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S. 3426

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

MARCH 10, 2020

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

A BILL

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.

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 “Anticompetitive Exclu-
5 sionary Conduct Prevention Act of 2020”.

6 **SEC. 2. FINDINGS AND PURPOSES.**

7 (a) FINDINGS.—Congress finds that—

1 (1) competitive markets, in which multiple
2 firms compete to buy and sell products and services,
3 are critical to ensuring economic opportunity for all
4 people in the United States;

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

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

12 (4) in the United States economy today, the ex-
13 ercise of market power is substantial and growing;

14 (5) anticompetitive exclusionary conduct is an
15 important source of market power and a substantial
16 threat to the United States economy;

17 (6) when dominant sellers exercise market
18 power, they harm buyers by overcharging them, re-
19 ducing product or service quality, limiting their
20 choices, and impairing innovation;

21 (7) when dominant buyers exercise market
22 power, they harm suppliers by underpaying them,
23 limiting their business opportunities, and impairing
24 innovation;

1 (8) when dominant employers exercise market
2 power, they harm workers by paying them low
3 wages, reducing their benefits, and limiting their fu-
4 ture employment opportunities;

5 (9) nascent or potential rivals can be an impor-
6 tant source of competitive discipline for dominant
7 firms;

8 (10) antitrust enforcement against anticompeti-
9 tive exclusionary conduct has been impeded when
10 courts have declined to rigorously examine the facts
11 in favor of inaccurate economic assumptions that are
12 inconsistent with contemporary economic learning,
13 such as presuming that market power is not durable
14 and can be expected to self-correct, that monopolies
15 drive innovation, that above-cost pricing cannot
16 harm competition, and other flawed assumptions;
17 and

18 (11) the courts of the United States have im-
19 properly implied immunity from the antitrust laws
20 based on Federal regulatory statutes, even limiting
21 the application of statutory antitrust savings clauses
22 passed by Congress.

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

24 (1) deter exclusionary conduct that harms com-
25 petition, particularly by dominant firms; and

1 (2) enhance antitrust enforcement by the De-
 2 partment of Justice, the Federal Trade Commission,
 3 the State enforcement agencies, and private parties.

4 **SEC. 3. DEFINITION.**

5 In this Act, the term “antitrust laws”—

6 (1) has the meaning given the term in sub-
 7 section (a) of section 1 of the Clayton Act (15
 8 U.S.C. 12);

9 (2) includes—

10 (A) section 5 of the Federal Trade Com-
 11 mission Act (15 U.S.C. 45) to the extent that
 12 such section applies to unfair methods of com-
 13 petition; and

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

16 **SEC. 4. EXCLUSIONARY CONDUCT.**

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

20 **“SEC. 26A. EXCLUSIONARY CONDUCT.**

21 “(a) DEFINITIONS.—In this section:

22 “(1) EXCLUSIONARY CONDUCT.—

23 “(A) IN GENERAL.—The term ‘exclu-
 24 sionary conduct’ means conduct that—

1 “(i) materially disadvantages one or
2 more actual or potential competitors; or

3 “(ii) tends to foreclose or limit the op-
4 portunity of one or more actual or poten-
5 tial competitors to compete.

6 “(B) LIMITATIONS.—

7 “(i) Applying for or enforcing a pat-
8 ent, trademark, or copyright, unless such
9 applications or enforcement actions are
10 baseless or made in bad faith, shall not
11 alone constitute exclusionary conduct, but
12 such actions may be considered as part of
13 a course of conduct that constitutes exclu-
14 sionary conduct.

15 “(ii) Conduct that is necessary to
16 comply with Federal or State law shall not
17 alone constitute exclusionary conduct, but
18 such actions may be considered as part of
19 a course of conduct that constitutes exclu-
20 sionary conduct.

21 “(2) MARKET POWER.—The term ‘market
22 power’ means the ability of a person, or a group of
23 persons acting in concert, to profitably impose trans-
24 action terms on counterparties, including terms re-
25 garding price, quantity, product or service quality,

1 or other terms affecting the value of consideration
2 exchanged in the transaction, that are more favor-
3 able to the person or group of persons than what the
4 person or group of persons could obtain in a com-
5 petitive market.

6 “(b) VIOLATION.—

7 “(1) IN GENERAL.—It shall be unlawful for a
8 person, acting alone or in concert with other per-
9 sons, to engage in exclusionary conduct that pre-
10 sents an appreciable risk of harming competition.

11 “(2) UNFAIR METHOD OF COMPETITION.—A
12 violation of paragraph (1) shall constitute an unfair
13 method of competition under section 5 of the Fed-
14 eral Trade Commission Act (15 U.S.C. 45).

15 “(c) PRESUMPTION.—

16 “(1) IN GENERAL.—Exclusionary conduct shall
17 be presumed to present an appreciable risk of harm-
18 ing competition and shall be a violation of subsection
19 (b)(1) if the exclusionary conduct is undertaken,
20 with respect to a relevant market, by a person or by
21 a group of more than 1 person acting in concert
22 that—

23 “(A) has a market share of greater than
24 50 percent as a seller or a buyer in the relevant
25 market; or

1 “(B) otherwise has significant market
2 power in the relevant market.

3 “(2) EXCEPTION.—The presumption in para-
4 graph (1) shall be rebutted if the defendant estab-
5 lishes, by a preponderance of the evidence, that—

6 “(A) distinct procompetitive benefits of the
7 exclusionary conduct in the relevant market
8 eliminate the risk of harming competition pre-
9 sented by the exclusionary conduct;

10 “(B) one or more persons, not including
11 any person participating in or facilitating the
12 exclusionary conduct, have entered or expanded
13 their presence in the market with the effect of
14 eliminating the risk of harming competition
15 posed by the exclusionary conduct; or

16 “(C) the exclusionary conduct does not
17 present an appreciable risk of harming competi-
18 tion.

19 “(d) CONSIDERATIONS.—If the presumption in sub-
20 section (c) does not apply, the determination of whether
21 exclusionary conduct presents an appreciable risk of harm-
22 ing competition shall be based on the totality of the cir-
23 cumstances, which may include consideration of—

24 “(1) the extent to which any distinct procom-
25 petitive benefits of the exclusionary conduct substan-

1 tially eliminate the risk of harming to competition
2 presented by the exclusionary conduct; and

3 “(2) whether one or more persons, not includ-
4 ing any person participating in or facilitating the ex-
5 clusionary conduct, have entered or expanded their
6 presence in the market, substantially eliminating the
7 risk of harming competition presented by the exclu-
8 sionary conduct.

9 “(e) LIMITATIONS.—Although the following cir-
10 cumstances may constitute evidence of a violation of sub-
11 section (b)(1), such violation does not require finding—

12 “(1) that the unilateral conduct of the defend-
13 ant altered or terminated a prior course of dealing
14 between the defendant and a person subject to the
15 exclusionary conduct;

16 “(2) that the defendant treated persons subject
17 to the exclusionary conduct differently than the de-
18 fendant treated other persons;

19 “(3) that any price of the defendant for a prod-
20 uct or service was below any measure of the costs
21 to the defendant of providing the product or service;
22 or

23 “(4) that the conduct of the defendant makes
24 no economic sense apart from its tendency to reduce
25 competition.

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

6 “(1) 15 percent of the total United States reve-
 7 nues of the person for the previous calendar year; or

8 “(2) 30 percent of the United States revenues
 9 of the person in any line of commerce affected or
 10 targeted by the unlawful conduct during the period
 11 of the unlawful conduct.”.

12 (b) FEDERAL TRADE COMMISSION ACT.—

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

16 “(o) CIVIL PENALTY FOR VIOLATION OF SECTION
 17 26A OF THE CLAYTON ACT.—The Commission may com-
 18 mence a civil action in a district court of the United States
 19 against any person, partnership, or corporation who vio-
 20 lates subsection (a)(1) respecting an unfair method of
 21 competition that constitutes a violation of section 26A of
 22 the Clayton Act to recover a civil penalty, which shall ac-
 23 crue to the United States, in an amount not more than
 24 the greater of—

1 “(1) 15 percent of the total United States reve-
 2 nues of the person, partnership, or corporation for
 3 the previous calendar year; or

4 “(2) 30 percent of the United States revenues
 5 of the person, partnership, or corporation in any line
 6 of commerce affected or targeted by the unlawful
 7 conduct during the period of the unlawful conduct.”.

8 (2) COMMISSION LITIGATION AUTHORITY.—Sec-
 9 tion 16(a)(2) of the Federal Trade Commission Act
 10 (15 U.S.C. 56(a)(2)) is amended—

11 (A) in subparagraph (D), by striking “or”
 12 after the semicolon;

13 (B) in subparagraph (E)—

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

16 (ii) by inserting “or” after the semi-
 17 colon; and

18 (C) inserting after subparagraph (E) the
 19 following:

20 “(F) to recover civil penalties under sec-
 21 tion 5(o) of this Act;”.

22 **SEC. 5. JOINT ENFORCEMENT GUIDELINES.**

23 (a) IN GENERAL.—Not later than 1 year after the
 24 date of enactment of this Act, the Attorney General and
 25 the Federal Trade Commission shall issue joint guidelines

1 outlining policies, practices, and analytical techniques re-
 2 lating to agency enforcement under section 26A of the
 3 Clayton Act, as added by section 4 of this Act, including
 4 agency policies for determining the appropriate amount of
 5 a civil penalty to be sought under section 26A of the Clay-
 6 ton Act and subsection (o) of section 5 of the Federal
 7 Trade Commission Act (15 U.S.C. 45), as added by sec-
 8 tion 4 of this Act, with the goal of promoting transparency
 9 and deterring violations of section 26A of the Clayton Act.

10 (b) PENALTY CONSIDERATIONS.—In establishing the
 11 guidelines described in subsection (a) regarding civil pen-
 12 alties, the Attorney General and the Federal Trade Com-
 13 mission shall consider the relevant factors to be used for
 14 calculating an appropriate civil penalty for a particular
 15 violation, including —

- 16 (1) the volume of commerce affected;
- 17 (2) the duration and severity of the unlawful
 18 conduct;
- 19 (3) the intent of the person undertaking the un-
 20 lawful conduct;
- 21 (4) the extent to which the unlawful conduct
 22 was egregious or a clear violation of the law;
- 23 (5) whether the civil penalty is to be applied in
 24 combination with other remedies for violations of
 25 section 26A of the Clayton Act, including—

1 (A) structural remedies, behavioral condi-
2 tions, or equitable disgorgement; or

3 (B) other remedies available under section
4 4, 4A, 15, or 16 of the Clayton Act (15 U.S.C.
5 15, 15a, 25, 26) or section 13(b) of the Federal
6 Trade Commission Act (15 U.S.C. 53(b));

7 (6) whether the person has previously engaged
8 in the same or similar anticompetitive conduct; and
9 (7) whether the person undertook the conduct
10 in violation of a preexisting consent decree or court
11 order.

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

18 (d) PUBLIC NOTICE AND COMMENT.—

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

1 (2) INAPPLICABILITY OF RULE MAKING PROVI-
2 SIONS.—The provisions of section 553 of title 5,
3 United States Code, shall not apply to the guidelines
4 issued under paragraph (1).

5 **SEC. 6. MARKET DEFINITION.**

6 (a) IN GENERAL.—Establishing liability under the
7 antitrust laws does not require the definition of a relevant
8 market, except when the definition of a relevant market
9 is required, to establish a presumption or to resolve a
10 claim, under a statutory provision that explicitly ref-
11 erences relevant market, market concentration, or market
12 share.

13 (b) DIRECT EVIDENCE.—If direct evidence is prof-
14 fered of actual or likely harm to competition or an appre-
15 ciable risk to competition sufficient to satisfy the applica-
16 ble statutory standard, or that the effect of an acquisition
17 subject to section 7 of the Clayton Act (15 U.S.C. 18)
18 may be substantially to lessen competition or tend to cre-
19 ate a monopoly, neither a court nor the Federal Trade
20 Commission shall require definition of a relevant market
21 in order to evaluate the evidence, to find liability, or to
22 find that a claim has been stated under the antitrust laws.

23 (c) RULE OF CONSTRUCTION.—Nothing in this sec-
24 tion may be construed to prevent a court or the Federal
25 Trade Commission from considering evidence relating to

1 the definition of proposed relevant markets to evaluate the
2 merits of a claim under the antitrust laws.

3 **SEC. 7. LIMITATIONS ON IMPLIED IMMUNITY FROM THE**
4 **ANTITRUST LAWS.**

5 (a) IN GENERAL.—In any action or proceeding to en-
6 force the antitrust laws with respect to conduct that is
7 regulated under Federal statute, no court or adjudicatory
8 body may find that the Federal statute, or any rule or
9 regulation promulgated in accordance with the Federal
10 statute, implicitly precludes application of the antitrust
11 laws to the conduct unless—

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

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

18 (3) Federal agency or department rules or regu-
19 lations, adopted by rulemaking or adjudication, ex-
20 plicitly require or authorize the defendant to under-
21 take the conduct.

22 (b) EXISTING FEDERAL REGULATION.—In any ac-
23 tion or proceeding described in subsection (a), the anti-
24 trust laws shall be applied fully and without qualification
25 or limitation, and the scope of the antitrust laws shall not

1 be defined more narrowly on account of the existence of
2 Federal rules, regulations, or regulatory agencies or de-
3 partments, unless application of the antitrust laws is pre-
4 cluded or limited by—

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

7 (2) an implied immunity that satisfies the re-
8 quirements under subsection (a).

9 **SEC. 8. ADDITIONAL REMEDIES; RULES OF CONSTRUCTION.**

10 (a) **ADDITIONAL REMEDIES.**—The rights and rem-
11 edies provided under this Act are in addition to, not in
12 lieu of, any other rights and remedies provided by Federal
13 law, including under section 4, 4A, 15, or 16 of the Clay-
14 ton Act (15 U.S.C. 15, 15a, 25, 26) or section 13(b) of
15 the Federal Trade Commission Act (15 U.S.C. 53(b)).

16 (b) **RULES OF CONSTRUCTION.**—Nothing in this Act
17 may be construed to—

18 (1) impair or limit the applicability of any of
19 the antitrust laws; and

20 (2) prohibit any other remedy provided by Fed-
21 eral law.

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