

House Judiciary Committee's Anti-Monopoly Agenda

June 16, 2021

On Friday, June 11, lawmakers on the House Judiciary Committee, led by Antitrust Subcommittee Chair David Cicilline (D-RI) and Ranking Member Ken Buck (R-CO), **unveiled** their bipartisan legislative agenda to hold Big Tech monopolies accountable for anticompetitive conduct. These bills will be marked up by the Committee the week of June 21. Senate Antitrust Subcommittee Chair Amy Klobuchar (D-MN) recently stated she is drafting companion legislation, although it may have some differences. On Monday, June 14, Senate Antitrust Subcommittee Ranking Member Mike Lee (R-UT) and Senate Judiciary Committee Ranking Member Chuck Grassley (R-IA) **introduced** the Tougher Enforcement Against Monopolies (TEAM) Act that diverged in many respects from the House agenda bills.¹

If any of the first four House bills listed below is enacted in its current form, it would significantly impact and force changes to the largest Big Tech companies' operations.

- The American Innovation and Choice Online Act, to prohibit discriminatory conduct by dominant platforms, including a ban on self-preferencing.
- The Platform Competition and Opportunity Act, to prohibit acquisitions of competitive threats by dominant platforms, as well as acquisitions that expand or entrench the market power of online platforms.
- The Ending Platform Monopolies Act, to eliminate the ability of dominant platforms to leverage their control across multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition.
- The Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act, to lower barriers to entry and switching costs for businesses and consumers through interoperability and data portability requirements.
- The Merger Filing Fee Modernization Act, to update filing fees for mergers to ensure that the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) have the resources they need to enforce the antitrust laws.

The first four bills are expansive, broad and, at times, overlap in the business practices and conduct they would prohibit or require, as well as in several of their enforcement mechanisms. They are, however, limited in their application to the few firms that would

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meet their definition of a “covered platform.” The bills would apply to firms (i) with at least 50,000,000 U.S.-based monthly active users on the online platform or at least 100,000 U.S.-based monthly active business users on the platform, and (ii) owned or controlled by a “person” with net annual sales or market capitalization greater than \$600 billion (indexed to the Consumer Price Index at the time of the covered platform’s designation or within two years before the designation or the filing of a complaint). A covered platform also must be (iii) a “critical trading partner” for “the sale or provision of any product or service offered on or directly related to the online platform.” The legislation directs the FTC and DOJ to publish their designations for covered platforms in the Federal Register, with the designations lasting 10 years unless removed earlier by the FTC, DOJ or upon petition for review of such a decision by the U.S. Court of Appeals for the District of Columbia Circuit.

Two of the four bills, the American Choice and Innovation Online Act and the Platform Competition and Opportunity Act, provide the FTC, DOJ and state attorneys general (AG) with enforcement authority and create a private right of action with treble damages available except to foreign states/foreign state actors who generally may only recover actual damages, costs and attorney’s fees. The Ending Platform Monopolies Act provides the FTC and Attorney General with enforcement authority. The ACCESS ACT provides the FTC with specific enforcement authority but does not limit the authority of the Attorney General or the FTC under the antitrust laws, Section 5 of the FTC Act (15 USC §45), or any other provision of law. Thus, under all four of the bills either both the FTC and DOJ, or just the FTC, may seek restitution, disgorgement and/or injunctive relief. Further, three of the bills enable the antitrust agencies to seek civil penalties up to specific significant revenue percentages through civil litigation in U.S. district court.

The Merger Filing Fee Modernization Act stands somewhat separate. It would apply to all companies making Hart-Scott-Rodino Antitrust Improvement Act of 1976 (HSR Act) transaction filings, substantially raising filing fees for high value transactions. It would also increase the fiscal year (FY) 2022 budgets for both the FTC and Antitrust Division of the DOJ. The language of the Act was included in the much broader U.S. Innovation and Competition Act (USICA) ([S. 1260](#)) the Senate passed in early June.

Below, please find a summary of key provisions in each bill.

American Choice and Innovation Online Act ([bill text](#))

The bill would enact numerous prohibitions designed to stop covered platform “discriminatory” practices by barring a covered platform operator from advantaging its own products or services or lines of business over a business user’s or otherwise excluding or disadvantaging another business’s products or services or lines of business, or discriminating among similarly situated business users. It also specifically makes it unlawful for a covered platform to:

- Impede a business user’s access or interoperability with the covered platform.
- Condition access or preferred status or placement on the covered platform on the purchase or use of other products or services of the covered platform operator.
- Use nonpublic data generated by the business user or its customers to support the offering of the covered platform’s own products or services.

- Restrict or impede a business user's access to data on the covered platform generated by it or its customers or the portability of such data.
- Restrict or impede covered platform users from uninstalling preinstalled software applications or changing default settings that steer to the covered platform's own products and services.
- Restrict or impede business users from providing information or hyperlinks on the covered platform to covered platform users to facilitate business transactions or a business user or its customers from interoperating or connecting to any product or service.
- In ranking or search treat the covered platform's own product, services or lines of business more favorably than another business user's.
- Interfere with or restrict a business user's pricing of its good or services.
- Retaliate against any business user or covered platform user that raises concerns with any law enforcement authority.

For violations of the Act, a covered platform is liable for a civil penalty of up to 15 percent of its U.S. revenue the previous year or 30 percent of its U.S. revenue from any line of business affected or targeted by the unlawful conduct during the period of the unlawful conduct. Additional remedies available upon request by an antitrust agency at the determination of a court include restitution (state AGs may seek restitution as well), disgorgement and/or injunctive relief. Further, the bill stipulates that in instances where a conflict of interest exists, the court may consider divestiture. Moreover, the antitrust agencies or a state AG(s) may seek from a court a temporary injunction of 120 days or less requiring a covered platform to take or stop taking an action. The bill also creates a private right of action with treble damages available to most private plaintiffs. It has a six-year statute of limitations.

Within 180 days of enactment, the bill directs the FTC to establish a Bureau of Digital Markets to enforce the Act. Within one year, it directs the FTC and the DOJ's Antitrust Division to issue joint guidance outlining policies related to enforcement of the Act.

Platform Competition and Opportunity Act ([bill text](#))

The bill aims to prohibit acquisitions of competitive threats by dominant platforms, as well as acquisitions that expand or entrench the market power of online platforms.

Specifically, covered platform operators are barred from acquiring stock or other share capital, as well as assets, of another entity engaged in commerce or in any activity or affecting commerce, unless they are able to demonstrate that the acquired assets do not compete with the platform or enhance the platform's market position or its ability to maintain its market position. The bill also stipulates that any acquisition resulting in additional data in the hands of the acquirer may increase or maintain a platform's market position.

It provides the FTC, DOJ and state AGs with enforcement authority and directs the FTC and the DOJ's Antitrust Division to issue joint guidance outlining policies related to enforcement of the Act within one year. It also creates a private right of action with treble damages available to most private plaintiffs.

Ending Platform Monopolies Act ([bill text](#))

The bill aims to eliminate the ability of dominant platforms to leverage their control across multiple business lines to self-preference and disadvantage competitors in ways that undermine free and fair competition.

The measure prohibits covered platform operators from owning, controlling or have a beneficial interest in a line of business that utilizes the platform to provide products or services, requires business users to purchase its products or services in order to access the platform or receive preferred status, or otherwise results in a conflict of interest.

Similar to the other bills, the Act defines “control” as holding 25 percent of more of the company’s stock, profits or assets; having the power to designate 25 percent of more of the entity’s directors or trustees; or otherwise exercising substantial control. The bill also limits a board member; an officer; an employee; or an agent, representative or contractor of a covered platform from serving in a similar role at a formerly affiliated entity.

The bill provides the FTC and the DOJ with enforcement authority. Either agency may seek civil penalties through civil litigation of up to 15 percent of the total average U.S. daily revenue of the company for the previous calendar year or 30 percent of the total average U.S. daily revenue of the company in any line of business affected or targeted by the unlawful conduct, whichever is greater. The FTC also may seek other “appropriate relief” from a U.S. district court.

Augmenting Compatibility and Competition by Enabling Service Switching (ACCESS) Act ([bill text](#))

The ACCESS bill aims to lower barriers to entry and switching costs for businesses and consumers through interoperability and data portability requirements.

The measure requires a covered platform to maintain a set of transparent, third-party-accessible interfaces, including application programming interfaces (APIs), to enable the secure transfer of data to a user or to a business at the user’s direction in a “structured, commonly used, and machine-readable format” and facilitate interoperability with a competing business. Platforms are required to obtain affirmative express consent from users.

The bill stipulates that a platform must take reasonable steps to avoid introducing security risks to its information systems. Further, platforms are directed to set privacy and security standards for access by competing businesses or potential competing businesses to address a threat to the covered platform or user data.

In order for a covered platform to make a change that could affect its interoperability interface, it must petition the FTC to approve such a change, unless it is necessary to address a security vulnerability.

The Act also contains data minimization principals, stipulating that platforms may not collect, use or share user data obtained through the interoperability interface, except for the purposes of safeguarding privacy and security or maintaining interoperability.

After designating an online platform as a covered platform, the FTC must issue standards of interoperability specific to the covered platform. To formulate these

standards, the FTC is directed to establish technical committees within 180 days of enactment. Each technical committee must include representatives of the covered platform, businesses that compete with the covered platform, competition or privacy advocacy organizations, and a representative of the National Institute of Standards and Technology (NIST).

For violations of the act, the FTC may seek in U.S. district court civil penalties of up to 15 percent of the U.S. revenue of the company in the previous year, or 30 percent of the U.S. revenue of the person, partnership or corporation of any line of business affected or targeted by the unlawful conduct. The FTC also may seek restitution, disgorgement and/or injunctive relief. Moreover, the FTC may seek emergency relief from a court for a temporary injunction of 120 days or less requiring a covered platform to take or stop taking an action. The proposed bill includes a six-year statute of limitations.

Merger Filing Fee Modernization Act ([bill text](#))

The bill proposes to change the fees for required HSR filings. As previously noted, the Senate passed its version of the measure ([S. 228](#)) on June 6 as part of the USICA ([S. 1260](#)).

The Act would decrease filing fees for smaller transactions, while increasing fees substantially for all deals over \$500 million, including increasing HSR filing fees for acquisitions over \$5 billion to \$2.25 million. The measure would also increase the fees each year in accordance with the Consumer Price Index (CPI). The bill also would increase the FTC's budget to \$418 million, and the DOJ Antitrust Division's budget to \$252 million, an increase of more than \$60 million for each agency.

Below is a table with these proposed changes.

Deal Value Thresholds	HSR Filing Fees
\$92 million - \$161.4 million	Decrease from \$45,000 to \$30,000
\$161.4 million - \$184 million	Increase from \$45,000 to \$100,000
\$184 million - \$500 million	Decrease from \$125,000 to \$100,000
\$500 million - \$919.9 million	Increase from \$125,000 to \$250,000
\$919.9 million - \$1 billion	Decrease from \$280,000 to \$250,000
\$1 billion - \$2 billion	Increase from \$280,000 to \$400,000
\$2 billion - \$5 billion	Increase from \$280,000 to \$800,000

\$5 billion or more

Increase from \$280,000 to
\$2,250,000

¹ The TEAM Act would, among other aspects, consolidate all antitrust enforcement in the Antitrust Division of the DOJ, including moving the FTC budget to DOJ and increasing the combined budget; raise HSR fees for larger transactions although less than the House has proposed for transactions greater than \$5 billion; create a rebuttable presumption that transactions resulting in unilateral effects or more than 33 percent market share (5 percent if a state-owned entity) will substantially lessen competition; ban mergers that result in market share greater than 66 percent unless to prevent serious harm to national economy; require studies of common ownership of institutional investors and separately self-preferencing by digital platforms; prohibit monopolist distributors that compete in their downstream market from discriminating between their offerings and those of their distribution customers; repeal *Illinois Brick* and *Hanover Shoe* thereby allowing indirect purchasers to recover antitrust damages; allow DOJ to recover treble damages on behalf of consumers and to distribute those funds to qualified claimants; and provide for civil penalties up to 15 percent of relevant annual revenues for each year in which the violation occurred.

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