

116TH CONGRESS
1ST SESSION

S. 2237

To authorize the Department of Justice and the Federal Trade Commission to seek civil monetary penalties to deter violations of section 2 of the Sherman Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JULY 23, 2019

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

A BILL

To authorize the Department of Justice and the Federal Trade Commission to seek civil monetary penalties to deter violations of section 2 of the Sherman Act, 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 “Monopolization Deter-
5 rence Act of 2019”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—Congress finds that—

1 (1) competitive markets are critical to ensuring
2 opportunity for all people in the United States;

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

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

9 (4) in the United States economy today, the ex-
10 ercise of market power is substantial and growing;

11 (5) anticompetitive exclusionary conduct is an
12 important source of market power and a substantial
13 threat to the United States economy;

14 (6) the exercise of market power tends to lessen
15 the rate of innovation, slow the growth of produc-
16 tivity, and increase economic inequality in the di-
17 rectly affected markets and economy-wide;

18 (7) the civil remedies currently available to cure
19 violations of section 2 of the Sherman Act (15
20 U.S.C. 2), including injunctions, equitable monetary
21 relief, and private damages, have not proven suffi-
22 cient, on their own, to deter anticompetitive exclu-
23 sionary conduct; and

24 (8) in some cases, effective deterrence requires
25 the imposition of civil penalties, alone or in combina-

tion with existing remedies, including structural relief, behavioral relief, private damages, and equitable monetary relief, including disgorgement and restitution.

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

(1) to enable the Department of Justice and the Federal Trade Commission to seek civil monetary penalties, in addition to existing remedies, for monopolization offenses and anticompetitive exclusionary conduct; and

(2) to give the Department of Justice and the Federal Trade Commission an additional enforcement tool to craft remedies for individual violations that are effective to deter future unlawful conduct and proportionate to the gravity of the violation.

SEC. 3. CIVIL PENALTIES.

(a) CIVIL PENALTY AMENDMENTS.—

(1) SHERMAN ACT.—Section 2 of the Sherman 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—

1 “(A) 15 percent of the total United States reve-
2 nues of the person for the previous calendar year; or

3 “(B) 30 percent of the United States revenues
4 of the person in any part of the trade or commerce
5 related to or targeted by the unlawful conduct under
6 this section during the period of the unlawful con-
7 duct.

8 “(2) A civil penalty under this section may be recov-
9 ered in a civil action brought by the United States.”.

10 (2) FEDERAL TRADE COMMISSION ACT.—Sec-
11 tion 5 of the Federal Trade Commission Act (15
12 U.S.C. 45) is amended by adding at the end the fol-
13 lowing:

14 “(o)(1) The Commission may commence a civil action
15 in a district court of the United States against any person,
16 partnership, or corporation for a violation of subsection
17 (a)(1) respecting an unfair method of competition that
18 constitutes a violation of section 2 of the Sherman Act
19 (15 U.S.C. 2) and to recover a civil penalty for such viola-
20 tion.

21 “(2) In an action under paragraph (1), any person,
22 partnership, or corporation found to have violated sub-
23 section (a)(1) respecting an unfair method of competition
24 that constitutes a violation of section 2 of the Sherman

1 Act (15 U.S.C. 2) shall be liable for a civil penalty of not
 2 more than the greater of—

3 “(A) 15 percent of the total United States reve-
 4 nues of the person, partnership, or corporation for
 5 the previous calendar year; or

6 “(B) 30 percent of the United States revenues
 7 of the person, partnership, or corporation in any line
 8 of commerce related to or targeted by the unlawful
 9 conduct described in paragraph (1) during the pe-
 10 riod of the unlawful conduct.”.

11 (b) RULE OF CONSTRUCTION.—

12 (1) CIVIL PENALTIES.—The civil penalties pro-
 13 vided in subsection (b) of section 2 of the Sherman
 14 Act (15 U.S.C. 2) and subsection (o) of section 5 of
 15 the Federal Trade Commission Act (15 U.S.C. 45),
 16 as added by subsection (a) of this section, are in ad-
 17 dition to, and not in lieu of, any other remedy pro-
 18 vided by Federal law, including under—

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

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

23 (2) AUTHORITIES.—Nothing in this paragraph
 24 may be construed to affect any authority of the At-

1 torney General or the Federal Trade Commission
2 under any other provision of law.

3 **SEC. 4. JOINT CIVIL PENALTY GUIDELINES.**

4 (a) IN GENERAL.—Not later than 1 year after the
5 date of enactment of this Act, the Attorney General and
6 the Federal Trade Commission shall issue joint guidelines
7 reflecting agency policies for determining the appropriate
8 amount of a civil penalty to be sought under subsection
9 (b) of section 2 of the Sherman Act (15 U.S.C. 2) and
10 subsection (o) of section 5 of the Federal Trade Commis-
11 sion Act (15 U.S.C. 45), as added by section 3(a) of this
12 Act, with the goal of promoting transparency and crafting
13 remedies for individual violations that are effective in de-
14 terrering future unlawful conduct and proportionate to the
15 gravity of the violation.

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

- 21 (1) the volume of commerce affected;
- 22 (2) the duration and severity of the unlawful
23 conduct;
- 24 (3) any action taken or attempted by the person
25 to conceal the unlawful conduct;

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

3 (5) whether the civil penalty is to be applied in
4 combination with other remedies for the unlawful
5 conduct, including structural remedies, behavioral
6 conditions, or equitable monetary relief, including
7 disgorgement and restitution;

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

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

13 **SEC. 5. FEDERAL TRADE COMMISSION LITIGATION AU-**
14 **THORITY.**

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

17 (1) in subparagraph (D), by striking “or” at
18 the end;

19 (2) in subparagraph (E)—

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

22 (B) by striking the semicolon and inserting
23 “; or”; and

24 (3) by inserting after subparagraph (E) the fol-
25 lowing:

1 “(F) to recover civil penalties under section
2 5(o) of this Act;”.

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