AMENDMENT NO. __________ Calendar No. ______

Purpose: In the nature of a substitute.


S. 2992

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

Referred to the Committee on ________________ and ordered to be printed

Ordered to lie on the table and to be printed

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

Viz:

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

3 SECTION 1. SHORT TITLE.

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

6 SEC. 2. DEFINITIONS.

(a) IN GENERAL.—In this Act:

(1) ANTITRUST LAWS; PERSON.—The terms “antitrust laws” and “person” have the meanings given the terms in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12).
(2) BUSINESS user.—The term “business user”—

(A) means a person that uses or is likely to use a covered platform for the advertising, sale, or provision of products or services, including such persons that are operating a covered platform or are controlled by a covered platform operator; and

(B) does not include a person that—

(i) is a clear national security risk; or

(ii) is controlled by the Government of the People’s Republic of China or the government of a foreign adversary.

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

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

(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) in the event of the dissolution of the person, having the right to 25 percent or more of the assets of the person;
(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 exercising substantial control
over the person.

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

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

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

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

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

(II) 100,000 United States-based
monthly active business users on the
online platform;
(ii) during—

(I) the 2 years preceding a designation under section 3(d), or the 2 years preceding the filing of a complaint for an alleged violation of this Act—

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

(bb) during any 180-day period during the 2-year period, has an average market capitalization greater than $550,000,000,000, adjusted for inflation on the basis of the Consumer Price Index; or

(II) the 12 months preceding a designation under section 3(d), or at any point during the 12 months preceding the filing of a complaint for an alleged violation of this Act, has at
least 1,000,000,000 worldwide monthly active users on the online platform; 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) **Critical Trading Partner.**—The term “critical trading partner” means a person that has the ability to restrict or materially impede the access of—

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

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

(7) **Data.**—The term “data” includes information that is collected by or provided to a covered platform or business user that is linked, or reasonably linkable, to a specific—

(A) user or customer of the covered platform; or

(B) user or customer of a business user.

(8) **Foreign Adversary.**—The term “foreign adversary” has the meaning given the term in sec-
tion 8(c) of the Secure and Trusted Communications
Networks Act of 2019 (47 U.S.C. 1607(e)).

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

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

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

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

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

and

(B) does not include a service by wire or
radio that provides the capability to transmit
data to and receive data from all or substan-
tially all internet endpoints, including any ca-
bilites that are incidental to and enable the op-
eration of the communications service.
(10) **STATE.**—The term “State” means a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States.

(b) **REGULATIONS.**—Not later than 180 days after the date of enactment of this Act, the Commission, with the concurrence of the Department of Justice, shall promulgate regulations 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.

**SEC. 3. UNLAWFUL CONDUCT.**

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

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

(2) limit the ability of the products, services, or lines of business of another business user to compete on the covered platform relative to the products, services, or lines of business of the covered platform operator in a manner that would materially harm competition;
(3) discriminate in the application or enforcement of the terms of service of the covered platform among similarly situated business users in a manner that would materially harm competition;

(4) materially restrict, impede, or unreasonably delay the capacity of a business user to access or interoperate with the same platform, operating system, or hardware or software features that are available to the products, services, or lines of business of the covered platform operator that compete or would compete with products or services offered by business users on the covered platform, except where such access would lead to a significant cybersecurity risk;

(5) 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 that are not part of or intrinsic to the covered platform;

(6) use nonpublic data that are obtained from or generated on the covered platform by the activities of a business user or by the interaction of a covered platform user with the products or services of a business user to offer, or support the offering of,
the products or services of the covered platform oper-
ator that compete or would compete with products or services offered by business users on the covered platform;

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

(8) materially restrict or impede covered platform users from uninstalling 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, unless necessary—

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

(B) to prevent data from the covered platform operator or another business user from being transferred to the Government of the
People’s Republic of China or the government
of a foreign adversary;

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

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

(b) AFFIRMATIVE DEFENSES.—

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

(A) prevent a violation of, or comply with,
Federal or State law;
(B) protect safety, user privacy, the security of nonpublic data, or the security of the covered platform; or

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

(2) ADDITIONAL AFFIRMATIVE DEFENSES.—It shall be an affirmative defense to an action under paragraph (4), (5), (6), (7), (8), (9), or (10) of subsection (a) if the defendant establishes that the conduct has not resulted in and would not result in material harm to competition.

(3) EFFECT OF OTHER LAWS.—Notwithstanding any other provision of law, whether user conduct would constitute a violation of section 1030 of title 18, United States Code, shall have no effect on whether the defendant has established an affirmative defense under this Act.

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

(c) ENFORCEMENT.—

(1) IN GENERAL.—Except as otherwise provided in this Act—

(A) the Commission 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 of the Federal
were incorporated into and made a part of this
Act;

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

(C) any attorney general of a State 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 of the Sherman Act (15 U.S.C. 1 et seq.)
and the Clayton Act (15 U.S.C. 12 et seq.)
were incorporated into and made a part of this
Act.

(2) COMMISSION INDEPENDENT LITIGATION AU-
THORITY.—If the Commission has reason to believe
that a person 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 re-
lief in a district court of the United States.

(3) PARENTES 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 juris-
diction of the defendant for any form of relief pro-
vided for in this section.

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

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

(6) REMEDIES.—

(A) IN GENERAL.—The remedies provided
in this paragraph are in addition to, and not in
lieu of, any other remedy available under Fed-
eral or State law.
(B) CIVIL PENALTY.—Any person who violates this Act shall forfeit and pay to the United States a civil penalty in an amount that is sufficient to deter violations of this Act, but not greater than 10 percent of the total United States revenue of the person for the period of time the violation occurred.

(C) INJUNCTIONS.—

(i) IN GENERAL.—The Department of Justice, the Commission, or the attorney general of any State may seek, and the court may order, relief in equity as necessary to prevent, restrain, or prohibit violations of this Act.

(ii) TEMPORARY INJUNCTIONS.—

(I) IN GENERAL.—The Commission, Department of Justice, 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.

(II) GRANT.—The court may grant a temporary injunction under this clause if the Commission, the De-
department of Justice, or the attorney
general of a State, as applicable, dem-
onstrates—

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

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

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

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

(IV) TERMINATION.—The court
shall terminate a temporary injunction
under this clause if the covered platform operator demonstrates that—

(aa) the Commission, the Department of Justice, or the attorney general of the State seeking relief under this subsection has not taken reasonable steps to investigate whether a violation has occurred; or

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

(V) OTHER EQUITABLE RELIEF.—Nothing in this clause shall prevent or limit the Commission, the Department of Justice, or any attorney general of any State from seeking other equitable relief, including the relief provided in this paragraph.

(D) FORFEITURE FOR REPEAT OFFENDERS.—

(i) IN GENERAL.—If a person has engaged in a pattern or practice of violating this Act, the court shall consider requiring, and may order, that the chief executive of-
ficer of the person, and any other cor-
porate officer of the person as appropriate
to deter violations of this Act, forfeit to the
United States Treasury any compensation
received by that chief executive officer or
corporate officer during the 12 months
preceding the filing of a complaint for an
alleged violation of this Act.

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

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

(8) RULES OF CONSTRUCTION.—
(A) IN GENERAL.—Nothing in subsection (a) may be construed—

(i) to require a covered platform operator to divulge or license any intellectual property, including any trade secrets, business secrets, or other confidential proprietary business processes, owned by or licensed to the covered platform operator;

(ii) to prevent a covered platform operator from asserting its preexisting rights under intellectual property law to prevent the unauthorized use of any intellectual property owned by or duly licensed to the covered platform operator;

(iii) to require a covered platform operator to interoperate or share data with persons or business users that are on any list maintained by the Federal Government by which entities—

(I) are identified as limited or prohibited from engaging in economic transactions as part of United States sanctions or export-control regimes; or
(II) have been identified as national security, intelligence, or law enforcement risks;
(iv) to prohibit a covered platform operator from promptly requesting and obtaining the consent of a covered platform user prior to providing access to the non-public, personally identifiable information of the user to a covered platform user under that subsection;
(v) in a manner that would likely result in data on the covered platform or data from another business user being transferred to the Government of the People’s Republic of China or the government of a foreign adversary; or
(vi) to impose liability on a covered platform operator solely for offering—
(I) full end-to-end encrypted messaging or full end-to-end encrypted communication products or services;
or
(II) a fee-for-service subscription that provides benefits to covered platform users on the covered platform.
(B) COPYRIGHT AND TRADEMARK VIOLATIONS.—An action taken by a covered platform operator that is reasonably tailored to protect the rights of third parties under section 106, 1101, 1201, or 1401 of title 17, United States Code, or rights actionable under section 32 or 43 of the Act entitled “An Act to provide for the registration and protection of trademarks used in commerce, to carry out the provisions of certain international conventions, and for other purposes”, approved July 5, 1946 (commonly known as the “Lanham Act” or the “Trademark Act of 1946”) (15 U.S.C. 1114, 1125), or corollary State law, shall not be considered unlawful conduct under subsection (a).

(d) COVERED PLATFORM DESIGNATION.—

(1) IN GENERAL.—The Commission and the Department of Justice may jointly, with concurrence of the other, designate an online platform as a covered platform for the purpose of implementing and enforcing this Act, which shall—

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

(B) be issued in writing and published in the Federal Register; and
(C) except as provided in paragraph (2), apply for a 7-year period beginning on the date on which the designation is issued, regardless of whether there is a change in control or ownership over the covered platform.

(2) Removal of Covered Platform Designation.—The Commission or the Department of Justice shall—

(A) consider whether a designation of a covered platform under paragraph (1) should be removed prior to the expiration of the 7-year period if the covered platform operator files a request with the Commission or the Department of Justice that shows that the online platform no longer meets the criteria set forth in section 2(a)(5)(B);

(B) determine whether to grant a request submitted under subparagraph (A) not later than 120 days after the date on which the request is filed;

(C) obtain the concurrence of the Commission or the Department of Justice, as appropriate, before granting a request submitted under subparagraph (A); and
(D) publish any decision to grant or deny removal of a covered platform designation in the Federal Register.

(3) JUDICIAL REVIEW.—Any person operating an online platform that has been designated as a covered platform under paragraph (1) or whose request for removal of such a designation under paragraph (2) is denied may, within 30 days of the issuance of such designation or decision, petition for review of such designation or decision in the United States Court of Appeals for the District of Columbia Circuit.

SEC. 4. ENFORCEMENT GUIDELINES.

(a) IN GENERAL.—Not later than 270 days after the date of enactment of this Act, the Commission and the Department of Justice, in consultation with other relevant Federal agencies and State attorneys general, shall jointly issue agency enforcement guidelines outlining policies and practices relating to conduct that may materially harm competition under section 3(a), agency interpretations of the affirmative defenses under section 3(b), and policies for determining the appropriate amount of a civil penalty to be sought under section 3(c), with the goal of promoting transparency, deterring violations, fostering innovation
and procompetitive conduct, and imposing sanctions pro-
portionate to the gravity of individual violations.

(b) Updates.—The Commission and the Depart-
ment of Justice 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.

e) Public Notice and Comment.—Before issuing
guidelines, or updates to those guidelines, under this sec-
tion, the Commission and the Department of Justice
shall—

(1) publish proposed guidelines in draft form;

and

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

(d) Operation.—The joint guidelines issued under
this section do not—

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

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

Nothing in this Act may be construed to limit—

(1) any authority of the Department of Justice or the 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

(2) the application of any law.

SEC. 6. 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.

SEC. 7. EFFECTIVE DATE.

(a) In General.—Except as provided in subsection (b), this Act shall take effect on the date of enactment of this Act.

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

(c) Authority.—The exception in subsection (b) shall not limit the authority of the Commission or Department of Justice to implement other sections of this Act.