[INCOMPLETE DISCUSSION DRAFT]

117th Congress  
1st Session  

H. R. ______

To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.

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IN THE HOUSE OF REPRESENTATIVES

Ms. SCANLON introduced the following bill; which was referred to the Committee on ______________________

_______________________________________________________

A BILL

To promote competition, lower entry barriers, and reduce switching costs for consumers and businesses online.

1 Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

2 SECTION 1. SHORT TITLE.

3 This Act may be cited as the “Augmenting Compatibility and Competition by Enabling Service Switching Act of 2021” or the “ACCESS Act of 2021”.

4 SEC. 2. UNFAIR METHOD OF COMPETITION.

5 A violation of this Act, or standards issued pursuant to this Act, by a person, partnership, or corporation oper-

SEC. 3. PORTABILITY.

(a) IN GENERAL.—A covered platform shall maintain a set of transparent, third-party-accessible interfaces (including application programming interfaces) to initiate the secure transfer of data to a user, or with the affirmative consent of a user, to a competing business or a potential competing business 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(b).

(b) DATA SECURITY.—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.

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 technically compatible, interoperable com-
munications with a competing business or a potential com-
peting business that complies with the standards issued
pursuant to section 6(b).

(b) DATA SECURITY.—A competing business or a po-
tential competing business that accesses an interop-
erability interface of a covered platform shall reasonably se-
cure any user data it acquires, processes, or transmits,
and shall take reasonable steps to avoid introducing secu-
ity risks to user data or the covered platform’s informa-
tion systems.

(c) INTEROPERABILITY OBLIGATIONS.—

(1) IN GENERAL.—In order to achieve inter-
operability under subsection (a), a covered platform
shall fulfill the duties under paragraphs (2) through
(7) of this subsection.

(2) NON-DISCRIMINATION.—

(A) IN GENERAL.—A covered platform
shall facilitate and maintain interoperability
with a competing business or a potential com-
peting business through an interoperability
interface on fair and nondiscriminatory terms.

(B) REASONABLE THRESHOLDS, ACCESS
STANDARDS, AND FEES.—

(i) IN GENERAL.—A covered platform
may establish reasonable thresholds related
to the frequency, nature, and volume of re-
quests by a competing business or a poten-
tial competing business to access resources
maintained by the covered platform, be-
yond which the covered platform may as-
.sess a reasonable fee for such access.

(ii) Usage Expectations.—A covered platform may suggest fair, reasonable, and nondiscriminatory usage expectations to govern access by a competing business or a potential competing business, including fees or penalties for providers that exceed those usage expectations.

(iii) Limitation on Fees and Usage Expectations.—Any fees, penalties, or usage expectations assessed under clauses (i) and (ii) shall be reasonably proportional to the cost, complexity, and risk to the covered platform of providing such access as established by the Commission under section 6(b) of this Act.

(iv) Notice.—A covered platform shall provide public notice of any fees, penalties, or usage expectations that may be established under clauses (i) and (ii), in-
including reasonable advance notice of any changes.

(v) Security and privacy standards.—A covered platform shall, consistent with best practices as recommended by the Commission under section 6(b) of this Act, 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.

(C) Prohibited changes to interfaces.—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, undermining interoperability for
competing businesses or potential competing businesses, and is not unduly disruptive.

(3) FUNCTIONAL EQUIVALENCE.—A covered platform that maintains interoperability between its own products or services and other products, services, or affiliated offerings shall offer a functionally equivalent version of that interface to competing businesses or potential competing businesses.

(4) INTERFACE INFORMATION.—

(A) IN GENERAL.—Not later than [120] days after the adoption of a rule by the Commission under section 6(b) of this Act, a covered platform shall, upon request, 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.

(5) 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 interoper-
ability of a competing business or a potential com-
peting business.

(6) **NON-COMMERCIALIZATION BY A COVERED
PLATFORM.**—A covered platform shall not collect,
use, or share user data obtained from a competing
business or potential competing business through the
interoperability interface except for the purposes of
safeguarding the privacy and security of such infor-
mation or maintaining interoperability of services.

(7) **NON-COMMERCIALIZATION OF DATA ON A
COVERED PLATFORM.**—A competing business or po-
tential competing business shall not collect, use, or
share the data of a user on a covered platform ex-
cept 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

(2) **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.

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

(4) CONTROL.—The term “control” with respect to a person means—
(A) holding 50 percent or more of the stock of the person;

(B) having the right to 50 percent or more of the profits of the person;

(C) having the right to 50 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 50 percent or more of the directors of the person; or

(E) if the person is a trust, having the power to designate 50 percent or more of the trustees.

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

(A) that has been designated as a “covered platform” pursuant to subsection 6(a); or

(B) that—

(i) has at least [500,000] United States-based monthly active users on the online platform in any of the 12 months preceding the filing of a complaint for an alleged violation of this Act;

(ii) is owned or controlled by a person, partnership, or corporation with net an-
annual sales, or a market capitalization
greater than $600,000,000,000 at any
time in the 2 years preceding the filing of
a complaint for an alleged violation of this
Act; and

(iii) is considered to be a critical trading
partner for the sale or provision of any
product or service offered on or directly re-
lated to the online platform.

(6) COVERED PLATFORM OPERATOR.—The
term “covered platform operator” means a person
that, directly or indirectly, owns or controls a cov-
ered platform.

(7) 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 dependent business to
its users or customers; or

(B) the access of a dependent business to
a tool or service that it needs to effectively
serve its users or customers.

(8) 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.

(9) DEPENDENT BUSINESS.—The term “dependent business” means a person, partnership, or corporation that utilizes the covered platform for the sale or provision of products or services.

(10) INTEROPERABILITY INTERFACE.—The term “interoperability interface” means an electronic interface maintained by a covered platform for purposes of achieving interoperability.
(11) **ONLINE PLATFORM.**—The term “online platform” means a website, online or mobile application, 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 and diverse 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 section 5(e)(2)(A)–(C) 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 2 and 3 of this Act. In adopting the standards implementing the requirements of sections 2 and 3, the Commission shall seek to encour-
age entry by reducing or eliminating the network ef-
facts that limit competition with the covered plat-
form.

(2) The Commission shall—

(A) establish a technical committee, as de-
scribed in section 7 of this Act, to develop pro-
posed standards implementing the requirements
of section 3 as they apply to a specific covered
platform; and

(B) issue such standards in accordance
with section 553 of title 5, United States Code.

(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 de-
mands for relevant information, including any infor-
mation that is necessary to effectuate the goals of
this Act, and consult with other agencies as appro-
priate; 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 the
purposes of this Act.
(e) AGENCY COMPLAINTS.—The Commission shall establish procedures under which a user, covered platform, or a competing business or potential competing business may file a complaint alleging a violation of this Act.

(f) RECIPROCITY.—A competing business or potential competing business 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 interoperability requirements 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; and

(3) a representative from the National Institute of Standards and Technology.

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 interoperability that should apply to the covered platform and any changes to those standards. The committee should propose standards that seek to reduce or eliminate network effects that limit competition with the covered platform, as well as data security and privacy standards for a competing business or potential competing business. The committee should also establish reasonable thresholds, access standards, and fees with consideration of recommendations from covered platforms.
(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 reason-
able steps to investigate whether a violation has oc-
curred.

(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 ac-
crue to the United States, in an amount not more than
the greater of—

(1) 15 percent of the total United States rev-

(2) 30 percent of the United States revenue of

(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 nec-
essary to prevent, restrain, or prohibit violations of
this Act

c) Repeat Offenders.—If the fact finder deter-
mines that a covered platform has shown a pattern or
practice of violating this Act, the court shall consider re-
quiring 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.