

**AMENDMENT IN THE NATURE OF A SUBSTITUTE  
TO H.R. 3816  
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 “American Innovation  
3 and Choice Online Act”.

**4 SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.**

5 (a) VIOLATION.—It shall be unlawful for a person op-  
6 erating a covered platform, in or affecting commerce, to  
7 engage in any conduct in connection with the operation  
8 of the covered platform that—

9 (1) advantages the covered platform operator’s  
10 own products, services, or lines of business over  
11 those of another business user;

12 (2) excludes or disadvantages the products,  
13 services, or lines of business of another business user  
14 relative to the covered platform operator’s own prod-  
15 ucts, services, or lines of business; or

16 (3) discriminates among similarly situated busi-  
17 ness users.

1 (b) OTHER DISCRIMINATORY CONDUCT.—It shall be  
2 unlawful for a person operating a covered platform, in or  
3 affecting commerce, to—

4 (1) restrict or impede the capacity of a business  
5 user to access or interoperate with the same plat-  
6 form, operating system, hardware or software fea-  
7 tures that are available to the covered platform oper-  
8 ator’s own products, services, or lines of business;

9 (2) condition access to the covered platform or  
10 preferred status or placement on the covered plat-  
11 form on the purchase or use of other products or  
12 services offered by the covered platform operator;

13 (3) use non-public data to offer, or support the  
14 offering of, the covered platform operator’s own  
15 products, services, or lines of business that are ob-  
16 tained from or generated on the covered platform—

17 (A) by the activities of a business user; or

18 (B) through an interaction of a covered  
19 platform user with the products or services of  
20 a business user;

21 (4) restrict or impede a business user from ac-  
22 cessing data generated on the covered platform by  
23 the activities of the business user, or through an  
24 interaction of a covered platform user with the busi-  
25 ness user’s products or services, such as by estab-

1       lishing contractual or technical restrictions that pre-  
2       vent the portability of such data by the business  
3       user to other systems or applications;

4           (5) restrict or impede covered platform users  
5       from un-installing software applications that have  
6       been preinstalled on the covered platform or chang-  
7       ing default settings that direct or steer covered plat-  
8       form users to products or services offered by the  
9       covered platform operator;

10          (6) restrict or impede businesses users from  
11       communicating information or providing hyperlinks  
12       on the covered platform to covered platform users to  
13       facilitate business transactions;

14          (7) in connection with any user interface, in-  
15       cluding search or ranking functionality offered by  
16       the covered platform, treat the covered platform op-  
17       erator's own products, services, or lines of business  
18       more favorably than those of another business user;

19          (8) interfere with or restrict a business user's  
20       pricing of its products or services;

21          (9) restrict or impede a business user, or a  
22       business user's customers or users, from interoper-  
23       ating or connecting to any product or service; or

24          (10) retaliate against any business user or cov-  
25       ered platform user that raises concerns with any law

1 enforcement authority about actual or potential vio-  
2 lations of State or Federal law.

3 (c) AFFIRMATIVE DEFENSE.—Subsections (a) and  
4 (b) shall not apply if the defendant establishes by clear  
5 and convincing evidence that the conduct described in sub-  
6 sections (a) or (b)—

7 (1) would not result in harm to the competitive  
8 process by restricting or impeding legitimate activity  
9 by business users; or

10 (2) was narrowly tailored, could not be achieved  
11 through less discriminatory means, was  
12 nonpretextual, and was necessary to—

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

15 (B) protect user privacy or other non-pub-  
16 lic data.

17 (d) COVERED PLATFORM DESIGNATION.—The Fed-  
18 eral Trade Commission or Department of Justice shall  
19 designate a covered platform for the purpose of imple-  
20 menting and enforcing this Act. Such designation shall—

21 (1) be based on a finding that the criteria set  
22 forth in subsection (g)(4)(i)–(iii) are met;

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

1           (3) apply for 10 years from its issuance regard-  
2           less of whether there is a change in control or own-  
3           ership over the covered platform unless the Commis-  
4           sion or the Department of Justice removes the des-  
5           ignation under subsection (e).

6           (e) REMOVAL OF COVERED PLATFORM DESIGNA-  
7           TION.—The Commission or the Department of Justice  
8           shall—

9           (1) consider whether its designation of a cov-  
10           ered platform under subsection (d) should be re-  
11           moved prior to the expiration of the ten-year period  
12           if the covered platform operator files a request with  
13           the Commission or the Department of Justice, which  
14           shows that the online platform no longer meets the  
15           criteria set forth in subsection (g)(4)(i)–(iii);

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

19           (3) obtain the concurrence of the Commission  
20           or the Department of Justice, as appropriate, before  
21           granting a request submitted under paragraph (1).

22           (f) REMEDIES.—

23           (1) CIVIL PENALTY.—Any covered platform op-  
24           erator who is found to have violated subsections (a)  
25           or (b) shall be liable to the United States or the

1 Commission for a civil penalty, which shall accrue to  
2 the United States Treasury, in an amount not more  
3 than the greater of—

4 (A) 15 percent of the total United States  
5 revenue of the person for the previous calendar  
6 year; or

7 (B) 30 percent of the United States rev-  
8 enue of the person in any line of business af-  
9 fected or targeted by the unlawful conduct dur-  
10 ing the period of the unlawful conduct. This  
11 civil penalty may be recovered in a civil action  
12 brought by the United States or the Commis-  
13 sion.

14 (2) REMEDIES IN ADDITION.—Remedies pro-  
15 vided in this subsection are in addition to, and not  
16 in lieu of, any other remedy available under Federal  
17 or State law.

18 (A) RESTITUTION; CONTRACT RESCISSION  
19 AND REFORMATION; REFUNDS; RETURN OF  
20 PROPERTY.—The Assistant Attorney General of  
21 the Antitrust Division, the Commission, or the  
22 attorney general of any State may seek, and the  
23 court may order, with respect to a violation that  
24 gives rise to the suit, restitution for losses, re-

1 scission or reformation of contracts, refund of  
2 money, or return of property.

3 (B) DISGORGEMENT.—The Assistant At-  
4 torney General of the Antitrust Division, the  
5 Commission, or the attorney general of any  
6 State may seek, and the court may order,  
7 disgorgement of any unjust enrichment that a  
8 covered platform operator obtained as a result  
9 of the violation that gives rise to the suit.

10 (C) INJUNCTIONS.—The Assistant Attor-  
11 ney General of the Antitrust Division, the Com-  
12 mission, or the attorney general of any State  
13 may seek, and the court may order, relief in eq-  
14 uity as necessary to prevent, restrain, or pro-  
15 hibit violations of this Act.

16 (D) CONFLICT OF INTEREST.—

17 (i) If the fact finder determines that  
18 a violation of this Act arises from a con-  
19 flict of interest related to the covered plat-  
20 form operator's ownership or control of  
21 multiple lines of business, the court shall  
22 consider requiring, and may order, divesti-  
23 ture of the line or lines of business that  
24 give rise to such conflict.

1 (ii) For purposes of this section, the  
2 term “conflict of interest” includes the  
3 conflict of interest that arises when—

4 (I) a covered platform operator  
5 owns or controls a line of business,  
6 other than the covered platform; and

7 (II) the covered platform opera-  
8 tor’s ownership or control of that line  
9 of business creates the incentive and  
10 ability for the covered platform oper-  
11 ator to—

12 (aa) advantage the covered  
13 platform operator’s own prod-  
14 ucts, services, or lines of business  
15 on the covered platform over  
16 those of a competing business or  
17 a business that constitutes nas-  
18 cent or potential competition to  
19 the covered platform operator; or

20 (bb) exclude from, or dis-  
21 advantage, the products, services,  
22 or lines of business on the cov-  
23 ered platform of a competing  
24 business or a business that con-  
25 stitutes nascent or potential com-



1                   petition to the covered platform  
2                   operator.

3           (3) REPEAT OFFENDERS.—If the fact finder  
4 determines that a covered platform operator has en-  
5 gaged in a pattern or practice of violating this Act,  
6 the court shall consider requiring, and may order,  
7 that the Chief Executive Officer, and any other cor-  
8 porate officer as appropriate to deter violations of  
9 this Act, forfeit to the United States Treasury any  
10 compensation received by that person during the 12  
11 months preceding or following the filing of a com-  
12 plaint for an alleged violation of this Act.

13 (g) DEFINITIONS.—In this section:

14           (1) ANTITRUST LAWS.—The term “antitrust  
15 laws” has the meaning given the term in subsection  
16 (a) of section 1 of the Clayton Act (15 U.S.C. 12).

17           (2) BUSINESS USER.—The term “Business  
18 User” means a person that utilizes or plans to uti-  
19 lize the covered platform for the sale or provision of  
20 products or services.

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

23           (4) COVERED PLATFORM.—The term “covered  
24 platform” means an online platform—

1 (A) that has been designated as a “covered  
2 platform” under section 2(d); or

3 (B) that—

4 (i) at any point during the 12 months  
5 preceding a designation under section 2(d)  
6 or at any point during the 12 months pre-  
7 ceding the filing of a complaint for an al-  
8 leged violation of this Act—

9 (I) has at least 50,000,000  
10 United States-based monthly active  
11 users on the online platform; or

12 (II) has at least 100,000 United  
13 States-based monthly active business  
14 users on the online platform;

15 (ii) at any point during the 2 years  
16 preceding a designation under section 2(d)  
17 or at any point during the 2 years pre-  
18 ceding the filing of a complaint for an al-  
19 leged violation of this Act, is owned or con-  
20 trolled by a person with United States net  
21 annual sales or a market capitalization  
22 greater than \$600,000,000,000, adjusted  
23 for inflation on the basis of the Consumer  
24 Price Index; and

1 (iii) is a critical trading partner for  
2 the sale or provision of any product or  
3 service offered on or directly related to the  
4 online platform.

5 (5) CRITICAL TRADING PARTNER.—The term  
6 “critical trading partner” means an entity that has  
7 the ability to restrict or impede the access of—

8 (A) a business user to its users or cus-  
9 tomers; or

10 (B) a business user to a tool or service  
11 that it needs to effectively serve its users or  
12 customers.

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

16 (7) DATA.—

17 (A) IN GENERAL.—Not later than 6  
18 months after the date of enactment of this Act,  
19 the Commission shall adopt rules in accordance  
20 with section 553 of title 5, United States Code,  
21 to define the term “data” for the purpose of  
22 implementing and enforcing this Act.

23 (B) DATA.—The term “data” shall include  
24 information that is collected by or provided to

1 a covered platform or business user that is  
2 linked, or reasonably linkable, to a specific—

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

5 (ii) user or customer of a business  
6 user.

7 (8) ONLINE PLATFORM.—The term “online  
8 platform” means a website, online or mobile applica-  
9 tion, mobile operating system, digital assistant, or  
10 online service that—

11 (A) enables a user to generate content that  
12 can be viewed by other users on the platform or  
13 to interact with other content on the platform;

14 (B) facilitates the offering, sale, purchase,  
15 payment, or shipping of products or services,  
16 including software applications, between and  
17 among consumers or businesses not controlled  
18 by the platform operator; or

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

21 (9) CONTROL.—The term “control” with re-  
22 spect to a person means—

23 (A) holding 25 percent or more of the  
24 stock of the person;

1 (B) having the right to 25 percent or more  
2 of the profits of the person;

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

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

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

12 (F) otherwise exercises substantial control  
13 over the person.

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

18 (h) ENFORCEMENT.—

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

21 (A) the Commission shall enforce this Act  
22 in the same manner, by the same means, and  
23 with the same jurisdiction, powers, and duties  
24 as though all applicable terms of the Federal  
25 Trade Commission Act (15 U.S.C. 41 et seq.)

1           were incorporated into and made a part of this  
2           Act;

3                   (B) the Attorney General shall enforce this  
4           Act in the same manner, by the same means,  
5           and with the same jurisdiction, powers and du-  
6           ties as though all applicable terms of the Sher-  
7           man Act (15 U.S.C. 1 et seq.), Clayton Act (15  
8           U.S.C. 12 et seq.), and Antitrust Civil Process  
9           Act (15 U.S.C. 1311 et seq.) were incorporated  
10          into and made a part of this Act; and

11                   (C) any attorney general of a State shall  
12          enforce this Act in the same manner, by the  
13          same means, and with the same jurisdiction,  
14          powers and duties as though all applicable  
15          terms of the Sherman Act (15 U.S.C. 1 et seq.)  
16          and the Clayton Act (15 U.S.C. 12 et seq.)  
17          were incorporated into and made a part of this  
18          Act.

19                   (2) UNFAIR METHODS OF COMPETITION.—A  
20          violation of this Act shall also constitute an unfair  
21          method of competition under section 5 of the Fed-  
22          eral Trade Commission Act (15 U.S.C. 45).

23                   (3) COMMISSION INDEPENDENT LITIGATION AU-  
24          THORITY.—If the Commission has reason to believe  
25          that a person violated this Act, the Commission may

1 commence a civil action, in its own name by any of  
2 its attorneys designated by it for such purpose, to  
3 recover a civil penalty and seek other appropriate re-  
4 lief in a district court of the United States.

5 (4) PARENS PATRIAE.—Any attorney general of  
6 a State may bring a civil action in the name of such  
7 State for a violation of this Act as *parens patriae* on  
8 behalf of natural persons residing in such State, in  
9 any district court of the United States having juris-  
10 diction of the defendant, and may secure any form  
11 of relief provided for in this section.

12 (i) EMERGENCY RELIEF.—

13 (1) The Commission, Assistant Attorney Gen-  
14 eral of the Antitrust Division, or any attorney gen-  
15 eral of a State may seek a temporary injunction re-  
16 quiring the covered platform operator to take or stop  
17 taking any action for not more than 120 days and  
18 the court shall grant such relief if the Commission,  
19 the United States, or the attorney general of a State  
20 proves—

21 (A) there is a plausible claim that a cov-  
22 ered platform operator took an action that vio-  
23 lates this Act; and

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

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

6 (3) The court shall terminate the emergency re-  
7 lief at any time that the covered platform operator  
8 proves that the Commission, the United States, or  
9 the attorney general of the State seeking relief  
10 under this section has not taken reasonable steps to  
11 investigate whether a violation has occurred.

12 (4) Nothing in this subsection prevents or limits  
13 the Commission, the United States, or any attorney  
14 general of any State from seeking other equitable re-  
15 lief as provided in subsection (f) of this section.

16 (j) STATUTE OF LIMITATIONS.—A proceeding for a  
17 violation of this section may be commenced not later than  
18 6 years after such violation occurs.

19 **SEC. 3. JUDICIAL REVIEW.**

20 (a) IN GENERAL.—Any party that is subject to a cov-  
21 ered platform designation under section 2(d) of this Act,  
22 a decision in response to a request to remove a covered  
23 platform designation under section 2(e) of this Act, a final  
24 order issued in any district court of the United States  
25 under this Act, or a final order of the Commission issued



1 in an administrative adjudicative proceeding under this  
2 Act may within 30 days of the issuance of such designa-  
3 tion, decision, or order, petition for review of such designa-  
4 tion, decision, or order in the United States Court of Ap-  
5 peals for the District of Columbia Circuit.

6 (b) TREATMENT OF FINDINGS.—In a proceeding for  
7 judicial review of a covered platform designation under  
8 section 2(d) of this Act, a decision in response to a request  
9 to remove a covered platform designation under section  
10 2(e) of this Act, or a final order of the Commission issued  
11 in an administrative adjudicative proceeding under this  
12 Act, the findings of the Commission or the Assistant At-  
13 torney General as to the facts, if supported by evidence,  
14 shall be conclusive.

15 **SEC. 4. BUREAU OF DIGITAL MARKETS.**

16 (a) ESTABLISHMENT OF BUREAU.—As soon as prac-  
17 ticable, but not later than 180 days after the date of en-  
18 actment of this Act, the Commission shall establish within  
19 the Commission a bureau of digital markets for purposes  
20 of enforcement of this Act.

21 (b) LEADERSHIP.—The head of the Bureau of Digital  
22 Markets shall be the Director of the Bureau of Digital  
23 Markets, who shall—

24 (1) report directly to the Chair of the Commis-  
25 sion; and

1           (2) be appointed by the Chair of the Commis-  
2           sion.

3           (c) BUREAU STAFF.—The Bureau of Digital Markets  
4 shall retain or employ legal, technology, economic, re-  
5 search, and service staff sufficient to carry out the func-  
6 tions, powers, and duties of the Bureau.

7           (d) REPORTING REQUIREMENT.—Not later than 1  
8 year after the date of enactment of this Act, the Bureau  
9 of Digital Markets shall on an annual basis publish and  
10 submit a report to the Committee on the Judiciary of the  
11 House of Representatives and the Committee on the Judi-  
12 ciary of the Senate describing the Bureau’s enforcement  
13 activities during the previous 12-month period.

14 **SEC. 5. ENFORCEMENT GUIDELINES.**

15           (a) IN GENERAL.—Not later than 1 year after the  
16 date of enactment of this Act, the Commission and the  
17 Assistant Attorney General of the Antitrust Division shall  
18 jointly issue guidelines outlining policies and practices, re-  
19 lating to agency enforcement of this Act, with the goal  
20 of promoting transparency and deterring violations.

21           (b) UPDATES.—The Commission and the Assistant  
22 Attorney General of the Antitrust Division shall update  
23 the joint guidelines issued under subsection (a), as needed  
24 to reflect current agency policies and practices, but not

1 less frequently than once every 4 years beginning on the  
2 date of enactment of this Act.

3 (c) OPERATION.—The Joint Guidelines issued under  
4 this section do not confer any rights upon any person,  
5 State, or locality, nor shall they operate to bind the Com-  
6 mission, Department of Justice, or any person, State, or  
7 locality to the approach recommended in such Guidelines.

8 **SEC. 6. SUITS BY PERSONS INJURED.**

9 (a) IN GENERAL.—Except as provided in subsection  
10 (b), any person who shall be injured in his business or  
11 property by reason of anything forbidden in this Act may  
12 sue therefor in any district court of the United States in  
13 the district in which the defendant resides or is found or  
14 has an agent, without respect to the amount in con-  
15 troversy, and shall recover threefold the damages by him  
16 sustained, and the cost of suit, including a reasonable at-  
17 torney's fee. The court may award under this section, pur-  
18 suant to a motion by such person promptly made, simple  
19 interest on actual damages for the period beginning on  
20 the date of service of such person's pleading setting forth  
21 a claim under this Act and ending on the date of judg-  
22 ment, or for any shorter period therein, if the court finds  
23 that the award of such interest for such period is just in  
24 the circumstances. In determining whether an award of

1 interest under this section for any period is just in the  
2 circumstances, the court shall consider only—

3 (1) whether such person or the opposing party,  
4 or either party's representative, made motions or as-  
5 serted claims or defenses so lacking in merit as to  
6 show that such party or representative acted inten-  
7 tionally for delay, or otherwise acted in bad faith;

8 (2) whether, in the course of the action in-  
9 volved, such person or the opposing party, or either  
10 party's representative, violated any applicable rule,  
11 statute, or court order providing for sanctions for  
12 dilatory behavior or otherwise providing for expedi-  
13 tious proceedings; and

14 (3) whether such person or the opposing party,  
15 or either party's representative, engaged in conduct  
16 primarily for the purpose of delaying the litigation  
17 or increasing the cost thereof.

18 (b) AMOUNT OF DAMAGES PAYABLE TO FOREIGN  
19 STATES AND INSTRUMENTALITIES OF FOREIGN  
20 STATES.—

21 (1) Except as provided in paragraph (2), any  
22 person who is a foreign state may not recover under  
23 subsection (a) an amount in excess of the actual  
24 damages sustained by it and the cost of suit, includ-  
25 ing a reasonable attorney's fee.

1           (2) Paragraph (1) shall not apply to a foreign  
2 state if—

3           (A) such foreign state would be denied,  
4 under section 1605(a)(2) of title 28, immunity  
5 in a case in which the action is based upon a  
6 commercial activity, or an act, that is the sub-  
7 ject matter of its claim under this section;

8           (B) such foreign state waives all defenses  
9 based upon or arising out of its status as a for-  
10 eign state, to any claims brought against it in  
11 the same action;

12           (C) such foreign state engages primarily in  
13 commercial activities; and

14           (D) such foreign state does not function,  
15 with respect to the commercial activity, or the  
16 act, that is the subject matter of its claim  
17 under this section as a procurement entity for  
18 itself or for another foreign state.

19       (c) INJUNCTIVE RELIEF.—Any person shall be enti-  
20 tled to sue for and have injunctive relief, in any court of  
21 the United States having jurisdiction over the parties,  
22 against threatened loss or damage by a violation of this  
23 Act, when and under the same conditions and principles  
24 as injunctive relief against threatened conduct that will  
25 cause loss or damage is granted by courts of equity, under

1 the rules governing such proceedings, and upon the execu-  
2 tion of proper bond against damages for an injunction im-  
3 providently granted and a showing that the danger of ir-  
4 reparable loss or damage is immediate, a preliminary in-  
5 junction may issue: Provided, That nothing herein con-  
6 tained shall be construed to entitle any person, except the  
7 United States, to bring suit for injunctive relief against  
8 any common carrier subject to the jurisdiction of the Sur-  
9 face Transportation Board under subtitle IV of title 49.  
10 In any action under this section in which the plaintiff sub-  
11 stantially prevails, the court shall award the cost of suit,  
12 including a reasonable attorney's fee, to such plaintiff.

13 **SEC. 7. RULE OF CONSTRUCTION.**

14 (a) Notwithstanding any other provision of law,  
15 whether user conduct would constitute a violation of sec-  
16 tion 1030 of title 18 of the United States Code is not dis-  
17 positive of whether the defendant has established an af-  
18 firmative defense under this Act.

19 (b) An action taken by a covered platform operator  
20 that is reasonably tailored to protect the rights of third  
21 parties under sections 106, 1101, 1201, or 1401 of title  
22 17 of the United States Code or rights actionable under  
23 sections 32 or 43 of the Lanham Act (15 U.S.C. §§ 1114,  
24 1125), or corollary state law, shall not be considered un-  
25 lawful conduct under subsection 2(a) or (b) of this Act.

1 (c) Nothing in this Act shall be construed to limit  
2 any authority of the Attorney General or the Commission  
3 under the antitrust laws, the Federal Trade Commission  
4 Act (15 U.S.C. 45), or any other provision of law or to  
5 limit the application of any law.

6 **SEC. 8. SEVERABILITY.**

7 If any provision of this Act, an amendment made by  
8 this Act, or the application of such provision or amend-  
9 ment to any person or circumstance is held to be unconsti-  
10 tutional, the remainder of this Act and of the amendments  
11 made by this Act, and the application of the remaining  
12 provisions of this Act and amendments to any person or  
13 circumstance shall not be affected.

Amend the title to read as follows: “A bill to provide  
that certain discriminatory conduct by a covered platform  
operator shall be unlawful, and for other purposes.”.

