

**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:

1 SECTION 1. SHORT TITLE.

2 This Act may be cited as the “Augmenting Compat-
3 ibility and Competition by Enabling Service Switching Act
4 of 2021” or the “ACCESS Act of 2021”.

5 SEC. 2. UNFAIR METHODS OF COMPETITION.

6 A violation of this Act, or standards issued under this
7 Act shall be an unfair method of competition in violation
8 of section 5(a)(1) of the Federal Trade Commission Act
9 (15 U.S.C. 45).

10 SEC. 3. PORTABILITY.

11 (a) IN GENERAL.—A covered platform shall maintain
12 a set of transparent, third-party-accessible interfaces (in-
13 cluding application programming interfaces) to enable the
14 secure transfer of data to a user, or with the affirmative
15 consent of a user, to a business user at the direction of
16 a user, in a structured, commonly used, and machine-read-
17 able format that complies with the standards issued under
18 section 6(c).

1 (b) DATA SECURITY.—

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

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

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

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

18 **SEC. 4. INTEROPERABILITY.**

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

24 (b) DATA SECURITY.—

1 (1) IN GENERAL.—A business user that ac-
2 cesses an interoperability interface of a covered plat-
3 form shall reasonably secure any user data it ac-
4 quires, processes, or transmits, and shall take rea-
5 sonable steps to avoid introducing security risks to
6 user data or the covered platform’s information sys-
7 tems.

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

11 (3) TERMINATION OF ACCESS.—The Commis-
12 sion may require the covered platform to cease inter-
13 operating with a business user that the Commission
14 finds has violated this section.

15 (c) INTEROPERABILITY OBLIGATIONS.—In order to
16 achieve interoperability under subsection (a), a covered
17 platform shall comply with the standards issued under sec-
18 tion 6(c).

19 (d) SECURITY AND PRIVACY STANDARDS.—Con-
20 sistent with the standards issued under section 6(c) of this
21 Act, a covered platform shall set privacy and security
22 standards for access by business users to the extent rea-
23 sonably necessary to address a threat to the covered plat-
24 form or user data, and shall report any suspected viola-
25 tions of those standards to the Commission.

1 (e) PROHIBITED CHANGES TO INTERFACES.—

2 (1) COMMISSION APPROVAL.—A covered plat-
3 form may make a change that may affect its inter-
4 operability interface by petitioning the Commission
5 to approve a proposed change. The Commission shall
6 allow the change if, after consulting with the rel-
7 evant technical committee, the Commission con-
8 cludes that the change is not being made with the
9 purpose or effect of unreasonably denying access or
10 undermining interoperability for business users.

11 (2) EXCEPTION.—A covered platform may
12 make a change affecting its interoperability inter-
13 faces without receiving approval from the Commis-
14 sion if that change is necessary to address a security
15 vulnerability or other exigent circumstance that cre-
16 ates an imminent risk to user privacy or security if
17 the change is narrowly tailored to the vulnerability
18 and does not have the purpose or effect of unreason-
19 ably denying access or undermining interoperability
20 for business users.

21 (3) INTERFACE INFORMATION.—

22 (A) IN GENERAL.—Not later than 120
23 days after the adoption of a rule by the Com-
24 mission under section 6(c) of this Act, a cov-
25 ered platform shall provide to business users

1 complete and accurate documentation describ-
2 ing access to the interoperability interface re-
3 quired under this section.

4 (B) CONTENTS.—The documentation re-
5 quired under subparagraph (A) is limited to
6 interface documentation necessary to achieve
7 development and operation of interoperable
8 products and services.

9 (4) NOTICE OF CHANGES.—A covered platform
10 shall provide reasonable advance notice to a business
11 user, which may be provided through public notice,
12 of any change to an interoperability interface main-
13 tained by the covered platform that will affect the
14 interoperability of a business user.

15 (f) DATA MINIMIZATION.—

16 (1) NON-COMMERCIALIZATION BY A COVERED
17 PLATFORM.—A covered platform shall not collect,
18 use, or share user data obtained from a business
19 user through the interoperability interface except for
20 the purposes of safeguarding the privacy and secu-
21 rity of such information or maintaining interoper-
22 ability of services.

23 (2) NON-COMMERCIALIZATION OF DATA ON A
24 COVERED PLATFORM.—A business user shall not col-
25 lect, use, or share the data of a user on a covered

1 platform except for the purposes of safeguarding the
2 privacy and security of such information or main-
3 taining interoperability of services.

4 **SEC. 5. DEFINITIONS.**

5 In this Act:

6 (1) **PERSON.**—The term “person” has the
7 meaning given the term in subsection (a) of section
8 1 of the Clayton Act (15 U.S.C. 12).

9 (2) **AFFIRMATIVE CONSENT.**—The term “af-
10 firmative consent” means an affirmative action of
11 the user to make a choice following a clear and con-
12 spicuous disclosure to the user, separate and apart
13 from any “privacy policy”, “terms of service”, “con-
14 sent for research”, or other similar document, of—

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

17 (B) the reason for such disclosures;

18 (C) the identity of all such third parties;

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

21 (E) how users may exercise any such op-
22 portunities.

23 An affirmative action does not include obtaining a
24 user’s approval for a preselected default option.

1 (3) CLEAR AND CONSPICUOUS DISCLOSURE.—

2 The term “clear and conspicuous disclosure” means
3 that a required disclosure is difficult to miss such
4 that it is easily noticeable and easily understandable
5 by ordinary consumers, including in all of the fol-
6 lowing ways:

7 (A) In any communication that is solely
8 visual or solely audible, the disclosure must be
9 made through the same means through which
10 the communication is presented. In any commu-
11 nication made through both visual and audible
12 means the disclosure must be presented simul-
13 taneously in both the visual and audible por-
14 tions of the communication even if the rep-
15 resentation requiring the disclosure is made
16 through only one means.

17 (B) A visual disclosure, by its size, con-
18 trast, location, the length of time it appears,
19 and other characteristics, must stand out from
20 any accompanying text or other visual elements
21 so that it is easily noticed, read, and under-
22 stood.

23 (C) An audible disclosure, including by
24 telephone or streaming video, must be delivered
25 in a volume, speed, and cadence sufficient for

1 ordinary consumers to easily hear and under-
2 stand it.

3 (D) In any communication using an inter-
4 active electronic medium, such as the Internet
5 or software, the disclosure must be unavoidable.

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

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

14 (G) The disclosure must not be contra-
15 dicted or mitigated by, or inconsistent with,
16 anything else in the communication.

17 (H) When the representation or sales prac-
18 tice targets a specific audience, such as chil-
19 dren, the elderly, or the terminally ill, “ordinary
20 consumers” includes reasonable members of
21 that group.

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

24 (5) CONTROL.—The term “control” with re-
25 spect to a person means—

1 (A) holding 25 percent or more of the
2 stock of the person;

3 (B) having the right to 25 percent or more
4 of the profits of the person;

5 (C) having the right to 25 percent or more
6 of the assets of the person, in the event of the
7 person's dissolution;

8 (D) if the person is a corporation, having
9 the power to designate 25 percent or more of
10 the directors of the person;

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

14 (F) otherwise exercises substantial control
15 over the person.

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

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

20 (B) that—

21 (i) at any point during the 12 months
22 preceding a designation under section 6(a)
23 or at any point during the 12 months pre-
24 ceding the filing of a complaint for an al-
25 leged violation of this Act—

1 (I) has at least 50,000,000
2 United States-based monthly active
3 users on the online platform; or

4 (II) has at least 100,000 United
5 States-based monthly active business
6 users on the online platform;

7 (ii) at any point during the 2 years
8 preceding a designation under section 6(a)
9 or at any point during the 2 years pre-
10 ceding the filing of a complaint for an al-
11 leged violation of this Act, is owned or con-
12 trolled by a person with United States net
13 annual sales or a market capitalization
14 greater than \$600,000,000,000, adjusted
15 for inflation on the basis of the Consumer
16 Price Index; and

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

21 (7) COVERED PLATFORM OPERATOR.—The
22 term “covered platform operator” means a person
23 that owns or controls a covered platform.

1 (8) CRITICAL TRADING PARTNER.—The term
2 “critical trading partner” means an entity that has
3 the ability to restrict or impede the access of—

4 (A) a business user to its users or cus-
5 tomers; or

6 (B) a business user to a tool or service
7 that it needs to effectively serve its users or
8 customers.

9 (9) DATA.—

10 (A) IN GENERAL.—Not later than 6
11 months after the date of enactment of this Act,
12 the Commission shall adopt rules in accordance
13 with section 553 of title 5, United States Code,
14 to define the term “data” for the purpose of
15 implementing and enforcing this Act.

16 (B) DATA.—The term “data” shall include
17 information that is collected by or provided to
18 a covered platform or business user that is
19 linked, or reasonably linkable, to a specific—

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

22 (ii) user or customer of a business
23 user.

24 (C) EXCLUSION.—The term “data” shall
25 exclude proprietary data that does not pertain

1 to the user or a user device of the covered plat-
2 form. The Commission shall narrowly construe
3 the term “proprietary data” for the purposes of
4 this Act.

5 (10) BUSINESS USER.—The term “business
6 user” means a person that utilizes or plans to utilize
7 the covered platform for the sale or provision of
8 products or services.

9 (11) INTEROPERABILITY INTERFACE.—The
10 term “interoperability interface” means an electronic
11 interface maintained by a covered platform for pur-
12 poses of achieving interoperability.

13 (12) ONLINE PLATFORM.—The term “online
14 platform” means a website, online or mobile applica-
15 tion, mobile operating system, digital assistant, or
16 online service that—

17 (A) enables a user to generate content that
18 can be viewed by other users on the platform or
19 to interact with other content on the platform;

20 (B) facilitates the offering, sale, purchase,
21 payment, or shipping of products or services,
22 including software applications, between and
23 among consumers or businesses not controlled
24 by the platform; or

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

3 **SEC. 6. IMPLEMENTATION.**

4 (a) COVERED PLATFORM DESIGNATION.—The Com-
5 mission or Department of Justice may designate a covered
6 platform for the purpose of implementing and enforcing
7 this Act. Such designation shall—

8 (1) be based on a finding that the criteria set
9 forth in paragraph (6)(B)(i)–(iii) of section 5 are
10 met;

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

13 (3) apply for 10 years from its issuance regard-
14 less of whether there is a change in control or own-
15 ership over the covered platform unless the Commis-
16 sion or the Department of Justice removes the des-
17 ignation under subsection (b).

18 (b) REMOVAL OF COVERED PLATFORM DESIGNA-
19 TION.—The Commission or the Department of Justice
20 shall—

21 (1) consider whether its designation of a cov-
22 ered platform under subsection (a) should be re-
23 moved prior to the expiration of the 10-year period
24 if the covered platform operator files a request with
25 the Commission or the Department of Justice, which

1 shows that the online platform no longer meets the
2 criteria set forth in paragraph (6)(B)(i)-(iii) of sec-
3 tion 5;

4 (2) determine whether to grant a request sub-
5 mitted under paragraph (1) not later than 120 days
6 after the date of the filing of such request; and

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

10 (c) RULEMAKING AND TECHNICAL STANDARDS.—

11 (1) After designating an online platform as a
12 covered platform, the Commission shall issue stand-
13 ards of interoperability specific to the covered plat-
14 form. These standards shall implement the require-
15 ments of sections 3 and 4 of this Act. In adopting
16 the standards implementing the requirements of sec-
17 tions 3 and 4, the Commission shall seek to encour-
18 age entry by reducing or eliminating the network ef-
19 fects that limit competition with the covered plat-
20 form, ensure that business users interconnect with
21 the covered platform on fair and nondiscriminatory
22 terms, and protect data security and privacy.

23 (2) The Commission shall—

24 (A) establish a technical committee, as de-
25 scribed in section 7 of this Act, to develop pro-

1 posed standards implementing the requirements
2 of sections 3 and 4 as they apply to a specific
3 covered platform;

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

7 (C) reject standards that have the purpose
8 or effect of unreasonably denying access, under-
9 mine interoperability, or are unduly disruptive
10 to interoperability.

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

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

16 (2) issue subpoenas and civil investigative de-
17 mands for relevant information, including any infor-
18 mation that is necessary to effectuate the goals of
19 sections 3 and 4 this Act, and consult with other
20 agencies as appropriate; and

21 (3) prescribe such other rules in accordance
22 with section 553 of title 5, United States Code as
23 may be necessary and appropriate to carry out sec-
24 tions 3 and 4 of this Act.

1 (e) AGENCY COMPLAINTS.—The Commission shall
2 establish procedures under which a user, a covered plat-
3 form, or a business user may file a complaint alleging a
4 violation of this Act.

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

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

11 (2) access an interoperability interface of a cov-
12 ered platform under section 4 of this Act.

13 **SEC. 7. TECHNICAL COMMITTEE.**

14 (a) ESTABLISHMENT.—

15 (1) Not later than 180 days following the enact-
16 ment of this Act, the Commission shall establish a
17 technical committee to assist the Commission with
18 considerations relating to implementation and tech-
19 nical aspects of the requirements under sections 3
20 and 4 of this Act.

21 (2) The size of the committee and its member-
22 ship is within the sole discretion of the Commission
23 except as specified in section 7(b).

24 (b) COMPOSITION.—Each technical committee shall
25 include—

1 (1) representatives of businesses that, in the
2 judgement of the Commission, utilize or compete
3 with the platform;

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

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

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

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

24 (1) seek to reduce or eliminate network effects
25 that limit competition with the covered platform;

1 (2) establish data security and privacy protec-
2 tions for data portability and interoperability;

3 (3) prevent fraudulent, malicious, or abusive ac-
4 tivity by a business user; and

5 (4) establish reasonable thresholds related to
6 the frequency, nature, and volume of requests by a
7 business user to access resources maintained by the
8 covered platform, beyond which the covered platform
9 may assess a reasonable fee for such access that
10 shall be reasonably proportional to the cost, com-
11 plexity, and risk to the covered platform of providing
12 such access, and do not limit the ability or deter the
13 incentive of a business user to interoperate with the
14 covered platform.

15 (d) **ROLE.**—The role of a technical committee estab-
16 lished under this Act is advisory in nature, and such com-
17 mittees shall have no implementation or enforcement au-
18 thority. However, the Commission shall give strong consid-
19 eration to the recommendations of such committee in im-
20 plementing this Act.

21 (e) **NONAPPLICABILITY OF THE FEDERAL ADVISORY**
22 **COMMITTEE ACT.**—The Federal Advisory Committee Act
23 (5 U.S.C. App.) shall not apply with respect to the tech-
24 nical committees.

1 **SEC. 8. JUDICIAL REVIEW.**

2 (a) IN GENERAL.—Any party that is subject to a cov-
3 ered platform designation under section 6(a) of this Act,
4 a decision in response to a request to remove a covered
5 platform designation under section 6(b) of this Act, a final
6 order issued in any district court under this Act, or a final
7 order of the Commission issued in an administrative adju-
8 dicative proceeding under this Act may within 30 days of
9 the issuance of such designation, decision, or order, peti-
10 tion for review of such designation, decision, or order in
11 the United States Court of Appeals for the District of Co-
12 lumbia Circuit.

13 (b) TREATMENT OF FINDINGS.—In a proceeding for
14 judicial review of a covered platform designation under
15 section 6(a) of this Act, a decision in response to a request
16 to remove a covered platform designation under section
17 6(b) of this Act, or a final order of the Commission issued
18 in an administrative adjudicative proceeding under this
19 Act, the findings of the Commission or the Assistant At-
20 torney General as to the facts, if supported by evidence,
21 shall be conclusive.

22 **SEC. 9. ENFORCEMENT.**

23 (a) COMMISSION LITIGATION AUTHORITY.—If the
24 Commission has reason to believe that a person has vio-
25 lated this Act, the Commission may commence a civil ac-
26 tion, in its own name by any of its attorneys designated

1 by it for such purpose, to recover a civil penalty under
2 this Act and seek other appropriate relief in a district
3 court of the United States.

4 (b) EMERGENCY RELIEF.—

5 (1) The Commission may seek a temporary in-
6 junction requiring the covered platform operator to
7 take or stop taking any action for not more than
8 120 days and the court shall grant such relief if the
9 Commission proves—

10 (A) there is a plausible claim that a cov-
11 ered platform operator took an action that
12 could violate this Act; and

13 (B) that action impairs the ability of at
14 least 1 business user to compete with the cov-
15 ered platform operator.

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

18 (3) The court shall terminate the emergency re-
19 lief at any time that the covered platform operator
20 proves that the Commission has not taken reason-
21 able steps to investigate whether a violation has oc-
22 curred.

23 (4) Nothing in this subsection prevents or limits
24 the Commission from seeking other equitable relief
25 as provided in section 10 of this Act.

1 (c) STATUTE OF LIMITATIONS.—A proceeding for a
2 violation of this Act may be commenced not later than
3 6 years after such violation occurs.

4 **SEC. 10. REMEDIES.**

5 (a) CIVIL PENALTY.—The Commission may recover
6 a civil penalty for a violation of this Act, which shall ac-
7 crue to the United States Treasury, in an amount not
8 more than the greater of—

9 (1) 15 percent of the total United States rev-
10 enue of the person for the previous calendar year; or

11 (2) 30 percent of the United States revenue of
12 the person in any line of business affected or tar-
13 geted by the unlawful conduct during the period of
14 the unlawful conduct.

15 (b) REMEDIES IN ADDITION.—Remedies provided in
16 this subsection are in addition to, and not in lieu of, any
17 other remedy available to the Commission under Federal
18 law.

19 (1) RESTITUTION; CONTRACT RESCISSION AND
20 REFORMATION; REFUNDS; RETURN OF PROPERTY.—
21 The Commission may seek, and a court may order,
22 with respect to a violation that gives rise to the suit,
23 restitution for losses, rescission or reformation of
24 contracts, refund of money, or return of property.

1 (2) DISGORGEMENT.—The Commission may
2 seek, and a court may order, disgorgement of any
3 unjust enrichment that a covered platform operator
4 obtained as a result of a violation that gives rise to
5 the suit.

6 (3) INJUNCTION.—The Commission may seek,
7 and the court may order, relief in equity as nec-
8 essary to prevent, restrain, or prohibit violations of
9 this Act.

10 (c) REPEAT OFFENDERS.—If the fact finder deter-
11 mines that a covered platform operator has shown a pat-
12 tern or practice of violating this Act, the court shall con-
13 sider requiring, and may order, that the Chief Executive
14 Officer, and any other corporate officer as appropriate to
15 deter violations of this Act, forfeit to the United States
16 Treasury any compensation received by that person during
17 the 12 months preceding or following the filing of a com-
18 plaint alleging a violation of this Act.

19 **SEC. 11. RULE OF CONSTRUCTION.**

20 Nothing in this Act shall be construed to limit any
21 authority of the Attorney General or the Commission
22 under the antitrust laws, section 5 of the Federal Trade
23 Commission Act (15 U.S.C. 45), or any other provision
24 of law or to limit the application of any law.

1 **SEC. 12. SEVERABILITY.**

2 If any provision of this Act, an amendment made by
3 this Act, or the application of such provision or amend-
4 ment to any person or circumstance is held to be unconsti-
5 tutional, the remainder of this Act and of the amendments
6 made by this Act, and the application of the remaining
7 provisions of this Act and amendments to any person or
8 circumstance shall not be affected.

