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, Ms. KLOBUCHAR, Mr. RUBIO, Ms. LUMMIS, Mr. BOOKER, Mr. GRAHAM, Mr. KENNEDY, Ms. HIRONO, Mr. HAWLEY, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

FEBRUARY 17, 2022

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italics]

A BILL

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

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 “Open App Markets
5. Act”.

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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-Referencing 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—
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 possible means.

SEC. 5. ENFORCEMENT.

(a) ENFORCEMENT.—

(1) IN GENERAL.—The Federal Trade Commission, 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 Fed-

(3) FEDERAL TRADE COMMISSION INDE-
pendent Litigation Authority.—If the Federal
Trade Commission has reason to believe that a Cov-
ered 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) PARENTS 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.

(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, in-
cluding 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. 41)), the Fed-
eral 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.

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 ap-
plication or electronic service that may be run or di-
rected 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 manage billing or process the payments from users of an app.

(6) Nonpublic business information.—The term “nonpublic 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
SEC. 3. PROTECTING A COMPETITIVE APP MARKET.

(a) EXCLUSIVITY AND TYING.—A covered company shall not—

(1) require developers to use or enable an in-app payment system owned or controlled by the covered company or any of its business partners as a condition of the distribution of an app on an app store or accessible 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 developer 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 an app of the developer through the app or direct outreach to a user concerning legitimate business offers, such
as pricing terms and product or service offerings. Nothing in this subsection shall prohibit a covered company from providing a user the option to offer consent prior to the collection and sharing of the data of the user by an app.

(c) **NONPUBLIC BUSINESS INFORMATION.**—A covered company shall not use nonpublic 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 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 in organic search results.

(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.—A covered company shall provide access to operating system interfaces, development information, and hardware and software features 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.—

(1) NO VIOLATION.—Subject to section (b), a covered company shall not be in violation of section 3 for an action that is—
(A) necessary to achieve user privacy, security, or digital safety;

(B) taken to prevent spam or fraud;

(C) necessary to prevent unlawful infringement of preexisting intellectual property; or

(D) taken to prevent a violation of, or comply with, Federal or State law.

(2) PRIVACY AND SECURITY PROTECTIONS.—In paragraph (1), the term “necessary to achieve user privacy, security, or digital safety” includes—

(A) allowing an end user to opt in, and providing information regarding the reasonable risks, prior to enabling installation of the third-party apps or app stores;

(B) removing malicious or fraudulent apps or app stores from an end user device;

(C) providing an end user with the technical means to verify the authenticity and origin of third-party apps or app stores; and

(D) providing an end user with option to limit the collection sharing of the data of the user with third-party apps or app stores.

(b) REQUIREMENTS.—Subsection (a) shall only apply if the covered company establishes by a preponderance of the evidence that the action described in that subsection is—
(1) applied on a demonstrably consistent basis to—

(A) apps of the covered company or its business partners; and

(B) 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 possible means.

SEC. 5. ENFORCEMENT.

(a) Enforcement.—

(1) In general.—The Federal Trade Commission, the Attorney General, and any attorney general of a State subject to the requirements in paragraph (3) 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.), the Sherman Act (15 U.S.C. 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.), and Antitrust Civil Process Act (15 U.S.C. 1311 et seq.), as appropriate, were incorporated into and made a part of this Act.
(2) 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 company.

(3) 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.—Except as provided in paragraph (3), any developer 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 the developer sustained and the cost of suit, including a rea-
sonable attorney’s fee. The court may award under this paragraph, pursuant to a motion by such developer promptly made, simple interest on actual damages for the period beginning on the date of service of the pleading of the developer 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 paragraph for any period is just in the circumstances, the court shall consider only—

(A) whether the 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, the 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
whether the 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.—Except as provided in paragraph (3), 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.

(3) FOREIGN STATE-OWNED ENTERPRISES.—A developer of an app that is owned by, or under the control of, a foreign state may not bring an action under this subsection.
SEC. 6. REPORTING.

Not later than 3 years after the date of enactment of this Act, the Federal Trade Commission, the Comptroller General of the United States, and the Antitrust Division of the Department of Justice shall each separately review and provide an in-depth analysis of the impact of this Act on competition, innovation, barriers to entry, and concentrations of market power or market share after the date of enactment of this Act.

SEC. 7. RULE OF CONSTRUCTION.

Nothing in this Act may be construed—

(1) to limit—

(A) 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

(B) the application of any law;

(2) to require—

(A) a covered company to provide service under a hardware or software warranty for damage caused by third-party apps or app stores installed through means other than the app store of the covered company; or
(B) customer service for the installation or
operation of third-party apps or app stores de-
scribed in subparagraph (A);

(3) to prevent an action taken by a covered com-
pany that is reasonably tailored to protect the rights
of third parties under section 106, 1101, 1201, or
1401 of title 17, United States Code, or rights action-
able under sections 32 or 43 of the Act entitled “An
Act to provide for the registration and protection of
trademarks used in commerce, to carry out the provi-
sions of certain international conventions, and for
other purposes”, approved July 5, 1946 (commonly
known as the “Lanham Act” or the “Trademark Act
of 1946”) (15 U.S.C. 1114, 1125), or corollary State
law;

(4) to require a covered company to license any
intellectual property, including any trade secrets,
owned by or licensed to the covered company;

(5) to prevent a covered company from asserting
preexisting rights of the covered company under intel-
lectual property law to prevent the unlawful use of
any intellectual property owned by or duly licensed
to the covered company; or

(6) to require a covered company to interoperate
or share data with persons or business users that—
(A) are on any list maintained by the Federal Government by which entities are identified as limited or prohibited from engaging in economic transactions as part of United States sanctions or export control regimes; or

(B) have been identified by the Federal Government as national security, intelligence, or law enforcement risks.

SEC. 8. SEVERABILITY.

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

SEC. 9. EFFECTIVE DATE.

This Act shall take effect on the date that is 180 days after the date of enactment of this Act.
A BILL

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

FEBRUARY 17, 2022

Reported with an amendment