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April 27, 2022

Re: Comments Regarding the American Innovation and Choice Online Act (S. 2992)

Dear Sir/Madam:

On behalf of the Antitrust Law Section of the American Bar Association (Section), I am pleased to submit these comments concerning the American Innovation and Choice Online Act (S. 2992). The views expressed herein are presented on behalf of the Antitrust Law Section. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. The Section has a wide-ranging membership, numbering over 7,600, from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise. The Section has specifically commented on proposed antitrust and competition legislation around the world. The Section strives to provide a balanced perspective on important issues in a way that reflects the diverse views if its membership.

We provide these comments to assist with your ongoing consideration of S. 2992 and related, important competition questions concerning digital markets and certain online platforms. Should you have questions about these comments, the Section would be pleased to answer them and to provide further assistance as helpful and appropriate.

Sincerely,

Jonathan Gleklen
Chair, ABA Section of Antitrust Law

Attachment

**COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW
SECTION REGARDING THE AMERICAN INNOVATION AND CHOICE ONLINE
ACT (S. 2992) BEFORE THE 117TH CONGRESS**

April 27, 2022

The views expressed herein are being presented on behalf of the Section of Antitrust Law. They have not been reviewed or approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the position of the Association.

The Antitrust Law Section of the American Bar Association (the Section) respectfully submits these comments regarding the *American Innovation and Choice Online Act* (S. 2992) currently under consideration.¹ Should members of the Committee on the Judiciary, or members of the Senate or Congress writ large, have questions about these comments, the Section would be pleased to answer them and to provide further assistance as helpful and appropriate.

The Section is the world's largest professional organization for antitrust and competition law, trade regulation, consumer protection and data privacy as well as related aspects of economics. Section members, numbering over 7,600, come from all over the world and include attorneys and non-lawyers from private law firms, in-house counsel, non-profit organizations, consulting firms, federal and state government agencies, as well as judges, professors, and law students. The Section provides a broad variety of programs and publications concerning all facets of antitrust and the other listed fields. Numerous Section members have extensive experience and expertise regarding similar laws of non-U.S. jurisdictions. For nearly thirty years, the Section has provided input to enforcement agencies around the world conducting consultations on topics within the Section's scope of expertise. The Section has specifically commented on proposed antitrust and competition legislation around the world.² The Section strives to provide a balanced perspective on important issues in a way that reflects the diverse views of its membership.³

¹ While these comments are addressed to the Senate version of the *American Innovation and Choice Online Act*, S. 2992 (as reported by S. Comm. on the Judiciary, Mar. 2, 2022), similar comments would apply to overlapping provisions of the associated House bill, H.R. 3816. Some respects in which these bills differ are addressed below.

² Prior comments submitted by the Section have been archived online and can be accessed on its website. *Comments, Reports, and Amicus Briefs*, AM. BAR ASS'N, ANTITRUST L. SECTION, https://www.americanbar.org/groups/antitrust_law/resources/comments_reports_amicus_briefs.

³ One way the Section contributes to this objective is by leveraging the expertise of its members to publish comments on various antitrust topics. As relevant here, the Section published an in-depth report on issues specifically relevant to the digital economy and competition. *See generally* COMMON ISSUES RELATING TO THE DIGITAL ECONOMY AND COMPETITION: REPORT OF THE INTERNATIONAL DEVELOPMENTS AND COMMENTS TASK FORCE ON POSITIONS EXPRESSED BY THE ABA ANTITRUST LAW SECTION BETWEEN 2017 AND 2019 (2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/april-2020/sal-report-on-

I. EXECUTIVE SUMMARY

The *American Innovation and Choice Online Act* (“the Bill”) describes its primary purpose as “provid[ing] that certain discriminatory conduct by covered platforms shall be unlawful.”⁴ In a news release associated with its introduction, sponsors cited concerns that “our laws have not changed to keep up and ensure [that Big Tech] companies are competing fairly.”⁵ In further explanation, sponsors have stated that “[e]veryone acknowledges the problems posed by dominant online platforms.”⁶ Sponsors describe the Bill as addressing these problems by “put[ting] policies in place to ensure small businesses and entrepreneurs still have the opportunity to succeed in the digital marketplace . . . while also providing consumers with the benefit of greater choice online.”⁷

In service of those goals, the Bill articulates a definition of “covered platforms,” prohibits and provides remedies for certain conduct by covered platforms, and provides certain “affirmative defenses” to illegality:

- **Covered Platforms.** The term “covered platform” is defined as an “online platform” with (1) a sufficient number of active users, (2) sufficiently large annual sales or market capitalization, and (3) sufficient positioning to meet the definition of a “critical trading partner.”⁸ A “critical trading partner” is defined by the “ability to restrict or materially impede” a business user’s ability to serve customers.⁹
- **Unlawful Conduct.** The Bill makes ten categories of conduct unlawful. Prohibited conduct must be proved by a preponderance of the evidence in all cases. But “material harm to competition” is an element of the offense to be proved by the plaintiff for only three categories of conduct. As to the remaining seven categories of conduct, the

[common-issues-relating-to-the-digital-economy-and-competition-final-4162020.pdf](#) [hereinafter DIGITAL ECONOMY AND COMPETITION]. The Section recommends this report as an in-depth supplement to a number of themes raised in the present comments.

⁴ *American Innovation and Choice Online Act*, S. 2992 Intro. (as reported by S. Comm. on the Judiciary, Mar. 2, 2022).

⁵ Amy Klobuchar, *Klobuchar, Grassley, Colleagues to Introduce Bipartisan Legislation to Rein in Big Tech*, U.S. SENATOR AMY KLOBUCHAR (Oct. 14, 2021), <https://www.klobuchar.senate.gov/public/index.cfm/2021/10/klobuchar-grassley-colleagues-to-introduce-bipartisan-legislation-to-rein-in-big-tech> (quoting Senator Grassley).

⁶ Amy Klobuchar, *Klobuchar, Grassley Statements on Judiciary Committee Passage of First Major Technology Bill on Competition To Advance to Senate Floor Since the Dawn of the Internet*, U.S. SENATOR AMY KLOBUCHAR (Jan. 20, 2022), <https://www.klobuchar.senate.gov/public/index.cfm/2022/1/klobuchar-grassley-statements-on-judiciary-committee-passage-of-first-major-technology-bill-on-competition-to-advance-to-senate-floor-since-the-dawn-of-the-internet#:~:text=%E2%80%9CEveryone%20acknowledges%20the%20problems%20posed,the%20consumers%20that%20use%20them> (quoting Senator Grassley).

⁷ Klobuchar, *supra* note 5.

⁸ S. 2992 § 2(a)(5).

⁹ *Id.* § 2(a)(6) defines “critical trading partner” by “the ability to restrict or materially impede the access of—(A) a business user to the users or customers of the business user; or (B) a business user to a tool or service that the business user needs to effectively serve the users or customers of the business user.”

defendant may rebut a prima facie case by proving the conduct “would not result in material harm to competition.”

- Three categories prohibit conduct that would “prefer,,” “limit,” or “discriminate” in ways that would “materially harm competition.”¹⁰
- Another three categories prohibit conduct that would “materially restrict,” “impede,” or (in one case) “unreasonably delay” (i) business users in accessing or interoperating with the platform or, accessing “data generated on the covered platform,” or (ii) platform users in uninstalling software applications” subject to certain qualifications.¹¹ Material harm to competition is not an element of this offense.
- Four categories prohibit activities like “condition[ing] access,” “us[ing] nonpublic data” that preference a platform operator’s own products, or “retaliat[ing] against any business user or covered platform user,” without any requirement of showing material harm or effect.¹²
- **Affirmative Defenses.** The Bill provides separate “affirmative defenses” for conduct made illegal by Section 3(a).
 - **Section 3(b)(1).** Conduct does not constitute a violation under the first three categories of conduct discussed above if “the defendant establishes by a preponderance of the evidence” that the conduct “was narrowly tailored, was nonpretextual, and was necessary to” (A) prevent a violation of law, (B) “protect safety, user privacy, the security of non-public data, or the security of the covered platform,” or (C) “maintain or enhance the core functionality of the covered platform.”¹³
 - **Section 3(b)(2).** Conduct does not constitute a violation under the remaining seven categories of conduct discussed above if the defense conditions described above for Section 3(b)(1) apply (with one difference),¹⁴ or “the defendant establishes by a preponderance of the

¹⁰ *Id.* § 3(a)(1)–(3).

¹¹ *Id.* § 3(a)(4), (7)–(8). With two limited exceptions, the Bill defines “business user” as “a person that uses or is likely to use a covered platform for the advertising, sale, or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered platform operator.” *Id.* § 2(a)2(A). The Bill does not define “platform user.”

¹² *Id.* § 3(a)(5)–(6), (9)–(10).

¹³ *Id.* § 3(b)(1).

¹⁴ These nearly identical defenses differ in one respect. Under Section 3(b)(2) the affirmative defense includes the additional requirement that the conduct “could not be achieved through less discriminatory means.” *Id.* § 3(b)(2)(B).

evidence that the conduct . . . has not resulted in and would not result in material harm to competition.”¹⁵

The Section submits these comments to identify concerns with aspects of the Bill and to recommend modifications. The Section has long supported the evolution of antitrust law to keep pace with evolving circumstances, economic theory, and empirical evidence. Here, however, the Section is concerned that the Bill, as written, departs in some respects from accepted principles of competition law and in so doing risks causing unpredicted and unintended consequences. Specifically, the Section offers the following comments and recommendations as elaborated below:

- **Part II.** The Section expresses concern about ambiguous terminology in the Bill regarding fairness, preferencing, materiality, and harm to competition on covered platforms. The Section recommends clarifying these key terms in the statute to minimize the risk of unintended consequences. The Section further recommends that these definitions direct attention to analysis consistent with antitrust principles: effects-based inquiries concerned with harm to the competitive process.
- **Part III.** The Section cautions against omitting market power as a requirement for harm to the competitive process and recommends focusing on whether existing standards/burdens should be adjusted to respond to competition concerns with respect to digital platforms. It is widely accepted that substantial market power is a prerequisite to a firm’s ability to harm competitive processes. Market power should be a factor in every prohibited act and defense in the Bill.
- **Part IV.** The Section urges Congress to require harm to the competitive process for each of the violations set forth in Section 3(a)(1)–(3) of the Bill. The economics of self-preferencing are complex, and the Bill raises a serious risk of unintended consequence based on the broad language of these violations. The Section cautions against departing from the antitrust laws’ commitment to protecting the competitive *process* as distinguished from favoring one set of competitors over another. This tenet of antitrust has served as a lodestar to antitrust enforcement and should not be omitted.
- **Part V.** The Section similarly urges Congress to require harm to the competitive process with respect to each of the categories of unlawful conduct set forth in the remainder of Section 3(a)(4)–(10) of the Bill. It further provides specific commentary and recommendations for each of the prohibited categories.
- **Part VI.** The Section agrees with efforts to make clear that certain conduct by platform operators does not violate the Bill. Certainty and predictability are especially important in digital markets. The Section expresses concern, however, that the Bill’s specific language establishing affirmative defenses creates significant uncertainty and undermines its effectiveness at protecting welfare-enhancing conduct on digital platforms.

¹⁵ *Id.* § 3(b)(2)(A).

The Section offers three additional recommendations with respect to affirmative defenses. First, the Section encourages Congress to adopt a standard reflecting harm to the competitive process for the reasons set forth on Part IV. The present version of the Bill replaces earlier language invoking “harm to the competitive process” with “material harm to competition,” which suggests a shift away from protecting competitive processes towards protecting individual competitors. Second, the Section observes asymmetrical burdens applicable to conduct unlawful under Section 3(a)(1)–(3) from conduct unlawful under Section 3(a)(4)–(10). For the former, the plaintiff bears the initial burden to show material harm to competition, whereas the burden falls on the defendant for the latter. The Section does not see a principled basis between these categories of unlawful conduct to justify differing burdens. Third, the Section recommends resolving the above-mentioned asymmetry by making proof of competitive harm an element of prohibited conduct, rather than making proof of the absence of such harm part of a defense to an alleged violation.

- **Part VII.** The Section agrees with the Bill’s understanding that penalties should be effective and proportionate to the harm inflicted by the prohibited conduct, with a particular emphasis on proportionality. The Section offers a few refinements of the legislative language to ensure the proper individuals are subject to appropriate penalties for the prohibited conduct.

II. KEY TERMS IN THE PROPOSED LEGISLATION SHOULD BE CLARIFIED TO AVOID UNINTENDED CONSEQUENCES

To varying degrees, the Bill qualifies the various categories of unlawful conduct with terminology about fairness, preference, materiality, the “intrinsic” nature of products, and competitive effects untethered from market power. Examples include the following:

- “*preference* the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform in a manner that would *materially harm competition*”;¹⁶
- “*materially* restrict, impede, or unreasonably delay the capacity of a business user to access or interoperate with [platform facilities accessible to the platform’s own products]”;¹⁷ and
- “condition access to the covered platform or preferred status or placement . . . on the purchase or use of other products or services offered by the covered platform operator that are *not part of or intrinsic to the covered platform*.”¹⁸

¹⁶ S. 2992 § 3(a)(1).

¹⁷ *Id.* § 3(a)(4).

¹⁸ *Id.* § 3(a)(5).

Qualifications like “preference,”¹⁹ “limit,”²⁰ “materially harm,”²¹ and “materially restrict or impede”²² inject uncertainty into how the Bill would be administered. These terms are not defined in the Bill and existing antitrust case law cannot be relied upon to supply definitions. Standards like the undue restraint of trade²³ or substantial lessening of competition²⁴ have collected meaning and predictability over many decades of interpretation and application. If the Bill means to import these traditional standards, it would be clearer to use the terminology of undue restraint or substantial lessening of competition. It is not clear, for example, to what degree a “material” harm differs from substantial lessening of competition. And an “unfairness” standard inherently involves a degree of ambiguity. If the Bill means to articulate entirely new substantive standards than those applied in current antitrust practice, it should state so explicitly and take steps to further define these concepts to minimize ambiguity.

Similar comments apply to concepts like “products or services . . . that are not part of or intrinsic to the covered platform itself”²⁵ or “standards mandating the neutral, fair, and non-discriminatory treatment of all business users.”²⁶ As discussed in more detail below, these terms have no generally accepted meaning in antitrust law,²⁷ though intrinsic relation might be attempting to articulate the concept of product separation in tying law.²⁸ The same applies again to “materially harm competition.”²⁹ There is little in antitrust law to provide meaning to the idea of “materially harm competition” in contexts other than properly defined relevant markets. As discussed in more detail below, the Bill’s articulation of “material[] harm [to] competition” does not obviously or necessarily equate to the antitrust concept of “harm to the competitive process.”³⁰

The Section recommends that the Bill explicitly define its key terms. The Section further recommends that these definitions direct attention to analysis consistent with antitrust principles: effects-based inquiries concerned with harm to the competitive process, not merely harm to particular competitors.³¹ The Section believes that it is important for Congress to define these terms

¹⁹ *Id.* § 3(a)(1).

²⁰ *Id.* § 3(a)(2).

²¹ *Id.* § 3(a)(1)–(3); *see also id.* § 3(b)(2)(A) (“material harm”).

²² *Id.* § 3(a)(7)–(8); *see also id.* § 3(a)(4) (“materially restrict, impede, or unreasonably delay”).

²³ *E.g., Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58–60 (1911) (interpreting Section 1 of the Sherman Act to apply to “undue” restraints of trade).

²⁴ *E.g., Brown Shoe Co. v. United States*, 370 U.S. 294, 321–22 (1962) (discussing what tests could be used to determine whether a merger may substantially lessen competition).

²⁵ S. 2992 § 3(a)(5).

²⁶ *Id.* § 3(a)(9).

²⁷ *See infra* Part V.

²⁸ *See infra* Part V.B.

²⁹ *E.g., S. 2992* § 3(a)(1).

³⁰ *See infra* Parts IV–V.

³¹ *See Brown Shoe*, 370 U.S. at 320 (“Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not competitors, and its desire to restrain mergers only to the extent that such

in the legislation. Although Section 4 of the Bill authorizes the Federal Trade Commission (“FTC”) and Department of Justice (“DOJ”) to issue joint “enforcement guidelines,”³² the Bill only explicitly delegates authority to define the term “data.”³³ Failure to adequately define key terms—or clearly delegate authority to the FTC and DOJ to define key terms—will inject variability and uncertainty into the administration of the law, to the potential detriment of businesses and consumers alike.

III. PROOF OF MARKET POWER SHOULD BE A REQUIRED ELEMENT OF EVERY VIOLATION AND INSTANCE OF UNLAWFUL CONDUCT

The Bill does not make proof of substantial market power an element of “unlawful conduct” under Section 3(a). Readers of the Bill might assume that market power is obvious, or that the “covered platform”³⁴ definition describes entities that are presumed to possess substantial market power, or that references to “material[] harm [to] competition”³⁵ would make market power an element of at least some proscribed conduct. But the Section submits that none of these considerations substitute for proof of substantial market power.

Some degree of market power is a prerequisite to any firm’s ability to unilaterally harm the competitive process through its conduct.³⁶ Prohibiting conduct without regard to market power invites arbitrary enforcement and wasteful disruption of normal competitive processes. The risks of unintended consequences are especially severe in digital markets characterized by multi-sided competition, dynamic complexities, and interdependence. As the Section recently commented: “An important economic feature of [the complexities and interdependencies of online platform

combinations may tend to lessen competition.”); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors.” (cleaned up)).

³² S. 2992 § 4.

³³ *Id.* § 2(b).

³⁴ *Id.* § 2(a)(5).

³⁵ *E.g.*, *id.* § 3(a)(1)–(3).

³⁶ See Jonathan B. Baker & Timothy F. Bresnahan, *Empirical Methods of Identifying and Measuring Market Power*, 61 ANTITRUST L.J. 3, 3 (1992) (“Measuring market power is important because antitrust law protects competition in order to deter or correct the exercise.”); John B. Kirkwood, *Market Power and Antitrust Enforcement*, 98 B.U. L. REV. 1169, 1173 (“Market power’s pivotal role is clear. . . . This concept is central to antitrust because it distinguishes firms that can harm competition and consumers from those that cannot.”); Louis Kaplow & Carl Shapiro, *Antitrust*, in 2 HANDBOOK OF LAW AND ECONOMICS 1073, 1078 (A. Mitchell Polinsky & Steven Shavell eds., 2007) (“The concept of market power is fundamental to antitrust economics and to the law.”); DIGITAL ECONOMY AND COMPETITION, *supra* note 3, at 5 (recognizing that “potentially anticompetitive actions typically require a substantial degree of market power to be successful in reducing competition or maintaining monopoly power”); see generally Thomas G. Krattenmaker, Robert H. Lande & Steven C. Salop, *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L. J. 241 (1987) (commenting on differences between the power of a firm to restrict its own output and the power to restrict a rival’s output).

competition] is that even relatively small changes can hinder the efficient operation of platforms and negatively affect innovation.”³⁷

To begin, finding or designating a platform to be a “covered platform” does not require or establish that it has market power in any relevant market. Size, in the sense of number of users³⁸ or market capitalization,³⁹ is not by itself evidence of market power. A firm may be large, as measured in these terms, yet lack the power to influence prices or exclude competitors. Because of this, the Section has long cautioned against the use of mere size as a proxy for market power.⁴⁰ Antitrust cases have held that market power may in some cases be inferred from a firm’s possession of a large share of an appropriately defined relevant market.⁴¹ But this is question of *relative size* within a *relevant market*, which in turn is typically delineated in a way that establishes market power.⁴² Outside the context of a relevant market defined by reference to market power, measures of firm size are not reliable predictors of market power.⁴³ And while current antitrust law recognizes proof of direct anticompetitive effects can reduce or eliminate market definition requirements,⁴⁴ the “covered platform” designation requires no such proof in the Bill as written.

³⁷ COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST ON THE DUTCH MINISTRY OF ECONOMIC AND CLIMATE AFFAIRS CONSULTATION ON ONLINE PLATFORMS AND COMPETITION LAW 4 (2019), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/february-2019/comments-sal-on-the-dutch-consultation-on-online-platforms-252019-final.pdf [hereinafter DUTCH COMPETITION].

³⁸ S. 2992 §§ 2(a)(5)(B)(ii)(I), 2(a)(5)(C)(ii)(I).

³⁹ *Id.* § 2(a)(5)(B)(ii)(II); § 2(a)(5)(C)(ii)(II).

⁴⁰ COMMENTS ON EUROPEAN COMMISSION’S CONSULTATION ON PROPOSED DIGITAL SERVICES ACT 6 (2020), https://www.americanbar.org/content/dam/aba/administrative/antitrust_law/comments/september-2020/comments-9820-belgium-dsa.pdf (“[T]he economic literature cautions against antitrust enforcement actions applied to platforms based solely on their relative size and user base”); COMMENTS OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW ON THE AUSTRALIAN COMPETITION AND CONSUMER COMMISSION’S PRELIMINARY REPORT ON DIGITAL PLATFORMS 2 (2019) (same), <https://www.accc.gov.au/system/files/American%20Bar%20Association%20Section%20of%20Antitrust%20Law%20%28February%202019%29.PDF> [hereinafter AUSTRALIAN COMPETITION]; see Catherine Tucker, *Network Effects and Market Power: What Have We Learned in the Last Decade?*, ANTITRUST 80 (2018), <https://sites.bu.edu/tpri/files/2018/07/tucker-network-effects-antitrust2018.pdf> (“[I]n general, platform markets may still be competitive even if larger firms in these industries exhibit both sizable user bases and competitive dynamics, which are driven by network effects. This implies a tempering of antitrust enforcement actions surrounding market dominance of digital platforms predicated simply on their relative size of user base.”).

⁴¹ *E.g.*, *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945); *United States v. Philadelphia Nat’l Bank*, 374 U.S. 321, 363 (1963); *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966).

⁴² See Sean P. Sullivan, *Modular Market Definition*, 55 U.C. DAVIS L. REV. 1091, 1129–42 (2021) (arguing that markets should be defined by tests selected on the basis of the alleged type of anticompetitive conduct); David Glasner & Sean P. Sullivan, *The Logic of Market Definition*, 83 ANTITRUST L.J. 293, 316–24 (2020) (describing how the Hypothetical Monopolist Test must be changed to define markets appropriate for evaluating different types of market power concerns); Gregory J. Werden, *Demand Elasticities in Antitrust Analysis*, 66 ANTITRUST L.J. 363, 384–96 (1998) (providing a detailed discussion of connections between market power and market definition).

⁴³ *Cf.* DIGITAL ECONOMY AND COMPETITION, *supra* note 3, at 6 (“The Section believes that the presence of sustainable dominant positions can be determined only on the basis of a case-specific economic analysis.”).

⁴⁴ See *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2285 n.7 (2018); *Fed. Trade Comm’n v. Indiana Fed’n of Dentists*, 476 U.S. 447, 460 (1986).

Further, antitrust has never distinguished varying size requirements based on distinctions between publicly traded and non-publicly traded companies.

The “critical trading partner” element of the definition of a “covered platform” is not a good substitute for proof of market power; rather, criticality is best assessed by considering competitive alternatives. A “critical trading partner,” as the Bill defines the term, has “the ability to restrict or materially impede the access” of a business user to either (1) “the users or customers,” or (2) “a tool or service that the business user needs to effectively serve the users or customers.”⁴⁵ It could be that a “covered platform” would rarely be considered to be a critical trading partner so long as a business user has the legal right and practical ability to contact and serve customers outside of the platform. More appropriately, though, and more consistent with the apparent intent of the Bill, whether a trading partner is critical should be assessed in the context of market power and competitive alternatives.⁴⁶

Qualifiers requiring materiality are similarly inadequate to substitute for an explicit market power requirement.⁴⁷ As discussed in Part II, the Bill does not define “materiality.” Assuming for sake of consideration that phrases like “materially harm,”⁴⁸ and “materially restrict or impede”⁴⁹ mean something different than undue restraints of trade or substantial lessening of competition, it is unclear what materiality requires. Dictionary definitions pointing to relevance, significance, and consequence do not indicate an obvious connection to market power.⁵⁰ To the extent material harm to a competitor or competitors is divorced from harm to the competitive process, this is a rejection of many decades of sound antitrust policy designed to ensure that markets function efficiently without artificial limitations on competition to the benefit of consumers.⁵¹ The Bill’s use of materiality in conjunction with users’ ability to access data⁵² and platform features used by competitors⁵³ suggest that the focus of this language is not on enhancement of market power but

⁴⁵ S. 2992 § 2(a)(6).

⁴⁶ See *Leegin Creative Leather Prod., Inc. v. PSKS, Inc.*, 551 U.S. 877, 878 (2007) (“[T]he antitrust laws’ primary purpose . . . is to protect interbrand competition.” (cleaned up)).

⁴⁷ S. 2992 § 3(a)(1)–(3) (qualifying each violation to encompass conduct that “would materially harm competition”); *id.* § 3(b)(2)(A) (affording an affirmative defense to unlawful conduct set forth in § 3(a)(4)–(10) that does not “result in material harm to competition”).

⁴⁸ *Id.* § 3(a)(1)–(3); see also *id.* § 3(b)(2)(A) (“material harm”).

⁴⁹ *Id.* § 3(a) (7)–(8); see also *id.* § 3(a)(4) (“materially restrict, impede, or unreasonably delay”).

⁵⁰ The Oxford English Dictionary defines materiality as “the quality of being relevant or significant.” *Materiality*, OXFORD ENG. DICTIONARY (3d ed. 2001), <https://www.oed.com/view/Entry/114928?redirectedFrom=materiality#eid>. The American Heritage Dictionary defines “material” as “relevant and consequential; crucial.” *Material*, AM. HERITAGE DICTIONARY OF THE ENG. LANGUAGE (5th ed. 2022), <https://ahdictionary.com/word/search.html?q=material>; Black’s Law Dictionary defines “material” as “of such a nature” as “would affect a person’s decision-making; significant; essential.” *Material*, BLACK’S LAW DICTIONARY (10th ed. 2014).

⁵¹ That is not to say that harm to competitors is irrelevant to assessing harm to the competitive process. But prohibiting a “material” harm to competitors—which could be quite minimal or transitory—without regard to impact on the competitive process could have the perverse effect of reducing rather than preserving competition.

⁵² S. 2992 § 3(a)(7).

⁵³ *Id.* § 3(a)(4).

instead a return to competition policy picking winners and losers by protecting certain competitors against others.⁵⁴

Finally, the Section emphasizes that market power ordinarily cannot be assumed or inferred outside the context of case-by-case factual analysis. The conclusions of prior legislative hearings on digital markets should not be expected to substitute for case-by-case factual analysis. For one thing, the Bill is not limited to the scope of the recent House Report’s conclusions; the Bill is not restricted to “markets” such as “online retail,” “general online search and search advertising,” “social networking,” and “the mobile operating system market.”⁵⁵ Nor does the Bill limit itself to the named companies in the House Report.⁵⁶ Proof of market power, like proof of all other elements of a violation, should be required to be established in case-specific factual scrutiny within the context of the adversarial process.

In sum, whatever one’s view on the degree of market power needed to justify intervention, or who bears the burden of proof, some degree of market power is needed for any conduct to present a risk of harm to the competitive process. Failing to require proof of market power as an element of “unlawful conduct” creates a risk of wasteful and arbitrary disruption of competition to the detriment of both businesses and consumers. The Section consequently recommends introducing explicit proof of market power requirements in the elements of every offense in the Bill.

IV. SECTIONS 3(A)(1)–(3) VIOLATIONS SHOULD BE LIMITED TO CONDUCT THAT HARMS THE COMPETITIVE PROCESS

As summarized previously, Section 3(a) of the Bill prohibits conduct that (1) “preference[s]” the platform operator’s products, (2) “limit[s]” a business user’s products, or (3) “discriminate[s] in the application or enforcement of the terms of service of the covered platform among similarly situated business users”⁵⁷ where any of this conduct is undertaken “in a

⁵⁴ Cf. *The Antitrust Laws*, FED. TRADE COMM’N, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws> (last visited Feb. 7, 2022) (“[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the *process of competition* for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep prices down, and keep quality up.” (emphasis added)); COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION AND INTERNATIONAL LAW SECTION ON THE JAPAN FAIR TRADE COMMISSION DRAFT GUIDELINES CONCERNING ABUSE OF A SUPERIOR BARGAINING POSITION IN TRANSACTIONS BETWEEN DIGITAL PLATFORM OPERATORS AND CONSUMERS THAT PROVIDE PERSONAL INFORMATION, ETC. 3 n.7 (2019), <https://www.americanbar.org/content/dam/aba/administrative/antitrust-law/comments/october-2019/aba-sal-sil-comments-on-jftc-draft-platform-abuse-of-superior-bargaining-position-guidelines-final-final-package.pdf> (“Competition law should seek to protect competition, not competitors or counterparties”).

⁵⁵ See INVESTIGATION OF COMPETITION IN DIGITAL MARKETS, MAJORITY STAFF REPORT AND RECOMMENDATIONS, SUBCOMMITTEE ON ANTITRUST, COMMERCIAL AND ADMINISTRATIVE LAW OF THE COMMITTEE ON THE JUDICIARY 12–16 (2020), https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 [hereinafter HOUSE REPORT].

⁵⁶ See *id.* at 11–19 (2020) (specifically analyzing Amazon, Apple, Facebook, and Google and concluding that these companies possess market power in certain markets).

⁵⁷ S. 2992 § 3(a)(1)–(3).

manner that would materially harm competition.”⁵⁸ Also, as summarized previously, the Bill’s language of “harm [to] competition” does not obviously equate to harm to the competitive process.

If the prohibitions in Section 3(a)(1)–(3) mean to establish freestanding prohibitions on “discriminatory” conduct without requiring proof of harm to the competitive process, then the Bill does not supplement antitrust law but is altogether different in kind. Prohibitions of this kind would resemble common carrier regulations that are not currently enforced by the DOJ or the FTC.

The Section has long cautioned against the creation of free-standing prohibitions on “unfairness” untethered from harm to the competitive process.⁵⁹ At a minimum, such prohibitions require difficult and often subjective line-drawing exercises about the meaning of “fairness.” Outside the focused and familiar context of harm to the competitive process, vague concepts like fairness and discrimination inject uncertainty into what is and is not permitted conduct. The risks that this type of uncertainty could have unintended consequences are pronounced in digital markets like those addressed here.⁶⁰ Even well-intentioned legislation aimed at promoting competition can cause serious and unintended injuries to the consumers it intends to help.⁶¹

To illustrate by specific example, the economic literature on self-preferencing lays bare the risk of unintended consequences if all that determines legality is a freestanding “fairness” standard. As those concerned with self-preferencing surmise, self-preferencing can be anticompetitive and welfare reducing in certain circumstances.⁶² But this is not the only possibility. Owners of platforms that sell products on their platforms alongside those of third parties (“dual mode intermediation”) may also create consumer benefits through increases in product diversity,

⁵⁸ *Id.*

⁵⁹ *E.g.*, AUSTRALIAN COMPETITION, *supra* note 40, at 5–6 (“The Section respectfully recommends that any prohibitions on unfairness be tethered to traditional competition law principles, namely, requiring an effects based analysis and a showing of harm to the competitive process, as opposed to merely harm to rivals.”).

⁶⁰ *See id.* at 5 (“In light of the wide variety of operators and products involved across platforms, there is significant difficulty in attempting to designate particular practices as ‘unfair’ or ‘anticompetitive’ by definition, as the wholesale condemnation of broad categories of conduct does not adequately account for the ‘circumstances, details, and logic of a restraint.’”).

⁶¹ *See, e.g., id.* at 3 (“The U.S. experience with the Robinson-Patman Act, which prohibits certain forms of price discrimination, shows that regulation of price discrimination has had the unintended effect of limiting the extent of discounting generally.” (internal quotation marks and citation omitted)).

⁶² *See, e.g.*, Jorge Padilla, Joe Perkins, & Salvatore Piccolo, *Self-Preferencing in Markets with Vertically-Integrated Gatekeeper Platforms*, (September 28, 2020), <https://ssrn.com/abstract=3701250> (“Gatekeeper platforms may have an incentive to exploit the installed user base of consumers and foreclose competitors when demand growth is slow.”); Aurelien Portuese, “*Please, Help Yourself*”: *Toward a Taxonomy of Self-Preferencing*, INFO. TECH. & INNOVATION FOUND., at 11-12 (2021), <https://itif.org/sites/default/files/2021-self-preferencing-taxonomy.pdf> (arguing that self-preferencing can be anticompetitive if the conduct is solely based on anticompetitive reasons); Jean Tirole, *Competition and the Industrial Challenge for the Digital Age*, IFS DEATON REV., at 10 (2020), https://www.tse-fr.eu/sites/default/files/TSE/documents/doc/by/tirole/competition_and_the_industrial_challenge_april_3_2020.pdf (“[T]here is a feeling that the new digital platforms have an unprecedented ability to a) favor their own brands when making a recommendation to consumers, and b) cheaply gather substantial information about third-party products and selectively create copycats for the most successful ones.”).

efficiency, and competition.⁶³ Indeed, while more work remains to be done, recent research finds that self-preferencing conduct on a platform can be welfare-enhancing.⁶⁴

Prohibition of self-preferencing on the basis of vague and abstract concepts like “fairness” thus risks the destruction of beneficial competition to the detriment of consumers. This risk is compounded by the fact that inherent supply-chain differences between first-party and third-party products makes it difficult to determine what constitutes self-preferencing in the first instance. Case-by-case factual analysis, focused on asking whether self-preferencing enhances or harms the competitive process, is a better path to pursuing the Bill’s objectives.

In sum, the Section recommends that the “unlawful conduct” in Section 3(a)(1)–(3) of the Bill focus on harm to the competitive process. The Section recommends that the Bill disclaim any generalized prohibition on the basis of “unfairness” or “discrimination” and instead make effects-based harm to the competitive process an element of proving each of the violations.

V. THE BILL SHOULD CLARIFY THE UNLAWFUL CONDUCT SET FORTH IN SECTION 3(A)(4)–(10) AND EXPRESSLY LIMIT THESE PROHIBITIONS TO CONDUCT THAT HARMS THE COMPETITIVE PROCESS

Section 3(a)(4)–(10) of the Bill prohibits several specific types of “unlawful conduct,” including conduct relating to interoperability, use of and access to data, tying, steering and self-preferencing, and retaliation.⁶⁵ These categories of conduct are not subject to a requirement of harm to competition on the covered platform, though a few instances of conduct are qualified to “material” restrictions.⁶⁶

As discussed in Part VI, the Section recognizes the Bill’s provision of an affirmative defense for Section 3(a)(4)–(10) conduct that does not “result in material harm to competition.”⁶⁷ The replacement of language in an earlier draft expressly stating “harm to the competitive process” with “material harm to competition” suggests a rejection of the concept of harm to competitive processes central to current antitrust analysis. For the reasons already provided in these comments,

⁶³ Andrei Hagiu, Tat-How Teh & Julian Wright, *Should Platforms Be Allowed to Sell on Their Own Marketplaces?*, RAND J. ECON., at 30 (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3606055 (“Indeed, such dual mode intermediation has clear benefits when applied across different products, including: increasing the diversity of products, allowing each product to be provided by the more efficient seller (the platform or the third-parties), saving on search costs for consumers, ensuring more stable supply, internalizing cross-product spillovers in marketing and enabling the platform to have some loss-leaders.”).

⁶⁴ Portuese, *supra* note 62, at 2 (“Unless companies engage in self-preferencing in an explicitly anticompetitive way—meaning intentionally limiting the ability of competitors to use their platform with anticompetitive motives—the practice usually makes consumers better off. . . . For over 150 years, large retailers have used self-preferencing strategies with their own private labels, resulting in lower prices for their products and putting price pressure on branded products.”).

⁶⁵ S. 2992 § 3(a).

⁶⁶ *E.g.*, *id.* § 3(a)(4) (referring to conduct that would “materially restrict, impede, or unreasonably delay the capacity of a business user to access or interoperate with the same platform”).

⁶⁷ *Id.* § 3(b)(2).

the Section recommends that all categories of unlawful conduct in the Bill require a showing of harm to the competitive process.

The following provides additional, specific commentary on different types of “unlawful conduct” set forth in Section 3(a) of the Bill.

A. Interoperability, Use of and Access to Data (nos. 4, 6, 7)

Several instances of “unlawful conduct” identified in Section 2(b) of the Bill relate to data portability and interoperability:⁶⁸

- **Section 3(a)(4).** This provision concerns interoperability and access to features “that are available to the covered platform operator’s own products, services, or lines of business that compete or would compete with products or services offered by business users on the covered platform,” making material restriction of either of these unlawful.
- **Sections 3(a)(6)–(7).** These provisions concern data that are “generated on the covered platform by the activities of a business user or by [the business user’s] interaction of a covered platform.” The covered platform is prohibited from using “nonpublic” instances of such data to compete against business users (6) and is prohibited from “materially restrict[ing] or imped[ing] a business user from accessing” that data (7).

The economic literature paints a complicated picture for interoperability requirements. As explained below, interoperability potentially brings competitive benefits by reducing lock-in and assisting new entrants.⁶⁹ On the other hand, forced interoperability can harm competition by reducing incentives to innovate and imposing economically inefficient requirements on firms. As a result, the Section cautions against broad-brush assumptions that compelled data sharing and interoperability requirements will promote competition.

Potential Benefits of Interoperability Requirements. The potential benefits of interoperability include facilitation of the ability of new entrants to build scale to offset a supplier’s economies of scale.⁷⁰ Relatedly, interoperability “allows entrants to share the same network effects

⁶⁸ Interoperability is “the ability to transfer and render useful data and other information across systems, applications or components.” J. Langenfeld, C. Ring & S. Clark, *Regulating digital platforms: Interoperability and data portability*, CONCURRENCES, at 46 (2021). See also Wolfgang Kerber & Heike Schweitzer, *Interoperability in the Digital Economy*, 8 J. INTELL. PROP., INFO. TECH. & E-COMM. L. 39, 40–41 (2017), <https://www.jipitec.eu/issues/jipitec-8-1-2017/4531>; JOHN PALFREY & URS GASSER, INTEROP: THE PROMISE AND PERILS OF HIGHLY INTERCONNECTED SYSTEMS 5 (2012).

⁶⁹ Fiona M. Scott Morton et al., *Equitable Interoperability: The “Super Tool” of Digital Platform Governance 2* (Yale Tobin Ctr. for Econ. Pol’y, Policy Discussion Paper No. 4, 2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3923602.

⁷⁰ Langenfeld, Ring & Clark, *supra* note 68, at 45 (“Interoperability and data portability can potentially allow new entrants to build sufficient scale and scope to offset the scale and scope economies of incumbent suppliers, thus reducing the potential barriers to entry.”); Gabriel Nicholas, *Taking It With You: Platform Barriers to Entry and the Limits of Data Portability*, 27 MICH. TECH. L. REV. 263, 276–79 (2021).

the dominant firm enjoys.”⁷¹ In this sense, “[b]y reducing consumer lock-in, data portability and interoperability can create incentives for entry and [for] greater competition within the market.”⁷² Likewise, “sharing relevant data between services may allow those complementary services to offer useful functionality and may prevent the extraction of consumer and/or business user value that arises when valuable data is controlled by one or a small number of dominant platforms.”⁷³

Conversely, restricting interoperability can lead to increased switching costs, which would “limit the ability of a customer to substitute between competitors in a given market,”⁷⁴ potentially reinforcing market power of the firms that are restricting interoperability. “If switching costs are high enough, a customer may be locked-in to that supplier and unwilling to switch even though rival suppliers have lower prices or high-quality products.”⁷⁵

Potential Costs of Interoperability Requirements. Forced interoperability can, however, cause consumer harm by increasing costs and decreasing innovation. With respect to costs, accommodating interoperability requirements can involve significant implementation costs, which may be passed on (in part or in whole) to business users and end consumers. Without particularized studies of costs and benefits, it is difficult to say when the benefits of imposing an interoperability requirement outweigh the costs.

Interoperability requirements can also dampen incentives to innovate. With mandated interoperability “[t]he incentive to invest in new features and improvements to existing platforms [are] diminished, because those improvements could be accessed by customers of competing platforms.”⁷⁶ In other words, by decreasing the profitability of product investments to platform owners, interoperability requirements decrease incentives to engage in product innovation⁷⁷ and can increase product homogeneity.⁷⁸ Moreover, the literature suggests that making all functions interoperable with all firms may not be efficient, as it deprives platforms of control over their own system and security.⁷⁹

Avoid Blanket Interoperability Requirements. Because interoperability requirements present both potential costs and benefits, the literature on this subject suggests that requirements be imposed “only with respect to platform functions for which the regulator is convinced that

⁷¹ Scott Morton et al., *supra* note 69, at 4.

⁷² Langenfeld, Ring & Clark, *supra* note 68, at 46.

⁷³ Scott Morton et al., *supra* note 69, at 26.

⁷⁴ Langenfeld, Ring & Clark, *supra* note 68, at 45.

⁷⁵ *Id.*

⁷⁶ Thomas M. Lenard, *If Data Portability Is the Solution, What’s the Problem?*, TECH. POL’Y INST. (2020), <https://techpolicyinstitute.org/wp-content/uploads/2020/01/Lenard-If-Data-Portability.pdf>.

⁷⁷ Langenfeld, Ring & Clark, *supra* note 68, at 46.

⁷⁸ Kerber & Schweitzer, *supra* note 68, at 42; Langenfeld, Ring & Clark, *supra* note 68, at 46.

⁷⁹ See Kerber & Schweitzer, *supra* note 68, at 41–42 (“Through a generally higher level of interconnectedness in a digital economy, more interoperability may lead to higher risks regarding reliability, security, and privacy. Considering these (potentially large) costs of interoperability, the policy objective should not be full or maximum interoperability, but rather an optimal degree of interoperability that balances benefits and costs.”).

interoperability will further the goals of contestability and fairness.”⁸⁰ When deciding which platform services require interoperability, the regulator may use criteria “such as size, the presence of network effects, the absence of multihoming, and entrenched market power.”⁸¹ Even then, there remains additional work to determine “the most effective location for the interface, followed by determining its design and functionality.”⁸²

Accordingly, rather than imposing blanket interoperability and data sharing requirements, the Section recommends that the Bill require case-by-case analysis of the facts specific to a given market and the characteristics specific to a particular platform when determining whether and how to implement interoperability requirements.⁸³

B. Tying (no. 5)

Section 3(a)(5) makes it unlawful for a covered platform to “condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator that are not part of or intrinsic to the covered platform.”⁸⁴

As a threshold matter, Section 3(a)(5) appears overly broad. Where the covered platform premises its business model on low-priced or nominally free access to the platform, recouping the costs of providing that access through sale or licensing of other products or services, this broad prohibition could push platforms to institute fees to defray platform expenses.⁸⁵ This prohibition also fails to distinguish between different types of access, making conditioning access unlawful even on *de minimis* purchases or the use of other products or services offered by a covered platform.

Section 3(a)(5) resembles, in certain respects, existing tying law that already restricts anticompetitive tying. The Supreme Court has held that a plaintiff may challenge “an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier.”⁸⁶ Current doctrine prohibits a tie-in where the plaintiff establishes (1) that a seller provides two distinct products or services (i.e., the “tying” and “tied”), (2) that the two are tied such that customers are coerced into purchasing both, (3) that the supplier has substantial economic power over the tying product, (4) that the practice causes anticompetitive effects or meets the threshold

⁸⁰ Scott Morton et al., *supra* note 69, at 3.

⁸¹ *Id.* at 7.

⁸² *Id.*

⁸³ Langenfeld, Ring & Clark, *supra* note 68, at 46.

⁸⁴ S. 2992 § 3(a)(5).

⁸⁵ The alternative would be mandatory access, and the Section urges caution regarding any measures that would lead to the imposition of mandatory access. DUTCH COMPETITION, *supra* 37, at 8.

⁸⁶ *N. Pac. Ry. v. United States*, 356 U.S. 1, 5–6 (1958); see *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984) (“[T]he essential characteristic of an invalid tying arrangement lies in the seller’s exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms.”).

potential for injuring competition, and (5) that the practice affects a nontrivial volume of commerce.⁸⁷

Some respects in which the prohibited conduct in Section 3(a)(5) differs from the elements of tying have already been addressed. As drafted, the elements of Section 3(a)(5) appear to omit the third element of illegal tying: market power in the tying product. The Section recommends that proof of such market power be made an element.⁸⁸ As drafted, the elements of Section 3(a)(5) also appear to omit the fourth element of illegal tying: evidence of anticompetitive effects or harm to the competitive process. The Section recommends that this be made an element as well.

Together, the first two elements of the offense of tying establish that the relevant products would be offered separately but for the tying arrangement.⁸⁹ Though not entirely clear, this appears to be the same inquiry envisioned in the language in Section 3(a)(5) about distinguishing unlawful access conditioning from something that is “part of or intrinsic to the covered platform itself.”⁹⁰ This language may invite courts to reject Section 3(a)(5) claims altogether where technologically integrated services are concerned, as they have for tying claims in the past, to avoid “enmesh[ing] the courts with technical and uncertain inquiry into the technological justifiability of functional integration and cast unfortunate doubt on the legality of product innovations in serious detriment to the industry and without legitimate antitrust purpose.”⁹¹ Tying doctrine would, at least, appear to offer a close analogue when trying to interpret this language.

In sum, the Section cautions against introducing a freestanding tying prohibition without reference to existing antitrust law. Some conduct that would fall within the scope of Section 3(a)(5) could constitute illegal tying under existing antitrust law, at least where a covered platform with market power conditioned access to the anticompetitive exclusion of competing services. If tying doctrine is thought insufficient to address other types of conduct, this should be addressed directly. To do otherwise creates inconsistent standards, risks unintended consequences, and ignores lessons from the case law on tying.

C. Steering and Self-preferencing (nos. 8, 9)

Two instances of “unlawful conduct” described in Section 3(a)(8)–(9) concern steering and self-preferencing of platform products:

⁸⁷ PHILLIP E. AREEDA & HERBERT HOVENKAMP, 9 ANTITRUST LAW ¶ 1702 (4th ed. 2012).

⁸⁸ *See supra* Part III.

⁸⁹ *Cf. Jefferson Parish*, 466 U.S. 2, 21 (1984) (discussing the requisite analysis and reasons for requiring “that two distinguishable product markets be involved” in an illegal tying arrangement).

⁹⁰ This narrowing language was added in the Senate version of the Bill.

⁹¹ *Telex Corp. v. Int’l Bus. Machines Corp.*, 367 F. Supp. 258, 347 (N.D. Okla. 1973); *see also Innovation Data Processing v. IBM*, 585 F. Supp. 1470, 1476 (D.N.J. 1984) (no per se illegal tie among technologically interrelated products “even if the new products are incompatible with the products then offered by the competition and effective use of any one of the new products necessitates purchase of some or all of the others”).

- **Section 3(a)(8): Steering.** Covered platforms shall not “materially restrict or impede” users from uninstalling or changing settings that would “direct or steer” users to the products of the platform operator.⁹²
- **Section 3(a)(9): Self-preferencing.** Covered platforms are prohibited from using the platform interface or search or ranking functionality to “treat the products, services, or lines of business of the covered platform more favorably relative to those of another business user than under standards mandating the neutral, fair, and non-discriminatory treatment of all business users.”⁹³

Antitrust law contains no general prohibition on self-preferencing. The leading case in this area is *Trinko*, in which the Supreme Court noted that forcing a monopolist to share its advantages with rivals may dilute its incentive to compete, “require[] courts to act as central planners,” and facilitate collusion.⁹⁴ The Court, in *Trinko*, thus reaffirmed that, subject to a limited exception where a prior profitable course of dealing is abandoned, “as a general matter, the Sherman Act ‘does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.’”⁹⁵

Self-preferencing can constitute either part of the competitive process or harm to the competitive process, depending on the particular facts and context of the conduct in a given case. Thus, the Section recommends antitrust enforcement proceed on a case-by-case basis upon evaluating the specific products and markets at issue and avoid ex ante generalizations.⁹⁶ Any legislation or related regulation should narrowly target clear market failures and maintain flexibility in administration over time to address market changes and remedy unintended consequences.

Unintended consequences are a particular concern for these prohibitions on steering and self-preferencing. For example:

- Certain cell phone software applications may interoperate as a suite of related applications. Depending on how interoperability is implemented, a consumer who uninstalled one application in the suite could degrade the performance of other applications in the suite, or break operability altogether. As long as software interoperability is not related to the “core functionality” of the covered platform,

⁹² S. 2992 § 3(a)(8). Steering as described in this prohibition is a species of self-preferencing. Our comments regarding self-preferencing here thus apply to both.

⁹³ *Id.* § 3(a)(9).

⁹⁴ *Verizon Commc’ns Inc. v. L. Offs. of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

⁹⁵ *Id.* (quoting *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919)).

⁹⁶ See, e.g., COMMENTS OF THE AMERICAN BAR ASSOCIATION ANTITRUST LAW SECTION ON THE EUROPEAN COMMISSION’S DIGITAL SERVICES ACT PACKAGES: OPEN PUBLIC CONSULTATION 7 (2020) (“While ex ante regulation can be used in some cases to prevent prospective harm to consumer welfare, this comes with a commensurate risk where the future impact on dynamic markets can be uncertain. Any regulation should therefore be targeted narrowly to address clear market failures and maintain flexibility in administration over time to address market changes and remedy any unintended consequences.”).

however, the affirmative defenses would not apply to this type of application suite interoperability.⁹⁷ Thus, Section 3(a)(8)’s ex ante steering prohibition could, in some cases, result in reduced performance and consumer harm.

- Online consumers generally desire a convenient one-stop shopping experience that allows them to quickly purchase a cost-effective product. To this end, a platform operator might favor its own product or feature relative to others to ensure a consumer can seamlessly purchase a product with familiar terms and conditions from a known brand at a competitive price. Again, as long as this self-preferencing was unrelated to the “core functionality” of the covered platform, the affirmative defenses would not permit it.⁹⁸ In this way, Section 3(a)(9)’s prohibition on self-preferencing similarly risks consumer harm.

Further, the Section recommends the Bill provide a more careful explanation of what it means by “neutral, fair, and non-discriminatory treatment.”⁹⁹ That phrase does not have an accepted meaning in antitrust practice today. Patent law includes a similarly undefined phrase—fair, reasonable, and non-discriminatory (FRAND)—and uncertainty about the scope of the phrase has led to wide-ranging global litigation focused on the definition of FRAND.¹⁰⁰ State laws also at times have prohibited “unfair” conduct, though courts have recognized the difficulties inherent in enforcing such an abstract standard.¹⁰¹ The Section cautions that including an undefined standard in this bill could create similar uncertainty and invite protracted litigation here.¹⁰²

In sum, the Section urges that the prohibitions in Section 3(a)(8)–(9) be reworked to avoid ex ante generalizations and instead to require case-by-case evaluation of the specific products and markets at issue when seeking to address anticompetitive conduct. The Section also recommends that the Bill explicitly define what it means by “neutral, fair, and non-discriminatory treatment.”¹⁰³

⁹⁷ See S. 2992 § 3(b) (affirmative defenses).

⁹⁸ See *id.*

⁹⁹ *Id.* § 2(b)(6).

¹⁰⁰ See generally Haris Tsilikas, *The New Landscape in FRAND Litigation*, COMPETITION POL’Y INT’L (2020), <https://www.competitionpolicyinternational.com/the-new-landscape-in-frand-litigation/> (discussing recent German, European Union, United Kingdom, and United States judicial developments in FRAND litigation).

¹⁰¹ See, e.g., *Cel-Tech Commc’ns, Inc. v. L.A. Cellular Tel. Co.*, 973 P.2d 527, 543 (Cal. 1999) (“An undefined standard of what is ‘unfair’ fails to give businesses adequate guidelines as to what conduct may be challenged and thus enjoined and may sanction arbitrary or unpredictable decisions about what is fair or unfair. In some cases, it may even lead to the enjoining of *pro* competitive conduct and thereby undermine consumer protection, the primary purpose of the antitrust laws.”).

¹⁰² The House version of the Bill does not include the undefined “neutral, fair, and non-discriminatory” language. American Choice and Innovation Online Act, H.R. 3816 § 2(b)(7), <https://www.congress.gov/bill/117th-congress/house-bill/3816/text>. To the extent this language was added to the Bill to clarify permissible self-preferencing, the Section recommends the Bill provide more certainty on permitted conduct.

¹⁰³ S. 2992 § 3(a)(9).

VI. AFFIRMATIVE DEFENSES

The Bill articulates two basic types of affirmative defenses. The first type applies to all ten types of “unlawful conduct” described in Section 3(a)(1)–(10) (albeit with somewhat different language applicable to Section 3(a)(1)–(3) and Section 3(a)(4)–(10)).¹⁰⁴ The second type applies only to the seven instances of “unlawful conduct” described in Section 3(a)(4)–(10).¹⁰⁵ For the first type, a defendant states an affirmative defense by proving “by a preponderance of the evidence” that the relevant conduct was “narrowly tailored, nonpretextual, and reasonably necessary to” either (1) prevent a violation of law, (2) “protect safety, user privacy, the security of non-public data, or the security of the covered platform,” or (3) “maintain or substantially enhance the core functionality of the covered platform.”¹⁰⁶ For conduct prohibited by Section 3(a)(4)–(10), a defendant also states an affirmative defense by proving by a preponderance of the evidence that the conduct “has not resulted in and would not result in material harm to competition.”¹⁰⁷

The Section agrees that it is appropriate for the legislation to recognize permitted categories of conduct by covered platforms. Further, these defenses align in some ways with the defense of a legitimate procompetitive justification that current antitrust law recognizes under the rule of reason. Nonetheless, the Section cautions that these affirmative defenses are subject to significant ambiguity. For instance, the type of conduct that “maintain[s] or enhance[s] the core functionality of the covered platform” remains uncertain given the diverse products, business applications, and markets implicated by the legislation. Both what qualifies as a “core functionality” and what “maintain[s] or enhance[s]” it are vague and fact-specific, preventing advance prediction of what conduct is protected and what conduct is prohibited.

Additionally, the Section cautions against requiring the conduct be “narrowly tailored,” “necessary,” or unachievable “through less discriminatory means.”¹⁰⁸ These qualifications inject an additional layer of uncertainty into the analysis, thus further complicating the prediction of what conduct is protected and what conduct is prohibited. They also invite judicial second-guessing into the operation of business decisions. The difficulty of evaluating hypothetical alternatives to the conduct in question further complicates prediction whether a particular practice would be held to be valid.

Further, the Section offers three recommendations regarding the defense in Section 3(b)(2)(A) applicable to conduct under Section 3(a)(4)–(10) that “has not resulted in and would not result in material harm to competition.”

¹⁰⁴ *Id.* §§ 3(b)(1), (b)(2)(B).

¹⁰⁵ *Id.* § 3(b)(2).

¹⁰⁶ *Id.* § 3(b)(1) (applicable to the unlawful conduct set forth in Section 3(a)(1)–(3)). The analogous language applicable to the unlawful conduct in Section 3(a)(4)–(10) includes the additional qualification that the conduct “could not be achieved through less discriminatory means.” *Id.* § 3(b)(2)(B). It is unclear why the affirmative defense for this type of unlawful conduct merits stricter treatment than the unlawful conduct set forth in Section 3(a)(1)–(3).

¹⁰⁷ *Id.* § 3(b)(2)(A).

¹⁰⁸ *Id.* §§ 3(b)(1), (b)(2)(B).

First, the Section encourages Congress to adopt a standard reflecting harm to the competitive process for the reasons set forth on Part IV of these comments. A prior version of this Bill included the language “harm to the competitive process” for this affirmative defense, which has since been replaced with “material harm to competition.” Congress should not jettison the concept of harm to the competitive process in favor of a provision that might be perceived as protecting *competitors* rather than competition itself.

Second, the Section observes asymmetrical burdens applicable to conduct unlawful under Section 3(a)(1)–(3) from conduct unlawful under Section 3(a)(4)–(10). For the former, the plaintiff bears the initial burden to show “material[] harm to competition.” Whereas for the latter the defendant bears the burden of establishing an affirmative defense showing no “material harm to competition.” The Section does not see a principled basis between these categories of unlawful conduct to justify differing burdens.

Third, the Section recommends resolving the above-mentioned asymmetry by making proof of competitive harm an element of prohibited conduct, not a defense. By making it an affirmative defense, the Bill effectively assumes harm to competition and shifts the burden of proof to the defendant.

Antitrust jurisprudence has long recognized that a presumption of illegality may be appropriate in some cases. For example, in *United States v. Philadelphia National Bank*, the Supreme Court held that “a merger which produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market is so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects.”¹⁰⁹ The Court also has endorsed a “quick look” approach to analyzing certain conduct when “no elaborate industry analysis is required to demonstrate [its] anticompetitive character[.]”¹¹⁰

Such presumptions of illegality, however, are premised on a showing of market power (or a reasonable proxy thereof) or extensive judicial experience with the allegedly anticompetitive conduct, neither of which the Bill requires to make out a violation.¹¹¹ Given the dynamic and evolving characteristics of digital platform markets, no obvious categorical line exists “between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment.”¹¹² Instead, the Bill should allow a court to examine the “circumstances, details, and logic” of the defendant’s conduct on a case-by-case basis, which must necessarily include a showing of competitive harm, before shifting the burden to the defendant to rebut.¹¹³

¹⁰⁹ *Philadelphia Nat’l Bank*, 374 U.S. at 363.

¹¹⁰ *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 692 (1978).

¹¹¹ *See supra* Part III.

¹¹² *Cal. Dental Ass’n v. Fed. Trade Comm’n*, 526 U.S. 756, 780–81 (1999).

¹¹³ *See id.* at 781.

VII. PENALTIES

The Bill authorizes civil penalties against firms and individuals who violate the Bill's provisions. The penalties include the lesser of "15 percent of the total United States revenue of the person for the period of time the violation occurred" as well as potential individual penalties for certain officers.¹¹⁴ The Bill also requires the FTC and DOJ issue joint guidelines including "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."¹¹⁵ The Section agrees with these goals, which are consistent with the Section's view that "[p]enalties should be effective, proportionate, and have a deterrent effect."¹¹⁶

The Section recommends revising the civil penalties' language to clarify its implementation. As currently drafted, Section 3(c)(5)(D) of the Bill states that in cases of recurring violations the court may order chief executive officers and other officers to forfeit "any compensation received by that person during the 12 months preceding or following the filing of a complaint."¹¹⁷ If this language remains in the Bill, the Section recommends lawmakers clarify such penalties would only apply to officers involved in the alleged repeated violation when the conduct took place and not, for example, to officers in charge by the time a complaint is filed and who had no involvement in the alleged repeated violation.

The Bill should also clarify that any forfeited compensation must be limited to officers' compensation for roles or responsibilities related to the alleged repeated violation. As currently drafted, the Bill targets officers' compensation around the time of the filing of the complaint. This could have the unintended consequence of capturing compensation that is wholly unrelated to the alleged repeated violation or even the operation of the covered platform. For instance, if a complaint is filed four years after an alleged pattern violation has occurred, and at that point the implicated officer has been out of the covered platform for two years, "any compensation received by that person during the 12 months preceding or following the filing of a complaint"¹¹⁸ would have nothing to do with the relevant conduct or covered platform.

¹¹⁴ S. 2992 § 3(c)(5)(B).

¹¹⁵ *Id.* § 4(a).

¹¹⁶ DIGITAL ECONOMY AND COMPETITION, *supra* note 3, at 57.

¹¹⁷ S. 2992 § 3(c)(5)(D).

¹¹⁸ *Id.*