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S. 225

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

Ms. KLOBUCHAR (for herself, Mr. BLUMENTHAL, Mr. BOOKER, Mr. MARKEY, and Mr. SCHATZ) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the ''Competition and Antitrust Law Enforcement Reform Act of 2021''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) competitive markets, in which multiple firms compete to buy and sell products and services, are critical to ensuring economic opportunity for all people in the United States and providing resilience to the economy during unpredictable times;

(2) when companies compete, businesses offer the highest quality and choice of goods and services for the lowest possible prices to consumers and other businesses;

(3) competition fosters small business growth, reduces economic inequality, and spurs innovation and job creation;

(4) in the United States economy today, the presence and exercise of market power is substantial and growing;

(5) the presence and exercise of market power makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality, with particularly damaging effects on historically disadvantaged communities;

(6) market power and undue market concentration contribute to the consolidation of political power, undermining the health of democracy in the United States;

(7) the anticompetitive effects of monopoly power or buyer market power include higher prices, lower quality, lessened choice, reduced innovation, foreclosure of competitors, and increased entry barriers;

(8) monopsony power or seller market power allows a firm to force suppliers of goods or services to accept below market prices or to force workers to accept below market wages, resulting in lower quality products and services, reduced opportunities for suppliers and workers, reduced availability of products and services for consumers, reduced innovation, foreclosure of competitors, and increased entry barriers;

(9) horizontal consolidation, vertical consolidation, and conglomerate mergers all have potential to increase market power and cause anticompetitive harm;

(10) extensive consolidation is reducing competition and threatens to place the American dream further out of reach for many consumers in the United States;

(11) since 2008, firms in the United States have engaged in over $10,000,000,000,000 in mergers and acquisitions;

(12) the acquisition of nascent or potential rivals by dominant firms can present significant long-term threats to competition and innovation;

(13) the acquisition, by one of its competitors, of a maverick firm that plays a disruptive role in the market—by using an innovative business model or technology, offering lower prices or new, different products or services products, or by other means that benefit consumers—can present a threat to competition;

(14) section 7 of the Clayton Act (15 U.S.C. 18), is the primary line of defense against anti-competitive mergers;

(15) in recent years, some court decisions and enforcement policies have limited the vitality of the Clayton Act to prevent harmful consolidation by—

(A) discounting previously accepted presumptions that certain acquisitions are anti-competitive;

(B) focusing inordinately on the effect of an acquisition on price in the short term, to the

exclusion of other potential anticompetitive effects;

(C) underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create buyer power, including monopsony power; and

(D) requiring the government to prove harmful effects of a proposed merger to a near certainty;

(16) anticompetitive exclusionary conduct constitutes a particularly harmful exercise of market power and a substantial threat to the United States economy;

(17) when dominant sellers exercise market power, they harm buyers by overcharging them, reducing product or service quality, limiting their choices, and impairing innovation;

(18) when dominant buyers exercise market power, they harm suppliers by underpaying them, limiting their business opportunities, and impairing innovation;

(19) when dominant employers exercise market power, they harm workers by paying them low

wages, reducing their benefits, and limiting their future employment opportunities;

(20) nascent or potential rivals—even those that are unprofitable or inefficient—can be an important source of competitive discipline for dominant firms;

(21) antitrust enforcement against anticompetitive exclusionary conduct has been impeded when courts have declined to rigorously examine the facts in favor of relying on inaccurate economic assumptions that are inconsistent with contemporary economic learning, such as presuming that market power is not durable and can be expected to self-correct, that monopolies can drive as much or more innovation than a competitive market, that above-cost pricing cannot harm competition, and other flawed assumptions;

(22) the courts of the United States have improperly implied immunity from the antitrust laws based on Federal regulatory statutes, even limiting the application of statutory antitrust savings clauses passed by Congress;

(23) the civil remedies currently available to cure violations of the Sherman Antitrust Act, including injunctions, equitable monetary relief, and pri-

vate damages, have not proven sufficient, on their own, to deter anticompetitive conduct;

(24) in some cases, effective deterrence requires the imposition of civil penalties, alone or in combination with existing remedies, including structural relief, behavioral relief, private damages, and equitable monetary relief, including disgorgement and restitution; and

(25) Federal antitrust enforcement budgets have failed to keep pace with the growth of the economy and increasing demands on agency resources, significantly undermining the ability of the Federal antitrust agencies to fulfill their law enforcement missions and contributing to the rise of market power in the American economy.

(b) PURPOSES.—The purposes of this Act are to—

(1) enhance competition throughout the American economy by strengthening antitrust enforcement by the Department of Justice, the Federal Trade Commission, the State enforcement agencies, and private parties;

(2) revise the legal standard under section 7 of the Clayton Act to better enable enforcers to arrest the likely anticompetitive effects of harmful mergers in their incipiency, as Congress intended, by clari-

fying that the potential effects that may justify prohibiting a merger under the Clayton Act include lower quality, reduced choice, reduced innovation, the exclusion of competitors, or increased entry barriers, in addition to increased price to buyers or reduced price to sellers;

(3) amend the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the Clayton Act;

(4) establish simple, cost-effective decision rules that require the parties to certain acquisitions that either significantly increase concentration or are extremely large bear the burden of establishing that the acquisition will not materially harm competition;

(5) prohibit and deter exclusionary conduct that harms competition, particularly by dominant firms;

(6) enable the Department of Justice and the Federal Trade Commission to seek civil monetary penalties, in addition to existing remedies, for violations of the Sherman Act;

(7) give the Department of Justice and the Federal Trade Commission additional financial resources and enforcement tools to craft remedies for individual violations that are effective to deter future

unlawful conduct and proportionate to the gravity of the violation;

(8) provide further protections for those who provide evidence of anticompetitive conduct to government enforcers and potential financial rewards for whistleblowers who provide information to the government that leads to a criminal fine; and

(9) grant successful antitrust plaintiffs the right to obtain prejudgment interest on damages awards to further deter anticompetitive conduct and more fully compensate injured parties.

SEC. 3. DEFINITION.

In this Act the term ''antitrust laws''—

(1) has the meaning given the term in the first section of the Clayton Act (15 U.S.C. 12); and

(2) includes—

(A) section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition; and

(B) this Act and the amendments made by this Act.

SEC. 4. UNLAWFUL ACQUISITIONS.

(a) MARKET POWER.—Section 1(a) of the Clayton Act (15 U.S.C. 12(a)) is amended by adding at the end the following:

''the term 'market power' in this Act means the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.''.

(b) UNLAWFUL ACQUISITIONS.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended—

(1) in the first and second undesignated paragraphs, by striking ''substantially to lessen'' each place that term appears and inserting ''to create an appreciable risk of materially lessening'';

(2) by inserting ''or a monopsony'' after ''monopoly'' each place that term appears; and

(3) by adding at the end the following:

''In a case brought by the United States, the Federal Trade Commission, or a State attorney general, a court shall determine that the effect of an acquisition described

in this section may be to create an appreciable risk of materially lessening competition or to tend to create a monopoly or a monopsony, in or affecting commerce, if—

''(1) the acquisition would lead to a significant increase in market concentration in any relevant market;

''(2)(A) the acquiring person has a market share of greater than 50 percent or otherwise has significant market power, as a seller or a buyer, in any relevant market, and as a result of the acquisition, the acquiring person would obtain control over entities or assets that compete or have a reasonable probability of competing with the acquiring person in the same relevant market; or

''(B) as a result of the acquisition, the acquiring person would obtain control over entities or assets that have a market share of greater than 50 percent or otherwise have significant market power, as a seller or a buyer, in any relevant market, and the acquiring person competes or has a reasonable probability of competing with the entities or assets over which it would obtain control, as result of the acquisition, in the same relevant market;

''(3) the acquisition would lead to the combination of entities or assets that compete or have a rea-

sonable probability of competing in a relevant market, and either the acquiring person or the entities or assets over which it would obtain control prevents, limits, or disrupts coordinated interaction among competitors in a relevant market or has a reasonable probability of doing so;

''(4) the acquisition—

''(A) would likely enable the acquiring person to unilaterally and profitably exercise market power or materially increase its ability to do so; or

''(B) would materially increase the probability of coordinated interaction among competitors in any relevant market; or

''(5)(A) the acquisition is not a transaction that is described in section 7A(c); and

''(B)(i) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2022, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal

year compared to the gross national product for the year ending September 30, 2021); or

''(ii)(I) the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 (as so adjusted and published); and

''(II) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000 (as so adjusted and published),

unless the acquiring or acquired person establish, by a preponderance of the evidence, that the effect of the acquisition will not be to create an appreciable risk of materially lessening competition or tend to create a monopoly or a monopsony. In this paragraph, the term 'materially' means more than a de minimis amount.''.

SEC. 5. POST-SETTLEMENT DATA.

Section 7A of the Clayton Act (15 U.S.C. 18a) is amended by adding at the end the following:

''(l)(1) Each person who enters into an agreement with the Federal Trade Commission or the United States to resolve a proceeding brought under the antitrust laws or under the Federal Trade Commission Act (15 U.S.C.

41 et seq.) regarding an acquisition with respect to which notification is required under this section shall, on an annual basis during the 5-year period beginning on the date on which the agreement is entered into, submit to the Federal Trade Commission or the Assistant Attorney General, as applicable, information sufficient for the Federal Trade Commission or the United States, as applicable, to assess the competitive impact of the acquisition, including—

''(A) the pricing, availability, and quality of any product or service, or inputs thereto, in any market, that was covered by the agreement;

''(B) the source, and the resulting magnitude and extent, of any cost-saving efficiencies or any benefits to consumers or trading partners that were claimed as a benefit of the acquisition and the extent to which any cost savings were passed on to consumers or trading partners; and

''(C) the effectiveness of any divestitures or any conditions placed on the acquisition in fully restoring competition.

''(2) The requirement to provide the information described in paragraph (1) shall be included in an agreement described in that paragraph.

''(3) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, by rule in ac-

cordance with section 553 of title 5, United States Code, and consistent with the purposes of this section—

''(A) shall require that the information described in paragraph (1) be in such form and contain such documentary material and information relevant to an acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to assess the competitive impact of the acquisition under paragraph (1); and

''(B) may—

''(i) define the terms used in this subsection;

''(ii) exempt, from the requirements of this section, information not relevant in assessing the competitive impact of the acquisition under paragraph (1); and

''(iii) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.''.

SEC. 6. FEDERAL TRADE COMMISSION STUDY.

Not later than 2 years after the date of enactment of this Act, the Federal Trade Commission, in consultation with the Securities and Exchange Commission, shall conduct and publish a study, using any compulsory proc-

ess necessary, relying on public data and information if available and sufficient, and incorporating public comment on—

(1) the extent to which an institutional investor or related institutional investors have ownership or control interests in competitors in moderately concentrated or concentrated markets;

(2) the economic impacts of such overlapping ownership or control; and

(3) the mechanisms by which an institutional investor could affect competition among the companies in which it invests and whether such mechanisms are prevalent.

SEC. 7. GAO STUDIES.

(a) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall—

(1) conduct a study to assess the success of merger remedies required by the Department of Justice or the Federal Trade Commission in consent decrees entered into since 6 years prior to the date of enactment of this Act, including the impact on maintaining competition, a comparison of structural and conduct remedies, and the viability of divested assets; and

(2) conduct a study on the impact of mergers and acquisitions on wages, employment, innovation, and new business formation.

(b) UPDATE.—The Comptroller General of the United States shall—

(1) update the study under paragraph (1) 3 years and 6 years after the date of enactment of this Act based on the information provided under section 7A(l) of the Clayton Act, as added by section 5 of this Act; and

(2) identify specific remedies or alleged merger benefits that require additional information or research.

SEC. 8. OFFICE OF COMPETITION ADVOCATE.

(a) DEFINITIONS.—In this section—

(1) the term ''agency'' has the meaning given the term in section 551 of title 5, United States Code;

(2) the term ''covered company'' means any company that has, at any time, been required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a);

(3) the term ''Office'' means the Office of the Competition Advocate established under subsection (b);

(4) the term ''Chairman'' means the Chairman of the Commission; and

(5) the term ''Commission'' means the Federal Trade Commission.

(b) ESTABLISHMENT.—There is established within the Federal Trade Commission the Office of the Competition Advocate.

(c) COMPETITION ADVOCATE.—

(1) IN GENERAL.—The head of the Office shall be the Competition Advocate, who shall—

(A) report directly to the Chairman; and

(B) be appointed by the Chairman, with the concurrence of a majority of the Commission, including at least 1 Commissioner who is not a member of the same political party of the majority members of the Commission, from among individuals having experience in advocating for the promotion of competition.

(2) COMPENSATION.—The annual rate of pay for the Competition Advocate shall be equal to the highest rate of annual pay for other senior executives who report to the Chairman of the Commission.

(3) LIMITATION ON SERVICE.—An individual who serves as the Competition Advocate may not be employed by the Commission—

(A) during the 2-year period ending on the date of appointment as Competition Advocate; or

(B) during the 5-year period beginning on the date on which the person ceases to serve as the Competition Advocate.

(d) STAFF OF OFFICE.—The Competition Advocate, after consultation with the Chairman of the Commission, shall retain or employ independent counsel, research staff, and service staff, as the Competition Advocate determines is necessary to carry out the functions, powers, and duties of the Office.

(e) DUTIES AND POWERS.—The Competition Advocate shall—

(1) recommend processes or procedures that will allow the Federal Trade Commission and the Antitrust Division of the Department of Justice to improve the ability of each agency to solicit reports from consumers, small businesses, and employees about possible anticompetitive practices or adverse effects of concentration;

(2) publicly provide recommendations to other Federal agencies about administrative actions that may have anticompetitive effects and the potential harm to competition if those actions are carried out;

(3) provide recommendations to other Federal agencies about administrative actions that may have procompetitive effects and the potential benefit to competition if those actions are carried out;

(4) publish periodic reports on—

(A) market competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups; and

(B) the success of remedies required by the Department of Justice or the Federal Trade Commission in consent decrees;

(5) collect data regarding concentration levels across industries and the impact and degree of antitrust enforcement; and

(6) standardize the types and formats of data reported and collected.

(f) SUBPOENA AUTHORITY.—

(1) IN GENERAL.—The Competition Advocate may either require the submission of or accept voluntary submissions of periodic and other reports

from any covered company for the purpose of assessing competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups.

(2) WRITTEN FINDING.—Before issuing a subpoena to collect the information described in paragraph (1), the Competition Advocate shall make a written finding that—

(A) the data is required to carry out the functions of the Competition Advocate; and

(B) the information is not available from a public source or another agency.

(3) MITIGATION OF REPORT BURDEN.—Before requiring the submission of a report from any company required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a), the Competition Advocate shall—

(A) coordinate with other agencies or authority; and

(B) whenever possible, rely on information available from such agencies or authority.

(g) DATA CENTER.—

(1) ESTABLISHMENT.—There is established within the Office the Data Center.

(2) DUTIES.—The Data Center shall—

(A) collect, validate, and maintain data obtained from agencies, as defined in section 551 of title 5, United States Code, commercial data providers, publicly available data sources, and any covered company; and

(B) prepare and publish, in a manner that is easily accessible to the public—

(i) a concentration database;

(ii) a merger enforcement database;

(iii) any other database that the Competition Advocate determines is necessary to carry out the duties of the Office; and

(iv) the format and standards for Office data, including standards for reporting financial transaction and position data to the Office.

(3) REGULATIONS.—The Competition Advocate shall promulgate regulations relating to the collection and standardizing of data under paragraph (2).

(4) CONFIDENTIALITY.—

(A) IN GENERAL.—The Data Center may not disclose any confidential data collected under paragraph (2).

(B) REQUIREMENTS.—Data obtained from an agency shall be subject to the same confiden-

tiality requirements and protection as the agency providing the data.

(C) INFORMATION SECURITY.—The Competition Advocate shall ensure that data collected and maintained by the Data Center are kept secure and protected against unauthorized disclosure.

(h) DIVISION OF MARKET ANALYSIS.—

(1) ESTABLISHMENT.—There is established within the Office the Division of Market Analysis.

(2) LEADERSHIP.—The head of the Division of Market Analysis shall be the Director of Market Analysis, who shall—

(A) report directly to the Competition Advocate; and

(B) be appointed by the Competition Advocate, with the concurrence of a majority of the Commission, including at least one Commissioner who is not a member of the same political party of the majority members of the Commission.

(3) DIVISION STAFF.—The Division of Market Analysis shall retain or employ independent legal, economic, research, and service staff sufficient to

carry out the functions, powers, and duties of the Division.

(4) DUTIES AND POWERS.—The Division of Market Analysis—

(A) shall, at the direction of the Competition Advocate or the Commission, conduct investigations of markets or industry sectors to analyze the competitive conditions and dynamics affecting such markets or industry sectors, including the effects that market concentration, mergers and acquisitions, certain types of agreements, and other forms of business conduct have on competition, consumers, workers and innovation, and shall publish reports on the results of such investigations;

(B) shall, at the direction of the Competition Advocate or the Commission, conduct investigations concerning the competitive effects of acquisitions that have been consummated no less than 2 years prior to the start of the investigation, which shall include recommendations concerning appropriate enforcement action to remedy any anticompetitive effects discovered and may include assessments of—

(i) the conditions of the relevant markets affected by the acquisition, over the period since the acquisition was consummated, including, but not limited to, the potential impact that the acquisition has had on—

(I) the prices of goods or services, including wages in any affected labor markets;

(II) the output and quality of goods and services;

(III) the entry or exit of competitors;

(IV) innovation;

(V) consumer choice and product variety;

(VI) the opportunity of suppliers and works to sell their product or services;

(VII) coordinated interaction between competitors; and

(VIII) subsequent mergers and acquisitions activity;

(ii) whether the acquiring person or its successors in interest—

(I) complied with all obligations under any agreement with the Federal Trade Commission, the United States, or State law enforcement authorities to resolve a proceeding brought under the antitrust laws; and

(II) achieved measurable, transaction-specific efficiencies, which did not arise from anticompetitive reductions of output, as a result of the acquisition; and

(iii) whether any agreements with the Federal Trade Commission or the United States to resolve a proceeding brought under the antitrust laws regarding the acquisition was effective in mitigating the anticompetitive effects from the acquisition;

(C) shall rely on public data and information, public comment, information from other Federal agencies, information from the Data Center, information obtained pursuant to the Competition Advocate's subpoena authority under subsection (f) of this section and may use compulsory process under section 6(b) of the

Federal Trade Commission Act (15 U.S.C. 46(b)) as necessary to carry out the functions set forth in subsections (h)(3)(A) and (h)(3)(B) of this section; and

(D) shall report any evidence it obtains that any person, partnership, or corporation has engaged in transactions or conduct that may constitute of a violation of the antitrust law to the Commission, which may institute further investigation, initiate enforcement proceedings, or refer such evidence to the Attorney General.

SEC. 9. EXCLUSIONARY CONDUCT.

(a) IN GENERAL.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 26 (15 U.S.C. 26a) the following:

"SEC. 26A. EXCLUSIONARY CONDUCT.

''(a) DEFINITIONS.—In this section:

''(1) EXCLUSIONARY CONDUCT.—

''(A) IN GENERAL.—The term 'exclusionary conduct' means conduct that—

''(i) materially disadvantages 1 or more actual or potential competitors; or

''(ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete.

''(B) LIMITATIONS.—

''(i) Applying for or enforcing a patent, trademark, or copyright, unless such applications or enforcement actions are baseless or made in bad faith or in violation of a legal obligation, shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

''(ii) Conduct that is necessary to comply with Federal or State law shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

''(2) MARKET POWER.—The term 'market power' means the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing

them than what the person or group of persons could obtain in a competitive market.

''(b) VIOLATION.—

''(1) IN GENERAL.—It shall be unlawful for a person, acting alone or in concert with other persons, to engage in exclusionary conduct that presents an appreciable risk of harming competition.

''(2) UNFAIR METHOD OF COMPETITION.—A violation of paragraph (1) shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

''(c) PRESUMPTION.—

''(1) IN GENERAL.—Except as provided in paragraph (2), exclusionary conduct shall be presumed to present an appreciable risk of harming competition and shall be a violation of subsection (b)(1) if the exclusionary conduct is undertaken, with respect to a relevant market, by a person or by a group of more than 1 person acting in concert that—

''(A) has a market share of greater than 50 percent as a seller or a buyer in the relevant market; or

''(B) otherwise has significant market power in the relevant market.

''(2) EXCEPTION.—Paragraph (1) shall not apply if the defendant establishes, by a preponderance of the evidence, that—

''(A) distinct procompetitive benefits of the exclusionary conduct in the relevant market eliminate the risk of harming competition presented by the exclusionary conduct;

''(B) 1 or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market with the effect of eliminating the risk of harming competition posed by the exclusionary conduct; or

''(C) the exclusionary conduct does not present an appreciable risk of harming competition.

''(d) CONSIDERATIONS.—If the presumption in subsection (c) does not apply, the determination of whether exclusionary conduct presents an appreciable risk of harming competition shall be based on the totality of the circumstances, which may include consideration of—

''(1) the extent to which any distinct procompetitive benefits of the exclusionary conduct substantially eliminate the risk of harming competition presented by the exclusionary conduct; and

''(2) whether 1 or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market, substantially eliminating the risk of harming competition presented by the exclusionary conduct.

''(e) LIMITATIONS.—Although the following circumstances may constitute evidence of a violation of subsection (b)(1), such violation does not require finding—

''(1) that the unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;

''(2) that the defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;

''(3) that any price of the defendant for a product or service was below any measure of the costs to the defendant of providing the product or service;

''(4) that a defendant with significant market power in a relevant market has recouped or is likely to recoup the losses it incurred or incurs from below-cost pricing for products or services in the relevant market;

''(5) that the conduct of the defendant makes no economic sense apart from its tendency to harm competition;

''(6) that the risk of harming competition presented by the conduct of the defendant or any resulting actual harm to competition have been quantified or proven with quantitative evidence; or

''(7) that when a defendant operates a multi-sided platform business, the conduct of the defendant presents an appreciable risk of harming competition on more than 1 side of the multi-sided platform.

''(f) CIVIL PENALTIES.—Any person who violates subsection (b)(1) shall be liable to the United States for a civil penalty, which may be recovered in a civil action brought by the Attorney General of the United States, of not more than the greater of—

''(1) 15 percent of the total United States revenues of the person for the previous calendar year; or

''(2) 30 percent of the United States revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct.''.

(b) FEDERAL TRADE COMMISSION ACT.—

(1) CIVIL PENALTIES.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

''(p) CIVIL PENALTY FOR VIOLATION OF SECTION 26A OF THE CLAYTON ACT.—The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation who violates subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 26A of the Clayton Act to recover a civil penalty, which shall accrue to the United States, in an amount not more than the greater of—

''(1) 15 percent of the total United States revenues of the person, partnership, or corporation for the previous calendar year; or

''(2) 30 percent of the United States revenues of the person, partnership, or corporation in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct.''.

(2) COMMISSION LITIGATION AUTHORITY.—Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(A) in subparagraph (D), by striking ''or'' after the semicolon;

(B) in subparagraph (E)—

(i) by moving the margins 2 ems to the left; and

(ii) by inserting ''or'' after the semicolon; and

(C) by inserting after subparagraph (E) the following:

''(F) to recover civil penalties under section 5(p) of this Act;''.

(c) ENFORCEMENT GUIDELINES.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines outlining policies, practices, and analytical techniques relating to agency enforcement under section 26A of the Clayton Act, as added by section 4 of this Act, with the goal of promoting transparency and deterring violations of section 26A of the Clayton Act.

(2) UPDATES.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(3) PUBLIC NOTICE AND COMMENT.—

(A) GUIDELINES.—Before issuing guidelines under subsection (c)(1) or (c)(2), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.

(B) INAPPLICABILITY OF RULEMAKING PROVISIONS.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under this section.

SEC. 10. CIVIL PENALTIES FOR SHERMAN ACT VIOLATIONS.

(a) CIVIL PENALTY AMENDMENTS.—

(1) SECTION 1 OF THE SHERMAN ACT.—Section 1 of the Sherman Antitrust Act (15 U.S.C. 1) is amended—

(A) by striking ''Every'' and inserting ''(a) Every''; and

(B) by adding at the end the following

''(b)(1) Every person who violates this section shall be liable to the United States for a civil penalty of not more than the greater of—

''(A) 15 percent of the total United States revenues of the person for the previous calendar year; or

''(B) 30 percent of the United States revenues of the person in any part of the trade or commerce related to or targeted by the unlawful conduct under this section during the period of the unlawful conduct.

''(2) A civil penalty under this section may be recovered in a civil action brought by the United States.''.

(2) SECTION 2 OF THE SHERMAN ACT.—Section 2 of the Sherman Antitrust Act (15 U.S.C. 2) is amended—

(A) by striking ''Every'' and inserting ''(a) Every''; and

(B) by adding at the end the following

''(b)(1) Every person who violates this section shall be liable to the United States for a civil penalty of not more than the greater of—

''(A) 15 percent of the total United States revenues of the person for the previous calendar year; or

''(B) 30 percent of the United States revenues of the person in any part of the trade or commerce related to or targeted by the unlawful conduct under this section during the period of the unlawful conduct.

''(2) A civil penalty under this section may be recovered in a civil action brought by the United States.''.

(3) FEDERAL TRADE COMMISSION ACT.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

''(o)(1) The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation for a violation of subsection (a)(1) respecting an unfair method of competition that constitutes a violation of sections 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) and to recover a civil penalty for such violation.

''(2) In an action under paragraph (1), any person, partnership, or corporation found to have violated subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) shall be liable for a civil penalty of not more than the greater of—

''(A) 15 percent of the total United States revenues of the person, partnership, or corporation for the previous calendar year; or

''(B) 30 percent of the United States revenues of the person, partnership, or corporation in any line of commerce related to or targeted by the unlawful conduct described in paragraph (1) during the period of the unlawful conduct.''.

(b) RULE OF CONSTRUCTION.—

(1) CIVIL PENALTIES.—The civil penalties provided in subsection (b) of section 1 of the Sherman Act (15 U.S.C. 1), subsection (b) of section 2 of the Sherman Act (15 U.S.C. 2), and subsection (o) of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as added by subsection (a) of this section, are in addition to, and not in lieu of, any other remedy provided by Federal law, including under—

(A) section 4 or 16 of the Clayton Act (15 U.S.C. 15, 26); or

(B) section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(2) AUTHORITIES.—Nothing in this paragraph may be construed to affect any authority of the Attorney General or the Federal Trade Commission under any other provision of law.

SEC. 11. JOINT CIVIL PENALTY GUIDELINES.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines reflecting agency policies for determining the appropriate amount of a civil penalty to be sought under sections 1(b) and 2(b) of the Sherman Act (15 U.S.C. 1, 2), section 26A(f) of the Clayton Act, and sections 5(o) and 5(p) of

the Federal Trade Commission Act (15 U.S.C. 45), as added by of this Act, with the goal of promoting transparency and crafting remedies for individual violations that are effective in deterring future unlawful conduct and proportionate to the gravity of the violation.

(b) CONSIDERATIONS.—In establishing the guidelines described in subsection (a), the Attorney General and the Federal Trade Commission shall consider the relevant factors to be used for calculating an appropriate civil penalty for a particular violation, including—

(1) the volume of commerce affected;

(2) the duration and severity of the unlawful conduct;

(3) the intent of the person undertaking the unlawful conduct;

(4) the extent to which the unlawful conduct was egregious or a clear violation of the law;

(5) whether the civil penalty is to be applied in combination with other remedies, including—

(A) structural remedies, behavioral conditions, or equitable disgorgement; or

(B) other remedies available under section 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b));

(6) whether the person has previously engaged in the same or similar anticompetitive conduct; and

(7) whether the person undertook the conduct in violation of a preexisting consent decree or court order.

(c) UPDATES.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(d) PUBLIC NOTICE AND COMMENT.—

(1) GUIDELINES.—Before issuing guidelines under subsection (a) or subsection (c), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.

(2) INAPPLICABILITY OF RULEMAKING PROVISIONS.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under this section.

SEC. 12. FEDERAL TRADE COMMISSION LITIGATION AUTHORITY.

Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(1) in subparagraph (D), by striking ''or'' at the end;

(2) in subparagraph (E)—

(A) by moving the margins 2 ems to the left; and

(B) by striking the semicolon and inserting ''; or''; and

(3) by inserting after subparagraph (E) the following:

''(F) to recover civil penalties under section 5(o) of this Act;''.

SEC. 13. MARKET DEFINITION.

(a) IN GENERAL.—Establishing liability under the antitrust laws does not require the definition of a relevant market, except when the definition of a relevant market is required, to establish a presumption or to resolve a claim, under a statutory provision that explicitly references the terms ''relevant market'', ''market concentration'', or ''market share''. Statutory references to the term ''line of commerce'' shall not constitute an exception to the foregoing rule that establishing liability under the

antitrust laws does not require the definition of a relevant market.

(b) DIRECT EVIDENCE.—If direct evidence in the record is sufficient to prove actual or likely harm to competition, an appreciable risk to competition sufficient to satisfy the applicable statutory standard, or that the effect of an acquisition subject to section 7 of the Clayton Act (15 U.S.C. 18) may be to create an appreciable risk of materially lessening competition or to tend to create a monopoly or a monopsony, neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws.

(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed to prevent a court or the Federal Trade Commission from considering evidence relating to the definition of proposed relevant markets to evaluate the merits of a claim under the antitrust laws.

SEC. 14. LIMITATIONS ON IMPLIED IMMUNITY FROM THE ANTITRUST LAWS.

(a) IN GENERAL.—In any action or proceeding to enforce the antitrust laws with respect to conduct that is regulated under Federal statute, no court or adjudicatory body may find that the Federal statute, or any rule or

regulation promulgated in accordance with the Federal statute, implicitly precludes application of the antitrust laws to the conduct unless—

(1) a Federal agency or department actively regulates the conduct under the Federal statute;

(2) the Federal statute does not include any provision preserving the rights, claims, or remedies under the applicable antitrust laws or under any area of law that includes the antitrust laws; and

(3) Federal agency or department rules or regulations, adopted by rulemaking or adjudication, explicitly require or authorize the defendant to undertake the conduct.

(b) EXISTING FEDERAL REGULATION.—In any action or proceeding described in subsection (a), the antitrust laws shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments, unless application of the antitrust laws is precluded or limited by—

(1) an explicit exemption from the antitrust laws under a Federal statute; or

(2) an implied immunity that satisfies the requirements under subsection (a).

SEC. 15. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal year 2022—

(1) $484,500,000 for the Antitrust Division of the Department of Justice; and

(2) $651,000,000 for the Federal Trade Commission.

SEC. 16. WHISTLEBLOWER PROTECTIONS.

(a) PROTECTIONS FOR CIVIL WHISTLEBLOWERS.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 27 (15 U.S.C. 26b) the following:

"SEC. 27A. ANTI-RETALIATION PROTECTION FOR CIVIL WHISTLEBLOWERS.

"(a) WHISTLEBLOWER PROTECTIONS FOR EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, AND AGENTS.—

"(1) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against a covered individual in the terms and conditions of employment of the covered individual because of any lawful act done by the covered individual—

"(A) to provide or cause to be provided to the Federal Government or a person with supervisory authority over the covered individual (or such other person working for the employer who has the authority to investigate, discover,

or terminate misconduct) information relating to any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the applicable antitrust laws; or

''(B) to cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the applicable antitrust laws.

''(2) LIMITATION ON PROTECTIONS.—Paragraph (1) shall not apply to any covered individual if—

''(A) the covered individual planned and initiated a violation or attempted violation of the applicable antitrust laws;

''(B) the covered individual planned and initiated a violation or attempted violation of a criminal law in conjunction with a violation or attempted violation of the applicable antitrust laws; or

''(C) the covered individual planned and initiated an obstruction or attempted obstruc-

tion of an investigation by the Federal Government of a violation of the applicable antitrust laws.

''(3) DEFINITIONS.—In this section:

''(A) APPLICABLE ANTITRUST LAWS.—The term 'applicable antitrust laws' means section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, and 3) or section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition.

''(B) COVERED INDIVIDUAL.—The term 'covered individual' means an employee, contractor, subcontractor, or agent of an employer.

''(C) EMPLOYER.—The term 'employer' means a person, or any officer, employee, contractor, subcontractor, or agent of such person.

''(D) FEDERAL GOVERNMENT.—The term 'Federal Government' means—

''(i) a Federal regulatory or law enforcement agency; or

''(ii) any Member of Congress or committee of Congress.

''(E) PERSON.—The term 'person' has the same meaning as in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

''(b) ENFORCEMENT ACTION.—

''(1) IN GENERAL.—A covered individual who alleges discharge or other discrimination by any employer in violation of subsection (a) may seek relief under subsection (c) by—

''(A) filing a complaint with the Secretary of Labor; or

''(B) if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

''(2) PROCEDURE.—

''(A) IN GENERAL.—A complaint filed with the Secretary of Labor under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to any individual named in the complaint and to the employer.

"(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

"(D) STATUTE OF LIMITATIONS.—A complaint under paragraph (1)(A) shall be filed with the Secretary of Labor not later than 180 days after the date on which the violation of this section occurs.

"(E) CIVIL ACTIONS TO ENFORCE.—If a person fails to comply with an order or preliminary order issued by the Secretary of Labor pursuant to the procedures set forth in section 42121(b) of title 49, United States Code, the Secretary of Labor or the person on whose behalf the order was issued may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

"(c) REMEDIES.—

''(1) IN GENERAL.—A covered individual prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the covered individual whole.

''(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

''(A) reinstatement with the same seniority status that the covered individual would have had, but for the discrimination;

''(B) the amount of back pay, with interest; and

''(C) compensation for any special damages sustained as a result of the discrimination including litigation costs, expert witness fees, and reasonable attorney's fees.

''(d) RIGHTS RETAINED BY WHISTLEBLOWERS.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any covered individual under any Federal or State law, or under any collective bargaining agreement.''.

(b) WHISTLEBLOWER REWARD.—The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (15 U.S.C. 1 note) is amended by inserting after section 216 the following:

"SEC. 217. CRIMINAL ANTITRUST WHISTLEBLOWER INCENTIVES.

"(a) DEFINITIONS.—In this section the following definitions shall apply:

"(1) ANTITRUST LAWS.—The term 'antitrust laws' means section 1 or 3 of the Sherman Act (15 U.S.C. 1 and 3).

"(2) COVERED ENFORCEMENT ACTION.—The term 'covered enforcement action' means any criminal action brought by the Attorney General under the antitrust laws that results in criminal fines exceeding $1,000,000.

"(3) ORIGINAL INFORMATION.—The term 'original information' means information that—

"(A) is derived from the independent knowledge or analysis of a whistleblower;

"(B) is not known to the Attorney General or the Department of Justice from any other source, unless the whistleblower is the original source of the information; and

"(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

''(4) WHISTLEBLOWER.—The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the antitrust laws to the Department of Justice, in a manner established by the Department of Justice.

''(b) AWARDS.—

''(1) IN GENERAL.—In a covered enforcement action, the Attorney General, subject to subsection (c), may pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Department of Justice that led to the successful enforcement of the covered enforcement action, in an amount equal to not more than 30 percent, in total, of what has been collected of the criminal fine imposed in the covered enforcement action under the antitrust laws.

''(2) PAYMENT.—Any amount paid under paragraph (1) shall be paid from the criminal fine collected in the covered enforcement action.

''(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

''(1) DETERMINATION OF AMOUNT OF AWARD.—

''(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Attorney General.

''(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Attorney General shall take into consideration—

''(i) the significance of the information provided by the whistleblower to the success of the covered enforcement action;

''(ii) the degree of assistance and cooperation provided by the whistleblower in a covered enforcement action;

''(iii) the interest of the Department of Justice in deterring criminal violations of the antitrust laws by making awards to whistleblowers who provide information that lead to the successful covered enforcement actions; and

''(iv) such additional relevant factors as the Attorney General may establish.

''(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

"(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

"(i) any branch, agency, or instrumentality of the Federal Government; or

"(ii) any law enforcement organization;

"(B) to any whistleblower who is convicted of a criminal violation related to the covered enforcement action for which the whistleblower otherwise could receive an award under this section;

"(C) to any whistleblower who was an originator or leader of or who coerced any other party to participate in the activity giving rise to liability under the antitrust laws in the covered enforcement action for which the whistleblower otherwise could receive an award under this section;

"(D) to any whistleblower who fails to respond fully and truthfully to all inquiries of the Department of Justice relating to the original information or intentionally withholds information relating to the original information;

''(E) to any whistleblower who commits, participates in, or attempts to commit or participate in any crimes after disclosing the original information to the Department of Justice; or

''(F) to any whistleblower who fails to submit information to the Department of Justice in such form as the Department may require.

''(d) REPRESENTATION.—

''(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

''(2) REQUIRED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

''(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

''(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Attorney

General or the Department of Justice may require, directly or through counsel for the whistleblower.

''(e) APPEALS.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Attorney General. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Attorney General. The court shall review the determination made by the Attorney General in accordance with section 706 of title 5.''.

SEC. 17. PREJUDGMENT INTEREST.

Section 4 of the Clayton Act (15 U.S.C. 15) is amended by striking subsection (a) and inserting the following:

''(a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws 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, the cost

of suit, including a reasonable attorney's fee, and simple interest on threefold the damages by him sustained for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment.''.

SEC. 18. ADDITIONAL REMEDIES; RULES OF CONSTRUCTION.

(a) ADDITIONAL REMEDIES.—The rights and remedies provided under this Act are in addition to, not in lieu of, any other rights and remedies provided by Federal law, including under section 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(b) RULES OF CONSTRUCTION.—Nothing in this Act may be construed to—

(1) impair or limit the applicability of any of the antitrust laws; and

(2) prohibit any other remedy provided by Federal law.

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