

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

IN THE SENATE OF THE UNITED STATES—117th Cong., 2d Sess.

S. 2992

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

Referred to the Committee on _____ and
ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended
to be proposed by Ms. KLOBUCHAR

Viz:

1 Strike all after the enacting clause and insert the fol-
2 lowing:

3 **SECTION 1. SHORT TITLE.**

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

6 **SEC. 2. DEFINITIONS.**

7 (a) IN GENERAL.—In this Act:

8 (1) ANTITRUST LAWS; PERSON.—The terms
9 “antitrust laws” and “person” have the meanings
10 given the terms in subsection (a) of the first section
11 of the Clayton Act (15 U.S.C. 12).

1 (2) BUSINESS USER.—The term “business
2 user”—

3 (A) means a person that uses or is likely
4 to use a covered platform for the advertising,
5 sale, or provision of products or services, includ-
6 ing such persons that are operating a covered
7 platform or are controlled by a covered platform
8 operator; and

9 (B) does not include a person that—

10 (i) is a clear national security risk; or

11 (ii) is controlled by the Government of
12 the People’s Republic of China or the gov-
13 ernment of a foreign adversary.

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

16 (4) CONTROL.—The term “control” means,
17 with respect to a person—

18 (A) holding 25 percent or more of the
19 stock of the person;

20 (B) having the right to 25 percent or more
21 of the profits of the person;

22 (C) in the event of the dissolution of the
23 person, having the right to 25 percent or more
24 of the assets of the person;

1 (D) if the person is a corporation, having
2 the power to designate 25 percent or more of
3 the directors of the person;

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

7 (F) otherwise exercising substantial control
8 over the person.

9 (5) COVERED PLATFORM.—The term “covered
10 platform” means an online platform that—

11 (A) has been designated as a covered plat-
12 form under section 3(d);

13 (B) is owned or controlled by a person
14 that—

15 (i) at any point during the 12 months
16 preceding a designation under section 3(d)
17 or the 12 months preceding the filing of a
18 complaint for an alleged violation of this
19 Act has at least—

20 (I) 50,000,000 United States-
21 based monthly active users on the on-
22 line platform; or

23 (II) 100,000 United States-based
24 monthly active business users on the
25 online platform;

1 (ii) during—

2 (I) the 2 years preceding a des-
3 ignation under section 3(d), or the 2
4 years preceding the filing of a com-
5 plaint for an alleged violation of this
6 Act—

7 (aa) at any point, is owned
8 or controlled by a person with
9 United States net annual sales of
10 greater than \$550,000,000,000,
11 adjusted for inflation on the
12 basis of the Consumer Price
13 Index; or

14 (bb) during any 180-day pe-
15 riod during the 2-year period,
16 has an average market capitaliza-
17 tion greater than
18 \$550,000,000,000, adjusted for
19 inflation on the basis of the Con-
20 sumer Price Index; or

21 (II) the 12 months preceding a
22 designation under section 3(d), or at
23 any point during the 12 months pre-
24 ceding the filing of a complaint for an
25 alleged violation of this Act, has at

1 least 1,000,000,000 worldwide month-
2 ly active users on the online platform;
3 and

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

8 (6) CRITICAL TRADING PARTNER.—The term
9 “critical trading partner” means a person that has
10 the ability to restrict or materially impede the access
11 of—

12 (A) a business user to the users or cus-
13 tomers of the business user; or

14 (B) a business user to a tool or service
15 that the business user needs to effectively serve
16 the users or customers of the business user.

17 (7) DATA.—The term “data” includes informa-
18 tion that is collected by or provided to a covered
19 platform or business user that is linked, or reason-
20 ably linkable, to a specific—

21 (A) user or customer of the covered plat-
22 form; or

23 (B) user or customer of a business user.

24 (8) FOREIGN ADVERSARY.—The term “foreign
25 adversary” has the meaning given the term in sec-

1 tion 8(c) of the Secure and Trusted Communications
2 Networks Act of 2019 (47 U.S.C. 1607(c)).

3 (9) ONLINE PLATFORM.—The term “online
4 platform”—

5 (A) means a website, online or mobile ap-
6 plication, operating system, digital assistant, or
7 online service that enables—

8 (i) a user to generate or share content
9 that can be viewed by other users on the
10 platform or to interact with other content
11 on the platform;

12 (ii) the offering, advertising, sale, pur-
13 chase, or shipping of products or services,
14 including software applications, between
15 and among consumers or businesses not
16 controlled by the platform operator; or

17 (iii) user searches or queries that ac-
18 cess or display a volume of information;
19 and

20 (B) does not include a service by wire or
21 radio that provides the capability to transmit
22 data to and receive data from all or substan-
23 tially all internet endpoints, including any capa-
24 bilities that are incidental to and enable the op-
25 eration of the communications service.

1 (10) STATE.—The term “State” means a State,
2 the District of Columbia, the Commonwealth of
3 Puerto Rico, and any other territory or possession of
4 the United States.

5 (b) REGULATIONS.—Not later than 180 days after
6 the date of enactment of this Act, the Commission, with
7 the concurrence of the Department of Justice, shall pro-
8 mulgate regulations in accordance with section 553 of title
9 5, United States Code, to define the term data for the
10 purpose of implementing and enforcing this Act.

11 **SEC. 3. UNLAWFUL CONDUCT.**

12 (a) IN GENERAL.—It shall be unlawful for a person
13 operating a covered platform in or affecting commerce
14 to—

15 (1) preference the products, services, or lines of
16 business of the covered platform operator over those
17 of another business user on the covered platform in
18 a manner that would materially harm competition;

19 (2) limit the ability of the products, services, or
20 lines of business of another business user to compete
21 on the covered platform relative to the products,
22 services, or lines of business of the covered platform
23 operator in a manner that would materially harm
24 competition;

1 (3) discriminate in the application or enforce-
2 ment of the terms of service of the covered platform
3 among similarly situated business users in a manner
4 that would materially harm competition;

5 (4) materially restrict, impede, or unreasonably
6 delay the capacity of a business user to access or
7 interoperate with the same platform, operating sys-
8 tem, or hardware or software features that are avail-
9 able to the products, services, or lines of business of
10 the covered platform operator that compete or would
11 compete with products or services offered by busi-
12 ness users on the covered platform, except where
13 such access would lead to a significant cybersecurity
14 risk;

15 (5) condition access to the covered platform or
16 preferred status or placement on the covered plat-
17 form on the purchase or use of other products or
18 services offered by the covered platform operator
19 that are not part of or intrinsic to the covered plat-
20 form;

21 (6) use nonpublic data that are obtained from
22 or generated on the covered platform by the activi-
23 ties of a business user or by the interaction of a cov-
24 ered platform user with the products or services of
25 a business user to offer, or support the offering of,

1 the products or services of the covered platform op-
2 erator that compete or would compete with products
3 or services offered by business users on the covered
4 platform;

5 (7) materially restrict or impede a business user
6 from accessing data generated on the covered plat-
7 form by the activities of the business user, or
8 through an interaction of a covered platform user
9 with the products or services of the business user,
10 such as by establishing contractual or technical re-
11 strictions that prevent the portability by the business
12 user to other systems or applications of the data of
13 the business user;

14 (8) materially restrict or impede covered plat-
15 form users from uninstalling software applications
16 that have been preinstalled on the covered platform
17 or changing default settings that direct or steer cov-
18 ered platform users to products or services offered
19 by the covered platform operator, unless necessary—

20 (A) for the security or functioning of the
21 covered platform; or

22 (B) to prevent data from the covered plat-
23 form operator or another business user from
24 being transferred to the Government of the

1 People's Republic of China or the government
2 of a foreign adversary;

3 (9) in connection with any covered platform
4 user interface, including search or ranking
5 functionality offered by the covered platform, treat
6 the products, services, or lines of business of the
7 covered platform operator more favorably relative to
8 those of another business user and in a manner that
9 is inconsistent with the neutral, fair, and non-
10 discriminatory treatment of all business users; or

11 (10) retaliate against any business user or cov-
12 ered platform user that raises good-faith concerns
13 with any law enforcement authority about actual or
14 potential violations of State or Federal law on the
15 covered platform or by the covered platform oper-
16 ator.

17 (b) AFFIRMATIVE DEFENSES.—

18 (1) IN GENERAL.—It shall be an affirmative de-
19 fense to an action under subsection (a) if the de-
20 fendant establishes that the conduct was reasonably
21 tailored and reasonably necessary, such that the con-
22 duct could not be achieved through materially less
23 discriminatory means, to—

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

1 (B) protect safety, user privacy, the secu-
2 rity of nonpublic data, or the security of the
3 covered platform; or

4 (C) maintain or substantially enhance the
5 core functionality of the covered platform.

6 (2) ADDITIONAL AFFIRMATIVE DEFENSES.—It
7 shall be an affirmative defense to an action under
8 paragraph (4), (5), (6), (7), (8), (9), or (10) of sub-
9 section (a) if the defendant establishes that the con-
10 duct has not resulted in and would not result in ma-
11 terial harm to competition.

12 (3) EFFECT OF OTHER LAWS.—Notwith-
13 standing any other provision of law, whether user
14 conduct would constitute a violation of section 1030
15 of title 18, United States Code, shall have no effect
16 on whether the defendant has established an affirm-
17 ative defense under this Act.

18 (4) BURDEN OF PROOF.—The defendant has
19 the burden of proving an affirmative defense under
20 this subsection by a preponderance of the evidence.

21 (c) ENFORCEMENT.—

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

24 (A) the Commission shall enforce this Act
25 in the same manner, by the same means, and

1 with the same jurisdiction, powers, and duties
2 as though all applicable terms of the Federal
3 Trade Commission Act (15 U.S.C. 41 et seq.)
4 were incorporated into and made a part of this
5 Act;

6 (B) the Department of Justice shall en-
7 force this Act in the same manner, by the same
8 means, and with the same jurisdiction, powers,
9 and duties as though all applicable terms of the
10 Sherman Act (15 U.S.C. 1 et seq.), Clayton Act
11 (15 U.S.C. 12 et seq.), and Antitrust Civil
12 Process Act (15 U.S.C. 1311 et seq.) were in-
13 corporated into and made a part of this Act;
14 and

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

23 (2) 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 (3) 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 for any form of relief pro-
11 vided for in this section.

12 (4) ENFORCEMENT IN FEDERAL DISTRICT
13 COURT.—The Commission, Department of Justice,
14 or any attorney general of a State shall only be able
15 to enforce this Act through a civil action brought be-
16 fore a district court of the United States.

17 (5) PREPONDERANCE OF THE EVIDENCE.—The
18 Department of Justice, the Commission, or the at-
19 torney general of a State shall establish a violation
20 of this section by a preponderance of the evidence.

21 (6) REMEDIES.—

22 (A) IN GENERAL.—The remedies provided
23 in this paragraph are in addition to, and not in
24 lieu of, any other remedy available under Fed-
25 eral or State law.

1 (B) CIVIL PENALTY.—Any person who vio-
2 lates this Act shall forfeit and pay to the
3 United States a civil penalty in an amount that
4 is sufficient to deter violations of this Act, but
5 not greater than 10 percent of the total United
6 States revenue of the person for the period of
7 time the violation occurred.

8 (C) INJUNCTIONS.—

9 (i) IN GENERAL.—The Department of
10 Justice, the Commission, or the attorney
11 general of any State may seek, and the
12 court may order, relief in equity as nec-
13 essary to prevent, restrain, or prohibit vio-
14 lations of this Act.

15 (ii) TEMPORARY INJUNCTIONS.—

16 (I) IN GENERAL.—The Commis-
17 sion, Department of Justice, or any
18 attorney general of a State may seek
19 a temporary injunction requiring the
20 covered platform operator to take or
21 stop taking any action for not more
22 than 120 days.

23 (II) GRANT.—The court may
24 grant a temporary injunction under
25 this clause if the Commission, the De-

1 department of Justice, or the attorney
2 general of a State, as applicable, dem-
3 onstrates—

4 (aa) there is a plausible
5 claim, supported by substantial
6 evidence raising sufficiently seri-
7 ous questions going to the merits
8 to make them fair ground for liti-
9 gation, that a covered platform
10 operator violated this Act;

11 (bb) that the conduct alleged
12 to violate this Act materially im-
13 pairs the ability of business users
14 to compete with the covered plat-
15 form operator; and

16 (cc) a temporary injunction
17 would be in the public interest.

18 (III) DURATION.—A temporary
19 injunction under this clause shall ex-
20 pire not later than the date that is
21 120 days after the date on which a
22 complaint under this subsection is
23 filed.

24 (IV) TERMINATION.—The court
25 shall terminate a temporary injunction

1 under this clause if the covered plat-
2 form operator demonstrates that—

3 (aa) the Commission, the
4 Department of Justice, or the at-
5 torney general of the State seek-
6 ing relief under this subsection
7 has not taken reasonable steps to
8 investigate whether a violation
9 has occurred; or

10 (bb) allowing the temporary
11 injunction to continue would
12 harm the public interest.

13 (V) OTHER EQUITABLE RE-
14 LIEF.—Nothing in this clause shall
15 prevent or limit the Commission, the
16 Department of Justice, or any attor-
17 ney general of any State from seeking
18 other equitable relief, including the re-
19 lief provided in this paragraph.

20 (D) FORFEITURE FOR REPEAT OFFEND-
21 ERS.—

22 (i) IN GENERAL.—If a person has en-
23 gaged in a pattern or practice of violating
24 this Act, the court shall consider requiring,
25 and may order, that the chief executive of-

1 ficer of the person, and any other cor-
2 porate officer of the person as appropriate
3 to deter violations of this Act, forfeit to the
4 United States Treasury any compensation
5 received by that chief executive officer or
6 corporate officer during the 12 months
7 preceding the filing of a complaint for an
8 alleged violation of this Act.

9 (ii) FORFEITURE PROCESS.—Prior to
10 ordering any chief executive officer or cor-
11 porate officer to forfeit compensation
12 under subsection (I), the court shall pro-
13 vide such chief executive officer or cor-
14 porate officer with reasonable notice that
15 the court is considering ordering forfeiture
16 under this section and provide an oppor-
17 tunity for such chief executive officer or
18 corporate officer to appear and be heard
19 before the court at a hearing on such po-
20 tential forfeiture.

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

24 (8) RULES OF CONSTRUCTION.—

1 (A) IN GENERAL.—Nothing in subsection

2 (a) may be construed—

3 (i) to require a covered platform oper-
4 ator to divulge or license any intellectual
5 property, including any trade secrets, busi-
6 ness secrets, or other confidential propri-
7 etary business processes, owned by or li-
8 censed to the covered platform operator;

9 (ii) to prevent a covered platform op-
10 erator from asserting its preexisting rights
11 under intellectual property law to prevent
12 the unauthorized use of any intellectual
13 property owned by or duly licensed to the
14 covered platform operator;

15 (iii) to require a covered platform op-
16 erator to interoperate or share data with
17 persons or business users that are on any
18 list maintained by the Federal Government
19 by which entities—

20 (I) are identified as limited or
21 prohibited from engaging in economic
22 transactions as part of United States
23 sanctions or export-control regimes; or

1 (II) have been identified as na-
2 tional security, intelligence, or law en-
3 forcement risks;

4 (iv) to prohibit a covered platform op-
5 erator from promptly requesting and ob-
6 taining the consent of a covered platform
7 user prior to providing access to the non-
8 public, personally identifiable information
9 of the user to a covered platform user
10 under that subsection;

11 (v) in a manner that would likely re-
12 sult in data on the covered platform or
13 data from another business user being
14 transferred to the Government of the Peo-
15 ple's Republic of China or the government
16 of a foreign adversary; or

17 (vi) to impose liability on a covered
18 platform operator solely for offering—

19 (I) full end-to-end encrypted mes-
20 saging or full end-to-end encrypted
21 communication products or services;
22 or

23 (II) a fee-for-service subscription
24 that provides benefits to covered plat-
25 form users on the covered platform.

1 (B) COPYRIGHT AND TRADEMARK VIOLA-
2 TIONS.—An action taken by a covered platform
3 operator that is reasonably tailored to protect
4 the rights of third parties under section 106,
5 1101, 1201, or 1401 of title 17, United States
6 Code, or rights actionable under section 32 or
7 43 of the Act entitled “An Act to provide for
8 the registration and protection of trademarks
9 used in commerce, to carry out the provisions
10 of certain international conventions, and for
11 other purposes”, approved July 5, 1946 (com-
12 monly known as the “Lanham Act” or the
13 “Trademark Act of 1946”) (15 U.S.C. 1114,
14 1125), or corollary State law, shall not be con-
15 sidered unlawful conduct under subsection (a).

16 (d) COVERED PLATFORM DESIGNATION.—

17 (1) IN GENERAL.—The Commission and the
18 Department of Justice may jointly, with concurrence
19 of the other, designate an online platform as a cov-
20 ered platform for the purpose of implementing and
21 enforcing this Act, which shall—

22 (A) be based on a finding that the criteria
23 set forth in section 2(a)(5)(B) are met;

24 (B) be issued in writing and published in
25 the Federal Register; and

1 (C) except as provided in paragraph (2),
2 apply for a 7-year period beginning on the date
3 on which the designation is issued, regardless of
4 whether there is a change in control or owner-
5 ship over the covered platform.

6 (2) REMOVAL OF COVERED PLATFORM DES-
7 IGNATION.—The Commission or the Department of
8 Justice shall—

9 (A) consider whether a designation of a
10 covered platform under paragraph (1) should be
11 removed prior to the expiration of the 7-year
12 period if the covered platform operator files a
13 request with the Commission or the Depart-
14 ment of Justice that shows that the online plat-
15 form no longer meets the criteria set forth in
16 section 2(a)(5)(B);

17 (B) determine whether to grant a request
18 submitted under subparagraph (A) not later
19 than 120 days after the date on which the re-
20 quest is filed;

21 (C) obtain the concurrence of the Commis-
22 sion or the Department of Justice, as appro-
23 priate, before granting a request submitted
24 under subparagraph (A); and

1 (D) publish any decision to grant or deny
2 removal of a covered platform designation in
3 the Federal Register.

4 (3) JUDICIAL REVIEW.—Any person operating
5 an online platform that has been designated as a
6 covered platform under paragraph (1) or whose re-
7 quest for removal of such a designation under para-
8 graph (2) is denied may, within 30 days of the
9 issuance of such designation or decision, petition for
10 review of such designation or decision in the United
11 States Court of Appeals for the District of Columbia
12 Circuit.

13 **SEC. 4. ENFORCEMENT GUIDELINES.**

14 (a) IN GENERAL.—Not later than 270 days after the
15 date of enactment of this Act, the Commission and the
16 Department of Justice, in consultation with other relevant
17 Federal agencies and State attorneys general, shall jointly
18 issue agency enforcement guidelines outlining policies and
19 practices relating to conduct that may materially harm
20 competition under section 3(a), agency interpretations of
21 the affirmative defenses under section 3(b), and policies
22 for determining the appropriate amount of a civil penalty
23 to be sought under section 3(c), with the goal of promoting
24 transparency, deterring violations, fostering innovation

1 and procompetitive conduct, and imposing sanctions pro-
2 portionate to the gravity of individual violations.

3 (b) UPDATES.—The Commission and the Depart-
4 ment of Justice shall update the joint guidelines issued
5 under subsection (a) as needed to reflect current agency
6 policies and practices, but not less frequently than once
7 every 4 years beginning on the date of enactment of this
8 Act.

9 (c) PUBLIC NOTICE AND COMMENT.—Before issuing
10 guidelines, or updates to those guidelines, under this sec-
11 tion, the Commission and the Department of Justice
12 shall—

13 (1) publish proposed guidelines in draft form;

14 and

15 (2) provide public notice and opportunity for
16 comment for not less than 60 days after the date on
17 which the draft guidelines are published.

18 (d) OPERATION.—The joint guidelines issued under
19 this section do not—

20 (1) confer any rights upon any person, State, or
21 locality; and

22 (2) operate to bind the Commission, Depart-
23 ment of Justice, or any person, State, or locality to
24 the approach recommended in the guidelines.

1 **SEC. 5. RULE OF CONSTRUCTION.**

2 Nothing in this Act may be construed to limit—

3 (1) any authority of the Department of Justice
4 or the Commission under the antitrust laws, section
5 5 of the Federal Trade Commission Act (15 U.S.C.
6 45), or any other provision of law; or

7 (2) the application of any law.

8 **SEC. 6. SEVERABILITY.**

9 If any provision of this Act, or the application of such
10 provision to any person or circumstance, is held to be un-
11 constitutional, the remainder of this Act, and the applica-
12 tion of the remaining provisions of this Act, to any person
13 or circumstance, shall not be affected.

14 **SEC. 7. EFFECTIVE DATE.**

15 (a) IN GENERAL.—Except as provided in subsection
16 (b), this Act shall take effect on the date of enactment
17 of this Act.

18 (b) EXCEPTION.—Section 3(a) shall take effect on
19 the date that is 1 year after the date of enactment of this
20 Act.

21 (c) AUTHORITY.—The exception in subsection (b)
22 shall not limit the authority of the Commission or Depart-
23 ment of Justice to implement other sections of this Act.