119TH CONGRESS
1ST SESSION

S. _____

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

_____

IN THE SENATE OF THE UNITED STATES

_____

Mrs. BLACKBURN (for herself, Mr. BLUMENTHAL, Mr. LEE, Ms. KLOBUCHAR, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on _____

_____

A BILL

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

1   *Be it enacted by the Senate and House of Representa-*

2   *tives of the United States of America in Congress assembled,*

3   **SECTION 1. SHORT TITLE.**

4   This Act may be cited as the "Open App Markets

5   Act".

6   **SEC. 2. DEFINITIONS.**

7   In this Act:

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

9   application or electronic service that may be run or

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

2   or any other general purpose consumer computing

3   device.

4   (2) APP STORE.—The term "app store" means

5   a publicly available website, software application, or

6   other electronic service that distributes apps from

7   third-party developers to users of a computer, a mo-

8   bile device, or any other general purpose consumer

9   computing device.

10   (3) COVERED COMPANY.—The term "covered

11   company" means any person that owns or controls—

12   (A) an app store for which users in the

13   United States exceed 50,000,000 on a monthly

14   basis (inclusive of support functions associated

15   with the app store such as updates to apps);

16   and

17   (B) the operating system or operating sys-

18   tem configuration on which the app store de-

19   scribed in subparagraph (A) operates.

20   (4) DEVELOPER.—The term "developer" means

21   a person that owns or controls an app or an app

22   store.

23   (5) IN-APP PAYMENT SYSTEM.—The term "in-

24   app payment system" means an application, service,

1   or user interface to manage billing or process the

2   payments from users of an app.

3   (6) NONPUBLIC BUSINESS INFORMATION.—The

4   term "nonpublic business information" means non-

5   public data that is—

6   (A) derived from a developer or an app or

7   app store owned or controlled by a developer,

8   including interactions between users and the

9   app or app store of the developer; and

10   (B) collected by a covered company in the

11   course of operating an app store or providing

12   an operating system.

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

14 (a) EXCLUSIVITY AND TYING.—A covered company

15 shall not—

16   (1) require developers to use or enable an in-

17   app payment system owned or controlled by the cov-

18   ered company or any of its business partners as a

19   condition of the distribution of an app on an app

20   store or being accessible on an operating system;

21   (2) require as a term of distribution on an app

22   store that pricing terms or conditions of sale be

23   equal to or more favorable on its app store than the

24   terms or conditions under another app store; or

1   (3) take punitive action or otherwise impose

2 less favorable terms and conditions against a devel-

3 oper—

4   (A) for using or offering different pricing

5 terms or conditions of sale through another in-

6 app payment system or on another app store; or

7   (B) on the basis that an app provides ac-

8 cess to other third-party apps or games through

9 remote electronic services rather than through

10 download from an app store.

11   (b) INTERFERENCE WITH LEGITIMATE BUSINESS

12 COMMUNICATIONS.—A covered company shall not impose

13 restrictions on communications of developers with the

14 users of an app of the developer through the app or direct

15 outreach to a user concerning legitimate business offers,

16 such as pricing terms and product or service offerings.

17 Nothing in this subsection shall prohibit a covered com-

18 pany from requiring that an app acquire user consent

19 prior to the collection and sharing of the data of the user

20 by an app.

21   (c) NONPUBLIC BUSINESS INFORMATION.—A cov-

22 ered company shall not use nonpublic business information

23 derived from a third-party app for the purpose of com-

24 peting with that app.

1   (d) INTEROPERABILITY.—A covered company that

2   controls the operating system or operating system configu-

3   ration on which its app store operates shall allow and pro-

4   vide readily accessible means for users of that operating

5   system to—

6   (1) choose third-party apps or app stores as de-

7   faults;

8   (2) install third-party apps or app stores

9   through means other than its app store; and

10   (3) hide or delete apps or app stores provided

11   or preinstalled by the covered company or any of its

12   business partners.

13   (e) SELF-PREFERENCING IN SEARCH.—

14   (1) IN GENERAL.—A covered company shall not

15   provide unequal treatment of apps in an app store

16   through ranking schemes, user interface features, or

17   algorithms that unreasonably preference or rank the

18   apps of the covered company or any of its business

19   partners over those of other apps in organic search

20   results.

21   (2)   CONSIDERATIONS.—Unreasonably

22   preferencing does not include clearly disclosed adver-

23   tising.

24   (f) OPEN APP DEVELOPMENT.—

1 (1) ACCESS.—A covered company shall provide

2 access to operating system interfaces and hardware

3 and software features to developers that are gen-

4 erally available to the public.

5 (2) DOCUMENTATION.—A covered company

6 shall provide documentation and development infor-

7 mation sufficient to access such interfaces and fea-

8 tures.

9 (3) TIMELY AND EQUIVALENT BASIS.—A cov-

10 ered company shall provide the access and docu-

11 mentation under this subsection on a reasonably

12 timely basis and on terms that are equivalent to the

13 terms for access by the covered company or to its

14 business partners.

15 **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**

16 **USERS.**

17 (a) IN GENERAL.—

18 (1) NO VIOLATION.—Subject to section (b), a

19 covered company shall not be in violation of section

20 3 for an action that is—

21 (A) necessary to achieve user privacy or se-

22 curity;

23 (B) taken to prevent spam or fraud;

24 (C) necessary to prevent unlawful infringe-

25 ment of preexisting intellectual property; or

1   (D) taken to prevent a violation of, or

2   comply with, Federal or State law.

3   (2) PRIVACY AND SECURITY PROTECTIONS.—In

4 paragraph (1), the term "necessary to achieve user

5 privacy or security" includes—

6   (A) allowing an end user to opt in, and

7   providing information regarding the reasonable

8   risks, prior to enabling installation of the third-

9   party apps or app stores;

10   (B) removing malicious or fraudulent apps

11   or app stores from an end user device;

12   (C) providing an end user with the means

13   to verify the authenticity and origin of third-

14   party apps or app stores; and

15   (D) providing an end user with the option

16   to limit access to the user's device or device fea-

17   tures, or limit the collection and sharing of the

18   data of the user with third-party apps or app

19   stores.

20 (b) REQUIREMENTS.—

21   (1) IN GENERAL.—Subsection (a) shall only

22 apply if the covered company establishes by a pre-

23 ponderance of the evidence that the action described

24 in that subsection is—

1   (A) applied on a demonstrably consistent

2   basis to—

3   (i) apps of the covered company or its

4   business partners; and

5   (ii) other apps; and

6   (B) narrowly tailored and could not be

7   achieved through a less discriminatory and

8   technically possible means.

9   (2) CERTIFICATION.—The principal executive

10 officer or officers of the covered company, or persons

11 performing similar functions shall submit to the

12 court a certification made under penalty of perjury

13 in accordance with section 1746 of title 28, United

14 States Code, that the action described in subsection

15 (a) is not used as a pretext to exclude, or impose un-

16 necessary or discriminatory terms on, third-party

17 apps, in-app payment systems, or alternative app

18 stores.

19 **SEC. 5. ENFORCEMENT.**

20 (a) ENFORCEMENT.—

21   (1) IN GENERAL.—The Federal Trade Commis-

22 sion, the Attorney General, and any attorney general

23 of a State subject to the requirements in paragraph

24 (3) shall enforce this Act in the same manner, by

25 the same means, and with the same jurisdiction,

1 powers, and duties as though all applicable terms

2 and provisions of the Federal Trade Commission Act

3 (15 U.S.C. 41 et seq.), the Sherman Act (15 U.S.C.

4 1 et seq.), the Clayton Act (15 U.S.C. 12 et seq.),

5 and the Antitrust Civil Process Act (15 U.S.C. 1311

6 et seq.), as appropriate, were incorporated into and

7 made a part of this Act.

8 (2) FEDERAL TRADE COMMISSION INDE-

9 PENDENT LITIGATION AUTHORITY.—If the Federal

10 Trade Commission has reason to believe that a cov-

11 ered company violated this Act, the Federal Trade

12 Commission may commence a civil action, in its own

13 name by any of its attorneys designated by it for

14 such purpose, to recover a civil penalty and seek

15 other appropriate relief in a district court of the

16 United States against the covered company.

17 (3) PARENS PATRIAE.—Any attorney general of

18 a State may bring a civil action in the name of such

19 State for a violation of this Act as parens patriae on

20 behalf of natural persons residing in such State, in

21 any district court of the United States having juris-

22 diction of the defendant, and may secure any form

23 of relief provided for in this section.

24 (b) SUITS BY DEVELOPERS INJURED.—

1   (1) IN GENERAL.—Except as provided in para-
2   graph (3), any developer injured by reason of any-
3   thing forbidden in this Act may sue therefor in any
4   district court of the United States in the district in
5   which the defendant resides or is found or has an
6   agent, without respect to the amount in controversy,
7   and shall recover threefold the damages by the devel-
8   oper sustained and the cost of suit, including a rea-
9   sonable attorney's fee. The court may award under
10   this paragraph, pursuant to a motion by such devel-
11   oper promptly made, simple interest on actual dam-
12   ages for the period beginning on the date of service
13   of the pleading of the developer setting forth a claim
14   under this Act and ending on the date of judgment,
15   or for any shorter period therein, if the court finds
16   that the award of such interest for such period is
17   just in the circumstances. In determining whether
18   an award of interest under this paragraph for any
19   period is just in the circumstances, the court shall
20   consider only—

21   (A) whether the developer or the opposing
22   party, or either party's representative, made
23   motions or asserted claims or defenses so lack-
24   ing in merit as to show that such party or rep-

1   resentative acted intentionally for delay or oth-

2   erwise acted in bad faith;

3   (B) whether, in the course of the action in-

4   volved, the developer or the opposing party, or

5   either party's representative, violated any appli-

6   cable rule, statute, or court order providing for

7   sanctions for dilatory behavior or otherwise pro-

8   viding for expeditious proceedings; and

9   (C) whether the developer or the opposing

10   party, or either party's representative, engaged

11   in conduct primarily for the purpose of delaying

12   the litigation or increasing the cost thereof.

13   (2) INJUNCTIVE RELIEF.—Except as provided

14   in paragraph (3), any developer shall be entitled to

15   sue for and have injunctive relief, in any court of the

16   United States having jurisdiction over the parties,

17   against threatened loss or damage by a violation of

18   this Act, when and under the same conditions and

19   principles as injunctive relief against threatened con-

20   duct that will cause loss or damage is granted by

21   courts of equity, under the rules governing such pro-

22   ceedings, and upon the execution of proper bond

23   against damages for an injunction improvidently

24   granted and a showing that the danger of irrep-

25   arable loss or damage is immediate, a preliminary

1 injunction may issue. In any action under this para-

2 graph in which the plaintiff substantially prevails,

3 the court shall award the cost of suit, including a

4 reasonable attorney's fee, to such plaintiff.

5 (3) FOREIGN STATE-OWNED ENTERPRISES.—A

6 developer of an app that is owned by, or under the

7 control of, a foreign state may not bring an action

8 under this subsection.

9 **SEC. 6. REPORTING.**

10 Not later than 3 years after the date of enactment

11 of this Act, the Federal Trade Commission, the Comp-

12 troller General of the United States, and the Antitrust Di-

13 vision of the Department of Justice shall each separately

14 review and provide an in-depth analysis of the impact of

15 this Act on competition, innovation, barriers to entry, and

16 concentrations of market power or market share after the

17 date of enactment of this Act.

18 **SEC. 7. RULE OF CONSTRUCTION.**

19 Nothing in this Act may be construed—

20 (1) to limit—

21 (A) any authority of the Attorney General

22 or the Federal Trade Commission under the

23 antitrust laws (as defined in the first section of

24 the Clayton Act (15 U.S.C. 12), the Federal

1   Trade Commission Act (15 U.S.C. 41 et seq.),

2   or any other provision of law; or

3   (B) the application of any law;

4   (2) to require—

5   (A) a covered company to provide service

6   under a hardware or software warranty for

7   damage caused by third-party apps or app

8   stores installed through means other than the

9   app store of the covered company; or

10   (B) customer service for the installation or

11   operation of third-party apps or app stores de-

12   scribed in subparagraph (A);

13   (3) to prevent an action taken by a covered

14   company that is reasonably tailored to protect the

15   rights of third parties under section 106, 1101,

16   1201, or 1401 of title 17, United States Code, or

17   rights actionable under sections 32 or 43 of the Act

18   entitled "An Act to provide for the registration and

19   protection of trademarks used in commerce, to carry

20   out the provisions of certain international conven-

21   tions, and for other purposes", approved July 5,

22   1946 (commonly known as the "Lanham Act" or the

23   "Trademark Act of 1946") (15 U.S.C. 1114, 1125),

24   or corollary State law;

1   (4) to require a covered company to license any

2 intellectual property, including any trade secrets,

3 owned by or licensed to the covered company;

4   (5) to prevent a covered company from assert-

5 ing preexisting rights of the covered company under

6 intellectual property law to prevent the unlawful use

7 of any intellectual property owned by or duly li-

8 censed to the covered company; or

9   (6) to require a covered company to inter-

10 operate or share data with any person or business

11 user that—

12   (A) is on any list maintained by the Fed-

13 eral Government by which entities are identified

14 as limited or prohibited from engaging in eco-

15 nomic transactions as part of United States

16 sanctions or export control regimes;

17   (B) is a foreign entity that has been identi-

18 fied by the Federal Government as a national

19 security, intelligence, or law enforcement risk,

20 including the Government of the People's Re-

21 public of China or the government of a foreign

22 adversary (as defined in section 8(c) of the Se-

23 cure and Trusted Communications Networks

24 Act of 2019 (473 U.S.C. 1607(c)); or

1   (C) is engaged in illegal or fraudulent ac-

2   tivity.

3 **SEC. 8. SEVERABILITY.**

4   If any provision of this Act, or the application of such

5 a provision to any person or circumstance, is held to be

6 unconstitutional, the remaining provisions of this Act, and

7 the application of such provisions to any person or cir-

8 cumstance shall not be affected thereby.

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

10   This Act shall take effect on the date that is 180 days

11 after the date of enactment of this Act.