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H. R. 3816

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Mr. CICILLINE (for himself, Mr. GOODEN of Texas, Mr. NADLER, and Mr. BUCK) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

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

6 **SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.**

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

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

4 (2) excludes or disadvantages the products,
5 services, or lines of business of another business user
6 relative to the covered platform operator's own prod-
7 ucts, services, or lines of business; or

8 (3) discriminates among similarly situated busi-
9 ness users.

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

13 (1) restrict or impede the capacity of a business
14 user to access or interoperate with the same plat-
15 form, operating system, hardware and software fea-
16 tures that are available to the covered platform oper-
17 ator's own products, services, or lines of business;

18 (2) condition access to the covered platform or
19 preferred status or placement on the covered plat-
20 form on the purchase or use of other products or
21 services offered by the covered platform operator;

22 (3) use non-public data obtained from or gen-
23 erated on the platform by the activities of a business
24 user or its customers that is generated through an
25 interaction with the business user's products or serv-

1 ices to offer or support the offering of the covered
2 platform operator's own products or services;

3 (4) restrict or impede a business user from ac-
4 cessing data generated on the platform by the activi-
5 ties of the business user or its customers through an
6 interaction with the business user's products or serv-
7 ices, such as contractual or technical restrictions
8 that prevent the portability of such data by the busi-
9 ness user to other systems or applications;

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

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

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

(8) interfere or restrict a business user's pricing
of its goods or services;

10 (c) AFFIRMATIVE DEFENSE.—

15 (A) would not result in harm to the com-
16 petitive process by restricting or impeding le-
17 gitimate activity by business users; or

18 (B) was narrowly tailored, could not be
19 achieved through a less discriminatory means,
20 was nonpretextual, and was necessary to—

1 (2) AVAILABILITY OF AFFIRMATIVE DE-
2 FENSE.—Notwithstanding any other provision of
3 law, whether user conduct would constitute a viola-
4 tion of section 1030 of title 18, United States Code,
5 is not dispositive of whether the defendant has es-
6 tablished the affirmative defense under this section.

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

11 (1) be based on a finding that the criteria set
12 forth in subsection (f)(4)(i)–(iii) are met;

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

15 (3) will apply for ten years from its issuance re-
16 gardless of whether there is a change in control or
17 ownership over the covered platform unless the Com-
18 mission or the Department of Justice removes the
19 designation pursuant to subsection (f).

20 (e) REMOVAL OF COVERED PLATFORM DESIGNA-
21 TION.—The Commission or the Department of Justice
22 shall—

23 (1) consider whether its designation of a cov-
24 ered platform pursuant to subsection (d) should be
25 removed prior to the expiration of the ten-year pe-

1 riod if the covered platform operator files a request
2 with the Commission or the Department of Justice,
3 which shows that the online platform is no longer a
4 critical trading partner; and

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

8 (f) REMEDIES.—

9 (1) CIVIL PENALTY.—Any covered platform op-
10 erator who is found to have violated subsections (a)
11 or (b) shall be liable to the United States or the
12 Commission for a civil penalty, which shall accrue to
13 the United States, in an amount not more than the
14 greater of—

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

18 (B) 30 percent of the United States rev-
19 enue of the person in any line of business af-
20 fected or targeted by the unlawful conduct dur-
21 ing the period of the unlawful conduct. This
22 civil penalty may be recovered in a civil action
23 brought by the United States or the Commis-
24 sion.

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

5 (A) RESTITUTION; CONTRACT RESCISSION
6 AND REFORMATION; REFUNDS; RETURN OF
7 PROPERTY.—The Assistant Attorney General of
8 the Antitrust Division, the Commission, or the
9 attorney general of any State may seek, and the
10 court may order, with respect to the violation
11 that gives rise to the suit, restitution for losses,
12 rescission or reformation of contracts, refund of
13 money, or return of property.

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

20 (C) INJUNCTIONS.—The Assistant Attor-
21 ney General of the Antitrust Division or the
22 Commission may seek, and the court may
23 order, relief in equity as necessary to prevent,
24 restrain, or prohibit violations of this Act.

25 (D) CONFLICT OF INTEREST.—

(i) If the fact finder determines that a violation of this Act arises from a conflict of interest related to the covered platform's concurrent operation of multiple lines of business, the court shall consider requiring divestiture 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's ownership or control of that line of business creates the incentive and ability for the covered platform 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

1 (bb) exclude from, or dis-
2 advantage, the products, services,
3 or lines of business on the cov-
4 ered platform of a competing
5 business or a business that con-
6 stitutes nascent or potential com-
7 petition to the covered platform
8 operator.

17 (g) DEFINITIONS.—In this section:

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

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

7 (B) that—

15 (I) has at least 50,000,000
16 United States-based monthly active
17 users on the online platform; or

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

1 Commission's or the Department of Justice's designation under section 2(d) or any
2 of the two years preceding that time, or at
3 any time in the 2 years preceding the filing
4 of a complaint for an alleged violation of
5 this Act; and

6
7 (iii) is a critical trading partner for
8 the sale or provision of any product or
9 service offered on or directly related to the
10 online platform.

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

14 (6) CRITICAL TRADING PARTNER.—The term
15 “critical trading partner” means a trading partner
16 that has the ability to restrict or impede—

17 (A) the access of a business user to its
18 users or customers; or

19 (B) the access of a business user to a tool
20 or service that it needs to effectively serve its
21 users or customers.

22 (7) PERSON.—The term “person” has the
23 meaning given the term in subsection (a) of section
24 1 of the Clayton Act (15 U.S.C. 12).

25 (8) DATA.—

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

7 (B) DATA.—The term “data” shall include
8 information that is collected by or provided to
9 a covered platform or competing business or a
10 potential competing business that is linked, or
11 reasonably linkable, to a specific user or cus-
12 tomer of the covered platform or a competing
13 business or a potential competing business.

14 (9) BUSINESS USER.—The term “business
15 user” means a person that utilizes or plans to utilize
16 the covered platform for the sale or provision of
17 products or services.

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

22 (A) enables a user to generate content that
23 can be viewed by other users on the platform or
24 to interact with other content on the platform;

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

(11) 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.

25 (h) ENFORCEMENT.—

1 (1) IN GENERAL.—The Commission, Depart-
2 ment of Justice, and any attorney general of a State
3 subject to the requirements in paragraph (4) shall
4 enforce this Act in the same manner, by the same
5 means, and with the same jurisdiction, powers, and
6 duties as though all applicable terms and provisions
7 of the Federal Trade Commission Act (15 U.S.C. 41
8 et seq.) or the Clayton Act (15 U.S.C. 12 et seq.),
9 as appropriate, were incorporated into and made a
10 part of this Act.

11 (2) UNFAIR METHODS OF COMPETITION.—A
12 violation of this Act shall also constitute an unfair
13 method of competition under section 5 of the Fed-
14 eral Trade Commission Act (15 U.S.C. 5).

15 (3) COMMISSION INDEPENDENT LITIGATION AU-
16 THORITY.—If the Commission has reason to believe
17 that a covered platform violated this Act, the Com-
18 mission may commence a civil action, in its own
19 name by any of its attorneys designated by it for
20 such purpose, to recover a civil penalty and seek
21 other appropriate relief in a district court of the
22 United States against the covered platform operator.

23 (4) PARENTS PATRIAE.—Any attorney general of
24 a State may bring a civil action in the name of such
25 State for a violation of this Act as parens patriae on

1 behalf of natural persons residing in such State, in
2 any district court of the United States having juris-
3 diction of the defendant, and may secure any form
4 of relief provided for in this section.

5 (i) EMERGENCY RELIEF.—

6 (1) The Commission, Assistant Attorney Gen-
7 eral of the Antitrust Division, or any attorney gen-
8 eral of a State may seek a temporary injunction re-
9 quiring the covered platform operator to take or stop
10 taking any action for not more than 120 days and
11 the court shall grant such relief if the Commission,
12 the United States, or the attorney general of a State
13 proves—

14 (A) there is a plausible claim that a cov-
15 ered platform operator took an action that vio-
16 lates this Act; and

17 (B) that action impairs the ability of at
18 least one company to compete with the covered
19 platform.

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

22 (3) The court shall terminate the emergency re-
23 lief at any time that the covered platform operator
24 proves that the Commission, the United States, or
25 the attorney general of the State seeking relief

1 under this section has not taken reasonable steps to
2 investigate whether a violation has occurred.

3 (4) Nothing in this subsection prevents or limits
4 the Commission, the United States, or any attorney
5 general of any State from seeking other equitable re-
6 lief as provided in subsection (h) of this section.

7 (j) STATUTE OF LIMITATIONS.—A proceeding for a
8 violation of this section may be commenced not later than
9 6 years after such violation occurs.

10 **SEC. 3. JUDICIAL REVIEW.**

11 (a) IN GENERAL.—Any party that is subject to a cov-
12 ered platform designation under section 2(d) of this Act,
13 a final order issued in any district court, or a final order
14 of the Commission issued in an administrative adjudica-
15 tive proceeding may within 30 days of the issuance of such
16 order, petition for review of such order in the United
17 States Court of Appeals for the District of Columbia Cir-
18 cuit.

19 (b) TREATMENT OF FINDINGS.—In a proceeding for
20 judicial review of a covered platform designation under to
21 section 2(d) of this Act or a final order of the Commission,
22 the findings of the Commission or the Assistant Attorney
23 General as to the facts, if supported by evidence, shall be
24 conclusive.

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

2 (a) ESTABLISHMENT OF BUREAU.—As soon as prac-
3 ticable, but not later than 180 days after the date of en-
4 actment of this Act, the Federal Trade Commission shall
5 establish within the Commission a bureau of digital mar-
6 kets for purposes of enforcement of this Act.

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

10 (1) report directly to the Chair of the Federal
11 Trade Commission; and

12 (2) be appointed by the Chair of the Federal
13 Trade Commission.

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

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

1 **SEC. 5. ENFORCEMENT GUIDELINES.**

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

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

14 (c) OPERATION.—The Joint Guidelines issued under
15 this section do not confer any rights upon any person,
16 State, or locality, nor shall operate to bind the Commis-
17 sion, Department of Justice, or any person, State, or local-
18 ity to the approach recommended in such Guidelines.

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

20 (a) IN GENERAL.—Except as provided in subsection
21 (b), any person who shall be injured in his business or
22 property by reason of anything forbidden in this Act sue
23 therefor in any district court of the United States in the
24 district in which the defendant resides or is found or has
25 an agent, without respect to the amount in controversy,
26 and shall recover threefold the damages by him sustained,

1 and the cost of suit, including a reasonable attorney's fee.
2 The court may award under this section, pursuant to a
3 motion by such person promptly made, simple interest on
4 actual damages for the period beginning on the date of
5 service of such person's pleading setting forth a claim
6 under the antitrust laws and ending on the date of judg-
7 ment, or for any shorter period therein, if the court finds
8 that the award of such interest for such period is just in
9 the circumstances. In determining whether an award of
10 interest under this section for any period is just in the
11 circumstances, the court shall consider only—

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

17 (2) whether, in the course of the action in-
18 volved, such person or the opposing party, or either
19 party's representative, violated any applicable rule,
20 statute, or court order providing for sanctions for
21 dilatory behavior or otherwise providing for expedi-
22 tious proceedings; and

23 (3) whether such person or the opposing party,
24 or either party's representative, engaged in conduct

1 primarily for the purpose of delaying the litigation
2 or increasing the cost thereof.

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

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

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

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

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

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

24 (D) such foreign state does not function,
25 with respect to the commercial activity, or the

1 act, that is the subject matter of its claim
2 under this section as a procurement entity for
3 itself or for another foreign state.

4 (c) INJUNCTIVE RELIEF.—Any person, firm, corpora-
5 tion, or association shall be entitled to sue for and have
6 injunctive relief, in any court of the United States having
7 jurisdiction over the parties, against threatened loss or
8 damage by a violation of this Act, when and under the
9 same conditions and principles as injunctive relief against
10 threatened conduct that will cause loss or damage is
11 granted by courts of equity, under the rules governing
12 such proceedings, and upon the execution of proper bond
13 against damages for an injunction improvidently granted
14 and a showing that the danger of irreparable loss or dam-
15 age is immediate, a preliminary injunction may issue: Pro-
16 vided, That nothing herein contained shall be construed
17 to entitle any person, firm, corporation, or association, ex-
18 cept the United States, to bring suit for injunctive relief
19 against any common carrier subject to the jurisdiction of
20 the Surface Transportation Board under subtitle IV of
21 title 49. In any action under this section in which the
22 plaintiff substantially prevails, the court shall award the
23 cost of suit, including a reasonable attorney's fee, to such
24 plaintiff.

1 SEC. 7. RULE OF CONSTRUCTION.

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

7 SEC. 8. 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.

