To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Ms. Scanlon (for herself, Mr. Owens, Mr. Cicilline, Mr. Buck, and Mr. Nadler) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021” or the “ACCESS Act of 2021”.

SEC. 2. UNFAIR METHOD OF COMPETITION.

A violation of this Act, or standards issued pursuant to this Act, by a person, partnership, or corporation operating a covered platform, in or affecting commerce, shall

SEC. 3. PORTABILITY.

(a) IN GENERAL.—A covered platform shall maintain a set of transparent, third-party-accessible interfaces (including application programming interfaces) to enable the secure transfer of data to a user, or with the affirmative consent of a user, to a business user at the direction of a user, in a structured, commonly used, and machine-readable format that complies with the standards issued pursuant to section 6(c).

(b) DATA SECURITY.—

(1) IN GENERAL.—A competing business or a potential competing business that receives ported user data from a covered platform shall reasonably secure any user data it acquires, and shall take reasonable steps to avoid introducing security risks to data or the covered platform’s information systems.

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

(3) TERMINATION OF ACCESS.—The Commission may require the covered platform to cease the transfer of data to a competing or potentially com-
peting business that the Commission finds has violated this section or standards adopted by the Commission under section 6(c) of this Act.

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

SEC. 4. INTEROPERABILITY.

(a) IN GENERAL.—A covered platform shall maintain a set of transparent, third-party-accessible interfaces (including application programming interfaces) to facilitate and maintain interoperability with a competing business or a potential competing business that complies with the standards issued pursuant to section 6(c).

(b) DATA SECURITY.—

(1) IN GENERAL.—A competing business or a potential competing business that accesses an interoperability interface of a covered platform shall reasonably secure any user data it acquires, processes, or transmits, and shall take reasonable steps to avoid introducing security risks to user data or the covered platform’s information systems.

(2) VIOLATION.—A failure to comply with this section is a violation of this Act and subject to the enforcement under sections 9 and 10 of this Act.
(3) **Termination of Access.**—The Commission may require the covered platform to cease interoperating with a competing or potentially competing business that the Commission finds has violated this section or standards adopted by the Commission under section 6(c) of this Act.

(e) **Interoperability Obligations.**—In order to achieve interoperability under subsection (a), a covered platform shall comply with the standards issued under section 6(c) by the Commission.

(d) **Security and Privacy Standards.**—Consistent with standards issued by the Commission under section 6(c) of this Act, a covered platform shall set privacy and security standards for access by competing businesses or potential competing businesses to the extent reasonably necessary to address a threat to the covered platform or user data, and shall report any suspected violations of those standards to the Commission.

(e) **Prohibited Changes to Interfaces.**—

   (1) **Commission Approval.**—A covered platform may make a change that may affect its interoperability interface by petitioning the Commission to approve a proposed change. The Commission shall allow the change if, after consulting with the relevant technical committee the Commission concludes
that the change is not being made with the purpose
or effect of unreasonably denying access or under-
mining interoperability for competing businesses or
potential competing businesses.

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

(3) INTERFACE INFORMATION.—

(A) IN GENERAL.—Not later than 120
days after the adoption of a rule by the Com-
misson under section 6(c) of this Act, a cov-
ered platform shall provide to competing busi-
esses or potential competing businesses com-
plete and accurate documentation describing ac-
cess to the interoperability interface required
under this section.
(B) CONTENTS.—The documentation required under subparagraph (A) is limited to interface documentation necessary to achieve development and operation of interoperable products and services.

(4) NOTICE OF CHANGES.—A covered platform shall provide reasonable advance notice to a competing business or a potential competing business, which may be provided through public notice, of any change to an interoperability interface maintained by the covered platform that will affect the interoperability of a competing business or a potential competing business.

(f) DATA MINIMIZATION.—

(1) NON-COMMERCIALIZATION BY A COVERED PLATFORM.—A covered platform shall not collect, use, or share user data obtained from a business user through the interoperability interface except for the purposes of safeguarding the privacy and security of such information or maintaining interoperability of services.

(2) NON-COMMERCIALIZATION OF DATA ON A COVERED PLATFORM.—A business user shall not collect, use, or share the data of a user on a covered platform except for the purposes of safeguarding
and security of such data or maintaining interoper-
ability of services.

SEC. 5. DEFINITIONS.

In this Act:

(1) PERSON.—The term “person” has the
meaning given the term in subsection (a) of section

(2) AFFIRMATIVE EXPRESS CONSENT.—The
term “affirmative express consent” means an affirm-
ative action of the consumer to make a choice fol-
lowing a clear and conspicuous disclosure to the con-
sumer, separate and apart from any “privacy pol-
icy”, “terms of service”, “terms of service”, “con-
sent for research”, or other similar document, of—

(A) the types of Personal Information that
Respondent will disclose to third parties;

(B) the reason for such disclosures;

(C) the identity of all such third parties;

(D) any opportunities consumers have to
decline or rescind consent for such disclosures;

and

(E) how consumers may exercise any such
opportunities.

An affirmative action does not include obtaining a
consumer’s approval for a preselected default option.
(3) **Clear and Conspicuous Disclosure.**—

The term “clear and conspicuous disclosure” means that a required disclosure is difficult to miss such that it is easily noticeable and easily understandable by ordinary consumers, including in all of the following ways:

(A) In any communication that is solely visual or solely audible, the disclosure must be made through the same means through which the communication is presented. In any communication made through both visual and audible means, such as a television advertisement, the disclosure must be presented simultaneously in both the visual and audible portions of the communication even if the representation requiring the disclosure (“triggering representation”) is made through only one means.

(B) A visual disclosure, by its size, contrast, location, the length of time it appears, and other characteristics, must stand out from any accompanying text or other visual elements so that it is easily noticed, read, and understood.

(C) An audible disclosure, including by telephone or streaming video, must be delivered
in a volume, speed, and cadence sufficient for ordinary consumers to easily hear and understand it.

(D) In any communication using an interactive electronic medium, such as the Internet or software, the disclosure must be unavoidable.

(E) The disclosure must use diction and syntax understandable to ordinary consumers and must appear in each language in which the triggering representation appears.

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

(G) The disclosure must not be contradicted or mitigated by, or inconsistent with, anything else in the communication.

(H) When the representation or sales practice targets a specific audience, such as children, the elderly, or the terminally ill, “ordinary consumers” includes reasonable members of that group.

(4) COMMISSION.—The term “Commission” means the Federal Trade Commission.
(5) 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.

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

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

(B) that—

(i) at the time of the Commission’s or the Department of Justice’s designation under section 2(d), or any of the twelve
months preceding that time, or in any of
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 platform;

(ii) is owned or controlled by a person
with net annual sales, or a market capital-
ization greater than $600,000,000,000, ad-
justed for inflation on the basis of the
Consumer Price Index, at the time of the
Commission’s or the Department of Jus-
tice’s designation under section 6(a) or any
of the two years preceding that time, or at
any time in the 2 years preceding the filing
of a complaint for an alleged violation of
this Act; 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.
(7) COVERED PLATFORM OPERATOR.—The term “covered platform operator” means a person that, directly or indirectly, owns or controls a covered platform.

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

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

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

(9) 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 competing business or a potential competing business that is linked, or reasonably linkable, to a specific user, user device, or customer of the covered platform or a
competing business or a potential competing business.

(C) **Exclusion.**—The term “data” shall not include proprietary data that does not pertain to the user or a user device of the covered platform. The Commission shall narrowly construe the term “proprietary data” for the purposes of this Act.

(10) **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.

(11) **Interoperability interface.**—The term “interoperability interface” means an electronic interface maintained by a covered platform for purposes of achieving interoperability.

(12) **Online platform.**—The term “online platform” means a website, online or mobile application, 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 goods or services, in-
cluding software applications, between and
among consumers or businesses not controlled
by the platform; or

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

SEC. 6. IMPLEMENTATION.

(a) COVERED PLATFORM DESIGNATION.—The Fed-
eral Trade Commission or Department of Justice may des-
ignate 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 paragraph (6) of section 5 are met;

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

(3) will apply for 10 years from its issuance re-
gardless of whether there is a change in control or
ownership over the covered platform unless the Fed-
eral Trade Commission or the Department of Jus-
tice removes the designation pursuant to subsection
(b).

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

(1) consider whether its designation of a cov-
ered platform pursuant to subsection (a) should be
removed prior to the expiration of the 10-year period
if the covered platform operator files a request with
the Commission or the Department of Justice, which
shows that the online platform is no longer a critical
trading partner; and

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

(c) Rulemaking and Technical Standards.—

(1) After designating an online platform as a
covered platform, the Commission shall issue stand-
ards of interoperability specific to the covered plat-
form. These standards shall implement the require-
ments of sections 3 and 4 of this Act. In adopting
the standards implementing the requirements of sec-
tions 3 and 4, the Commission shall seek to encour-
age entry by reducing or eliminating the network ef-
fects that limit competition with the covered plat-
form, ensure that competing businesses or a poten-
tial competing business interconnects with the cov-
ered platform on fair and nondiscriminatory terms,
and protect data security and privacy.

(2) The Commission shall—

(A) establish a technical committee, as de-
scribed in section 7 of this Act, to develop pro-
posed standards implementing the requirements
of section 3 as they apply to a specific covered
platform;

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

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

(d) COMPLIANCE ASSESSMENT.—The Commission
shall regularly assess compliance by covered platforms
with the provisions of this Act and may—

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

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

(3) prescribe such other rules in accordance
with section 553 of title 5, United States Code as
may be necessary and appropriate to carry out sec-
tions 3 and 4 of this Act.
(c) AGENCY COMPLAINTS.—The Commission shall establish procedures under which a user, covered platform, or a business user may file a complaint alleging a violation of this Act.

(f) RECIPROCITY.—A business user shall not be under any obligation to adopt or comply with the requirements of this Act or the rules adopted by the Commission under this Act unless it chooses to—

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

(2) access an interoperability interface of a covered platform under section 4 of this Act.

SEC. 7. TECHNICAL COMMITTEE.

(a) ESTABLISHMENT.—

(1) Not later than 180 days following the enactment of this Act, the Commission shall establish a technical committee to assist the Commission with considerations relating to implementation and technical aspects of the requirements under sections 3 and 4 of this Act.

(2) The size of the committee and its membership is within the sole discretion of the Commission except as specified in subsection 7(b).

(b) COMPOSITION.—Each technical committee shall include—
(1) representatives of businesses that, in the judgment of the Commission, utilize or compete with the platform;

(2) representatives of competition or privacy advocacy organizations, and independent academics that possess technical, legal, economic, financial, or other knowledge that the Commission may deem useful;

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

(4) representatives of a covered platform, which, if required by Commission, shall provide a nonvoting advisory member to provide consultation and other aid to the technical committee. A failure by the covered platform to participate in good faith in the development of standards by the Technical Committee shall be a violation of this statute.

(c) General Responsibilities.—Each technical committee established under this section shall meet regularly to provide information, analysis, and recommendations to the Commission on the standards of portability and interoperability and any changes to those standards. These standards should—

(1) seek to reduce or eliminate network effects that limit competition with the covered platform;
(2) establish data security and privacy protections for data portability and interoperability;

(3) prevent fraudulent, malicious, or abusive activity by a competing business or a potential competing business; and

(4) establish reasonable thresholds related to the frequency, nature, and volume of requests by a competing business or a potential competing business to access resources maintained by the covered platform, beyond which the covered platform may assess a reasonable fee for such access that shall be reasonably proportional to the cost, complexity, and risk to the covered platform of providing such access, and do not limit the ability or deter the incentive of a competing business or a potentially competing business to interoperate with the covered platform.

(d) Role.—The role of technical committees is advisory in nature, and such committees shall have no implementation or enforcement authority. However, the Commission shall give strong consideration to the recommendations of such committees in implementing this Act.

(e) Nonapplicability of the Federal Advisory Committee Act.—The Federal Advisory Committee Act
(5 U.S.C. App.) shall not apply with respect to the technical committees.

SEC. 8. JUDICIAL REVIEW.

(a) In General.—Any party that is subject to a covered platform designation pursuant to section 6(a) of this Act, a final order issued in any district court, or a final order of the Commission issued in an administrative adjudicative proceeding may within 30 days of the issuance of such order, petition for review of such 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 pursuant to section 6(a) of this Act or a final order of the Commission, the findings of the Commission as to the facts, if supported by evidence, shall be conclusive.

SEC. 9. ENFORCEMENT.

(a) Commission Litigation Authority.—If the Commission has reason to believe that a covered platform 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 under this Act and seek other appropriate relief in a district court of the United States against the covered platform operator.
(b) Emergency Relief.—

(1) The Commission 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 proves—

(A) there is a plausible claim that a covered platform operator took an action that could violate this Act; and

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

(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 has not taken reasonable steps to investigate whether a violation has occurred.

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

(e) Statute of Limitations.—A proceeding for a violation of this Act may be commenced not later than 6 years after such violation occurs.
SEC. 10. REMEDIES.

(a) CIVIL PENALTY.—The Commission may recover a civil penalty for a violation of this Act, which shall accrue to the United States, in an amount not more than the greater of—

(1) 15 percent of the total United States revenue of the person, partnership, or corporation for the previous calendar year; or

(2) 30 percent of the United States revenue of the person, partnership, or corporation in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct.

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

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

(2) DISGORGEMENT.—The Commission may seek, and a court may order, disgorgement of any unjust enrichment that a covered platform obtained as a result of the violation that gives rise to the suit.
(3) INJUNCTION.—The Commission may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

c) REPEAT OFFENDERS.—If the fact finder determines that a covered platform has shown a pattern or practice of violating this Act, the court shall consider requiring that the Chief Executive Officer forfeit to the United States Treasury any compensation received by that person during the 12 months preceding or following the filing of a complaint alleging a violation of this Act.

SEC. 11. RULE OF CONSTRUCTION.

Nothing in this Act shall be construed to limit any authority of the Attorney General or the Federal Trade Commission under the antitrust laws, section 5 of 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. 12. 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.