To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

IN THE SENATE OF THE UNITED STATES

AUGUST 11 (legislative day, AUGUST 10), 2021

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

A BILL

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

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 “Open App Markets Act”.

SEC. 2. DEFINITIONS.

In this Act:

(1) App.—The term “App” means a software application or electronic service that may be run or
directed by a user on a computer, a mobile device, or any other general purpose computing device.

(2) App store.—The term “App Store” means a publicly available website, software application, or other electronic service that distributes Apps from third-party developers to users of a computer, a mobile device, or any other general purpose computing device.

(3) Covered company.—The term “Covered Company” means any person that owns or controls an App Store for which users in the United States exceed 50,000,000.

(4) Developer.—The term “developer” means a person that owns or controls an App or an App Store.

(5) In-app payment system.—The term “In-App Payment System” means an application, service, or user interface to process the payments from users of an App.

(6) Non-public business information.—The term “non-public business information” means non-public data that is—

(A) derived from a developer or an App or App Store owned or controlled by a developer,
including interactions between users and the
App or App Store of the developer; and

(B) collected by a Covered Company in the
course of operating an App Store or providing
an operating system.

SEC. 3. PROTECTING A COMPETITIVE APP MARKET.

(a) Exclusivity and Tying.—A Covered Company
shall not—

(1) require developers to use an In-App Pay-
ment System owned or controlled by the Covered
Company or any of its business partners as a condi-
tion of being distributed on an App Store or acces-
sible on an operating system;

(2) require as a term of distribution on an App
Store that pricing terms or conditions of sale be
equal to or more favorable on its App Store than the
terms or conditions under another App Store; or

(3) take punitive action or otherwise impose
less favorable terms and conditions against a devel-
oper for using or offering different pricing terms or
conditions of sale through another In-App Payment
System or on another App Store.

(b) Interference with Legitimate Business
Communications.—A Covered Company shall not impose
restrictions on communications of developers with the
users of the App through an App or direct outreach to
a user concerning legitimate business offers, such as pricing terms and product or service offerings.

(c) Non-Public Business Information.—A Covered Company shall not use non-public business information derived from a third-party App for the purpose of competing with that App.

(d) Interoperability.—A Covered Company that controls the operating system or operating system configuration on which its App Store operates shall allow and provide the readily accessible means for users of that operating system to—

(1) choose third-party Apps or App Stores as defaults for categories appropriate to the App or App Store;

(2) install third-party Apps or App Stores through means other than its App Store; and

(3) hide or delete Apps or App Stores provided or preinstalled by the App Store owner or any of its business partners.

(e) Self-Preferencing in Search.—

(1) In General.—A Covered Company shall not provide unequal treatment of Apps in an App Store through unreasonably preferencing or ranking
the Apps of the Covered Company or any of its business partners over those of other Apps.

(2) CONSIDERATIONS.—Unreasonably preferencing—

(A) includes applying ranking schemes or algorithms that prioritize Apps based on a criterion of ownership interest by the Covered Company or its business partners; and

(B) does not include clearly disclosed advertising.

(f) OPEN APP DEVELOPMENT.—Access to operating system interfaces, development information, and hardware and software features shall be provided to developers on a timely basis and on terms that are equivalent or functionally-equivalent to the terms for access by similar Apps or functions provided by the Covered Company or to its business partners.

SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF USERS.

(a) IN GENERAL.—Subject to section (b), a Covered Company shall not be in violation of a subsection of section 3 for an action that is—

(1) necessary to achieve user privacy, security, or digital safety;

(2) taken to prevent spam or fraud; or
(3) taken to prevent a violation of, or comply
with, Federal or State law.

(b) REQUIREMENTS.—Section (a) shall only apply if
the Covered Company establishes by clear and convincing
evidence that the action described is—

(1) applied on a demonstrably consistent basis
to Apps of the Covered Company or its business
partners and to other Apps;

(2) not used as a pretext to exclude, or impose
unnecessary or discriminatory terms on, third-party
Apps, In-App Payment Systems, or App Stores; and

(3) narrowly tailored and could not be achieved
through a less discriminatory and technically pos-
sible means.

SEC. 5. ENFORCEMENT.

(a) ENFORCEMENT.—

(1) IN GENERAL.—The Federal Trade Commiss-
ion, the Attorney General, 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
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) Federal Trade Commission independent litigation authority.—If the Federal Trade Commission has reason to believe that a Covered Company violated this Act, the Federal Trade 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 jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(b) Suits by Developers Injured.—

(1) In general.—Any developer who shall be injured by reason of anything forbidden in this Act
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, and the cost of suit, including a reasonable attorney’s fee. The court may award under this subsection, pursuant to a motion by such developer promptly made, simple interest on actual damages for the period beginning on the date of service of such developer’s pleading setting forth a claim under this Act 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 subsection for any period is just in the circumstances, the court shall consider only—

(A) whether such developer 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;

(B) whether, in the course of the action involved, such developer 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

(C) whether such developer 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.

(2) INJUNCTIVE RELIEF.—Any developer 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. In any action under this paragraph in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney’s fee, to such plaintiff.
SEC. 6. 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 (as defined in the first section of the Clayton Act (15 U.S.C. 12)), the Federal Trade Commission Act (15 U.S.C. 41 et seq.), or any other provision of law or to limit the application of any law.

SEC. 7. SEVERABILITY.

If any provision of this Act, or the application of such a provision to any person or circumstance, is held to be unconstitutional, the remaining provisions of this Act, and the application of the provision held to be unconstitutional to any other person or circumstance, shall not be affected thereby.