes, businesses not eligible for the Black Business Accelerator program (i.e., non-Black-owned business) could sue Amazon, claiming this as an example of “unfairly preferencing” or discrimination under §2(a)(3) of the Bill, to the extent that similarly-situated businesses are not being treated the same under Amazon's terms and conditions.

Facebook similarly has launched initiatives to support Black and minority-owned businesses that specifically allows these businesses to self-identify as such so that this information can be shown to users, allowing these businesses to be more easily discovered by users:

- Such an ability to differentiate a business based on minority-owned status could open up Facebook to lawsuits claiming that this feature is “discriminating” under §2(a)(3) of the Bill, to the extent that similarly-situated businesses are not being treated the same under Facebook's terms and conditions.

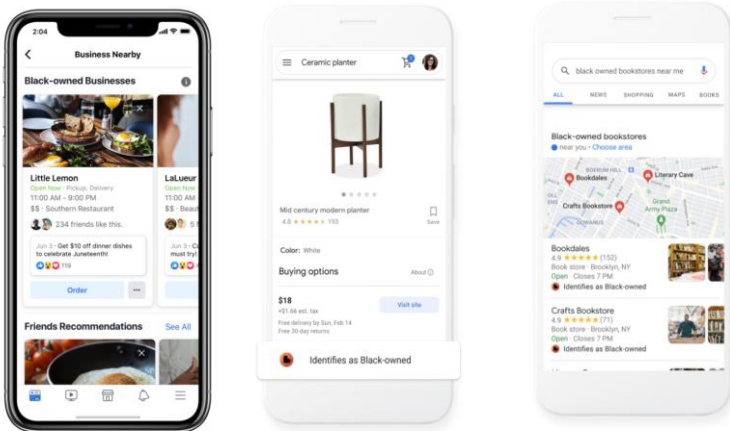
Apple, Google, and Microsoft have also offered programs that offer financial assistance, training, and other support from these companies that could be viewed as legally risky under the Bill.

Under the Bill, such outreach programs would put the platforms at risk of being sued for unfairly helping minority-owned businesses.

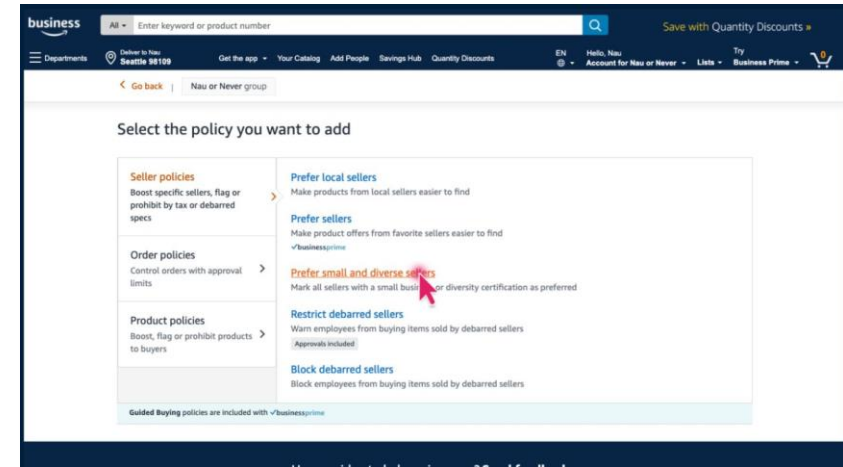




# THE BILL MAY ALSO HAMPER THE ABILITY TO BUILD TOOLS TO HELP SURFACE MINORITY-OWNED BUSINESSES



Facebook and Google allow business users to identify as Black-owned and incorporate these identifiers into their search results to surface these businesses to consumers.



Amazon allows customers to change their settings on business accounts to highlight products from minority-owned businesses.

The Bill, however, provides no guidance on whether these tools would be considered unfairly preferencing or discrimination under §2(a)(3) of the Bill, to the extent that similarly-situated businesses are not being treated the same under these companies' terms and conditions.



# THE UNDERLYING PROBLEMS OF AICOA

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# THE BILL'S UNCLEAR AND BROAD LANGUAGE SWEEPS UP A BROAD RANGE OF BENEFICIAL BUSINESS OPERATIONS

The press release announcing the Bill describes the proposed legislation as setting “clear, effective rules” to accomplish these goals.

However, the range of conduct that would face scrutiny under such legislation would be broad and defined unclearly to the point of covering most basic functions of running an online platform business.

Specifically, the bill would ban:

- “Unfairly preferencing” a platform’s own products, according to §2(a)(1).
- “Unfairly limiting” the ability of business users to compete, according to §2(a)(2).
- “Discriminating” among similarly situated business users, according to §2(a)(3).

But there is no language guiding what preferencing would be defined as “unfairly preferencing” or “unfairly limiting,” and what “discriminating” would mean.

Such broad language could put an extreme burden on a broad range of the normal operations of a platform business. This would include platform businesses’ ability to:

- Develop new and innovative features and products.
- Set platform rules that help small businesses reach consumers and promote competition that lowers prices for consumers.
- Safeguard users’ security and privacy.

Antitrust history teaches that vague and over-inclusive language takes years, if not decades, of court battles to work out. Even a “materially harm” limiting principle is vague given that economic analysis and efficiency defenses seem to be ignored by the bill.



# THE BILL IMPOSES HEAVY BURDENS AND SIGNIFICANT RISKS TO ENGAGING IN NORMAL BUSINESS OPERATIONS FOR PLATFORM BUSINESSES

The Bill would impose substantial risks to engaging in the most routine of business operations. These risks would include:

- Government enforcement leading to fines of up to 15% of revenue per incident.
- A flood of litigation, both individual lawsuits and class actions, that would test the bounds of these unclear laws.
- The risk that any new feature would trigger a requirements to provide third parties unrestricted access to the platforms proprietary technology.

More importantly, the Bill would impose a huge risk of injunctions requiring platform businesses to cease business operations for 120 days if there is a claim that an action has impaired a business from competing with the platform:

- Any complaints could effectively stop a tech company dead in its tracks for 120 days.
- In online markets, 120-day delays after just a “mini-trial” in an injunction hearing would effectively block activities subject to an injunction that could be proven to be pro-competitive after a thorough investigation.
- An injunction would effectively ban any conduct that is investigated or that receives complaints.



# THE BILL WOULD CREATE REGULATORY BURDENS AND RISKS FOR SEEMINGLY ANY CHANGE TO THE PLATFORMS

The administrative burden of the bill would require essentially 24-hour monitoring of any changes.

Platform businesses adjust their rules and platform operations on a nearly daily basis that invariably create winners and losers among businesses on the platform, thus potentially running afoul of §2(a)(3).

Each of these changes would open up a platform business to lawsuits and investigations at a near constant clip.

The pace of innovation would therefore greatly slow, and each change would have to be accompanied by a large regulatory push unheard of for any business looking to adjust its business operations.

# THE LACK OF A SAFE HARBOR MAKES COMPLIANCE WITH THE BILL EXTREMELY BURDENSOME

The Bill would apply to companies based solely on counts of “monthly active users” and “business users” and a market capitalization cutoff.

There could be no change to a business, besides simply shrinking a business, that would escape scrutiny under the Bill.

The Bill also provides carve-outs for conduct that would be unlawful under the Bill in the case that the challenged conduct is narrowly tailored to address security or privacy concerns or that would create “no consumer harm.” However, such carve-outs are not clear “safe harbors” but require an investigation to demonstrate that they are “narrowly tailored” and solely for the purpose of addressing such concerns.

Enforcement of the bill by government agencies would be under the FTC Act, giving the FTC authority to launch investigations into any conduct possibly in violation of the Bill:

- FTC reviews of mergers provide guidance on the regulatory burden the Bill would create.
- Merger reviews by the FTC take at minimum 30 days under the Hart-Scott-Rodino Act and average 11.4 months for the 33 “significant” reviews that took place in 2020.

Giving the FTC authority to investigate a broad range of conduct by the firms targeted by the Bill would place these firms under a near constant government investigation.



# THE BILL COULD EFFECTIVELY HAMPER CONDUCT THAT IS REGULARLY PRACTICED BOTH ONLINE AND OFFLINE

Much of the conduct targeted by this bill are core functions of other businesses, both online and offline, that would not be regulated under this proposed legislation. These businesses include:

- Retailers like Wal-Mart and Target, who discriminate among the many manufacturers selling products in their stores.
- Online platforms like Twitter and TikTok, that promote certain content over other content.
- Gig economy platforms like Uber, Lyft, and Instacart, that regulate the drivers and shoppers that can access their platforms.
- Foreign companies with platform businesses like Alibaba, Huawei, and Samsung that compete in many of the U.S. industries targeted by the Bill.

# THE BILL COULD EFFECTIVELY HAMPER INNOVATIVE PRODUCTS THAT CONSUMERS VALUE GREATLY

The combination of overly broad and unclear language and heavy burden of litigation and regulatory risk and compliance could effectively hamper the innovative products that are at the core of online platform's businesses that consumers use and enjoy every day.

Core products that the platforms offer like search engines, online shopping, and smartphones would be put at risk by the Bill.

The Bill would also chill any incentive to develop any new features for a tech platform since they would be presumptively illegal if any other firm wanted to offer a competing product:

- Such disincentives would curtail investment in research and development to develop innovative products that harness synergies across tech companies.

The tech antitrust bills will also lessen competition among large tech platforms since any efforts to create a competing product may fall under this broad language.





# THE BILL WOULD LIKELY REDUCE COMPETITION IN DIGITAL MARKETS

Contrary to other antitrust laws, the restrictions and regulations in the Bill, specifically those under §2(a), are not limited to products that are sold by a firm with monopoly power.

Rather the Bill includes restrictions that are universally applied to all products sold by large tech firms whether they are subject to competition or not.

The reason why such framing is harmful is because it indiscriminately places restrictions on dynamic and competitive markets.

Such restrictions not only burden the companies that are arbitrarily subject to them, but when they impose tremendous litigation, regulatory, and commercial risks they can also prevent companies from investing in products or competing in regulated segments.

Eliminating competitors is of course great for some less successful rivals, but it comes at a cost to consumers - it makes it easier for protected rivals to operate with less pressures to innovate products or invest in consumer benefits.

The Bill would (a) place less pressures on protected competitors that are not covered by the legislation to invest and innovate and (b) undermine and/or eliminate the ability of targeted firms to compete in such segments.



# THE BILL WOULD LIKELY HARM COMPETITION BETWEEN PLATFORMS

An additional unintended consequence of the legislation is that it would reduce competition amongst large digital platforms and lead to market segmentation.

- Because the Bill imposes severe restrictions on services that are not needed for “the core functionality of the platform,” (see e.g., §2(d)(1)(c)) it makes it more costly and uncertain for covered platforms to compete with one another in non-core products.
- The Bill may for instance make it more likely that Amazon would focus on its core products and Apple would focus on its own core products but reduce their ability to cross over because of prohibitive legislations.

By imposing penalties and enforcing strict standards, the legislation would in fact promote an outcome that is highly undesirable - a market segmentation in which covered platforms focus on products that are at their own core but find it too costly and too uncertain to compete with one another in their respective core businesses.

# SUMMARY

The Klobuchar-Grassley Bill and other tech antitrust bills being considered in Congress are poorly targeted remedies to potential competition issues posed by platform businesses.

While these potential issues should be investigated and considered as needed, the proposed laws are blunt instruments that would only remedy competition issues by rendering virtually all of the activities of the targeted platform businesses – whether they are anticompetitive or procompetitive – as illegal.

The proposed legislation would fundamentally hinder platform companies' ability to innovate and ultimately harm the businesses that rely on these platforms to reach consumers and the consumers who enjoy the many products from these companies every day.

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