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The Unpopular Reintroduction of the American Innovation and Choice Online Act

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June 2026

I. The Much-Changed Digital and Economic Landscape

In early June, Senators Amy Klobuchar and Charles Grassley introduced the American Innovation and Choice Online Act (AICOA, S.2992). Like its predecessor, introduced four years ago, AICOA attempts to restrain practices by large online platform owners that limit competition — both on their platforms and between competing platforms.

Since AICOA 1.0 was introduced in 2022, however, much has happened. The courts have handed down key decisions in a number of U.S. federal and state digital tech antitrust cases. Artificial intelligence (AI) has exploded, and digital regulation in Europe continues to be controversial.

Yet AICOA 2.0 picks up where its predecessor, AICOA 1.0, left off. This disconnect makes it uncomfortably clear that the authors are aiming to support the agenda of anti-monopoly activists in targeting the digital sector, rather than helping consumers contend with high prices for food, healthcare, and housing.

II. AICOA's Authors and Sponsors Aren't Reading the Room on Consumers

The U.S. is facing one of the biggest cost-of-living crises in history. AICOA 2.0's expansive applicability to digital market players and potential for disrupting the U.S. antitrust enforcement system has enormous implications for consumers.

For example, enforcement of AICOA 2.0 is guaranteed to divert massive, scarce antitrust resources toward enforcement in digital markets. That means resources will (necessarily) be taken away from enforcement in other sectors, including food, healthcare, energy, and housing, where serious market power problems drive up consumer prices and reduce choice and innovation.

The failure of the bill's sponsors and co-sponsors to read the room on the problems facing American consumers could become a political liability. The high probability that voters will take to the polls in November with cost-of-living issues top of mind may explain why AICOA 2.0 has far fewer co-sponsors, both Democrat and Republican, than AICOA 1.0.

III. AICOA 2.0 is Sector Regulation Masquerading as Antitrust

AICOA 2.0 is the first major attempt by U.S. lawmakers to write sector-specific antitrust laws. As was true for AICOA 1.0, the provisions of AICOA 2.0 raise complex legal, policy, and administrability questions. Even at the 10,000-foot level, AICOA 2.0 creates two major conundrums.

First, it is no secret that there is little political appetite in the U.S. to pass a federal law that would create a dedicated digital sector regulator. AICOA 2.0 works around this policy logjam by deviating from antitrust's intended purpose and process and saddling it with the job of administering what is essentially economic regulation.

The rub, of course, is that the federal courts are a poor venue for the highly technical inquiries into the conduct that AICOA 2.0 proscribes, the justifications for it, or the necessary remedies to prevent it. Only a sector regulator, like the FCC or FERC, would have the tools to effectively and efficiently enforce the vast framework of regulation that AICOA 2.0 envisions. Those tools include technical industry expertise, rulemaking authority, and enforcement and compliance systems.

IV. The Existing Antitrust Laws Work Well in the Digital Sector

A second conundrum raised by AICOA 2.0 is that existing U.S. antitrust law is well-equipped to address the exclusionary conduct it deems illegal. Section 2 of the Sherman Act is broadly constructed to do just this.

The key difference between the generalist antitrust laws and AICOA 2.0 is that judges have latitude to interpret the caselaw, determine whether there is a violation, and if consumers are harmed by the conduct, and to fashion appropriate remedies.

There are pending monopolization cases involving Google, Apple, and Meta that take on the very conduct that AICOA 2.0 targets. Each is proceeding apace, with judicial opinions that support both plaintiffs and defendants, depending on the arguments.

That antitrust enforcement is alive and well in the digital sector, therefore, begs the question: "Why does the U.S. need a new, special antitrust law to police competition in digital markets?"

V. Politically Motivated Antitrust Laws Disserve Competition and Consumers

The answer to the question is that the vision for, and substance of, AICOA 2.0 rests on two fallacies. One is the thinly veiled political value judgment that antitrust enforcement in the digital sector should take precedence over competition problems in other sectors. The second fallacy is that the government knows — with certainty and into perpetuity — what types of conduct involving digital platforms are anticompetitive.

These are sweeping assumptions. And they come with a huge price tag in committing antitrust resources to serving a political mission. The reality is that opinion polls of working Americans don't flag competition in the digital sector as a major concern. Rather, they call out high prices for essentials that hit them hard in their paychecks and pocketbooks.

It is strange, indeed, for lawmakers to assert that the overriding priority for U.S. antitrust should be a focus on digital competition rather than stopping anticompetitive mergers and conduct in markets where competition problems raise consumers' cost of living.

VI. Tight Timeframes, Sweeping Applicability, and Lists of "Don'ts"

Even if prioritizing the digital sector had the imprimatur of millions of Americans, a deeper dive into AICOA 2.0 raises other thorny issues. For example, the new version sets up tight time frames for the courts to opine on and resolve alleged violations; applies to a much larger set of market participants; and spells out specific conduct that is illegal under the law.

A. Timing Burdens on the Courts

The bill provides for expedited treatment of civil cases brought by federal and state enforcers under AICOA *and* other antitrust statutes. District courts are required to issue a final ruling within a year, with pressure on the appellate courts (including the Supreme Court) to act as quickly as possible.

This is eye-popping. By way of comparison, the Google search monopolization case, filed originally by the U.S. Department of Justice in late 2020, is still in play six years later. There are active motions to appeal the district court's findings on a remedy, and the states are challenging the decision on the grounds that the remedy did not go far enough.

Simply because AICOA 2.0 mandates expedited treatment of a violation does not mean that the complex evidentiary process in litigated antitrust cases disappears. AICOA 2.0 will put enormous pressure on the courts to accelerate proceedings and render conclusions that will build a body of new antitrust caselaw. This will come at a cost to enforcement in other consumer-facing areas.

B. Sweeping Applicability to Companies

AICOA 2.0 contains new "revenue and reach" criteria for what is a "systematically important platform." The bill pairs two thresholds — a minimum of $175 billion in average annual gross revenue and active monthly users accounting for 34% or more of the U.S. population (over the age of 12).

The new revenue-based threshold sweeps in far more digital platforms, including in digital healthcare, banking, and finance, than AICOA 1.0's "market cap and reach"

criteria. Moreover, digitization across the economy is proceeding at warp speed. Growth in the digital sector is estimated to increase at a compound annual rate of over 11%. This will quickly outpace the GNP benchmark that AICOA 2.0 will use to adjust the threshold.

The practical implication of AICOA 2.0's new approach, therefore, is that it could apply to a vast number of companies that already, and will rapidly, meet the $175 billion revenue threshold. As digital platforms continue to attract more users, the "revenue and reach" approach effectively guarantees that it will be a massive regulatory framework.

The courts will, therefore, be burdened with a potentially large number of AICOA cases that require expedited treatment, diverting antitrust resources toward digital enforcement and away from other important issues.

C. Checklists of Proscribed Conduct and Possible Defenses

AICOA 2.0 toggles away from general prohibitions on anticompetitive conduct by a digital platform owner in the 2021 version to a list of specific "don'ts." This includes unfair self-preferencing, blocking access to platform features, preventing the transfer of data to competing platforms, locking users into default settings, tying unrelated services that are not intrinsic to the platform, and presenting search and ranking results to disfavor rivals.

The bill also gives defendants the chance to offer "affirmative defenses," or justifications, for potentially prohibited conduct. This includes protecting safety and user privacy, maintaining cybersecurity, protecting intellectual property, preventing fraud, and addressing national security concerns. AICOA 2.0's checklist approach, therefore, codifies both specific illegal conduct and potential justifications for it.

This has important implications for how companies deliver products and services to B2B and individual consumers. Given the dynamic, technology-driven nature of the digital sector, one can only imagine how many times AICOA 2.0 would need to be changed to cover new or different conduct, leaving businesses and consumers hanging as lawmakers debate amendments.

AICOA 2.0's check-list approach also creates perverse incentives for companies to adopt defensive or strategic innovation pathways that will ultimately impact consumers through less choice, lower quality (i.e., data privacy and security), and slower innovation.

VII. The Impending Head-On Collision with Generalist Antitrust Enforcement

Finally, AICOA 2.0 fails to address how enforcement under the law will interact with generalist enforcement under the Sherman Act and Federal Trade Commission Act. It does not anticipate critical questions for the business community, plaintiffs, or the administrability of the laws.

One question is how decisions will be made to bring claims under AICOA 2.0 versus the Sherman Act. Another is how remedies under AICOA 2.0 would align with remedies for Sherman Act violations. Yet another is whether complaints can be brought under one or both statutes. The inevitable statutory conflicts that emerge from AICOA 2.0 could imperil the antitrust enterprise.

Passage of the bill could also fuel the proliferation of sector-specific antitrust laws, such as the food and agriculture and healthcare bills that are currently idling in the Senate. All of this would inject chaos into the enforcement system, compounding the instability caused by ideological lurches under Anti-Monopoly enforcers and politicized enforcement under Trump 2.0. Competition, consumers, and innovation will take the hit.

VIII. Lawmakers Should Say "No" to AICOA 2.0

AICOA 2.0's potentially vast reach, codification of specific conduct, and compressed timeframes stand in sharp contrast to the flexibility and administrability of monopolization enforcement under Section 2 of the Sherman Act. Using antitrust to effectively regulate an enormous sector is bad public policy.

AICOA 2.0 imposes high opportunity costs on the antitrust enforcement system, and diverts scarce resources to digital enforcement and away from other sectors where consumers badly need more competition. This disservice to competition, consumers, and innovation, and it is a compelling reason why lawmakers across the aisle should say no to AICOA 2.0.

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