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.

This Act may be cited as the “American Innovation and Choice Online Act”.

4 SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to engage in any conduct in connection with the operation of the covered platform that—

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

(2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator’s own products, services, or lines of business; or

(3) discriminates among similarly situated business users.
(b) OTHER DISCRIMINATORY CONDUCT.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to—

(1) 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;

(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;

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

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

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

(4) 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 business user’s products or services, such as by estab-
lishing contractual or technical restrictions that pre-
vent the portability of such data by the business
user to other systems or applications;

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

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

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

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

(9) restrict or impede a business user, or a
business user’s customers or users, from interopera-
ting or connecting to any product or service; or

(10) retaliate against any business user or cov-
ered platform user that raises concerns with any law
enforcement authority about actual or potential violations of State or Federal law.

(c) AFFIRMATIVE DEFENSE.—Subsections (a) and (b) shall not apply if the defendant establishes by clear and convincing evidence that the conduct described in subsections (a) or (b)—

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

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

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

(B) protect user privacy or other non-public data.

(d) COVERED PLATFORM DESIGNATION.—The Federal Trade Commission or Department of Justice shall 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 subsection (g)(4)(i)–(iii) 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 (e).

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

(1) consider whether its designation of a covered platform under subsection (d) should be removed prior to the expiration of the ten-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 subsection (g)(4)(i)–(iii);

(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).

(f) Remedies.—

(1) Civil Penalty.—Any covered platform operator 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 the greater of—

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

(B) 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. This civil penalty may be recovered in a civil action brought by the United States or the Commission.

(2) Remedies in addition.—Remedies provided in this subsection are in addition to, and not in lieu of, any other remedy available under Federal or State law.

(A) Restitution; contract rescission and reformation; refunds; return of property.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the court may order, with respect to a violation that gives rise to the suit, restitution for losses, re-
scission or reformation of contracts, refund of
money, or return of property.

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

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

(D) CONFLICT OF INTEREST.—

(i) If the fact finder determines that
a violation of this Act arises from a con-
flict of interest related to the covered plat-
form operator’s ownership or control of
multiple lines of business, the court shall
consider requiring, and may order, divesti-
ture of the line or lines of business that
give rise to such conflict.
(ii) For purposes of this section, the term “conflict of interest” includes the conflict of interest that arises when—

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

(II) the covered platform operator’s ownership or control of that line of business creates the incentive and ability for the covered platform operator to—

(aa) advantage the covered platform operator’s own products, services, or lines of business on the covered platform over those of a competing business or a business that constitutes nascent or potential competition to the covered platform operator; or

(bb) exclude from, or disadvantage, the products, services, or lines of business on the covered platform of a competing business or a business that constitutes nascent or potential com-
petition to the covered platform operator.

(3) REPEAT OFFENDERS.—If the fact finder determines that a covered platform operator 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.

(g) 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 plans to utilize the covered platform for the sale or provision of products or services.

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

(4) COVERED PLATFORM.—The term “covered platform” means an online platform—
(A) that has been designated as a “covered platform” under section 2(d); or

(B) that—

(i) at any point during the 12 months preceding a designation under section 2(d) 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(d) 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.

(5) 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 cus-
tomers; 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, 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 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.

(h) 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) 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 jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(i) EMERGENCY RELIEF.—

(1) 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 shall grant such relief if the Commission, the United States, or the attorney general of a State proves—

(A) there is a plausible claim that a covered platform operator took an action that violates 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, the United States, or the attorney general of the State seeking relief under this section has not taken reasonable steps to investigate whether a violation has occurred.

(4) 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 (f) of this section.

(j) 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(d) of this Act, a decision in response to a request to remove a covered platform designation under section 2(e) 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(d) of this Act, a decision in response to a request to remove a covered platform designation under section 2(e) 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. BUREAU OF DIGITAL MARKETS.

(a) ESTABLISHMENT OF BUREAU.—As soon as practicable, but not later than 180 days after the date of enactment of this Act, the Commission shall establish within the Commission a bureau of digital markets for purposes of enforcement of this Act.

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

(1) report directly to the Chair of the Commission; and
(2) be appointed by the Chair of the Commission.

(c) BUREAU STAFF.—The Bureau of Digital Markets shall retain or employ legal, technology, economic, research, and service staff sufficient to carry out the functions, powers, and duties of the Bureau.

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

SEC. 5. 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, with the goal of promoting transparency and deterring 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 Com-
mission, Department of Justice, or any person, State, or
locality to the approach recommended in such Guidelines.

SEC. 6. SUITS BY PERSONS INJURED.

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

(1) whether such person or the opposing party, or either party’s representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party’s representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

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

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

(1) Except as provided in paragraph (2), any person who is a foreign state may not recover under subsection (a) an amount in excess of the actual damages sustained by it and the cost of suit, including a reasonable attorney’s fee.
(2) Paragraph (1) shall not apply to a foreign state if—

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

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

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

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

(c) INJUNCTIVE RELIEF.—Any person shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under
the rules governing such proceedings, and upon the exec-
ution of proper bond against damages for an injunction im-
providently granted and a showing that the danger of ir-
reparable loss or damage is immediate, a preliminary in-
junction may issue: Provided, That nothing herein con-
tained shall be construed to entitle any person, except the
United States, to bring suit for injunctive relief against
any common carrier subject to the jurisdiction of the Sur-
face Transportation Board under subtitle IV of title 49.
In any action under this section in which the plaintiff sub-
stantially prevails, the court shall award the cost of suit,
including a reasonable attorney’s fee, to such plaintiff.
SEC. 7. RULE OF CONSTRUCTION.
(a) Notwithstanding any other provision of law,
whether user conduct would constitute a violation of sec-
tion 1030 of title 18 of the United States Code is not dis-
positive of whether the defendant has established an af-
firmative 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 un-
lawful 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. 8. 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.

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.”.