

## If Sen. Klobuchar won't answer these questions, the American Innovation and Choice Online Act (S. 2992) must not advance.

The U.S.'s legislative process is designed to empower the people, not those in positions of authority. Every American has a right to watch the legislative process unfold and be confident that they understand how the actions of legislators will affect their family and their business.

Unfortunately, the sponsors of S. 2992 – *American Innovation and Choice Online Act* – have ignored regular order and skipped straight to the last step – leaving dozens of critical questions unaddressed. Without answering tough questions related to privacy, cybersecurity, competition, and innovation, Senate sponsors will take a victory lap and American families will suffer.

### The Main Questions

- Who is even covered by the bill? Why them and not others? How did the Senate reach this threshold? What justifications are there for what seems to be an arbitrary threshold?
- Why isn't the Consumer Welfare Standard protected in your bill?
- Why does your bill force my private data to be shared with untrusted vendors?
- Is the FTC chair—an unelected, independent bureaucrat—the appropriate person to regulate the U.S. economy?
- Does the 15% penalty apply to all revenue or only U.S. revenue?
- Why is there a private right of action through a “Little Section 5” loophole? Was that intentional?
- If the bill only targets U.S. revenue, isn't it unfairly targeting American businesses, putting innovation and competitiveness at risk?
- Why don't you want a hearing where privacy experts, security professionals, and economists can have an open discussion about the language in your bill?
- What industry do you plan to regulate next?

### Inflation

- Will S. 2992 increase inflation – by restricting American tech companies from adding innovations and discounts that save money and increase choice and convenience for American consumers?
- How many economists were consulted in the drafting of S. 2992 and what issues were they asked to analyze? Did they look at impact of S. 2992 on inflation? If not, why not?
- Did economists analyze S. 2992's impact on prices and American consumers? If not, why not?

## Scope of the Law

- Why these businesses? Is this based on the flawed House Judiciary investigation? Is Microsoft covered?
- How does an agency decide which business to designate first?
- Does S. 2992 pass muster under the current jurisprudence on Bills of Attainder? If the FTC/DOJ selection criterion were to drop from the bill, would the rest of the legislation then be applicable to *all* companies?
- Who is doing the designating? Why do the FTC and DOJ both have authority?
  - Which agency is going to enforce against which company? Will that change over time, as it has over the last decade?
  - Will the FTC be able to bring an administrative action or will it have to go to an Article III court like DOJ?
  - If the FTC can pursue an administrative action, how do you explain the different procedural rules applying to the very limited subset of companies that are targeted by S. 2992?
- Are the guidelines required by bill a formal rule-making? If so, what process is supposed to govern rulemaking?
- Does S. 2992 apply to foreign (Chinese, Russian, and Iranian) businesses whose platforms serve American users? If so, how would it be enforced against foreign entities?
- What is to prevent administrations from leveraging S. 2992 to extract preferential treatments from covered businesses.
- Do Americans understand that S. 2992 would affect not only large tech firms but would also capture Walmart by mid-2023.

## Cybersecurity and Privacy Threats

- S. 2992 makes it illegal if targeted companies are “preventing another business’s product or service from interoperating with the dominant platform.”. But bad actors might exploit a 3rd party program. How many cybersecurity experts were consulted in the drafting of S. 2992 and how many raised privacy and cybersecurity concerns?
  - Interoperating is precisely how the Cambridge Analytica breach affected private data of millions of Facebook users. How do businesses block Chinese, Russian, and Iranian services from exploiting S. 2992?
  - How does S. 2992 interfere with military contracts?
  - If a Chinese business is big enough, how will the government mandate interoperability?
- How does S. 2992 balance forcing transfer of personal information with mandates on recipients to protect against foreign nation attacks on data?
- Does S. 2992 indemnify covered entities for abuses of data resulting from compliance with S. 2992? If not, why not? If there are no privacy or security concerns arising from S. 2992 what is the harm in adding such language?

## Impact on Americans

- Under S. 2992, the FTC is empowered to control business practices at firms with several trillion dollars of market value. In practical terms, that means the agency can affect the retirement accounts of tens of millions of Americans.
  - What protections exist to ensure these investments aren't negatively impacted on an academic whim or for political purposes?
  - Doesn't it seem problematic that the chair of a single agency could, under S. 2992, affect the livelihoods of so many Americans?
  - Is that power appropriate for an independent agency whose leadership is unelected and thus not directly accountable to the American people?

## Harming Amazon Prime

- From Klobuchar-Grassley release, S. 2992 makes it illegal for Google, Amazon, Apple, or Facebook to be “biasing search results in favor of the dominant firm,” and would “prevent self-preferencing and discriminatory conduct by the most economically significant online platforms “
  - Are the sponsors guaranteeing S. 2992 will not have any impact Amazon prime shipping?
  - If S. 2992 does have impact on Amazon prime shipping, what protections exist in S. 2992 to provide immediate remedy to covered businesses?

## Copyright Concerns

- Will S. 2992 limit that ability of platforms to remove copyrighted and patented content?
- Will S. 2992 result in more fake goods being sold?
- Were any intellectual property attorneys consulted in drafting of S. 2992? Were intellectual property holders consulted in the drafting of S. 2992?
- If so, who were consulted and what was their analysis?

## Due Process/Agency Independence

- Although the FTC is ostensibly an “independent” agency, the Biden administration has gone out of its way to rope the agency into its larger antitrust agenda. Given the close connection between the White House and the agency—and future White Houses:
  - How does S. 2992 protect private businesses from falling prey to political pressure?
  - What legal guardrails does the bill impose on the FTC to ensure it doesn't abuse its discretion in designating private businesses as falling within the bill's scope?
  - How does the bill prevent competitors from using or trying to use the FTC to intervene on their behalf?