H. R. 3826

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

IN THE HOUSE OF REPRESENTATIVES
JUNE 11, 2021

Mr. JEFFRIES (for himself, Mr. BUCK, Mr. CICILLINE, Mr. NADLER, and Mr. GOODEN of Texas) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

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 “Platform Competition and Opportunity Act of 2021”.

SEC. 2. UNLAWFUL ACQUISITIONS.

(a) VIOLATION.—It shall be unlawful for a covered platform operator to acquire directly or indirectly—
(1) the whole or any part of the stock or other share capital of another person engaged in commerce or in any activity or affecting commerce; or

(2) the whole or any part of the assets of another person engaged in commerce or in any activity affecting commerce.

(b) EXCLUSION.—An acquisition shall not be unlawful under subsection (a) if the acquiring covered platform operator demonstrates by clear and convincing evidence that—

(1) the acquisition is a transaction that is described in section 7A(c) of the Clayton Act; or

(2) the acquired assets or the issuer of the acquired stock do not—

(A) compete with the covered platform or with the covered platform operator for the sale or provision of any product or service;

(B) constitute nascent or potential competition to the covered platform or the covered platform operator for the sale or provision of any product or service;

(C) enhance or increase the covered platform’s or the covered platform operator’s market position with respect to the sale or provision
of any product or service offered on or directly related to the covered platform; or

(D) enhance or increase the covered platform’s or covered platform operator’s ability to maintain its market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform.

(e) User Attention.—For purposes of this Act, competition, nascent competition, or potential competition for “the sale or provision of any product or service” includes competition for a user’s attention.

(d) Role of Data.—For purposes of this Act, an acquisition that results in access to additional data may, without more, enhance, increase, or maintain a covered platform’s market position.

SEC. 3. DEFINITIONS.

(a) 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).

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

(e) Control.—The term “control” with respect to a person means—
(1) holding 25 percent or more of the stock of
the person;

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

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

(4) if the person is a corporation, having the
power to designate 25 percent or more of the direc-
tors of the person;

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

(6) otherwise exercises substantial control over
the person.

(d) Covered Platform.—The term “covered plat-
form” means an online platform—

(1) that has been designated as a “covered plat-
form” under section 4(a); or

(2) that—

(A) at the time of the Commission’s or the
Department of Justice’s designation under sec-
tion 2(d), or any of the twelve months pre-
ceding that time, or in any of the 12 months
preceding the filing of a complaint for an al-
leged 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;

(B) 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 4(a) 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

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

(e) COVERED PLATFORM OPERATOR.—The term “covered platform operator” means a person that, directly or indirectly, owns or controls a covered platform.

(f) CRITICAL TRADING PARTNER.—The term “critical trading partner” means an entity that has the ability to restrict or impede—
(1) the access of a business user to its users or customers; or

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

(g) 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.

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

(1) 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;

(2) 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

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

(i) 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).
SEC. 4. IMPLEMENTATION.

(a) COVERED PLATFORM DESIGNATION.—

(1) The Federal Trade Commission or Department of Justice shall designate whether an entity is a covered platform for the purpose of implementing and enforcing this Act. Such designation shall—

(A) be based on a finding that the criteria set forth in section 3(d)(2)(A)–(C) are met;

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

(C) will apply for 10 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 (b).

(b) REMOVAL OF COVERED PLATFORM DESIGNATION.—The Commission and the Department of Justice shall—

(1) consider whether its designation of a covered platform pursuant to subsection (a) should be removed prior to the expiration of the 10-year 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;
(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; and

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

SEC. 5. ENFORCEMENT.

(a) ENFORCEMENT PROCEEDING.—The Commission, Department of Justice, and any attorney general of a State subject to the requirements in subsection (d) 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.

(b) 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).

(c) 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.

(d) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

SEC. 6. 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 Commiss-
ion, Department of Justice, or any person, State, or local-
ity to the approach recommended in such Guidelines.

SEC. 7. 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 judg-
ment, 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 as-
serted 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, including 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, United States Code, immunity in a case in which the
action is based upon a commercial activity, or
an act, that is the subject 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.

SEC. 8. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a cov-
ered platform designation pursuant to section 4(a) of this
Act, a decision in response to a request to remove a cov-
ered platform designation pursuant to section 4(b), a final
order issued in any district court, or a final order of the
Commission issued in an administrative adjudicative pro-
ceeding may within 30 days of the issuance of such des-
ignation, decision, or order, petition for review of such des-
ignation or order in the United States Court of Appeals
for the District of Columbia Circuit.
(b) TREATMENT OF FINDINGS.—In a proceeding for judicial review of a covered platform designation pursuant to section 4(a) of this Act or a final order of the Commission, the findings of the Commission or the Department of Justice as to the facts, if supported by evidence, shall be conclusive.

(e) 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. 9. RULES 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. 10. 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.