

**AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. 3826
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 “Platform Competition
3 and Opportunity Act of 2021”.

4 SEC. 2. UNLAWFUL ACQUISITIONS.

5 (a) VIOLATION.—It shall be unlawful for a covered
6 platform operator to acquire directly or indirectly—

7 (1) the whole or any part of the stock or other
8 share capital of another person engaged in com-
9 merce or in any activity affecting commerce; or

10 (2) the whole or any part of the assets of an-
11 other person engaged in commerce or in any activity
12 affecting commerce.

13 (b) EXCLUSION.—An acquisition shall not be unlaw-
14 ful under subsection (a) if the acquiring covered platform
15 operator demonstrates by clear and convincing evidence
16 that—

17 (1) the acquisition is a transaction that is de-
18 scribed in section 7A(c) of the Clayton Act; or

1 (2) the acquired assets or the issuer of the ac-
2 quired stock do not—

3 (A) compete with the covered platform or
4 covered platform operator for the sale or provi-
5 sion of any product or service;

6 (B) constitute nascent or potential com-
7 petition to the covered platform or covered plat-
8 form operator for the sale or provision of any
9 product or service;

10 (C) enhance or increase the covered plat-
11 form's or covered platform operator's market
12 position with respect to the sale or provision of
13 any product or service offered on or directly re-
14 lated to the covered platform; and

15 (D) enhance or increase the covered plat-
16 form's or covered platform operator's ability to
17 maintain its market position with respect to the
18 sale or provision of any product or service of-
19 fered on or directly related to the covered plat-
20 form.

21 (c) USER ATTENTION.—For purposes of this Act,
22 competition, nascent competition, or potential competition
23 for the sale or provision of any product or service includes
24 competition for a user's attention.

1 (d) ROLE OF DATA.—For purposes of this Act, an
2 acquisition that results in access to additional data may,
3 without more—

4 (1) enhance or increase the market position of
5 a covered platform or covered platform operator; or

6 (2) enhance or increase the ability of a covered
7 platform or covered platform operator to maintain
8 its market position.

9 **SEC. 3. DEFINITIONS.**

10 (a) ANTITRUST LAWS.—The term “antitrust laws”
11 has the meaning given the term in subsection (a) of sec-
12 tion 1 of the Clayton Act (15 U.S.C. 12).

13 (b) COMMISSION.—The term “Commission” means
14 the Federal Trade Commission.

15 (c) CONTROL.—The term “control” with respect to
16 a person means—

17 (1) holding 25 percent or more of the stock of
18 the person;

19 (2) having the right to 25 percent or more of
20 the profits of the person;

21 (3) having the right to 25 percent or more of
22 the assets of the person, in the event of the person’s
23 dissolution;

1 (4) if the person is a corporation, having the
2 power to designate 25 percent or more of the direc-
3 tors of the person;

4 (5) if the person is a trust, having the power
5 to designate 25 percent or more of the trustees; or

6 (6) otherwise exercises substantial control over
7 the person.

8 (d) COVERED PLATFORM.—The term “covered plat-
9 form” means an online platform—

10 (1) that has been designated as a “covered plat-
11 form” under section 4(a); or

12 (2) that—

13 (A) at any point during the 12 months
14 preceding a designation under section 4(a) or at
15 any point during the 12 months preceding the
16 filing of a complaint for an alleged violation of
17 this Act—

18 (i) has at least 50,000,000 United
19 States-based monthly active users on the
20 online platform operator; or

21 (ii) has at least 100,000 United
22 States-based monthly active business users
23 on the online platform;

24 (B) at any point during the 2 years pre-
25 ceding a designation under section 4(a) or at

1 any point during the 2 years preceding the fil-
2 ing of a complaint for an alleged violation of
3 this Act, is owned or controlled by a person
4 with United States net annual sales or a mar-
5 ket capitalization greater than
6 \$600,000,000,000, adjusted for inflation on the
7 basis of the Consumer Price Index; and

8 (C) is a critical trading partner for the sale
9 or provision of any product or service offered on
10 or directly related to the online platform.

11 (e) COVERED PLATFORM OPERATOR.—The term
12 “covered platform operator” means a person that owns or
13 controls a covered platform.

14 (f) CRITICAL TRADING PARTNER.—The term “crit-
15 ical trading partner” means an entity that has the ability
16 to restrict or impede the access of—

17 (1) a business user to its users or customers; or

18 (2) a business user to a tool or service that it
19 needs to effectively serve its users or customers.

20 (g) BUSINESS USER.—The term “business user”
21 means a person that utilizes or plans to utilize the covered
22 platform for the sale or provision of products or services.

23 (h) ONLINE PLATFORM.—The term “online plat-
24 form” means a website, online or mobile application, mo-

1 bile operating system, digital assistant, or online service
2 that—

3 (1) enables a user to generate content that can
4 be viewed by other users on the platform or to inter-
5 act with other content on the platform;

6 (2) facilitates the offering, sale, purchase, pay-
7 ment, or shipping of products or services, including
8 software applications, between and among con-
9 sumers or businesses not controlled by the platform
10 operator; or

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

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

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

19 **SEC. 4. IMPLEMENTATION.**

20 (a) COVERED PLATFORM DESIGNATION.—

21 (1) The Federal Trade Commission or Depart-
22 ment of Justice shall designate whether an entity is
23 a covered platform for the purpose of implementing
24 and enforcing this Act. Such designation shall—

1 (A) be based on a finding that the criteria
2 set forth in section 3(d)(2)(A)–(C) are met;

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

5 (C) apply for 10 years from its issuance
6 regardless of whether there is a change in con-
7 trol or ownership over the covered platform un-
8 less the Commission or the Department of Jus-
9 tice removes the designation under subsection
10 (b).

11 (b) REMOVAL OF COVERED PLATFORM DESIGNA-
12 TION.—The Commission or the Department of Justice
13 shall—

14 (1) consider whether its designation of a cov-
15 ered platform under subsection (a) should be re-
16 moved prior to the expiration of the 10-year period
17 if the covered platform operator files a request with
18 the Commission or the Department of Justice, which
19 shows that the online platform no longer meets the
20 criteria set forth in section 3(d)(2)(A)–(C);

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

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

4 **SEC. 5. ENFORCEMENT.**

5 (a) IN GENERAL.—Except as otherwise provided in
6 this Act—

7 (1) the Commission shall enforce this Act in the
8 same manner, by the same means, and with the
9 same jurisdiction, powers, and duties as though all
10 applicable terms of the Federal Trade Commission
11 Act (15 U.S.C. 41 et seq.) were incorporated into
12 and made a part of this Act;

13 (2) the Attorney General shall enforce this Act
14 in the same manner, by the same means, and with
15 the same jurisdiction, powers and duties as though
16 all applicable terms of the Sherman Act (15 U.S.C.
17 1 et seq.), Clayton Act (15 U.S.C. 12 et seq.), and
18 Antitrust Civil Process Act (15 U.S.C. 1311 et seq.)
19 were incorporated into and made a part of this Act;
20 and

21 (3) any attorney general of a State shall en-
22 force this Act in the same manner, by the same
23 means, and with the same jurisdiction, powers and
24 duties as though all applicable terms of the Sherman
25 Act (15 U.S.C. 1 et seq.) and the Clayton Act (15

1 U.S.C. 12 et seq.) were incorporated into and made
2 a part of this Act.

3 (b) UNFAIR METHODS OF COMPETITION.—A viola-
4 tion of this Act shall also constitute an unfair method of
5 competition under section 5 of the Federal Trade Commis-
6 sion Act (15 U.S.C. 45).

7 (c) COMMISSION INDEPENDENT LITIGATION AU-
8 THORITY.—If the Commission has reason to believe that
9 a person violated this Act, the Commission may commence
10 a civil action, in its own name by any of its attorneys des-
11 igned by it for such purpose, to recover a civil penalty
12 and seek other appropriate relief in a district court of the
13 United States.

14 (d) PARENS PATRIAE.—Any attorney general of a
15 State may bring a civil action in the name of such State
16 for a violation of this Act as parens patriae on behalf of
17 natural persons residing in such State, in any district
18 court of the United States having jurisdiction of the de-
19 fendant, and may secure any form of relief provided for
20 in this section.

21 (e) INJUNCTIVE RELIEF.—The Assistant Attorney
22 General of the Antitrust Division, the Commission, or the
23 attorney general of any State may seek, and the court may
24 order, relief in equity as necessary to prevent, restrain,
25 or prohibit violations of this Act.

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

4 **SEC. 6. ENFORCEMENT GUIDELINES.**

5 (a) IN GENERAL.—Not later than 1 year after the
6 date of enactment of this Act, the Commission and the
7 Assistant Attorney General of the Antitrust Division shall
8 jointly issue guidelines outlining policies and practices, re-
9 lating to agency enforcement of this Act, with the goal
10 of promoting transparency and deterring violations.

11 (b) UPDATES.—The Commission and the Assistant
12 Attorney General of the Antitrust Division shall update
13 the joint guidelines issued under subsection (a), as needed
14 to reflect current agency policies and practices, but not
15 less frequently than once every 4 years beginning on the
16 date of enactment of this Act.

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

22 **SEC. 7. SUITS BY PERSONS INJURED.**

23 (a) IN GENERAL.—Except as provided in subsection
24 (b), any person who shall be injured in his business or
25 property by reason of anything forbidden in this Act may

1 sue therefor in any district court of the United States in
2 the district in which the defendant resides or is found or
3 has an agent, without respect to the amount in con-
4 troversy, and shall recover threefold the damages by him
5 sustained, and the cost of suit, including a reasonable at-
6 torney's fee. The court may award under this section, pur-
7 suant to a motion by such person promptly made, simple
8 interest on actual damages for the period beginning on
9 the date of service of such person's pleading setting forth
10 a claim under this Act and ending on the date of judg-
11 ment, or for any shorter period therein, if the court finds
12 that the award of such interest for such period is just in
13 the circumstances. In determining whether an award of
14 interest under this section for any period is just in the
15 circumstances, the court shall consider only—

16 (1) whether such person or the opposing party,
17 or either party's representative, made motions or as-
18 serted claims or defenses so lacking in merit as to
19 show that such party or representative acted inten-
20 tionally for delay, or otherwise acted in bad faith;

21 (2) whether, in the course of the action in-
22 volved, such person or the opposing party, or either
23 party's representative, violated any applicable rule,
24 statute, or court order providing for sanctions for

1 dilatory behavior or otherwise providing for expedi-
2 tious proceedings; and

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

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

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

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

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

23 (B) such foreign state waives all defenses
24 based upon or arising out of its status as a for-

1 eign state, to any claims brought against it in
2 the same action;

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

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

10 (c) INJUNCTIVE RELIEF.—Any person shall be enti-
11 tled to sue for and have injunctive relief, in any court of
12 the United States having jurisdiction over the parties,
13 against threatened loss or damage by a violation of this
14 Act, when and under the same conditions and principles
15 as injunctive relief against threatened conduct that will
16 cause loss or damage is granted by courts of equity, under
17 the rules governing such proceedings, and upon the execu-
18 tion of proper bond against damages for an injunction im-
19 providently granted and a showing that the danger of ir-
20 reparable loss or damage is immediate, a preliminary in-
21 junction may issue: Provided, That nothing herein con-
22 tained shall be construed to entitle any person, except the
23 United States, to bring suit for injunctive relief against
24 any common carrier subject to the jurisdiction of the Sur-
25 face Transportation Board under subtitle IV of title 49.

1 In any action under this section in which the plaintiff sub-
2 stantially prevails, the court shall award the cost of suit,
3 including a reasonable attorney's fee, to such plaintiff.

4 **SEC. 8. JUDICIAL REVIEW.**

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

16 (b) TREATMENT OF FINDINGS.—In a proceeding for
17 judicial review of a covered platform designation under
18 section 4(a) of this Act, a decision in response to a request
19 to remove a covered platform designation under section
20 4(b) of this Act, or a final order of the Commission issued
21 in an administrative adjudicative proceeding under this
22 Act, the findings of the Commission or the Assistant At-
23 torney General as to the facts, if supported by evidence,
24 shall be conclusive.

1 **SEC. 9. RULES OF CONSTRUCTION.**

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

7 **SEC. 10. SEVERABILITY.**

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

Amend the title so as to read: “A bill to promote
competition and economic opportunity in digital markets
by establishing that certain acquisitions by a dominant
online platform are unlawful.”.

