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S. 2992

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

IN THE SENATE OF THE UNITED STATES

OCTOBER 18, 2021

Ms. KLOBUCHAR (for herself, Mr. GRASSLEY, Mr. DURBIN, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. KENNEDY, Mr. BOOKER, Ms. LUMMIS, Ms. HIRONO, Mr. WARNER, Mr. HAWLEY, and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

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 “American Innovation
5 and Choice Online Act”.

6 **SEC. 2. UNLAWFUL CONDUCT.**

7 (a) VIOLATION.—It shall be unlawful for a person op-
8 erating a covered platform, in or affecting commerce, if

1 it is shown, by a preponderance of the evidence, that the
2 person has engaged in conduct that would—

3 (1) unfairly preference the covered platform op-
4 erator's own products, services, or lines of business
5 over those of another business user on the covered
6 platform in a manner that would materially harm
7 competition on the covered platform;

8 (2) unfairly limit the ability of another business
9 user's products, services, or lines of business to com-
10 pete on the covered platform relative to the covered
11 platform operator's own products, services, or lines
12 of business in a manner that would materially harm
13 competition on the covered platform; or

14 (3) discriminate in the application or enforce-
15 ment of the covered platform's terms of service
16 among similarly situated business users in a manner
17 that may materially harm competition on the cov-
18 ered platform.

19 (b) UNLAWFUL CONDUCT.—It shall be unlawful for
20 a person operating a covered platform, in or affecting com-
21 merce, if it is shown, by a preponderance of the evidence,
22 that the person has engaged in conduct that would—

23 (1) materially restrict or impede the capacity of
24 a business user to access or interoperate with the
25 same platform, operating system, hardware or soft-

1 ware features that are available to the covered plat-
2 form operator's own products, services, or lines of
3 business that compete or would compete with prod-
4 ucts or services offered by business users on the cov-
5 ered platform;

6 (2) condition access to the covered platform or
7 preferred status or placement on the covered plat-
8 form on the purchase or use of other products or
9 services offered by the covered platform operator
10 that are not part of or intrinsic to the covered plat-
11 form itself;

12 (3) use non-public data that are obtained from
13 or generated on the covered platform by the activi-
14 ties of a business user or by the interaction of a cov-
15 ered platform user with the products or services of
16 a business user to offer, or support the offering of,
17 the covered platform operator's own products or
18 services that compete or would compete with prod-
19 ucts or services offered by business users on the cov-
20 ered platform;

21 (4) materially restrict or impede a business user
22 from accessing data generated on the covered plat-
23 form by the activities of the business user, or
24 through an interaction of a covered platform user
25 with the business user's products or services, such as

1 by establishing contractual or technical restrictions
2 that prevent the portability of the business user's
3 data by the business user to other systems or appli-
4 cations;

5 (5) unless necessary for the security or func-
6 tioning of the covered platform, materially restrict or
7 impede covered platform users from un-installing
8 software applications that have been preinstalled on
9 the covered platform or changing default settings
10 that direct or steer covered platform users to prod-
11 ucts or services offered by the covered platform op-
12 erator;

13 (6) in connection with any covered platform
14 user interface, including search or ranking
15 functionality offered by the covered platform, treat
16 the covered platform operator's own products, serv-
17 ices, or lines of business more favorably relative to
18 those of another business user than they would be
19 treated under standards mandating the neutral, fair,
20 and non-discriminatory treatment of all business
21 users; or

22 (7) retaliate against any business user or cov-
23 ered platform user that raises concerns with any law
24 enforcement authority about actual or potential vio-
25 lations of State or Federal law.

1 (c) RULE OF CONSTRUCTION.—Subsections (a) and
 2 (b) shall not be construed to require a covered platform
 3 operator to divulge, license, or otherwise grant the use of
 4 the covered platform operator’s intellectual property, trade
 5 or business secrets, or other confidential proprietary busi-
 6 ness processes to a business user.

7 (d) AFFIRMATIVE DEFENSES.—

8 (1) IN GENERAL.—Subsection (a) shall not
 9 apply if the defendant establishes by a preponder-
 10 ance of the evidence that the conduct described in
 11 subsections (a) was narrowly tailored, was
 12 nonpretextual, and was necessary to—

13 (A) prevent a violation of, or comply with,
 14 Federal or State law;

15 (B) protect safety, user privacy, the secu-
 16 rity of non-public data, or the security of the
 17 covered platform; or

18 (C) maintain or enhance the core
 19 functionality of the covered platform.

20 (2) UNLAWFUL CONDUCT.—Subsection (b) shall
 21 not apply if the defendant establishes by a prepon-
 22 derance of the evidence that the conduct described
 23 in subsection (b)—

24 (A) has not resulted in and would not re-
 25 sult in material harm to the competitive process

1 by restricting or impeding legitimate activity by
 2 business users; or

3 (B) was narrowly tailored, could not be
 4 achieved through less discriminatory means,
 5 was nonpretextual, and was necessary to—

6 (i) prevent a violation of, or comply
 7 with, Federal or State law;

8 (ii) protect safety, user privacy, the
 9 security of non-public data, or the security
 10 of the covered platform; or

11 (iii) maintain or enhance the core
 12 functionality of the covered platform.

13 (e) COVERED PLATFORM DESIGNATION.—The Fed-
 14 eral Trade Commission and Department of Justice may
 15 jointly, with concurrence of the other, designate a covered
 16 platform for the purpose of implementing and enforcing
 17 this Act. Such designation shall—

18 (1) be based on a finding that the criteria set
 19 forth in clauses (i) through (iii) of subsection (h)(4)
 20 are met;

21 (2) be issued in writing and published in the
 22 Federal Register; and

23 (3) apply for 7 years from its issuance regard-
 24 less of whether there is a change in control or own-
 25 ership over the covered platform unless the Commis-

1 sion or the Department of Justice removes the des-
 2 ignation under subsection (f).

3 (f) REMOVAL OF COVERED PLATFORM DESIGNA-
 4 TION.—The Commission or the Department of Justice
 5 shall—

6 (1) consider whether its designation of a cov-
 7 ered platform under subsection (e) should be re-
 8 moved prior to the expiration of the 7-year period if
 9 the covered platform operator files a request with
 10 the Commission or the Department of Justice, which
 11 shows that the online platform no longer meets the
 12 criteria set forth in clauses (i) through (iii) of sub-
 13 section (h)(4);

14 (2) determine whether to grant a request sub-
 15 mitted under paragraph 1 not later than 120 days
 16 after the date of the filing of such request; and

17 (3) obtain the concurrence of the Commission
 18 or the Department of Justice, as appropriate, before
 19 granting a request submitted under paragraph (1).

20 (g) REMEDIES.—The remedies provided in this sub-
 21 section are in addition to, and not in lieu of, any other
 22 remedy available under Federal or State law.

23 (1) CIVIL PENALTY.—Any person who is found
 24 to have violated subsections (a) or (b) shall be liable
 25 to the United States or the Commission for a civil

1 penalty, which shall accrue to the United States
 2 Treasury, in an amount not more than 15 percent
 3 of the total United States revenue of the person for
 4 the period of time the violation occurred.

5 (2) INJUNCTIONS.—The Assistant Attorney
 6 General of the Antitrust Division, the Commission,
 7 or the attorney general of any State may seek, and
 8 the court may order, relief in equity as necessary to
 9 prevent, restrain, or prohibit violations of this Act.

10 (3) REPEAT OFFENDERS.—If the fact finder
 11 determines that a person has engaged in a pattern
 12 or practice of violating this Act, the court shall con-
 13 sider requiring, and may order, that the Chief Exec-
 14 utive Officer, and any other corporate officer as ap-
 15 propriate to deter violations of this Act, forfeit to
 16 the United States Treasury any compensation re-
 17 ceived by that person during the 12 months pre-
 18 ceding or following the filing of a complaint for an
 19 alleged violation of this Act.

20 (h) DEFINITIONS.—In this section:

21 (1) ANTITRUST LAWS.—The term “antitrust
 22 laws” has the meaning given the term in subsection
 23 (a) of section 1 of the Clayton Act (15 U.S.C. 12).

24 (2) BUSINESS USER.—The term “Business
 25 User” means a person that utilizes or is likely to

utilize the covered platform for the sale or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered platform operator.

(3) COMMISSION.—The term “Commission” means the Federal Trade Commission.

(4) COVERED PLATFORM.—The term “covered platform” means an online platform—

(A) that has been designated as a covered platform under section 2(e); or

(B) that—

(i) at any point during the 12 months preceding a designation under section 2(e) or at any point during the 12 months preceding the filing of a complaint for an alleged violation of this Act—

(I) has at least 50,000,000 United States-based monthly active users on the online platform; or

(II) has at least 100,000 United States-based monthly active business users on the online platform;

(ii) at any point during the 2 years preceding a designation under section 2(e) or at any point during the 2 years pre-

1 ceding the filing of a complaint for an al-
2 leged violation of this Act, is owned or con-
3 trolled by a person with United States net
4 annual sales or a market capitalization
5 greater than \$550,000,000,000, adjusted
6 for inflation on the basis of the Consumer
7 Price Index; and

8 (iii) is a critical trading partner for
9 the sale or provision of any product or
10 service offered on or directly related to the
11 online platform.

12 (5) CRITICAL TRADING PARTNER.—The term
13 “critical trading partner” means a person that has
14 the ability to restrict or materially impede the access
15 of—

16 (A) a business user to its users or cus-
17 tomers; or

18 (B) a business user to a tool or service
19 that it needs to effectively serve its users or
20 customers.

21 (6) PERSON.—The term “person” has the
22 meaning given the term in subsection (a) of section
23 1 of the Clayton Act (15 U.S.C. 12).

24 (7) DATA.—

1 (A) IN GENERAL.—Not later than 6
2 months after the date of enactment of this Act,
3 the Commission shall adopt rules in accordance
4 with section 553 of title 5, United States Code,
5 to define the term “data” for the purpose of
6 implementing and enforcing this Act.

7 (B) DATA.—The term “data” shall include
8 information that is collected by or provided to
9 a covered platform or business user that is
10 linked, or reasonably linkable, to a specific—

11 (i) user or customer of the covered
12 platform; or

13 (ii) user or customer of a business
14 user.

15 (8) ONLINE PLATFORM.—The term “online
16 platform” means a website, online or mobile applica-
17 tion, operating system, digital assistant, or online
18 service that—

19 (A) enables a user to generate content that
20 can be viewed by other users on the platform or
21 to interact with other content on the platform;

22 (B) facilitates the offering, sale, purchase,
23 payment, or shipping of products or services,
24 including software applications, between and

1 among consumers or businesses not controlled
2 by the platform operator; or

3 (C) enables user searches or queries that
4 access or display a large volume of information.

5 (9) CONTROL.—The term “control” with re-
6 spect to a person means—

7 (A) holding 25 percent or more of the
8 stock of the person;

9 (B) having the right to 25 percent or more
10 of the profits of the person;

11 (C) having the right to 25 percent or more
12 of the assets of the person, in the event of the
13 person’s dissolution;

14 (D) if the person is a corporation, having
15 the power to designate 25 percent or more of
16 the directors of the person;

17 (E) if the person is a trust, having the
18 power to designate 25 percent or more of the
19 trustees; or

20 (F) otherwise exercises substantial control
21 over the person.

22 (10) STATE.—The term “State” means a State,
23 the District of Columbia, the Commonwealth of
24 Puerto Rico, and any other territory or possession of
25 the United States.

1 (i) ENFORCEMENT.—

2 (1) IN GENERAL.—Except as otherwise pro-
3 vided in this Act—

4 (A) the Commission shall enforce this Act
5 in the same manner, by the same means, and
6 with the same jurisdiction, powers, and duties
7 as though all applicable terms of the Federal
8 Trade Commission Act (15 U.S.C. 41 et seq.)
9 were incorporated into and made a part of this
10 Act;

11 (B) the Attorney General shall enforce this
12 Act in the same manner, by the same means,
13 and with the same jurisdiction, powers and du-
14 ties as though all applicable terms of the Sher-
15 man Act (15 U.S.C. 1 et seq.), Clayton Act (15
16 U.S.C. 12 et seq.), and Antitrust Civil Process
17 Act (15 U.S.C. 1311 et seq.) were incorporated
18 into and made a part of this Act; and

19 (C) any attorney general of a State shall
20 enforce this Act in the same manner, by the
21 same means, and with the same jurisdiction,
22 powers and duties as though all applicable
23 terms of the Sherman Act (15 U.S.C. 1 et seq.)
24 and the Clayton Act (15 U.S.C. 12 et seq.)

1 were incorporated into and made a part of this
2 Act.

3 (2) UNFAIR METHODS OF COMPETITION.—A
4 violation of this Act shall also constitute an unfair
5 method of competition under section 5 of the Fed-
6 eral Trade Commission Act (15 U.S.C. 45).

7 (3) COMMISSION INDEPENDENT LITIGATION AU-
8 THORITY.—If the Commission has reason to believe
9 that a person violated this Act, the Commission may
10 commence a civil action, in its own name by any of
11 its attorneys designated by it for such purpose, to
12 recover a civil penalty and seek other appropriate re-
13 lief in a district court of the United States.

14 (4) PARENS PATRIAE.—Any attorney general of
15 a State may bring a civil action in the name of such
16 State for a violation of this Act as parens patriae on
17 behalf of natural persons residing in such State, in
18 any district court of the United States having juris-
19 diction of the defendant, and may secure any form
20 of relief provided for in this section.

21 (j) EMERGENCY RELIEF.—

22 (1) IN GENERAL.—The Commission, Assistant
23 Attorney General of the Antitrust Division, or any
24 attorney general of a State may seek a temporary
25 injunction requiring the covered platform operator to

1 take or stop taking any action for not more than
2 120 days and the court may grant such relief if the
3 Commission, the United States, or the attorney gen-
4 eral of a State proves—

5 (A) there is a claim that a covered plat-
6 form operator took an action that would violate
7 this Act; and

8 (B) that action impairs the ability of busi-
9 ness users to compete with the covered platform
10 operator.

11 (2) EMERGENCY RELIEF.—The emergency re-
12 lief shall not last more than 120 days from the filing
13 of the complaint.

14 (3) TERMINATION.—The court shall terminate
15 the emergency relief at any time that the covered
16 platform operator proves that the Commission, the
17 United States, or the attorney general of the State
18 seeking relief under this section has not taken rea-
19 sonable steps to investigate whether a violation has
20 occurred.

21 (4) OTHER EQUITABLE RELIEF.—Nothing in
22 this subsection prevents or limits the Commission,
23 the United States, or any attorney general of any
24 State from seeking other equitable relief as provided
25 in subsection (g) of this section.

1 (k) STATUTE OF LIMITATIONS.—A proceeding for a
2 violation of this section may be commenced not later than
3 6 years after such violation occurs.

4 **SEC. 3. JUDICIAL REVIEW.**

5 (a) IN GENERAL.—Any party that is subject to a cov-
6 ered platform designation under section 2(e) of this Act,
7 a decision in response to a request to remove a covered
8 platform designation under section 2(f) of this Act, a final
9 order issued in any district court of the United States
10 under this Act, or a final order of the Commission issued
11 in an administrative adjudicative proceeding under this
12 Act may within 30 days of the issuance of such designa-
13 tion, decision, or order, petition for review of such designa-
14 tion, decision, or order in the United States Court of Ap-
15 peals for the District of Columbia Circuit.

16 (b) TREATMENT OF FINDINGS.—In a proceeding for
17 judicial review of a covered platform designation under
18 section 2(e) of this Act, a decision in response to a request
19 to remove a covered platform designation under section
20 2(f) of this Act, or a final order of the Commission issued
21 in an administrative adjudicative proceeding under this
22 Act, the findings of the Commission or the Assistant At-
23 torney General as to the facts, if supported by evidence,
24 shall be conclusive.

1 **SEC. 4. ENFORCEMENT GUIDELINES.**

2 (a) IN GENERAL.—Not later than 1 year after the
3 date of enactment of this Act, the Commission and the
4 Assistant Attorney General of the Antitrust Division shall
5 jointly issue guidelines outlining policies and practices, re-
6 lating to agency enforcement of this Act, including policies
7 for determining the appropriate amount of a civil penalty
8 to be sought under section 2(g)(1) of this Act, with the
9 goal of promoting transparency, deterring violations, and
10 imposing sanctions proportionate to the gravity of indi-
11 vidual violations.

12 (b) UPDATES.—The Commission and the Assistant
13 Attorney General of the Antitrust Division shall update
14 the joint guidelines issued under subsection (a), as needed
15 to reflect current agency policies and practices, but not
16 less frequently than once every 4 years beginning on the
17 date of enactment of this Act.

18 (c) OPERATION.—The Joint Guidelines issued under
19 this section do not confer any rights upon any person,
20 State, or locality, nor shall they operate to bind the Com-
21 mission, Department of Justice, or any person, State, or
22 locality to the approach recommended in such Guidelines.

23 **SEC. 5. RULE OF CONSTRUCTION.**

24 (a) Notwithstanding any other provision of law,
25 whether user conduct would constitute a violation of sec-
26 tion 1030 of title 18 of the United States Code is not dis-

1 positive of whether the defendant has established an af-
2 firmative defense under this Act.

3 (b) An action taken by a covered platform operator
4 that is reasonably tailored to protect the rights of third
5 parties under sections 106, 1101, 1201, or 1401 of title
6 17 of the United States Code or rights actionable under
7 sections 32 or 43 of the Lanham Act (15 U.S.C. 1114,
8 1125), or corollary state law, shall not be considered un-
9 lawful conduct under subsection 2(a) or (b) of this Act.

10 (c) Nothing in this Act shall be construed to limit
11 any authority of the Attorney General or the Commission
12 under the antitrust laws, the Federal Trade Commission
13 Act (15 U.S.C. 45), or any other provision of law or to
14 limit the application of any law.

15 **SEC. 6. SEVERABILITY.**

16 If any provision of this Act, an amendment made by
17 this Act, or the application of such provision or amend-
18 ment to any person or circumstance is held to be unconsti-
19 tutional, the remainder of this Act and of the amendments
20 made by this Act, and the application of the remaining
21 provisions of this Act and amendments to any person or
22 circumstance shall not be affected.

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