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Analysis of the American Innovation and Choice Online Act (AICOA): Putting the Brakes on Innovation

Executive Summary: *On October 18, Sens. Klobuchar (D-MN) and Grassley (R-IA) and several cosponsors introduced the 'American Innovation and Choice Online Act' (AICOA) with the aim of regulating a select group of digital service providers, or "covered platforms" (Covered Platforms). AICOA represents a shift from the market-oriented principles that have thus far have allowed the U.S. to become the world leader in innovation. It would severely restrict innovation in the digital sector, potentially putting U.S. economic and national security at risk. AICOA restricts Covered Platforms from engaging in pro-competitive actions on the basis of size, imposes restrictions on only a handful of U.S. technology firms and has no corollary restrictions on foreign and other domestic competitors, limiting U.S. technological innovation and global leadership.*

The Klobuchar/Grassley AICOA is a companion to Rep. Cicilline's (D-RI) previously introduced bill in the House of almost the same name (H.R. 3816, the American Choice and Innovation Online Act). The Senate version modestly departs from its House counterpart, but these minor variations do not alter the negative impact the bills will have on consumers and the U.S. economy overall. AICOA will (a) impose discriminatory prohibitions on a selected group of companies including a ban on the so-called self-preferencing practices, (b) impose common carrier-type of obligations with respect to data, (c) create antitrust institutional arrangement rivalry, and (d) vest the Federal Trade Commission (FTC) with expansive regulatory powers.

1. AICOA imposes discriminatory obligations based on size

The size of a company will determine whether AICOA will apply to that company. In this respect, AICOA grants the U.S. Federal Trade Commission (FTC) and the Department of Justice (DoJ) a mandate to classify a digital service as a Covered Platform based on three cumulative conditions, namely: number of active users based in the U.S., market capitalization (USD 550 billion), and the critical nature of the service. Based on these arbitrarily defined requirements, AICOA will apply only to a handful of innovative companies currently, and will introduce negative incentives for corporations to keep innovating and growing lest they breach the U.S. user and market cap thresholds.

The classification will last for 7 years, although the AICOA contemplates a regulatory process to remove a 'Covered Platform' designation earlier than the statutory duration.

2. AICOA restricts normal business practices, imposing common-carrier obligations

AICOA considers the services that are offered by Covered Platforms to be of a distinct "critical" nature, and forces these companies to conduct business under an obligation to be "neutral" vis-a-vis competitors and service providers that might operate on the Covered Platforms' services. To ensure this artificially created

neutrality, AICOA imposes limitations and obligations on the normal conduct of business of these Covered Platforms akin to those imposed on public utilities. Among other restrictions, it prohibits Covered Platforms from preferencing their own products, engaging in discrimination, and exclusionary arrangements.

3. AICOA bans self-preferencing practices, putting competitors ahead of consumers' welfare

AICOA explicitly addresses self-preferencing and bans Covered Platforms from engaging in this business practice widely used by companies. Featuring "house brands" or related products is a common strategy considered to be healthy for competition, and often represents an important part of how firms introduce consumers to new products. AICOA's objections to self-preferencing only by Covered Platforms will distort market dynamics in a discriminatory fashion, and will condition how firms design their business models. The introduction of a ban on self-preferencing practices, which may be pro-competitive, will serve to protect less efficient competitors.

4. AICOA introduces abstract legal concepts that impair legal certainty and increase litigation

AICOA contains legal concepts and enforcement standards unfamiliar to U.S. jurisprudence such as 'materially harm competition', 'generated data', or 'core functionality' . The unprecedented use of these abstract concepts in a discriminatory regulation generates legal uncertainty and grants the antitrust agencies an option to interpret the law in an expansive and/or unjust manner to the detriment of affected businesses. Inevitably, as a result, the enforcement of this regulation will be subject to limitless litigation and increase costs of doing business and innovating in the United States.

5. AICOA departs from the consumer welfare standard and fails to account for pro-competitive practices

AICOA fails to account for the well-established consumer welfare standard that characterizes U.S. antitrust enforcement. As a result, Covered Platforms won't be able to show to the authorities how a business practice may benefit consumers prior to being banned. The lack of possibility to evaluate the competition tradeoffs of a business practice is a radical departure from traditional market analysis that has permitted the advancement of innovation to the benefit of consumers in the past decades.

6. AICOA vests the FTC with expanded legislative powers relating to data

More concerningly, AICOA grants the FTC, an independent agency with political appointees, with broad rulemaking authority over the abstract term "data" — to which it gives few boundaries. Thus, AICOA vests the FTC with broad regulatory powers over data, potentially creating the nation's first data regulator without fully defining its regulatory ambit.

AICOA expands the scope of Section 5 of the Federal Trade Commission Act (FTC Act) to impose requirements on Covered Platforms to share user data, potentially without the express permission of data subjects, and to build interfaces that enable interoperability with competing and potential competing businesses. Finally, AICOA imposes limitations on the commercialization of certain data that is unclearly defined and may limit the ability of businesses to improve, innovate, and differentiate the services offered to consumers.

7. AICOA generates conflicts between the federal antitrust authorities, increasing legal uncertainty

AICOA endows both the FTC and the Department of Justice (DoJ) with the power to classify a business as a Covered Platform, but fails to delineate how this shared competence will be administered. The lack of clarity as to how the agencies will coordinate creates legal uncertainty for companies. The absence of procedural rules as to how the FTC and DoJ will make 'Covered Platform' designations raises institutional legitimacy issues. These weak institutional arrangements may impair the due process rights of affected companies, to say nothing of the fact that the competing agencies may disagree upon a designation.

8. AICOA imposes draconian fines for non-compliance, departing from international best practices

Failure to comply with AICOA's ambiguous requirements would result in draconian penalties of a confiscatory nature, up to 15% of total United States revenue — not profit — of the Covered Platform for the previous calendar year. The imposition of these fines exceeds the international standard maximum imposed for antitrust violations that typically are no more than 10%.

9. AICOA impairs U.S. competitiveness by disfavoring U.S. investment to the benefit of foreign stakeholders

AICOA would apply only to a handful of U.S. tech companies, excluding from its scope most major Chinese tech companies such as Alibaba, Baidu and Tencent that do not have a large number of U.S. users. AICOA essentially mirrors the House proposals which would have devastating consequences for consumers, innovation, and the future of the U.S. leadership in innovation worldwide.