

Calendar No. 275

117TH CONGRESS 2D SESSION

S. 2710

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

IN THE SENATE OF THE UNITED STATES

August 11 (legislative day, August 10), 2021

Mr. Blumenthal (for himself, Mrs. Blackburn, Ms. Klobuchar, Mr. Rubio, Ms. Lummis, Mr. Booker, Mr. Graham, Mr. Kennedy, Ms. Hirono, Mr. Hawley, and Mr. Durbin) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

February 17, 2022

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

- 1 Be it enacted by the Senate and House of Representa-
- 2 tives of the United States of America in Congress assembled,
- 3 **SECTION 1. SHORT TITLE.**
- 4 This Act may be cited as the "Open App Markets
- 5 Act".

SEC 2 DEFINITIONS

1	SEC. 2. DEFINITIONS.
2	In this Act:
3	(1) APP.—The term "App" means a software
4	application or electronic service that may be run or
5	directed by a user on a computer, a mobile device,
6	or any other general purpose computing device.
7	(2) APP STORE.—The term "App Store" means
8	a publicly available website, software application, or
9	other electronic service that distributes Apps from
10	third-party developers to users of a computer, a mo-
11	bile device, or any other general purpose computing
12	device.
13	(3) COVERED COMPANY.—The term "Covered
14	Company" means any person that owns or controls
15	an App Store for which users in the United States
16	exceed 50,000,000.
17	(4) DEVELOPER.—The term "developer" means
18	a person that owns or controls an App or an App
19	Store.
20	(5) IN-APP PAYMENT SYSTEM.—The term "In-
21	App Payment System" means an application, serv-
22	ice, or user interface to process the payments from
23	users of an App.
24	(6) Non-public business information.—
25	The term "non-public business information" means

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non-public data that is—

1	(A) derived from a developer or an App or
2	App Store owned or controlled by a developer,
3	including interactions between users and the
4	App or App Store of the developer; and
5	(B) collected by a Covered Company in the
6	course of operating an App Store or providing
7	an operating system.
8	SEC. 3. PROTECTING A COMPETITIVE APP MARKET.
9	(a) Exclusivity and Tying.—A Covered Company
10	shall not—
11	(1) require developers to use an In-App Pay-
12	ment System owned or controlled by the Covered
13	Company or any of its business partners as a condi-
14	tion of being distributed on an App Store or acces-
15	sible on an operating system;
16	(2) require as a term of distribution on an App
17	Store that pricing terms or conditions of sale be
18	equal to or more favorable on its App Store than the
19	terms or conditions under another App Store; or
20	(3) take punitive action or otherwise impose
21	less favorable terms and conditions against a devel-
22	oper for using or offering different pricing terms or
23	conditions of sale through another In-App Payment
24	System or on another App Store.

1	(b) Interference With Legitimate Business
2	COMMUNICATIONS.—A Covered Company shall not impose
3	restrictions on communications of developers with the
4	users of the App through an App or direct outreach to
5	a user concerning legitimate business offers, such as pric-
6	ing terms and product or service offerings.
7	(e) Non-Public Business Information.—A Cov-
8	ered Company shall not use non-public business informa-
9	tion derived from a third-party App for the purpose of
10	competing with that App.
11	(d) Interoperability.—A Covered Company that
12	controls the operating system or operating system configu-
13	ration on which its App Store operates shall allow and pro-
14	vide the readily accessible means for users of that oper-
15	ating system to—
16	(1) choose third-party Apps or App Stores as
17	defaults for eategories appropriate to the App or
18	App Store;
19	(2) install third-party Apps or App Stores
20	through means other than its App Store; and
21	(3) hide or delete Apps or App Stores provided
22	or preinstalled by the App Store owner or any of its
23	business partners.
24	(e) Self-Preferencing in Search.—

1	(1) In General.—A Covered Company shall
2	not provide unequal treatment of Apps in an App
3	Store through unreasonably preferencing or ranking
4	the Apps of the Covered Company or any of its busi-
5	ness partners over those of other Apps.
6	(2) Considerations.—Unreasonably
7	preferencing—
8	(A) includes applying ranking schemes or
9	algorithms that prioritize Apps based on a cri-
10	terion of ownership interest by the Covered
11	Company or its business partners; and
12	(B) does not include clearly disclosed ad-
13	vertising.
14	(f) Open App Development.—Access to operating
15	system interfaces, development information, and hardware
16	and software features shall be provided to developers on
17	a timely basis and on terms that are equivalent or func-
18	tionally-equivalent to the terms for access by similar Apps
19	or functions provided by the Covered Company or to its
20	business partners.
21	SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF
22	USERS.
23	(a) In General.—Subject to section (b), a Covered
24	Company shall not be in violation of a subsection of sec-
25	tion 3 for an action that is—

1	(1) necessary to achieve user privacy, security,
2	or digital safety;
3	(2) taken to prevent spam or fraud; or
4	(3) taken to prevent a violation of, or comply
5	with, Federal or State law.
6	(b) REQUIREMENTS.—Section (a) shall only apply if
7	the Covered Company establishes by clear and convincing
8	evidence that the action described is—
9	(1) applied on a demonstrably consistent basis
10	to Apps of the Covered Company or its business
11	partners and to other Apps;
12	(2) not used as a pretext to exclude, or impose
13	unnecessary or discriminatory terms on, third-party
14	Apps, In-App Payment Systems, or App Stores; and
15	(3) narrowly tailored and could not be achieved
16	through a less discriminatory and technically pos-
17	sible means.
18	SEC. 5. ENFORCEMENT.
19	(a) Enforcement.—
20	(1) In General.—The Federal Trade Commis-
21	sion, the Attorney General, and any attorney general
22	of a State subject to the requirements in paragraph
23	(4) shall enforce this Act in the same manner, by
24	the same means, and with the same jurisdiction,
25	powers, and duties as though all applicable terms

- and provisions of the Federal Trade Commission Act

 (15 U.S.C. 41 et seq.) or the Clayton Act (15 U.S.C.

 12 et seq.), as appropriate, were incorporated into

 and made a part of this Act.
 - (2) Unfair Methods of competition.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 5).
 - (3) FEDERAL TRADE COMMISSION INDEPENDENT LITIGATION AUTHORITY.—If the Federal Trade Commission has reason to believe that a Covered Company violated this Act, the Federal Trade Commission may commence a civil action, in its own name by any of its attorneys designated by it for such purpose, to recover a civil penalty and seek other appropriate relief in a district court of the United States against the covered platform operator.
 - (4) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.
- 25 (b) Suits by Developers Injured.—

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(1) In General.—Any developer who shall be injured by reason of anything forbidden in this Act may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this subsection, pursuant to a motion by such developer promptly made, simple interest on actual damages for the period beginning on the date of service of such developer's pleading setting forth a claim under this Act and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this subsection for any period is just in the circumstances, the court shall consider only—

(A) whether such developer or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(B) whether, in the course of the action involved, such developer or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(C) whether such developer or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

(2) INJUNCTIVE RELIEF.—Any developer shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. In any action under this paragraph in which the plaintiff substantially

- 1 prevails, the court shall award the cost of suit, in-
- 2 eluding a reasonable attorney's fee, to such plaintiff.

3 SEC. 6. RULE OF CONSTRUCTION.

- 4 Nothing in this Act shall be construed to limit any
- 5 authority of the Attorney General or the Federal Trade
- 6 Commission under the antitrust laws (as defined in the
- 7 first section of the Clayton Act (15 U.S.C. 12)), the Fed-
- 8 eral Trade Commission Act (15 U.S.C. 41 et seq.), or any
- 9 other provision of law or to limit the application of any
- 10 law.

11 SEC. 7. SEVERABILITY.

- 12 If any provision of this Act, or the application of such
- 13 a provision to any person or circumstance, is held to be
- 14 unconstitutional, the remaining provisions of this Act, and
- 15 the application of the provision held to be unconstitutional
- 16 to any other person or circumstance, shall not be affected
- 17 thereby.
- 18 SECTION 1. SHORT TITLE.
- 19 This Act may be cited as the "Open App Markets Act".
- 20 SEC. 2. DEFINITIONS.
- 21 In this Act:
- 22 (1) APP.—The term "app" means a software ap-
- 23 plication or electronic service that may be run or di-
- 24 rected by a user on a computer, a mobile device, or
- 25 any other general purpose computing device.

1	(2) APP STORE.—The term "app store" means a
2	publicly available website, software application, or
3	other electronic service that distributes apps from
4	third-party developers to users of a computer, a mo-
5	bile device, or any other general purpose computing
6	device.
7	(3) Covered company.—The term "covered
8	company" means any person that owns or controls an
9	app store for which users in the United States exceed
10	50,000,000.
11	(4) Developer.—The term "developer" means a
12	person that owns or controls an app or an app store.
13	(5) IN-APP PAYMENT SYSTEM.—The term "in-
14	app payment system" means an application, service,
15	or user interface to manage billing or process the pay-
16	ments from users of an app.
17	(6) Nonpublic business information.—The
18	term "nonpublic business information" means non-
19	public data that is—
20	(A) derived from a developer or an app or
21	app store owned or controlled by a developer, in-
22	cluding interactions between users and the app

or app store of the developer; and

1	(B) collected by a covered company in the
2	course of operating an app store or providing an
3	operating system.
4	SEC. 3. PROTECTING A COMPETITIVE APP MARKET.
5	(a) Exclusivity and Tying.—A covered company
6	shall not—
7	(1) require developers to use or enable an in-app
8	payment system owned or controlled by the covered
9	company or any of its business partners as a condi-
10	tion of the distribution of an app on an app store or
11	accessible on an operating system;
12	(2) require as a term of distribution on an app
13	store that pricing terms or conditions of sale be equal
14	to or more favorable on its app store than the terms
15	or conditions under another app store; or
16	(3) take punitive action or otherwise impose less
17	favorable terms and conditions against a developer for
18	using or offering different pricing terms or conditions
19	of sale through another in-app payment system or on
20	another app store.
21	(b) Interference With Legitimate Business
22	Communications.—A covered company shall not impose
23	restrictions on communications of developers with the users
24	of an app of the developer through the app or direct out-
25	reach to a user concerning legitimate business offers, such

1 as pricing terms and product or service offerings. Nothing

2	in this subsection shall prohibit a covered company from
3	providing a user the option to offer consent prior to the
4	collection and sharing of the data of the user by an app
5	(c) Nonpublic Business Information.—A covered
6	company shall not use nonpublic business information de
7	rived from a third-party app for the purpose of competing
8	with that app.
9	(d) Interoperability.—A covered company that con
10	trols the operating system or operating system configura
11	tion on which its app store operates shall allow and provide
12	readily accessible means for users of that operating system
13	to—
14	(1) choose third-party apps or app stores as de
14 15	(1) choose third-party apps or app stores as de faults for categories appropriate to the app or app
15	
	faults for categories appropriate to the app or app
15 16	faults for categories appropriate to the app or app store;
15 16 17	faults for categories appropriate to the app or app store; (2) install third-party apps or app stores
15 16 17 18	faults for categories appropriate to the app or app store; (2) install third-party apps or app store; through means other than its app store; and
15 16 17 18 19 20	faults for categories appropriate to the app or app store; (2) install third-party apps or app stores through means other than its app store; and (3) hide or delete apps or app stores provided on
15 16 17 18	faults for categories appropriate to the app or app store; (2) install third-party apps or app stores through means other than its app store; and (3) hide or delete apps or app stores provided or preinstalled by the app store owner or any of its busi
15 16 17 18 19 20 21	faults for categories appropriate to the app or app store; (2) install third-party apps or app store: through means other than its app store; and (3) hide or delete apps or app stores provided or preinstalled by the app store owner or any of its busi ness partners.
15 16 17 18 19 20 21	faults for categories appropriate to the app or app store; (2) install third-party apps or app store: through means other than its app store; and (3) hide or delete apps or app stores provided or preinstalled by the app store owner or any of its busi ness partners. (e) SELF-PREFERENCING IN SEARCH.—

1	apps of the covered company or any of its business
2	partners over those of other apps in organic search re-
3	sults.
4	(2) Considerations.—Unreasonably
5	preferencing—
6	(A) includes applying ranking schemes or
7	algorithms that prioritize apps based on a cri-
8	terion of ownership interest by the covered com-
9	pany or its business partners; and
10	(B) does not include clearly disclosed adver-
11	tising.
12	(f) Open App Development.—A covered company
13	shall provide access to operating system interfaces, develop-
14	ment information, and hardware and software features to
15	developers on a timely basis and on terms that are equiva-
16	lent or functionally equivalent to the terms for access by
17	similar apps or functions provided by the covered company
18	or to its business partners.
19	SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF
20	USERS.
21	(a) In General.—
22	(1) No violation.—Subject to section (b), a cov-
23	ered company shall not be in violation of section 3 for
24	an action that is—

1	(A) necessary to achieve user privacy, secu-
2	rity, or digital safety;
3	(B) taken to prevent spam or fraud;
4	(C) necessary to prevent unlawful infringe-
5	ment of preexisting intellectual property; or
6	(D) taken to prevent a violation of, or com-
7	ply with, Federal or State law.
8	(2) Privacy and Security Protections.—In
9	paragraph (1), the term "necessary to achieve user
10	privacy, security, or digital safety" includes—
11	(A) allowing an end user to opt in, and
12	providing information regarding the reasonable
13	risks, prior to enabling installation of the third-
14	party apps or app stores;
15	(B) removing malicious or fraudulent apps
16	or app stores from an end user device;
17	(C) providing an end user with the tech-
18	nical means to verify the authenticity and origin
19	of third-party apps or app stores; and
20	(D) providing an end user with option to
21	limit the collection sharing of the data of the
22	user with third-party apps or app stores.
23	(b) Requirements.—Subsection (a) shall only apply
24	if the covered company establishes by a preponderance of
25	the evidence that the action described in that subsection is—

1	(1) applied on a demonstrably consistent basis
2	to—
3	(A) apps of the covered company or its busi-
4	ness partners; and
5	(B) other apps;
6	(2) not used as a pretext to exclude, or impose
7	unnecessary or discriminatory terms on, third-party
8	apps, in-app payment systems, or app stores; and
9	(3) narrowly tailored and could not be achieved
10	through a less discriminatory and technically possible
11	means.
12	SEC. 5. ENFORCEMENT.
13	(a) Enforcement.—
14	(1) In General.—The Federal Trade Commis-
15	sion, the Attorney General, and any attorney general
16	of a State subject to the requirements in paragraph
17	(3) shall enforce this Act in the same manner, by the
18	same means, and with the same jurisdiction, powers,
19	and duties as though all applicable terms and provi-
20	sions of the Federal Trade Commission Act (15
21	U.S.C. 41 et seq.), the Sherman Act (15 U.S.C. 1 et
22	seq.), the Clayton Act (15 U.S.C. 12 et seq.), and
23	Antitrust Civil Process Act (15 U.S.C. 1311 et seq.),
24	as appropriate, were incorporated into and made a
25	part of this Act.

- (2) Federal trade commission independent Litigation authority.—If the Federal Trade Commission has reason to believe that a covered company violated this Act, the Federal Trade Commission may commence a civil action, in its own name by any of its attorneys designated by it for such purpose, to recover a civil penalty and seek other appropriate relief in a district court of the United States against the covered company.
 - (3) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(b) Suits by Developers Injured.—

(1) In General.—Except as provided in paragraph (3), any developer injured by reason of anything forbidden in this Act may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by the developer sustained and the cost of suit, including a rea-

sonable attorney's fee. The court may award under this paragraph, pursuant to a motion by such developer promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the developer setting forth a claim under this Act and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this paragraph for any period is just in the circumstances, the court shall consider only—

- (A) whether the developer or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay or otherwise acted in bad faith;
- (B) whether, in the course of the action involved, the developer or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

- 1 (C) whether the developer or the opposing 2 party, or either party's representative, engaged 3 in conduct primarily for the purpose of delaying 4 the litigation or increasing the cost thereof.
 - (2) Injunctive relief.—Except as provided in paragraph (3), any developer shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue. In any action under this paragraph in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.
 - (3) Foreign state-owned enterprises.—A developer of an app that is owned by, or under the control of, a foreign state may not bring an action under this subsection.

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1 SEC. 6. REPORTING.

2	Not later than 3 years after the date of enactment of
3	this Act, the Federal Trade Commission, the Comptroller
4	General of the United States, and the Antitrust Division
5	of the Department of Justice shall each separately review
6	and provide an in-depth analysis of the impact of this Act
7	on competition, innovation, barriers to entry, and con-
8	centrations of market power or market share after the date
9	of enactment of this Act.
10	SEC. 7. RULE OF CONSTRUCTION.
11	Nothing in this Act may be construed—
12	(1) to limit—
13	(A) any authority of the Attorney General
14	or the Federal Trade Commission under the
15	antitrust laws (as defined in the first section of
16	the Clayton Act (15 U.S.C. 12), the Federal
17	Trade Commission Act (15 U.S.C. 41 et seq.), or
18	any other provision of law; or
19	(B) the application of any law;
20	(2) to require—
21	(A) a covered company to provide service
22	under a hardware or software warranty for
23	damage caused by third-party apps or app stores
24	installed through means other than the app store
25	of the covered company; or

- 1 (B) customer service for the installation or 2 operation of third-party apps or app stores de-3 scribed in subparagraph (A);
 - (3) to prevent an action taken by a covered company that is reasonably tailored to protect the rights of third parties under section 106, 1101, 1201, or 1401 of title 17, United States Code, or rights actionable under sections 32 or 43 of the Act entitled "An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes", approved July 5, 1946 (commonly known as the "Lanham Act" or the "Trademark Act of 1946") (15 U.S.C. 1114, 1125), or corollary State law;
 - (4) to require a covered company to license any intellectual property, including any trade secrets, owned by or licensed to the covered company;
 - (5) to prevent a covered company from asserting preexisting rights of the covered company under intellectual property law to prevent the unlawful use of any intellectual property owned by or duly licensed to the covered company; or
 - (6) to require a covered company to interoperate or share data with persons or business users that—

1	(A) are on any list maintained by the Fed-				
2	eral Government by which entities are identified				
3	as limited or prohibited from engaging in eco-				
4	nomic transactions as part of United States				
5	sanctions or export control regimes; or				
6	(B) have been identified by the Federal Gov-				
7	ernment as national security, intelligence, or law				
8	enforcement risks.				
9	SEC. 8. SEVERABILITY.				
10	If any provision of this Act, or the application of such				
11	a provision to any person or circumstance, is held to be				
12	unconstitutional, the remaining provisions of this Act, and				

15 SEC. 9. EFFECTIVE DATE.

14 cumstance shall not be affected thereby.

16 This Act shall take effect on the date that is 180 days 17 after the date of enactment of this Act.

13 the application of such provisions to any person or cir-

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117TH CONGRESS S. 2710

A BILL

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

February 17, 2022
Reported with an amendment