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S. 2992

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 18, 2021

Ms. KLOBUCHAR (for herself, Mr. GRASSLEY, Mr. DURBIN, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. KENNEDY, Mr. BOOKER, Ms. LUMMIS, Ms. HIRONO, Mr. WARNER, Mr. HAWLEY, and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MARCH 2, 2022

Reported by Mr. DURBIN, with an amendment

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

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, 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 “American Innovation
5  and Choice Online Act”.

SEC. 2. UNLAWFUL CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, if it is shown, by a preponderance of the evidence, that the person has engaged in conduct that would—

(1) unfairly preference the covered platform operator’s own products, services, or lines of business over those of another business user on the covered platform in a manner that would materially harm competition on the covered platform;

(2) unfairly limit the ability of another business user’s products, services, or lines of business to compete on the covered platform relative to the covered platform operator’s own products, services, or lines of business in a manner that would materially harm competition on the covered platform; or

(3) discriminate in the application or enforcement of the covered platform’s terms of service among similarly situated business users in a manner that may materially harm competition on the covered platform.

(b) UNLAWFUL CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, if it is shown, by a preponderance of the evidence, that the person has engaged in conduct that would—
(1) materially restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware or software features that are available to the covered platform operator’s own products, services, or lines of business that compete or would compete with products or services offered by business users on the covered platform;

(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 that are not part of or intrinsic to the covered platform itself;

(3) use non-public data that are obtained from or generated on the covered platform by the activities of a business user or by the interaction of a covered platform user with the products or services of a business user to offer, or support the offering of, the covered platform operator’s own products or services that compete or would compete with products or services offered by business users on the covered platform;

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

(5) unless necessary for the security or functioning of the covered platform, materially 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) in connection with any covered platform user interface, 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 relative to those of another business user than they would be treated under standards mandating the neutral, fair, and non-discriminatory treatment of all business users; or
(7) 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) RULE OF CONSTRUCTION.—Subsections (a) and (b) shall not be construed to require a covered platform operator to divulge, license, or otherwise grant the use of the covered platform operator’s intellectual property, trade or business secrets, or other confidential proprietary business processes to a business user.

(d) AFFIRMATIVE DEFENSES.—

(1) IN GENERAL.—Subsection (a) shall not apply if the defendant establishes by a preponderance of the evidence that the conduct described in subsections (a) was narrowly tailored, was nonpretextual, and was necessary to—

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

(B) protect safety, user privacy, the security of non-public data, or the security of the covered platform; or

(C) maintain or enhance the core functionality of the covered platform.

(2) UNLAWFUL CONDUCT.—Subsection (b) shall not apply if the defendant establishes by a prepon-
derance of the evidence that the conduct described in subsection (b)—

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

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

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

(ii) protect safety, user privacy, the security of non-public data, or the security of the covered platform; or

(iii) maintain or enhance the core functionality of the covered platform.

(c) COVERED PLATFORM DESIGNATION.—The Federal Trade Commission and Department of Justice may jointly, with concurrence of the other, 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 clauses (i) through (iii) of subsection (h)(4) are met;
(2) be issued in writing and published in the Federal Register; and

(3) apply for 7 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 under subsection (f).

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

(1) consider whether its designation of a covered platform under subsection (e) should be removed prior to the expiration of the 7-year period if the covered platform operator files a request with the Commission or the Department of Justice, which shows that the online platform no longer meets the criteria set forth in clauses (i) through (iii) of subsection (h)(4);

(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).
(g) REMEDIES.—The remedies provided in this sub-
section are in addition to, and not in lieu of, any other
remedy available under Federal or State law.

(1) CIVIL PENALTY.—Any person 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
Treasury, in an amount not more than 15 percent
of the total United States revenue of the person for
the period of time the violation occurred.

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

(3) REPEAT OFFENDERS.—If the fact finder
determines that a person has engaged in a pattern
or practice of violating this Act, the court shall con-
sider requiring, and may order, that the Chief Exec-
utive Officer, and any other corporate officer as ap-
propriate to deter violations of this Act, forfeit to
the United States Treasury any compensation re-
ceived by that person during the 12 months pre-
ceding or following the filing of a complaint for an
alleged violation of this Act.
(h) **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 is likely to utilize the covered platform for the sale or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered platform operator.


4. **COVERED PLATFORM.**—The term "covered platform" means an online platform—

   (A) that has been designated as a covered platform under section 2(c); or

   (B) that—

   (i) at any point during the 12 months preceding a designation under section 2(e) or at any point during 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 online platform;

(ii) at any point during the 2 years preceding a designation under section 2(e) or at any point during the 2 years preceding the filing of a complaint for an alleged violation of this Act, is owned or controlled by a person with United States net annual sales or a market capitalization greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; 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) CRITICAL TRADING PARTNER.—The term "critical trading partner" means a person that has the ability to restrict or materially impede the access of—

(A) a business user to its users or customers; or
(B) a business user to a tool or service
that it needs to effectively serve its users or
customers.

(6) person.—The term “person” has the
meaning given the term in subsection (a) of section

(7) data.—

(A) in general.—Not later than 6
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 business user that is
linked, or reasonably linkable, to a specific—

(i) user or customer of the covered
platform; or

(ii) user or customer of a business
user.

(8) 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 products or services, including software applications, between and among consumers or businesses not controlled by the platform operator; or

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

9. 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.

(10) STATE.—The term "State" means a State,
the District of Columbia, the Commonwealth of
Puerto Rico, and any other territory or possession of
the United States.

(i) ENFORCEMENT.—

(1) IN GENERAL.—Except as otherwise pro-
vided in this Act—

(A) the Commission 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 of the Federal
were incorporated into and made a part of this
Act;

(B) the Attorney General shall enforce this
Act in the same manner, by the same means,
and with the same jurisdiction, powers and du-
ties as though all applicable terms of the Sher-
man Act (15 U.S.C. 1 et seq.), Clayton Act (15
U.S.C. 12 et seq.), and Antitrust Civil Process
Act (15 U.S.C. 1311 et seq.) were incorporated
into and made a part of this Act; and
(C) any attorney general of a State 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 of the Sherman Act (15 U.S.C. 1 et seq.) and the Clayton Act (15 U.S.C. 12 et seq.) 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. 45).

(3) COMMISSION INDEPENDENT LITIGATION AUTHORITY.—If the Commission has reason to believe that a person 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.

(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.

(j) EMERGENCY RELIEF.—

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

(A) there is a claim that a covered plat-
form operator took an action that would violate
this Act; and

(B) that action impairs the ability of busi-
ness users to compete with the covered platform
operator.

(2) EMERGENCY RELIEF.—The emergency re-
lief shall not last more than 120 days from the filing
of the complaint.

(3) TERMINATION.—The court shall terminate
the emergency relief 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 rea-
sonable steps to investigate whether a violation has occurred.

(4) OTHER EQUITABLE RELIEF.—Nothing in this subsection prevents or limits the Commission, the United States, or any attorney general of any State from seeking other equitable relief as provided in subsection (g) of this section.

(k) 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 covered platform designation under section 2(e) of this Act, a decision in response to a request to remove a covered platform designation under section 2(f) of this Act, a final order issued in any district court of the United States under this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act may within 30 days of the issuance of such designation, decision, or order, petition for review of such designation, decision, 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 under section 2(e) of this Act, a decision in response to a request
to remove a covered platform designation under section 2(f) of this Act, or a final order of the Commission issued in an administrative adjudicative proceeding under this Act, the findings of the Commission or the Assistant Attorney General as to the facts, if supported by evidence, shall be conclusive.

SEC. 4. 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, including policies for determining the appropriate amount of a civil penalty to be sought under section 2(g)(1) of this Act, with the goal of promoting transparency, deterring violations, and imposing sanctions proportionate to the gravity of individual 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 they operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 5. RULE OF CONSTRUCTION.

(a) Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18 of the United States Code is not dispositive of whether the defendant has established an affirmative defense under this Act.

(b) An action taken by a covered platform operator that is reasonably tailored to protect the rights of third parties under sections 106, 1101, 1201, or 1401 of title 17 of the United States Code or rights actionable under sections 32 or 43 of the Lanham Act (15 U.S.C. 1114, 1125), or corollary state law, shall not be considered unlawful conduct under subsection 2(a) or (b) of this Act.

(c) Nothing in this Act shall be construed to limit any authority of the Attorney General or the 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. 6. 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 unconsti-
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1 tutitional, the remainder of this Act and of the amendments
2 made by this Act, and the application of the remaining
3 provisions of this Act and amendments to any person or
4 circumstance shall not be affected.

5 SECTION 1. SHORT TITLE.
6
7 This Act may be cited as the “American Innovation
8 and Choice Online Act”.

8 SEC. 2. DEFINITIONS.
9
10 (a) IN GENERAL.—In this Act:

11 (1) ANTITRUST LAWS; PERSON.—The terms
12 “antitrust laws” and “person” have the meanings
13 given the terms in subsection (a) of the first section

15 (2) BUSINESS USER.—The term “business
16 user”—

17 (A) means a person that uses or is likely to
18 use a covered platform for the advertising, sale,
19 or provision of products or services, including
20 such persons that are operating a covered plat-
21 form or are controlled by a covered platform op-
22 erator; and

23 (B) does not include a person that—

(i) is a clear national security risk; or
(ii) is controlled by the Government of
the People’s Republic of China or the gov-
ernment of another foreign adversary.

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

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

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

(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 exercising substantial control
over the person.

(5) COVERED PLATFORM.—The term “covered
platform” means an online platform that—
(A) has been designated as a covered platform under section 3(d);

(B) is owned or controlled by a person that—

(i) is a publicly traded company; and

(ii)(I) at any point during the 12 months preceding a designation under section 3(d) or the 12 months preceding the filing of a complaint for an alleged violation of this Act has at least—

(aa) 50,000,000 United States-based monthly active users on the online platform; or

(bb) 100,000 United States-based monthly active business users on the online platform;

(II) during—

(aa) the 2 years preceding a designation under section 3(d), or the 2 years preceding the filing of a complaint for an alleged violation of this Act—

(AA) at any point, is owned or controlled by a person with United States net annual sales of
greater than $550,000,000,000,
adjusted for inflation on the basis
of the Consumer Price Index; or

(BB) during any 180-day
period during the 2-year period,
an average market capitalization
greater than $550,000,000,000,
adjusted for inflation on the basis
of the Consumer Price Index or

(bb) the 12 months preceding a
designation under section 3(d), or at
any point during the 12 months pre-
ceeding the filing of a complaint for an
alleged violation of this Act, has at
least 1,000,000,000 worldwide monthly
active users on the online platform;
and

(III) is a critical trading partner for
the sale or provision of any product or serv-
ice offered on or directly related to the on-
line platform; or

(C) is owned or controlled by a person
that—

(i) is not a publicly traded company;
and
(ii)(I) at any point during the 12 months preceding a designation under section 3(d), or the 12 months preceding the filing of a complaint for an alleged violation of this Act has at least—

(aa) 50,000,000 United States-based monthly active users on the online platform; or

(bb) 100,000 United States-based monthly active business users on the online platform;

(II) at any point—

(aa) during the 2 years preceding a designation under section 3(d), or the 2 years preceding the filing of a complaint for an alleged violation of this Act, is owned or controlled by a person with earnings, before interest, taxes, depreciation, and amortization, in the previous fiscal year of greater than $30,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; or

(bb) during the 12 months preceding a designation under section
3(d), or the 12 months preceding the filing of a complaint for an alleged violation of this Act, has at least 1,000,000,000 worldwide monthly active users on the online platform; 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.

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

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

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

(7) **Data**.—The term “data” includes information that is collected by or provided to a covered platform or business user that is linked, or reasonably linkable, to a specific—

(A) user or customer of the covered platform; or

(B) user or customer of a business user.
(8) **FOREIGN ADVERSARY.**—The term “foreign adversary” has the meaning given the term in section 8(c) of the Secure and Trusted Communications Networks Act of 2019 (47 U.S.C. 1607(c)).

(9) **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, advertising, sale, purchase, payment, or shipping of products or services, including software applications, between and among consumers or businesses not controlled by the platform operator; or

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

(10) **PUBLICLY TRADED COMPANY.**—The term “publicly traded company”—

(A) means any company whose principal class of shares—

(i) is listed on a stock exchange; and

(ii) can be readily purchased or sold by the public; and
(B) includes all subsidiaries of a company described in subparagraph (A).

(11) STATE.—The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(b) REGULATIONS.—Not later than 180 days after the date of enactment of this Act, the Commission shall promulgate regulations 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.

SEC. 3. UNLAWFUL CONDUCT.

(a) IN GENERAL.—It shall be unlawful for a person operating a covered platform in or affecting commerce to engage in conduct, as demonstrated by a preponderance of the evidence, that would—

(1) preference the products, services, or lines of business of the covered platform operator over those of another business user on the covered platform in a manner that would materially harm competition;

(2) limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered platform oper-
ator in a manner that would materially harm com-
petition;

(3) discriminate in the application or enforce-
ment of the terms of service of the covered platform
among similarly situated business users in a manner
that would materially harm competition;

(4) materially restrict, impede, or unreasonably
delay the capacity of a business user to access or
interoperate with the same platform, operating sys-
tem, or hardware or software features that are avail-
able to the products, services, or lines of business of
the covered platform operator that compete or would
compete with products or services offered by business
users on the covered platform;

(5) 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 that are not
part of or intrinsic to the covered platform;

(6) use nonpublic data that are obtained from or
generated on the covered platform by the activities of
a business user or by the interaction of a covered
platform user with the products or services of a busi-
ness user to offer, or support the offering of, the prod-
ucts or services of the covered platform operator that
compete or would compete with products or services
offered by business users on the covered platform;

(7) materially restrict or impede a business user
from accessing data generated on the covered platform
by the activities of the business user, or through an
interaction of a covered platform user with the prod-
ucts or services of the business user, such as by estab-
lishing contractual or technical restrictions that pre-
vent the portability by the business user to other sys-
tems or applications of the data of the business user;

(8) materially restrict or impede covered plat-
form users from uninstalling 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, unless necessary—

(A) for the security or functioning of the
covered platform; or

(B) to prevent data from the covered plat-
form operator or another business user from
being transferred to the Government of the Peo-
ple’s Republic of China or the government of an-
other foreign adversary;

(9) in connection with any covered platform user
interface, including search or ranking functionality
offered by the covered platform, treat the products, services, or lines of business of the covered platform operator more favorably relative to those of another business user than under standards mandating the neutral, fair, and nondiscriminatory treatment of all business users; or

(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.

(b) AFFIRMATIVE DEFENSES.—

(1) IN GENERAL.—It shall be an affirmative defense to an action under paragraph (1), (2), or (3) of subsection (a) if the defendant establishes by a preponderance of the evidence that the conduct was narrowly tailored, nonpretextual, and reasonably necessary to—

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

(B) protect safety, user privacy, the security of nonpublic data, or the security of the covered platform; or

(C) maintain or substantially enhance the core functionality of the covered platform.
(2) **OTHER UNLAWFUL CONDUCT.**—It shall be an affirmative defense to an action under paragraph (4), (5), (6), (7), (8), (9), or (10) of subsection (a) if the defendant establishes by a preponderance of the evidence that the conduct—

(A) has not resulted in and would not result in material harm to competition; or

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

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

(ii) protect safety, user privacy, the security of non-public data, or the security of the covered platform; or

(iii) maintain or substantially enhance the core functionality of the covered platform.

(3) **EFFECT OF OTHER LAWS.**—Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18, United States Code, shall have no effect on whether the defendant has established an affirmative defense under this Act.
(c) Enforcement.—

(1) In general.—Except as otherwise provided in this Act—

(A) the Commission 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 of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act;

(B) the Attorney General 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 of the Sherman Act (15 U.S.C. 1 et seq.), Clayton Act (15 U.S.C. 12 et seq.), and Antitrust Civil Process Act (15 U.S.C. 1311 et seq.) were incorporated into and made a part of this Act; and

(C) any attorney general of a State 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 of the Sherman Act (15 U.S.C. 1 et seq.) and the Clayton Act (15 U.S.C. 12 et seq.) were incorporated into and made a part of this Act.
(2) **Commission independent litigation authority.**—If the Commission has reason to believe that a person 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.

(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 for any form of relief provided for in this section.

(4) **Enforcement in federal district court.**—The Commission, Attorney General, or any attorney general of a State shall only be able to enforce this Act through a civil action brought before a district court of the United States.

(5) **Remedies.**—

(A) **In general.**—The remedies provided in this paragraph are in addition to, and not in lieu of, any other remedy available under Federal or State law.
(B) Civil Penalty.—Any person who violates this Act shall be liable to the United States or the Commission for a civil penalty, which shall accrue to the United States Treasury, in an amount not greater than 15 percent of the total United States revenue of the person for the period of time the violation occurred.

(C) Injunctions.—

(i) In general.—The Assistant Attorney General in charge of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(ii) Temporary injunctions.—

(I) In general.—The Commission, Assistant Attorney General in charge of the Antitrust Division, or any attorney general of a State may seek a temporary injunction requiring the covered platform operator to take or stop taking any action for not more than 120 days.
(II) GRANT.—The court may grant a temporary injunction under this clause if the Commission, the United States, or the attorney general of a State, as applicable, proves—

(aa) there is a plausible claim, supported by evidence, that a covered platform operator took an action that would violate this Act;

(bb) that action materially impairs the ability of business users to compete with the covered platform operator; and

(cc) a temporary injunction would be in the public interest.

(III) DURATION.—A temporary injunction under this clause shall expire not later than the date that is 120 days after the date on which a complaint under this subsection is filed.

(IV) TERMINATION.—The court shall terminate a temporary injunction under this clause if the covered platform operator proves that—
(aa) the Commission, the United States, or the attorney general of the State seeking relief under this subsection has not taken reasonable steps to investigate whether a violation has occurred; or

(bb) allowing the temporary injunction to continue would harm the public interest.

(V) OTHER EQUITABLE RELIEF.—

Nothing in this clause shall prevent or limit the Commission, the United States, or any attorney general of any State from seeking other equitable relief, including the relief provided in this paragraph.

(D) FORFEITURE FOR REPEAT OFFENDERS.—If a person has engaged in a pattern or practice of violating this Act, the court shall consider requiring, and may order, that the chief executive officer, and any other corporate officer as appropriate to deter violations of this Act, forfeit to the United States Treasury any compensation received by that person during the 12 months
preceding or following the filing of a complaint for an alleged violation of this Act.

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

(7) RULES OF CONSTRUCTION.—

(A) IN GENERAL.—Nothing in subsection (a) may be construed—

(i) to require a covered platform operator to divulge or license any intellectual property, including any trade secrets, business secrets, or other confidential proprietary business processes, owned by or licensed to the covered platform operator;

(ii) to prevent a covered platform operator from asserting its preexisting rights under intellectual property law to prevent the unauthorized use of any intellectual property owned by or duly licensed to the covered platform operator;

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

(II) have been identified as national security, intelligence, or law enforcement risks;

(iv) to prohibit a covered platform operator from promptly requesting and obtaining the consent of a covered platform user prior to providing access to the non-public, personally identifiable information of the user to a covered platform user under that subsection;

(v) in a manner that would likely result in data on the covered platform or data from another business user being transferred to the Government of the People’s Republic of China or the government of another foreign adversary; or

(vi) to impose liability on a covered platform operator solely for offering—

(I) full end-to-end encrypted messaging or communication products or
services that allow communication between covered platform users; or

(II) a fee-for-service subscription that provides benefits to covered platform users on the covered platform.

(B) COPYRIGHT AND TRADEMARK VIOLATIONS.—An action taken by a covered platform operator 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 actionable under section 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 provisions 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, shall not be considered unlawful conduct under subsection (a).

(d) COVERED PLATFORM DESIGNATION.—

(1) IN GENERAL.—The Commission and Department of Justice may jointly, with concurrence of the other, designate an online platform as a covered plat-
form for the purpose of implementing and enforcing this Act, which shall—

(A) be based on a finding that the criteria set forth in subparagraph (B) or (C) of section 2(a)(5) are met;

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

(C) except as provided in paragraph (2), apply for a 7-year period beginning on the date on which the designation is issued, regardless of whether there is a change in control or ownership over the covered platform.

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

(A) consider whether a designation of a covered platform under paragraph (1) should be removed prior to the expiration of the 7-year period if the covered platform operator files a request with the Commission or the Department of Justice that shows that the online platform no longer meets the criteria set forth in subparagraphs (B) and (C);

(B) determine whether to grant a request submitted under subparagraph (A) not later
than 120 days after the date on which the re-
quest is filed; and

(C) obtain the concurrence of the Commis-
sion or the Department of Justice, as appro-
priate, before granting a request submitted under
subparagraph (A).

(3) JUDICIAL REVIEW.—

(A) In general.—Any person aggrieved by
a designation under paragraph (1), a decision in
response to a request under paragraph (2), or a
final order issued in any district court of the
United States under this Act may, within 30
days of the issuance of such designation, deci-
sion, or order, petition for review of such des-
ignation, decision, or order in the United States
Court of Appeals for the District of Columbia
Circuit.

(B) Treatment of findings.—In a pro-
ceeding for judicial review of a designation
under paragraph (1) or a decision in response to
a request under paragraph (2), the findings of
fact by the Commission or the Department of
Justice, if supported by evidence, shall be conclu-
sive.
SEC. 4. ENFORCEMENT GUIDELINES.

(a) IN GENERAL.—Not later than 270 days after the date of enactment of this Act, the Commission and the Assistant Attorney General in charge of the Antitrust Division, in consultation with other relevant Federal agencies and State attorneys general, shall jointly issue agency enforcement guidelines outlining policies and practices relating to conduct that may materially harm competition under section 3(a), agency interpretations of the affirmative defenses under section 3(b), and policies for determining the appropriate amount of a civil penalty to be sought under section 3(c), with the goal of promoting transparency, deterring violations, fostering innovation and procompetitive conduct, and imposing sanctions proportionate to the gravity of individual violations.

(b) UPDATES.—The Commission and the Assistant Attorney General in charge 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) PUBLIC NOTICE AND COMMENT.—Before issuing guidelines, or updates to those guidelines, under this section, the Commission and the Assistant Attorney General in charge of the Antitrust Division shall—
(1) publish proposed guidelines in draft form;

and

(2) provide public notice and opportunity for comment for not less than 60 days after the date on which the draft guidelines are published.

(d) OPERATION.—The joint guidelines issued under this section do not—

(1) confer any rights upon any person, State, or locality; and

(2) operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in the guidelines.

SEC. 5. RULE OF CONSTRUCTION.

Nothing in this Act may be construed to limit—

(1) any authority of the Attorney General or the Commission under the antitrust laws, section 5 of the Federal Trade Commission Act (15 U.S.C. 45), or any other provision of law; or

(2) the application of any law.

SEC. 6. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and the application of the remaining provisions of this Act, to any person or circumstance, shall not be affected.
SEC. 7. EFFECTIVE DATE.

(a) In General.—Except as provided in subsection (b), this Act shall take effect on the date of enactment of this Act.

(b) Exception.—Section 3(a) shall take effect on the date that is 1 year after the date of enactment of this Act.

(c) Authority.—The exception in subsection (b) shall not limit the authority of the Commission or Department of Justice to implement other sections of this Act.
A BILL

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

MARCH 2, 2022

Reported with an amendment

March 2, 2022

S. 2992

Calendar No. 301