

AMENDMENT NO. _____ Calendar No. _____

Purpose: In the nature of a substitute.

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

S. 2710

To promote competition and reduce gatekeeper power in the app economy, increase choice, improve quality, and reduce costs for consumers.

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 Mr. BLUMENTHAL

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 “Open App Markets

5 Act”.

6 **SEC. 2. DEFINITIONS.**

7 In this Act:

8 (1) APP.—The term “app” means a software

9 application or electronic service that may be run or

10 directed by a user on a computer, a mobile device,

11 or any other general purpose computing device.

1 (2) APP STORE.—The term “app store” means
2 a publicly available website, software application, or
3 other electronic service that distributes apps from
4 third-party developers to users of a computer, a mo-
5 bile device, or any other general purpose computing
6 device.

7 (3) COVERED COMPANY.—The term “covered
8 company” means any person that owns or controls
9 an app store for which users in the United States
10 exceed 50,000,000.

11 (4) DEVELOPER.—The term “developer” means
12 a person that owns or controls an app or an app
13 store.

14 (5) IN-APP PAYMENT SYSTEM.—The term “in-
15 app payment system” means an application, service,
16 or user interface to manage billing or process the
17 payments from users of an app.

18 (6) NONPUBLIC BUSINESS INFORMATION.—The
19 term “nonpublic business information” means non-
20 public data that is—

21 (A) derived from a developer or an app or
22 app store owned or controlled by a developer,
23 including interactions between users and the
24 app or app store of the developer; and

1 (B) collected by a covered company in the
2 course of operating an app store or providing
3 an operating system.

4 **SEC. 3. PROTECTING A COMPETITIVE APP MARKET.**

5 (a) EXCLUSIVITY AND TYING.—A covered company
6 shall not—

7 (1) require developers to use or enable an in-
8 app payment system owned or controlled by the cov-
9 ered company or any of its business partners as a
10 condition of the distribution of an app on an app
11 store or accessible on an operating system;

12 (2) require as a term of distribution on an app
13 store that pricing terms or conditions of sale be
14 equal to or more favorable on its app store than the
15 terms or conditions under another app store; or

16 (3) take punitive action or otherwise impose
17 less favorable terms and conditions against a devel-
18 oper for using or offering different pricing terms or
19 conditions of sale through another in-app payment
20 system or on another app store.

21 (b) INTERFERENCE WITH LEGITIMATE BUSINESS
22 COMMUNICATIONS.—A covered company shall not impose
23 restrictions on communications of developers with the
24 users of the app through an app or direct outreach to a
25 user concerning legitimate business offers, such as pricing

1 terms and product or service offerings. Nothing in this
2 subsection shall prohibit a covered company from pro-
3 viding a user the option to offer consent prior to the collec-
4 tion and sharing of the data of the user by an app.

5 (c) NONPUBLIC BUSINESS INFORMATION.—A cov-
6 ered company shall not use nonpublic business information
7 derived from a third-party app for the purpose of com-
8 peting with that app.

9 (d) INTEROPERABILITY.—A covered company that
10 controls the operating system or operating system configu-
11 ration on which its app store operates shall allow and pro-
12 vide readily accessible means for users of that operating
13 system to—

14 (1) choose third-party apps or app stores as de-
15 faults for categories appropriate to the app or app
16 store;

17 (2) install third-party apps or app stores
18 through means other than its app store; and

19 (3) hide or delete apps or app stores provided
20 or preinstalled by the app store owner or any of its
21 business partners.

22 (e) SELF-PREFERENCING IN SEARCH.—

23 (1) IN GENERAL.—A covered company shall not
24 provide unequal treatment of apps in an app store
25 through unreasonably preferencing or ranking the

1 apps of the covered company or any of its business
2 partners over those of other apps in organic search
3 results.

4 (2) CONSIDERATIONS.—Unreasonably
5 preferencing—

6 (A) includes applying ranking schemes or
7 algorithms that prioritize apps based on a cri-
8 terion of ownership interest by the covered com-
9 pany or its business partners; and

10 (B) does not include clearly disclosed ad-
11 vertising.

12 (f) OPEN APP DEVELOPMENT.—A covered company
13 shall provide access to operating system interfaces, devel-
14 opment information, and hardware and software features
15 to developers on a timely basis and on terms that are
16 equivalent or functionally equivalent to the terms for ac-
17 cess by similar apps or functions provided by the covered
18 company or to its business partners.

19 **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**
20 **USERS.**

21 (a) IN GENERAL.—

22 (1) NO VIOLATION.—Subject to section (b), a
23 covered company shall not be in violation of section
24 3 for an action that is—

1 (A) necessary to achieve user privacy, secu-
2 rity, or digital safety;

3 (B) taken to prevent spam or fraud;

4 (C) necessary to prevent unlawful infringe-
5 ment of preexisting intellectual property; or

6 (D) taken to prevent a violation of, or
7 comply with, Federal or State law.

8 (2) PRIVACY AND SECURITY PROTECTIONS.—In
9 paragraph (1), the term “necessary to achieve user
10 privacy, security, or digital safety” includes—

11 (A) allowing an end user to opt in, and
12 providing information regarding the reasonable
13 risks, prior to enabling installation of the third-
14 party apps or app stores;

15 (B) removing malicious or fraudulent apps
16 or app stores from an end user device;

17 (C) providing an end user with the tech-
18 nical means to verify the authenticity and origin
19 of a third-party apps or app stores; and

20 (D) providing an end user with option to
21 limit the collection sharing of the data of the
22 user with third-party apps or app stores.

23 (b) REQUIREMENTS.—Subsection (a) shall only apply
24 if the covered company establishes by a preponderance of

1 the evidence that the action described in that subsection
2 is—

3 (1) applied on a demonstrably consistent basis
4 to—

5 (A) apps of the covered company or its
6 business partners; and

7 (B) other apps;

8 (2) not used as a pretext to exclude, or impose
9 unnecessary or discriminatory terms on, third-party
10 apps, in-app payment systems, or app stores; and

11 (3) narrowly tailored and could not be achieved
12 through a less discriminatory and technically pos-
13 sible means.

14 **SEC. 5. ENFORCEMENT.**

15 (a) ENFORCEMENT.—

16 (1) IN GENERAL.—The Federal Trade Commis-
17 sion, the Attorney General, and any attorney general
18 of a State subject to the requirements in paragraph
19 (4) shall enforce this Act in the same manner, by
20 the same means, and with the same jurisdiction,
21 powers, and duties as though all applicable terms
22 and provisions of the Federal Trade Commission Act
23 (15 U.S.C. 41 et seq.), the Sherman Act (15 U.S.C.
24 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.),
25 and Antitrust Civil Process Act (15 U.S.C. 1311 et

1 seq.), as appropriate, were incorporated into and
2 made a part of this Act.

3 (2) FEDERAL TRADE COMMISSION INDE-
4 PENDENT LITIGATION AUTHORITY.—If the Federal
5 Trade Commission has reason to believe that a cov-
6 ered company violated this Act, the Federal Trade
7 Commission may commence a civil action, in its own
8 name by any of its attorneys designated by it for
9 such purpose, to recover a civil penalty and seek
10 other appropriate relief in a district court of the
11 United States against the covered company.

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

19 (b) SUITS BY DEVELOPERS INJURED.—

20 (1) IN GENERAL.—Except as provided in para-
21 graph (3), any developer injured by reason of any-
22 thing forbidden in this Act may sue therefor in any
23 district court of the United States in the district in
24 which the defendant resides or is found or has an
25 agent, without respect to the amount in controversy,

1 and shall recover threefold the damages by the devel-
2 oper sustained and the cost of suit, including a rea-
3 sonable attorney's fee. The court may award under
4 this subsection, pursuant to a motion by such devel-
5 oper promptly made, simple interest on actual dam-
6 ages for the period beginning on the date of service
7 of the pleading of the developer setting forth a claim
8 under this Act and ending on the date of judgment,
9 or for any shorter period therein, if the court finds
10 that the award of such interest for such period is
11 just in the circumstances. In determining whether
12 an award of interest under this subsection for any
13 period is just in the circumstances, the court shall
14 consider only—

15 (A) whether the developer or the opposing
16 party, or either party's representative, made
17 motions or asserted claims or defenses so lack-
18 ing in merit as to show that such party or rep-
19 resentative acted intentionally for delay or oth-
20 erwise acted in bad faith;

21 (B) whether, in the course of the action in-
22 volved, the developer or the opposing party, or
23 either party's representative, violated any appli-
24 cable rule, statute, or court order providing for

1 sanctions for dilatory behavior or otherwise pro-
2 viding for expeditious proceedings; and

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

7 (2) INJUNCTIVE RELIEF.—Except as provided
8 in paragraph (3), any developer shall be entitled to
9 sue for and have injunctive relief, in any court of the
10 United States having jurisdiction over the parties,
11 against threatened loss or damage by a violation of
12 this Act, when and under the same conditions and
13 principles as injunctive relief against threatened con-
14 duct that will cause loss or damage is granted by
15 courts of equity, under the rules governing such pro-
16 ceedings, and upon the execution of proper bond
17 against damages for an injunction improvidently
18 granted and a showing that the danger of irrep-
19 arable loss or damage is immediate, a preliminary
20 injunction may issue. In any action under this para-
21 graph in which the plaintiff substantially prevails,
22 the court shall award the cost of suit, including a
23 reasonable attorney's fee, to such plaintiff.

24 (3) FOREIGN STATE-OWNED ENTERPRISES.—A
25 developer of an app that is owned by, or under the

1 control of, a foreign state may not bring an action
2 under this subsection.

3 **SEC. 6. RULE OF CONSTRUCTION.**

4 Nothing in this Act may be construed—

5 (1) to limit—

6 (A) any authority of the Attorney General
7 or the Federal Trade Commission under the
8 antitrust laws (as defined in the first section of
9 the Clayton Act (15 U.S.C. 12), the Federal
10 Trade Commission Act (15 U.S.C. 41 et seq.),
11 or any other provision of law; or

12 (B) the application of any law;

13 (2) to require—

14 (A) a covered company to provide service
15 under a hardware or software warranty for
16 damage caused by third-party apps or app
17 stores installed through means other than the
18 app store of the covered company; or

19 (B) customer service for the installation or
20 operation of third-party apps or app stores de-
21 scribed in subparagraph (A);

22 (3) to prevent an action taken by a covered
23 company that is reasonably tailored to protect the
24 rights of third parties under section 106, 1101,
25 1201, or 1401 of title 17, United States Code, or

1 rights actionable under sections 32 or 43 of the Act
2 entitled “An Act to provide for the registration and
3 protection of trademarks used in commerce, to carry
4 out the provisions of certain international conven-
5 tions, and for other purposes”, approved July 5,
6 1946 (commonly known as the “Lanham Act” or the
7 “Trademark Act of 1946”) (15 U.S.C. 1114, 1125),
8 or corollary State law;

9 (4) to require a covered company to license any
10 intellectual property, including any trade secrets,
11 owned by or licensed to the covered company;

12 (5) to prevent a covered company from assert-
13 ing preexisting rights of the covered company under
14 intellectual property law to prevent the unlawful un-
15 authorized use of any intellectual property owned by
16 or duly licensed to the covered company; or

17 (6) to require a covered company to inter-
18 operate or share data with persons or business users
19 that—

20 (A) are on any list maintained by the Fed-
21 eral Government by which entities are identified
22 as limited or prohibited from engaging in eco-
23 nomic transactions as part of United States
24 sanctions or export control regimes; or

1 (B) have been identified as national secu-
2 rity, intelligence, or law enforcement risks.

3 **SEC. 7. SEVERABILITY.**

4 If any provision of this Act, or the application of such
5 a provision to any person or circumstance, is held to be
6 unconstitutional, the remaining provisions of this Act, and
7 the application of such provisions to any person or cir-
8 cumstance shall not be affected thereby.

9 **SEC. 8. EFFECTIVE DATE.**

10 This Act shall take effect on the date that is 180 days
11 after the date of enactment of this Act.