USA

Rules Under Development

There are currently no digital-specific competition laws in the US. Two pieces of pending legislation may change that: the American Innovation and Choice Online Act and the Open App Markets Act. Both bills target so called "self-preferencing" by large digital platforms. As of November 2022, neither bill has passed. Overall, passage seems unlikely at this stage, but cannot be ruled out.

Authored by Bruce Hoffman, Brian Byrne, Elaine Ewing, George Cary and Michael Goldenberg

1. What rules govern competition in digital markets in the US?

There are currently no digital-specific competition laws in the US. Like all firms, digital firms are subject to the Sherman Act (which regulates agreements and single-firm conduct), and the Clayton Act (which primarily regulates mergers), the FTC Act (which largely runs in parallel to the other statutes, though may have a slightly broader reach), and similar state laws. In recent times, case law has expanded in ways that are particularly relevant to digital markets. For example, the Supreme Court in *Ohio v. American Express* held that both sides of a two-sided platform must be taken into account when assessing competitive harm, in certain circumstances.[1]

However, there are at least two relevant pieces of pending legislation—the American Innovation and Choice Online Act ("**AICOA**") and the Open App Markets Act ("**OAMA**"). If passed, the AICOA and OAMA would introduce sweeping changes to the regulation of competition in digital markets in the US, targeting companies such as Google, Apple, Meta, Amazon, Microsoft, and likely TikTok. Various states, including Ohio and New York, have also considered legislation that would either specifically target digital firms, or would likely have significant effects on them.

[1] *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2287 (2018) (*"Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."*).

2. What is the status of any forthcoming digital regulation in the US?

While drafts of the AICOA and OAMA were voted out of committee in a bipartisan manner (through a 16-6 January vote and 20-2 February vote respectively), the bills have since stalled. Senate Majority Leader Chuck Schumer committed to bringing the bills to a vote in summer 2022 if he could gather the support necessary, but was unable to do so.

Despite this setback, the legislations' sponsors claim they have the necessary votes and the White House is planning a post-midterm elections push to get the bills to a vote.[2] If passed, the AICOA would take effect in one year and the OAMA would take effect in 180 days.

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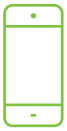
3. How are the rules expected to be enforced?

If passed, the AICOA and OAMA would be enforceable by the FTC, DOJ, and State Attorneys General. As currently drafted, the OAMA would also create private rights of action for developers.[3] All these groups have demonstrated their strong appetite for litigation against large digital platforms. Should either or both bills enter into force, investigations and litigation should be expected.

Injunctive relief would be available under both bills. Further, under the AICOA, enforcers would be able to seek penalties up to 10% of the defendant's global annual turnover.[4] Under the OAMA, app developers could bring private suits for treble damages and State Attorneys General could sue for such damages in the name of developers from their states.[5]

4. Which firms will the rules apply to?

If passed, the OAMA would apply to companies that own app stores with over 50 million US users. The OAMA is intended to regulate iOS and the Apple App Store and Google Play and Android. It would also likely cover the Microsoft Store on Windows.



50 million

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The AICOA would apply to a broader set of "*covered platforms*." In simple terms, these are online services, owned by large companies, that have a significant number of active users or business users. In practice a significant number of popular products and services supplied by companies like Google, Apple, Meta, Amazon, Microsoft, and likely TikTok will qualify as covered platforms.

Covered platforms under the AICOA are defined by reference to the following criteria:

— The product or service must be a website, online or mobile app, operating system, digital assistant, or online service.

— The product or service must (1) allow users to generate, share, or interact with content;

[2] Emily Birnbaum, Bloomberg, Biden Team to Push 'Ambitious' Antitrust Crackdown on Big Tech in Congress (November 4, 2022).

[3] OAMA Sec. 5(b).

[4] AICAO Sec. 3(c)(6)(B).

[5] OAMA Sec. 5(a)(3), (b).

(2) allow users to perform broad searches; or (3) facilitate offering, selling, shipping, or advertising of goods or services between entities not controlled by the platform.

— The product or service must have at least 50,000,000 US monthly active end users *or* at least 100,000 US monthly active business users.

— The product or service must be a "*critical trading partner*" for the sale or provision of any product "*offered on or directly related to*" the platform. In other words, the product or service could be used either to: (1) restrict or impede access of a business user to its end users; or (2) restrict or impede access of a business user to a tool or service it "*needs to effectively serve*" its end users.

— The product or service must be at least 25% owned by a company with (1) a market cap greater than USD 550 billion; (2) US revenue greater than USD 550 billion; *or* (3) greater than 1 billion global monthly active users.

5. What are the main substantive rules that would govern firms covered by the proposed digital regulation?

If passed, the AICOA would broadly prohibit covered platforms from self-preferencing (*i.e.*, preferencing first-party products and services over those of other business users on a covered platform in a manner that materially harms competition).[6]

The AICOA also contains a number of more specific prohibitions:

— **Terms of service discrimination**. Covered platforms cannot discriminate among similarly situated business users in the application or enforcement of their terms of service in a manner that materially harms competition.[7]

— **Interoperability**. Covered platforms cannot materially restrict or impede business users from interoperating with the same features available to first-party products and services that compete with products or services offered by business users on the covered platform.[8]

— **Tying**. Covered platforms cannot condition covered platform access or preferential placement on the use of other first-party products that are not part of or intrinsic to the covered platform.[9]

— **Use of data to compete**. Covered platforms cannot use non-public data generated by business users, or their users, to support first-party products that compete against business users on the covered platform.[10]

— **Data access**. Covered platforms cannot materially impede business users from accessing data generated on the platform by them or their customers' interactions with them.[11]

— **Defaults and uninstallation**. Covered platforms cannot impede platform users from uninstalling preinstalled software or changing default settings that steer users to first-party products.[12]

— **User interface**. Covered platforms cannot treat first-party products more favorably than those of other business users within any

[6] AICOA Sec. 3(a)(1),(2).

[7] AICOA Sec. 3(a)(3).

[8] AICOA Sec. 3(a)(4).

[9] AICOA Sec. 3(a)(5).

[10] AICOA Sec. 3(a)(6).

[11] AICOA Sec. 3(a)(7).

[12] AICOA Sec. 3(a)(8).

platform user interface, including search or ranking functionality. [13]

— **Retaliation**. Covered platforms cannot retaliate against users that raise good faith concerns with law enforcement about legal violations.[14]

The OAMA contains a number of prohibitions specific to covered app stores and operating systems, some of which mirror the AICOA:

— **Obligatory first-party payment systems**. Covered companies cannot condition use of their app stores or operating systems on use of first-party in-app payment systems.

— **Most-favored nation clauses**. Covered companies cannot employ most-favored nation clauses in app store terms of service. In other words, covered app stores would be prevented from prohibiting developers from offering better terms to users on rival app stores.

— **Anti-steering provisions**. Covered companies cannot discriminate against developers that offer different terms of sale for use of third-party payment systems or app stores and cannot restrict developers from communicating legitimate business offers.

— **Use of data to compete**. Covered companies cannot use non-public data from third-party apps to compete against them.[15] This provision is narrower in scope than the AICOA's equivalent prohibition, which prohibits the use of such data entirely in any first-party app that generally competes on the covered platform.

— **Defaults**. Covered companies must provide "*readily accessible means*" for operating system users to choose third-party apps and app stores as defaults.[16] This provision does not prevent covered companies from setting first-party apps as default. Unlike the EU Digital Markets Act, the OAMA does not contain an express requirement to show users default choice screens.

— **"Sideloading"**. Covered companies must provide "*readily accessible means*" for operating system users to install third-party apps and app stores outside of the covered companies' first-party app stores (*i.e.*, to enable so-called "sideloading").[17]

— **Self-preferencing**. Covered companies cannot unreasonably preference first-party or business partners' apps in their app stores.[18]

— **Interoperability**. Covered companies must provide developers access to the same operating system features that are available to first-party products and services, as well as to those that are available to business partners.[19]

6. Are there specific rules governing digital platforms' relationships with publishers?

No. The AICOA and OAMA do not contain specific rules governing digital platforms' relationships with publishers. Senator Amy Klobuchar has introduced a separate bill, the Journalism Competition and Preservation Act, which would give publishers a six year

[13] AICOA Sec. 3(a)(9).

[14] AICOA Sec. 3(a)(19).

[15] OAMA Sec. 3(c).

[16] OAMA Sec. 3(d)(1).

[17] OAMA Sec. 3(d)(2).

[18] OAMA Sec. 3(e)(1).

[19] OAMA Sec. 3(f).

safe-harbor from antitrust law in order to negotiate collectively against covered online platforms.[20]

7. Will the authority need to establish the effects of certain conduct in order to establish a breach of the proposed rules?

If passed, the AICOA's general self-preferencing and terms of service discrimination provisions would require plaintiffs to show "*material harm to competition*." The remaining provisions do not contain affirmative effects requirements, but would not apply if the defendant shows a lack of "*material harm to competition*." In order words, the burden would be shifted from the plaintiff to the defendant for these provisions. As a matter of general antitrust law, harm to competition typically means that prices are rising, output is falling, or innovation or quality is decreasing; it is not sufficient to show that the challenged conduct harms competitors.

The OAMA would not require plaintiffs to establish the effects of challenged conduct.

8. Will firms be able to defend or objectively justify their conduct under the proposed rules?

The AICOA would take into account the overall competitive effect of conduct when determining liability. In particular, the self-preferencing and discrimination provisions require plaintiffs to show "*material harm to competition*."[21] And under the other prohibitions, defendants can avoid liability by showing, by a preponderance of the evidence (>50%), that conduct did not materially harm competition.[22]

The AICOA also provides specific affirmative defenses where a defendant can show that conduct was "*reasonably tailored*," and "*reasonably necessary*" to: (1) prevent a violation of law; (2) protect safety, privacy, or security; or (3) maintain or enhance core platform functionality.[23]

THE AICOA PROVIDES SPECIFIC AFFIRMATIVE DEFENSES WHERE A DEFENDANT CAN SHOW THAT CONDUCT WAS "REASONABLY TAILORED," AND "REASONABLY NECESSARY" TO:

1. **Prevent a violation of law;**
2. **Protect safety, privacy, or security; or**
3. **Maintain or enhance core platform functionality.**

The OAMA contains affirmative defenses, albeit on fairly narrow grounds. In particular, covered companies can defend actions by showing they were necessary to: (1) achieve user privacy, security, or digital safety; (2) prevent spam or fraud; or (3) prevent a violation of, or comply with, Federal or State law.[24] However, the covered company must also show "*by a preponderance of the evidence*" (>50%) that such actions were:

— Applied on a demonstrably consistent basis to the covered platform's apps, its business partners' apps, and other apps;

— Not used as a pretext to exclude, or impose unnecessary or discriminatory terms on, third-party apps, in-app payment systems, or app stores; and

[20] JCPA Sec. 5(b)(1). The JCPA applies to "*covered platforms*." Similar to the AICOA, covered platforms are online platforms with over 50 million US monthly active users that either: (1) are owned by a company with market cap greater than USD 550 billion; or (2) have over 1 billion global monthly active users. JCPA Sec. 2(2).

[21] AICOA Sec. 3(a)(1)-(3).

[22] AICOA Sec. 3(b)(2).

[23] AICOA Sec. 3(b)(1).

[24] OAMA Sec. 4

— Narrowly tailored and could not have been achieved through a less discriminatory and technically possible means.

The OAMA substantially shifts the burden of proof on these issues. Under current doctrine, protecting user privacy or security is considered a permitted procompetitive justification that defendants can avail themselves of. In particular, in antitrust cases, if a defendant takes an action to protect user privacy or security, a plaintiff must demonstrate the existence of a reasonable alternative with substantially smaller competitive effects.[25] By contrast, under the OAMA, if a defendant takes an action to protect user privacy or security, the defendant is still liable unless it can show, by clear and convincing evidence, that no less discriminatory alternative existed.

9. What procedural safeguards would the proposed rules include?

If passed, the AICOA and OAMA would be enforced in the same manner as existing antitrust laws. In particular, both bills could be enforced through the courts, where Defendants would have all the rights available within the American legal system. Further, as is true today, the FTC could bring cases through its internal administrative system.[26] In the FTC's administrative system, claims are initially presided over by an FTC administrative law judge and then must be appealed to the FTC Commission (which decided to bring the claims) before they can be appealed to a Federal appellate court.[27]

Both bills could also be enforced through agency investigations.[28] Specifically, in addition to bringing claims, enforcers could issue broad subpoenas to investigate potential infringements. Responding to such subpoenas can often be quite burdensome.

Separately, when the agencies designate an online service as a covered platform, the owner of that service would have the right to challenge that designation in the DC Circuit within 30 days (whether or not the service was subject to an enforcement action in court).[29]

The agencies would also be tasked with publishing enforcement guidelines within 270 days of passage detailing how they would assess "*material harm to competition*," affirmative defenses, and fines under the Act.[30]

10. What kinds of penalties or remedies will the authority be able to impose following a breach of the proposed rules?

If passed, under the AICOA, enforcers could seek to impose penalties of up to 10% of a covered platform operator's total global annual turnover.[31] To provide further transparency, the Act requires the agencies within 270 days to draft enforcement guidelines detailing how they will assess penalties.[32] Injunctive relief would also be available.

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[25] *Nat'l Collegiate Athletic Ass'n v. Alston,* 141 S. Ct. 2141, 2161 (2021) ("*We agree with the NCAA's premise that antitrust law does not require businesses to use anything like the least restrictive means of achieving legitimate business purposes. To the contrary, courts should not second-guess degrees of reasonable necessity so that the lawfulness of conduct turns upon judgments of degrees of efficiency.*").

[26] AICOA Sec. 3(c)(1)(A); OAMA Sec. 5(a)(2).

[27] There are currently cases pending in the US that challenge the constitutionality of the administrative litigation process used by the FTC and other administrative agencies.

[28] AICOA Sec. 3(c)(1); OAMA Sec. 5(a).

[29] AICOA Sec. 3(d)(3).

[30] AICOA Sec. 4(a).

[31] AICAO Sec. 3(c)(6)(B).

[32] AICOA Sec. 4(a).

10%

UNDER THE AICOA, ENFORCERS WOULD BE ABLE TO SEEK PENALTIES UP TO 10% OF THE DEFENDANT'S GLOBAL ANNUAL TURNOVER.

270 days

TO PROVIDE FURTHER TRANSPARENCY, THE ACT REQUIRES THAT WITHIN 270 DAYS THE AGENCIES DRAFT ENFORCEMENT GUIDELINES DETAILING HOW THEY WILL ASSESS PENALTIES.

Under the OAMA, app developers could bring private suits for treble damages and State Attorneys General could sue for such damages in the name of developers from their states.[33] The OAMA does not include penalty provisions. It would be enforced by the FTC and DOJ in the same manner as the current antitrust laws in the civil context.[34] In short, Federal enforcement would mostly be limited to injunctive relief, though in rare cases the DOJ may also seek equitable monetary remedies (*e.g.*, disgorgement and restitution).[35]

11. Have any guidance or reports been issued regarding the proposed rules?

No, as neither the AICOA nor OAMA have been passed into law. However, the agencies would have to produce enforcement guidelines within 270 days if the legislation is passed.[36]

12. Will the new regime be competition based, or does it target other types of conduct, such as consumer protection, moderation of content, or privacy?

As a general matter, the AICOA and OAMA are competition-based. However, there is debate over whether the AICOA would have second order effects on content moderation by covered platforms (*e.g.*, whether the prohibition on terms of service discrimination against business users would limit the ability of platforms to take down misinformation posted by fringe media outlets).

This debate has become a serious barrier to the bills' passage. Progressives are pushing for amendments to explicitly prevent the AICOA from becoming a tool to punish platforms that moderate politically sensitive speech.[37] However, some Republicans have stated that such an amendment would be a non-starter if they are to support the bill's passage.[38] For the AICOA to become law, it would need sixty votes in the Senate, which requires bipartisan support. Given the debate on content moderation, it is unclear whether such bipartisan support is possible.

[33] OAMA Sec. 5(a)(3), (b).

[34] OAMA Sec. 5(a)(1).

[35] Antitrust Monetary Remedies, Practical Law Practice Note (citing Antitrust Division Manual, Fifth Ed. IV-88-89) (*"The DOJ may seek equitable monetary remedies, including disgorgement and restitution, in civil and criminal matters. Generally, the DOJ only seeks equitable monetary remedies for criminal antitrust violations and in criminal and civil contempt cases, rather than for civil violations."; "The FTC cannot obtain equitable monetary relief or civil penalties under its administrative procedures and, in the past, had brought these cases in a separate action in federal court under Section 13(b) of the FTC Act. However, on April 22, 2021, the Supreme Court held that the FTC does not have the power to seek monetary remedies under Section 13(b) of the FTC Act directly in court."*).

[36] AICOA Sec. 4(a).

[37] Rebecca Klar, The Hill, Four Senate Democrats push Klobuchar to revise antitrust bill over hate speech concerns (June 15, 2022).

[38] Mike Masnick, TechDirt, Republicans Announce That If Content Moderation Is Written Out Of Antitrust Bills, They'll Pull Their Support (June 23, 2022).

13. What is the current enforcement practice with respect to conduct that is expected to be addressed by the digital regulation?

Unlike in other jurisdictions, US agencies have not historically challenged self-preferencing by tech companies. This is likely because self-preferencing, while subject to US antitrust law, would rarely rise to the level that would trigger a potential law violation, for three main reasons. First, under US antitrust law, dominant companies are only required to do business with competitors in specific narrow circumstances, and do not have a general obligation to give competitors the same treatment they give themselves.[39] Second, self-preferencing would only be actionable if engaged in by a monopolist and if it is likely to result in acquiring or maintaining monopoly power. Third, the effects of the self-preferencing would have to result in net harm to consumers, so courts would weigh the benefits of self-preferencing against its harms. This would change under the AICOA and OAMA, and greater enforcement would be expected accordingly.

Generally, however, enforcement of antitrust law in digital markets by the FTC, DOJ, and State Attorneys General has ramped up in recent years. The following cases are currently pending before the courts:

— The FTC is challenging alleged monopolization by Surescripts, the largest provider of digital services for filling pharmaceutical prescriptions and confirming insurance coverage for those prescriptions.

— The FTC is challenging Meta's 2012 acquisition of Instagram and 2014 acquisition of WhatsApp, alleging that the acquisitions allowed Meta to maintain a monopoly in personal social networking services.

— The DOJ is challenging Google's distribution agreements with mobile carriers and Apple, alleging that the agreements are exclusionary and have allowed Google to maintain a monopoly in general search services and search advertising. A coalition of State Attorneys General led by Colorado has joined the DOJ's suit and is also challenging alleged restrictions on certain specialized vertical search providers' access to Google's Search results page.[40]

— A coalition of State Attorneys General led by Texas is challenging practices on Google's ad-exchange that the coalition alleges coerce publishers on the exchange into also using Google's ad-serving tools.

14. Are there merger rules specific to digital platforms in the US?

No. Neither the AICOA nor the OAMA would create new merger rules for digital platforms. A separate piece of legislation pending in Congress, the Platform Competition and Opportunity Act, would substantially limit acquisitions over USD 50 million by Google, Apple, Meta, Amazon, and Microsoft.[41] However, given its lack of progress

[39] Brief for the DOJ as Amicus Curiae, p. 6, *Fed. Trade Comm'n v. Qualcomm Inc.*, 969 F.3d 974 (9th Cir. 2020) (noting that a duty to deal only exists where there is "*1) a unilateral termination of a voluntary and profitable arrangement; 2) a refusal to deal that would be considered irrational, but for anticompetitive malice; and 3) an administrable remedy that does not require a court to delineate the defendant's sharing obligations*.").

[40] Complaint at 61, *Colorado et al vs. Google* D.D.C (Dec. 17, 2020) (*"Google selects particular commercial segments, like local home services, in which it denies specialized search providers the ability to: (a) purchase specialized advertisements in their own name in its specialized-advertising carousel; and/or (b) appear on the Google search results page in the so-called OneBox feature that typically provides a map and associated listings for a specific commercial segment (e.g., a listing of local electricians or hotels).*").

[41] Among other things, the PCOA prohibits reportable acquisitions over USD 50M that would allow a GAFAM to maintain or enhance its market position with respect to a product sold on or related to a covered platform (which covers most GAFAM products). PCOA Sec. 2(b)(3). Functionally, this would prohibit GAFAM from making large acquisitions that could make their products more successful. It is unclear what acquisitions over USD 50 million would not fall into this category.

and the lack of time left in the legislative calendar in the current session, the PCOA is not expected to pass.

$50 million

A SEPARATE PIECE OF LEGISLATION PENDING IN CONGRESS WOULD SUBSTANTIALLY LIMIT ACQUISITIONS OVER USD 50 MILLION BY GOOGLE, APPLE, META/FACEBOOK, AMAZON, AND MICROSOFT.

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