PROGRAM MATERIALS
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The Antitrust Evolution: Nine Months In

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THE BIDEN ADMINISTRATION 9 MONTHS IN

OCTOBER 2021

THE BIDEN ADMINISTRATION 8 MONTHS IN

AGENDA

- Current Congress Legislation & Status
- NY Legislation & Status
- Biden Executive Order
- FTC Chair Lina Khan and Her First Orders of Business
- The Nomination of Jonathan Kanter
- Update: The FTC Case Against Facebook
- States’ Case Against Google

CURRENT CONGRESS LEGISLATION & STATUS

- On May 13, 2021, the Senate Judiciary Committee unanimously approved a bill that would drastically change the fee structure for pre-merger notification filings made pursuant to the HSR Act. A similar bill has been approved by the House Judiciary Committee.

Current Filing Fees (as of May 2021)	Size of Transaction
$45,000	valued in excess of $92 million but less than $184 million
$125,000	valued at $184 million or greater but less than $919.9 million; or
$280,000	valued at $919.9 million or greater

New Proposed Filing Fees	Size of Transaction
$30,000	$92 million or greater but is less than $161.5 million[2]
$100,000	$161.5 million or greater but is less than $500 million
$250,000	$500 million or greater but is less than $1 billion
$400,000	$1 billion or greater but is less than $2 billion
$800,000	$2 billion or greater but is less than $5 billion
$2,250,000	$5 billion or greater

CURRENT CONGRESS LEGISLATION & STATUS

- On June 23 and 24, the House Judiciary Committee passed six bills aimed at Big Tech.
  - Merger Filing Fee Modernization Act (29-12 vote)
  - State Antitrust Enforcement Venue Act (34-7 vote)
  - Augmenting Compatibility and Competition by Enabling Service Switching ("ACCESS") Act (25-19 vote)
  - Platform Competition and Opportunity Act (24-17 vote)
  - American Choice and Innovation Online Act (24-20 vote)
  - Ending Platform Monopolies Act (21-20 vote)
- The bills now move on to a full vote in the House of Representatives.
- While voting was somewhat along party lines, there were significant defections on both sides of the aisle. A number of Democrat Representatives from California, where a number of Big Tech companies are located, voted against several bills. Conversely, some Republicans voted for the bills. We understand that these bills are being revisited by the Speaker's office.

CURRENT CONGRESS LEGISLATION & STATUS

- The Consumer Protection and Recovery Act, which was introduced on April 20, 2021, passed in the House of Representatives 221-205 on July 20, 2021. It was received in the Senate on July 21, 2021. The bill would amend the Federal Trade Commission Act to affirmatively confirm the authority of the Federal Trade Commission to seek permanent injunctions and other equitable relief for violations of any provision of law enforced by the Commission. This bill would restore the FTC to its position prior to the Supreme Court's decision in *AMG Capital Management, LLC v. Federal Trade Commission* in April 2021.
- Both the Senate (August 11) and House (August 13) introduced the Open App Markets Act. The Open App Markets Act would (1) allow developers to collect user fees/payments outside the app stores' mandatory payment mechanisms; (2) let developers tell users they can set up payment for services outside the app stores (i.e., on developers' websites); (3) let users sideload competing apps and app stores (e.g. Microsoft's store — 12% commission); (4) preclude app store searches from favoring Apple and Google's own apps; and (5) prevent Apple and Google from using nonpublic data of app stores to benefit their own apps.

CURRENT CONGRESS LEGISLATION & STATUS

In the Senate, there are three main legislative efforts (in addition to those mentioned above):

- Senator Josh Hawley introduced two bills: the Trust Busting for the Twenty-First Century Act and the Bust Up Big Tech Act. Among other topics, the former would prohibit mergers by companies with a market capitalization of greater than $100 billion and change the consumer welfare standard to one based on economic competition. The latter would prohibit big technology companies from marketing their own products.
- Senator Mike Lee introduced three bills: the State Antitrust Enforcement Venue Act, the One Agency Act, and the Tougher Enforcement Against Monopolies Act. The first would allow State Attorneys General to remain in their venue of choice; the second and third would combine the two agencies.
- Senator Klobuchar, following the plan set forth in her recent book, introduced the Competition and Antitrust Law Enforcement Reform Act (CALERA), which would make it easier for the FTC and DOJ to challenge mergers by lowering the burdens of proof and, in some cases, shifting the burden of proof to the merging parties. In addition, the Act would prohibit exclusionary conduct by dominant firms and grant the DOJ and FTC the ability to seek monetary relief.

CURRENT CONGRESS LEGISLATION & STATUS

Notable Similarities Between the Klobuchar and Lee Bills

Klobuchar Bill:

- Changes standard for merger control to "appreciable risk of materially lessening competition"
- Requires institutional investor study
- Fines of 15% of total revenue
- Increased funding to DOJ and FTC
- Increases filing fees

Lee Bill:

- Keeps the substantially all standard, but creates presumptions for certain market shares
- Requires institutional investor study
- Fines of 15% of total revenue
- Increased funding to DOJ and FTC
- Increases filing fees

CURRENT CONGRESS LEGISLATION & STATUS

Notable Differences Between the Klobuchar and Lee Bills

Klobuchar Bill:

- Shifts burden proof in some merger challenges to merging party
- Mandates reporting of certain acquisitions
- Requires a merger remedy study
- Establishes an Office of Competition Advocate and Division of Market Analysis
- Expands exclusionary conduct
- Decreases relevance of market definition
- Increases whistleblower protections

Lee Bill:

- Overturns *Illinois Brick*
- Combines the FTC and DOJ into the DOJ
- Poses the possibility of repealing the US nexus requirement for merger filings

NY LEGISLATION & STATUS

- New York's 21st Century Antitrust Bill has passed the Senate but has not been voted on by the Assembly. The legislative calendar has ended. The bill will need to be reintroduced in the Senate during the next term.
- The bill aimed to modernize the Donnelly Act, which is NY's current antitrust legislation.
- **Unilateral Conduct**: prohibition on monopolization and attempted monopolization, as well as an "abuse of a dominant position."
- **Pre-Merger Notification**: with certain exemptions, mandatory notification for acquisitions valued at USD 9.2 million or more, at least 60 calendar days before closing. Failure to file will result in fines up to $10,000 per day.
- **Penalties**: significant increases in criminal penalties for antitrust violations and explicit authorization of private class actions.

PRESIDENT BIDEN’S EXECUTIVE ORDER

- On July 9, 2021, President Biden signed the *Executive Order on Promoting Competition in the American Economy*.
- The Order contains 72 initiatives and calls more than a dozen federal agencies to action in what the Order terms a "whole-of-government approach" to competition.
- The Order's initiatives call for general heightened antitrust enforcement, as well as specific focus on the following industries: labor, healthcare, agriculture, banking and consumer finance, transportation, internet service, and information technology (namely larger internet platforms).
- The Order establishes a White House Competition Council ("WHCC"). The WHCC is tasked with "work[ing] with each [federal] agency to ensure that agency operations are conducted in a manner that promotes fair competition, as appropriate and consistent with applicable law."
- The Order also calls on the FTC and the DOJ to re-examine their joint Horizontal and Vertical Merger Guidelines, the latter of which were recently revised in 2020.

PRESIDENT BIDEN'S EXECUTIVE ORDER

WHAT IT MEANS FOR U.S. ANTITRUST

- The Order will likely lead to increased merger scrutiny (including previously consummated mergers) affecting particular sectors and the implementation of new federal agency rules impacting competition.
- The Order signals a potential shift away from the current "consumer welfare standard." In his speech upon signing the Order, President Biden stated that he believes the United States took the wrong path years ago when it followed Robert Bork and the Chicago School's "consumer welfare standard," which has underpinned antitrust jurisprudence for approximately the last four decades. The FTC took a similar action to move away from the "consumer welfare standard" standard in early July.
- The degree of impact of an executive order is debatable, especially compared to federal legislation. Executive orders can be undone or priorities shifted by successive presidents.

PRESIDENT BIDEN'S EXECUTIVE ORDER

DOJ/FTC REACTION

- The same day the Order was issued, the DOJ and the FTC issued a joint statement in response, acknowledging there should be "a hard look to determine whether [the guidelines] are overly permissive" and promising a joint review would be undertaken.
- "We must ensure that the merger guidelines reflect current economic realities and empirical learning and that they guide enforcers to review mergers with the skepticism the law demands."
- The DOJ announced earlier this month that it has created an Executive Order Task Force to examine how to best implement the President's initiatives.

FTC CHAIR LINA KHAN AND HER FIRST ORDERS OF BUSINESS

- On June 15, Lina Khan was confirmed (69-28 vote) by the Senate. In an unusual move, she was named the FTC Chair following her confirmation.
- On July 1, FTC Chair Lina Khan held the first open meeting in over 20 years. She opened the meeting with a brief statement about the importance of transparency to both inform the public of the agency's work and create a "robust participatory process." The meeting included public comments for the first time.
- During that meeting, Democrat Commissioners voted to rescind a 2015 policy statement on enforcement principles, namely, the use of the "consumer welfare standard." It was approved during the Obama administration by a bipartisan group of Commissioners.

FTC CHAIR LINA KHAN AND HER FIRST ORDERS OF BUSINESS

- On July 8, it was reported that Chair Khan’s Chief of Staff ordered the agency’s staff to cancel all public appearances in an email on June 22.
- In confirming the message, a spokesperson stated "The FTC is severely under-resourced and in the midst of a massive surge in merger filings. This is an all-hands-on-deck moment. So the agency pushed pause on public speaking events that aren't focused on educating consumers to ensure staff time is being used to maximum benefit and productivity. The American public needs this agency solving problems, not speaking on panels."

FTC CHAIR LINA KHAN AND HER FIRST ORDERS OF BUSINESS

- The FTC held another open meeting on July 21, where 3 initiatives were voted on (Care Labeling Rule, passed 5-0; Policy Statement on Repair Restrictions Imposed by Manufacturers and Sellers, passed 5-0; and Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases, passed 3-2 (Wilson and Phillips voting no)).
- The Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases rescinded a 1995 policy that ended the FTC practice of requiring parties that proposed unlawful mergers to receive prior approval and give prior notice for future transactions (in other words the FTC may now require prior approval for M&A transactions by certain companies).
- The FTC is now issuing warning letters for transactions that it does not have capacity to review. The FTC is warning parties that although the waiting period is expiring, parties close at their own peril.

FTC CHAIR LINA KHAN AND HER FIRST ORDERS OF BUSINESS

- On August 26, the FTC announced it is going through its Informal Interpretations "determine the best path forward." One item of note is the possibility that debt may no longer be subtracted from the overall consideration to determine if a deal is notifiable.
- At the end of August, Chair Khan, in a letter to the National Economic Council, stated that she had ordered the FTC to re-examine how it analyzes gas station mergers and promised to start an investigation of abuses in the "franchise market" for retail fuel stations.
- On September 15, the FTC voted 3-2 to rescind the Vertical Merger Guidelines that both the FTC and the DOJ had promulgated just 14 months prior. The DOJ has not rescinded the Guidelines.
- The FTC also voted 3-2 to open rulemaking petitions and engage in rulemaking in the competition space.

THE NOMINATION OF JONATHAN KANTER

- On July 20, the Biden Administration nominated Jonathan Kanter for the role as Assistant Attorney General of the Antitrust Division of the Department of Justice.
- Kanter comes to the position with considerable antitrust experience. Besides working at the FTC, Kanter was an antitrust partner for Cadwalader and later Paul Weiss, before starting his own firm a few years ago.
- He is a strong advocate for increased antitrust scrutiny of large technology companies. Over the past decade, Kanter represented several companies in actions against Google and other large technology companies. His clients included Microsoft, Yelp, and Getty Images.
- Kanter's nomination is likely to go before the US Senate for confirmation in late fall.
- We expect that Kanter will be an aggressive enforcer across the broad spectrum of industries for which the DOJ has responsibility.

DISMISSAL OF THE FTC CASE AGAINST FACEBOOK

- On June 28, the District Court dismissed the FTC's complaint against Facebook.
- The judge dismissed the FTC's complaint, but not the entire case (the judge dismissed the States' case in its entirety). The judge gave the FTC 30 days to file an amended complaint.
- The Court found that "the FTC has failed to plead enough facts to plausibly establish a necessary element of all of its Section 2 claims — namely, that Facebook has monopoly power in the market for Personal Social Networking (PSN) Services."
- On another claim, the Court acknowledged that Facebook's implementation of its interoperability policy as to certain specific competitor apps may have violated Section 2 (if it previously granted such competitors access) but Facebook is not violating or about to violate Section 2.
- The Court did reject Facebook's argument that the FTC lacks authority to seek injunctive relief against the acquisitions of Instagram and WhatsApp because the mergers happened years ago. It noted "an injunction...is a theoretically available remedy in a Section 2 challenge to long-ago mergers so long as the defendant still holds the purchased assets or stock, as is the case here."

DISMISSAL OF THE FTC CASE AGAINST FACEBOOK

- The FTC filed an amended complaint on August 19.
- According to the FTC, the amended complaint “bolsters the FTC’s monopoly power allegations by providing detailed statistics showing that Facebook had dominant market shares in the U.S. personal social networking market."
- The FTC added nearly 30 pages to its complaint, including a revamped section on Facebook’s monopoly power.
- Of note: the amended complaint was filed after Lina Khan's confirmation as Chair of the FTC. The FTC Office of the General Counsel confirmed that Chair Khan need not recuse herself from the case, as petitioned by Facebook.

STATES CASE AGAINST GOOGLE

- The States' complaint against Google regarding the Play Store is a continuation of the case that Epic Games started over app stores when it filed suit against Apple and Google last summer, with some additional evidence regarding Google's relationships with third parties and state-level claims.
- The States argue that Google holds monopolies in three markets: (1) licensable mobile operating systems (Android); (2) app distribution on Android devices (the Google Play Store); and (3) the in-app payment processing market for Android devices (Google Play Billing).
- Google's monopoly over Google Play Billing is only made possible as an illegal tie-in via Google's monopoly over the Google Play Store (GPS), which is only made possible as an illegal tie-in through Google's monopoly over Android devices.

STATES CASE AGAINST GOOGLE

- The case also focuses on five forms of exclusionary behavior:
  - (1) Google creates and imposes broad practical, technological, and contractual restrictions to foreclose the "ecosystem" of Android app distribution;
  - (2) Google uses a "carrot-and-stick approach" to discourage competition from its only potential competitors: Android device manufacturers and mobile network operators;
  - (3) Google has essentially "bought off" its largest potential competitor, Samsung;
  - (4) Google enters into revenue-sharing agreements with large app developers to prevent them from developing their own app stores or moving to a competing app store; and
  - (5) Google illegally ties Google Play Billing to all transactions made on GPS.
- The State AGs filed an amended complaint in the Play Store cases on August 28, 2021. The primary difference between the two complaints is the removal of redactions, including a now-visible internal Google document stating "Play Store dominates in all countries."

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September 2, 2021

Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, D.C. 20515

Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives
Washington, D.C. 20515

Dear Speaker Pelosi and Leader McCarthy:

We write to you to express our support for the package of Big Tech antitrust bills marked up by the House Judiciary Committee in June. This bipartisan package of bills reflects the culmination of a two-year investigation into the abuses of Big Tech. If enacted, these bills are a major step forward in restoring competitive markets and unlocking the potential of Americans to grow successful businesses and build an economy that is more prosperous, equitable, and innovative. Furthermore, they represent our best chance in generations to rein in the runaway power of the biggest, wealthiest, and least accountable corporations in the world.

For nearly two years Chairs David Cicilline and Jerrold Nadler, and Ranking Member Ken Buck led an extremely thorough bipartisan investigation. It included 10 hearings, 240 interviews, 1.3 million documents, and a historic 450-page report. There was testimony from dozens of experts and representatives from the corporations themselves, including the CEOs, Jeff Bezos, Mark Zuckerberg, Tim Cook, and Sundar Pichai.

The committee developed a suite of groundbreaking bills informed by the recommendations of the report. They were carefully crafted to address the abusive practices of the Big Tech companies. We believe that these bills will bring urgently needed change and accountability to these companies and an industry that most Americans agree is already doing great harm to our democracy. The legislative package includes:

H.R. 3816 – American Innovation and Choice Online Act (Reps. Cicilline and Gooden): This bill will promote innovation and competition by prohibiting dominant Big Tech platforms from anticompetitive discrimination, self-preferencing, and excluding competitors to protect their monopolies and leverage them into other lines of business.

H.R. 3825 – Ending Platform Monopolies Act (Reps. Jayapal and Gooden): This bill will address the most problematic aspects of the Big Tech companies by giving government enforcers the ability to sue to break-up or separate certain parts of the businesses that create conflicts of interest that give the companies an unfair advantage against potential competitors and business users.

H.R. 3826 – Platform Competition and Opportunity Act (Reps. Jeffries and Buck): This bill will prevent the most problematic mergers and acquisitions, such as those that include competitors, potential or nascent competitors, or will enhance or maintain the company's market power.

H.R. 3849 – Augmenting Compatibility and Competition by Enabling Service Switching ACCESS) Act (Reps. Scanlon and Owens): This bill would promote competition against the Big Tech platforms by reducing their power to keep users locked in. It would require Big Tech platforms to allow users to take their data with them if they decide to leave, and to allow users to communicate across networks or platforms.

H.R. 3843 – Merger Filing Fee Modernization Act (Reps. Neguse and Spartz): This bill would update merger filing fees and authorize much-needed funding for antitrust enforcement agencies.

H.R. 3460 – State Antitrust Enforcement Venue Act (Reps. Buck and Cicilline): This bill would give state attorneys general the same ability that federal antitrust enforcers have to stay in the court of their choosing when bringing a federal antitrust suit rather than have a defendant seek to move a case to a more favorable venue.

America has a monopoly problem. Monopoly power lowers wages, reduces innovation and entrepreneurship, exacerbates income and regional inequality, undermines the free press and access to information, and perpetuates toxic systems of racial, gender, and class dominance. Big Tech monopolies are at the center of many of these problems. Reining in these companies is an essential first step to reverse the damage of concentrated corporate power throughout our economy. The bills that passed out of the House Judiciary Committee, with bipartisan support, do just that and it is imperative that they move forward in the House.

Americans support taking action against these companies. Antitrust reform enjoys widespread public support. Recent polling found that 57 percent of Democrats and Republicans and 61 percent of independents believe that Big Tech companies should be broken up. Nearly nine in 10 voters strongly support a proposal to make rules to ensure Big Tech corporations do not abuse consumer data or civil rights.

We are proud to support this important legislative package and encourage all members of Congress to vote for its swift passage.

Sincerely,

Public Citizen
Accountable Tech
Action Center on Race & the Economy
ALIGN: The Alliance for a Greater New York
Alliance for Pharmacy Compounding
American Booksellers Association
American Family Voices

American Independent Business Alliance
American Specialty Toy Retailing Association
Artist Rights Alliance
Athena
Cambridge Local First
Center for American Progress
Center for Digital Democracy
Center for Popular Democracy
Committee to Support the Antitrust Laws
Decode Democracy
Demos
Electronic Frontier Foundation
Friends of the Earth
Future of Music Coalition
Gig Workers Rising
Global Exchange
Indivisible Georgia Coalition
Indivisible Hawaii
Indivisible Ulster/NY19
Institute for Local Self-Reliance
International Brotherhood of Teamsters
Jobs With Justice
Kairos Action
Local First Arizona
Louisville Independent Business Alliance
Main Street Alliance
Mainers for Accountable Leadership
Media Alliance
Metropolitan Washington Council, AFL-CIO
National Employment Law Project
New York Communities For Change
New York Communities for Change
North American Hardware and Paint Association
Open Markets Institute
Our Revolution
PowerSwitch Action
Public Knowledge
Running Industry Association
Secure Elections Network
Service Employees International Union
Shop Local Raleigh/Greater Raleigh Merchants Association
SIMBA (Spokane Independent Metro Business Alliance)
Small Business Rising
Stand Up Nashville
StayLocal, an initiative of Urban Conservancy
Strategic Organizing Center

SumOfUs
The Democratic Coalition
UltraViolet
Venice Resistance
Warehouse workers for justice

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Adjusting merger review to deal with the surge in merger filings

Share This Page

Holly Vedova, Bureau of Competition
Aug 3, 2021

Given the recent surge in merger filings, the FTC is reviewing its processes to determine how best to use its limited resources.

The FTC reviews mergers per the Hart-Scott-Rodino (HSR) Act, which requires that companies provide the FTC and Department of Justice with advance notice of certain transactions above a certain threshold. (The current minimum size-of-transaction threshold is $92 million.) After the merging parties submit a filing with information about the transaction, the statute generally gives the agencies 30 days to pursue an initial investigation and determine whether additional information is needed to evaluate the transaction. If the FTC or DOJ seeks additional information through what's known as a "second request," the deal is then put on hold until the companies have fully complied with the additional investigatory request. Once the parties have submitted all of the additional information, the reviewing agency has a limited number of days to file a complaint challenging the proposed merger ahead of its consummation. The purpose of this process is to give the FTC and DOJ time to identify illegal mergers prior to their consummation. However, the law permits the antitrust agencies to determine that a merger is illegal even after the companies have merged and even if the merger was subject to premerger review. When the FTC does not challenge a transaction prior to its consummation, this does not constitute an "approval" or "clearance" of the deal, and the agency maintains the right to challenge a deal regardless of whether it was initially investigated. The FTC always has the right to take such further action as the public interest may require.

This year, the FTC has been hit by a tidal wave of merger filings that is straining the agency's capacity to rigorously investigate deals ahead of the statutory deadlines. (We now post our monthly HSR figures on the website and they are astounding.) We believe it is important to be upfront about these capacity constraints. For deals that we cannot fully investigate within the requisite timelines, we have begun to send standard form letters alerting companies that the FTC's investigation remains open and reminding companies that the agency may subsequently determine that the deal was unlawful. Companies that choose to proceed with transactions that have not been fully investigated are doing so at their own risk. Of course, this action should not be construed as a determination that the deal is unlawful, just as the fact that we have not issued such a letter with respect to an HSR filing should not be construed as a determination that a deal is lawful.

The form of the letter is posted in its entirety below.

Sample Pre-Consummation Warning Letter (133.19 KB)

ftc.gov

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

September 22, 2021

MEMORANDUM

FROM: Chair Lina M. Khan

TO: Commission Staff and Commissioners

SUBJECT: Vision and Priorities for the FTC

Thank you for the grace and patience you've displayed the last few months as my team and I have gotten up to speed on the agency's work and processes. Navigating a leadership transition during a pandemic has posed a host of challenges, and I am so grateful for the warm welcome and support from across the Commission. The past 18 months have involved significant hardship and loss for many of us, and I want to thank everyone for their hard work and dedication during these difficult times.

It's been great to meet and speak with many of you as I've dug deeper into the agency's workload. Reviewing the breadth of our work has underscored the enormity of the job Congress has given us and the critical role the Commission must play in policing unlawful conduct across markets. Using our full set of tools and authorities—including rulemaking and research in addition to adjudication—will be critical, especially post-*AMG*.

Over its 107 years, the Commission has navigated various periods of change and transformation. At its best, the agency has focused on tackling urgent problems, learning from new evidence, and course-correcting where needed. American consumers, workers, and honest businesses depend on the Commission to champion a fair and thriving economy for all, and I am confident that we can deliver.

Succeeding will require us to adjust our approach based on what we learn and to focus on key strategic priorities and operational objectives. I have offered below some thoughts on each of these prongs, and I look forward to engaging with you further as we dive into this work. I respect deeply the expertise and talent within the agency and fully recognize that the work ahead will require collective learning and engagement as we chart a path forward.

Strategic Approach

There are a few key principles that should animate the agency's approach across its work.

First, we need to take a holistic approach to identifying harms, recognizing that antitrust and consumer protection violations harm workers and independent businesses as well as consumers. Focusing on power asymmetries and the unlawful practices those imbalances enable will help to ensure our efforts are geared towards tackling the most significant harms across markets, including those directed at marginalized communities. Broadening our frame can also help surface the macro effects of our policy decisions, such as the relationship between market structure and supply chain fragility, or data consolidation and security vulnerabilities.

Second, we need to orient our enforcement efforts around targeting root causes rather than looking at one-off effects. This means focusing on structural incentives that enable unlawful conduct—be it certain conflicts of interest, business models, or structural dominance—as well as looking upstream at the firms that are enabling and profiting from this conduct. Focusing enforcement efforts towards targeting and rectifying root causes can avoid a whack-a-mole approach that imposes significant enforcement burden with few long-term benefits.

Third, we need to invest in a more rigorous and empiricism-driven approach to understanding market behaviors and business practices. While enforcers routinely suffer from information asymmetries, adopting a more interdisciplinary approach can help mitigate blind spots and narrow the gap between theory and practice. To achieve this, we need to incorporate a greater range of analytical tools and skillsets into the agency's work and foster greater collaboration among disciplines.

Fourth, we need to be forward-looking in anticipating problems and taking swift action. On both the competition and the consumer protection sides, this means being especially attentive to next-generation technologies, innovations, and nascent industries across sectors. Timely intervention—be it checking anticompetitive conduct that would lead markets to tip, or targeting unfair practices before they become widely adopted—can help us tackle problems at their inception, both limiting harms and saving resources over the long term.

Finally, we need to further democratize the agency. This means recognizing the agency as a public body whose work shapes the distribution of power and opportunity across our economy. It also means ensuring the Commission is in tune with the real problems that Americans are facing in their daily lives and using that understanding to inform our work.

Policy Priorities

In terms of the specific policy priorities that will harness our strategic approach, there are a few areas where I would like the agency to focus its work.

First, we need to address rampant consolidation and the dominance that it has enabled across markets. This will require both finding ways to strengthen our merger enforcement work as well as generally focusing our resources on scrutinizing dominant firms, where lack of competition makes unlawful conduct more likely.

Above all, we need to be intentional in how we direct our resources. Growing evidence suggests that market power now looks to be an increasingly systemic problem across the economy, so we should generally focus our resources on the most significant actors, where our enforcement actions can have the greatest impact on the everyday lives of Americans. Given the ongoing merger surge, there is a real risk that markets will become only more consolidated absent our vigilance and assertive posture. The current deal volume is imposing huge demands on our staff, and I'm very grateful to the merger shops for the heavy load they are carrying, as well as to the attorneys from OPP and OIA who have graciously stepped up to help.

A key project will be revising the merger guidelines, an effort we will undertake in conjunction with DOJ. Prior guidelines have represented a somewhat narrow and outdated framework for assessing mergers, and revising the guidelines is an opportunity to close gaps between theory and practice, setting the foundation for more effective and empirically grounded enforcement work. I know many at the agency have given significant thought to the current deficiencies, and our review process will benefit greatly from tapping into that expertise.

More broadly, we need to find ways to deter unlawful transactions. The rate at which firms propose facially illegal deals heavily strains agency resources and compromises our ability to investigate significant mergers, raising the risk of false negatives. Identifying ways to reduce the agency resources and burden associated with investigating and filing lawsuits against unlawful mergers will be important as we look for ways to turn the page.

The second area I'd like us to prioritize addressing is dominant intermediaries and extractive business models. Research documents how gatekeepers and dominant middlemen across the economy have been able to use their critical market position to hike fees, dictate terms, and protect and extend their market power. Business models that centralize control and profits while outsourcing risk, liability, and costs also warrant particular scrutiny, given that deeply asymmetric relationships between the controlling firm and dependent entities can be ripe for abuse. Meanwhile, the growing role of private equity and other investment vehicles invites us to examine how these business models may distort ordinary incentives in ways that strip productive capacity and may facilitate unfair methods of competition and consumer protection violations. Evidence suggests that many of these abuses target marginalized communities, and combatting practices that prey on these communities will be a key priority.

The third area centers on taking aim at the ways in which certain contract terms, particularly those that are imposed in take-it-or-leave-it contracts, constitute unfair methods of competition or unfair or deceptive practices. We have seen how market power abuses and consumer protection concerns can emerge when one-sided contract provisions are imposed by dominant firms. Non-competes, repair restrictions, and exclusionary clauses are just some of the terms we have heard about in our public comments. Consumers, workers, franchisees, and other market participants are at a significant disadvantage when they are unable to negotiate freely over terms and conditions. Focusing on contractual provisions in these contexts should help surface the types of restrictions or requirements that hamper a free and fair economy.

Operational Objectives

Tackling this robust agenda will require us to update the ways in which we carry out our work, building on our successes and learning from our challenges. To that end, I would like the agency to prioritize a few core operational objectives.

First, we should move away from seeing our work in consumer protection and competition siloes, and instead apply an integrated approach to our cases, rules, research, and other policy tools. Improving cross-Bureau coordination and creating more cross-training opportunities can help to maximize agency oversight over particular sectors, surface interconnections between the conditions that give rise to antitrust and consumer protection violations, and promote staff exposure to a broader variety of work. We have already seen greater coordination between BC and BCP pay dividends, and I'm excited for us to continue this effort.

Second, it is critical that we are connected to the communities that we serve and that we reflect America's broad diversity in the talent we recruit. To do this, I would like us to expand our regional footprint. This should allow us to fill out our ranks by taking advantage of a national pool of qualified candidates. It also helps grow our understanding of and expertise in industries that might be more specific to certain local economies. Finally, it means that we will have more staff who live in and are connected to the many different places where our work has significant impact.

Third, we should broaden our institutional skillsets to ensure we are fully grasping market realities, especially as the economy becomes increasingly digitized. Bringing on additional technologists, data analysts, financial analysts, and experts from outside disciplines will build on our existing talent and position us to analyze conduct, assess remedies, and pursue market studies with greater rigor. I admire the interdisciplinary approach adopted by some of our international counterparts and am eager for us to learn from their experience and execute on best practices.

To help us accomplish these priorities, I am happy to share that I will be moving to name Holly Vedova as Director of the Bureau of Competition and Samuel Levine as Director of the Bureau of Consumer Protection. Both Holly and Sam are longtime public servants who bring great talents and expertise to their respective positions, and I'm so grateful for the dedication that each of them brings to their role.

I'm so appreciative of the work many teams have already done to begin executing on key priorities, and I look forward to engaging with and hearing from you as we build out this work together. It's an honor to be your colleague and to serve with you at this moment of tremendous need and opportunity.

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September 20, 2021

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Jerrold Nadler
Chair
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Dick Durbin Chairman
Chair
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Jim Jordan
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Chuck Grassley
Ranking Member
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

RE: 2021 Congressional Legislation to Update Federal Antitrust Laws

Dear Speaker Pelosi, Majority Leader Schumer, Minority Leader McCarthy, and Minority Leader McConnell:

As you know, state attorneys general are on the front line of consumer protections and antitrust enforcement for our respective states. This month, we were pleased to see a bipartisan plan in Congress unveiled to update federal antitrust laws.

A comprehensive update of federal antitrust laws has not occurred in decades. Given changes in technology, decreased competition in important sectors, and undue judicial skepticism towards robust enforcement, we applaud Congress for taking up the Ending Platform Monopolies Act[1], American Choice and Innovation Online Act[2], Platform Competition and Opportunity Act[3], Augmenting Compatibility and Competition by Enabling Service Switching ("ACCESS") Act[4], Merger Filing Fee Modernization Act[5], and State Antitrust Enforcement Venue Act[6]. The sponsors of these bills should be commended for working to ensure that federal antitrust laws remain robust and keep pace with that of modern markets.

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[1] Ending Platform Monopolies Act of 2021, H.R. 3825, 117th Cong. (2021).
[2] American Choice and Innovation Online Act of 2021, H.R. 3816, 117th Cong. (2021).
[3] Platform Competition and Opportunity Act of 2021, H.R. 3826, 117th Cong. (2021).
[4] Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021, H.R. 3849, 117th Cong. (2021).
[5] Merger Filing Fee Modernization Act of 2021, H.R. 3843, 117th Cong. (2021).
[6] State Antitrust Enforcement Venue Act of 2021, H.R. 3460, 117th Cong. (2021).

As state attorneys general, we are very supportive of Congress' efforts to modernize federal antitrust laws. As the antitrust bills move forward from the House Committee on the Judiciary for consideration by the full House of Representatives and, eventually, the Senate, we encourage Congress to continue making improvements to these important measures. These include provisions to further enhance consumer protections from unlawful and irresponsible mergers and business practices as well as necessary improvements to ensure that competition and innovation are not stifled. In addition, we urge Congress to include in the legislation a provision confirming that the states are sovereigns that stand on equal footing with federal enforcers under federal antitrust law, including with regard to the timing of challenging anticompetitive mergers and other practices.

As Congress considers how best to improve antitrust law, we encourage the House and Senate to prioritize protecting competition and innovation. We welcome the opportunity to discuss suggestions to address these critical considerations and to improve any of the proposed laws. We stand ready and willing to share our experience with members of Congress, including how our antitrust enforcement efforts have met inappropriate skepticism in the courts, as Attorneys General Peterson and Weiser recently explained in testimony before the House Antitrust Subcommittee[7].

As H.R. 3825, H.R. 3816, H.R. 3826, H.R. 3849, H.R. 3843, and H.R. 3460 advance in the lawmaking process, we look forward to working with the House of Representatives and the Senate and being a resource to your members. It is critical, as we do so, that we advance measures to promote competition and that we not let this moment pass. There is simply too much at stake.

Sincerely,

Phil Weiser
Colorado Attorney General

Douglas Peterson
Nebraska Attorney General

Letitia James
New York Attorney General

Herbert H. Slatery III
Tennessee Attorney General

Rob Bonta
California Attorney General

William Tong
Connecticut Attorney General

[7] Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power: Hearing Before the Subcomm. on Antitrust, Commercial, and Administrative Law, 117th Cong. (2021) (Testimony of Phillip J. Weiser and Doug Peterson).

Kathleen Jennings
Delaware Attorney General

Karl A. Racine
District of Columbia Attorney General

Leevin Taitano Camacho
Guam Attorney General

Clare E. Connors
Hawaii Attorney General

Lawrence Wasden
Idaho Attorney General

Kwame Raoul
Illinois Attorney General

Tom Miller
Iowa Attorney General

Jeff Landry
Louisiana Attorney General

Aaron M. Frey
Maine Attorney General

Brian Frosh
Maryland Attorney General

Maura Healey
Massachusetts Attorney General

Dana Nessel
Michigan Attorney General

Keith Ellison
Minnesota Attorney General

Aaron D. Ford
Nevada Attorney General

John M. Formella
New Hampshire Attorney General

Hector Balderas
New Mexico Attorney General

Josh Stein
North Carolina Attorney General

Wayne Stenehjem
North Dakota Attorney General

Ellen F. Rosenblum
Oregon Attorney General

Josh Shapiro
Pennsylvania Attorney General

Peter F. Neronha
Rhode Island Attorney General

Sean D. Reyes
Utah Attorney General

T.J. Donovan
Vermont Attorney General

Mark R. Herring
Virginia Attorney General

Robert W. Ferguson
Washington Attorney General

Joshua L. Kaul
Wisconsin Attorney General

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Presidential Documents

Title 3—

The President

Executive Order 14036 of July 9, 2021

Promoting Competition in the American Economy

By the authority vested in me as President by the Constitution and the laws of the United States of America, and in order to promote the interests of American workers, businesses, and consumers, it is hereby ordered as follows:

Section 1. *Policy*. A fair, open, and competitive marketplace has long been a cornerstone of the American economy, while excessive market concentration threatens basic economic liberties, democratic accountability, and the welfare of workers, farmers, small businesses, startups, and consumers.

The American promise of a broad and sustained prosperity depends on an open and competitive economy. For workers, a competitive marketplace creates more high-quality jobs and the economic freedom to switch jobs or negotiate a higher wage. For small businesses and farmers, it creates more choices among suppliers and major buyers, leading to more take-home income, which they can reinvest in their enterprises. For entrepreneurs, it provides space to experiment, innovate, and pursue the new ideas that have for centuries powered the American economy and improved our quality of life. And for consumers, it means more choices, better service, and lower prices.

Robust competition is critical to preserving America's role as the world's leading economy.

Yet over the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.

Consolidation has increased the power of corporate employers, making it harder for workers to bargain for higher wages and better work conditions. Powerful companies require workers to sign non-compete agreements that restrict their ability to change jobs. And, while many occupational licenses are critical to increasing wages for workers and especially workers of color, some overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States.

Consolidation in the agricultural industry is making it too hard for small family farms to survive. Farmers are squeezed between concentrated market power in the agricultural input industries—seed, fertilizer, feed, and equipment suppliers—and concentrated market power in the channels for selling agricultural products. As a result, farmers' share of the value of their agricultural products has decreased, and poultry farmers, hog farmers, cattle ranchers, and other agricultural workers struggle to retain autonomy and to make sustainable returns.

The American information technology sector has long been an engine of innovation and growth, but today a small number of dominant internet platforms use their power to exclude market entrants, to extract monopoly profits, and to gather intimate personal information that they can exploit for their own advantage. Too many small businesses across the economy depend on those platforms and a few online marketplaces for their survival. And too many local newspapers have shuttered or downsized, in part due to the internet platforms' dominance in advertising markets.

Americans are paying too much for prescription drugs and healthcare services—far more than the prices paid in other countries. Hospital consolidation has left many areas, particularly rural communities, with inadequate or more expensive healthcare options. And too often, patent and other laws have been misused to inhibit or delay—for years and even decades—competition from generic drugs and biosimilars, denying Americans access to lower-cost drugs.

In the telecommunications sector, Americans likewise pay too much for broadband, cable television, and other communications services, in part because of a lack of adequate competition. In the financial-services sector, consumers pay steep and often hidden fees because of industry consolidation. Similarly, the global container shipping industry has consolidated into a small number of dominant foreign-owned lines and alliances, which can disadvantage American exporters.

The problem of economic consolidation now spans these sectors and many others, endangering our ability to rebuild and emerge from the coronavirus disease 2019 (COVID–19) pandemic with a vibrant, innovative, and growing economy. Meanwhile, the United States faces new challenges to its economic standing in the world, including unfair competitive pressures from foreign monopolies and firms that are state-owned or state-sponsored, or whose market power is directly supported by foreign governments.

We must act now to reverse these dangerous trends, which constrain the growth and dynamism of our economy, impair the creation of high-quality jobs, and threaten America's economic standing in the world.

This order affirms that it is the policy of my Administration to enforce the antitrust laws to combat the excessive concentration of industry, the abuses of market power, and the harmful effects of monopoly and monopsony—especially as these issues arise in labor markets, agricultural markets, Internet platform industries, healthcare markets (including insurance, hospital, and prescription drug markets), repair markets, and United States markets directly affected by foreign cartel activity.

It is also the policy of my Administration to enforce the antitrust laws to meet the challenges posed by new industries and technologies, including the rise of the dominant Internet platforms, especially as they stem from serial mergers, the acquisition of nascent competitors, the aggregation of data, unfair competition in attention markets, the surveillance of users, and the presence of network effects.

Whereas decades of industry consolidation have often led to excessive market concentration, this order reaffirms that the United States retains the authority to challenge transactions whose previous consummation was in violation of the Sherman Antitrust Act (26 Stat. 209, 15 U.S.C. 1 *et seq.*) (Sherman Act), the Clayton Antitrust Act (Public Law 63–212, 38 Stat. 730, 15 U.S.C. 12 *et seq.*) (Clayton Act), or other laws. *See* 15 U.S.C. 18; *Standard Oil Co. v. United States,* 221 U.S. 1 (1911).

This order reasserts as United States policy that the answer to the rising power of foreign monopolies and cartels is not the tolerance of domestic monopolization, but rather the promotion of competition and innovation by firms small and large, at home and worldwide.

It is also the policy of my Administration to support aggressive legislative reforms that would lower prescription drug prices, including by allowing Medicare to negotiate drug prices, by imposing inflation caps, and through other related reforms. It is further the policy of my Administration to support the enactment of a public health insurance option.

My Administration further reaffirms the policy stated in Executive Order 13725 of April 15, 2016 (Steps to Increase Competition and Better Inform Consumers and Workers to Support Continued Growth of the American Economy), and the Federal Government's commitment to the principles that led to the passage of the Sherman Act, the Clayton Act, the Packers and

Stockyards Act, 1921 (Public Law 67–51, 42 Stat. 159, 7 U.S.C. 181 *et seq.*) (Packers and Stockyards Act), the Celler-Kefauver Antimerger Act (Public Law 81–899, 64 Stat. 1125), the Bank Merger Act (Public Law 86–463, 74 Stat. 129, 12 U.S.C. 1828), and the Telecommunications Act of 1996 (Public Law 104–104, 110 Stat. 56), among others.

Sec. 2. *The Statutory Basis of a Whole-of-Government Competition Policy.* (a) The antitrust laws, including the Sherman Act, the Clayton Act, and the Federal Trade Commission Act (Public Law 63–203, 38 Stat. 717, 15 U.S.C. 41 *et seq.*), are a first line of defense against the monopolization of the American economy.

(b) The antitrust laws reflect an underlying policy favoring competition that transcends those particular enactments. As the Supreme Court has stated, for instance, the Sherman Act ''rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.'' *Northern Pac. Ry. Co. v. United States,* 356 U.S. 1, 4 (1958).

(c) Consistent with these broader policies, and in addition to the traditional antitrust laws, the Congress has also enacted industry-specific fair competition and anti-monopolization laws that often provide additional protections. Such enactments include the Packers and Stockyards Act, the Federal Alcohol Administration Act (Public Law 74–401, 49 Stat. 977, 27 U.S.C. 201 *et seq.*), the Bank Merger Act, the Drug Price Competition and Patent Term Restoration Act of 1984 (Public Law 98–417, 98 Stat. 1585), the Shipping Act of 1984 (Public Law 98–237, 98 Stat. 67, 46 U.S.C. 40101 *et seq.*) (Shipping Act), the ICC Termination Act of 1995 (Public Law 104–88, 109 Stat. 803), the Telecommunications Act of 1996, the Fairness to Contact Lens Consumers Act (Public Law 108–164, 117 Stat. 2024, 15 U.S.C. 7601 *et seq.*), and the Dodd-Frank Wall Street Reform and Consumer Protection Act (Public Law 111–203, 124 Stat. 1376) (Dodd-Frank Act).

(d) These statutes independently charge a number of executive departments and agencies (agencies) to protect conditions of fair competition in one or more ways, including by:

(i) policing unfair, deceptive, and abusive business practices;

(ii) resisting consolidation and promoting competition within industries through the independent oversight of mergers, acquisitions, and joint ventures;

(iii) promulgating rules that promote competition, including the market entry of new competitors; and

(iv) promoting market transparency through compelled disclosure of information.

(e) The agencies that administer such or similar authorities include the Department of the Treasury, the Department of Agriculture, the Department of Health and Human Services, the Department of Transportation, the Federal Reserve System, the Federal Trade Commission (FTC), the Securities and Exchange Commission, the Federal Deposit Insurance Corporation, the Federal Communications Commission, the Federal Maritime Commission, the Commodity Futures Trading Commission, the Federal Energy Regulatory Commission, the Consumer Financial Protection Bureau, and the Surface Transportation Board.

(f) Agencies can influence the conditions of competition through their exercise of regulatory authority or through the procurement process. *See* 41 U.S.C. 1705.

(g) This order recognizes that a whole-of-government approach is necessary to address overconcentration, monopolization, and unfair competition in the American economy. Such an approach is supported by existing statutory mandates. Agencies can and should further the polices set forth in section

1 of this order by, among other things, adopting pro-competitive regulations and approaches to procurement and spending, and by rescinding regulations that create unnecessary barriers to entry that stifle competition.

Sec. 3. *Agency Cooperation in Oversight, Investigation, and Remedies.* (a) The Congress frequently has created overlapping agency jurisdiction in the policing of anticompetitive conduct and the oversight of mergers. It is the policy of my Administration that, when agencies have overlapping jurisdiction, they should endeavor to cooperate fully in the exercise of their oversight authority, to benefit from the respective expertise of the agencies and to improve Government efficiency.

(b) Where there is overlapping jurisdiction over particular cases, conduct, transactions, or industries, agencies are encouraged to coordinate their efforts, as appropriate and consistent with applicable law, with respect to:

(i) the investigation of conduct potentially harmful to competition;

(ii) the oversight of proposed mergers, acquisitions, and joint ventures; and

(iii) the design, execution, and oversight of remedies.

(c) The means of cooperation in cases of overlapping jurisdiction should include, as appropriate and consistent with applicable law:

(i) sharing relevant information and industry data;

(ii) in the case of major transactions, soliciting and giving significant consideration to the views of the Attorney General or the Chair of the FTC, as applicable; and

(iii) cooperating with any concurrent Department of Justice or FTC oversight activities under the Sherman Act or Clayton Act.

(d) Nothing in subsections (a) through (c) of this section shall be construed to suggest that the statutory standard applied by an agency, or its independent assessment under that standard, should be displaced or substituted by the judgment of the Attorney General or the Chair of the FTC. When their views are solicited, the Attorney General and the Chair of the FTC are encouraged to provide a response to the agency in time for the agency to consider it in advance of any statutory deadline for agency action.

Sec. 4. *The White House Competition Council.* (a) There is established a White House Competition Council (Council) within the Executive Office of the President.

(b) The Council shall coordinate, promote, and advance Federal Government efforts to address overconcentration, monopolization, and unfair competition in or directly affecting the American economy, including efforts to:

(i) implement the administrative actions identified in this order;

(ii) develop procedures and best practices for agency cooperation and coordination on matters of overlapping jurisdiction, as described in section 3 of this order;

(iii) identify and advance any additional administrative actions necessary to further the policies set forth in section 1 of this order; and

(iv) identify any potential legislative changes necessary to further the policies set forth in section 1 of this order.

(c) The Council shall work across agencies to provide a coordinated response to overconcentration, monopolization, and unfair competition in or directly affecting the American economy. The Council shall also work with each agency to ensure that agency operations are conducted in a manner that promotes fair competition, as appropriate and consistent with applicable law.

(d) The Council shall not discuss any current or anticipated enforcement actions.

(e) The Council shall be led by the Assistant to the President for Economic Policy and Director of the National Economic Council, who shall serve as Chair of the Council.

(f) In addition to the Chair, the Council shall consist of the following members:

(i) the Secretary of the Treasury;

(ii) the Secretary of Defense;

(iii) the Attorney General;

(iv) the Secretary of Agriculture;

(v) the Secretary of Commerce;

(vi) the Secretary of Labor;

(vii) the Secretary of Health and Human Services;

(viii) the Secretary of Transportation;

(ix) the Administrator of the Office of Information and Regulatory Affairs; and

(x) the heads of such other agencies and offices as the Chair may from time to time invite to participate.

(g) The Chair shall invite the participation of the Chair of the FTC, the Chair of the Federal Communications Commission, the Chair of the Federal Maritime Commission, the Director of the Consumer Financial Protection Bureau, and the Chair of the Surface Transportation Board, to the extent consistent with their respective statutory authorities and obligations.

(h) Members of the Council shall designate, not later than 30 days after the date of this order, a senior official within their respective agency or office who shall coordinate with the Council and who shall be responsible for overseeing the agency's or office's efforts to address overconcentration, monopolization, and unfair competition. The Chair may coordinate subgroups consisting exclusively of Council members or their designees, as appropriate.

(i) The Council shall meet on a semi-annual basis unless the Chair determines that a meeting is unnecessary.

(j) Each agency shall bear its own expenses for participating in the Council.

Sec. 5. *Further Agency Responsibilities.* (a) The heads of all agencies shall consider using their authorities to further the policies set forth in section 1 of this order, with particular attention to:

(i) the influence of any of their respective regulations, particularly any licensing regulations, on concentration and competition in the industries under their jurisdiction; and

(ii) the potential for their procurement or other spending to improve the competitiveness of small businesses and businesses with fair labor practices.

(b) The Attorney General, the Chair of the FTC, and the heads of other agencies with authority to enforce the Clayton Act are encouraged to enforce the antitrust laws fairly and vigorously.

(c) To address the consolidation of industry in many markets across the economy, as described in section 1 of this order, the Attorney General and the Chair of the FTC are encouraged to review the horizontal and vertical merger guidelines and consider whether to revise those guidelines.

(d) To avoid the potential for anticompetitive extension of market power beyond the scope of granted patents, and to protect standard-setting processes from abuse, the Attorney General and the Secretary of Commerce are encouraged to consider whether to revise their position on the intersection of the intellectual property and antitrust laws, including by considering whether to revise the Policy Statement on Remedies for Standards-Essential Patents Subject to Voluntary F/RAND Commitments issued jointly by the Department of Justice, the United States Patent and Trademark Office, and the National Institute of Standards and Technology on December 19, 2019.

(e) To ensure Americans have choices among financial institutions and to guard against excessive market power, the Attorney General, in consultation with the Chairman of the Board of Governors of the Federal Reserve System, the Chairperson of the Board of Directors of the Federal Deposit Insurance Corporation, and the Comptroller of the Currency, is encouraged to review current practices and adopt a plan, not later than 180 days after the date of this order, for the revitalization of merger oversight under the Bank Merger Act and the Bank Holding Company Act of 1956 (Public Law 84–511, 70 Stat. 133, 12 U.S.C. 1841 *et seq.*) that is in accordance with the factors enumerated in 12 U.S.C. 1828(c) and 1842(c).

(f) To better protect workers from wage collusion, the Attorney General and the Chair of the FTC are encouraged to consider whether to revise the Antitrust Guidance for Human Resource Professionals of October 2016.

(g) To address agreements that may unduly limit workers' ability to change jobs, the Chair of the FTC is encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority under the Federal Trade Commission Act to curtail the unfair use of non-compete clauses and other clauses or agreements that may unfairly limit worker mobility.

(h) To address persistent and recurrent practices that inhibit competition, the Chair of the FTC, in the Chair's discretion, is also encouraged to consider working with the rest of the Commission to exercise the FTC's statutory rulemaking authority, as appropriate and consistent with applicable law, in areas such as:

(i) unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy;

(ii) unfair anticompetitive restrictions on third-party repair or self-repair of items, such as the restrictions imposed by powerful manufacturers that prevent farmers from repairing their own equipment;

(iii) unfair anticompetitive conduct or agreements in the prescription drug industries, such as agreements to delay the market entry of generic drugs or biosimilars;

(iv) unfair competition in major Internet marketplaces;

(v) unfair occupational licensing restrictions;

(vi) unfair tying practices or exclusionary practices in the brokerage or listing of real estate; and

(vii) any other unfair industry-specific practices that substantially inhibit competition.

(i) The Secretary of Agriculture shall:

(i) to address the unfair treatment of farmers and improve conditions of competition in the markets for their products, consider initiating a rulemaking or rulemakings under the Packers and Stockyards Act to strengthen the Department of Agriculture's regulations concerning unfair, unjustly discriminatory, or deceptive practices and undue or unreasonable preferences, advantages, prejudices, or disadvantages, with the purpose of furthering the vigorous implementation of the law established by the Congress in 1921 and fortified by amendments. In such rulemaking or rulemakings, the Secretary of Agriculture shall consider, among other things:

(A) providing clear rules that identify recurrent practices in the livestock, meat, and poultry industries that are unfair, unjustly discriminatory, or deceptive and therefore violate the Packers and Stockyards Act;

(B) reinforcing the long-standing Department of Agriculture interpretation that it is unnecessary under the Packers and Stockyards Act to demonstrate industry-wide harm to establish a violation of the Act and that the ''unfair, unjustly discriminatory, or deceptive'' treatment of one farmer, the giving to one farmer of an ''undue or unreasonable preference or advantage,'' or the subjection of one farmer to an ''undue or unreasonable prejudice or disadvantage in any respect'' violates the Act;

(C) prohibiting unfair practices related to grower ranking systems—systems in which the poultry companies, contractors, or dealers exercise extraordinary control over numerous inputs that determine the amount farmers are paid and require farmers to assume the risk of factors outside their control, leaving them more economically vulnerable;

(D) updating the appropriate definitions or set of criteria, or application thereof, for undue or unreasonable preferences, advantages, prejudices, or disadvantages under the Packers and Stockyards Act; and

(E) adopting, to the greatest extent possible and as appropriate and consistent with applicable law, appropriate anti-retaliation protections, so that farmers may assert their rights without fear of retribution;

(ii) to ensure consumers have accurate, transparent labels that enable them to choose products made in the United States, consider initiating a rulemaking to define the conditions under which the labeling of meat products can bear voluntary statements indicating that the product is of United States origin, such as ''Product of USA'';

(iii) to ensure that farmers have greater opportunities to access markets and receive a fair return for their products, not later than 180 days after the date of this order, submit a report to the Chair of the White House Competition Council, with a plan to promote competition in the agricultural industries and to support value-added agriculture and alternative food distribution systems through such means as:

(A) the creation or expansion of useful information for farmers, such as model contracts, to lower transaction costs and help farmers negotiate fair deals;

(B) measures to encourage improvements in transparency and standards so that consumers may choose to purchase products that support fair treatment of farmers and agricultural workers and sustainable agricultural practices;

(C) measures to enhance price discovery, increase transparency, and improve the functioning of the cattle and other livestock markets;

(D) enhanced tools, including any new legislative authorities needed, to protect whistleblowers, monitor agricultural markets, and enforce relevant laws;

(E) any investments or other support that could bolster competition within highly concentrated agricultural markets; and

(F) any other means that the Secretary of Agriculture deems appropriate;

(iv) to improve farmers' and smaller food processors' access to retail markets, not later than 300 days after the date of this order, in consultation with the Chair of the FTC, submit a report to the Chair of the White House Competition Council, on the effect of retail concentration and retailers' practices on the conditions of competition in the food industries, including any practices that may violate the Federal Trade Commission Act, the Robinson-Patman Act (Public Law 74–692, 49 Stat. 1526, 15 U.S.C. 13 *et seq.*), or other relevant laws, and on grants, loans, and other support that may enhance access to retail markets by local and regional food enterprises; and

(v) to help ensure that the intellectual property system, while incentivizing innovation, does not also unnecessarily reduce competition in seed and other input markets beyond that reasonably contemplated by the Patent Act (*see* 35 U.S.C. 100 *et seq.* and 7 U.S.C. 2321 *et seq.*), in consultation with the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, submit a report to the Chair of the White House Competition Council, enumerating and describing any relevant concerns of the Department of Agriculture and strategies for addressing those concerns across intellectual property, antitrust, and other relevant laws.

(j) To protect the vibrancy of the American markets for beer, wine, and spirits, and to improve market access for smaller, independent, and new operations, the Secretary of the Treasury, in consultation with the Attorney General and the Chair of the FTC, not later than 120 days after the date of this order, shall submit a report to the Chair of the White House Competition Council, assessing the current market structure and conditions of competition, including an assessment of any threats to competition and barriers to new entrants, including:

(i) any unlawful trade practices in the beer, wine, and spirits markets, such as certain exclusionary, discriminatory, or anticompetitive distribution practices, that hinder smaller and independent businesses or new entrants from distributing their products;

(ii) patterns of consolidation in production, distribution, or retail beer, wine, and spirits markets; and

(iii) any unnecessary trade practice regulations of matters such as bottle sizes, permitting, or labeling that may unnecessarily inhibit competition by increasing costs without serving any public health, informational, or tax purpose.

(k) To follow up on the foregoing assessment, the Secretary of the Treasury, through the Administrator of the Alcohol and Tobacco Tax and Trade Bureau, shall, not later than 240 days after the date of this order, consider:

(i) initiating a rulemaking to update the Alcohol and Tobacco Tax and Trade Bureau's trade practice regulations;

(ii) rescinding or revising any regulations of the beer, wine, and spirits industries that may unnecessarily inhibit competition; and

(iii) reducing any barriers that impede market access for smaller and independent brewers, winemakers, and distilleries.

(l) To promote competition, lower prices, and a vibrant and innovative telecommunications ecosystem, the Chair of the Federal Communications Commission is encouraged to work with the rest of the Commission, as appropriate and consistent with applicable law, to consider:

(i) adopting through appropriate rulemaking ''Net Neutrality'' rules similar to those previously adopted under title II of the Communications Act of 1934 (Public Law 73–416, 48 Stat. 1064, 47 U.S.C. 151 *et seq.*), as amended by the Telecommunications Act of 1996, in ''Protecting and Promoting the Open internet,'' 80 Fed.Reg. 19738 (Apr. 13, 2015);

(ii) conducting future spectrum auctions under rules that are designed to help avoid excessive concentration of spectrum license holdings in the United States, so as to prevent spectrum stockpiling, warehousing of spectrum by licensees, or the creation of barriers to entry, and to improve the conditions of competition in industries that depend upon radio spectrum, including mobile communications and radio-based broadband services;

(iii) providing support for the continued development and adoption of 5G Open Radio Access Network (O-RAN) protocols and software, continuing to attend meetings of voluntary and consensus-based standards development organizations, so as to promote or encourage a fair and representative standard-setting process, and undertaking any other measures that might promote increased openness, innovation, and competition in the markets for 5G equipment;

(iv) prohibiting unjust or unreasonable early termination fees for end-user communications contracts, enabling consumers to more easily switch providers;

(v) initiating a rulemaking that requires broadband service providers to display a broadband consumer label, such as that as described in the Public Notice of the Commission issued on April 4, 2016 (DA 16–357), so as to give consumers clear, concise, and accurate information regarding provider prices and fees, performance, and network practices;

(vi) initiating a rulemaking to require broadband service providers to regularly report broadband price and subscription rates to the Federal Communications Commission for the purpose of disseminating that information to the public in a useful manner, to improve price transparency and market functioning; and

(vii) initiating a rulemaking to prevent landlords and cable and Internet service providers from inhibiting tenants' choices among providers.

(m) The Secretary of Transportation shall:

(i) to better protect consumers and improve competition, and as appropriate and consistent with applicable law:

(A) not later than 30 days after the date of this order, appoint or reappoint members of the Advisory Committee for Aviation Consumer Protection to ensure fair representation of consumers, State and local interests, airlines, and airports with respect to the evaluation of aviation consumer protection programs and convene a meeting of the Committee as soon as practicable;

(B) promote enhanced transparency and consumer safeguards, as appropriate and consistent with applicable law, including through potential rulemaking, enforcement actions, or guidance documents, with the aims of:

(1) enhancing consumer access to airline flight information so that consumers can more easily find a broader set of available flights, including by new or lesser known airlines; and

(2) ensuring that consumers are not exposed or subject to advertising, marketing, pricing, and charging of ancillary fees that may constitute an unfair or deceptive practice or an unfair method of competition;

(C) not later than 45 days after the date of this order, submit a report to the Chair of the White House Competition Council, on the progress of the Department of Transportation's investigatory and enforcement activities to address the failure of airlines to provide timely refunds for flights cancelled as a result of the COVID–19 pandemic;

(D) not later than 45 days after the date of this order, publish for notice and comment a proposed rule requiring airlines to refund baggage fees when a passenger's luggage is substantially delayed and other ancillary fees when passengers pay for a service that is not provided;

(E) not later than 60 days after the date of this order, start development of proposed amendments to the Department of Transportation's definitions of ''unfair'' and ''deceptive'' in 49 U.S.C. 41712; and

(F) not later than 90 days after the date of this order, consider initiating a rulemaking to ensure that consumers have ancillary fee information, including ''baggage fees,'' ''change fees,'' and ''cancellation fees,'' at the time of ticket purchase;

(ii) to provide consumers with more flight options at better prices and with improved service, and to extend opportunities for competition and market entry as the industry evolves:

(A) not later than 30 days after the date of this order, convene a working group within the Department of Transportation to evaluate the effectiveness of existing commercial aviation programs, consumer protections, and rules of the Federal Aviation Administration;

(B) consult with the Attorney General regarding means of enhancing effective coordination between the Department of Justice and the Department of Transportation to ensure competition in air transportation and the ability of new entrants to gain access; and

(C) consider measures to support airport development and increased capacity and improve airport congestion management, gate access, implementation of airport competition plans pursuant to 49 U.S.C. 47106(f), and ''slot'' administration;

(iii) given the emergence of new aerospace-based transportation technologies, such as low-altitude unmanned aircraft system deliveries, advanced air mobility, and high-altitude long endurance operations, that have great potential for American travelers and consumers, yet also the danger of early monopolization or new air traffic control problems, ensure that the Department of Transportation takes action with respect to these technologies to:

(A) facilitate innovation that fosters United States market leadership and market entry to promote competition and economic opportunity and to resist monopolization, while also ensuring safety, providing security and privacy, protecting the environment, and promoting equity; and

(B) provide vigilant oversight over market participants.

(n) To further competition in the rail industry and to provide accessible remedies for shippers, the Chair of the Surface Transportation Board (Chair) is encouraged to work with the rest of the Board to:

(i) consider commencing or continuing a rulemaking to strengthen regulations pertaining to reciprocal switching agreements pursuant to 49 U.S.C. 11102(c), if the Chair determines such rulemaking to be in the public interest or necessary to provide competitive rail service;

(ii) consider rulemakings pertaining to any other relevant matter of competitive access, including bottleneck rates, interchange commitments, or other matters, consistent with the policies set forth in section 1 of this order;

(iii) to ensure that passenger rail service is not subject to unwarranted delays and interruptions in service due to host railroads' failure to comply with the required preference for passenger rail, vigorously enforce new on-time performance requirements adopted pursuant to the Passenger Rail Investment and Improvement Act of 2008 (Public Law 110–423, 122 Stat. 4907) that will take effect on July 1, 2021, and further the work of the passenger rail working group formed to ensure that the Surface Transportation Board will fully meet its obligations; and

(iv) in the process of determining whether a merger, acquisition, or other transaction involving rail carriers is consistent with the public interest under 49 U.S.C. 11323–25, consider a carrier's fulfillment of its responsibilities under 49 U.S.C. 24308 (relating to Amtrak's statutory rights).

(o) The Chair of the Federal Maritime Commission is encouraged to work with the rest of the Commission to:

(i) vigorously enforce the prohibition of unjust and unreasonable practices in the context of detention and demurrage pursuant to the Shipping Act, as clarified in ''Interpretive Rule on Demurrage and Detention Under the Shipping Act,'' 85 Fef. Reg. 29638 (May 18, 2020);

(ii) request from the National Shipper Advisory Committee recommendations for improving detention and demurrage practices and enforcement of related Shipping Act prohibitions; and

(iii) consider further rulemaking to improve detention and demurrage practices and enforcement of related Shipping Act prohibitions.

(p) The Secretary of Health and Human Services shall:

(i) to promote the wide availability of low-cost hearing aids, not later than 120 days after the date of this order, publish for notice and comment a proposed rule on over-the-counter hearing-aids, as called for by section 709 of the FDA Reauthorization Act of 2017 (Public Law 115–52, 131 Stat. 1005);

(ii) support existing price transparency initiatives for hospitals, other providers, and insurers along with any new price transparency initiatives or changes made necessary by the No Surprises Act (Public Law 116–260, 134 Stat. 2758) or any other statutes;

(iii) to ensure that Americans can choose health insurance plans that meet their needs and compare plan offerings, implement standardized options in the national Health Insurance Marketplace and any other appropriate mechanisms to improve competition and consumer choice;

(iv) not later than 45 days after the date of this order, submit a report to the Assistant to the President for Domestic Policy and Director of the Domestic Policy Council and to the Chair of the White House Competition Council, with a plan to continue the effort to combat excessive pricing of prescription drugs and enhance domestic pharmaceutical supply chains, to reduce the prices paid by the Federal Government for such drugs, and to address the recurrent problem of price gouging;

(v) to lower the prices of and improve access to prescription drugs and biologics, continue to promote generic drug and biosimilar competition, as contemplated by the Drug Competition Action Plan of 2017 and Biosimilar Action Plan of 2018 of the Food and Drug Administration (FDA), including by:

(A) continuing to clarify and improve the approval framework for generic drugs and biosimilars to make generic drug and biosimilar approval more transparent, efficient, and predictable, including improving and clarifying the standards for interchangeability of biological products;

(B) as authorized by the Advancing Education on Biosimilars Act of 2021 (Public Law 117–8, 135 Stat. 254, 42 U.S.C. 263–1), supporting biosimilar product adoption by providing effective educational materials and communications to improve understanding of biosimilar and interchangeable products among healthcare providers, patients, and caregivers;

(C) to facilitate the development and approval of biosimilar and interchangeable products, continuing to update the FDA's biologics regulations to clarify existing requirements and procedures related to the review and submission of Biologics License Applications by advancing the ''Biologics Regulation Modernization'' rulemaking (RIN 0910–AI14); and

(D) with the Chair of the FTC, identifying and addressing any efforts to impede generic drug and biosimilar competition, including but not limited to false, misleading, or otherwise deceptive statements about generic drug and biosimilar products and their safety or effectiveness;

(vi) to help ensure that the patent system, while incentivizing innovation, does not also unjustifiably delay generic drug and biosimilar competition beyond that reasonably contemplated by applicable law, not later than 45 days after the date of this order, through the Commissioner of Food and Drugs, write a letter to the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office enumerating and describing any relevant concerns of the FDA;

(vii) to support the market entry of lower-cost generic drugs and biosimilars, continue the implementation of the law widely known as the CREATES Act of 2019 (Public Law 116–94, 133 Stat. 3130), by:

(A) promptly issuing Covered Product Authorizations (CPAs) to assist product developers with obtaining brand-drug samples; and

(B) issuing guidance to provide additional information for industry about CPAs; and

(viii) through the Administrator of the Centers for Medicare and Medicaid Services, prepare for Medicare and Medicaid coverage of interchangeable biological products, and for payment models to support increased utilization of generic drugs and biosimilars.

(q) To reduce the cost of covered products to the American consumer without imposing additional risk to public health and safety, the Commissioner of Food and Drugs shall work with States and Indian Tribes that propose to develop section 804 Importation Programs in accordance with the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173, 117 Stat. 2066), and the FDA's implementing regulations.

(r) The Secretary of Commerce shall:

(i) acting through the Director of the National Institute of Standards and Technology (NIST), consider initiating a rulemaking to require agencies to report to NIST, on an annual basis, their contractors' utilization activities, as reported to the agencies under 35 U.S.C. 202(c)(5);

(ii) acting through the Director of NIST, consistent with the policies set forth in section 1 of this order, consider not finalizing any provisions on march-in rights and product pricing in the proposed rule ''Rights to Federally Funded Inventions and Licensing of Government Owned Inventions,'' 86 Fed. Reg. 35 (Jan. 4, 2021); and

(iii) not later than 1 year after the date of this order, in consultation with the Attorney General and the Chair of the Federal Trade Commission, conduct a study, including by conducting an open and transparent stakeholder consultation process, of the mobile application ecosystem, and submit a report to the Chair of the White House Competition Council, regarding findings and recommendations for improving competition, reducing barriers to entry, and maximizing user benefit with respect to the ecosystem.

(s) The Secretary of Defense shall:

(i) ensure that the Department of Defense's assessment of the economic forces and structures shaping the capacity of the national security innovation base pursuant to section 889(a) and (b) of the William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021 (Public Law 116–283, 134 Stat. 3388) is consistent with the policy set forth in section 1 of this order;

(ii) not later than 180 days after the date of this order, submit to the Chair of the White House Competition Council, a review of the state of competition within the defense industrial base, including areas where a lack of competition may be of concern and any recommendations for improving the solicitation process, consistent with the goal of the Competition in Contracting Act of 1984 (Public Law 98–369, 98 Stat. 1175); and

(iii) not later than 180 days after the date of this order, submit a report to the Chair of the White House Competition Council, on a plan for avoiding contract terms in procurement agreements that make it challenging or impossible for the Department of Defense or service members to repair their own equipment, particularly in the field.

(t) The Director of the Consumer Financial Protection Bureau, consistent with the pro-competition objectives stated in section 1021 of the Dodd-Frank Act, is encouraged to consider:

(i) commencing or continuing a rulemaking under section 1033 of the Dodd-Frank Act to facilitate the portability of consumer financial transaction data so consumers can more easily switch financial institutions and use new, innovative financial products; and

(ii) enforcing the prohibition on unfair, deceptive, or abusive acts or practices in consumer financial products or services pursuant to section 1031 of the Dodd-Frank Act so as to ensure that actors engaged in unlawful activities do not distort the proper functioning of the competitive process or obtain an unfair advantage over competitors who follow the law.

(u) The Director of the Office of Management and Budget, through the Administrator of the Office of Information and Regulatory Affairs, shall incorporate into its recommendations for modernizing and improving regulatory review required by my Memorandum of January 20, 2021 (Modernizing Regulatory Review), the policies set forth in section 1 of this order, including consideration of whether the effects on competition and the potential for creation of barriers to entry should be included in regulatory impact analyses.

(v) The Secretary of the Treasury shall:

(i) direct the Office of Economic Policy, in consultation with the Attorney General, the Secretary of Labor, and the Chair of the FTC, to submit a report to the Chair of the White House Competition Council, not later than 180 days after the date of this order, on the effects of lack of competition on labor markets; and

(ii) submit a report to the Chair of the White House Competition Council, not later than 270 days after the date of this order, assessing the effects on competition of large technology firms' and other non-bank companies' entry into consumer finance markets.

Sec. 6. *General Provisions.* (a) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

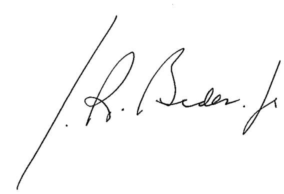
(b) Where not already specified, independent agencies are encouraged to comply with the requirements of this order.

(c) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(d) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.



THE WHITE HOUSE,
July 9, 2021.

[FR Doc. 2021–15069
Filed 7–13–21; 8:45 am]
Billing code 3295–F1–P

Federal Trade Commission Withdraws Vertical Merger Guidelines and Commentary

September 15, 2021

2020 guidance withdrawn to prevent industry and judicial reliance on unsound economic theories; FTC to work with DOJ to update merger guidance

TAGS: Bureau of Competition | Bureau of Consumer Protection | Bureau of Economics | Office of Policy Planning | Office of International Affairs | Competition | Consumer Protection | Merger | Vertical

The Federal Trade Commission voted to withdraw its approval of the Vertical Merger Guidelines, issued jointly with the Department of Justice (DOJ), and the FTC's Vertical Merger Commentary. The guidance documents, which were published in 2020, include unsound economic theories that are unsupported by the law or market realities. The FTC is withdrawing its approval in order to prevent industry or judicial reliance on a flawed approach. In voting to withdraw, the FTC reaffirmed its commitment to working closely with the DOJ to review and update the agencies' merger guidance.

The withdrawn Vertical Merger Guidelines set out analytical techniques and enforcement policies for non-horizontal mergers, while the associated commentary had summarized a selection of prior investigations that largely utilized that framework. The guidelines noted several ways vertical mergers can harm competition, which the statement by the FTC majority recognizes provided valuable analysis.

The statement by the FTC majority, however, notes that the 2020 Vertical Merger Guidelines had improperly contravened the Clayton Act's language with its approach to efficiencies, which are not recognized by the statute as a defense to an unlawful merger. The majority statement explains that the guidelines adopted a particularly flawed economic theory regarding purported pro-competitive benefits of mergers, despite having no basis of support in the law or market reality. The majority noted that because the Vertical Merger Guidelines were adopted in 2020, they had yet to have a significant impact and that acting swiftly was paramount to preventing judicial reliance on this flawed discussion.

Going forward, the FTC will work with the DOJ to update merger guidance to better-reflect market realities. The FTC majority statement lays out several areas for consideration in that review. First, the FTC intends to explore ways to provide clear guidance on the characteristics of transactions that are likely unlawful. Second, the FTC will look at ways to provide guidance on ineffective remedies, based on an evaluation of past remedy practices and any evidence that past remedies may not have fully restored competition. Finally, the agency will look to expand on the harms identified in the 2020 Vertical Merger Guidelines to consider various features of modern firms, including in digital markets, and impacts of mergers on labor markets.

The Commission vote to rescind the policy statement was 3-2, with the majority issuing a separate statement and Commissioners Noah Joshua Phillips and Christine S. Wilson issuing a separate dissenting statement.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

Contact Information

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Opens Rulemaking Petition Process, Promoting Public Participation and Accountability

September 15, 2021

Changes to FTC Rules of Practice reflect commitment to public access to vital agency processes

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FOR RELEASE

TAGS: Office of the General Counsel | FTC Operations

At an open Commission meeting today, the Federal Trade Commission voted to make significant changes to enhance public participation the agency's rulemaking, a significant step to increase public participation and accountability around the work of the FTC.

The Commission approved a series of changes to the FTC's Rules of Practice designed to make it easier for members of the public to petition the agency for new rules or changes to existing rules that are administered by the FTC. The changes are a key part of the work of opening the FTC's regulatory processes to public input and scrutiny. This is a departure from the previous practice, under which the Commission had no obligation to respond to or otherwise address petitions for agency action.

"Guarding against insularity is a constant challenge for virtually all federal agencies, and ensuring that the FTC is accessible even to those who lack well-heeled counsel or personal connections is essential to our institutional credibility," said Chair Lina M. Khan. "Congress granted the FTC the power to issue rules, equipping us with a vital tool to protect the public from harmful business practices. Interested members of the public will be able to petition the FTC to invoke its rulemaking and other authorities to advance its mission."

The updates to the Rules of Practice make a number of changes designed to clarify the process of submitting petitions to the FTC while also adding more opportunities for public input and accountability in the Commission's response to the petitions it receives.

Among the changes are:

> More clarity for those seeking to file petitions related to rulemaking with regard to information that is required with submissions, as well as guidance on the data that can be helpful to the Commission in evaluation petitions.

- A new requirement that the Commission publish all petitions for rulemaking that it receives in the Federal Register and solicit public comment about those petitions.
- A new requirement that the Commission provide petitioners with a specific point of contact in the agency, and that the Commission provide a response to petitioners on its decision to either act on or deny the petition.

In addition to formal rulemaking, the new changes will also apply to requests by certain parties for special exemption from FTC rules, as well as petitions related to industry guidance issued by the Commission.

The Commission vote to approve the changes to the Rules of Practice and other related rules and to publish the changes in the Federal Register was 4-1, with Commissioner Christine S. Wilson voting no. Chair Khan issued a separate statement. Commissioner Rohit Chopra also issued a separate statement.

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Rescinds 1995 Policy Statement that Limited the Agency's Ability to Deter Problematic Mergers

July 21, 2021

Eliminating the policy statement restores a valuable tool to stop illegal mergers

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FOR RELEASE

TAGS: Government | Policy | Bureau of Competition | Competition | Merger | Horizontal | Vertical

The Federal Trade Commission voted in an open Commission meeting to rescind a 1995 policy statement that made it more difficult and burdensome to deter problematic mergers and acquisitions. The 1995 Policy Statement on Prior Approval and Prior Notice Provisions ended the Commission's longstanding practice of requiring parties that proposed unlawful mergers to receive prior approval and give prior notice for future transactions. By rescinding this policy statement, the FTC regains a valuable law enforcement tool.

Prior to 1995, the Commission required all companies that had violated the law in a previous merger to obtain prior approval by the FTC for any future transaction in at least the same product and geographic market for which a violation was alleged. In 1995, the Commission decided to do away with the requirement, based on the presumption that the Hart-Scott-Rodino premerger notification requirements would suffice. The resulting policy statement required prior approval and prior notice provisions only when there was a "credible risk" of an unlawful merger, with no regard for market conditions or a company's prior actions.

Since the 1995 Policy Statement was implemented, the Commission has been forced to re-review the same transaction on numerous occasions at considerable expense. The FTC twice litigated (and won) legal challenges to Staples' acquisition of Office Depot. Other industries involving FTC re-review of the same deal include gasoline retailing and wholesaling, gasoline import terminaling, hot oil used to process aluminum, and industrial chemicals. Just last week parties to a transaction involving the same pipelines in Utah abandoned a transaction after a lengthy Commission review, where the Commission had previously rejected the same combination.

"Since the FTC substantially reduced using these prior approval provisions, the agency has encountered numerous examples of companies repeatedly proposing the same or similar deals in the same market, despite the fact that the Commission had earlier determined that those deals were problematic. Companies have also in several cases sought to buy back assets that the Commission ordered those same companies to divest," said FTC Chair Lina M. Khan during an open Commission meeting. "Without a prior approval provision, the Commission must initiate a whole new investigation and then go into court to block the deal anew. This additional burden drains the already strapped resources of the Commission."

The FTC is significantly under-resourced and its staff count remains roughly 50 percent less than it was in 1980, at a time when the economy was many times smaller in size than it is now. Today, as the Commission is handling a surge in merger filings, reversing the misconceived 1995 policy will stop repeat offenders – and the illegal mergers they propose that siphon resources and staff – while preserving competition in the markets.

The Commission voted 3-2 to rescind the policy statement in an open Commission meeting live streamed to its website.

The Federal Trade Commission works to promote competition, and protect and educate consumers. You can learn more about how competition benefits consumers or file an antitrust complaint. For the latest news and resources, follow the FTC on social media, subscribe to press releases and read our blog.

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117TH CONGRESS
1ST SESSION

H. R. 3460

To amend title 28 of the United States Code to prevent the transfer of actions arising under the antitrust laws in which a State is a complainant.

IN THE HOUSE OF REPRESENTATIVES

MAY 21, 2021

Mr. BUCK (for himself, Mr. OWENS, Mr. CICILLINE, and Mr. BISHOP of North Carolina) introduced the following bill; which was referred to the Committee on the Judiciary

---

A BILL

To amend title 28 of the United States Code to prevent the transfer of actions arising under the antitrust laws in which a State is a complainant.

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 "State Antitrust Enforcement Venue Act of 2021".

SEC. 2. AMENDMENTS.

Section 1407 of title 28 of the United States Code is amended—

(1) in subsection (g) by inserting ‘‘or a State’’ after ‘‘United States’’, and

(2) by striking subsection (h).

SEC. 3. EFFECTIVE DATE.

This Act and the amendments made by this Act, shall take effect on June 1, 2021.

○

117TH CONGRESS
1ST SESSION

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

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A BILL

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

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 "American Choice and Innovation Online Act".

SEC. 2. UNLAWFUL DISCRIMINATORY CONDUCT.

(a) VIOLATION.—It shall be unlawful for a person operating a covered platform, in or affecting commerce, to engage in any conduct in connection with the operation of the covered platform that—

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

(2) excludes or disadvantages the products, services, or lines of business of another business user relative to the covered platform operator's own products, services, or lines of business; or

(3) discriminates among similarly situated business users.

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

(1) restrict or impede the capacity of a business user to access or interoperate with the same platform, operating system, hardware and software features that are available to the covered platform operator's own products, services, or lines of business;

(2) condition access to the covered platform or preferred status or placement on the covered platform on the purchase or use of other products or services offered by the covered platform operator;

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

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

(4) restrict or impede a business user from accessing data generated on the platform by the activities of the business user or its customers through an interaction with the business user's products or services, such as contractual or technical restrictions that prevent the portability of such data by the business user to other systems or applications;

(5) restrict or impede covered platform users from un-installing software applications that have been preinstalled on the covered platform or changing default settings that direct or steer covered platform users to products or services offered by the covered platform operator;

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

(7) in connection with any user interfaces, including search or ranking functionality offered by the covered platform, treat the covered platform operator's own products, services, or lines of business more favorably than those of another business user;

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

(9) restrict or impede a business user, or a business user's customers or users, from interoperating or connecting to any product or service; and

(10) retaliate against any business user or covered platform user that raises concerns with any law enforcement authority about actual or potential violations of State or Federal law.

(c) AFFIRMATIVE DEFENSE.—

(1) IN GENERAL.—Subsection (a) and (b) shall not apply if the defendant establishes by clear and convincing evidence that the conduct described in subsections (a) or (b)—

(A) would not result in harm to the competitive process by restricting or impeding legitimate activity by business users; or

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

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

(ii) protect user privacy or other nonpublic data.

(2) AVAILABILITY OF AFFIRMATIVE DEFENSE.—Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18, United States Code, is not dispositive of whether the defendant has established the affirmative defense under this section.

(d) COVERED PLATFORM DESIGNATION.—The Federal Trade Commission or Department of Justice shall designate 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 subsection (f)(4)(i)–(iii) are met;

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

(3) will apply for ten years from its issuance regardless of whether there is a change in control or ownership over the covered platform unless the Commission or the Department of Justice removes the designation pursuant to subsection (f).

(e) REMOVAL OF COVERED PLATFORM DESIGNATION.—The Commission or the Department of Justice shall—

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

riod 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 submitted under paragraph 1 not later than 120 days after the date of the filing of such request.

(f) REMEDIES.—

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

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

(B) 30 percent of the United States revenue of the person in any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct. This civil penalty may be recovered in a civil action brought by the United States or the Commission.

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

(A) RESTITUTION; CONTRACT RESCISSION AND REFORMATION; REFUNDS; RETURN OF PROPERTY.—The Assistant Attorney General of the Antitrust Division, the Commission, or the attorney general of any State may seek, and the 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.

(B) DISGORGEMENT.—The Assistant Attorney General of the Antitrust Division or the Commission may seek, and the court may order, disgorgement of any unjust enrichment that a covered platform operator obtained as a result of the violation that gives rise to the suit.

(C) INJUNCTIONS.—The Assistant Attorney General of the Antitrust Division or the Commission may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(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 (bb) exclude from, or disadvantage, the products, services, or lines of business on the covered platform of a competing business or a business that constitutes nascent or potential competition to the covered platform operator.

(3) REPEAT OFFENDERS.—If the fact finder determines that a covered platform has engaged in 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 for an alleged violation of this Act.

(g) DEFINITIONS.—In this section:

(1) ANTITRUST LAWS.—The term ''antitrust laws'' has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(2) 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.

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

(4) COVERED PLATFORM.—The term ''covered platform'' means an online platform—

(A) that has been designated as a ''covered platform'' under section 2(d); 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 capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, at the time of the

Commission's or the Department of Justice's designation under section 2(d) 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.

(5) COVERED PLATFORM OPERATOR.—The term ''covered platform operator'' means a person that owns or controls a covered platform.

(6) 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.

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

(8) DATA.—

(A) IN GENERAL.—Not later than six 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 or customer of the covered platform or a competing business or a potential competing business.

(9) 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.

(10) 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, including 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.

(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.

(h) ENFORCEMENT.—

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

(2) UNFAIR METHODS OF COMPETITION.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 5).

(3) COMMISSION INDEPENDENT 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 and seek other appropriate relief in a district court of the United States against the covered platform operator.

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

behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

(i) EMERGENCY RELIEF.—

(1) The Commission, Assistant Attorney General of the Antitrust Division, or any attorney general of a State 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, the United States, or the attorney general of a State proves—

(A) there is a plausible claim that a covered platform operator took an action that violates 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, the United States, or the attorney general of the State seeking relief

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

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

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

SEC. 3. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a covered platform designation under section 2(d) 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 under to section 2(d) of this Act or a final order of the Commission, the findings of the Commission or the Assistant Attorney General as to the facts, if supported by evidence, shall be conclusive.

SEC. 4. BUREAU OF DIGITAL MARKETS.

(a) ESTABLISHMENT OF BUREAU.—As soon as practicable, but not later than 180 days after the date of enactment of this Act, the Federal Trade Commission shall establish within the Commission a bureau of digital markets for purposes of enforcement of this Act.

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

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

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

(c) BUREAU STAFF.—The Bureau of Digital Markets shall retain or employ legal, technology, economic, research, and service staff sufficient to carry out the functions, powers, and duties of the Bureau.

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

SEC. 5. ENFORCEMENT GUIDELINES.

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

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

(c) OPERATION.—The Joint Guidelines issued under this section do not confer any rights upon any person, State, or locality, nor shall operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 6. SUITS BY PERSONS INJURED.

(a) IN GENERAL.—Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in this Act sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

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

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

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

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

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

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

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

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

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

(c) INJUNCTIVE RELIEF.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

SEC. 7. 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, 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. 8. 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.

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117TH CONGRESS
1ST SESSION

H. R. 3825

To promote competition and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Ms. JAYAPAL (for herself, Mr. GOODEN of Texas, 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 and economic opportunity in digital markets by eliminating the conflicts of interest that arise from dominant online platforms' concurrent ownership or control of an online platform and certain other businesses.

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 ''Ending Platform Monopolies Act''.

SEC. 2. UNLAWFUL CONFLICTS OF INTEREST.

(a) VIOLATION.—As of the date an online platform is designated as a covered platform under subsection 6(a), it shall be unlawful for a covered platform operator to own, control, or have a beneficial interest in a line of business other than the covered platform that—

(1) utilizes the covered platform for the sale or provision of products or services;

(2) offers a product or service that the covered platform requires a business user to purchase or utilize as a condition for access to the covered platform, or as a condition for preferred status or placement of a business user's product or services on the covered platform; or

(3) gives rise to a conflict of interest.

(b) CONFLICT OF INTEREST.—For purposes of this section, the term ''conflict of interest'' includes the conflict of interest that arises when—

(1) a covered platform operator owns or controls a line of business, other than the covered platform; and

(2) the covered platform's ownership or control of that line of business creates the incentive and ability for the covered platform to—

(A) 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

(B) exclude from, or disadvantage, the products, services, or lines of business on the covered platform of a competing business or a business that constitutes nascent or potential competition to the covered platform operator.

SEC. 3. ENFORCEMENT.

(a) IN GENERAL.—The Commission and the Department of Justice shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or the Clayton Act (15 U.S.C. 12 et seq.), as appropriate, were incorporated into and made a part of this Act.

(b) UNFAIR METHODS OF COMPETITION.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 5).

(c) CIVIL PENALTIES.—Any person, or any individual who is an officer, director, partner, or employee of a person, who fails to comply with any provision of this Act within two years of the Commission or Department of Justice designating a covered platform under section 6(a), shall be liable to the United States for a civil penalty in an amount not more than the greater of—

(1) 15 percent of the total average daily United States revenue of the person for the previous calendar year; or

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

(d) COMMISSION INDEPENDENT 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 and seek other appropriate relief in a district court of the United States against the covered platform operator.

SEC. 4. LIMITATIONS ON BOARD MEMBERSHIP AND OTHER SERVICE.

(a) IN GENERAL.—An individual who is an officer, director, employee, including an agent, representative, or contractor, of a covered platform or who has control over the covered platform may not serve at the same time as an officer, director, employee, or other institution-affiliated party, including as an agent, representative, or contractor, of a formerly affiliated person.

(b) TERMINATION OF SERVICE.—Any individual whose service violates subsection (a) as of the date an online platform is designated as a covered platform under subsection 6(a), shall terminate such service as soon as is practicable and in no event, later than the end of the 60-day period beginning on the date the online platform is designated as a covered platform.

SEC. 5. DEFINITIONS.

For purposes of this Act:

(1) ANTITRUST LAWS.—The term ‘‘antitrust laws’’ has the meaning given the term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).

(2) BENEFICIAL INTEREST.—The term ‘‘Beneficial Interest’’ means with respect to a person, having access to competitively sensitive information or the ability to affect the person’s strategic decisions.

(3) COMMISSION.—The term ‘‘Commission’’ means the Federal Trade Commission.

(4) 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.

(5) 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 6(a), 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 capitalization greater than $600,000,000,000 at, adjusted for inflation on the basis of the Consumer Price Index, the time of the Commission's or the Department of Justice'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.

(6) COVERED PLATFORM OPERATOR.—The term ''covered platform operator'' means a person

that, directly or indirectly, owns or controls a covered platform.

(7) CRITICAL TRADING PARTNER.—The term "critical trading partner" means an entity 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.

(8) 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.

(9) FORMERLY AFFILIATED PERSON.—The term "formerly affiliated person" means a person that was owned or controlled by a covered platform prior to termination of the affiliation described in section 3.

(10) 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, including 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.

(11) PERSON.—The term "person" has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

SEC. 6. IMPLEMENTATION.

(a) COVERED PLATFORM DESIGNATION.—

(1) The Commission or Department of Justice shall designate whether an entity is a covered platform for the purpose of implementing and enforcing this Act. Such designation shall—

(A) be based on a finding that the criteria set forth in paragraph (5)(B)(i)–(iii) of section 5 are met;

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

(C) will apply for years from its issuance regardless of whether there is a change in control or ownership over the covered platform unless the Commission or the Department of Justice removes the designation pursuant to subsection (b).

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

(1) consider whether its designation of a covered 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;

(2) determine whether to grant a request submitted under paragraph (1) not later than 120 days after the date of the filing of such request; and

(3) obtain the concurrence of the Commission or the Department of Justice, as appropriate, before granting a request submitted under paragraph (1).

SEC. 7. JUDICIAL REVIEW.

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

SEC. 8. RULES 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, 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. 9. SEVERABILITY.

If any provision of this Act, or the application of such provision to any person or circumstance, is held to be unconstitutional, the remainder of this Act, and the application of the remaining provisions of this Act to any person or circumstance shall not be affected.

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117TH CONGRESS
1ST SESSION

H. R. 3826

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

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

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A BILL

To promote competition and economic opportunity in digital markets by establishing that certain acquisitions by dominant online platforms are unlawful.

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 ''Platform Competition and Opportunity Act of 2021''.

SEC. 2. UNLAWFUL ACQUISITIONS.

(a) VIOLATION.—It shall be unlawful for a covered platform operator to acquire directly or indirectly—

(1) the whole or any part of the stock or other share capital of another person engaged in commerce or in any activity or affecting commerce; or

(2) the whole or any part of the assets of another person engaged in commerce or in any activity affecting commerce.

(b) EXCLUSION.—An acquisition shall not be unlawful under subsection (a) if the acquiring covered platform operator demonstrates by clear and convincing evidence that—

(1) the acquisition is a transaction that is described in section 7A(c) of the Clayton Act; or

(2) the acquired assets or the issuer of the acquired stock do not—

(A) compete with the covered platform or with the covered platform operator for the sale or provision of any product or service;

(B) constitute nascent or potential competition to the covered platform or the covered platform operator for the sale or provision of any product or service;

(C) enhance or increase the covered platform's or the covered platform operator's market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform; or

(D) enhance or increase the covered platform's or covered platform operator's ability to maintain its market position with respect to the sale or provision of any product or service offered on or directly related to the covered platform.

(c) USER ATTENTION.—For purposes of this Act, competition, nascent competition, or potential competition for "the sale or provision of any product or service" includes competition for a user's attention.

(d) ROLE OF DATA.—For purposes of this Act, an acquisition that results in access to additional data may, without more, enhance, increase, or maintain a covered platform's market position.

SEC. 3. DEFINITIONS.

(a) ANTITRUST LAWS.—The term "antitrust laws" has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(b) COMMISSION.—The term "Commission" means the Federal Trade Commission.

(c) CONTROL.—The term "control" with respect to a person means—

(1) holding 25 percent or more of the stock of the person;

(2) having the right to 25 percent or more of the profits of the person;

(3) having the right to 25 percent or more of the assets of the person, in the event of the person's dissolution;

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

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

(6) otherwise exercises substantial control over the person.

(d) COVERED PLATFORM.—The term ''covered platform'' means an online platform—

(1) that has been designated as a ''covered platform'' under section 4(a); or

(2) that—

(A) 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;

(B) is owned or controlled by a person with net annual sales, or a market capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, at the time of the Commission's or the Department of Justice's designation under section 4(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

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

(e) COVERED PLATFORM OPERATOR.—The term ''covered platform operator'' means a person that, directly or indirectly, owns or controls a covered platform.

(f) CRITICAL TRADING PARTNER.—The term ''critical trading partner'' means an entity that has the ability to restrict or impede—

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

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

(g) 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.

(h) ONLINE PLATFORM.—The term ''online platform'' means a website, online or mobile application operating system, digital assistant, or online service that—

(1) 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;

(2) facilitates the offering, sale, purchase, payment, or shipping of goods or services, including software applications, between and among consumers or businesses not controlled by the platform; or

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

(i) PERSON.—The term ''person'' has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

SEC. 4. IMPLEMENTATION.

(a) COVERED PLATFORM DESIGNATION.—

(1) The Federal Trade Commission or Department of Justice shall designate whether an entity is a covered platform for the purpose of implementing and enforcing this Act. Such designation shall—

(A) be based on a finding that the criteria set forth in section 3(d)(2)(A)–(C) are met;

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

(C) will apply for 10 years from its issuance regardless of whether there is a change in control or ownership over the covered platform unless the Commission or the Department of Justice removes the designation pursuant to subsection (b).

(b) REMOVAL OF COVERED PLATFORM DESIGNATION.—The Commission and the Department of Justice shall—

(1) consider whether its designation of a covered 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;

(2) determine whether to grant a request submitted under paragraph 1 not later than 120 days after the date of the filing of such request; and

(3) obtain the concurrence of the Commission or the Department of Justice, as appropriate, before granting a request submitted under paragraph (1).

SEC. 5. ENFORCEMENT.

(a) ENFORCEMENT PROCEEDING.—The Commission, Department of Justice, and any attorney general of a State subject to the requirements in subsection (d) shall enforce this Act in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) or the Clayton Act (15 U.S.C. 12 et seq.), as appropriate, were incorporated into and made a part of this Act.

(b) UNFAIR METHODS OF COMPETITION.—A violation of this Act shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 5).

(c) COMMISSION INDEPENDENT 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 and seek other appropriate relief in a district court of the United States against the covered platform operator.

(d) PARENS PATRIAE.—Any attorney general of a State may bring a civil action in the name of such State for a violation of this Act as parens patriae on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, and may secure any form of relief provided for in this section.

SEC. 6. ENFORCEMENT GUIDELINES.

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

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

(c) OPERATION.—The Joint Guidelines issued under this section do not confer any rights upon any person, State, or locality, nor shall operate to bind the Commission, Department of Justice, or any person, State, or locality to the approach recommended in such Guidelines.

SEC. 7. SUITS BY PERSONS INJURED.

(a) IN GENERAL.—Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in this Act sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only—

(1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to

show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;

(2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and

(3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

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

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

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

(A) such foreign state would be denied, under section 1605(a)(2) of title 28, United States Code, immunity in a case in which the action is based upon a commercial activity, or an act, that is the subject matter of its claim under this section;

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

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

(D) such foreign state does not function, with respect to the commercial activity, or the act, that is the subject matter of its claim under this section as a procurement entity for itself or for another foreign state.

SEC. 8. JUDICIAL REVIEW.

(a) IN GENERAL.—Any party that is subject to a covered platform designation pursuant to section 4(a) of this Act, a decision in response to a request to remove a covered platform designation pursuant to section 4(b), 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 designation, decision, or order, petition for review of such designation or 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 4(a) of this Act or a final order of the Commission, the findings of the Commission or the Department of Justice as to the facts, if supported by evidence, shall be conclusive.

(c) INJUNCTIVE RELIEF.—Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of this Act, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

SEC. 9. RULES 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, 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. 10. 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.

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117TH CONGRESS
1ST SESSION

H. R. 3843

To promote antitrust enforcement and protect competition through adjusting premerger filing fees, and increasing antitrust enforcement resources.

IN THE HOUSE OF REPRESENTATIVES

JUNE 11, 2021

Mr. NEGUSE (for himself, Mrs. SPARTZ, Mr. CICILLINE, Mr. BUCK, Mr. NADLER, and Mr. ROY) introduced the following bill; which was referred to the Committee on the Judiciary, and in addition to the Committee on Energy and Commerce, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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A BILL

To promote antitrust enforcement and protect competition through adjusting premerger filing fees, and increasing antitrust enforcement resources.

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 "Merger Filing Fee Modernization Act of 2021".

SEC. 2. PREMERGER NOTIFICATION FILING FEES.

Section 605 of Public Law 101–162 (15 U.S.C. 18a note) is amended—

(1) in subsection (b)—

(A) in paragraph (1)—

(i) by striking "$45,000" and inserting "$30,000";

(ii) by striking "$100,000,000" and inserting "$161,500,000";

(iii) by striking "2004" and inserting "2022"; and

(iv) by striking "2003" and inserting "2021";

(B) in paragraph (2)—

(i) by striking "$125,000" and inserting "$100,000";

(ii) by striking "$100,000,000" and inserting "$161,500,000";

(iii) by striking "but less" and inserting "but is less"; and

(iv) by striking "and" at the end;

(C) in paragraph (3)—

(i) by striking "$280,000" and inserting "$250,000"; and

(ii) by striking the period at the end and inserting "but is less than $1,000,000,000 (as so adjusted and published);"; and

(D) by adding at the end the following:

"(4) $400,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $1,000,000,000 (as so adjusted and published) but is less than $2,000,000,000 (as so adjusted and published);

"(5) $800,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $2,000,000,000 (as so adjusted and published) but is less than $5,000,000,000 (as so adjusted and published); and

"(6) $2,250,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $5,000,000,000 (as so adjusted and published)."; and

(2) by adding at the end the following:

"(c)(1) For each fiscal year commencing after September 30, 2022, the filing fees in this section shall be increased each year by an amount equal to the percentage increase, if any, in the Consumer Price Index, as determined by the Department of Labor or its successor, for the year then ended over the level so established for the year ending September 30, 2021.

"(2) As soon as practicable, but not later than January 31 of each year, the Federal Trade Commission shall publish the adjusted amounts required by paragraph (1).

"(3) The Federal Trade Commission shall not adjust amounts required by paragraph (1) if the percentage increase described in paragraph (1) is less than 1 percent.

"(4) An amount adjusted under this section shall be rounded to the nearest multiple of $5,000.".

SEC. 3. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal year 2022—

(1) $252,000,000 for the Antitrust Division of the Department of Justice; and

(2) $418,000,000 for the Federal Trade Commission.

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117TH CONGRESS
1ST SESSION

H. R. 3849

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 be an unfair method of competition in violation of section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45).

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.

(c) 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 undermining interoperability for competing businesses or potential competing businesses.

(2) EXCEPTION.—A covered platform may make a change affecting its interoperability interfaces without receiving approval from the Commission if that change is necessary to address a security vulnerability or other exigent circumstance that creates 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 unreasonably 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 Commission under section 6(c) of this Act, a covered platform shall provide to competing businesses or potential competing businesses complete and accurate documentation describing access 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 interoperability of services.

SEC. 5. DEFINITIONS.

In this Act:

(1) PERSON.—The term "person" has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12).

(2) AFFIRMATIVE EXPRESS CONSENT.—The term "affirmative express consent" means an affirmative action of the consumer to make a choice following a clear and conspicuous disclosure to the consumer, separate and apart from any "privacy policy", "terms of service", "terms of service", "consent 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 capitalization greater than $600,000,000,000, adjusted for inflation on the basis of the Consumer Price Index, at the time of the Commission's or the Department of Justice'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, including 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 Federal Trade Commission or Department of Justice may designate 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 regardless of whether there is a change in control or ownership over the covered platform unless the Federal Trade Commission or the Department of Justice removes the designation pursuant to subsection (b).

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

(1) consider whether its designation of a covered 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 submitted 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 standards of interoperability specific to the covered platform. These standards shall implement the requirements of sections 3 and 4 of this Act. In adopting the standards implementing the requirements of sections 3 and 4, the Commission shall seek to encourage entry by reducing or eliminating the network effects that limit competition with the covered platform, ensure that competing businesses or a potential competing business interconnects with the covered platform on fair and nondiscriminatory terms, and protect data security and privacy.

(2) The Commission shall—

(A) establish a technical committee, as described in section 7 of this Act, to develop proposed 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, undermine 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 demands for relevant information, including any information 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 sections 3 and 4 of this Act.

(e) 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 judgement 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.

(c) 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.

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FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Reforming the Pre-Filing Process for Companies Considering Consolidation and a Change in the Treatment of Debt

Share This Page

Holly Vedova, Bureau of Competition
Aug 26, 2021

As the FTC continues to experience a massive surge in planned merger deals, we are looking at every step of the merger filing process to identify ways to streamline and maximize our efficiency. Under the Hart-Scott-Rodino Act ("HSR" or the Act), companies are required to file notice of mergers over a certain size before they can close the deal. This is not an application process – it is for law enforcement purposes.

The HSR Act does not require companies to file notice with the FTC and DOJ for every deal ahead of time. It sets out a general framework for transactions that are covered and gives the FTC the authority to write rules, with the concurrence of the DOJ, to provide more specific guidance as to which deals qualify. The FTC is currently in the process of working with the DOJ to update its existing merger filing rules.

However, outside of the formal rules, agency staff also provide "informal interpretations" in response to questions from firms about whether specific types of transactions are covered. These interpretations are not reviewed or authorized by the Commission, and do not carry the force of law.

The Bureau is concerned that some of these informal interpretations may not reflect modern market realities or the policy position of the Commission. We are currently in the process of reviewing the voluminous log of informal interpretations to determine the best path forward. However, it is worth noting one initial example of where the informal interpretation program missed the mark.

Under the Hart-Scott-Rodino rules, parties generally need to file if the transaction is valued over a certain dollar-value threshold. However, previous informal interpretations gave the impression that companies could avoid filing by paying off a target company's debt, instead of paying the company with cash.

It appears that some merging parties have responded by structuring deals in ways that they believe fall outside of the filing requirements. Target companies may be incentivized to take on debt just before an acquisition, so that the acquiring company can retire the debt as part of the deal. These deals then are not being reported to the FTC and the DOJ, which means that merging parties are effectively sidestepping the law and avoiding accountability.

Herein lies the problem of unintended consequences with informal interpretations. Despite the agency's clearly stated assertion that informal interpretations are not a legal determination, companies appear to rely on them as a substitute or supplement for their own legal analysis. In practice, this means that informal interpretations regarding instances that companies may not have to file are being treated by merging parties as if they are legal exemptions.

That outcome is not aligned with either the statute or the agency's stated instructions. It is the Commission's responsibility, with the concurrence of the DOJ, to determine whether and when reporting exemptions are appropriate, through rules or formal interpretations of those rules. As a law enforcement agency, the FTC must be mindful of helping firms avoid accountability, even indirectly.

Effective September 27, 2021, the Bureau will begin to recommend enforcement action for companies that fail to file when retirement of debt is part of the consideration for the deal. The details of this change can be accessed via this link.

ftc.gov

117TH CONGRESS
1ST SESSION

S. 225

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

Ms. KLOBUCHAR (for herself, Mr. BLUMENTHAL, Mr. BOOKER, Mr. MARKEY, and Mr. SCHATZ) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To reform the antitrust laws to better protect competition in the American economy, to amend the Clayton Act to modify the standard for an unlawful acquisition, to deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

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 ''Competition and Antitrust Law Enforcement Reform Act of 2021''.

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—

(1) competitive markets, in which multiple firms compete to buy and sell products and services, are critical to ensuring economic opportunity for all people in the United States and providing resilience to the economy during unpredictable times;

(2) when companies compete, businesses offer the highest quality and choice of goods and services for the lowest possible prices to consumers and other businesses;

(3) competition fosters small business growth, reduces economic inequality, and spurs innovation and job creation;

(4) in the United States economy today, the presence and exercise of market power is substantial and growing;

(5) the presence and exercise of market power makes it more difficult for people in the United States to start their own businesses, depresses wages, and increases economic inequality, with particularly damaging effects on historically disadvantaged communities;

(6) market power and undue market concentration contribute to the consolidation of political power, undermining the health of democracy in the United States;

(7) the anticompetitive effects of monopoly power or buyer market power include higher prices, lower quality, lessened choice, reduced innovation, foreclosure of competitors, and increased entry barriers;

(8) monopsony power or seller market power allows a firm to force suppliers of goods or services to accept below market prices or to force workers to accept below market wages, resulting in lower quality products and services, reduced opportunities for suppliers and workers, reduced availability of products and services for consumers, reduced innovation, foreclosure of competitors, and increased entry barriers;

(9) horizontal consolidation, vertical consolidation, and conglomerate mergers all have potential to increase market power and cause anticompetitive harm;

(10) extensive consolidation is reducing competition and threatens to place the American dream further out of reach for many consumers in the United States;

(11) since 2008, firms in the United States have engaged in over $10,000,000,000,000 in mergers and acquisitions;

(12) the acquisition of nascent or potential rivals by dominant firms can present significant long-term threats to competition and innovation;

(13) the acquisition, by one of its competitors, of a maverick firm that plays a disruptive role in the market—by using an innovative business model or technology, offering lower prices or new, different products or services products, or by other means that benefit consumers—can present a threat to competition;

(14) section 7 of the Clayton Act (15 U.S.C. 18), is the primary line of defense against anti-competitive mergers;

(15) in recent years, some court decisions and enforcement policies have limited the vitality of the Clayton Act to prevent harmful consolidation by—

(A) discounting previously accepted presumptions that certain acquisitions are anti-competitive;

(B) focusing inordinately on the effect of an acquisition on price in the short term, to the exclusion of other potential anticompetitive effects;

(C) underestimating the dangers that horizontal, vertical, and conglomerate mergers will lower quality, reduce choice, impede innovation, exclude competitors, increase entry barriers, or create buyer power, including monopsony power; and

(D) requiring the government to prove harmful effects of a proposed merger to a near certainty;

(16) anticompetitive exclusionary conduct constitutes a particularly harmful exercise of market power and a substantial threat to the United States economy;

(17) when dominant sellers exercise market power, they harm buyers by overcharging them, reducing product or service quality, limiting their choices, and impairing innovation;

(18) when dominant buyers exercise market power, they harm suppliers by underpaying them, limiting their business opportunities, and impairing innovation;

(19) when dominant employers exercise market power, they harm workers by paying them low

wages, reducing their benefits, and limiting their future employment opportunities;

(20) nascent or potential rivals—even those that are unprofitable or inefficient—can be an important source of competitive discipline for dominant firms;

(21) antitrust enforcement against anticompetitive exclusionary conduct has been impeded when courts have declined to rigorously examine the facts in favor of relying on inaccurate economic assumptions that are inconsistent with contemporary economic learning, such as presuming that market power is not durable and can be expected to self-correct, that monopolies can drive as much or more innovation than a competitive market, that above-cost pricing cannot harm competition, and other flawed assumptions;

(22) the courts of the United States have improperly implied immunity from the antitrust laws based on Federal regulatory statutes, even limiting the application of statutory antitrust savings clauses passed by Congress;

(23) the civil remedies currently available to cure violations of the Sherman Antitrust Act, including injunctions, equitable monetary relief, and pri-

vate damages, have not proven sufficient, on their own, to deter anticompetitive conduct;

(24) in some cases, effective deterrence requires the imposition of civil penalties, alone or in combination with existing remedies, including structural relief, behavioral relief, private damages, and equitable monetary relief, including disgorgement and restitution; and

(25) Federal antitrust enforcement budgets have failed to keep pace with the growth of the economy and increasing demands on agency resources, significantly undermining the ability of the Federal antitrust agencies to fulfill their law enforcement missions and contributing to the rise of market power in the American economy.

(b) PURPOSES.—The purposes of this Act are to—

(1) enhance competition throughout the American economy by strengthening antitrust enforcement by the Department of Justice, the Federal Trade Commission, the State enforcement agencies, and private parties;

(2) revise the legal standard under section 7 of the Clayton Act to better enable enforcers to arrest the likely anticompetitive effects of harmful mergers in their incipiency, as Congress intended, by clari-

fying that the potential effects that may justify prohibiting a merger under the Clayton Act include lower quality, reduced choice, reduced innovation, the exclusion of competitors, or increased entry barriers, in addition to increased price to buyers or reduced price to sellers;

(3) amend the Clayton Act to clarify that an acquisition that tends to create a monopsony violates the Clayton Act;

(4) establish simple, cost-effective decision rules that require the parties to certain acquisitions that either significantly increase concentration or are extremely large bear the burden of establishing that the acquisition will not materially harm competition;

(5) prohibit and deter exclusionary conduct that harms competition, particularly by dominant firms;

(6) enable the Department of Justice and the Federal Trade Commission to seek civil monetary penalties, in addition to existing remedies, for violations of the Sherman Act;

(7) give the Department of Justice and the Federal Trade Commission additional financial resources and enforcement tools to craft remedies for individual violations that are effective to deter future

unlawful conduct and proportionate to the gravity of the violation;

(8) provide further protections for those who provide evidence of anticompetitive conduct to government enforcers and potential financial rewards for whistleblowers who provide information to the government that leads to a criminal fine; and

(9) grant successful antitrust plaintiffs the right to obtain prejudgment interest on damages awards to further deter anticompetitive conduct and more fully compensate injured parties.

SEC. 3. DEFINITION.

In this Act the term ‘‘antitrust laws’’—

(1) has the meaning given the term in the first section of the Clayton Act (15 U.S.C. 12); and

(2) includes—

(A) section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition; and

(B) this Act and the amendments made by this Act.

SEC. 4. UNLAWFUL ACQUISITIONS.

(a) MARKET POWER.—Section 1(a) of the Clayton Act (15 U.S.C. 12(a)) is amended by adding at the end the following:

"the term 'market power' in this Act means the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.".

(b) UNLAWFUL ACQUISITIONS.—Section 7 of the Clayton Act (15 U.S.C. 18) is amended—

(1) in the first and second undesignated paragraphs, by striking "substantially to lessen" each place that term appears and inserting "to create an appreciable risk of materially lessening";

(2) by inserting "or a monopsony" after "monopoly" each place that term appears; and

(3) by adding at the end the following:

"In a case brought by the United States, the Federal Trade Commission, or a State attorney general, a court shall determine that the effect of an acquisition described in this section may be to create an appreciable risk of materially lessening competition or to tend to create a monopoly or a monopsony, in or affecting commerce, if—

"(1) the acquisition would lead to a significant increase in market concentration in any relevant market;

"(2)(A) the acquiring person has a market share of greater than 50 percent or otherwise has significant market power, as a seller or a buyer, in any relevant market, and as a result of the acquisition, the acquiring person would obtain control over entities or assets that compete or have a reasonable probability of competing with the acquiring person in the same relevant market; or

"(B) as a result of the acquisition, the acquiring person would obtain control over entities or assets that have a market share of greater than 50 percent or otherwise have significant market power, as a seller or a buyer, in any relevant market, and the acquiring person competes or has a reasonable probability of competing with the entities or assets over which it would obtain control, as result of the acquisition, in the same relevant market;

"(3) the acquisition would lead to the combination of entities or assets that compete or have a reasonable probability of competing in a relevant market, and either the acquiring person or the entities or assets over which it would obtain control prevents, limits, or disrupts coordinated interaction among competitors in a relevant market or has a reasonable probability of doing so;

"(4) the acquisition—

"(A) would likely enable the acquiring person to unilaterally and profitably exercise market power or materially increase its ability to do so; or

"(B) would materially increase the probability of coordinated interaction among competitors in any relevant market; or

"(5)(A) the acquisition is not a transaction that is described in section 7A(c); and

"(B)(i) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $5,000,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2022, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2021); or

"(ii)(I) the person acquiring or the person being acquired has assets, net annual sales, or a market capitalization greater than $100,000,000,000 (as so adjusted and published); and

"(II) as a result of such acquisition, the acquiring person would hold an aggregate total amount of the voting securities and assets of the acquired person in excess of $50,000,000 (as so adjusted and published),

unless the acquiring or acquired person establish, by a preponderance of the evidence, that the effect of the acquisition will not be to create an appreciable risk of materially lessening competition or tend to create a monopoly or a monopsony. In this paragraph, the term 'materially' means more than a de minimis amount.".

SEC. 5. POST-SETTLEMENT DATA.

Section 7A of the Clayton Act (15 U.S.C. 18a) is amended by adding at the end the following:

"(l)(1) Each person who enters into an agreement with the Federal Trade Commission or the United States to resolve a proceeding brought under the antitrust laws or under the Federal Trade Commission Act (15 U.S.C.

41 et seq.) regarding an acquisition with respect to which notification is required under this section shall, on an annual basis during the 5-year period beginning on the date on which the agreement is entered into, submit to the Federal Trade Commission or the Assistant Attorney General, as applicable, information sufficient for the Federal Trade Commission or the United States, as applicable, to assess the competitive impact of the acquisition, including—

"(A) the pricing, availability, and quality of any product or service, or inputs thereto, in any market, that was covered by the agreement;

"(B) the source, and the resulting magnitude and extent, of any cost-saving efficiencies or any benefits to consumers or trading partners that were claimed as a benefit of the acquisition and the extent to which any cost savings were passed on to consumers or trading partners; and

"(C) the effectiveness of any divestitures or any conditions placed on the acquisition in fully restoring competition.

"(2) The requirement to provide the information described in paragraph (1) shall be included in an agreement described in that paragraph.

"(3) The Federal Trade Commission, with the concurrence of the Assistant Attorney General, by rule in accordance with section 553 of title 5, United States Code, and consistent with the purposes of this section—

"(A) shall require that the information described in paragraph (1) be in such form and contain such documentary material and information relevant to an acquisition as is necessary and appropriate to enable the Federal Trade Commission and the Assistant Attorney General to assess the competitive impact of the acquisition under paragraph (1); and

"(B) may—

"(i) define the terms used in this subsection;

"(ii) exempt, from the requirements of this section, information not relevant in assessing the competitive impact of the acquisition under paragraph (1); and

"(iii) prescribe such other rules as may be necessary and appropriate to carry out the purposes of this section.".

SEC. 6. FEDERAL TRADE COMMISSION STUDY.

Not later than 2 years after the date of enactment of this Act, the Federal Trade Commission, in consultation with the Securities and Exchange Commission, shall conduct and publish a study, using any compulsory process necessary, relying on public data and information if available and sufficient, and incorporating public comment on—

(1) the extent to which an institutional investor or related institutional investors have ownership or control interests in competitors in moderately concentrated or concentrated markets;

(2) the economic impacts of such overlapping ownership or control; and

(3) the mechanisms by which an institutional investor could affect competition among the companies in which it invests and whether such mechanisms are prevalent.

SEC. 7. GAO STUDIES.

(a) IN GENERAL.—Not later than 18 months after the date of enactment of this Act, the Comptroller General of the United States shall—

(1) conduct a study to assess the success of merger remedies required by the Department of Justice or the Federal Trade Commission in consent decrees entered into since 6 years prior to the date of enactment of this Act, including the impact on maintaining competition, a comparison of structural and conduct remedies, and the viability of divested assets; and

(2) conduct a study on the impact of mergers and acquisitions on wages, employment, innovation, and new business formation.

(b) UPDATE.—The Comptroller General of the United States shall—

(1) update the study under paragraph (1) 3 years and 6 years after the date of enactment of this Act based on the information provided under section 7A(l) of the Clayton Act, as added by section 5 of this Act; and

(2) identify specific remedies or alleged merger benefits that require additional information or research.

SEC. 8. OFFICE OF COMPETITION ADVOCATE.

(a) DEFINITIONS.—In this section—

(1) the term ''agency'' has the meaning given the term in section 551 of title 5, United States Code;

(2) the term ''covered company'' means any company that has, at any time, been required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a);

(3) the term ''Office'' means the Office of the Competition Advocate established under subsection (b);

(4) the term ''Chairman'' means the Chairman of the Commission; and

(5) the term ''Commission'' means the Federal Trade Commission.

(b) ESTABLISHMENT.—There is established within the Federal Trade Commission the Office of the Competition Advocate.

(c) COMPETITION ADVOCATE.—

(1) IN GENERAL.—The head of the Office shall be the Competition Advocate, who shall—

(A) report directly to the Chairman; and

(B) be appointed by the Chairman, with the concurrence of a majority of the Commission, including at least 1 Commissioner who is not a member of the same political party of the majority members of the Commission, from among individuals having experience in advocating for the promotion of competition.

(2) COMPENSATION.—The annual rate of pay for the Competition Advocate shall be equal to the highest rate of annual pay for other senior executives who report to the Chairman of the Commission.

(3) LIMITATION ON SERVICE.—An individual who serves as the Competition Advocate may not be employed by the Commission—

(A) during the 2-year period ending on the date of appointment as Competition Advocate; or

(B) during the 5-year period beginning on the date on which the person ceases to serve as the Competition Advocate.

(d) STAFF OF OFFICE.—The Competition Advocate, after consultation with the Chairman of the Commission, shall retain or employ independent counsel, research staff, and service staff, as the Competition Advocate determines is necessary to carry out the functions, powers, and duties of the Office.

(e) DUTIES AND POWERS.—The Competition Advocate shall—

(1) recommend processes or procedures that will allow the Federal Trade Commission and the Antitrust Division of the Department of Justice to improve the ability of each agency to solicit reports from consumers, small businesses, and employees about possible anticompetitive practices or adverse effects of concentration;

(2) publicly provide recommendations to other Federal agencies about administrative actions that may have anticompetitive effects and the potential harm to competition if those actions are carried out;

(3) provide recommendations to other Federal agencies about administrative actions that may have procompetitive effects and the potential benefit to competition if those actions are carried out;

(4) publish periodic reports on—

(A) market competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups; and

(B) the success of remedies required by the Department of Justice or the Federal Trade Commission in consent decrees;

(5) collect data regarding concentration levels across industries and the impact and degree of antitrust enforcement; and

(6) standardize the types and formats of data reported and collected.

(f) SUBPOENA AUTHORITY.—

(1) IN GENERAL.—The Competition Advocate may either require the submission of or accept voluntary submissions of periodic and other reports

from any covered company for the purpose of assessing competition and its impact on the United States, local geographic areas, and different demographic and socioeconomic groups.

(2) WRITTEN FINDING.—Before issuing a subpoena to collect the information described in paragraph (1), the Competition Advocate shall make a written finding that—

(A) the data is required to carry out the functions of the Competition Advocate; and

(B) the information is not available from a public source or another agency.

(3) MITIGATION OF REPORT BURDEN.—Before requiring the submission of a report from any company required to make a filing under section 7A of the Clayton Act (15 U.S.C. 18a), the Competition Advocate shall—

(A) coordinate with other agencies or authority; and

(B) whenever possible, rely on information available from such agencies or authority.

(g) DATA CENTER.—

(1) ESTABLISHMENT.—There is established within the Office the Data Center.

(2) DUTIES.—The Data Center shall—

(A) collect, validate, and maintain data obtained from agencies, as defined in section 551 of title 5, United States Code, commercial data providers, publicly available data sources, and any covered company; and

(B) prepare and publish, in a manner that is easily accessible to the public—

(i) a concentration database;

(ii) a merger enforcement database;

(iii) any other database that the Competition Advocate determines is necessary to carry out the duties of the Office; and

(iv) the format and standards for Office data, including standards for reporting financial transaction and position data to the Office.

(3) REGULATIONS.—The Competition Advocate shall promulgate regulations relating to the collection and standardizing of data under paragraph (2).

(4) CONFIDENTIALITY.—

(A) IN GENERAL.—The Data Center may not disclose any confidential data collected under paragraph (2).

(B) REQUIREMENTS.—Data obtained from an agency shall be subject to the same confidentiality requirements and protection as the agency providing the data.

(C) INFORMATION SECURITY.—The Competition Advocate shall ensure that data collected and maintained by the Data Center are kept secure and protected against unauthorized disclosure.

(h) DIVISION OF MARKET ANALYSIS.—

(1) ESTABLISHMENT.—There is established within the Office the Division of Market Analysis.

(2) LEADERSHIP.—The head of the Division of Market Analysis shall be the Director of Market Analysis, who shall—

(A) report directly to the Competition Advocate; and

(B) be appointed by the Competition Advocate, with the concurrence of a majority of the Commission, including at least one Commissioner who is not a member of the same political party of the majority members of the Commission.

(3) DIVISION STAFF.—The Division of Market Analysis shall retain or employ independent legal, economic, research, and service staff sufficient to

carry out the functions, powers, and duties of the Division.

(4) DUTIES AND POWERS.—The Division of Market Analysis—

(A) shall, at the direction of the Competition Advocate or the Commission, conduct investigations of markets or industry sectors to analyze the competitive conditions and dynamics affecting such markets or industry sectors, including the effects that market concentration, mergers and acquisitions, certain types of agreements, and other forms of business conduct have on competition, consumers, workers and innovation, and shall publish reports on the results of such investigations;

(B) shall, at the direction of the Competition Advocate or the Commission, conduct investigations concerning the competitive effects of acquisitions that have been consummated no less than 2 years prior to the start of the investigation, which shall include recommendations concerning appropriate enforcement action to remedy any anticompetitive effects discovered and may include assessments of—

(i) the conditions of the relevant markets affected by the acquisition, over the period since the acquisition was consummated, including, but not limited to, the potential impact that the acquisition has had on—

(I) the prices of goods or services, including wages in any affected labor markets;

(II) the output and quality of goods and services;

(III) the entry or exit of competitors;

(IV) innovation;

(V) consumer choice and product variety;

(VI) the opportunity of suppliers and works to sell their product or services;

(VII) coordinated interaction between competitors; and

(VIII) subsequent mergers and acquisitions activity;

(ii) whether the acquiring person or its successors in interest—

(I) complied with all obligations under any agreement with the Federal Trade Commission, the United States, or State law enforcement authorities to resolve a proceeding brought under the antitrust laws; and

(II) achieved measurable, transaction-specific efficiencies, which did not arise from anticompetitive reductions of output, as a result of the acquisition; and

(iii) whether any agreements with the Federal Trade Commission or the United States to resolve a proceeding brought under the antitrust laws regarding the acquisition was effective in mitigating the anticompetitive effects from the acquisition;

(C) shall rely on public data and information, public comment, information from other Federal agencies, information from the Data Center, information obtained pursuant to the Competition Advocate's subpoena authority under subsection (f) of this section and may use compulsory process under section 6(b) of the

Federal Trade Commission Act (15 U.S.C. 46(b)) as necessary to carry out the functions set forth in subsections (h)(3)(A) and (h)(3)(B) of this section; and

(D) shall report any evidence it obtains that any person, partnership, or corporation has engaged in transactions or conduct that may constitute of a violation of the antitrust law to the Commission, which may institute further investigation, initiate enforcement proceedings, or refer such evidence to the Attorney General.

SEC. 9. EXCLUSIONARY CONDUCT.

(a) IN GENERAL.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 26 (15 U.S.C. 26a) the following:

"SEC. 26A. EXCLUSIONARY CONDUCT.

"(a) DEFINITIONS.—In this section:

"(1) EXCLUSIONARY CONDUCT.—

"(A) IN GENERAL.—The term 'exclusionary conduct' means conduct that—

"(i) materially disadvantages 1 or more actual or potential competitors; or

"(ii) tends to foreclose or limit the ability or incentive of 1 or more actual or potential competitors to compete.

"(B) LIMITATIONS.—

"(i) Applying for or enforcing a patent, trademark, or copyright, unless such applications or enforcement actions are baseless or made in bad faith or in violation of a legal obligation, shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

"(ii) Conduct that is necessary to comply with Federal or State law shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

"(2) MARKET POWER.—The term 'market power' means the ability of a person, or a group of persons acting in concert, to profitably impose terms or conditions on counterparties, including terms regarding price, quantity, product or service quality, or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons imposing them than what the person or group of persons could obtain in a competitive market.

"(b) VIOLATION.—

"(1) IN GENERAL.—It shall be unlawful for a person, acting alone or in concert with other persons, to engage in exclusionary conduct that presents an appreciable risk of harming competition.

"(2) UNFAIR METHOD OF COMPETITION.—A violation of paragraph (1) shall also constitute an unfair method of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45).

"(c) PRESUMPTION.—

"(1) IN GENERAL.—Except as provided in paragraph (2), exclusionary conduct shall be presumed to present an appreciable risk of harming competition and shall be a violation of subsection (b)(1) if the exclusionary conduct is undertaken, with respect to a relevant market, by a person or by a group of more than 1 person acting in concert that—

"(A) has a market share of greater than 50 percent as a seller or a buyer in the relevant market; or

"(B) otherwise has significant market power in the relevant market.

"(2) EXCEPTION.—Paragraph (1) shall not apply if the defendant establishes, by a preponderance of the evidence, that—

"(A) distinct procompetitive benefits of the exclusionary conduct in the relevant market eliminate the risk of harming competition presented by the exclusionary conduct;

"(B) 1 or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market with the effect of eliminating the risk of harming competition posed by the exclusionary conduct; or

"(C) the exclusionary conduct does not present an appreciable risk of harming competition.

"(d) CONSIDERATIONS.—If the presumption in subsection (c) does not apply, the determination of whether exclusionary conduct presents an appreciable risk of harming competition shall be based on the totality of the circumstances, which may include consideration of—

"(1) the extent to which any distinct procompetitive benefits of the exclusionary conduct substantially eliminate the risk of harming competition presented by the exclusionary conduct; and

"(2) whether 1 or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market, substantially eliminating the risk of harming competition presented by the exclusionary conduct.

"(e) LIMITATIONS.—Although the following circumstances may constitute evidence of a violation of subsection (b)(1), such violation does not require finding—

"(1) that the unilateral conduct of the defendant altered or terminated a prior course of dealing between the defendant and a person subject to the exclusionary conduct;

"(2) that the defendant treated persons subject to the exclusionary conduct differently than the defendant treated other persons;

"(3) that any price of the defendant for a product or service was below any measure of the costs to the defendant of providing the product or service;

"(4) that a defendant with significant market power in a relevant market has recouped or is likely to recoup the losses it incurred or incurs from below-cost pricing for products or services in the relevant market;

"(5) that the conduct of the defendant makes no economic sense apart from its tendency to harm competition;

"(6) that the risk of harming competition presented by the conduct of the defendant or any resulting actual harm to competition have been quantified or proven with quantitative evidence; or

"(7) that when a defendant operates a multi-sided platform business, the conduct of the defendant presents an appreciable risk of harming competition on more than 1 side of the multi-sided platform.

"(f) CIVIL PENALTIES.—Any person who violates subsection (b)(1) shall be liable to the United States for a civil penalty, which may be recovered in a civil action brought by the Attorney General of the United States, of not more than the greater of—

"(1) 15 percent of the total United States revenues of the person for the previous calendar year; or

"(2) 30 percent of the United States revenues of the person in any line of commerce affected or targeted by the unlawful conduct during the period of the unlawful conduct.".

(b) FEDERAL TRADE COMMISSION ACT.—

(1) CIVIL PENALTIES.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

"(p) CIVIL PENALTY FOR VIOLATION OF SECTION 26A OF THE CLAYTON ACT.—The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation who violates subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 26A of the Clayton Act to recover a civil penalty, which shall accrue to the United States, in an amount not more than the greater of—

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

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

(2) COMMISSION LITIGATION AUTHORITY.—Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(A) in subparagraph (D), by striking "or" after the semicolon;

(B) in subparagraph (E)—

(i) by moving the margins 2 ems to the left; and

(ii) by inserting ‘‘or’’ after the semicolon; and

(C) by inserting after subparagraph (E) the following:

‘‘(F) to recover civil penalties under section 5(p) of this Act;’’.

(c) ENFORCEMENT GUIDELINES.—

(1) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines outlining policies, practices, and analytical techniques relating to agency enforcement under section 26A of the Clayton Act, as added by section 4 of this Act, with the goal of promoting transparency and deterring violations of section 26A of the Clayton Act.

(2) UPDATES.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(3) PUBLIC NOTICE AND COMMENT.—

(A) GUIDELINES.—Before issuing guidelines under subsection (c)(1) or (c)(2), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.

(B) INAPPLICABILITY OF RULEMAKING PROVISIONS.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under this section.

SEC. 10. CIVIL PENALTIES FOR SHERMAN ACT VIOLATIONS.

(a) CIVIL PENALTY AMENDMENTS.—

(1) SECTION 1 OF THE SHERMAN ACT.—Section 1 of the Sherman Antitrust Act (15 U.S.C. 1) is amended—

(A) by striking ‘‘Every’’ and inserting ‘‘(a) Every’’; and

(B) by adding at the end the following

‘‘(b)(1) Every person who violates this section shall be liable to the United States for a civil penalty of not more than the greater of—

‘‘(A) 15 percent of the total United States revenues of the person for the previous calendar year; or

"(B) 30 percent of the United States revenues of the person in any part of the trade or commerce related to or targeted by the unlawful conduct under this section during the period of the unlawful conduct.

"(2) A civil penalty under this section may be recovered in a civil action brought by the United States.".

(2) SECTION 2 OF THE SHERMAN ACT.—Section 2 of the Sherman Antitrust Act (15 U.S.C. 2) is amended—

(A) by striking "Every" and inserting "(a) Every"; and

(B) by adding at the end the following

"(b)(1) Every person who violates this section shall be liable to the United States for a civil penalty of not more than the greater of—

"(A) 15 percent of the total United States revenues of the person for the previous calendar year; or

"(B) 30 percent of the United States revenues of the person in any part of the trade or commerce related to or targeted by the unlawful conduct under this section during the period of the unlawful conduct.

"(2) A civil penalty under this section may be recovered in a civil action brought by the United States.".

(3) FEDERAL TRADE COMMISSION ACT.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

"(o)(1) The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation for a violation of subsection (a)(1) respecting an unfair method of competition that constitutes a violation of sections 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) and to recover a civil penalty for such violation.

"(2) In an action under paragraph (1), any person, partnership, or corporation found to have violated subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 1 or 2 of the Sherman Act (15 U.S.C. 1, 2) shall be liable for a civil penalty of not more than the greater of—

"(A) 15 percent of the total United States revenues of the person, partnership, or corporation for the previous calendar year; or

"(B) 30 percent of the United States revenues of the person, partnership, or corporation in any line of commerce related to or targeted by the unlawful conduct described in paragraph (1) during the period of the unlawful conduct.".

(b) RULE OF CONSTRUCTION.—

(1) CIVIL PENALTIES.—The civil penalties provided in subsection (b) of section 1 of the Sherman Act (15 U.S.C. 1), subsection (b) of section 2 of the Sherman Act (15 U.S.C. 2), and subsection (o) of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as added by subsection (a) of this section, are in addition to, and not in lieu of, any other remedy provided by Federal law, including under—

(A) section 4 or 16 of the Clayton Act (15 U.S.C. 15, 26); or

(B) section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(2) AUTHORITIES.—Nothing in this paragraph may be construed to affect any authority of the Attorney General or the Federal Trade Commission under any other provision of law.

SEC. 11. JOINT CIVIL PENALTY GUIDELINES.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines reflecting agency policies for determining the appropriate amount of a civil penalty to be sought under sections 1(b) and 2(b) of the Sherman Act (15 U.S.C. 1, 2), section 26A(f) of the Clayton Act, and sections 5(o) and 5(p) of the Federal Trade Commission Act (15 U.S.C. 45), as added by of this Act, with the goal of promoting transparency and crafting remedies for individual violations that are effective in deterring future unlawful conduct and proportionate to the gravity of the violation.

(b) CONSIDERATIONS.—In establishing the guidelines described in subsection (a), the Attorney General and the Federal Trade Commission shall consider the relevant factors to be used for calculating an appropriate civil penalty for a particular violation, including—

(1) the volume of commerce affected;

(2) the duration and severity of the unlawful conduct;

(3) the intent of the person undertaking the unlawful conduct;

(4) the extent to which the unlawful conduct was egregious or a clear violation of the law;

(5) whether the civil penalty is to be applied in combination with other remedies, including—

(A) structural remedies, behavioral conditions, or equitable disgorgement; or

(B) other remedies available under section 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b));

(6) whether the person has previously engaged in the same or similar anticompetitive conduct; and

(7) whether the person undertook the conduct in violation of a preexisting consent decree or court order.

(c) UPDATES.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(d) PUBLIC NOTICE AND COMMENT.—

(1) GUIDELINES.—Before issuing guidelines under subsection (a) or subsection (c), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.

(2) INAPPLICABILITY OF RULEMAKING PROVISIONS.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under this section.

SEC. 12. FEDERAL TRADE COMMISSION LITIGATION AUTHORITY.

Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

(1) in subparagraph (D), by striking "or" at the end;

(2) in subparagraph (E)—

(A) by moving the margins 2 ems to the left; and

(B) by striking the semicolon and inserting "; or"; and

(3) by inserting after subparagraph (E) the following:

"(F) to recover civil penalties under section 5(o) of this Act;".

SEC. 13. MARKET DEFINITION.

(a) IN GENERAL.—Establishing liability under the antitrust laws does not require the definition of a relevant market, except when the definition of a relevant market is required, to establish a presumption or to resolve a claim, under a statutory provision that explicitly references the terms "relevant market", "market concentration", or "market share". Statutory references to the term "line of commerce" shall not constitute an exception to the foregoing rule that establishing liability under the antitrust laws does not require the definition of a relevant market.

(b) DIRECT EVIDENCE.—If direct evidence in the record is sufficient to prove actual or likely harm to competition, an appreciable risk to competition sufficient to satisfy the applicable statutory standard, or that the effect of an acquisition subject to section 7 of the Clayton Act (15 U.S.C. 18) may be to create an appreciable risk of materially lessening competition or to tend to create a monopoly or a monopsony, neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws.

(c) RULE OF CONSTRUCTION.—Nothing in this section may be construed to prevent a court or the Federal Trade Commission from considering evidence relating to the definition of proposed relevant markets to evaluate the merits of a claim under the antitrust laws.

SEC. 14. LIMITATIONS ON IMPLIED IMMUNITY FROM THE ANTITRUST LAWS.

(a) IN GENERAL.—In any action or proceeding to enforce the antitrust laws with respect to conduct that is regulated under Federal statute, no court or adjudicatory body may find that the Federal statute, or any rule or regulation promulgated in accordance with the Federal statute, implicitly precludes application of the antitrust laws to the conduct unless—

(1) a Federal agency or department actively regulates the conduct under the Federal statute;

(2) the Federal statute does not include any provision preserving the rights, claims, or remedies under the applicable antitrust laws or under any area of law that includes the antitrust laws; and

(3) Federal agency or department rules or regulations, adopted by rulemaking or adjudication, explicitly require or authorize the defendant to undertake the conduct.

(b) EXISTING FEDERAL REGULATION.—In any action or proceeding described in subsection (a), the antitrust laws shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments, unless application of the antitrust laws is precluded or limited by—

(1) an explicit exemption from the antitrust laws under a Federal statute; or

(2) an implied immunity that satisfies the requirements under subsection (a).

SEC. 15. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal year 2022—

(1) $484,500,000 for the Antitrust Division of the Department of Justice; and

(2) $651,000,000 for the Federal Trade Commission.

SEC. 16. WHISTLEBLOWER PROTECTIONS.

(a) PROTECTIONS FOR CIVIL WHISTLEBLOWERS.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 27 (15 U.S.C. 26b) the following:

"SEC. 27A. ANTI-RETALIATION PROTECTION FOR CIVIL WHISTLEBLOWERS.

"(a) WHISTLEBLOWER PROTECTIONS FOR EMPLOYEES, CONTRACTORS, SUBCONTRACTORS, AND AGENTS.—

"(1) IN GENERAL.—No employer may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against a covered individual in the terms and conditions of employment of the covered individual because of any lawful act done by the covered individual—

"(A) to provide or cause to be provided to the Federal Government or a person with supervisory authority over the covered individual (or such other person working for the employer who has the authority to investigate, discover, or terminate misconduct) information relating to any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the applicable antitrust laws; or

"(B) to cause to be filed, testify in, participate in, or otherwise assist a Federal Government investigation or a Federal Government proceeding filed or about to be filed (with any knowledge of the employer) relating to any violation of, or any act or omission the covered individual reasonably believes to be a violation of, the applicable antitrust laws.

"(2) LIMITATION ON PROTECTIONS.—Paragraph (1) shall not apply to any covered individual if—

"(A) the covered individual planned and initiated a violation or attempted violation of the applicable antitrust laws;

"(B) the covered individual planned and initiated a violation or attempted violation of a criminal law in conjunction with a violation or attempted violation of the applicable antitrust laws; or

"(C) the covered individual planned and initiated an obstruction or attempted obstruction of an investigation by the Federal Government of a violation of the applicable antitrust laws.

"(3) DEFINITIONS.—In this section:

"(A) APPLICABLE ANTITRUST LAWS.—The term 'applicable antitrust laws' means section 1, 2, or 3 of the Sherman Act (15 U.S.C. 1, 2, and 3) or section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section applies to unfair methods of competition.

"(B) COVERED INDIVIDUAL.—The term 'covered individual' means an employee, contractor, subcontractor, or agent of an employer.

"(C) EMPLOYER.—The term 'employer' means a person, or any officer, employee, contractor, subcontractor, or agent of such person.

"(D) FEDERAL GOVERNMENT.—The term 'Federal Government' means—

"(i) a Federal regulatory or law enforcement agency; or

"(ii) any Member of Congress or committee of Congress.

"(E) PERSON.—The term 'person' has the same meaning as in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)).

"(b) ENFORCEMENT ACTION.—

"(1) IN GENERAL.—A covered individual who alleges discharge or other discrimination by any employer in violation of subsection (a) may seek relief under subsection (c) by—

"(A) filing a complaint with the Secretary of Labor; or

"(B) if the Secretary of Labor has not issued a final decision within 180 days of the filing of the complaint and there is no showing that such delay is due to the bad faith of the claimant, bringing an action at law or equity for de novo review in the appropriate district court of the United States, which shall have jurisdiction over such an action without regard to the amount in controversy.

"(2) PROCEDURE.—

"(A) IN GENERAL.—A complaint filed with the Secretary of Labor under paragraph (1)(A) shall be governed under the rules and procedures set forth in section 42121(b) of title 49, United States Code.

"(B) EXCEPTION.—Notification made under section 42121(b)(1) of title 49, United States Code, shall be made to any individual named in the complaint and to the employer.

"(C) BURDENS OF PROOF.—An action brought under paragraph (1)(B) shall be governed by the legal burdens of proof set forth in section 42121(b) of title 49, United States Code.

"(D) STATUTE OF LIMITATIONS.—A complaint under paragraph (1)(A) shall be filed with the Secretary of Labor not later than 180 days after the date on which the violation of this section occurs.

"(E) CIVIL ACTIONS TO ENFORCE.—If a person fails to comply with an order or preliminary order issued by the Secretary of Labor pursuant to the procedures set forth in section 42121(b) of title 49, United States Code, the Secretary of Labor or the person on whose behalf the order was issued may bring a civil action to enforce the order in the district court of the United States for the judicial district in which the violation occurred.

"(c) REMEDIES.—

"(1) IN GENERAL.—A covered individual prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the covered individual whole.

"(2) COMPENSATORY DAMAGES.—Relief for any action under paragraph (1) shall include—

"(A) reinstatement with the same seniority status that the covered individual would have had, but for the discrimination;

"(B) the amount of back pay, with interest; and

"(C) compensation for any special damages sustained as a result of the discrimination including litigation costs, expert witness fees, and reasonable attorney's fees.

"(d) RIGHTS RETAINED BY WHISTLEBLOWERS.—Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any covered individual under any Federal or State law, or under any collective bargaining agreement.".

(b) WHISTLEBLOWER REWARD.—The Antitrust Criminal Penalty Enhancement and Reform Act of 2004 (15 U.S.C. 1 note) is amended by inserting after section 216 the following:

"SEC. 217. CRIMINAL ANTITRUST WHISTLEBLOWER INCENTIVES.

"(a) DEFINITIONS.—In this section the following definitions shall apply:

"(1) ANTITRUST LAWS.—The term 'antitrust laws' means section 1 or 3 of the Sherman Act (15 U.S.C. 1 and 3).

"(2) COVERED ENFORCEMENT ACTION.—The term 'covered enforcement action' means any criminal action brought by the Attorney General under the antitrust laws that results in criminal fines exceeding $1,000,000.

"(3) ORIGINAL INFORMATION.—The term 'original information' means information that—

"(A) is derived from the independent knowledge or analysis of a whistleblower;

"(B) is not known to the Attorney General or the Department of Justice from any other source, unless the whistleblower is the original source of the information; and

"(C) is not exclusively derived from an allegation made in a judicial or administrative hearing, in a governmental report, hearing, audit, or investigation, or from the news media, unless the whistleblower is a source of the information.

"(4) WHISTLEBLOWER.—The term 'whistleblower' means any individual who provides, or 2 or more individuals acting jointly who provide, information relating to a violation of the antitrust laws to the Department of Justice, in a manner established by the Department of Justice.

"(b) AWARDS.—

"(1) IN GENERAL.—In a covered enforcement action, the Attorney General, subject to subsection (c), may pay an award or awards to 1 or more whistleblowers who voluntarily provided original information to the Department of Justice that led to the successful enforcement of the covered enforcement action, in an amount equal to not more than 30 percent, in total, of what has been collected of the criminal fine imposed in the covered enforcement action under the antitrust laws.

"(2) PAYMENT.—Any amount paid under paragraph (1) shall be paid from the criminal fine collected in the covered enforcement action.

"(c) DETERMINATION OF AMOUNT OF AWARD; DENIAL OF AWARD.—

"(1) DETERMINATION OF AMOUNT OF AWARD.—

"(A) DISCRETION.—The determination of the amount of an award made under subsection (b) shall be in the discretion of the Attorney General.

"(B) CRITERIA.—In determining the amount of an award made under subsection (b), the Attorney General shall take into consideration—

"(i) the significance of the information provided by the whistleblower to the success of the covered enforcement action;

"(ii) the degree of assistance and cooperation provided by the whistleblower in a covered enforcement action;

"(iii) the interest of the Department of Justice in deterring criminal violations of the antitrust laws by making awards to whistleblowers who provide information that lead to the successful covered enforcement actions; and

"(iv) such additional relevant factors as the Attorney General may establish.

"(2) DENIAL OF AWARD.—No award under subsection (b) shall be made—

"(A) to any whistleblower who is, or was at the time the whistleblower acquired the original information submitted to the Commission, a member, officer, or employee of—

"(i) any branch, agency, or instrumentality of the Federal Government; or

"(ii) any law enforcement organization;

"(B) to any whistleblower who is convicted of a criminal violation related to the covered enforcement action for which the whistleblower otherwise could receive an award under this section;

"(C) to any whistleblower who was an originator or leader of or who coerced any other party to participate in the activity giving rise to liability under the antitrust laws in the covered enforcement action for which the whistleblower otherwise could receive an award under this section;

"(D) to any whistleblower who fails to respond fully and truthfully to all inquiries of the Department of Justice relating to the original information or intentionally withholds information relating to the original information;

"(E) to any whistleblower who commits, participates in, or attempts to commit or participate in any crimes after disclosing the original information to the Department of Justice; or

"(F) to any whistleblower who fails to submit information to the Department of Justice in such form as the Department may require.

"(d) REPRESENTATION.—

"(1) PERMITTED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

"(2) REQUIRED REPRESENTATION.—Any whistleblower who makes a claim for an award under subsection (b) may be represented by counsel.

"(A) IN GENERAL.—Any whistleblower who anonymously makes a claim for an award under subsection (b) shall be represented by counsel if the whistleblower anonymously submits the information upon which the claim is based.

"(B) DISCLOSURE OF IDENTITY.—Prior to the payment of an award, a whistleblower shall disclose the identity of the whistleblower and provide such other information as the Attorney

General or the Department of Justice may require, directly or through counsel for the whistleblower.

"(e) APPEALS.—Any determination made under this section, including whether, to whom, or in what amount to make awards, shall be in the discretion of the Attorney General. Any such determination, except the determination of the amount of an award if the award was made in accordance with subsection (b), may be appealed to the appropriate court of appeals of the United States not more than 30 days after the determination is issued by the Attorney General. The court shall review the determination made by the Attorney General in accordance with section 706 of title 5.".

SEC. 17. PREJUDGMENT INTEREST.

Section 4 of the Clayton Act (15 U.S.C. 15) is amended by striking subsection (a) and inserting the following:

"(a) Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, the cost of suit, including a reasonable attorney's fee, and simple interest on threefold the damages by him sustained for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment.''.

SEC. 18. ADDITIONAL REMEDIES; RULES OF CONSTRUCTION.

(a) ADDITIONAL REMEDIES.—The rights and remedies provided under this Act are in addition to, not in lieu of, any other rights and remedies provided by Federal law, including under section 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of the Federal Trade Commission Act (15 U.S.C. 53(b)).

(b) RULES OF CONSTRUCTION.—Nothing in this Act may be construed to—

(1) impair or limit the applicability of any of the antitrust laws; and

(2) prohibit any other remedy provided by Federal law.

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117TH CONGRESS
1ST SESSION

S. 228

To promote antitrust enforcement and protect competition through adjusting premerger filing fees, and increasing antitrust enforcement resources.

IN THE SENATE OF THE UNITED STATES

FEBRUARY 4, 2021

Ms. KLOBUCHAR (for herself and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To promote antitrust enforcement and protect competition through adjusting premerger filing fees, and increasing antitrust enforcement resources.

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 ''Merger Filing Fee Modernization Act of 2021''.

SEC. 2. PREMERGER NOTIFICATION FILING FEES.

Section 605 of Public Law 101–162 (15 U.S.C. 18a note) is amended—

(1) in subsection (b)—

(A) in paragraph (1)—

(i) by striking "$45,000" and inserting "$30,000";

(ii) by striking "$100,000,000" and inserting "$161,500,000";

(iii) by striking "2004" and inserting "2022"; and

(iv) by striking "2003" and inserting "2021";

(B) in paragraph (2)—

(i) by striking "$125,000" and inserting "$100,000";

(ii) by striking "$100,000,000" and inserting "$161,500,000";

(iii) by striking "but less" and inserting "but is less"; and

(iv) by striking "and" at the end;

(C) in paragraph (3)—

(i) by striking "$280,000" and inserting "$250,000"; and

(ii) by striking the period at the end and inserting "but is less than $1,000,000,000 (as so adjusted and published);"; and

(D) by adding at the end the following:

"(4) $400,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $1,000,000,000 (as so adjusted and published) but is less than $2,000,000,000 (as so adjusted and published);

"(5) $800,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $2,000,000,000 (as so adjusted and published) but is less than $5,000,000,000 (as so adjusted and published); and

"(6) $2,250,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $5,000,000,000 (as so adjusted and published)."; and

(2) by adding at the end the following:

"(c)(1) For each fiscal year commencing after September 30, 2022, the filing fees in this section shall be increased each year by an amount equal to the percentage increase, if any, in the Consumer Price Index, as determined by the Department of Labor or its successor, for the year then ended over the level so established for the year ending September 30, 2021.

"(2) As soon as practicable, but not later than January 31 of each year, the Federal Trade Commission shall publish the adjusted amounts required by paragraph (1).

"(3) The Federal Trade Commission shall not adjust amounts required by paragraph (1) if the percentage increase described in paragraph (1) is less than 1 percent.

"(4) An amount adjusted under this section shall be rounded to the nearest multiple of $5,000.".

SEC. 3. AUTHORIZATION OF APPROPRIATIONS.

There is authorized to be appropriated for fiscal year 2022—

(1) $252,000,000 for the Antitrust Division of the Department of Justice; and

(2) $418,000,000 for the Federal Trade Commission.

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117TH CONGRESS
1ST SESSION

S. 1074

To amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to promote competition in the United States, and for other purposes.

IN THE SENATE OF THE UNITED STATES

APRIL 12, 2021

Mr. HAWLEY introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To amend the Sherman Act, the Clayton Act, and the Federal Trade Commission Act to promote competition in the United States, and for other purposes.

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 ''Trust-Busting for the Twenty-First Century Act''.

SEC. 2. SHERMAN ACT AMENDMENTS.

The Sherman Act (15 U.S.C. 1 et seq.) is amended—

(1) in section 2 (15 U.S.C. 2)—

(A) by striking ‘‘Every’’ and inserting ‘‘(a) Every’’; and

(B) by adding at the end the following:

‘‘(b)(1) In any case alleging a violation of this section or section 1 in which a plaintiff establishes by a preponderance of the evidence (including direct evidence) the existence of substantial market power or the anticompetitive or otherwise detrimental effects of particular practices, a plaintiff need neither define the scope of a relevant market nor establish the share of such a market controlled by the defendant.

‘‘(2) In any case alleging a violation of this section or section 1 in which the defendant relies on alleged procompetitive effects to justify the conduct of the defendant, the defendant shall establish by clear and convincing evidence that—

‘‘(A) the procompetitive effects of the conduct clearly outweigh the anticompetitive effects of the conduct; and

‘‘(B) the defendant could not obtain substantially similar procompetitive effects through commercially reasonable alternatives that would involve materially lower competitive risks.’’; and

(2) in section 4 (15 U.S.C. 4)—

(A) by striking ''The several'' and inserting ''(a) The several''; and

(B) by adding at the end the following:

''(b) In any action brought by the United States or the Federal Trade Commission alleging a violation of this Act, if the United States or the Federal Trade Commission establishes such a violation, the court shall order disgorgement of all profits earned by the defendant as a result of the conduct constituting that violation, except upon a showing of extraordinary good cause.

''(c) It is the policy of the United States that the principal standard for evaluating the permissibility of practices under this Act is the protection of economic competition within the United States.''.

SEC. 3. CLAYTON ACT AMENDMENTS.

The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) in the first section (15 U.S.C. 12), by adding at the end the following:

''(c) It is the policy of the United States that the principal standard for evaluating the permissibility of practices under this Act is the protection of economic competition within the United States.'';

(2) in section 7 (15 U.S.C. 18), by adding at the end the following:

"No person with a market capitalization exceeding $100,000,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2022, in the same manner as provided in section 8(a)(5) to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2021) shall acquire, directly or indirectly, the whole or any part of the stock or other share capital or the whole or any part of the assets of 1 or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be to lessen competition in any way.

"Where a preponderance of the evidence (including direct evidence) is adduced to demonstrate that the effect of an acquisition may be substantially to lessen competition or to tend to create a monopoly, a plaintiff need neither establish market shares nor the concentration of any particular market.

"No acquisition shall be presumed not to substantially lessen competition or tend to create a monopoly only because the parties to the acquisition do not compete directly against one another at the time of the acquisition.''; and

(3) in section 7a(a) (15 U.S.C. 18a(a)), in the undesignated matter following paragraph (2)(B)(ii)(III), by adding at the end the following: ''In the case of any transaction involving a person, partnership, or corporation designated as a dominant digital firm under section 10A of the Federal Trade Commission Act, the person, partnership, or corporation shall file notification as required by this section.''.

SEC. 4. RESTRICTIONS ON DOMINANT DIGITAL FIRMS.

The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended by inserting after section 10 the following:

''SEC. 10A. RESTRICTIONS ON DOMINANT DIGITAL FIRMS.

''(a) DEFINITIONS.—In this section:

''(1) DOMINANT DIGITAL FIRM.—The term 'dominant digital firm' means a person, partnership, or corporation that—

''(A) provides a website or service accessible through the internet; and

''(B) possesses dominant market power in any market related to that website or service.

"(2) SEARCH FUNCTIONALITY.—The term 'search functionality' means any feature or aspect of a website or service accessible through the internet that allows a user to input alphanumeric data in order to retrieve and display a ranked list of relevant results.

"(b) DESIGNATION AS A DOMINANT DIGITAL FIRM.—

"(1) IN GENERAL.—The Commission shall have power to designate a person, partnership, or corporation as a dominant digital firm.

"(2) FACTORS TO BE CONSIDERED.—In determining whether a person, partnership, or corporation possesses dominant market power under paragraph (1), the Commission shall consider factors including—

"(A) dominance of the firm in other markets and durability of the dominance;

"(B) the extent to which the firm benefits from government contracts or other privileges;

"(C) exclusivity agreements entered into by the firm;

"(D) network effects; and

"(E) any ownership stake of the firm in other entities within the supply chain of the firm.

"(3) INVESTIGATIVE AUTHORITY.—In determining whether to designate a person, partnership, or corporation as a dominant digital firm under paragraph (1), the Commission shall have power to issue investigative demands.

"(c) REQUIREMENTS.—

"(1) IN GENERAL.—Any designation made by the Commission under subsection (b) shall be preceded by a notice and comment period in accordance with section 553 of title 5, United States Code, except that the required publication and service of any designation by the Commission may be made not less than 15 days before the effective date of the designation.

"(2) JUDICIAL REVIEW.—Any designation made by the Commission under subsection (b) shall be subject to judicial review pursuant to section 706 of title 5, United States Code.

"(d) PRESUMPTION AS UNFAIR OR DECEPTIVE ACT OR PRACTICE.—Any acquisition by a person, partnership, or corporation designated as a dominant digital firm under this section, direct or indirect, of the whole or any part of the stock or other share capital or the whole or any part of the assets of 1 or more persons engaged in commerce or in any activity affecting commerce, where such acquisition exceeds $1,000,000 (as adjusted and published for each fiscal year beginning after September 30, 2022, in the same manner as provided in section 8(a)(5) of the Clayton Act to reflect the percentage change in the gross national product for such fiscal year compared to the gross national product for the year ending September 30, 2021) shall be presumed to be a unfair or deceptive act or practice.

"(e) UNFAIR OR DECEPTIVE ACT OR PRACTICE.—It shall be an unfair or deceptive act or practice if a person, partnership, or corporation designated as a dominant digital firm under this section—

"(1) provides search functionality;

"(2) promotes or demotes particular search results, on the basis of whether those results are affiliated or not affiliated with the dominant digital firm; and

"(3) does not disclose such affiliation to users of the search functionality.".

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II

117TH CONGRESS
1ST SESSION

S. 2039

To improve the antitrust laws, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JUNE 14, 2021

Mr. LEE (for himself and Mr. GRASSLEY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

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A BILL

To improve the antitrust laws, and for other purposes.

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 ''Tougher Enforcement Against Monopolists Act'' or the ''TEAM Act''.

SEC. 2. TABLE OF CONTENTS.

The table of contents for this Act is as follows:

SEC. 3. DEFINITIONS.

In this Act:

(1) ANTITRUST LAWS.—The term "antitrust laws" means—

(A) the Sherman Act (15 U.S.C. 1 et seq.); and

(B) the Clayton Act (15 U.S.C. 12 et seq.).

(2) ASSISTANT ATTORNEY GENERAL.—The term "Assistant Attorney General" means the Assistant Attorney General for the Antitrust Division of the Department of Justice.

(3) EXECUTIVE AGENCY.—The term "Executive agency" has the meaning given that term in section 105 of title 5, United States Code.

TITLE I—ONE AGENCY

SEC. 101. SHORT TITLE.

This title may be cited as the "One Agency Act".

SEC. 102. FINDINGS.

Congress finds the following:

(1) It is the policy of the United States to promote the vigorous, effective, and efficient enforcement of the antitrust laws.

(2) The overlapping antitrust enforcement jurisdiction of the Department of Justice and the Federal Trade Commission has wasted taxpayer resources, hampered enforcement efforts, and caused uncertainty for businesses and consumers in the United States.

(3) It is preferable that primary Federal responsibility for enforcing the antitrust laws of the United States be given to a single agency, and the Department of Justice is best suited to do so.

SEC. 103. DEFINITIONS.

In this title:

(1) COMMISSION.—The term ''Commission'' means the Federal Trade Commission.

(2) EFFECTIVE DATE.—The term ''effective date'' means the date described in section 107.

(3) FTC ANTITRUST ACTION.—The term ''FTC antitrust action'' means any litigation or administrative proceeding initiated by the Commission that—

(A) is supervised by an FTC Antitrust Unit; or

(B) relates to the antitrust laws or section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date.

(4) FTC ANTITRUST ASSETS.—The term ''FTC antitrust assets''—

(A) means all electronic or tangible records and files relating to matters supervised, as well as any physical assets or equipment owned and used or retained, by an FTC Antitrust Unit; and

(B) does not include any office space or leased facilities or equipment.

(5) FTC ANTITRUST EMPLOYEE.—The term ''FTC antitrust employee'' means an individual who on the day before the effective date is employed by the Federal Trade Commission and assigned to an FTC Antitrust Unit.

(6) FTC ANTITRUST FUNCTION.—The term ''FTC antitrust function'' means a function of the Commission relating to the antitrust laws or unfair methods of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date.

(7) FTC ANTITRUST FUNDING.—The term ''FTC antitrust funding'' means—

(A) all amounts appropriated before the effective date by an Act of Congress to the Federal Trade Commission that are designated, by Congress or the Commission, for an FTC Antitrust Unit; and

(B) all fees collected by the Federal Trade Commission before the effective date under section 7A of the Clayton Act (15 U.S.C. 18a) and rules issued under that section.

(8) FTC ANTITRUST UNIT.—The term ''FTC Antitrust Unit'' means—

(A) the Bureau of Competition of the Commission; and

(B) each division of the Bureau of Economics of the Commission that is designated to work on FTC antitrust actions.

(9) FUNCTION.—The term ''function'' means any duty, obligation, power, authority, responsibility, right, privilege, activity, or program.

(10) TRANSITION PERIOD.—The term ''transition period'' means the period beginning on the effective date of this title and ending on the later of—

(A) the date that is 1 year after the effective date of this title; or

(B) the date that is 180 days after the date described in subparagraph (A), which may be extended by the Assistant Attorney General once for an additional 180 days, if the Assistant Attorney General determines that a period longer than the period described in subparagraph (A) is necessary to avoid harm to the interests of the United States or the effective enforcement of the antitrust laws.

SEC. 104. TRANSFER OF ANTITRUST ENFORCEMENT FUNCTIONS FROM THE FEDERAL TRADE COMMISSION TO THE DEPARTMENT OF JUSTICE.

(a) TRANSFER OF FUNCTIONS.—

(1) IN GENERAL.—Except as provided in paragraph (3)(D), there shall be transferred to the Department of Justice all FTC antitrust functions, FTC antitrust employees, FTC antitrust assets, and FTC antitrust funding on the earlier of—

(A) the date determined by the Assistant Attorney General under paragraph (2)(B); or

(B) the end of the transition period.

(2) REQUIREMENT.—The Assistant Attorney General, taking care to minimize disruption to ongoing enforcement matters and in consultation as necessary with the Attorney General, the Office of Personnel Management, the General Services Administration, and the Chairman of the Commission, shall—

(A) take all necessary actions to complete implementation of this title before the end of the transition period; and

(B) determine the dates certain, which may not be earlier than the effective date nor later than the end of the transition period, on which the transfers under paragraph (1) shall occur.

(3) PERSONNEL.—

(A) ASSIGNMENT.—An FTC antitrust employee transferred to the Department of Justice under this title shall be assigned to the Antitrust Division of the Department of Justice.

(B) EFFECT ON PERSONNEL.—Except as provided in subparagraph (C), the transfer under this title of an FTC antitrust employee shall not cause the employee to be separated or reduced in grade or compensation for 1 year after the transfer date.

(C) EXECUTIVE SCHEDULE.—Notwithstanding subparagraph (B), the Assistant Attorney General may appoint an FTC antitrust employee in a Senior Executive Service position, as defined in section 3132 of title 5, United States Code, to a position within the Antitrust Division rate payable for a position at level 15, step 10 of the General Schedule.

(D) VOLUNTARY NONTRANSFER OF PERSONNEL.—Notwithstanding paragraph (1), an FTC antitrust employee may, with the consent of the Chairman of the Commission, elect to remain an employee of the Commission assigned to a non-FTC Antitrust Unit.

(E) OFFICE SPACE.—Upon request from the Assistant Attorney General, and in consultation as necessary with the General Services Administration, the Commission shall allow the Department of Justice to use any office space or leased facilities previously used by FTC antitrust employees until such time as the Department of Justice may provide its own office space or facilities. After the transfer of FTC antitrust funding to the Department of Justice, the Department of Justice shall compensate the Commission for the costs of the use of such office space or leased facilities.

(F) RESTRUCTURING.—Notwithstanding any other provision of law, the Assistant Attorney General is authorized to restructure the Antitrust Division before the expiration of the transition period, as the Assistant Attorney General determines is appropriate, to carry out the purposes of this title and accomplish the efficient enforcement of the antitrust laws.

(4) ANTITRUST ACTIONS.—

(A) IN GENERAL.—As soon as is reasonably practicable during the transition period, all open investigations, litigations, matters, or other proceedings being supervised by an FTC antitrust unit and relating to the antitrust laws or unfair methods of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date, shall be transferred to and assumed by the Department of Justice.

(B) HANDLING OF CERTAIN ADMINISTRATIVE PROCEEDINGS.—Administrative proceedings that were initiated by the Commission, were unresolved as of the first day of the transition period, and relate to enforcement of the antitrust laws or unfair methods of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date, shall be treated in the following manner:

(i) Any such proceeding pending before an administrative law judge shall be dismissed without prejudice and the matter shall be referred to the Assistant Attorney General.

(ii) For any such proceeding pending on appeal before the Commission, the administrative appeal shall cease, the ruling of the administrative law judge shall be treated as the final decision of the Commission, and the Court of Appeals for the District of Columbia Circuit shall have jurisdiction over any appeal therefrom.

(C) INTERVENTION.—

(i) IN GENERAL.—In any FTC antitrust action before a court of the United States as of the first day of the transition period, the court shall allow the Department of Justice to—

(I) intervene and assume representation of the Federal Government from the Commission; and

(II) amend any complaint originally brought by the Commission for the purpose of alleging violations of statutes other than the Federal Trade

Commission Act as necessary and where appropriate.

(ii) SCHEDULING ORDER UPON REQUEST.—Upon the request of the Commission or the Department of Justice, and in consultation with all parties to the matter, the court shall issue an order making such scheduling adjustments as necessary to facilitate the transfer of prosecutorial responsibilities under this subparagraph.

(D) CONSENT DECREES.—At the end of the transition period, the Department of Justice shall have sole authority to enforce violations of, approve modifications to, or rescind any consent decree entered into by the Commission before the effective date that concerns conduct alleged to violate the antitrust laws or unfair methods of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date.

(5) AUTHORITY TO CONDUCT INVESTIGATIVE STUDIES.—

(A) REPORTS OF PERSONS, PARTNERSHIPS, AND CORPORATIONS.—

(i) IN GENERAL.—The Department of Justice may require, by general or special orders, persons, partnerships, and corporations, engaged in or whose business affects commerce to file with the Department in such form as the Department may prescribe annual or special reports or answers in writing to specific questions, furnishing to the Department such information as the Department may require as to the organization, business, conduct, practices, management, and relation to other corporations, partnerships, and individuals of the respective persons, partnerships, and corporations filing such reports or answers in writing.

(ii) OATH.—Reports and answers required under clause (i) shall—

(I) be made under oath or otherwise as the Department may prescribe;

(II) pertain solely to competition or the application of the antitrust laws; and

(III) be filed with the Department within such reasonable period as the Department may prescribe, unless additional time be granted in any case by the Department.

(B) PUBLICATION OF INFORMATION OR REPORTS.—

(i) IN GENERAL.—Except as provided in clause (ii), the Department of Justice—

(I) shall make public from time to time such portions of the information obtained by the Department under this paragraph as are in the public interest;

(II) may make annual and special reports to Congress that include recommendations for additional legislation; and

(III) shall provide for the publication of reports and decisions of the Department in such form and manner as may be best adapted for public information and use.

(ii) PROHIBITION AGAINST PUBLICATION OF PRIVILEGED OR CONFIDENTIAL INFORMATION.—

(I) IN GENERAL.—Except as provided in subclause (II), the Department of Justice shall not make public any trade secret or any commercial or financial information that is obtained from any person and that is privileged or confidential.

(II) EXCEPTION.—The Department may disclose information described in subclause (I) to—

(aa) officers and employees of appropriate Federal law enforcement agencies or to any officer or employee of any State law enforcement agency upon the prior certification of an officer of any such Federal or State law enforcement agency that such information will be maintained in confidence and will be used only for official law enforcement purposes; or (bb) any officer or employee of any foreign law enforcement agency under the same circumstances that making material available to foreign law enforcement agencies is permitted under section 21(b) of the Federal Trade Commission Act (15 U.S.C. 57b–2(b)).

(6) BENEFIT OF ANTITRUST DIVISION.—All FTC antitrust assets and FTC antitrust funding transferred under this subsection shall be for the exclusive use and benefit of the Antitrust Division of the Department of Justice.

(b) TRANSITION PERIOD.—

(1) IN GENERAL.—Except as provided in paragraph (2), beginning on the effective date, the Commission may not—

(A) hire or assign an employee to an FTC Antitrust Unit;

(B) open a new investigation or matter within an FTC Antitrust Unit or relating to antitrust enforcement;

(C) without the approval of the Assistant Attorney General, enter into a consent decree, enter into a settlement agreement, or otherwise resolve an FTC antitrust action; or

(D) initiate a new FTC antitrust action.

(2) ENFORCEMENT ON BEHALF OF THE DEPARTMENT OF JUSTICE.—Notwithstanding paragraph (1), during the transition period, the Assistant Attorney General may deputize an FTC Antitrust Employee to investigate or prosecute an alleged violation of the antitrust laws on behalf of the Department of Justice before the completion of the transfer of personnel under subsection (a)(3).

(3) SAME RIGHTS AND OBLIGATIONS.—

(A) IN GENERAL.—Notwithstanding any other provision of law, during the transition period all Department of Justice employees under the supervision of the Assistant Attorney General shall have the same rights and obligations with respect to confidential information submitted to the Commission as FTC antitrust employees on the day before the effective date.

(B) RULE OF CONSTRUCTION.—Nothing in this paragraph may be construed as implying any change to the rights and obligations described in subparagraph (A) as a result of this title.

(c) AGREEMENTS.—The Assistant Attorney General, in consultation with the Chairman of the Commission, shall—

(1) review any agreements between the Commission and any other Federal agency or any foreign law enforcement agency; and

(2) before the end of the transition period, seek to amend, transfer, or rescind such agreements as necessary and appropriate to carry out this title, endeavoring to complete such amendment, transfer, or rescindment with all due haste.

(d) RULES.—The Attorney General shall, pursuant to section 7A of the Clayton Act (15 U.S.C. 18a) and in accordance with section 553 of title 5, United States Code, prescribe or amend any rules as necessary to carry out this title.

SEC. 105. REMOVAL OF REVIEW AUTHORITY FROM FEDERAL COMMUNICATIONS COMMISSION AND STATE ENTITIES.

(a) DEFINITIONS.—In this section—

(1) the term ''covered transaction'' means any acquisition, assignment, or transfer of control of—

(A) any license, authorization, or line subject to the jurisdiction of the Communications Act of 1934 (47 U.S.C. 151 et seq.); or

(B) any authorization, certificate, franchise, or other instrument issued by a State commission or franchising authority; and

(2) the terms ''State commission'' and ''franchising authority'' have the meanings given those terms in sections 3 and 602, respectively, of the Communications Act of 1934 (47 U.S.C. 153, 522).

(b) REVIEW OF COMMUNICATIONS TRANSACTIONS.—

(1) SOLE RESPONSIBILITY OF DEPARTMENT OF JUSTICE.—Notwithstanding any provision of the Communications Act of 1934 (47 U.S.C. 151 et seq.) or any law or regulation of a State or political subdivision thereof, the review of the competitive impact of any proposed covered transaction shall be solely the responsibility of the Department of Justice pursuant to the antitrust laws, and neither the Federal Communications Commission nor any State commission or franchising authority shall have any authority to conduct such review.

(2) CONSULTATION.—In reviewing the competitive impact of a proposed covered transaction, the Attorney General shall solicit and consider the views of the Federal Communications Commission.

(c) APPLICATION OF PUBLIC INTEREST STANDARDS.—

(1) IN GENERAL.—A determination of the Federal Communications Commission described in paragraph (2) with respect to a proposed covered transaction shall be limited to an assessment of whether the acquirer, assignee, or transferee meets the technical, financial, character, and citizenship qualifications that the Commission has prescribed by rule under the Communications Act of 1934 (47 U.S.C. 151 et seq.) to hold that license, authorization, or line.

(2) DETERMINATIONS.—A determination described in this paragraph is a determination pursuant to section 214(a) or 310(d) of the Communications Act of 1934 (47 U.S.C. 214(a), 310(d)) as to whether a proposed covered transaction would serve the public interest, without regard to whether the determination is phrased as whether the present or future public convenience and necessity require or will require the transaction or whether the public interest, convenience, and necessity will be served by the transaction.

SEC. 106. TECHNICAL AND CONFORMING AMENDMENTS.

(a) CLAYTON ACT.—The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) in section 2 (15 U.S.C. 13)—

(A) in subsection (a), by striking ‘‘Federal Trade Commission’’ and inserting ‘‘Attorney General of the United States’’; and

(B) in subsection (b), by striking ‘‘Commission’’ and inserting ‘‘Attorney General of the United States’’;

(2) in section 5(a) (15 U.S.C. 16(a)), in the second sentence, by striking ‘‘, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws’’;

(3) in section 7 (15 U.S.C. 18)—

(A) in the first undesignated paragraph, by striking ‘‘and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce’’; and

(B) in the second undesignated paragraph, by striking ‘‘and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce'';

(4) in section 7A (15 U.S.C. 18a)—

(A) in subsection (b)—

(i) in paragraph (1)(A), in the matter preceding clause (i), by striking ''the Federal Trade Commission and''; and

(ii) in paragraph (2), by striking ''Federal Trade Commission and the'';

(B) in subsection (c)—

(i) in paragraph (6), by striking ''the Federal Trade Commission and''; and

(ii) in paragraph (8), by striking ''the Federal Trade Commission and'';

(C) in subsection (d)—

(i) in the matter preceding paragraph (1), by striking ''Federal Trade Commission, with the concurrence of the Assistant Attorney General and'' and inserting ''Attorney General of the United States''; and

(ii) in paragraph (1), by striking ''the Federal Trade Commission and'';

(D) in subsection (e)—

(i) in paragraph (1)—

(I) in subparagraph (A), by striking ‘‘Federal Trade Commission or the’’; and

(II) in subparagraph (B), by striking ‘‘and the Federal Trade Commission shall each’’ and inserting ‘‘shall’’; and

(ii) in paragraph (2)—

(I) by striking ‘‘Federal Trade Commission or the’’;

(II) by striking ‘‘its or’ ’’;

(III) by striking ‘‘the Federal Trade Commission or’’ each place the term appears; and

(IV) by striking ‘‘, as the case may be,’’;

(E) in subsection (f)—

(i) by striking ‘‘the Federal Trade Commission, alleging that a proposed acquisition violates section 7 of this Act or section 5 of the Federal Trade Commission Act, or an action is filed by’’; and

(ii) by striking ‘‘the Federal Trade Commission or’’;

(F) in subsection (g)(2), in the matter following subparagraph (C), by striking ‘‘the Federal Trade Commission or’’;

(G) in subsection (h), by striking ‘‘or the Federal Trade Commission’’;

(H) in subsection (i)—

(i) in paragraph (1), by striking ‘‘the Federal Trade Commission or’’ each place the term appears; and

(ii) in paragraph (2)—

(I) by striking ‘‘or the Federal Trade Commission’’; and

(J) by striking ‘‘, the Federal Trade Commission Act,’’; and

(5) in section 8(a)(5) (15 U.S.C. 19(a)(5)), in the second sentence, by striking ‘‘Federal Trade Commission’’ and inserting ‘‘Attorney General of the United States’’.

(b) CHARITABLE GIFT ANNUITY ANTITRUST RELIEF ACT OF 1995.—Section 3(1) of the Charitable Gift Annuity Antitrust Relief Act of 1995 (15 U.S.C. 37a(1)) is amended by striking ‘‘, except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition’’.

(c) PENSION FUNDING EQUITY ACT OF 2004.—Section 207(b)(1)(A)(i) of the Pension Funding Equity Act of 2004 (15 U.S.C. 37b(b)(1)(A)(i)) is amended by striking ", except that such term includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition".

(d) FEDERAL TRADE COMMISSION ACT.—The Federal Trade Commission Act (15 U.S.C. 41 et seq.) is amended—

(1) in section 5 (15 U.S.C. 45)—

(A) in subsection (a)—

(i) in paragraph (1), by striking "methods of competition in or affecting commerce, and unfair";

(ii) by striking paragraph (3); and

(iii) by redesignating paragraph (4) as paragraph (3);

(B) in subsection (b)—

(i) in the first sentence, by striking "unfair method of competition or"; and

(ii) in the fifth sentence—

(I) by striking "the method of competition or"; and

(II) by striking "method of competition or such";

(C) in subsection (c)—

(i) in the first sentence—

(I) by striking ''method of competition or''; and

(II) by striking ''method of competition or the''; and

(ii) in the third sentence, by striking ''or to competitors'';

(D) by striking subsection (e);

(E) in subsection (g), by striking paragraph (4); and

(F) in subsection (n), in the first sentence, by striking ''or to competition'';

(2) in section 6 (15 U.S.C. 46)—

(A) by striking subsections (c) through (e) and (i);

(B) by redesignating—

(i) subsections (f), (g), and (h) as subsections (c) through (e), respectively; and

(ii) subsections (j) through (l) as subsections (f) through (h), respectively;

(C) in subsection (f)(1), as so redesignated, by striking ''other than Federal antitrust laws (as defined in section 12(5) of the International Antitrust Enforcement Assistance Act of 1994 (15 U.S.C. 6211(5))),''; and

(D) in subsection (h)(2), as so redesignated, in the matter preceding subparagraph (A), by striking ''or competition'';

(3) by repealing section 7 (15 U.S.C. 47);

(4) in section 11 (15 U.S.C. 51), by striking ''antitrust Acts or the'' each place the term appears;

(5) in section 18 (15 U.S.C. 57a(a)(2)), by striking the second sentence;

(6) in section 20 (15 U.S.C. 57b–1)—

(A) in subsection (a)—

(i) in paragraph (2), by striking ''or in any antitrust violations'';

(ii) in paragraph (3), by striking ''or any provisions relating to antitrust violations'';

(iii) in paragraph (7), by striking ''or any antitrust violation''; and

(iv) by striking paragraph (8);

(B) in subsection (c)(1), by striking ''or to antitrust violations,''; and

(C) in subsection (j)(1), by striking '', any proceeding under section 11(b) of the Clayton Act (15 U.S.C. 21(b)),'';

(7) in section 21(b)(6) (15 U.S.C. 57b–2(b)(6)), in the matter following subparagraph (D), by striking ‘‘paragraphs (5) and (7)’’ and inserting ‘‘paragraphs (4) and (6)’’; and

(8) in section 21A (15 U.S.C. 57b–2a)—

(A) by striking subsection (f);

(B) by redesignating subsection (g) as subsection (f);

(C) in subsection (f), as so redesignated, by striking ‘‘subsection (g)’’ each place the term appears and inserting ‘‘subsection (f)’’; and

(D) in section 24 (15 U.S.C. 57b–5(a)), by striking ‘‘for any conduct which, because of the provisions of the Act entitled ‘An Act to authorize association of producers of agricultural products’, approved February 18, 1922 (7 U.S.C. 291 et seq., commonly known as the Capper-Volstead Act), is not a violation of any of the antitrust Acts or this Act’’.

(e) WEBB-POMERENE ACT.—The Webb-Pomerene Act (15 U.S.C. 61 et seq.) is amended—

(1) by repealing section 4 (15 U.S.C. 64); and

(2) in section 5—

(A) in the first undesignated paragraph—

(i) in the first sentence, by striking "Federal Trade Commission" and inserting "Attorney General of the United States"; and

(ii) in the second sentence, by striking "commission" each place the term appears and inserting "Attorney General of the United States";

(B) in the second undesignated paragraph—

(i) in the first sentence, by striking "Federal Trade Commission" and inserting "Attorney General of the United States"; and

(ii) by striking the third sentence; and

(C) by striking the third undesignated paragraph.

(f) WOOL PRODUCTS LABELING ACT OF 1939.—The Wool Products Labeling Act of 1939 (15 U.S.C. 68 et seq.) is amended—

(1) by striking "an unfair method of competition, and" each place the term appears; and

(2) in section 68g(b), by striking "an unfair method of competition and".

(g) FUR PRODUCTS LABELING ACT.—The Fur Products Labeling Act (15 U.S.C. 69 et seq.) is amended by striking ''an unfair method of competition, and'' each place the term appears.

(h) TEXTILE FIBER PRODUCTS IDENTIFICATION ACT.—The Textile Fiber Products Identification Act (15 U.S.C. 70 et seq.) is amended—

(1) by striking ''an unfair method of competition, and'' each place the term appears; and

(2) in section 3 (15 U.S.C. 70a), by striking ''an unfair method of competition and'' each place the term appears.

(i) ANTITRUST CIVIL PROCESS ACT.—Section 4(d) of the Antitrust Civil Process Act (15 U.S.C. 1313(d)) is amended—

(1) in paragraph (1), by striking ''(1) Whoever'' and inserting ''Whoever''; and

(2) by striking paragraph (2).

(j) INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE ACT OF 1994.—The International Antitrust Enforcement Assistance Act of 1994 (15 U.S.C. 6201 et seq.) is amended—

(1) in section 2 (15 U.S.C. 6201), in the matter preceding paragraph (1), by striking ''and the Federal Trade Commission'';

(2) in section 3(b) (15 U.S.C. 6202(b)), by striking "and the Commission may, using their respective authority to investigate possible violations of the Federal antitrust laws," and inserting "may";

(3) in section 5(1) (15 U.S.C. 6204(1)), by striking "or the Commission" each place the term appears;

(4) in section 6 (15 U.S.C. 6205)—

(A) by striking "or the Commission"; and

(B) by striking "6(f)" and inserting "6(c)";

(5) in section 7 (15 U.S.C. 6206)—

(A) by striking ", with the concurrence of the Commission," each place the term appears; and

(B) in subsection (c)(2)(B), by striking "and the Commission";

(6) in section 8 (15 U.S.C. 6207)—

(A) by striking "Neither the Attorney General nor the Commission may" each place the term appears and inserting "The Attorney General may not";

(B) in subsection (a), by striking "or the Commission, as the case may be,";

(C) in subsection (b), by striking ''or the Commission''; and

(D) in subsection (c)—

(i) by striking ''or the Commission''; and

(ii) by striking ''or the Commission, as the case may be,'';

(7) in section 10 (15 U.S.C. 6209)—

(A) in subsection (a)—

(i) by striking '', the Commission,''; and

(ii) by striking ''(a) In General.—The'' and inserting ''The''; and

(B) by striking subsection (b);

(8) in section 12 (15 U.S.C. 6211)—

(A) in paragraph (2)—

(i) in the matter preceding subparagraph (A)—

(I) by striking ''and the Commission jointly determine'' and inserting ''determines'';

(II) by striking ''jointly''; and

(III) by striking ''and the Commission'';

(ii) in subparagraph (A)—

(I) by striking "and the Commission" each place the term appears; and

(II) by striking "provide" and inserting "provides";

(iii) in subparagraph (E)(ii), in the matter preceding subclause (I), by striking "or the Commission, as the case may be,";

(iv) in subparagraph (F)—

(I) by striking "or the Commission"; and

(II) by striking "or the Commission, respectively,"; and

(v) in subparagraph (H)—

(I) in clause (i)—

(aa) by striking "or the Commission"; and

(bb) by striking "or the Commission, respectively,"; and

(II) in clause (ii), by striking "or the Commission" each place the term appears;

(B) by striking paragraph (4);

(C) by redesignating paragraphs (5) through (9) as paragraphs (4) through (8), respectively; and

(D) in paragraph (4), as so redesignated, by striking ‘‘but also includes section 5 of the Federal Trade Commission Act (15 U.S.C. 45) to the extent that such section 5 applies to unfair methods of competition’’; and

(9) in section 13 (15 U.S.C. 6212)—

(A) by striking ‘‘and the Commission are’’ and inserting ‘‘is’’; and

(B) by striking ‘‘or the Commission, respectively,’’.

(k) MEDICARE PRESCRIPTION DRUG, IMPROVEMENT, AND MODERNIZATION ACT OF 2003.—Subtitle B of title XI of the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (Public Law 108–173; 117 Stat. 2461) is amended—

(1) in the subtitle heading, by striking ‘‘Federal Trade Commission’’ and inserting ‘‘Antitrust’’;

(2) in section 1111 (21 U.S.C. 355 note)—

(A) by striking paragraph (8); and

(B) by redesignating paragraphs (9) through (12) as paragraphs (8) through (11), respectively;

(3) in section 1112(c) (21 U.S.C. 355 note), by striking "and the Commission" each place the term appears;

(4) in section 1113 (21 U.S.C. 355 note), by striking "and the Commission";

(5) in section 1114 (21 U.S.C. 355 note), by striking "or the Commission";

(6) in section 1115 (21 U.S.C. 355 note)—

(A) in subsection (a), by striking ", or brought by the Commission in accordance with the procedures established in section 16(a)(1) of the Federal Trade Commission Act (15 U.S.C. 56(a))"; and

(B) in subsection (b), by striking "or the Commission";

(7) in section 1116 (21 U.S.C. 355 note), in the matter preceding paragraph (1), by striking "Commission, with the concurrence of the Assistant Attorney General" and inserting "Attorney General"; and

(8) in section 1117 (21 U.S.C. 355 note), by striking "or the Commission" each place the term appears.

(l) OTHER LAWS.—For any other provision of law requiring the Assistant Attorney General or the Attorney

General to consult with or seek the concurrence of the Commission or the Chairman of the Commission, where such requirement relates to the antitrust laws or unfair methods of competition under section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as in effect on the day before the effective date, that requirement shall be waived.

SEC. 107. EFFECTIVE DATE.

Except where explicitly provided otherwise, this title and the amendments made by this title shall take effect on the start of the first fiscal year that is at least 90 days after the date of enactment of this title.

TITLE II—MERGERS

SEC. 201. PREMERGER NOTIFICATION FILING FEES.

Section 605 of Public Law 101–162 (15 U.S.C. 18a note) is amended—

(1) in subsection (b)—

(A) in paragraph (1)—

(i) by striking ‘‘$45,000’’ and inserting ‘‘$30,000’’;

(ii) by striking ‘‘$100,000,000’’ and inserting ‘‘$161,500,000’’;

(iii) by striking ‘‘2004’’ and inserting ‘‘2022’’; and

(iv) by striking "2003" and inserting "2021";

(B) in paragraph (2)—

(i) by striking "$125,000" and inserting "$100,000";

(ii) by striking "$100,000,000" and inserting "$161,500,000";

(iii) by striking "but less" and inserting "but is less"; and

(iv) by striking "and" at the end;

(C) in paragraph (3)—

(i) by striking "$280,000" and inserting "$250,000"; and

(ii) by striking the period at the end and inserting "but is less than $1,000,000,000 (as so adjusted and published);"; and

(D) by adding at the end the following:

"(4) $400,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $1,000,000,000 (as so adjusted and published) but is less than $2,000,000,000 (as so adjusted and published);

"(5) $800,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $2,000,000,000 (as so adjusted and published) but is less than $5,000,000,000 (as so adjusted and published); and

"(6) $1,250,000 if the aggregate total amount determined under section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is not less than $5,000,000,000 (as so adjusted and published)."; and

(2) by adding at the end the following:

"(c)(1) For each fiscal year commencing after September 30, 2022, the filing fees in this section shall be increased each year by an amount equal to the percentage increase, if any, in the Gross National Product of the United States, as determined by the Department of Labor or its successor, for the year then ended over the level so established for the year ending September 30, 2021.

"(2) As soon as practicable, but not later than January 31 of each year, the Attorney General shall publish the adjusted amounts required by paragraph (1).

"(3) The Attorney General shall not adjust amounts required by paragraph (1) if the percentage increase described in paragraph (1) is less than 1 percent.

"(4) An amount adjusted under this section shall be rounded to the nearest multiple of $5,000.".

SEC. 202. MERGER PRESUMPTIONS.

Section 7 of the Clayton Act (15 U.S.C. 18), as amended by section 106 of this Act, is amended—

(1) by striking all that proceeds "person engaged in commerce" and inserting the following:

"SEC. 7. ACQUISITION BY ONE CORPORATION OF STOCK OF ANOTHER.

"(a) IN GENERAL.—No";

(2) by striking "No person shall acquire," and inserting the following:

"(b) ACQUISITION OF PERSONS ENGAGED IN COMMERCE.—No person shall acquire";

(3) by striking "This section shall not apply" and inserting the following:

"(d) NOT LESSENING COMPETITION.—This section shall not apply";

(4) by striking "Nor shall anything herein" and inserting the following:

"(e) COMMON CARRIERS.—Nor shall anything herein";

(5) by striking "Nothing contained in this section shall be held" and inserting the following:

“(f) HOLD HARMLESS.—Nothing contained in this section shall be held”;

(6) by striking “Nothing contained in this section shall apply to transactions” and inserting the following:

“(g) CERTAIN TRANSACTIONS.—Nothing contained in this section shall apply to transactions”; and

(7) by inserting after subsection (b), as so designated by this section, the following:

“(c) ACTIONS BY UNITED STATES.—

“(1) IN GENERAL.—The United States may initiate a proceeding to enjoin a transaction prohibited by this section.

“(2) REBUTTABLE PRESUMPTIONS.—

“(A) IN GENERAL.—In a proceeding initiated by the United States to enjoin a transaction prohibited by this section, it shall be presumed that the effect of a transaction may be substantially to lessen competition, or to tend to create a monopoly, if—

“(i) the United States shows by a preponderance of the evidence that, as a result of the transaction, the combined firm would be able meaningfully to increase prices or reduce output, innovation, or quality in a market; or

"(ii)(I) the transaction would combine persons that compete, would compete, or would attempt to compete against each other, absent the transaction; and

"(II) the combined firm would have a post-transaction share of the market that—

"(aa) is greater than 33 percent; or

"(bb) if the acquiring person is owned or controlled by a foreign government, is greater than 5 percent.

"(B) REBUTTAL.—A defendant may rebut a presumption under clause (i) or (ii) of subparagraph (A) only if the defendant demonstrates by a preponderance of the evidence that—

"(i) the combined parties post-transaction would not be able to exercise market power; or

"(ii) the anticompetitive effects of the transaction—

"(I) are insubstantial; or

"(II) are clearly outweighed by the procompetitive benefits of the transaction in the relevant market.

"(C) RULE OF CONSTRUCTION.—The presumptions under clauses (i) and (ii) of subparagraph (A) shall not limit any other presumption courts have created or used or may create or use in resolving cases under this section.

"(3) IRREBUTTABLE PRESUMPTION.—In a proceeding initiated by the United States to enjoin a transaction prohibited by this section, except to the extent the transaction is necessary to prevent serious harm to the national economy, the effect of a transaction shall be deemed to substantially to lessen competition, or to tend to create a monopoly, if—

"(A) the transaction would combine persons that compete, would compete, or would attempt to compete against each other absent the transaction; and

"(B) the combined firm would have a post-transaction share of the market that is greater than 66 percent.".

SEC. 203. MERGER NOTIFICATION REQUIREMENTS.

(a) IN GENERAL.—Section 7A(a)(2) of the Clayton Act (15 U.S.C. 18a(a)(2)) is amended—

(1) by redesignating subclause (III) of subparagraph (B)(ii) as item (bb);

(2) by striking "(ii)(I) any voting" and all that follows through "(II) any voting securities or assets of a person not engaged in manufacturing" and inserting "(II)(aa) any voting securities or assets of a person";

(3) by striking "(B)(i) in excess" and inserting "(ii)(I) in excess";

(4) by striking "(A) in excess" and inserting "(i) in excess";

(5) by inserting "(A)" after "(2)";

(6) by striking "published) or more." and inserting "published) or more; or"; and

(7) by inserting after subparagraph (A), as so redesignated, the following:

"(B) except with respect to an acquisition made solely for the purpose of investment, the acquiring person—

"(i) has assets in excess of $500,000,000,000; or

"(ii) is owned or controlled by a foreign government.".

(b) REPEAL OF LIMITED NEXUS TO COMMERCE IN THE UNITED STATES EXCEPTION.—

(1) IN GENERAL.—The Assistant Attorney General shall amend sections 802.50 and 802.51 of title 16, Code of Federal Regulations, and any other rule or regulation, to repeal any exception from filing a notification under subsection (a) of section 7A of the Clayton Act (15 U.S.C. 18a) or from the waiting period described in subsection (b)(1) of such section with respect to an acquisition on the basis that the acquisition has a limited nexus with the United States.

(2) LIMITATION.—The Assistant Attorney General may not promulgate or enforce any rule that excludes from the requirements under section 7A of the Clayton Act (15 U.S.C. 18a) any acquisition by or of a person engaged in commerce or in any activity affecting commerce on the basis that the acquisition has a limited nexus with the United States.

TITLE III—COMPETITION POLICY

SEC. 301. COMPETITIVE IMPACT STATEMENT.

(a) DEFINITIONS.—In this section:

(1) ADMINISTRATOR.—The term ‘‘Administrator’’ means the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget.

(2) AGENCY; SIGNIFICANT REGULATORY ACTION.—The terms ''agency'' and ''significant regulatory action'' have the meanings given those terms in section 3 of the Executive Order.

(3) EXECUTIVE ORDER.—The term ''Executive Order'' means Executive Order 12866 (5 U.S.C. 601 note; relating to regulatory planning and review).

(b) REQUIREMENT.—In reviewing a significant regulatory action of an agency in accordance with the Executive Order, the Administrator shall prepare and submit to the agency a competitive impact statement that—

(1) identifies any way in which the significant regulatory action may impact or harm competition in the market to which the significant regulatory action applies; and

(2) provides guidance on how the significant regulatory could be revised to minimize the impact or harm to competition in that market.

SEC. 302. WRITTEN EXPLANATIONS OF ENFORCEMENT AND NON-ENFORCEMENT ACTIONS.

(a) IN GENERAL.—The Assistant Attorney General shall prepare and preserve a written explanation of any decision by the Federal Government not to file a civil action under the antitrust laws after the use of compulsory process by the Federal Government.

(b) AVAILABILITY TO CONGRESS.—Upon request by any Member of Congress, the Assistant Attorney General shall make available an unredacted version of a written explanation described in subsection (a). A Member of Congress shall not disclose an unredacted version of a written explanation received under this subsection.

(c) PUBLIC AVAILABILITY.—

(1) IN GENERAL.—The Assistant Attorney General shall make a written explanation described in subsection (a) publicly available if all subjects of the investigation have acknowledged the existence of the investigation.

(2) OTHER AVAILABILITY.—A written explanation described in subsection (a) may be disclosed in accordance with the procedures and limitations under section 552 of title 5, United States Code (commonly known as the ''Freedom of Information Act''), or any other applicable provision of law.

(3) REDACTION.—Information in a written explanation described in subsection (a) that is made publicly available shall be redacted to protect confidential or competitively sensitive information, which may include the identities of the subjects of the investigation when appropriate.

SEC. 303. STUDIES.

(a) INSTITUTIONAL INVESTORS.—Not later than 2 years after the date of enactment of this Act, the Assistant Attorney General, in consultation with the Securities and Exchange Commission, shall conduct and publish a study, using any compulsory process reasonably necessary, relying on public data and information if available and sufficient, and incorporating public comment, on—

(1) the extent to which an institutional investor or related institutional investors have ownership or control interests in competitors in moderately concentrated or concentrated markets;

(2) the economic impacts of such overlapping ownership or control; and

(3) the mechanisms by which an institutional investor could affect competition among the companies in which it invests and whether such mechanisms are prevalent.

(b) SELF-PREFERENCING BY DIGITAL PLATFORMS.—Not later than 2 years after the date of enactment of this Act, the Assistant Attorney General shall conduct and publish a study, using any compulsory process reasonably necessary, relying on public data and information if available and sufficient, and incorporating public comment, on self-preferencing by digital platforms.

(c) TECHNOLOGY MERGER RETROSPECTIVE.—Not later than 2 years after the date of enactment of this Act, the Assistant Attorney General shall—

(1) conduct a retrospective analysis of mergers involving technology companies completed during the 15-year period ending on the date of enactment of this Act; and

(2) publish a report of the findings of the analysis, which shall include an analysis of the adequacy of any enforcement actions or settlement agreements regarding such mergers.

SEC. 304. MONOPSONY GUIDELINES.

The Assistant Attorney General shall publicly issue guidelines regarding how the Antitrust Division of the Department of Justice analyzes and approaches a matter involving a monopsony under the antitrust laws.

TITLE IV—RESTORING BOARD IMMUNITY

SEC. 401. SHORT TITLE.

This title may be cited as the ‘‘Restoring Board Immunity Act of 2021’’ or the ‘‘RBI Act’’.

SEC. 402. STATEMENT OF FINDINGS AND PURPOSE.

Congress finds the following:

(1) The prevalence of occupational licensing has increased dramatically in recent decades, in part be-

cause private interests have sought licensing in order to limit competition.

(2) Occupational licensing often limits opportunities for workers, frustrates entrepreneurs seeking to introduce new business models, and raises prices paid by consumers.

(3) Licensing should be imposed only to combat real, substantial threats to public health, safety, or welfare and only where other less restrictive regulatory alternatives are insufficient to protect consumers and serve the public interest.

(4) Regulators should consider a range of less restrictive alternatives before enacting an occupational licensing regime, which may include inspections, bonding or insurance requirements, registration, and voluntary certification.

(5) Voluntary certification provides a particularly significant alternative to licensure, as it allows market participants to signal to consumers the attainment of personal qualifications without limiting entry into the marketplace.

(6) The failure of State governments to adopt less restrictive alternatives to licensing, and less burdensome requirements in those areas where licensing

is deemed necessary, has resulted in significant costs to consumers and the broader economy.

(7) The United States Supreme Court responded to these concerns in North Carolina Board of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015), holding that self-interested licensing boards may be subject to liability under the antitrust laws, but that decision has also created significant uncertainty for the States and their licensing boards.

(8) Some States have responded to the decision in North Carolina Board of Dental Examiners by establishing a layer of bureaucratic oversight that merely monitors board actions for consistency with State licensing laws. This response is a missed opportunity for reform, as it does not address the specific competition concern raised in North Carolina Board of Dental Examiners or the underlying problems with over-reliance on occupational licensure as a regulatory approach and with overly broad enforcement of licensing laws as a means to regulate commercial activities outside an occupation's scope of practice.

(9) Legislation is necessary to clarify the requirements of active supervision, both to offer States a clear and certain mechanism to immunize their oc-

cupational boards and to make clear that mere bureaucratic oversight to ensure consistency with State licensing laws does not suffice to confer immunity.

(10) This title is intended to offer States a choice between two alternative routes to achieve immunity for their occupational licensing boards—either establishing a mechanism for meaningful active supervision of licensing boards by State officials or establishing a mechanism for meaningful judicial review of board actions in the State courts.

SEC. 403. DEFINITIONS.

In this title:

(1) CERTIFICATION.—The term ''certification'' means a voluntary program under which—

(A) a private organization (in the case of private certification) or the government of a State (in the case of government certification) authorizes an individual who meets certain personal qualifications to use ''certified'' as a designated title with respect to the performance of a lawful occupation; and

(B) a non-certified individual may perform the lawful occupation for compensation but may not use the title ''certified''.

(2) GOOD FAITH.—The term ''good faith'', with respect to performance—

(A) means diligent performance that is directed towards achieving the policies set forth in this title;

(B) does not include performance that is—

(i) designed to subvert or evade the policies set forth in this title; or

(ii) carried out in a manner that has the systematic effect of subverting or evading the policies set forth in this title; and

(C) refers to an objective, rather than subjective, standard.

(3) LAWFUL OCCUPATION.—The term ''lawful occupation'' means a course of conduct, pursuit, or profession that includes the sale of goods or services that are not themselves illegal to sell irrespective of whether the individual selling the goods or services is subject to occupational licensing laws.

(4) LEAST RESTRICTIVE REGULATION.—The term ''least restrictive regulation'' means, from least to most restrictive:

(A) One or more of the following, each of which shall be considered equally restrictive:

(i) Market competition.

(ii) Industry or consumer-related ratings and reviews.

(iii) Private certification.

(iv) A specific private civil cause of action to remedy consumer harm.

(v) A deceptive trade practice act.

(vi) A regulation of the process of providing the specific goods or services to consumers.

(vii) Inspections.

(viii) Bonding or insurance.

(ix) Registration.

(x) Government certification.

(B) Specialty occupational license for medical reimbursement.

(C) Occupational license.

(5) LESS RESTRICTIVE ALTERNATIVES TO OCCUPATIONAL LICENSING.—The term ‘‘less restrictive alternatives to occupational licensing’’—

(A) means regulations that achieve the public health or safety goals asserted by the government to justify licensing while imposing a less onerous restriction on entry into the marketplace; and

(B) includes the alternative forms of regulation described in paragraph (4)(A).

(6) MEMBER, OFFICER, OR EMPLOYEE.—The term ‘‘member, officer, or employee’’, with respect to an occupational licensing board, means an individual appointed by a State to the board.

(7) OCCUPATIONAL LICENSE.—The term ‘‘occupational license’’ means a nontransferable authorization under law for an individual to perform a lawful occupation for compensation based on meeting personal qualifications established by the State government.

(8) OCCUPATIONAL LICENSING BOARD.—The term ‘‘occupational licensing board’’ or ‘‘board’’ means an entity established under State law—

(A) the express purpose of which is to regulate the personal qualifications required to engage in or practice a particular lawful occupation;

(B) that has authority conferred by State law to interpret or enforce the occupational licensing laws of the State; and

(C) not less than ⅔ of the members of which are appointed by an elected official of the State.

(9) OCCUPATIONAL LICENSING LAW.—The term "occupational licensing law"—

(A) means a State statute that allows an individual to work in a lawful occupation and use an occupational title; and

(B) does not include a business license, facility license, building permit, or zoning and land use regulation, except to the extent that the law regulates an individual's personal qualifications to engage in or practice a lawful occupation.

(10) OCCUPATIONAL REGULATION.—The term "occupational regulation"—

(A) means a statute, rule, practice, policy, or other law that substantially burdens an individual's ability to work in a lawful occupation;

(B) includes a regulation requiring registration, certification, or an occupational license; and

(C) does not include a business license, facility license, building permit, or zoning and land use regulation except to the extent that such a requirement or restriction substantially burdens an individual's ability to work in a lawful occupation.

(11) PERSONAL QUALIFICATIONS.—The term ‘‘personal qualifications’’ means criteria related to an individual’s personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education.

(12) REGISTRATION.—The term ‘‘registration’’ means a requirement that an individual give notice to the government of a State that may include—

(A) the individual’s name and address;

(B) the individual’s agent for service of process;

(C) the location of the activity to be performed; and

(D) a description of the service the individual provides.

(13) SPECIALTY OCCUPATIONAL LICENSE FOR MEDICAL REIMBURSEMENT.—The term ‘‘specialty occupational license for medical reimbursement’’ means a nontransferable authorization in law for an individual to qualify for payment or reimbursement from a government agency for the non-exclusive pro-

vision of medical services based on meeting personal qualifications established by the State legislature.

(14) STATE.—The term ''State'' means—

(A) each of the several States; and

(B) the District of Columbia.

SEC. 404. ANTITRUST IMMUNITY.

(a) IN GENERAL.—Subject to subsection (b), the Sherman Act (15 U.S.C. 1 et seq.) shall not apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of the board acting in the official capacity of that member, officer, or employee, if—

(1) the requirements under section 405 of this title are satisfied; or

(2) the requirements under section 406 of this title are satisfied.

(b) REQUIREMENT OF GOOD FAITH.—The immunity provided under subsection (a) shall not apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of the board acting in the official capacity of that member, officer, or employee, unless the State acts in good faith to perform the applicable requirements under section 405 or 406 of this title.

(c) EXISTING ENTITIES OR PROCEDURES.—The fact that a State governmental entity or procedure was established before the date of enactment of this Act shall not prevent an occupational licensing board of the State, or a member, officer, or employee of that board, from qualifying for immunity under subsection (a) if the State governmental entity or procedure satisfies the applicable requirements under section 405 or 406 of this title.

(d) SAVINGS CLAUSE.—The immunity provided under subsection (a) shall not apply to an action unrelated to regulating the personal qualifications required to engage in or practice a lawful occupation, such as rules of an occupational licensing board governing minimum prices or residency requirements.

SEC. 405. ACTIVE SUPERVISION.

(a) IN GENERAL.—The immunity under section 404(a) shall apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of that board acting in the official capacity of that member, officer, or employee, if—

(1) the actions of the occupational licensing board or member, officer, or employee are authorized by a non-frivolous interpretation of the occupational licensing laws of the State;

(2) the State adopts a policy of using less restrictive alternatives to occupational licensing to address real, substantial threats to public health, safe-

ty, or welfare, in accordance with subsection (b) of this section; and

(3) the State enacts legislation providing for active supervision of the actions of an occupational licensing board and any member, officer, or employee of such a board, in accordance with subsection (c) of this section.

(b) POLICY.—The State shall adopt a policy providing that—

(1) occupational licensing laws should be construed and applied to—

(A) protect public health, safety, and welfare; and

(B) increase economic opportunity, promote competition, and encourage innovation;

(2) regulators should displace competition through occupational licensing laws only if less restrictive alternatives to occupational licensing will not suffice to protect consumers from real, substantial threats to public health, safety, or welfare; and

(3) an occupational licensing law should be enforced against an individual only to the extent the individual sells goods or services that are included explicitly in the statute or regulation that defines the occupation's scope of practice.

(c) ACTIVE SUPERVISION.—

(1) IN GENERAL.—The legislation enacted under subsection (a)(3) shall satisfy each of the requirements under this subsection.

(2) DAY-TO-DAY SUPERVISION.—

(A) ESTABLISHMENT OF OFFICE OF SUPERVISION OF OCCUPATIONAL BOARDS.—The State shall establish an Office of Supervision of Occupational Boards (referred to in this subsection as the ''Office'') to review the actions of occupational licensing boards to ensure compliance with the policy adopted under subsection (b).

(B) DUTIES.—The Office shall—

(i) review and explicitly approve or reject in writing any occupational regulation proposed by an occupational licensing board before the board may adopt or implement the occupational regulation;

(ii) play a substantial role in the development of a board's rules and policies to ensure they benefit consumers and do not serve the private interests of providers of goods and services regulated by the board;

(iii) disapprove in writing the use of any board rule or policy relating to an occupational regulation and terminate any enforcement action, including any such action pending on the date of enactment of this Act, that is inconsistent with the policy adopted under subsection (b);

(iv) exercise control over each board by reviewing and affirmatively approving in writing only occupational regulations that are consistent with the policy adopted under subsection (b);

(v) use the analysis conducted under paragraph (5) and conduct reasonable investigations to gain additional information, including about less restrictive regulatory approaches, to promote compliance with subsection (b);

(vi)(I) be staffed by not less than 1 attorney; and

(II) prohibit attorneys working in the Office from providing general counsel to any board; and

(vii)(I) approve board actions explicitly in writing, rather than implicitly; and

(II) clearly establish that silence or inaction does not constitute approval.

(3) INTERNAL REVIEW.—

(A) COMPLAINT.—The State shall establish a mechanism under which a person who is a resident of or has a license to operate a business in the State may file a complaint with the Office about an occupational regulation of an occupational licensing board in the State that the person believes is inconsistent with the policy adopted under subsection (b).

(B) OFFICE RESPONSE.—Not later than 90 days after the date on which a person files a complaint under subparagraph (A), the Office shall—

(i) investigate the complaint;

(ii) identify remedies and instruct the board to take action, where appropriate; and

(iii) respond in writing to the complainant.

(C) REVIEW.—The State shall establish a mechanism for review of a determination made by the Office under subparagraph (B), under which a complainant may appeal the determination to the general division of the trial court of the State if the challenged occupational regulation would substantially burden the complainant's ability to—

(i) engage in a lawful occupation; or

(ii) employ or contract other individuals for the performance of a lawful occupation.

(4) RIGHT TO RAISE DEFENSE.—

(A) IN GENERAL.—The State shall authorize an individual to assert as a defense, in any administrative or judicial proceeding to enforce an occupational regulation, that the regulation does not comply with the policy adopted under subsection (b).

(B) PROCEDURES.—In a proceeding described in subparagraph (A)—

(i) an individual who asserts a defense under this paragraph has the initial burden of proof that the occupational regulation being enforced substantially burdens the individual's ability to engage in a lawful occupation;

(ii) if an individual meets the burden of proof under clause (i), the State shall be required to demonstrate by clear and convincing evidence that the occupational regulation—

(I) advances an important government interest in protecting against real, substantial threats to public health, safety, or welfare; and

(II) is substantially related to achievement of the important government interest described in subclause (I), in light of the availability of less restrictive alternatives to occupational licensing; and

(iii) in reviewing an alleged violation of the policy adopted under subsection (b), an administrative agency or a court—

(I) shall make its own findings of fact and conclusions of law;

(II) may not rely on a legislative finding of fact presented in admissible form to the agency or court; and

(III) may not grant any presumption to a legislative determination—

(aa) of harm to public health, safety, or welfare; or

(bb) that the occupational regulation is substantially related to achievement of the important government interest described in clause (ii)(I).

(5) PERIODIC ADVISORY REVIEW.—

(A) IN GENERAL.—The State shall establish a mechanism for periodic non-binding review of existing occupational regulations, and non-binding review of new proposed occupational regulations, to ensure that the occupational regulations comply with the policy adopted under subsection (b).

(B) SCOPE OF REVIEW.—The entity conducting the review under subparagraph (A)—

(i) shall publish an annual written report encompassing approximately 20 percent of the occupations subject to occupational regulations within the State, such that the entity will review all occupational regulations within the State during each 5-year period; and

(ii) shall publish a written report assessing any proposed occupational licensing law, or other proposed law that would expand the authority of an occupational licensing board to impose occupational regulations, before the proposed law is submitted to a vote by the State legislature.

(C) REQUIREMENTS FOR ANALYSIS.—In conducting the review required under subparagraph (A), the entity shall—

(i) determine whether the law or other regulation satisfies the policy adopted under subsection (b) of using the least restrictive regulation necessary to protect consumers from real, substantial threats to public health, safety, or welfare;

(ii) evaluate the effects of the law or other regulation on opportunities for workers, consumer choices and costs, general unemployment, market competition, governmental costs, and other effects;

(iii) compare the law or other regulation to whether and how other States regulate the applicable occupation; and

(iv) if the applicable occupation is subject to an occupational licensing law, evaluate—

(I) the feasibility of entering into reciprocity compacts with one or more other States to improve worker mobility and labor market flexibility; and

(II) the advisability of endorsing occupational licenses granted by other States to spouses of active service military members as if those occupational licenses were granted by the State conducting the review.

SEC. 406. JUDICIAL REVIEW.

(a) IN GENERAL.—The immunity under section 404(a) shall apply to any action of an occupational licensing board of a State, or any action of a member, officer, or employee of that board acting in the official capacity of that member, officer, or employee, if—

(1) the actions of the occupational licensing board or member, officer, or employee are authorized by a non-frivolous interpretation of the occupational licensing laws of the State;

(2) the State adopts a policy of using less restrictive alternatives to occupational licensing to ad-

dress real, substantial threats to public health, safety, or welfare, in accordance with section 405(b); and

(3) the State enacts legislation providing for judicial review of occupational licensing laws, in accordance with subsection (b) of this section.

(b) JUDICIAL REVIEW LEGISLATION.—Legislation enacted by a State under subsection (a)(3)—

(1) shall—

(A) prohibit the State and any occupational licensing board from imposing an occupational licensing law unless the State—

(i) identifies an important government interest in protecting against real, substantial threats to public health, safety, or welfare; and

(ii) demonstrates that the occupational licensing law is substantially related to achievement of the important government interest described in clause (i), in light of the availability of less restrictive alternatives to occupational licensing;

(B) provide an affirmative defense against enforcement of any occupational licensing law of the State under which the State shall be required to demonstrate that the standard under subparagraph (A) has been met;

(C) establish a cause of action under which—

(i) a person may bring an action for injunctive relief against enforcement of an occupational licensing law of the State;

(ii) the plaintiff bears the initial burden to prove that the challenged occupational licensing law substantially burdens the plaintiff's ability to engage in a lawful occupation; and

(iii) once the plaintiff makes the initial showing under clause (ii), the State is required to demonstrate that the standard under subparagraph (A) has been met;

(D) provide for an award of reasonable costs and attorney fees to a person who successfully challenges the application of an occupational licensing law of the State by—

(i) raising an affirmative defense under subparagraph (B); or

(ii) bringing an action under subparagraph (C); and

(E) provide for independent judicial review of the occupational licensing laws of the State to ensure that the standard set forth in subparagraph (A) has been met; and

(2) may not authorize a court to—

(A) uphold enforcement of an occupational licensing law of the State simply because the court believes the law is rationally related to a legitimate governmental purpose;

(B) rely on hypothetical risks to public safety, not substantiated by evidence in the record, to uphold enforcement of an occupational licensing law of the State;

(C) defer to factual or legal conclusions of another person or entity, rather than exercising independent review; or

(D) rely on a post hoc justification for the action of an occupational licensing board that was not put forward by the board at the time of the challenged action.

(c) RULE OF CONSTRUCTION.—Nothing in subsection (b) shall be construed to require legislation enacted by a State under subsection (a)(3) to provide a right to recover monetary damages, other than reasonable costs and attorney fees as provided under subsection (b)(1)(D).

TITLE V—OTHER IMPROVEMENTS TO ANTITRUST LAWS

SEC. 501. OVERTURNING ILLINOIS BRICK AND HANOVER SHOE.

Section 4 of the Clayton Act (15 U.S.C. 15) is amended—

(1) in subsection (a), in the first sentence—

(A) by striking ‘‘subsection (b)’’ and inserting ‘‘subsections (b) and (c)’’; and

(B) by inserting ‘‘, including an indirect purchaser,’’ after ‘‘business or property’’;

(2) by redesignating subsection (c) as subsection (f); and

(3) by inserting after subsection (b) the following:

‘‘(c)(1) In the case of a person who was injured by a violation of the antitrust laws and who resold any property or service that was the subject of the violation, the amount of the damages sustained by the person shall not include the amount of any overcharge by the defendant (or portion thereof) that the person passed on to a subsequent purchaser of the property or service that was the subject of the violation.

"(2) The defendant shall bear the burden of proving the amount of any overcharge passed on to a subsequent purchaser.".

SEC. 502. LIMITATIONS ON IMPLIED IMMUNITY FROM THE ANTITRUST LAWS.

(a) IN GENERAL.—In any action or proceeding to enforce the antitrust laws with respect to conduct that is regulated under Federal statute, no court or adjudicatory body may find that the Federal statute, or any rule or regulation promulgated in accordance with the Federal statute, implicitly precludes application of the antitrust laws to the conduct unless—

(1) a Federal agency or department actively regulates the conduct under the Federal statute;

(2) the Federal statute does not include any provision preserving the rights, claims, or remedies under the applicable antitrust laws or under any area of law that includes the antitrust laws; and

(3) the Federal agency or department rules or regulations, adopted by rulemaking or adjudication, explicitly require or authorize the defendant to undertake the conduct.

(b) EXISTING FEDERAL REGULATION.—In any action or proceeding described in subsection (a), the antitrust laws shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments, unless application of the antitrust laws is precluded or limited by—

(1) an explicit exemption from the antitrust laws under a Federal statute; or

(2) an implied immunity that satisfies the requirements under subsection (a).

SEC. 503. PREJUDGMENT INTEREST.

Section 4(a) of the Clayton Act (15 U.S.C. 15), as amended by section 502 of this Act, is amended by striking ''may sue therefor'' and all that follows and inserting ''may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, the cost of suit, including a reasonable attorney's fee, and simple interest on threefold the damages by him sustained for the period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment.''.

SEC. 504. SAFE HARBOR FOR EFFORTS TO FACILITATE DATA PORTABILITY AND INTEROPERABILITY.

(a) In General.—Except as provided in subsection (b), it shall not constitute a violation of the antitrust laws for 2 or more persons providing comparable interactive computer services (as defined in section 230(f) of the Communications Act of 1934 (47 U.S.C. 230(f))) to enter into a joint venture or similar partnership to create standard protocols for data portability or interoperability between the interactive computer services if—

(1) the joint venture or similar partnership does not exclude from the joint venture or similar partnership any person that offers comparable interactive computer services; and

(2) the standard protocols do not restrict competition in any market.

(b) Exception for Per Se Violations.—Subsection (a) shall not apply to conduct constituting a per se violation of section 1 of the Sherman Act (15 U.S.C. 1).

SEC. 505. STUDY OF ASSIGNING ALL ANTITRUST CASES TO CERTAIN DISTRICT COURTS OF THE UNITED STATES.

Not later than 1 year after the date of enactment of this Act, the Director of the Administrative Office of the United States Courts shall submit to Congress a report reviewing the feasibility, possible benefits, and potential harms of establishing a program to designate certain district courts of the United States that will hear cases raising 1 or more claims under the antitrust laws.

SEC. 506. BALANCING HARM AND BENEFITS.

The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) by redesignating section 28 (15 U.S.C. 27) as section 31; and

(2) by inserting after section 27 the following:

"SEC. 28. BALANCING HARM AND BENEFITS.

"(a) IN GENERAL.—In any civil action brought under this Act or the Sherman Act (15 U.S.C. 1 et seq.), a court may consider a benefit, efficiency, or other mitigating factor only to the degree that it—

"(1) is tied to the market in which competition or consumers are harmed;

"(2) can reasonably be achieved only through the conduct or transaction at issue;

"(3) is reasonably quantifiable;

"(4) will accrue to the consumer; and

"(5) has a high likelihood of being achieved.

"(b) EXAMINATION OF COMPETITIVE EFFECTS.—In examining the competitive effects of conduct or a transaction challenged under any of the antitrust laws, a court shall consider exclusively the effects of the challenged conduct or transaction on consumer welfare, including price, output, quality, innovation, and consumer choice.

"(c) RULE OF CONSTRUCTION.—Nothing in this section shall be construed to require that, in the aggregate, in-market benefits, efficiencies, or mitigating factors outnumber or outweigh any out-of-market benefits, efficiencies, or mitigating factors.

"(d) DEFINITION OF CONSUMER.—In this section, the term 'consumer' includes buyers and sellers.".

SEC. 507. ACTIONS ON BEHALF OF CONSUMERS UNDER SHERMAN ACT.

Section 4 of the Clayton Act (15 U.S.C. 15), is amended—

(1) by inserting after subsection (c), as added by section 501 of this Act, the following:

"(d)(1) The Assistant Attorney General may bring an action on behalf of persons in the United States injured in their business or property by reason of anything forbidden under the Sherman Act (15 U.S.C. 1 et seq.) in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages sustained by such persons, and the cost of suit, including a reasonable attorney's fee.

"(2)(A) The court may award under this subsection, pursuant to a motion by the Assistant Attorney General promptly made, simple interest on actual damages in accordance with the requirements under subsection (a).

"(B) A court may not award any damages under this subsection that are duplicative of damages awarded before the date of the award under this subsection in a separate civil action pertaining to the same conduct and injured party.

"(C) A court awarding damages to a person in a civil action after the date of an award of damages under this subsection that would be duplicative of damages awarded to the Assistant Attorney General on behalf of the person shall direct that such damages shall first be paid by the Assistant Attorney General from amounts in the Fund and, to the extent such damages are not fully paid from amounts in the Fund, shall be paid by the defendant.

"(3)(A) There is established in the Treasury of the United States a fund to be known as the 'Antitrust Consumer Damages Fund' (in this subsection referred to as the 'Fund'), which shall consist of amounts deposited under subparagraph (B).

"(B) Notwithstanding section 3302 of title 31, United States Code, any amounts received by the Assistant Attorney General under an award under this subsection—

"(i) shall be deposited in the Fund; and

"(ii) shall be available to the Assistant Attorney General, without further appropriation, for distribution to persons in the United States harmed by the applicable violation of the Sherman Act (15 U.S.C. 1 et seq.).

"(4) Effective on the day after the date that is 10 years after the date on which an award is received under this subsection, the unobligated balances in the Fund of amounts that were received under the award are rescinded and shall be deposited in the general fund of the Treasury."; and

(2) in subsection (f), as so redesignated by section 501 of this Act—

(A) by redesignating paragraphs (1) and (2) as paragraphs (2) and (3), respectively; and

(B) by inserting before paragraph (1) the following:

"(1) the term 'Assistant Attorney General' means the Assistant Attorney General in charge of the Antitrust Division of the Department of Justice;".

SEC. 508. CIVIL FINES FOR KNOWING VIOLATIONS OF THE ANTITRUST LAWS.

Section 4 of the Clayton Act (15 U.S.C. 15), is amended by inserting after subsection (d), as added by section 507 of this Act, the following:

"(e)(1) In this subsection, the term 'covered antitrust laws' means any provision of the antitrust laws, other than section 7 of this Act.

"(2)(A) In an action brought by the Assistant Attorney General in an appropriate district court of the United States, the court may impose a civil fine against any person who engaged in a knowing violation of any provision of the covered antitrust laws.

"(B) The maximum amount of a civil fine imposed on a person under subparagraph (A) shall be 15 percent of the total of the gross income of the person from the line of business at issue during each year during which the person engaged in the violation.

"(3) A civil fine under paragraph (2) shall be in addition to any damages awarded or other remedy imposed in connection with the violation of the provision of the covered antitrust laws.".

SEC. 509. DIRECT EVIDENCE OF INTENT TO AVOID OR RESTRICT COMPETITION.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 28, as added by section 506 of this Act, the following:

"SEC. 29. DIRECT EVIDENCE OF INTENT TO AVOID OR RESTRICT COMPETITION.

''In any civil action brought under this Act or the Sherman Act (15 U.S.C. 1 et seq.), if there is direct evidence that the conduct or transaction at issue was undertaken with the clear intent to harm or prevent competition, which shall not require proof that the person knowingly violated the antitrust laws, the court shall deem the conduct or transaction to be anticompetitive.''.

SEC. 510. LIMIT ON CONTRACTING.

The head of an Executive agency may not award a contract for the procurement of goods or services to any person that has been found by a trier of fact in a court of competent jurisdiction to have violated any of the antitrust laws, except for section 7 of the Clayton Act (15 U.S.C. 18), on or after the date that is 5 years before the date on which the procurement process for the goods or services begins.

SEC. 511. PROHIBITING DISCRIMINATION IN DISTRIBUTION.

The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 29, as added by section 509 of this Act, the following:

"SEC. 30. PROHIBITING DISCRIMINATION IN DISTRIBUTION.

"(a) DEFINITIONS.—In this section:

"(1) DISTRIBUTED PRODUCT.—The term 'distributed product' means a good or service that is distributed by a person other than the person which manufactures or provides the good or service.

"(2) DISTRIBUTION MARKET.—The term 'distribution market' means the geographic and product markets for the distribution of a distributed product.

"(b) DISCRIMINATION BY PERSONS WITH MONOPOLY POWER.—A person with monopoly power in a distribution market, that also offers a product or service that competes with a distributed product in the distribution market in which it has monopoly power, may not engage in discrimination in that distribution market that harms competition in the market for the distributed product.".

SEC. 512. AUTHORIZATIONS OF APPROPRIATIONS.

There is authorized to be appropriated for the Antitrust Division of the Department of Justice $600,000,000 for fiscal year 2022.

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