



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

The Honorable Richard J. Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Amy Klobuchar
Chairwoman
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

The Honorable Mike Lee
Ranking Member
Subcommittee on Competition Policy,
Antitrust, and Consumer Rights
Committee on the Judiciary
United States Senate
Washington, DC 20510

Dear Chairman Durbin, Chairwoman Klobuchar, Senator Grassley, and Senator Lee:

The Department of Justice (Department) appreciates the considerable attention and resources devoted by the House and Senate Committees on the Judiciary over the past several years to ensuring the competitiveness of our digital economy, and writes today to express support for the American Innovation and Choice Online Act, Senate bill S. 2992, and the American Innovation and Choice Online Act, House bill H.R. 3816, which contain similar prohibitions on discriminatory conduct by dominant platforms (the “bills”).

The Department views the rise of dominant platforms as presenting a threat to open markets and competition, with risks for consumers, businesses, innovation, resiliency, global competitiveness, and our democracy. By controlling key arteries of the nation’s commerce and communications, such platforms can exercise outsized market power in our modern economy. Vesting the power to pick winners and losers across markets in a small number of corporations contravenes the foundations of our capitalist system, and given the increasing importance of these markets, the power of such platforms is likely to continue to grow unless checked. This puts at risk the nation’s economic progress and prosperity, ultimately threatening the economic liberty that undergirds our democracy.

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The legislation, if enacted, would emphasize causes of action prohibiting the largest digital platforms from discriminating in favor of their own products or services, or among third-parties. In so doing, it would provide important clarification from Congress on types of discriminatory conduct that can materially harm competition. This would improve upon the system of *ex ante* enforcement through which the United States maintains competitive markets with legal prohibitions on harmful corporate conduct. By confirming the illegality of behaviors that reduce incentives for smaller or newer firms to innovate and compete, the legislation would supplement the existing antitrust laws in preventing the largest digital companies from abusing and exploiting their dominant positions to the detriment of competition and the competitive process. The Department is strongly supportive of these objectives and encourages both the Committee and Congress to work to finalize this legislation¹ and pass it into law.

The Department views the legislation's new prohibitions on discrimination as a helpful complement to, and clarification of, existing antitrust authority. In our view, the most significant benefits would arise where the legislation elucidates Congress' views of anticompetitive conduct—particularly with respect to harmful types of discrimination and self-preferencing by dominant platforms. Enumerating discriminatory and self-preferencing conduct that Congress views as anticompetitive and therefore illegal would clarify the antitrust laws and supplement the available causes of action and legal frameworks to pursue that conduct. Doing so would enhance the ability of the DOJ and FTC to challenge that conduct efficiently and effectively and better enable them to promote competition in digital markets. The legislation also has the potential to effectively harmonize broad prohibitions with the particularized needs and business practices of individual platforms over time.

If enacted, we believe that this legislation has the potential to have a positive effect on dynamism in digital markets going forward. Our future global competitiveness depends on innovators and entrepreneurs having the ability to access markets free from dominant incumbents that impede innovation, competition, resiliency, and widespread prosperity. Discriminatory conduct by dominant platforms can sap the rewards from other innovators and entrepreneurs, reducing the incentives for entrepreneurship and innovation. Even more importantly, the legislation may support the growth of new tech businesses adjacent to the platforms, which may ultimately pose a critically needed competitive check to the covered platforms themselves. We view these benefits as significant. For these reasons, the Department strongly supports the principles and goals animating the legislation and looks forward to working with Congress to ensure that the final legislation enacted meets these goals.

¹ As members continue to revise the legislation, the Department will provide under separate cover additional assistance to ensure that the bills achieve their goals.

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Thank you for the opportunity to present our views. We hope this information is helpful.
Please do not hesitate to contact this office if we may be of additional assistance to you.

Sincerely,

Peter S. Hyun
Acting Assistant Attorney General