H. R. 3816

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

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Mr. Cicilline (for himself, Mr. Gooden of Texas, Mr. Nadler, and Mr. Buck) introduced the following bill; which was 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.

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 “American Choice and Innovation Online Act”.

SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to engage in any conduct in connection with the operation of the covered platform that—
(1) advantages the covered platform operator’s own products, services, or lines of business over those of another business user;

(2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business; or

(3) discriminates among similarly situated business users.

(b) OTHER DISCRIMINATORY CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to—

(1) restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware and software features that are available to the covered platform operator’s own products, services, or lines of business;

(2) condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator;

(3) use non-public data obtained from or generated on the platform by the activities of a business user or its customers that is generated through an interaction with the business user’s products or serv-
ices to offer or support the offering of the covered platform operator’s own products or services;

(4) restrict or impede a business user from accessing data generated on the platform by the activities of the business user or its customers through an interaction with the business user’s products or services, such as contractual or technical restrictions that prevent the portability of such data by the business user to other systems or applications;

(5) restrict or impede covered platform users from un-installing software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator;

(6) restrict or impede businesses users from communicating information or providing hyperlinks on the covered platform to covered platform users to facilitate business transactions;

(7) in connection with any user interfaces, including search or ranking functionality offered by the covered platform, treat the covered platform operator’s own products, services, or lines of business more favorably than those of another business user;
(8) interfere or restrict a business user’s pricing of its goods or services;

(9) restrict or impede a business user, or a business user’s customers or users, from interoperating or connecting to any product or service; and

(10) retaliate against any business user or covered platform user that raises concerns with any law enforcement authority about actual or potential violations of State or Federal law.

(c) AFFIRMATIVE DEFENSE.—

(1) IN GENERAL.—Subsection (a) and (b) shall not apply if the defendant establishes by clear and convincing evidence that the conduct described in subsections (a) or (b)—

(A) would not result in harm to the competitive process by restricting or impeding legitimate activity by business users; or

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

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

(ii) protect user privacy or other non-public data.
(2) Availability of Affirmative Defense.—Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18, United States Code, is not dispositive of whether the defendant has established the affirmative defense under this section.

(d) Covered Platform Designation.—The Federal Trade Commission or Department of Justice shall designate a covered platform for the purpose of implementing and enforcing this Act. Such designation shall—

   (1) be based on a finding that the criteria set forth in subsection (f)(4)(i)–(iii) are met;

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

   (3) will apply for ten years from its issuance regardless of whether there is a change in control or ownership over the covered platform unless the Commission or the Department of Justice removes the designation pursuant to subsection (f).

(e) Removal of Covered Platform Designation.—The Commission or the Department of Justice shall—

   (1) consider whether its designation of a covered platform pursuant to subsection (d) should be removed prior to the expiration of the ten-year pe-
period if the covered platform operator files a request with the Commission or the Department of Justice, which shows that the online platform is no longer a critical trading partner; and

(2) determine whether to grant a request submitted under paragraph 1 not later than 120 days after the date of the filing of such request.

(f) Remedies.—

(1) Civil penalty.—Any covered platform operator who is found to have violated subsections (a) or (b) shall be liable to the United States or the Commission for a civil penalty, which shall accrue to the United States, in an amount not more than the greater of—

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

(B) 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct. This civil penalty may be recovered in a civil action brought by the United States or the Commission.
(2) Remedies in addition.—Remedies provided in this subsection are in addition to, and not in lieu of, any other remedy available under Federal or State law.

(A) Restitution; contract rescission and reformation; refunds; return of property.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, with respect to the violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.

(B) Disgorgement.—The Assistant Attorney General of the Antitrust Division or the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a covered platform operator obtained as a result of the violation that gives rise to the suit.

(C) Injunctions.—The Assistant Attorney General of the Antitrust Division or the Commission may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(D) Conflict of interest.—
(i) If the fact finder determines that a violation of this Act arises from a conflict of interest related to the covered platform’s concurrent operation of multiple lines of business, the court shall consider requiring divestiture of the line or lines of business that give rise to such conflict.

(ii) For purposes of this section, the term “conflict of interest” includes the conflict of interest that arises when—

(I) a covered platform operator owns or controls a line of business, other than the covered platform; and

(II) the covered platform’s ownership or control of that line of business creates the incentive and ability for the covered platform to—

(aa) advantage the covered platform operator’s own products, services, or lines of business on the covered platform over those of a competing business or a business that constitutes nascent or potential competition to the covered platform operator; or
(bb) exclude from, or dis-
advantage, the products, services,
or lines of business on the cov-
ered platform of a competing
business or a business that con-
stitutes nascent or potential com-
petition to the covered platform
operator.

(3) REPEAT OFFENDERS.—If the fact finder
determines that a covered platform has engaged in
a pattern or practice of violating this Act, the court
shall consider requiring that the Chief Executive Of-
fer forfeit to the United States Treasury any com-
pensation received by that person during the 12
months preceding or following the filing of a com-
plaint for an alleged violation of this Act.

(g) DEFINITIONS.—In this section:

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

(2) BUSINESS USER.—The term “Business
User” means a person that utilizes or plans to uti-
lize the covered platform for the sale or provision of
products or services.
(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(d); or

(B) that—

(i) at the time of the Commission’s or the Department of Justice’s designation under section 2(d), or any of the twelve months preceding that time, or in any of 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 platform;

(ii) is owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, at the time of the
Commission’s or the Department of Justice’s designation under section 2(d) or any of the two years preceding that time, or at any time in the 2 years preceding the filing of a complaint for an alleged violation of this Act; and

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

(5) Covered Platform Operator.—The term “covered platform operator” means a person that owns or controls a covered platform.

(6) Critical Trading Partner.—The term “critical trading partner” means a trading partner that has the ability to restrict or impede—

(A) the access of a business user to its users or customers; or

(B) the access of a business user to a tool or service that it needs to effectively serve its users or customers.

(7) Person.—The term “person” has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

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

(B) DATA.—The term “data” shall include information that is collected by or provided to a covered platform or competing business or a potential competing business that is linked, or reasonably linkable, to a specific user or customer of the covered platform or a competing business or a potential competing business.

(9) BUSINESS USER.—The term “business user” means a person that utilizes or plans to utilize the covered platform for the sale or provision of products or services.

(10) ONLINE PLATFORM.—The term “online platform” means a website, online or mobile application, operating system, digital assistant, or online service that—

(A) enables a user to generate content that can be viewed by other users on the platform or to interact with other content on the platform;
(B) facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or

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

(11) CONTROL.—The term “control” with respect to a person means—

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

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

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

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

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

(F) otherwise exercises substantial control over the person.

(h) ENFORCEMENT.—
(1) IN GENERAL.—The Commission, Department of Justice, and any attorney general of a State subject to the requirements in paragraph (4) shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, 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) COMMISSION INDEPENDENT LITIGATION AUTHORITY.—If the Commission has reason to believe that a covered platform violated this Act, the 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 juris-
diction of the defendant, and may secure any form
of relief provided for in this section.

(i) **Emergency Relief.**—

(1) The Commission, Assistant Attorney Gen-
eral of the Antitrust Division, or any attorney gen-
eral of a State may seek a temporary injunction re-
quiring the covered platform operator to take or stop
taking any action for not more than 120 days and
the court shall grant such relief if the Commission,
the United States, or the attorney general of a State
proves—

(A) there is a plausible claim that a cov-
ered platform operator took an action that vio-
lates this Act; and

(B) that action impairs the ability of at
least one company to compete with the covered
platform.

(2) The emergency relief shall not last more
than 120 days from the filing of the complaint.

(3) The court shall terminate the emergency re-
lief at any time that the covered platform operator
proves that the Commission, the United States, or
the attorney general of the State seeking relief
under this section has not taken reasonable steps to
investigate whether a violation has occurred.

(4) Nothing in this subsection prevents or limits
the Commission, the United States, or any attorney
general of any State from seeking other equitable re-

lief as provided in subsection (h) of this section.

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

SEC. 3. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a cov-
ered platform designation under section 2(d) of this Act,
a final order issued in any district court, or a final order
of the Commission issued in an administrative adjudica-
tive proceeding may within 30 days of the issuance of such
order, petition for review of such order in the United
States Court of Appeals for the District of Columbia Cir-
cuit.

(b) TREATMENT OF FINDINGS.—In a proceeding for
judicial review of a covered platform designation under to
section 2(d) of this Act or a final order of the Commission,
the findings of the Commission or the Assistant Attorney
General as to the facts, if supported by evidence, shall be
conclusive.
SEC. 4. BUREAU OF DIGITAL MARKETS.

(a) Establishment of Bureau.—As soon as practicable, but not later than 180 days after the date of enactment of this Act, the Federal Trade Commission shall establish within the Commission a bureau of digital markets for purposes of enforcement of this Act.

(b) Leadership.—The head of the Bureau of Digital Markets shall be the Director of the Bureau of Digital Markets, who shall—

(1) report directly to the Chair of the Federal Trade Commission; and

(2) be appointed by the Chair of the Federal Trade Commission.

(c) Bureau Staff.—The Bureau of Digital Markets shall retain or employ legal, technology, economic, research, and service staff sufficient to carry out the functions, powers, and duties of the Bureau.

(d) Reporting Requirement.—Not later than 1 year after the date of enactment of this Act, the Bureau of Digital Markets shall on an annual basis publish and submit a report to the Committee on the Judiciary of the House of Representatives and the Committee on the Judiciary of the Senate describing the Bureau’s enforcement activities during the previous 12-month period.
SEC. 5. ENFORCEMENT GUIDELINES.

(a) In general.—Not later than 1 year after the date of enactment of this Act, the Commission and the Assistant Attorney General of the Antitrust Division shall jointly issue guidelines outlining policies and practices, relating to agency enforcement of this Act, with the goal of promoting transparency and deterring violations.

(b) Updates.—The Commission and the Assistant Attorney General of the Antitrust Division 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 4 years beginning on the date of enactment of this Act.

(c) Operation.—The Joint Guidelines issued under this section do not confer any rights upon any person, State, or locality, nor shall operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 6. SUITS BY PERSONS INJURED.

(a) In general.—Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in this Act 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 section, pursuant to a motion by such person promptly made, simple interest on actual damages 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, 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 section for any period is just in the circumstances, the court shall consider only—

(1) whether such person 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;

(2) whether, in the course of the action involved, such person 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

(3) whether such person 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.

(b) Amount of Damages Payable to Foreign
States and Instrumentalities of Foreign
States.—

(1) Except as provided in paragraph (2), any
person who is a foreign state may not recover under
subsection (a) an amount in excess of the actual
damages sustained by it and the cost of suit, includ-
ing a reasonable attorney’s fee.

(2) Paragraph (1) shall not apply to a foreign
state if—

(A) such foreign state would be denied,
under section 1605(a)(2) of title 28, immunity
in a case in which the action is based upon a
commercial activity, or an act, that is the sub-
ject matter of its claim under this section;

(B) such foreign state waives all defenses
based upon or arising out of its status as a for-
egn state, to any claims brought against it in
the same action;

(C) such foreign state engages primarily in
commercial activities; and

(D) such foreign state does not function,
with respect to the commercial activity, or the
act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) INJUNCTIVE RELIEF.—Any person, firm, corporation, or association 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: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney’s fee, to such plaintiff.
SEC. 7. RULE OF CONSTRUCTION.

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

SEC. 8. SEVERABILITY.

If any provision of this Act, an amendment made by this Act, or the application of such provision or amendment to any person or circumstance is held to be unconstitutional, the remainder of this Act and of the amendments made by this Act, and the application of the remaining provisions of this Act and amendments to any person or circumstance shall not be affected.