

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 (for herself and Mr. GRASSLEY)

Viz:

1 Strike all after the enacting clause and insert the following:
2

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” means a person that uses or is likely to use
3 a covered platform for the advertising, sale, or provi-
4 sion of products or services, including such persons
5 that are operating a covered platform or are con-
6 trolled by a covered platform operator.

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

9 (4) CONTROL.—The term “control” means,
10 with respect to person—

11 (A) holding 25 percent or more of the
12 stock of the person;

13 (B) having the right to 25 percent or more
14 of the profits of the person;

15 (C) in the event of the dissolution of the
16 person, having the right to 25 percent or more
17 of the assets of the person;

18 (D) if the person is a corporation, having
19 the power to designate 25 percent or more of
20 the directors of the person;

21 (E) if the person is a trust, having the
22 power to designate 25 percent or more of the
23 trustees; or

24 (F) otherwise exercising substantial control
25 over the person.

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

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

5 (B) is owned or controlled by a person
6 that—

7 (i) is a publicly traded company; and

8 (ii)(I) at any point during the 12
9 months preceding a designation under sec-
10 tion 3(d) or at any point during the 12
11 months preceding the filing of a complaint
12 for an alleged violation of this Act has at
13 least—

14 (aa) 50,000,000 United States-
15 based monthly active users on the on-
16 line platform; or

17 (bb) 100,000 United States-
18 based monthly active business users
19 on the online platform;

20 (II) at any point—

21 (aa) during the 2 years preceding
22 a designation under section 3(d), or at
23 any point during the 2 years pre-
24 ceding the filing of a complaint for an
25 alleged violation of this Act, is owned

1 or controlled by a person with United
2 States net annual sales of greater
3 than \$550,000,000,000, adjusted for
4 inflation on the basis of the Consumer
5 Price Index or an average market cap-
6 italization greater than
7 \$550,000,000,000, adjusted for infla-
8 tion on the basis of the Consumer
9 Price Index, over any 180-day period
10 during the 2-year period; or

11 (bb) during the 12 months pre-
12 ceding a designation under section
13 3(d), or at any point during the 12
14 months preceding the filing of a com-
15 plaint for an alleged violation of this
16 Act, has at least 1,000,000,000 world-
17 wide monthly active users on the on-
18 line platform; and

19 (III) is a critical trading partner for
20 the sale or provision of any product or
21 service offered on or directly related to the
22 online platform; or

23 (C) is not owned or controlled by a person
24 that—

25 (i) is a publicly traded company; and

1 (ii)(I) at any point during the 12
2 months preceding a designation under sec-
3 tion 3(d), or at any point during the 12
4 months preceding the filing of a complaint
5 for an alleged violation of this Act has at
6 least—

7 (aa) 50,000,000 United States-
8 based monthly active users on the on-
9 line platform; or

10 (bb) 100,000 United States-
11 based monthly active business users
12 on the online platform;

13 (II) at any point—

14 (aa) during the 2 years preceding
15 a designation under section 3(d), or at
16 any point during the 2 years pre-
17 ceding the filing of a complaint for an
18 alleged violation of this Act, is owned
19 or controlled by a person with earn-
20 ings, before interest, taxes, deprecia-
21 tion, and amortization, in the previous
22 fiscal year of greater than
23 \$30,000,000,000, adjusted for infla-
24 tion on the basis of the Consumer
25 Price Index; or

1 (bb) during the 12 months pre-
2 ceding a designation under section
3 3(d), or at any point during the 12
4 months preceding the filing of a com-
5 plaint for an alleged violation of this
6 Act, has at least 1,000,000,000 world-
7 wide monthly active users on the on-
8 line platform; and

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

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

17 (A) a business user to the users or cus-
18 tomers of the business user; or

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

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

1 (A) user or customer of the covered plat-
2 form; or

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

4 (8) ONLINE PLATFORM.—The term “online
5 platform” means a website, online or mobile applica-
6 tion, operating system, digital assistant, or online
7 service that—

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

11 (B) facilitates the offering, advertising,
12 sale, purchase, payment, or shipping of prod-
13 ucts or services, including software applications,
14 between and among consumers or businesses
15 not controlled by the platform operator; or

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

18 (9) PUBLICLY TRADED COMPANY.—The term
19 “publicly traded company”—

20 (A) means any company whose principal
21 class of shares—

22 (i) is listed on a stock exchange; and

23 (ii) can be readily purchased or sold
24 by the public; and

1 (B) includes all subsidiaries of a company
2 described in subparagraph (A).

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

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

12 **SEC. 3. UNLAWFUL CONDUCT.**

13 (a) IN GENERAL.—It shall be unlawful for a person
14 operating a covered platform, in or affecting commerce,
15 if it is shown, by a preponderance of the evidence, that
16 the person has engaged in conduct that would—

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

21 (2) limit the ability of the products, services, or
22 lines of business another business user to compete
23 on the covered platform relative to the products,
24 services, or lines of business of the covered platform

1 operator in a manner that would materially harm
2 competition;

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

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

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) unless necessary for the security or func-
15 tioning of the covered platform, materially restrict or
16 impede covered platform users from uninstalling
17 software applications that have been preinstalled on
18 the covered platform or changing default settings
19 that direct or steer covered platform users to prod-
20 ucts or services offered by the covered platform op-
21 erator;

22 (9) in connection with any covered platform
23 user interface, including search or ranking
24 functionality offered by the covered platform, treat
25 the products, services, or lines of business of the

1 covered platform operator more favorably relative to
2 those of another business user than under standards
3 mandating the neutral, fair, and nondiscriminatory
4 treatment of all business users; or

5 (10) retaliate against any business user or cov-
6 ered platform user that raises concerns with any law
7 enforcement authority about actual or potential vio-
8 lations of State or Federal law.

9 (b) AFFIRMATIVE DEFENSES.—

10 (1) IN GENERAL.—It shall be an affirmative de-
11 fense to an action under paragraph (1), (2), or (3)
12 of subsection (a) if the defendant establishes by a
13 preponderance of the evidence that the conduct was
14 narrowly tailored, nonpretextual, and reasonably
15 necessary to—

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

18 (B) protect safety, user privacy, the secu-
19 rity of nonpublic data, or the security of the
20 covered platform; or

21 (C) maintain or substantially enhance the
22 core functionality of the covered platform.

23 (2) OTHER UNLAWFUL CONDUCT.—It shall be
24 an affirmative defense to an action under paragraph
25 (4), (5), (6), (7), (8), (9), or (10) of subsection (a)

1 if the defendant establishes by a preponderance of
2 the evidence that the conduct—

3 (A) has not resulted in and would not re-
4 sult in material harm to competition; or

5 (B) was narrowly tailored, could not be
6 achieved through less discriminatory means,
7 was nonpretextual, and was reasonably nec-
8 essary to—

9 (i) prevent a violation of, or comply
10 with, Federal or State law;

11 (ii) protect safety, user privacy, the
12 security of non-public data, or the security
13 of the covered platform; or

14 (iii) maintain or substantially enhance
15 the core functionality of the covered plat-
16 form.

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

23 (c) ENFORCEMENT.—

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

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

8 (B) the Attorney General shall enforce this
9 Act in the same manner, by the same means,
10 and with the same jurisdiction, powers and du-
11 ties as though all applicable terms of the Sher-
12 man Act (15 U.S.C. 1 et seq.), Clayton Act (15
13 U.S.C. 12 et seq.), and Antitrust Civil Process
14 Act (15 U.S.C. 1311 et seq.) were incorporated
15 into and made a part of this Act; and

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

24 (2) COMMISSION INDEPENDENT LITIGATION AU-
25 THORITY.—If the Commission has reason to believe

1 that a person violated this Act, the Commission may
2 commence a civil action, in its own name by any of
3 its attorneys designated by it for such purpose, to
4 recover a civil penalty and seek other appropriate re-
5 lief in a district court of the United States.

6 (3) PARENS PATRIAE.—Any attorney general of
7 a State may bring a civil action in the name of such
8 State for a violation of this Act as parens patriae on
9 behalf of natural persons residing in such State, in
10 any district court of the United States having juris-
11 diction of the defendant for any form of relief pro-
12 vided for in this section.

13 (4) ENFORCEMENT IN FEDERAL DISTRICT
14 COURT.—The Commission, Attorney General, or any
15 attorney general of a State shall only be able to en-
16 force this Act through a civil action brought before
17 a district court of the United States.

18 (5) REMEDIES.—

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

23 (B) CIVIL PENALTY.—Any person who vio-
24 lates this Act shall be liable to the United
25 States or the Commission for a civil penalty,

1 which shall accrue to the United States Treas-
2 ury, in an amount not greater than 15 percent
3 of the total United States revenue of the person
4 for the period of time the violation occurred.

5 (C) INJUNCTIONS.—

6 (i) IN GENERAL.—The Assistant At-
7 torney General of the Antitrust Division,
8 the Commission, or the attorney general of
9 any State may seek, and the court may
10 order, relief in equity as necessary to pre-
11 vent, restrain, or prohibit violations of this
12 Act.

13 (ii) TEMPORARY INJUNCTIONS.—

14 (I) IN GENERAL.—The Commis-
15 sion, Assistant Attorney General of
16 the Antitrust Division, or any attor-
17 ney general of a State may seek a
18 temporary injunction requiring the
19 covered platform operator to take or
20 stop taking any action for not more
21 than 120 days.

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

1 United States, or the attorney general
2 of a State, as applicable, proves—

3 (aa) there is a plausible
4 claim, supported by evidence,
5 that a covered platform operator
6 took an action that would violate
7 this Act;

8 (bb) that action materially
9 impairs the ability of business
10 users to compete with the covered
11 platform operator; and

12 (cc) a temporary injunction
13 would be in the public interest.

14 (III) DURATION.—A temporary
15 injunction under this clause shall ex-
16 pire not later than the date that is
17 120 days after the date on which a
18 complaint under this subsection is
19 filed.

20 (IV) TERMINATION.—The court
21 shall terminate a temporary injunction
22 under this clause if the covered plat-
23 form operator proves that—

24 (aa) the Commission, the
25 United States, or the attorney

1 general of the State seeking relief
2 under this subsection has not
3 taken reasonable steps to inves-
4 tigate whether a violation has oc-
5 curred; or

6 (bb) allowing the temporary
7 injunction to continue would
8 harm the public interest.

9 (V) OTHER EQUITABLE RE-
10 LIEF.—Nothing in this clause shall
11 prevent or limit the Commission, the
12 United States, or any attorney general
13 of any State from seeking other equi-
14 table relief, including the relief pro-
15 vided in this paragraph.

16 (D) FORFEITURE FOR REPEAT OFFEND-
17 ERS.—If a person has engaged in a pattern or
18 practice of violating this Act, the court shall
19 consider requiring, and may order, that the
20 chief executive officer, and any other corporate
21 officer as appropriate to deter violations of this
22 Act, forfeit to the United States Treasury any
23 compensation received by that person during
24 the 12 months preceding or following the filing

1 of a complaint for an alleged violation of this
2 Act.

3 (6) STATUTE OF LIMITATIONS.—A proceeding
4 for a violation of this section may be commenced not
5 later than 6 years after such violation occurs.

6 (7) RULES OF CONSTRUCTION.—

7 (A) IN GENERAL.—Nothing in subsection
8 (a) may be construed—

9 (i) to require a covered platform oper-
10 ator to divulge or license any intellectual
11 property, including any trade secrets, busi-
12 ness secrets, or other confidential propri-
13 etary business processes, owned by or li-
14 censed to the covered platform operator;

15 (ii) to prevent a covered platform op-
16 erator from asserting its preexisting rights
17 under intellectual property law to prevent
18 the unauthorized use of any intellectual
19 property owned by or duly licensed to the
20 covered platform operator;

21 (iii) to require a covered platform op-
22 erator to interoperate or share data with
23 persons or business users that are on any
24 list maintained by the Federal Government
25 by which entities—

1 (I) are identified as limited or
2 prohibited from engaging in economic
3 transactions as part of United States
4 sanctions or export-control regimes; or

5 (II) have been identified as na-
6 tional security, intelligence, or law en-
7 forcement risks;

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

15 (v) to impose liability on a covered
16 platform operator solely for offering—

17 (I) full end-to-end encrypted mes-
18 saging or communication products or
19 services that allow communication be-
20 tween covered platform users; or

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

24 (B) COPYRIGHT AND TRADEMARK VIOLA-
25 TIONS.—An action taken by a covered platform

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

14 (d) COVERED PLATFORM DESIGNATION.—

15 (1) IN GENERAL.—The Commission and De-
16 partment of Justice may jointly, with concurrence of
17 the other, designate an online platform as a covered
18 platform for the purpose of implementing and en-
19 forcing this Act, which shall—

20 (A) be based on a finding that the criteria
21 set forth in subparagraph (B) or (C) of section
22 2(a)(5) are met;

23 (B) be issued in writing and published in
24 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 subparagraphs (B) and (C);

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; and

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).

25 (3) JUDICIAL REVIEW.—

1 (A) IN GENERAL.—Any person aggrieved
2 by a designation under paragraph (1), a deci-
3 sion in response to a request under paragraph
4 (2), or a final order issued in any district court
5 of the United States under this Act may, within
6 30 days of the issuance of such designation, de-
7 cision, or order, petition for review of such des-
8 ignation, decision, or order in the United States
9 Court of Appeals for the District of Columbia
10 Circuit.

11 (B) TREATMENT OF FINDINGS.—In a pro-
12 ceeding for judicial review of a designation
13 under paragraph (1) or a decision in response
14 to a request under paragraph (2), the findings
15 of fact by the Commission or the Department
16 of Justice, if supported by evidence, shall be
17 conclusive.

18 **SEC. 4. ENFORCEMENT GUIDELINES.**

19 (a) IN GENERAL.—Not later than 270 days after the
20 date of enactment of this Act, the Commission and the
21 Assistant Attorney General of the Antitrust Division, in
22 consultation with other relevant Federal agencies and
23 State attorneys general, shall jointly issue agency enforce-
24 ment guidelines outlining policies and practices relating to
25 conduct that may materially harm competition under sec-

1 tion 3(a), agency interpretations of the affirmative de-
2 fenses under section 3(b), and policies for determining the
3 appropriate amount of a civil penalty to be sought under
4 section 3(c), with the goal of promoting transparency, de-
5 terring violations, fostering innovation and procompetitive
6 conduct, and imposing sanctions proportionate to the
7 gravity of individual 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) PUBLIC NOTICE AND COMMENT.—Before issuing
15 guidelines, or updates to those guidelines, under this sec-
16 tion, the Commission and the Assistant Attorney General
17 of the Antitrust Division shall—

18 (1) publish proposed guidelines in draft form;

19 and

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

23 (d) OPERATION.—The joint guidelines issued under
24 this section do not—

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

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

6 **SEC. 5. RULE OF CONSTRUCTION.**

7 Nothing in this Act may be construed to limit—

8 (1) any authority of the Attorney General or
9 the Commission under the antitrust laws, section 5
10 of the Federal Trade Commission Act (15 U.S.C.
11 45), or any other provision of law; or

12 (2) the application of any law.

13 **SEC. 6. SEVERABILITY.**

14 If any provision of this Act, or the application of such
15 provision to any person or circumstance, is held to be un-
16 constitutional, the remainder of this Act, and the applica-
17 tion of the remaining provisions of this Act, to any person
18 or circumstance, shall not be affected.

19 **SEC. 7. EFFECTIVE DATE.**

20 (a) **IN GENERAL.**—Except as provided in subsection
21 (b), this Act shall take effect on the date of enactment
22 of this Act.

23 (b) **EXCEPTION.**—Section 3(a) shall take effect on
24 the date that is 1 year after the date of enactment of this
25 Act.

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