AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3849
OFFERED BY MR. NADLER OF NEW YORK

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021” or the “ACCESS Act of 2021”.

SEC. 2. UNFAIR METHODS OF COMPETITION.


SEC. 3. PORTABILITY.

(a) IN GENERAL.—A covered platform shall maintain a set of transparent, third-party-accessible interfaces (including application programming interfaces) to enable the secure transfer of data to a user, or with the affirmative consent of a user, to a business user at the direction of a user, in a structured, commonly used, and machine-readable format that complies with the standards issued under section 6(c).
(b) DATA SECURITY.—

(1) IN GENERAL.—A business user that receives
ported user data from a covered platform shall rea-
sonably secure any user data it acquires, and shall
take reasonable steps to avoid introducing security
risks to data or the covered platform’s information
systems.

(2) VIOLATION.—A failure to comply with this
section is a violation of this Act and subject to en-
forcement under sections 9 and 10 of this Act.

(3) TERMINATION OF ACCESS.—The Commis-
sion may require the covered platform to cease the
transfer of data to a business user that the Commis-
sion finds has violated this section.

(c) PORTABILITY OBLIGATIONS.—In order to achieve
portability under subsection (a), a covered platform shall
comply with the standards issued under section 6(c).

SEC. 4. INTEROPERABILITY.

(a) IN GENERAL.—A covered platform shall maintain
a set of transparent, third-party-accessible interfaces (in-
cluding application programming interfaces) to facilitate
and maintain interoperability with a business user that
complies with the standards issued under section 6(c).

(b) DATA SECURITY.—
(1) **IN GENERAL.**—A business user that accesses an interoperability interface of a covered platform shall reasonably secure any user data it acquires, processes, or transmits, and shall take reasonable steps to avoid introducing security risks to user data or the covered platform’s information systems.

(2) **VIOLATION.**—A failure to comply with this section is a violation of this Act and subject to enforcement under sections 9 and 10 of this Act.

(3) **TERMINATION OF ACCESS.**—The Commission may require the covered platform to cease interoperating with a business user that the Commission finds has violated this section.

(c) **INTEROPERABILITY OBLIGATIONS.**—In order to achieve interoperability under subsection (a), a covered platform shall comply with the standards issued under section 6(c).

(d) **SECURITY AND PRIVACY STANDARDS.**—Consistent with the standards issued under section 6(c) of this Act, a covered platform shall set privacy and security standards for access by business users to the extent reasonably necessary to address a threat to the covered platform or user data, and shall report any suspected violations of those standards to the Commission.
(c) Prohibited Changes to Interfaces.—

(1) Commission Approval.—A covered platform may make a change that may affect its interoperability interface by petitioning the Commission to approve a proposed change. The Commission shall allow the change if, after consulting with the relevant technical committee, the Commission concludes that the change is not being made with the purpose or effect of unreasonably denying access or undermining interoperability for business users.

(2) Exception.—A covered platform may make a change affecting its interoperability interfaces without receiving approval from the Commission if that change is necessary to address a security vulnerability or other exigent circumstance that creates an imminent risk to user privacy or security if the change is narrowly tailored to the vulnerability and does not have the purpose or effect of unreasonably denying access or undermining interoperability for business users.

(3) Interface Information.—

(A) In general.—Not later than 120 days after the adoption of a rule by the Commission under section 6(c) of this Act, a covered platform shall provide to business users
complete and accurate documentation describing access to the interoperability interface required under this section.

(B) CONTENTS.—The documentation required under subparagraph (A) is limited to interface documentation necessary to achieve development and operation of interoperable products and services.

(4) NOTICE OF CHANGES.—A covered platform shall provide reasonable advance notice to a business user, which may be provided through public notice, of any change to an interoperability interface maintained by the covered platform that will affect the interoperability of a business user.

(f) DATA MINIMIZATION.—

(1) NON-COMMERCIALIZATION BY A COVERED PLATFORM.—A covered platform shall not collect, use, or share user data obtained from a business user through the interoperability interface except for the purposes of safeguarding the privacy and security of such information or maintaining interoperability of services.

(2) NON-COMMERCIALIZATION OF DATA ON A COVERED PLATFORM.—A business user shall not collect, use, or share the data of a user on a covered
platform except for the purposes of safeguarding the privacy and security of such information or maintaining interoperability of services.

SEC. 5. DEFINITIONS.

In this Act:

(1) 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).

(2) AFFIRMATIVE CONSENT.—The term “affirmative consent” means an affirmative action of the user to make a choice following a clear and conspicuous disclosure to the user, separate and apart from any “privacy policy”, “terms of service”, “consent for research”, or other similar document, of—

(A) the types of personal information will be disclosed to third parties;

(B) the reason for such disclosures;

(C) the identity of all such third parties;

(D) any opportunities users have to decline or rescind consent for such disclosures; and

(E) how users may exercise any such opportunities.

An affirmative action does not include obtaining a user’s approval for a preselected default option.
(3) CLEAR AND CONSPICUOUS DISCLOSURE.—

The term “clear and conspicuous disclosure” means that a required disclosure is difficult to miss such that it is easily noticeable and easily understandable by ordinary consumers, including in all of the following ways:

(A) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure is made through only one means.

(B) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(C) An audible disclosure, including by telephone or streaming video, must be delivered in a volume, speed, and cadence sufficient for
ordinary consumers to easily hear and understand it.

(D) In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

(E) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which it appears.

(F) The disclosure must comply with these requirements in each medium through which it is received, including all electronic devices and face-to-face communications.

(G) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(H) When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.

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

(5) 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.

(6) COVERED PLATFORM.—The term “covered platform” means an online platform—

(A) that has been designated as a “covered platform” under section 6(a); or

(B) that—

(i) at any point during the 12 months preceding a designation under section 6(a) 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 6(a) 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 $600,000,000,000, 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.

(7) COVERED PLATFORM OPERATOR.—The term “covered platform operator” means a person that owns or controls a covered platform.
(8) **Critical Trading Partner.**—The term “critical trading partner” means an entity that has the ability to restrict or 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.

(9) **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.

(C) Exclusion.—The term “data” shall exclude proprietary data that does not pertain
to the user or a user device of the covered platform. The Commission shall narrowly construe the term “proprietary data” for the purposes of this Act.

(10) 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.

(11) INTEROPERABILITY INTERFACE.—The term “interoperability interface” means an electronic interface maintained by a covered platform for purposes of achieving interoperability.

(12) ONLINE PLATFORM.—The term “online platform” means a website, online or mobile application, mobile 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; or
(C) enables user searches or queries that access or display a large volume of information.

**SEC. 6. IMPLEMENTATION.**

(a) **COVERED PLATFORM DESIGNATION.—** The Commission or Department of Justice may 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 paragraph (6)(B)(i)–(iii) of section 5 are met;

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

(3) 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 under subsection (b).

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

(1) consider whether its designation of a covered platform under 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 no longer meets the criteria set forth in paragraph (6)(B)(i)-(iii) of section 5;

(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).

(c) RULEMAKING AND TECHNICAL STANDARDS.—

(1) After designating an online platform as a covered platform, the Commission shall issue standards of interoperability specific to the covered platform. These standards shall implement the requirements of sections 3 and 4 of this Act. In adopting the standards implementing the requirements of sections 3 and 4, the Commission shall seek to encourage entry by reducing or eliminating the network effects that limit competition with the covered platform, ensure that business users interconnect with the covered platform on fair and nondiscriminatory terms, and protect data security and privacy.

(2) The Commission shall—

(A) establish a technical committee, as described in section 7 of this Act, to develop pro-
posed standards implementing the requirements of sections 3 and 4 as they apply to a specific covered platform;

(B) issue such standards in accordance with section 553 of title 5, United States Code; and

(C) reject standards that have the purpose or effect of unreasonably denying access, undermine interoperability, or are unduly disruptive to interoperability.

(d) COMPLIANCE ASSESSMENT.—The Commission shall regularly assess compliance by a covered platform with the provisions of this Act and may—

(1) undertake such investigation as appropriate to render this assessment;

(2) issue subpoenas and civil investigative demands for relevant information, including any information that is necessary to effectuate the goals of sections 3 and 4 of this Act, and consult with other agencies as appropriate; and

(3) prescribe such other rules in accordance with section 553 of title 5, United States Code as may be necessary and appropriate to carry out sections 3 and 4 of this Act.
(e) AGENCY COMPLAINTS.—The Commission shall establish procedures under which a user, a covered platform, or a business user may file a complaint alleging a violation of this Act.

(f) BUSINESS USER OBLIGATIONS.—A business user shall not be under any obligation to adopt or comply with the requirements of this Act or the rules adopted by the Commission under this Act unless it chooses to—

(1) initiate the secure transfer of data from a covered platform under section 3 of this Act; or

(2) access an interoperability interface of a covered platform under section 4 of this Act.

SEC. 7. TECHNICAL COMMITTEE.

(a) ESTABLISHMENT.—

(1) Not later than 180 days following the enactment of this Act, the Commission shall establish a technical committee to assist the Commission with considerations relating to implementation and technical aspects of the requirements under sections 3 and 4 of this Act.

(2) The size of the committee and its membership is within the sole discretion of the Commission except as specified in section 7(b).

(b) COMPOSITION.—Each technical committee shall include—
(1) representatives of businesses that, in the
judgement of the Commission, utilize or compete
with the platform;

(2) representatives of competition or privacy ad-
vocacy organizations, and independent academics
that possess technical, legal, economic, financial, or
other knowledge that the Commission may deem
useful;

(3) a representative from the National Institute
of Standards and Technology; and

(4) a representative of a covered platform,
which, if required by the Commission, shall serve as
a nonvoting advisory member to provide consultation
and other aid to the technical committee. A failure
by the covered platform to participate in good faith
in the development of standards by the Technical
Committee shall be a violation of this statute.

(c) GENERAL RESPONSIBILITIES.—Each technical
committee established under this section shall meet regu-
larly to provide information, analysis, and recommenda-
tions to the Commission on the standards of portability
and interoperability and any changes to those standards.

These standards should—

(1) seek to reduce or eliminate network effects
that limit competition with the covered platform;
(2) establish data security and privacy protections for data portability and interoperability;

(3) prevent fraudulent, malicious, or abusive activity by a business user; and

(4) establish reasonable thresholds related to the frequency, nature, and volume of requests by a business user to access resources maintained by the covered platform, beyond which the covered platform may assess a reasonable fee for such access that shall be reasonably proportional to the cost, complexity, and risk to the covered platform of providing such access, and do not limit the ability or deter the incentive of a business user to interoperate with the covered platform.

(d) ROLE.—The role of a technical committee established under this Act is advisory in nature, and such committees shall have no implementation or enforcement authority. However, the Commission shall give strong consideration to the recommendations of such committee in implementing this Act.

(e) NONAPPLICABILITY OF THE FEDERAL ADVISORY COMMITTEE ACT.—The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply with respect to the technical committees.
SEC. 8. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a covered platform designation under section 6(a) of this Act, a decision in response to a request to remove a covered platform designation under section 6(b) of this Act, a final order issued in any district court 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 6(a) of this Act, a decision in response to a request to remove a covered platform designation under section 6(b) 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. 9. ENFORCEMENT.

(a) COMMISSION LITIGATION AUTHORITY.—If the Commission has reason to believe that a person has 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 under this Act and seek other appropriate relief in a district court of the United States.

(b) Emergency Relief.—

(1) The Commission 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 shall grant such relief if the Commission proves—

(A) there is a plausible claim that a covered platform operator took an action that could violate this Act; and

(B) that action impairs the ability of at least 1 business user to compete with the covered platform operator.

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

(3) The court shall terminate the emergency relief at any time that the covered platform operator proves that the Commission has not taken reasonable steps to investigate whether a violation has occurred.

(4) Nothing in this subsection prevents or limits the Commission from seeking other equitable relief as provided in section 10 of this Act.
(c) Statute of Limitations.—A proceeding for a violation of this Act may be commenced not later than 6 years after such violation occurs.

SEC. 10. REMEDIES.

(a) Civil Penalty.—The Commission may recover a civil penalty for a violation of this Act, which shall accrue to the United States Treasury, in an amount not more than the greater of—

(1) 15 percent of the total United States revenue of the person for the previous calendar year; or

(2) 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct.

(b) Remedies in Addition.—Remedies provided in this subsection are in addition to, and not in lieu of, any other remedy available to the Commission under Federal law.

(1) Restitution; Contract Rescission and Reformation; Refunds; Return of Property.—The Commission may seek, and a court may order, with respect to a violation that gives rise to the suit, restitution for losses, rescission or reformation of contracts, refund of money, or return of property.
(2) DISGORGEMENT.—The Commission may seek, and a court may order, disgorgement of any unjust enrichment that a covered platform operator obtained as a result of a violation that gives rise to the suit.

(3) INJUNCTION.—The Commission may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(c) REPEAT OFFENDERS.—If the fact finder determines that a covered platform operator has shown 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 alleging a violation of this Act.

SEC. 11. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to limit 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 to limit the application of any law.
SEC. 12. 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.