



## Insight

# The Effect of Congressional Antitrust Legislation on Consumers

JEFFREY WESTLING, JUAN LONDOÑO | JANUARY 18, 2022

## Executive Summary

- Technology firms often act as both market participants and market operators, drawing concern from Congress that these companies are self-preferencing their products and harming competition.
- The American Innovation and Choice Online Act and the Open App Markets Act were recently introduced in the Senate to address these concerns, but these bills discount the significant benefits to consumers that often come with greater size and integration.
- Rather than focus solely on the size of companies or propping up individual competitors to large firms, Congress should instead direct its attention to anticompetitive behavior with a clear eye toward consumer welfare.

## Introduction

Often, technology companies both operate platforms and act as market participants on those platforms. This dynamic has drawn the attention of some in Congress, and two bills—the [American Innovation and Choice Online Act](#) (“AICOA”) and Open App Markets Act—were recently introduced in the Senate to address concerns about [self-preferencing](#) by large technology firms to privilege their own products above those of competitors.

Among the self-preferencing behaviors with which Congress is concerned are Google search’s ability to return results for Google’s [own apps or products](#), Amazon selling its [AmazonBasics](#) over its online store, and Apple offering its [own applications](#) through its app store. Some legislators have [expressed concerns](#) that, in these markets, dominant firms can leverage monopoly power in one market to harm competition in another. Despite the concerns about self-preferencing, however, these dynamics do not necessarily harm consumers. Indeed, the efficiencies of integration can often lead to consumer benefits, such as lower prices or the development of useful features.

Regulators should carefully consider the dynamics in these markets and ensure that firms do not violate existing antitrust laws. Recent legislative proposals, however, ignore this consumer-focused analysis and instead target the size of the firms, themselves. While attempting to police “big tech,” these legislative efforts could cause significant harms to consumers and limit the functionality of the services on which they rely. This insight reviews the AICOA and the Open App Markets Act and examines how each bill’s proposed changes would affect consumers.

## The American Innovation and Choice Online Act

## *What It Would Do*

AICOA targets a wide array of practices, but almost all are related to some form of self-preferencing. Specifically, AICOA prohibits platforms from, in many cases, preferencing their own products and services, limiting the ability of another business to compete, or discriminating in the application of the terms of service among similarly situated businesses. The bill also imposes restrictions on covered platforms' ability to harm individual competitors by [requiring interoperability](#) — access to the same platform, operating system, or features that are available to the covered platform — and restricting the ability of platforms to use non-public data to advantage their own products.

The bill would also grant the Federal Trade Commission and Department of Justice the authority to designate the covered platforms that would be subject to the provisions of the bill, and [broad discretion](#) to enforce the provisions of the act.

## *What It Would Mean for Consumers*

This bill would limit the availability of services and products that stem from integration. In the tech space, this includes a broad swath of offerings that consumers like. For example, [some note](#) the bill's prohibitions could jeopardize features such as [less expensive store brands or two-day delivery](#) from services such as Amazon. Under this legislation, Amazon couldn't return results for AmazonBasics — Amazon's private-label offerings — above competitors' products, or potentially even offer their own products at all, as courts could see this behavior as self-preferencing. Amazon would also likely have to stop offering its Prime two-day shipping because Amazon owns those distribution centers and uses them to deliver its products more quickly to consumers. Regardless of the consumer benefits, the simple fact that Amazon owns and operates within the market could make these offerings illegal.

Similarly, the bill's broad definition of "covered platform" would bring other services, including search engines or app stores, into the purview of regulators. If a user searches for a local restaurant on Google, and Google provides a map from its Google Maps application showing the user how to get there, Google may be seen as favoring its own map application. Instead, Google would likely just remove the map result, thus forcing users to click through different links, rather than having the information they are looking for delivered to them. These broad restrictions would essentially treat platforms as "[common carriers](#)," forcing the platforms to operate as dumb pipes which act, to the extent possible, neutrally but provide little value to consumers.

Further, as more third parties gain access to these stores and services, malicious actors could find new avenues to reach unsuspecting consumers, undermining their security and privacy. This in-turn would lower consumer trust in the marketplace or service, hurting smaller firms and sellers who rely on the authority derived from being in that marketplace or store. If, for example, a consumer can no longer value the reputability that comes with being admitted to a service, consumers would just go to large, well-known brands instead of smaller sellers and vendors with which the consumer has no existing relationship. While intending to help these businesses and services, the bill would instead make it harder for them to compete, leaving consumers with worse options at higher costs.

Finally, the bill's affirmative defense provisions will likely fall short in providing the protections necessary for platforms. In practice, these provisions are designed to allow firms to protect the privacy of users and ensure compliance with relevant law. Platforms, however, would need to prove that any action taken was "necessary" to achieve these goals. This high bar, paired with the broad enforcement authority of the FTC, would force firms

to err on the side of caution, again removing features and offerings on which consumers rely.

## **The Open App Markets Act**

### *What It Would Do*

Similar to AICOA, the [Open App Markets Act](#) would target firms that both own a marketplace and act as a participant in that market. This bill, however, focuses on app stores rather than online services more broadly. Specifically, the bill would prevent app store owners from forcing app developers to use the owner's in-app payment system, blocking communications between developers and customers, forbidding the self-preferencing of their own apps in a search, or otherwise excluding apps from an app store.

Also like AICOA, in addressing significant concerns about cybersecurity and privacy that would stem from forcing platforms to host third-party apps, the bill would allow exceptions for certain circumstances, but only for actions that are "necessary" to achieve user privacy, security, or digital safety, taken to prevent spam or fraud, or to prevent violations of the law.

### *What It Would Mean for Consumers*

Similar to AICOA, the Open App Markets Act would essentially require app store operators to allow third-party applications into the store and limit the usefulness of the search functionality. While intended to inject competition into the app marketplace, the legislation may do the opposite and harm consumers in the process.

Primarily, the bill targets Apple's "[walled garden](#)" model — a metaphor for its heavily curated and protective approach, which restricts the installation of apps outside of authorized channels — forcing the company to open devices to third-party applications and stores. Apple [differentiates itself](#) from other app stores and smartphone providers by emphasizing the security and privacy of its devices. While forcing Apple to allow third-party apps onto its devices would allow more competitors to reach consumers without needing Apple's approval, this unfettered access could create numerous security and privacy vulnerabilities for the consumers who chose Apple for its longstanding emphasis on privacy.

This concern would not be exclusive to Apple users. Even in a more open environment like Android's, the bill would prevent operating systems from placing security and privacy checks that restrict the ability of users to install third-party apps onto their devices. Thus, users would be more likely to accidentally download untrustworthy applications that put them at risk.

This could not only harm consumers, who are more likely to be exposed to malware and fraudulent content, but also small developers. Smaller app developers [tend to rely more](#) on the verification and trust that come with operating through reputable app stores. When that trust goes away, consumers will likely only download apps from well-known companies, leaving [independent developers](#) behind.

Again, while the bill would provide exemptions for security and privacy of users, these protections may not go far enough to give companies the flexibility to target bad actors without violating the law. As a result, many companies may simply choose to forgo instituting practices that are designed to protect the privacy or the security of their users to ensure the company does not violate the law.

## **Conclusion**

As Congress contemplates major changes to antitrust law to target the country's largest technology firms, it should carefully consider how these changes could erode consumer security and choice. Lawmakers should carefully examine the competitive dynamics in online markets, and there are reasons to be concerned when a firm both owns and operates within a marketplace. This doesn't necessarily mean, however, that these practices inherently harm competition. Consumers benefit from large firms that can incorporate efficiencies and integrate new products and services into their offerings. All these factors must be weighed when crafting antitrust legislation.