

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2831

Public Law 109–417
109th Congress

An Act

To amend the Public Health Service Act with respect to public health security and all-hazards preparedness and response, and for other purposes.

Dec. 19, 2006
[S. 3678]

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Pandemic and All-Hazards Preparedness Act”.

(b) **TABLE OF CONTENTS.**—The table of contents of this Act is as follows:

Pandemic and
All-Hazards
Preparedness
Act.
42 USC 201 note.

Sec. 1. Short title; table of contents.

**TITLE I—NATIONAL PREPAREDNESS AND RESPONSE, LEADERSHIP,
ORGANIZATION, AND PLANNING**

Sec. 101. Public health and medical preparedness and response functions of the Secretary of Health and Human Services.

Sec. 102. Assistant Secretary for Preparedness and Response.

Sec. 103. National Health Security Strategy.

TITLE II—PUBLIC HEALTH SECURITY PREPAREDNESS

Sec. 201. Improving State and local public health security.

Sec. 202. Using information technology to improve situational awareness in public health emergencies.

Sec. 203. Public health workforce enhancements.

Sec. 204. Vaccine tracking and distribution.

Sec. 205. National Science Advisory Board for Biosecurity.

Sec. 206. Revitalization of Commissioned Corps.

TITLE III—ALL-HAZARDS MEDICAL SURGE CAPACITY

Sec. 301. National disaster medical system.

Sec. 302. Enhancing medical surge capacity.

Sec. 303. Encouraging health professional volunteers.

Sec. 304. Core education and training.

Sec. 305. Partnerships for State and regional hospital preparedness to improve surge capacity.

Sec. 306. Enhancing the role of the Department of Veterans Affairs.

**TITLE IV—PANDEMIC AND BIODEFENSE VACCINE AND DRUG
DEVELOPMENT**

Sec. 401. Biomedical Advanced Research and Development Authority.

Sec. 402. National Biodefense Science Board.

Sec. 403. Clarification of countermeasures covered by Project BioShield.

Sec. 404. Technical assistance.

Sec. 405. Collaboration and coordination.

Sec. 406. Procurement.

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2865

TITLE IV—PANDEMIC AND BIODEFENSE VACCINE AND DRUG DEVELOPMENT

SEC. 401. BIOMEDICAL ADVANCED RESEARCH AND DEVELOPMENT AUTHORITY.

Title III of the Public Health Service Act (42 U.S.C. 241 et seq.) is amended by inserting after section 319K the following:

“SEC. 319L. BIOMEDICAL ADVANCED RESEARCH AND DEVELOPMENT AUTHORITY. 42 USC 247d–7e.

“(a) DEFINITIONS.—In this section:

“(1) BARDA.—The term ‘BARDA’ means the Biomedical Advanced Research and Development Authority.

“(2) FUND.—The term ‘Fund’ means the Biodefense Medical Countermeasure Development Fund established under subsection (d).

“(3) OTHER TRANSACTIONS.—The term ‘other transactions’ means transactions, other than procurement contracts, grants, and cooperative agreements, such as the Secretary of Defense may enter into under section 2371 of title 10, United States Code.

“(4) QUALIFIED COUNTERMEASURE.—The term ‘qualified countermeasure’ has the meaning given such term in section 319F–1.

“(5) QUALIFIED PANDEMIC OR EPIDEMIC PRODUCT.—The term ‘qualified pandemic or epidemic product’ has the meaning given the term in section 319F–3.

“(6) ADVANCED RESEARCH AND DEVELOPMENT.—

“(A) IN GENERAL.—The term ‘advanced research and development’ means, with respect to a product that is or may become a qualified countermeasure or a qualified pandemic or epidemic product, activities that predominantly—

“(i) are conducted after basic research and pre-clinical development of the product; and

“(ii) are related to manufacturing the product on a commercial scale and in a form that satisfies the regulatory requirements under the Federal Food, Drug, and Cosmetic Act or under section 351 of this Act.

“(B) ACTIVITIES INCLUDED.—The term under subparagraph (A) includes—

“(i) testing of the product to determine whether the product may be approved, cleared, or licensed under the Federal Food, Drug, and Cosmetic Act or under section 351 of this Act for a use that is or may be the basis for such product becoming a qualified countermeasure or qualified pandemic or epidemic product, or to help obtain such approval, clearance, or license;

“(ii) design and development of tests or models, including animal models, for such testing;

“(iii) activities to facilitate manufacture of the product on a commercial scale with consistently high quality, as well as to improve and make available new technologies to increase manufacturing surge capacity;

120 STAT. 2866

PUBLIC LAW 109-417—DEC. 19, 2006

“(iv) activities to improve the shelf-life of the product or technologies for administering the product; and

“(v) such other activities as are part of the advanced stages of testing, refinement, improvement, or preparation of the product for such use and as are specified by the Secretary.

“(7) SECURITY COUNTERMEASURE.—The term ‘security countermeasure’ has the meaning given such term in section 319F-2.

“(8) RESEARCH TOOL.—The term ‘research tool’ means a device, technology, biological material (including a cell line or an antibody), reagent, animal model, computer system, computer software, or analytical technique that is developed to assist in the discovery, development, or manufacture of qualified countermeasures or qualified pandemic or epidemic products.

“(9) PROGRAM MANAGER.—The term ‘program manager’ means an individual appointed to carry out functions under this section and authorized to provide project oversight and management of strategic initiatives.

“(10) PERSON.—The term ‘person’ includes an individual, partnership, corporation, association, entity, or public or private corporation, and a Federal, State, or local government agency or department.

“(b) STRATEGIC PLAN FOR COUNTERMEASURE RESEARCH, DEVELOPMENT, AND PROCUREMENT.—

“(1) IN GENERAL.—Not later than 6 months after the date of enactment of the Pandemic and All-Hazards Preparedness Act, the Secretary shall develop and make public a strategic plan to integrate biodefense and emerging infectious disease requirements with the advanced research and development, strategic initiatives for innovation, and the procurement of qualified countermeasures and qualified pandemic or epidemic products. The Secretary shall carry out such activities as may be practicable to disseminate the information contained in such plan to persons who may have the capacity to substantially contribute to the activities described in such strategic plan. The Secretary shall update and incorporate such plan as part of the National Health Security Strategy described in section 2802.

“(2) CONTENT.—The strategic plan under paragraph (1) shall guide—

“(A) research and development, conducted or supported by the Department of Health and Human Services, of qualified countermeasures and qualified pandemic or epidemic products against possible biological, chemical, radiological, and nuclear agents and to emerging infectious diseases;

“(B) innovation in technologies that may assist advanced research and development of qualified countermeasures and qualified pandemic or epidemic products (such research and development referred to in this section as ‘countermeasure and product advanced research and development’); and

“(C) procurement of such qualified countermeasures and qualified pandemic or epidemic products by such Department.

Deadline.
Public
information.

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2867

“(c) BIOMEDICAL ADVANCED RESEARCH AND DEVELOPMENT AUTHORITY.—

“(1) ESTABLISHMENT.—There is established within the Department of Health and Human Services the Biomedical Advanced Research and Development Authority.

“(2) IN GENERAL.—Based upon the strategic plan described in subsection (b), the Secretary shall coordinate the acceleration of countermeasure and product advanced research and development by—

“(A) facilitating collaboration between the Department of Health and Human Services and other Federal agencies, relevant industries, academia, and other persons, with respect to such advanced research and development;

“(B) promoting countermeasure and product advanced research and development;

“(C) facilitating contacts between interested persons and the offices or employees authorized by the Secretary to advise such persons regarding requirements under the Federal Food, Drug, and Cosmetic Act and under section 351 of this Act; and

“(D) promoting innovation to reduce the time and cost of countermeasure and product advanced research and development.

“(3) DIRECTOR.—The BARDA shall be headed by a Director (referred to in this section as the ‘Director’) who shall be appointed by the Secretary and to whom the Secretary shall delegate such functions and authorities as necessary to implement this section.

“(4) DUTIES.—

“(A) COLLABORATION.—To carry out the purpose described in paragraph (2)(A), the Secretary shall—

“(i) facilitate and increase the expeditious and direct communication between the Department of Health and Human Services and relevant persons with respect to countermeasure and product advanced research and development, including by—

“(I) facilitating such communication regarding the processes for procuring such advanced research and development with respect to qualified countermeasures and qualified pandemic or epidemic products of interest; and

“(II) soliciting information about and data from research on potential qualified countermeasures and qualified pandemic or epidemic products and related technologies;

“(ii) at least annually—

“(I) convene meetings with representatives from relevant industries, academia, other Federal agencies, international agencies as appropriate, and other interested persons;

“(II) sponsor opportunities to demonstrate the operation and effectiveness of relevant biodefense countermeasure technologies; and

“(III) convene such working groups on countermeasure and product advanced research and development as the Secretary may determine are necessary to carry out this section; and

120 STAT. 2868

PUBLIC LAW 109–417—DEC. 19, 2006

“(iii) carry out the activities described in section 405 of the Pandemic and All-Hazards Preparedness Act.

“(B) SUPPORT ADVANCED RESEARCH AND DEVELOPMENT.—To carry out the purpose described in paragraph (2)(B), the Secretary shall—

“(i) conduct ongoing searches for, and support calls for, potential qualified countermeasures and qualified pandemic or epidemic products;

“(ii) direct and coordinate the countermeasure and product advanced research and development activities of the Department of Health and Human Services;

“(iii) establish strategic initiatives to accelerate countermeasure and product advanced research and development and innovation in such areas as the Secretary may identify as priority unmet need areas; and

“(iv) award contracts, grants, cooperative agreements, and enter into other transactions, for countermeasure and product advanced research and development.

“(C) FACILITATING ADVICE.—To carry out the purpose described in paragraph (2)(C) the Secretary shall—

“(i) connect interested persons with the offices or employees authorized by the Secretary to advise such persons regarding the regulatory requirements under the Federal Food, Drug, and Cosmetic Act and under section 351 of this Act related to the approval, clearance, or licensure of qualified countermeasures or qualified pandemic or epidemic products; and

“(ii) with respect to persons performing countermeasure and product advanced research and development funded under this section, enable such offices or employees to provide to the extent practicable such advice in a manner that is ongoing and that is otherwise designed to facilitate expeditious development of qualified countermeasures and qualified pandemic or epidemic products that may achieve such approval, clearance, or licensure.

“(D) SUPPORTING INNOVATION.—To carry out the purpose described in paragraph (2)(D), the Secretary may award contracts, grants, and cooperative agreements, or enter into other transactions, such as prize payments, to promote—

“(i) innovation in technologies that may assist countermeasure and product advanced research and development;

“(ii) research on and development of research tools and other devices and technologies; and

“(iii) research to promote strategic initiatives, such as rapid diagnostics, broad spectrum antimicrobials, and vaccine manufacturing technologies.

“(5) TRANSACTION AUTHORITIES.—

“(A) OTHER TRANSACTIONS.—

“(i) IN GENERAL.—The Secretary shall have the authority to enter into other transactions under this subsection in the same manner as the Secretary of

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2869

Defense enters into such transactions under section 2371 of title 10, United States Code.

“(ii) LIMITATIONS ON AUTHORITY.—

“(I) IN GENERAL.—Subsections (b), (c), and (h) of section 845 of the National Defense Authorization Act for Fiscal Year 1994 (10 U.S.C. 2371 note) shall apply to other transactions under this subparagraph as if such transactions were for prototype projects described by subsection (a) of such section 845.

Applicability.

“(II) WRITTEN DETERMINATIONS REQUIRED.—The authority of this subparagraph may be exercised for a project that is expected to cost the Department of Health and Human Services in excess of \$20,000,000 only upon a written determination by the senior procurement executive for the Department (as designated for purpose of section 16(c) of the Office of Federal Procurement Policy Act (41 U.S.C. 414(c))), that the use of such authority is essential to promoting the success of the project. The authority of the senior procurement executive under this subclause may not be delegated.

“(iii) GUIDELINES.—The Secretary shall establish guidelines regarding the use of the authority under clause (i). Such guidelines shall include auditing requirements.

“(B) EXPEDITED AUTHORITIES.—

“(i) IN GENERAL.—In awarding contracts, grants, and cooperative agreements, and in entering into other transactions under subparagraph (B) or (D) of paragraph (4), the Secretary shall have the expedited procurement authorities, the authority to expedite peer review, and the authority for personal services contracts, supplied by subsections (b), (c), and (d) of section 319F–1.

“(ii) APPLICATION OF PROVISIONS.—Provisions in such section 319F–1 that apply to such authorities and that require institution of internal controls, limit review, provide for Federal Tort Claims Act coverage of personal services contractors, and commit decisions to the discretion of the Secretary shall apply to the authorities as exercised pursuant to this paragraph.

“(iii) AUTHORITY TO LIMIT COMPETITION.—For purposes of applying section 319F–1(b)(1)(D) to this paragraph, the phrase ‘BioShield Program under the Project BioShield Act of 2004’ shall be deemed to mean the countermeasure and product advanced research and development program under this section.

Applicability.

“(iv) AVAILABILITY OF DATA.—The Secretary shall require that, as a condition of being awarded a contract, grant, cooperative agreement, or other transaction under subparagraph (B) or (D) of paragraph (4), a person make available to the Secretary on an

120 STAT. 2870

PUBLIC LAW 109-417—DEC. 19, 2006

ongoing basis, and submit upon request to the Secretary, all data related to or resulting from countermeasure and product advanced research and development carried out pursuant to this section.

“(C) ADVANCE PAYMENTS; ADVERTISING.—The Secretary may waive the requirements of section 3324(a) of title 31, United States Code, or section 3709 of the Revised Statutes of the United States (41 U.S.C. 5) upon the determination by the Secretary that such waiver is necessary to obtain countermeasures or products under this section.

“(D) MILESTONE-BASED PAYMENTS ALLOWED.—In awarding contracts, grants, and cooperative agreements, and in entering into other transactions, under this section, the Secretary may use milestone-based awards and payments.

“(E) FOREIGN NATIONALS ELIGIBLE.—The Secretary may under this section award contracts, grants, and cooperative agreements to, and may enter into other transactions with, highly qualified foreign national persons outside the United States, alone or in collaboration with American participants, when such transactions may inure to the benefit of the American people.

“(F) ESTABLISHMENT OF RESEARCH CENTERS.—The Secretary may assess the feasibility and appropriateness of establishing, through contract, grant, cooperative agreement, or other transaction, an arrangement with an existing research center in order to achieve the goals of this section. If such an agreement is not feasible and appropriate, the Secretary may establish one or more federally-funded research and development centers, or university-affiliated research centers, in accordance with section 303(c)(3) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(3)).

“(6) AT-RISK INDIVIDUALS.—In carrying out the functions under this section, the Secretary may give priority to the advanced research and development of qualified countermeasures and qualified pandemic or epidemic products that are likely to be safe and effective with respect to children, pregnant women, elderly, and other at-risk individuals.

“(7) PERSONNEL AUTHORITIES.—

“(A) SPECIALLY QUALIFIED SCIENTIFIC AND PROFESSIONAL PERSONNEL.—

“(i) IN GENERAL.—In addition to any other personnel authorities, the Secretary may—

“(I) without regard to those provisions of title 5, United States Code, governing appointments in the competitive service, appoint highly qualified individuals to scientific or professional positions in BARDA, such as program managers, to carry out this section; and

“(II) compensate them in the same manner and subject to the same terms and conditions in which individuals appointed under section 9903 of such title are compensated, without regard to the provisions of chapter 51 and subchapter III of chapter 53 of such title relating to classification and General Schedule pay rates.

PUBLIC LAW 109-417—DEC. 19, 2006

120 STAT. 2871

“(ii) MANNER OF EXERCISE OF AUTHORITY.—The authority provided for in this subparagraph shall be exercised subject to the same limitations described in section 319F-1(e)(2).

“(iii) TERM OF APPOINTMENT.—The term limitations described in section 9903(c) of title 5, United States Code, shall apply to appointments under this subparagraph, except that the references to the ‘Secretary’ and to the ‘Department of Defense’s national security missions’ shall be deemed to be to the Secretary of Health and Human Services and to the mission of the Department of Health and Human Services under this section.

Applicability.

“(B) SPECIAL CONSULTANTS.—In carrying out this section, the Secretary may appoint special consultants pursuant to section 207(f).

“(C) LIMITATION.—

“(i) IN GENERAL.—The Secretary may hire up to 100 highly qualified individuals, or up to 50 percent of the total number of employees, whichever is less, under the authorities provided for in subparagraphs (A) and (B).

“(ii) REPORT.—The Secretary shall report to Congress on a biennial basis on the implementation of this subparagraph.

“(d) FUND.—

“(1) ESTABLISHMENT.—There is established the Biodefense Medical Countermeasure Development Fund, which shall be available to carry out this section in addition to such amounts as are otherwise available for this purpose.

“(2) FUNDING.—To carry out the purposes of this section, there are authorized to be appropriated to the Fund—

“(A) \$1,070,000,000 for fiscal years 2006 through 2008, the amounts to remain available until expended; and

“(B) such sums as may be necessary for subsequent fiscal years, the amounts to remain available until expended.

“(e) INAPPLICABILITY OF CERTAIN PROVISIONS.—

“(1) DISCLOSURE.—

“(A) IN GENERAL.—The Secretary shall withhold from disclosure under section 552 of title 5, United States Code, specific technical data or scientific information that is created or obtained during the countermeasure and product advanced research and development carried out under subsection (c) that reveals significant and not otherwise publicly known vulnerabilities of existing medical or public health defenses against biological, chemical, nuclear, or radiological threats. Such information shall be deemed to be information described in section 552(b)(3) of title 5, United States Code.

“(B) REVIEW.—Information subject to nondisclosure under subparagraph (A) shall be reviewed by the Secretary every 5 years, or more frequently as determined necessary by the Secretary, to determine the relevance or necessity of continued nondisclosure.

“(C) SUNSET.—This paragraph shall cease to have force or effect on the date that is 7 years after the date of

120 STAT. 2872

PUBLIC LAW 109-417—DEC. 19, 2006

Termination
date.

enactment of the Pandemic and All-Hazards Preparedness Act.

“(2) REVIEW.—Notwithstanding section 14 of the Federal Advisory Committee Act, a working group of BARDA under this section and the National Biodefense Science Board under section 319M shall each terminate on the date that is 5 years after the date on which each such group or Board, as applicable, was established. Such 5-year period may be extended by the Secretary for one or more additional 5-year periods if the Secretary determines that any such extension is appropriate.”.

SEC. 402. NATIONAL BIODEFENSE SCIENCE BOARD.

Title III of the Public Health Service Act (42 U.S.C. 241 et seq.), as amended by section 401, is further amended by inserting after section 319L the following:

42 USC 247d-7f.

“SEC. 319M. NATIONAL BIODEFENSE SCIENCE BOARD AND WORKING GROUPS.

“(a) IN GENERAL.—

“(1) ESTABLISHMENT AND FUNCTION.—The Secretary shall establish the National Biodefense Science Board (referred to in this section as the ‘Board’) to provide expert advice and guidance to the Secretary on scientific, technical and other matters of special interest to the Department of Health and Human Services regarding current and future chemical, biological, nuclear, and radiological agents, whether naturally occurring, accidental, or deliberate.

“(2) MEMBERSHIP.—The membership of the Board shall be comprised of individuals who represent the Nation’s pre-eminent scientific, public health, and medical experts, as follows—

“(A) such Federal officials as the Secretary may determine are necessary to support the functions of the Board;

“(B) four individuals representing the pharmaceutical, biotechnology, and device industries;

“(C) four individuals representing academia; and

“(D) five other members as determined appropriate by the Secretary, of whom—

“(i) one such member shall be a practicing healthcare professional; and

“(ii) one such member shall be an individual from an organization representing healthcare consumers.

“(3) TERM OF APPOINTMENT.—A member of the Board described in subparagraph (B), (C), or (D) of paragraph (2) shall serve for a term of 3 years, except that the Secretary may adjust the terms of the initial Board appointees in order to provide for a staggered term of appointment for all members.

“(4) CONSECUTIVE APPOINTMENTS; MAXIMUM TERMS.—A member may be appointed to serve not more than 3 terms on the Board and may serve not more than 2 consecutive terms.

“(5) DUTIES.—The Board shall—

“(A) advise the Secretary on current and future trends, challenges, and opportunities presented by advances in biological and life sciences, biotechnology, and genetic engineering with respect to threats posed by naturally occurring infectious diseases and chemical, biological, radiological, and nuclear agents;

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2873

“(B) at the request of the Secretary, review and consider any information and findings received from the working groups established under subsection (b); and

“(C) at the request of the Secretary, provide recommendations and findings for expanded, intensified, and coordinated biodefense research and development activities.

“(6) MEETINGS.—

“(A) INITIAL MEETING.—Not later than one year after the date of enactment of the Pandemic and All-Hazards Preparedness Act, the Secretary shall hold the first meeting of the Board.

Deadline.

“(B) SUBSEQUENT MEETINGS.—The Board shall meet at the call of the Secretary, but in no case less than twice annually.

“(7) VACANCIES.—Any vacancy in the Board shall not affect its powers, but shall be filled in the same manner as the original appointment.

“(8) CHAIRPERSON.—The Secretary shall appoint a chairperson from among the members of the Board.

“(9) POWERS.—

“(A) HEARINGS.—The Board may hold such hearings, sit and act at such times and places, take such testimony, and receive such evidence as the Board considers advisable to carry out this subsection.

“(B) POSTAL SERVICES.—The Board may use the United States mails in the same manner and under the same conditions as other departments and agencies of the Federal Government.

“(10) PERSONNEL.—

“(A) EMPLOYEES OF THE FEDERAL GOVERNMENT.—A member of the Board that is an employee of the Federal Government may not receive additional pay, allowances, or benefits by reason of the member’s service on the Board.

“(B) OTHER MEMBERS.—A member of the Board that is not an employee of the Federal Government may be compensated at a rate not to exceed the daily equivalent of the annual rate of basic pay prescribed for level IV of the Executive Schedule under section 5315 of title 5, United States Code, for each day (including travel time) during which the member is engaged in the actual performance of duties as a member of the Board.

“(C) TRAVEL EXPENSES.—Each member of the Board shall receive travel expenses, including per diem in lieu of subsistence, in accordance with applicable provisions under subchapter I of chapter 57 of title 5, United States Code.

“(D) DETAIL OF GOVERNMENT EMPLOYEES.—Any Federal Government employee may be detailed to the Board with the approval for the contributing agency without reimbursement, and such detail shall be without interruption or loss of civil service status or privilege.

“(b) OTHER WORKING GROUPS.—The Secretary may establish a working group of experts, or may use an existing working group or advisory committee, to—

“(1) identify innovative research with the potential to be developed as a qualified countermeasure or a qualified pandemic or epidemic product;

120 STAT. 2874

PUBLIC LAW 109-417—DEC. 19, 2006

“(2) identify accepted animal models for particular diseases and conditions associated with any biological, chemical, radiological, or nuclear agent, any toxin, or any potential pandemic infectious disease, and identify strategies to accelerate animal model and research tool development and validation; and

“(3) obtain advice regarding supporting and facilitating advanced research and development related to qualified countermeasures and qualified pandemic or epidemic products that are likely to be safe and effective with respect to children, pregnant women, and other vulnerable populations, and other issues regarding activities under this section that affect such populations.

“(c) DEFINITIONS.—Any term that is defined in section 319L and that is used in this section shall have the same meaning in this section as such term is given in section 319L.

“(d) AUTHORIZATION OF APPROPRIATIONS.—There are authorized to be appropriated \$1,000,000 to carry out this section for fiscal year 2007 and each fiscal year thereafter.”.

SEC. 403. CLARIFICATION OF COUNTERMEASURES COVERED BY PROJECT BIOSHIELD.

(a) QUALIFIED COUNTERMEASURE.—Section 319F-1(a) of the Public Health Service Act (42 U.S.C. 247d-6a(a)) is amended by striking paragraph (2) and inserting the following:

“(2) DEFINITIONS.—In this section:

“(A) QUALIFIED COUNTERMEASURE.—The term ‘qualified countermeasure’ means a drug (as that term is defined by section 201(g)(1) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(g)(1))), biological product (as that term is defined by section 351(i) of this Act (42 U.S.C. 262(i))), or device (as that term is defined by section 201(h) of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 321(h))), that the Secretary determines to be a priority (consistent with sections 302(2) and 304(a) of the Homeland Security Act of 2002) to—

“(i) diagnose, mitigate, prevent, or treat harm from any biological agent (including organisms that cause an infectious disease) or toxin, chemical, radiological, or nuclear agent that may cause a public health emergency affecting national security; or

“(ii) diagnose, mitigate, prevent, or treat harm from a condition that may result in adverse health consequences or death and may be caused by administering a drug, biological product, or device that is used as described in this subparagraph.

“(B) INFECTIOUS DISEASE.—The term ‘infectious disease’ means a disease potentially caused by a pathogenic organism (including a bacteria, virus, fungus, or parasite) that is acquired by a person and that reproduces in that person.”.

42 USC 247d-6b.

(b) SECURITY COUNTERMEASURE.—Section 319F-2(c)(1)(B) is amended by striking “treat, identify, or prevent” each place it appears and inserting “diagnose, mitigate, prevent, or treat”.

42 USC 321j.

(c) LIMITATION ON USE OF FUNDS.—Section 510(a) of the Homeland Security Act of 2002 (6 U.S.C. 320(a)) is amended by adding at the end the following: “None of the funds made available under this subsection shall be used to procure countermeasures to

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2875

diagnose, mitigate, prevent, or treat harm resulting from any naturally occurring infectious disease or other public health threat that are not security countermeasures under section 319F–2(c)(1)(B).”.

SEC. 404. TECHNICAL ASSISTANCE.

Subchapter E of chapter V of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 360bbb et seq.) is amended by adding at the end the following:

“SEC. 565. TECHNICAL ASSISTANCE.

“The Secretary, in consultation with the Commissioner of Food and Drugs, shall establish within the Food and Drug Administration a team of experts on manufacturing and regulatory activities (including compliance with current Good Manufacturing Practice) to provide both off-site and on-site technical assistance to the manufacturers of qualified countermeasures (as defined in section 319F–1 of the Public Health Service Act), security countermeasures (as defined in section 319F–2 of such Act), or vaccines, at the request of such a manufacturer and at the discretion of the Secretary, if the Secretary determines that a shortage or potential shortage may occur in the United States in the supply of such vaccines or countermeasures and that the provision of such assistance would be beneficial in helping alleviate or avert such shortage.”.

Establishment.
21 USC
360bbb–4.

SEC. 405. COLLABORATION AND COORDINATION.

(a) LIMITED ANTITRUST EXEMPTION.—

(1) MEETINGS AND CONSULTATIONS TO DISCUSS SECURITY COUNTERMEASURES, QUALIFIED COUNTERMEASURES, OR QUALIFIED PANDEMIC OR EPIDEMIC PRODUCT DEVELOPMENT.—

(A) AUTHORITY TO CONDUCT MEETINGS AND CONSULTATIONS.—The Secretary of Health and Human Services (referred to in this subsection as the “Secretary”), in coordination with the Attorney General and the Secretary of Homeland Security, may conduct meetings and consultations with persons engaged in the development of a security countermeasure (as defined in section 319F–2 of the Public Health Service Act (42 U.S.C. 247d–6b)) (as amended by this Act), a qualified countermeasure (as defined in section 319F–1 of the Public Health Service Act (42 U.S.C. 247d–6a)) (as amended by this Act), or a qualified pandemic or epidemic product (as defined in section 319F–3 of the Public Health Service Act (42 U.S.C. 247d–6d)) for the purpose of the development, manufacture, distribution, purchase, or storage of a countermeasure or product. The Secretary may convene such meeting or consultation at the request of the Secretary of Homeland Security, the Attorney General, the Chairman of the Federal Trade Commission (referred to in this section as the “Chairman”), or any interested person, or upon initiation by the Secretary. The Secretary shall give prior notice of any such meeting or consultation, and the topics to be discussed, to the Attorney General, the Chairman, and the Secretary of Homeland Security.

42 USC 247d–6a
note.

(B) MEETING AND CONSULTATION CONDITIONS.—A meeting or consultation conducted under subparagraph (A) shall—

- (i) be chaired or, in the case of a consultation, facilitated by the Secretary;

Notice.

120 STAT. 2876

PUBLIC LAW 109–417—DEC. 19, 2006

(ii) be open to persons involved in the development, manufacture, distribution, purchase, or storage of a countermeasure or product, as determined by the Secretary;

(iii) be open to the Attorney General, the Secretary of Homeland Security, and the Chairman;

(iv) be limited to discussions involving covered activities; and

(v) be conducted in such manner as to ensure that no national security, confidential commercial, or proprietary information is disclosed outside the meeting or consultation.

(C) LIMITATION.—The Secretary may not require participants to disclose confidential commercial or proprietary information.

(D) TRANSCRIPT.—The Secretary shall maintain a complete verbatim transcript of each meeting or consultation conducted under this subsection. Such transcript (or a portion thereof) shall not be disclosed under section 552 of title 5, United States Code, to the extent that the Secretary, in consultation with the Attorney General and the Secretary of Homeland Security, determines that disclosure of such transcript (or portion thereof) would pose a threat to national security. The transcript (or portion thereof) with respect to which the Secretary has made such a determination shall be deemed to be information described in subsection (b)(3) of such section 552.

(E) EXEMPTION.—

(i) IN GENERAL.—Subject to clause (ii), it shall not be a violation of the antitrust laws for any person to participate in a meeting or consultation conducted in accordance with this paragraph.

(ii) LIMITATION.—Clause (i) shall not apply to any agreement or conduct that results from a meeting or consultation and that is not covered by an exemption granted under paragraph (4).

(2) SUBMISSION OF WRITTEN AGREEMENTS.—The Secretary shall submit each written agreement regarding covered activities that is made pursuant to meetings or consultations conducted under paragraph (1) to the Attorney General and the Chairman for consideration. In addition to the proposed agreement itself, any submission shall include—

(A) an explanation of the intended purpose of the agreement;

(B) a specific statement of the substance of the agreement;

(C) a description of the methods that will be utilized to achieve the objectives of the agreement;

(D) an explanation of the necessity for a cooperative effort among the particular participating persons to achieve the objectives of the agreement; and

(E) any other relevant information determined necessary by the Attorney General, in consultation with the Chairman and the Secretary.

(3) EXEMPTION FOR CONDUCT UNDER APPROVED AGREEMENT.—It shall not be a violation of the antitrust laws for a person to engage in conduct in accordance with a written

PUBLIC LAW 109-417—DEC. 19, 2006

120 STAT. 2877

agreement to the extent that such agreement has been granted an exemption under paragraph (4), during the period for which the exemption is in effect.

(4) ACTION ON WRITTEN AGREEMENTS.—

(A) IN GENERAL.—The Attorney General, in consultation with the Chairman, shall grant, deny, grant in part and deny in part, or propose modifications to an exemption request regarding a written agreement submitted under paragraph (2), in a written statement to the Secretary, within 15 business days of the receipt of such request. An exemption granted under this paragraph shall take effect immediately.

Deadline.

(B) EXTENSION.—The Attorney General may extend the 15-day period referred to in subparagraph (A) for an additional period of not to exceed 10 business days.

(C) DETERMINATION.—An exemption shall be granted regarding a written agreement submitted in accordance with paragraph (2) only to the extent that the Attorney General, in consultation with the Chairman and the Secretary, finds that the conduct that will be exempted will not have any substantial anticompetitive effect that is not reasonably necessary for ensuring the availability of the countermeasure or product involved.

(5) LIMITATION ON AND RENEWAL OF EXEMPTIONS.—An exemption granted under paragraph (4) shall be limited to covered activities, and such exemption shall be renewed (with modifications, as appropriate, consistent with the finding described in paragraph (4)(C)), on the date that is 3 years after the date on which the exemption is granted unless the Attorney General in consultation with the Chairman determines that the exemption should not be renewed (with modifications, as appropriate) considering the factors described in paragraph (4).

(6) AUTHORITY TO OBTAIN INFORMATION.—Consideration by the Attorney General for granting or renewing an exemption submitted under this section shall be considered an antitrust investigation for purposes of the Antitrust Civil Process Act (15 U.S.C. 1311 et seq.).

(7) LIMITATION ON PARTIES.—The use of any information acquired under an agreement for which an exemption has been granted under paragraph (4), for any purpose other than specified in the exemption, shall be subject to the antitrust laws and any other applicable laws.

(8) REPORT.—Not later than one year after the date of enactment of this Act and biannually thereafter, the Attorney General and the Chairman shall report to Congress on the use of the exemption from the antitrust laws provided by this subsection.

(b) SUNSET.—The applicability of this section shall expire at the end of the 6-year period that begins on the date of enactment of this Act.

(c) DEFINITIONS.—In this section:

(1) ANTITRUST LAWS.—The term “antitrust laws”—

(A) has the meaning given such term in subsection (a) of the first section of the Clayton Act (15 U.S.C. 12(a)), except that such term includes section 5 of the Federal

Applicability.

120 STAT. 2878

PUBLIC LAW 109–417—DEC. 19, 2006

Trade Commission Act (15 U.S.C. 45) to the extent such section 5 applies to unfair methods of competition; and

(B) includes any State law similar to the laws referred to in subparagraph (A).

(2) COUNTERMEASURE OR PRODUCT.—The term “countermeasure or product” refers to a security countermeasure, qualified countermeasure, or qualified pandemic or epidemic product (as those terms are defined in subsection (a)(1)).

(3) COVERED ACTIVITIES.—

(A) IN GENERAL.—Except as provided in subparagraph (B), the term “covered activities” includes any activity relating to the development, manufacture, distribution, purchase, or storage of a countermeasure or product.

(B) EXCEPTION.—The term “covered activities” shall not include, with respect to a meeting or consultation conducted under subsection (a)(1) or an agreement for which an exemption has been granted under subsection (a)(4), the following activities involving 2 or more persons:

(i) Exchanging information among competitors relating to costs, profitability, or distribution of any product, process, or service if such information is not reasonably necessary to carry out covered activities—

(I) with respect to a countermeasure or product regarding which such meeting or consultation is being conducted; or

(II) that are described in the agreement as exempted.

(ii) Entering into any agreement or engaging in any other conduct—

(I) to restrict or require the sale, licensing, or sharing of inventions, developments, products, processes, or services not developed through, produced by, or distributed or sold through such covered activities; or

(II) to restrict or require participation, by any person participating in such covered activities, in other research and development activities, except as reasonably necessary to prevent the misappropriation of proprietary information contributed by any person participating in such covered activities or of the results of such covered activities.

(iii) Entering into any agreement or engaging in any other conduct allocating a market with a competitor that is not expressly exempted from the antitrust laws under subsection (a)(4).

(iv) Exchanging information among competitors relating to production (other than production by such covered activities) of a product, process, or service if such information is not reasonably necessary to carry out such covered activities.

(v) Entering into any agreement or engaging in any other conduct restricting, requiring, or otherwise involving the production of a product, process, or service that is not expressly exempted from the antitrust laws under subsection (a)(4).

(vi) Except as otherwise provided in this subsection, entering into any agreement or engaging in

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2879

any other conduct to restrict or require participation by any person participating in such covered activities, in any unilateral or joint activity that is not reasonably necessary to carry out such covered activities.

(vii) Entering into any agreement or engaging in any other conduct restricting or setting the price at which a countermeasure or product is offered for sale, whether by bid or otherwise.

SEC. 406. PROCUREMENT.

Section 319F–2 of the Public Health Service Act (42 U.S.C. 247d–6b) is amended—

(1) in the section heading, by inserting “**AND SECURITY COUNTERMEASURE PROCUREMENTS**” before the period; and

(2) in subsection (c)—

(A) in the subsection heading, by striking “**BIO-MEDICAL**”;

(B) in paragraph (3)—

(i) by striking “**COUNTERMEASURES.—The Secretary**” and inserting the following: “**COUNTERMEASURES.—**

“(A) **IN GENERAL.—The Secretary**”; and

(ii) by adding at the end the following:

“(B) **INFORMATION.—The Secretary shall institute a process for making publicly available the results of assessments under subparagraph (A) while withholding such information as—**

Public
information.

“(i) would, in the judgment of the Secretary, tend to reveal public health vulnerabilities; or

“(ii) would otherwise be exempt from disclosure under section 552 of title 5, United States Code.”;

(C) in paragraph (4)(A), by inserting “not developed or” after “currently”;

(D) in paragraph (5)(B)(i), by striking “to meet the needs of the stockpile” and inserting “to meet the stockpile needs”;

(E) in paragraph (7)(B)—

(i) by striking the subparagraph heading and all that follows through “Homeland Security Secretary” and inserting the following: “**INTERAGENCY AGREEMENT; COST.—The Homeland Security Secretary**”; and

(ii) by striking clause (ii);

(F) in paragraph (7)(C)(ii)—

(i) by amending subclause (I) to read as follows:

“(I) **PAYMENT CONDITIONED ON DELIVERY.—The contract shall provide that no payment may be made until delivery of a portion, acceptable to the Secretary, of the total number of units contracted for, except that, notwithstanding any other provision of law, the contract may provide that, if the Secretary determines (in the Secretary’s discretion) that an advance payment, partial payment for significant milestones, or payment to increase manufacturing capacity is necessary to ensure success of a project, the Secretary shall pay an amount, not to exceed 10 percent of the**

120 STAT. 2880

PUBLIC LAW 109–417—DEC. 19, 2006

contract amount, in advance of delivery. The Secretary shall, to the extent practicable, make the determination of advance payment at the same time as the issuance of a solicitation. The contract shall provide that such advance payment is required to be repaid if there is a failure to perform by the vendor under the contract. The contract may also provide for additional advance payments of 5 percent each for meeting the milestones specified in such contract, except that such payments shall not exceed 50 percent of the total contract amount. If the specified milestones are reached, the advanced payments of 5 percent shall not be required to be repaid. Nothing in this subclause shall be construed as affecting the rights of vendors under provisions of law or regulation (including the Federal Acquisition Regulation) relating to the termination of contracts for the convenience of the Government.”; and

(ii) by adding at the end the following:

“(VII) SALES EXCLUSIVITY.—The contract may provide that the vendor is the exclusive supplier of the product to the Federal Government for a specified period of time, not to exceed the term of the contract, on the condition that the vendor is able to satisfy the needs of the Government. During the agreed period of sales exclusivity, the vendor shall not assign its rights of sales exclusivity to another entity or entities without approval by the Secretary. Such a sales exclusivity provision in such a contract shall constitute a valid basis for a sole source procurement under section 303(c)(1) of the Federal Property and Administrative Services Act of 1949 (41 U.S.C. 253(c)(1)).

“(VIII) WARM BASED SURGE CAPACITY.—The contract may provide that the vendor establish domestic manufacturing capacity of the product to ensure that additional production of the product is available in the event that the Secretary determines that there is a need to quickly purchase additional quantities of the product. Such contract may provide a fee to the vendor for establishing and maintaining such capacity in excess of the initial requirement for the purchase of the product. Additionally, the cost of maintaining the domestic manufacturing capacity shall be an allowable and allocable direct cost of the contract.

“(IX) CONTRACT TERMS.—The Secretary, in any contract for procurement under this section, may specify—

“(aa) the dosing and administration requirements for countermeasures to be developed and procured;

“(bb) the amount of funding that will be dedicated by the Secretary for development and acquisition of the countermeasure; and

PUBLIC LAW 109–417—DEC. 19, 2006

120 STAT. 2881

“(cc) the specifications the countermeasure must meet to qualify for procurement under a contract under this section.”; and

(G) in paragraph (8)(A), by adding at the end the following: “Such agreements may allow other executive agencies to order qualified and security countermeasures under procurement contracts or other agreements established by the Secretary. Such ordering process (including transfers of appropriated funds between an agency and the Department of Health and Human Services as reimbursements for such orders for countermeasures) may be conducted under the authority of section 1535 of title 31, United States Code, except that all such orders shall be processed under the terms established under this subsection for the procurement of countermeasures.”.

Approved December 19, 2006.

LEGISLATIVE HISTORY—S. 3678:

SENATE REPORTS: No. 109–319 (Comm. on Health, Education, Labor, and Pensions).

CONGRESSIONAL RECORD, Vol. 152 (2006):

Dec. 5, considered and passed Senate.

Dec. 8, considered and passed House.





Explaining Operation Warp Speed

What's the goal?

Operation Warp Speed's goal is to produce and deliver 300 million doses of safe and effective vaccines with the initial doses available by January 2021, as part of a broader strategy to accelerate the development, manufacturing, and distribution of COVID-19 vaccines, therapeutics, and diagnostics (collectively known as countermeasures).

How will the goal be accomplished?

By investing in and coordinating countermeasure development, OWS will allow countermeasures such as a vaccine to be delivered to patients more rapidly while adhering to standards for safety and efficacy.

Who's working on Operation Warp Speed?

OWS is a partnership among components of the Department of Health and Human Services (HHS), including the Centers for Disease Control and Prevention (CDC), the National Institutes of Health (NIH), and the Biomedical Advanced Research and Development Authority (BARDA), and the Department of Defense (DoD). OWS engages with private firms and other federal agencies, including the Department of Veterans Affairs. It will coordinate existing HHS-wide efforts, including the NIH's Accelerating COVID-19 Therapeutic Interventions and Vaccines (ACTIV) partnership, NIH's Rapid Acceleration of Diagnostics (RADx) initiative, and work by BARDA.

What's the plan and what's happened so far?

DEVELOPMENT: To accelerate development while maintaining standards for safety and efficacy, OWS has been selecting the most promising countermeasure candidates and providing coordinated government support.

Protocols for the demonstration of safety and efficacy are being aligned, which will allow these harmonized clinical trials to proceed more quickly, and the protocols for the trials will be overseen by the federal government (NIH), as opposed to traditional public-private partnerships, in which pharmaceutical companies decide on their own protocols. Rather than eliminating steps from traditional development timelines, steps will proceed simultaneously, such as starting manufacturing of vaccines and therapeutics at industrial scale well before the demonstration of efficacy and safety as happens normally. This increases the financial risk, but not the product risk.

Select actions to support OWS vaccine and therapeutic development so far include:

- **March 30:** HHS [announced](#) \$456 million in funds for Johnson & Johnson's (Janssen) candidate vaccine. Phase 1 clinical trials began in Belgium on July 24th and in the U.S on July 27th. Janssen's large-scale Phase 3 clinical trial began on September 22, 2020, making them the fourth OWS candidate to enter Phase 3 clinical trials in the United States. Up to 60,000 volunteers will be enrolled in the trial at up to nearly 215 clinical research sites in the United States and internationally.
- **April 16:** HHS [made](#) up to \$483 million in support available for Moderna's candidate vaccine, which began Phase 1 trials on March 16 and received a fast-track designation from FDA. This agreement was expanded on July 26 to include an additional \$472 million to support late-stage clinical development, including the [expanded](#) Phase 3 study of the company's mRNA vaccine, which began on July 27th.
- **May 21:** HHS [announced](#) up to \$1.2 billion in support for AstraZeneca's candidate vaccine, developed in conjunction with the University of Oxford. The agreement is to make available at least 300 million doses of the vaccine for the United States, with the first doses delivered as early as October 2020, if the product successfully receives FDA EUA or licensure. AstraZeneca's large-scale Phase 3 clinical trial began on August 31, 2020.
- **July 7:** HHS [announced](#) \$450 million in funds to support the large-scale manufacturing of Regeneron's COVID-19 investigational anti-viral antibody treatment, REGN-COV2. This agreement is the first of a number of OWS awards to support potential therapeutics all the way through to manufacturing. As part of the manufacturing demonstration project, doses of the medicine will be packaged and ready to ship immediately if clinical trials are successful and FDA grants EUA or licensure.
- **July 7:** HHS [announced](#) \$1.6 billion in funds to support the large-scale manufacturing of Novavax's vaccine candidate. By funding Novavax's manufacturing effort, the federal government will own the 100 million doses expected to result from the demonstration project.
- **July 22:** HHS [announced](#) up to \$1.95 billion in funds to Pfizer for the large-scale manufacturing and nationwide distribution of 100 million doses of their vaccine candidate. The federal government will own the 100 million doses of vaccine initially produced as a result of this agreement, and Pfizer will deliver the doses in the United States if the product successfully receives FDA EUA or licensure, as outlined in FDA [guidance](#), after completing demonstration of safety and efficacy in a large Phase 3 clinical trial, which began July 27th.
- **July 31:** HHS [announced](#) approximately \$2 billion in funds to support the advanced development, including clinical trials and large scale manufacturing, of Sanofi and GlaxoSmithKline's (GSK) investigational adjuvanted vaccine. By funding the manufacturing effort, the federal government will own the approximately 100 million doses expected to result from the demonstration project. The adjuvanted vaccine doses could be used in clinical trials or, if the FDA authorizes use, as outlined in agency guidance, the doses would be distributed as part of a COVID-19 vaccination campaign.
- **August 5:** HHS [announced](#) approximately \$1 billion in funds to support the large-scale manufacturing and delivery of Johnson & Johnson's (Janssen) investigational vaccine candidate. Under the terms of the agreement, the U.S. Government will own the resulting 100 million doses of vaccine, and will have the option to acquire more. The company's investigational vaccine relies on Janssen's recombinant adenovirus technology, AdVac,

a technology used to develop and manufacture Janssen's Ebola vaccine with BARDA support; that vaccine received European Commission approval and was used in the Democratic Republic of the Congo (DRC) and Rwanda during the 2018-2020 Ebola outbreak that began in the DRC.

- **August 11:** HHS [announced](#) up to \$1.5 billion in funds to support the large-scale manufacturing and delivery of Moderna's investigational vaccine candidate. Under the terms of the agreement, the U.S. Government will own the resulting 100 million doses of vaccine, and will have the option to acquire more. The vaccine, called mRNA-1273, has been co-developed by Moderna and scientists from the National Institute of Allergy and Infectious Diseases (NIAID), part of the National Institutes of Health. NIAID has continued to support the vaccine's development including nonclinical studies and clinical trials. Additionally, BARDA has supported phase 2/3 clinical trials, vaccine manufacturing scale up and other development activities for this vaccine. The [Phase 3](#) clinical trial, which began July 27, is the first government-funded Phase 3 clinical trial for a COVID-19 vaccine in the United States.
- **August 23:** As part of the agency's efforts to combat COVID-19, the FDA [issued](#) an emergency use authorization (EUA) for investigational convalescent plasma. Based on available scientific evidence, the FDA determined convalescent plasma may be effective in lessening the severity or shortening the length of COVID-19 illness in hospitalized patients, and that the known and potential benefits of the product outweigh the known and potential risks. The EUA authorizes the distribution of convalescent plasma in the U.S. as well as its administration by health care providers, as appropriate, to treat suspected or confirmed cases of COVID-19. [Click here](#) to learn more about EUAs.
- **October 9:** HHS announced an agreement with AstraZeneca for late-stage development and large-scale manufacturing of the company's COVID-19 investigational product AZD7442, a cocktail of two monoclonal antibodies, that may help treat or prevent COVID-19. The goal of AstraZeneca's partnership with the U.S. Government is to develop a monoclonal antibody cocktail that can help prevent infection. An effective monoclonal antibody that can prevent COVID-19, particularly one that is long-lasting and delivered by intramuscular injection, may be of particular use in certain groups. This includes people who have compromised immune function, those who are over 80 years old, and people undergoing medical treatments that preclude them from receiving a COVID-19 vaccine.
- **October 28:** HHS [announced](#) a \$375 million agreement with Eli Lilly and Company to purchase the first doses of the company's COVID-19 investigational antibody therapeutic bamlanivimab, also known as LY-CoV555. Bamlanivimab currently is being evaluated in Phase 3 clinical trials funded by Eli Lilly, in addition to clinical trials as part of the [ACTIV](#) public-private partnership. The FDA is reviewing bamlanivimab as a possible treatment for COVID-19 in outpatients. Monoclonal antibodies, which mimic the human immune system, bind to certain proteins of a virus, reducing the ability of the virus to infect human cells.
- **November 10:** HHS [announced](#) plans to allocate initial doses of Eli Lilly and Company's investigational monoclonal antibody therapeutic, bamlanivimab, which received emergency use authorization from the FDA on November 9, for the treatment of non-hospitalized patients with mild or moderate confirmed cases of COVID-19. A data-driven system will ensure continued fair and equitable distribution of these new products. Weekly allocations to state and territorial health departments will be proportionally

based on confirmed COVID-19 cases in each state and territory over the previous seven days, based on data hospitals and state health departments enter into the HHS Protect data collection platform. To find out how much bamlanivimab has been allocated to specific states, territories, and jurisdictions, visit the allocation dashboard. This dashboard will be updated each distribution week until the FDA issues a revised EUA indicating the U.S. government involvement in the allocation and distribution process is no longer needed.

- **November 23:** HHS [announced](#) plans to allocate initial doses of Regeneron's investigational monoclonal antibody therapeutic, casirivimab and imdevimab, which received [emergency use authorization](#) from the U.S. Food and Drug Administration on November 21, 2020, for treatment of non-hospitalized patients with mild or moderate confirmed cases of COVID-19 at high risk of hospitalization. In July, the federal government [announced](#) federal funding to support large-scale manufacturing of the therapeutic with approximately 300,000 doses of the medicine expected to result from the project. HHS will allocate these government-owned doses equitably on a weekly basis to state and territorial health departments which, in turn, will determine which healthcare facilities receive the infusion drug. To find out how much of Regeneron's therapeutic has been allocated to specific states, territories, and jurisdictions, visit the [allocation dashboard](#). This dashboard will be updated each distribution week until the FDA issues a revised EUA indicating the U.S. government involvement in the allocation and distribution process is no longer needed.

As [announced](#) on May 15, the vaccine development plan is as follows, subject to change as work proceeds:

- **Fourteen** promising candidates have been chosen from the 100+ vaccine candidates currently in development—some of them already in clinical trials with U.S. government support.
- **The 14** vaccine candidates are being narrowed down to about seven candidates, representing the most promising candidates from a range of technology options (nucleic acid, viral vector, protein subunit), which will go through further testing in early-stage clinical trials.
- **Large-scale** randomized trials for the demonstration of safety and efficacy will proceed for the most promising candidates.

MANUFACTURING: The federal government is making investments in the necessary manufacturing capacity at its own risk, giving firms the confidence to invest aggressively in development which will allow faster distribution of an eventual vaccine. Manufacturing capacity for selected candidates will be advanced while they are still in development, rather than scaled up after approval or authorization. Manufacturing capacity developed will be used for whatever vaccine is eventually successful, if possible given the nature of the successful product, regardless of which firms have developed the capacity.

Select actions to support OWS manufacturing efforts so far include:

- **The May 21, April 16, and March 30** HHS agreements with AstraZeneca, Moderna, and Johnson & Johnson respectively include investments in manufacturing capabilities.

- **June 1:** HHS [announced](#) a task order with Emergent BioSolutions to advance domestic manufacturing capabilities and capacity for a potential COVID-19 vaccine as well as therapeutics, worth approximately \$628 million, using Emergent's BARDA-supported Center for Innovation in Advanced Department and Manufacturing.
- **July 27:** HHS [announced](#) a task order with Texas A&M University and FUJIFILM to advance domestic manufacturing capabilities and capacity for a potential COVID-19 vaccine, worth approximately \$265 million, using another BARDA-supported CIADM.
- **August 4:** Grand River Aseptic Manufacturing Inc., (GRAM) Grand Rapids, Michigan, was awarded a \$160 million firm-fixed-price contract for domestic aseptic fill and finish manufacturing capacity for critical vaccines and therapeutics in response to the COVID-19 pandemic.
- **October 13:** HHS [announced](#) a \$31 million agreement with Cytiva to expand the company's manufacturing capacity for products that are essential in producing COVID-19 vaccines, such as liquid and dry powder cell culture media, cell culture buffers, mixer bags, and XDR bioreactors. Cytiva is a major manufacturer of pharmaceutical consumables and hardware products and the primary supplier to many of the companies currently working with the U.S. government to develop COVID-19 vaccines. This capacity expansion will help Cytiva respond to the demand for COVID-19 vaccine consumables and hardware products without impacting on current manufacturing output.

DISTRIBUTION: OWS and our private partners are developing a plan for delivering a safe and effective product to Americans as quickly and reliably as possible. Experts from HHS are leading vaccine development, while experts from DoD are partnering with the CDC and other parts of HHS to coordinate supply, production, and distribution of vaccines.

Select actions to support OWS distribution efforts include:

MAY:

- **May 12:** DoD and HHS [announced](#) a \$138 million contract with Apiject for more than 100 million prefilled syringes for distribution across the United States by year-end 2020, as well as the development of manufacturing capacity for the ultimate production goal of over 500 million prefilled syringes in 2021.

JUNE:

- **June 9:** HHS and DoD announced a joint effort to increase domestic manufacturing capacity for vials that may be needed for vaccines and treatments.
- **June 11:** HHS [announced](#) \$204 million in funds to Corning to expand the domestic manufacturing capacity to produce approximately 164 million Valor Glass vials per year if needed. Valor Glass provides chemical durability to minimize particulate contamination. The specialized glass allows for rapid filling and capping methods that can increase manufacturing throughput by as much as 50 percent compared with conventional filling lines, which in turn can reduce the overall manufacturing time for vaccines and therapies.
- **June 11:** HHS [announced](#) \$143 million to SiO₂ Materials Science to ramp up capacity to produce the company's glass-coated plastic container, which can be used for drugs and vaccines. The new lines provide the capacity to produce an additional 120 million vials per year if needed.

AUGUST:

- **August 14:** HHS and DoD [announced](#) that McKesson Corporation will be a central distributor of future COVID-19 vaccines and related supplies needed to administer the pandemic vaccinations. The CDC is executing an existing contract option with McKesson to support vaccine distribution. The company also distributed the H1N1 vaccine during the H1N1 pandemic in 2009-2010. The current contract with McKesson, awarded as part of a competitive bidding process in 2016, includes an option for the distribution of vaccines in the event of a pandemic. Detailed planning is underway to ensure rapid distribution as soon as the FDA authorizes one or more vaccines. Once these decisions are made, McKesson will work under CDC's guidance to ship COVID-19 vaccines to administration sites.

SEPTEMBER:

- **September 16:** HHS and DoD [released](#) two documents outlining the Trump Administration's detailed strategy to deliver safe and effective COVID-19 vaccine doses to the American people as quickly and reliably as possible. The documents, developed by HHS in coordination with DoD and the Centers for Disease Control and Prevention (CDC), provide a [strategic distribution overview](#) along with an [interim playbook](#) for state, tribal, territorial, and local public health programs and their partners on how to plan and operationalize a vaccination response to COVID-19 within their respective jurisdictions.

OCTOBER:

- **October 16:** HHS and DoD [announced](#) agreements with CVS and Walgreens to provide and administer COVID-19 vaccines to residents of long-term care facilities (LTCF) nationwide with no out-of-pocket costs. Protecting especially vulnerable Americans has been a critical part of the Trump Administration's work to combat COVID-19, and LTCF residents may be part of the prioritized groups for initial COVID-19 vaccination efforts until there are enough doses available for every American who wishes to be vaccinated. The Pharmacy Partnership for Long-Term Care Program provides complete management of the COVID-19 vaccination process. This means LTCF residents and staff across the country will be able to safely and efficiently get vaccinated once vaccines are available and recommended for them, if they have not been previously vaccinated. It will also minimize the burden on LTCF sites and jurisdictional health departments of vaccine handling, administration, and fulfilling reporting requirements.

NOVEMBER:

- **November 12:** HHS and DoD [announced](#) partnerships with large chain pharmacies and networks that represent independent pharmacies and regional chains. Through the partnership with pharmacy chains, this program covers approximately 60 percent of pharmacies throughout the 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Through the partnerships with network administrators, independent pharmacies and regional chains will also be part of the federal pharmacy program, further increasing access to vaccine across the country—particularly in traditionally underserved areas.

Who's leading Operation Warp Speed?

HHS Secretary Alex Azar and Acting Defense Secretary Christopher Miller oversee OWS, with Dr. Moncef Slaoui designated as chief advisor and General Gustave F. Perna confirmed as the chief operating officer. To allow these OWS leaders to focus on operational work, in the near future the program will be announcing separate points of contact, with deep expertise and involvement in the program, for communication with Congress and the public.

What are you doing to make these products affordable for Americans?

The Administration is committed to providing free or low-cost COVID-19 countermeasures to the American people as fast as possible. Any vaccine or therapeutic doses purchased with US taxpayer dollars will be given to the American people at no cost.

How is Operation Warp Speed being funded?

Congress has directed almost \$10 billion to this effort through supplemental funding, including the CARES Act. Congress has also appropriated other flexible funding. The almost \$10 billion specifically directed includes more than \$6.5 billion designated for countermeasure development through BARDA and \$3 billion for NIH research.

129 STAT. 1312

PUBLIC LAW 114–94—DEC. 4, 2015

Public Law 114–94
114th Congress

An Act

Dec. 4, 2015
[H.R. 22]

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Fixing America’s
Surface
Transportation
Act.
23 USC 101 note.

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Fixing America’s Surface Transportation Act” or the “FAST Act”.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

Sec. 1. Short title; table of contents.

DIVISION A—SURFACE TRANSPORTATION

- Sec. 1001. Definitions.
- Sec. 1002. Reconciliation of funds.
- Sec. 1003. Effective date.
- Sec. 1004. References.

TITLE I—FEDERAL-AID HIGHWAYS

Subtitle A—Authorizations and Programs

- Sec. 1101. Authorization of appropriations.
- Sec. 1102. Obligation ceiling.
- Sec. 1103. Definitions.
- Sec. 1104. Apportionment.
- Sec. 1105. Nationally significant freight and highway projects.
- Sec. 1106. National highway performance program.
- Sec. 1107. Emergency relief for federally owned roads.
- Sec. 1108. Railway-highway grade crossings.
- Sec. 1109. Surface transportation block grant program.
- Sec. 1110. Highway use tax evasion projects.
- Sec. 1111. Bundling of bridge projects.
- Sec. 1112. Construction of ferry boats and ferry terminal facilities.
- Sec. 1113. Highway safety improvement program.
- Sec. 1114. Congestion mitigation and air quality improvement program.
- Sec. 1115. Territorial and Puerto Rico highway program.
- Sec. 1116. National highway freight program.
- Sec. 1117. Federal lands and tribal transportation programs.
- Sec. 1118. Tribal transportation program amendment.
- Sec. 1119. Federal lands transportation program.
- Sec. 1120. Federal lands programmatic activities.
- Sec. 1121. Tribal transportation self-governance program.
- Sec. 1122. State flexibility for National Highway System modifications.
- Sec. 1123. Nationally significant Federal lands and tribal projects program.

Subtitle B—Planning and Performance Management

- Sec. 1201. Metropolitan transportation planning.
- Sec. 1202. Statewide and nonmetropolitan transportation planning.

Subtitle C—Acceleration of Project Delivery

- Sec. 1301. Satisfaction of requirements for certain historic sites.

PUBLIC LAW 114–94—DEC. 4, 2015

129 STAT. 1417

SEC. 1413. NATIONAL ELECTRIC VEHICLE CHARGING AND HYDROGEN, PROPANE, AND NATURAL GAS FUELING CORRIDORS.

(a) IN GENERAL.—Chapter 1 of title 23, United States Code, is amended by inserting after section 150 the following:

“§ 151. National electric vehicle charging and hydrogen, propane, and natural gas fueling corridors 23 USC 151.

“(a) IN GENERAL.—Not later than 1 year after the date of enactment of the FAST Act, the Secretary shall designate national electric vehicle charging and hydrogen, propane, and natural gas fueling corridors that identify the near- and long-term need for, and location of, electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, and natural gas fueling infrastructure at strategic locations along major national highways to improve the mobility of passenger and commercial vehicles that employ electric, hydrogen fuel cell, propane, and natural gas fueling technologies across the United States.

“(b) DESIGNATION OF CORRIDORS.—In designating the corridors under subsection (a), the Secretary shall—

“(1) solicit nominations from State and local officials for facilities to be included in the corridors;

“(2) incorporate existing electric vehicle charging, hydrogen fueling, propane fueling, and natural gas fueling corridors designated by a State or group of States; and

“(3) consider the demand for, and location of, existing electric vehicle charging stations, hydrogen fueling stations, propane fueling stations, and natural gas fueling infrastructure.

“(c) STAKEHOLDERS.—In designating corridors under subsection (a), the Secretary shall involve, on a voluntary basis, stakeholders that include—

“(1) the heads of other Federal agencies;

“(2) State and local officials;

“(3) representatives of—

“(A) energy utilities;

“(B) the electric, fuel cell electric, propane, and natural gas vehicle industries;

“(C) the freight and shipping industry;

“(D) clean technology firms;

“(E) the hospitality industry;

“(F) the restaurant industry;

“(G) highway rest stop vendors; and

“(H) industrial gas and hydrogen manufacturers; and

“(4) such other stakeholders as the Secretary determines to be necessary.

“(d) REDESIGNATION.—Not later than 5 years after the date of establishment of the corridors under subsection (a), and every 5 years thereafter, the Secretary shall update and redesignate the corridors.

“(e) REPORT.—During designation and redesignation of the corridors under this section, the Secretary shall issue a report that—

“(1) identifies electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, and natural gas fueling infrastructure and standardization needs for electricity providers, industrial gas providers, natural gas providers, infrastructure providers, vehicle manufacturers, electricity purchasers, and natural gas purchasers; and

129 STAT. 1418

PUBLIC LAW 114–94—DEC. 4, 2015

“(2) establishes an aspirational goal of achieving strategic deployment of electric vehicle charging infrastructure, hydrogen fueling infrastructure, propane fueling infrastructure, and natural gas fueling infrastructure in those corridors by the end of fiscal year 2020.”

23 USC
prec. 101.

(b) CONFORMING AMENDMENT.—The analysis for chapter 1 of title 23, United States Code, is amended by inserting after the item relating to section 150 the following:

“151. National electric vehicle charging and hydrogen, propane, and natural gas fueling corridors.”

42 USC 6364.

(c) OPERATION OF BATTERY RECHARGING STATIONS IN PARKING AREAS USED BY FEDERAL EMPLOYEES.—

(1) AUTHORIZATION.—

(A) IN GENERAL.—The Administrator of General Services may install, construct, operate, and maintain on a reimbursable basis a battery recharging station (or allow, on a reimbursable basis, the use of a 120-volt electrical receptacle for battery recharging) in a parking area that is in the custody, control, or administrative jurisdiction of the General Services Administration for the use of only privately owned vehicles of employees of the General Services Administration, tenant Federal agencies, and others who are authorized to park in such area to the extent such use by only privately owned vehicles does not interfere with or impede access to the equipment by Federal fleet vehicles.

(B) AREAS UNDER OTHER FEDERAL AGENCIES.—The Administrator of General Services (on the request of a Federal agency) or the head of a Federal agency may install, construct, operate, and maintain on a reimbursable basis a battery recharging station (or allow, on a reimbursable basis, the use of a 120-volt electrical receptacle for battery recharging) in a parking area that is in the custody, control, or administrative jurisdiction of the requesting Federal agency, to the extent such use by only privately owned vehicles does not interfere with or impede access to the equipment by Federal fleet vehicles.

(C) USE OF VENDORS.—The Administrator of General Services, with respect to subparagraph (A) or (B), or the head of a Federal agency, with respect to subparagraph (B), may carry out such subparagraph through a contract with a vendor, under such terms and conditions (including terms relating to the allocation between the Federal agency and the vendor of the costs of carrying out the contract) as the Administrator or the head of the Federal agency, as the case may be, and the vendor may agree to.

(2) IMPOSITION OF FEES TO COVER COSTS.—

(A) FEES.—The Administrator of General Services or the head of the Federal agency under paragraph (1)(B) shall charge fees to the individuals who use the battery recharging station in such amount as is necessary to ensure that the respective agency recovers all of the costs such agency incurs in installing, constructing, operating, and maintaining the station.

(B) DEPOSIT AND AVAILABILITY OF FEES.—Any fees collected by the Administrator of General Services or the

PUBLIC LAW 117–58—NOV. 15, 2021

135 STAT. 429

Public Law 117–58
117th Congress

An Act

To authorize funds for Federal-aid highways, highway safety programs, and transit programs, and for other purposes.

Nov. 15, 2021
[H.R. 3684]

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

SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

(a) **SHORT TITLE.**—This Act may be cited as the “Infrastructure Investment and Jobs Act”.

Infrastructure
Investment and
Jobs Act.

23 USC 101 note.

(b) **TABLE OF CONTENTS.**—The table of contents for this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. References.

DIVISION A—SURFACE TRANSPORTATION

- Sec. 10001. Short title.
- Sec. 10002. Definitions.
- Sec. 10003. Effective date.

TITLE I—FEDERAL-AID HIGHWAYS

Subtitle A—Authorizations and Programs

- Sec. 11101. Authorization of appropriations.
- Sec. 11102. Obligation ceiling.
- Sec. 11103. Definitions.
- Sec. 11104. Apportionment.
- Sec. 11105. National highway performance program.
- Sec. 11106. Emergency relief.
- Sec. 11107. Federal share payable.
- Sec. 11108. Railway-highway grade crossings.
- Sec. 11109. Surface transportation block grant program.
- Sec. 11110. Nationally significant freight and highway projects.
- Sec. 11111. Highway safety improvement program.
- Sec. 11112. Federal lands transportation program.
- Sec. 11113. Federal lands access program.
- Sec. 11114. National highway freight program.
- Sec. 11115. Congestion mitigation and air quality improvement program.
- Sec. 11116. Alaska Highway.
- Sec. 11117. Toll roads, bridges, tunnels, and ferries.
- Sec. 11118. Bridge investment program.
- Sec. 11119. Safe routes to school.
- Sec. 11120. Highway use tax evasion projects.
- Sec. 11121. Construction of ferry boats and ferry terminal facilities.
- Sec. 11122. Vulnerable road user research.
- Sec. 11123. Wildlife crossing safety.
- Sec. 11124. Consolidation of programs.
- Sec. 11125. GAO report.
- Sec. 11126. Territorial and Puerto Rico highway program.
- Sec. 11127. Nationally significant Federal lands and Tribal projects program.
- Sec. 11128. Tribal high priority projects program.
- Sec. 11129. Standards.
- Sec. 11130. Public transportation.

PUBLIC LAW 117-58—NOV. 15, 2021

135 STAT. 1421

paragraph in this Act in each fiscal year shall be for the administration and operations of the Federal Highway Administration: *Provided further*, That, after setting aside funds under the third proviso of this paragraph in this Act the Secretary shall distribute the remaining funds made available under this paragraph in this Act among States as follows—

(A) 75 percent by the proportion that the total cost of replacing all bridges classified in poor condition in such State bears to the sum of the total cost to replace all bridges classified in poor condition in all States; and

(B) 25 percent by the proportion that the total cost of rehabilitating all bridges classified in fair condition in such State bears to the sum of the total cost to rehabilitate all bridges classified in fair condition in all States:

Provided further, That the amounts calculated under the preceding proviso shall be adjusted such that each State receives, for each of fiscal years 2022 through 2026, no less than \$45,000,000 under such proviso: *Provided further*, That for purposes of the preceding 2 provisos, the Secretary shall determine replacement and rehabilitation costs based on the average unit costs of bridges from 2016 through 2020, as submitted by States to the Federal Highway Administration, as required by section 144(b)(5) of title 23, United States Code: *Provided further*, That for purposes of determining the distribution of funds to States under this paragraph in this Act, the Secretary shall calculate the total deck area of bridges classified as in poor or fair condition based on the National Bridge Inventory as of December 31, 2020: *Provided further*, That, subject to the following proviso, funds made available under this paragraph in this Act that are distributed to States shall be used for highway bridge replacement, rehabilitation, preservation, protection, or construction projects on public roads: *Provided further*, That of the funds made available under this paragraph in this Act that are distributed to a State, 15 percent shall be set aside for use on off-system bridges for the same purposes as described in the preceding proviso: *Provided further*, That, except as provided in the following proviso, for funds made available under this paragraph in this Act that are distributed to States, the Federal share shall be determined in accordance with section 120 of title 23, United States Code: *Provided further*, That for funds made available under this paragraph in this Act that are distributed to States and used on an off-system bridge that is owned by a county, town, township, city, municipality or other local agency, or federally-recognized Tribe the Federal share shall be 100 percent;

Determination.
Replacement
costs.

Determination.
Bridges.

Determination.

(2) \$5,000,000,000, to remain available until expended for amounts made available for each of fiscal years 2022 through 2026, shall be to carry out a National Electric Vehicle Formula Program (referred to in this paragraph in this Act as the “Program”) to provide funding to States to strategically deploy electric vehicle charging infrastructure and to establish an interconnected network to facilitate data collection, access, and reliability: *Provided*, That funds made available under this paragraph in this Act shall be used for: (1) the acquisition and installation of electric vehicle charging infrastructure to serve as a catalyst for the deployment of such infrastructure and to connect it to a network to facilitate data collection, access, and reliability; (2) proper operation and maintenance of electric vehicle charging infrastructure; and (3) data sharing

135 STAT. 1422

PUBLIC LAW 117-58—NOV. 15, 2021

about electric vehicle charging infrastructure to ensure the long-term success of investments made under this paragraph in this Act: *Provided further*, That for each of fiscal years 2022 through 2026, the Secretary shall distribute among the States the funds made available under this paragraph in this Act so that each State receives an amount equal to the proportion that the total base apportionment or allocation determined for the State under subsection (c) of section 104 or under section 165 of title 23, United States Code, bears to the total base apportionments or allocations for all States under subsection (c) of section 104 and section 165 of title 23, United States Code: *Provided further*, That the Federal share payable for the cost of a project funded under this paragraph in this Act shall be 80 percent: *Provided further*, That the Secretary shall establish a deadline by which a State shall provide a plan to the Secretary, in such form and such manner that the Secretary requires (to be made available on the Department's website), describing how such State intends to use funds distributed to the State under this paragraph in this Act to carry out the Program for each fiscal year in which funds are made available: *Provided further*, That, not later than 120 days after the deadline established in the preceding proviso, the Secretary shall make publicly available on the Department's website and submit to the House Committee on Transportation and Infrastructure, the Senate Committee on Environment and Public Works, and the House and Senate Committees on Appropriations, a report summarizing each plan submitted by a State to the Department of Transportation and an assessment of how such plans make progress towards the establishment of a national network of electric vehicle charging infrastructure: *Provided further*, That if a State fails to submit the plan required under the fourth proviso of this paragraph in this Act to the Secretary by the date specified in such proviso, or if the Secretary determines a State has not taken action to carry out its plan, the Secretary may withhold or withdraw, as applicable, funds made available under this paragraph in this Act for the fiscal year from the State and award such funds on a competitive basis to local jurisdictions within the State for use on projects that meet the eligibility requirements under this paragraph in this Act: *Provided further*, That, prior to the Secretary making a determination that a State has not taken actions to carry out its plan, the Secretary shall notify the State, consult with the State, and identify actions that can be taken to rectify concerns, and provide at least 90 days for the State to rectify concerns and take action to carry out its plan: *Provided further*, That the Secretary shall provide notice to a State on the intent to withhold or withdraw funds not less than 60 days before withholding or withdrawing any funds, during which time the States shall have an opportunity to appeal a decision to withhold or withdraw funds directly to the Secretary: *Provided further*, That if the Secretary determines that any funds withheld or withdrawn from a State under the preceding proviso cannot be fully awarded to local jurisdictions within the State under the preceding proviso in a manner consistent with the purpose of this paragraph in this Act, any such funds remaining shall be distributed among other States (except States for which funds for that fiscal year

Deadline.
Plan.
Web posting.

Deadline.
Public information.
Web posting.
Reports.
Summaries.
Assessment.

Determination.

Notification.
Consultation.
Time period.

Notification.
Deadline.
Appeal.

Determination.

PUBLIC LAW 117-58—NOV. 15, 2021

135 STAT. 1423

have been withheld or withdrawn under the preceding proviso) in the same manner as funds distributed for that fiscal year under the second proviso under this paragraph in this Act, except that the ratio shall be adjusted to exclude States for which funds for that fiscal year have been withheld or withdrawn under the preceding proviso: *Provided further*, That funds distributed under the preceding proviso shall only be available to carry out this paragraph in this Act: *Provided further*, That funds made available under this paragraph in this Act may be used to contract with a private entity for acquisition and installation of publicly accessible electric vehicle charging infrastructure and the private entity may pay the non-Federal share of the cost of a project funded under this paragraph: *Provided further*, That funds made available under this paragraph in this Act shall be for projects directly related to the charging of a vehicle and only for electric vehicle charging infrastructure that is open to the general public or to authorized commercial motor vehicle operators from more than one company: *Provided further*, That any electric vehicle charging infrastructure acquired or installed with funds made available under this paragraph in this Act shall be located along a designated alternative fuel corridor: *Provided further*, That no later than 90 days after the date of enactment of this Act, the Secretary of Transportation, in coordination with the Secretary of Energy, shall develop guidance for States and localities to strategically deploy electric vehicle charging infrastructure, consistent with this paragraph in this Act: *Provided further*, That the Secretary of Transportation, in coordination with the Secretary of Energy, shall consider the following in developing the guidance described in the preceding proviso: (1) the distance between publicly available electric vehicle charging infrastructure; (2) connections to the electric grid, including electric distribution upgrades; vehicle-to-grid integration, including smart charge management or other protocols that can minimize impacts to the grid; alignment with electric distribution interconnection processes, and plans for the use of renewable energy sources to power charging and energy storage; (3) the proximity of existing off-highway travel centers, fuel retailers, and small businesses to electric vehicle charging infrastructure acquired or funded under this paragraph in this Act; (4) the need for publicly available electric vehicle charging infrastructure in rural corridors and underserved or disadvantaged communities; (5) the long-term operation and maintenance of publicly available electric vehicle charging infrastructure to avoid stranded assets and protect the investment of public funds in that infrastructure; (6) existing private, national, State, local, Tribal, and territorial government electric vehicle charging infrastructure programs and incentives; (7) fostering enhanced, coordinated, public-private or private investment in electric vehicle charging infrastructure; (8) meeting current and anticipated market demands for electric vehicle charging infrastructure, including with regard to power levels and charging speed, and minimizing the time to charge current and anticipated vehicles; and (9) any other factors, as determined by the Secretary: *Provided further*, That if a State determines, and the Secretary certifies, that the designated alternative fuel corridors in the States are fully built out, then the State may use funds provided

Contracts.

Deadline.
Coordination.

Coordination.

Determination.
Certification.

135 STAT. 1424

PUBLIC LAW 117-58—NOV. 15, 2021

under this paragraph for electric vehicle charging infrastructure on any public road or in other publically accessible locations, such as parking facilities at public buildings, public schools, and public parks, or in publically accessible parking facilities owned or managed by a private entity: *Provided further*, That subject to the minimum standards and requirements established under the following proviso, funds made available under this paragraph in this Act may be used for: (1) the acquisition or installation of electric vehicle charging infrastructure; (2) operating assistance for costs allocable to operating and maintaining electric vehicle charging infrastructure acquired or installed under this paragraph in this Act, for a period not to exceed five years; (3) the acquisition or installation of traffic control devices located in the right-of-way to provide directional information to electric vehicle charging infrastructure acquired, installed, or operated under this paragraph in this Act; (4) on-premises signs to provide information about electric vehicle charging infrastructure acquired, installed, or operated under this paragraph in this Act; (5) development phase activities relating to the acquisition or installation of electric vehicle charging infrastructure, as determined by the Secretary; or (6) mapping and analysis activities to evaluate, in an area in the United States designated by the eligible entity, the locations of current and future electric vehicle owners, to forecast commuting and travel patterns of electric vehicles and the quantity of electricity required to serve electric vehicle charging stations, to estimate the concentrations of electric vehicle charging stations to meet the needs of current and future electric vehicle drivers, to estimate future needs for electric vehicle charging stations to support the adoption and use of electric vehicles in shared mobility solutions, such as micro-transit and transportation network companies, and to develop an analytical model to allow a city, county, or other political subdivision of a State or a local agency to compare and evaluate different adoption and use scenarios for electric vehicles and electric vehicle charging stations: *Provided further*, That not later than 180 days after the date of enactment of this Act, the Secretary of Transportation, in coordination with the Secretary of Energy and in consultation with relevant stakeholders, shall, as appropriate, develop minimum standards and requirements related to: (1) the installation, operation, or maintenance by qualified technicians of electric vehicle charging infrastructure under this paragraph in this Act; (2) the interoperability of electric vehicle charging infrastructure under this paragraph in this Act; (3) any traffic control device or on-premises sign acquired, installed, or operated under this paragraph in this Act; (4) any data requested by the Secretary related to a project funded under this paragraph in this Act, including the format and schedule for the submission of such data; (5) network connectivity of electric vehicle charging infrastructure; and (6) information on publicly available electric vehicle charging infrastructure locations, pricing, real-time availability, and accessibility through mapping applications: *Provided further*, That not later than 1 year after the date of enactment of this Act, the Secretary shall designate national electric vehicle charging corridors that identify the near- and long-term need for, and the location of, electric vehicle charging

Determination.

Evaluation.
Estimate.

Deadline.
Coordination.
Consultation.
Standards.
Requirements.

Deadline.

PUBLIC LAW 117–58—NOV. 15, 2021

135 STAT. 1425

infrastructure to support freight and goods movement at strategic locations along major national highways, the National Highway Freight Network established under section 167 of title 23, United States Code, and goods movement locations including ports, intermodal centers, and warehousing locations: *Provided further*, That the report issued under section 151(e) of title 23, United States Code, shall include a description of efforts to achieve strategic deployment of electric vehicle charging infrastructure in electric vehicle charging corridors, including progress on the implementation of the Program under this paragraph in this Act: *Provided further*, That, for fiscal year 2022, before distributing funds made available under this paragraph in this Act to States, the Secretary shall set aside from funds made available under this paragraph in this Act to carry out this paragraph in this Act not more than \$300,000,000, which may be transferred to the Joint Office described in the twenty-fourth proviso of this paragraph in this Act, to establish such Joint Office and carry out its duties under this paragraph in this Act: *Provided further*, That, for each of fiscal years 2022 through 2026, after setting aside funds under the preceding proviso, and before distributing funds made available under this paragraph in this Act to States, the Secretary shall set aside from funds made available under this paragraph in this Act for such fiscal year to carry out this paragraph in this Act 10 percent for grants to States or localities that require additional assistance to strategically deploy electric vehicle charging infrastructure: *Provided further*, That not later than 1 year after the date of enactment of this Act, the Secretary shall establish a grant program to administer to States or localities the amounts set aside under the preceding proviso: *Provided further*, That, except as otherwise specified under this paragraph in this Act, funds made available under this paragraph in this Act, other than funds transferred under the nineteenth proviso of this paragraph in this Act to the Joint Office, shall be administered as if apportioned under chapter 1 of title 23, United States Code: *Provided further*, That funds made available under this paragraph in this Act shall not be transferable under section 126 of title 23, United States Code: *Provided further*, That there is established a Joint Office of Energy and Transportation (referred to in this paragraph in this Act as the “Joint Office”) in the Department of Transportation and the Department of Energy to study, plan, coordinate, and implement issues of joint concern between the two agencies, which shall include: (1) technical assistance related to the deployment, operation, and maintenance of zero emission vehicle charging and refueling infrastructure, renewable energy generation, vehicle-to-grid integration, including microgrids, and related programs and policies; (2) data sharing of installation, maintenance, and utilization in order to continue to inform the network build out of zero emission vehicle charging and refueling infrastructure; (3) performance of a national and regionalized study of zero emission vehicle charging and refueling infrastructure needs and deployment factors, to support grants for community resilience and electric vehicle integration; (4) development and deployment of training and certification programs; (5) establishment and implementation of a program to promote renewable

Deadline.
Grants.

Establishment.
23 USC 151 note.

135 STAT. 1426

PUBLIC LAW 117-58—NOV. 15, 2021

Public information. Data.

Advance notice. Time period.

Definitions.

energy generation, storage, and grid integration, including microgrids, in transportation rights-of-way; (6) studying, planning, and funding for high-voltage distributed current infrastructure in the rights-of way of the Interstate System and for constructing high-voltage and or medium-voltage transmission pilots in the rights-of-way of the Interstate System; (7) research, strategies, and actions under the Departments' statutory authorities to reduce transportation-related emissions and mitigate the effects of climate change; (8) development of a streamlined utility accommodations policy for high-voltage and medium-voltage transmission in the transportation right-of-way; and (9) any other issues that the Secretary of Transportation and the Secretary of Energy identify as issues of joint interest: *Provided further*, That the Joint Office of Energy and Transportation shall establish and maintain a public database, accessible on both Department of Transportation and Department of Energy websites, that includes: (1) information maintained on the Alternative Fuel Data Center by the Office of Energy Efficiency and Renewable Energy of the Department of Energy with respect to the locations of electric vehicle charging stations; (2) potential locations for electric vehicle charging stations identified by eligible entities through the program; and (3) the ability to sort generated results by various characteristics with respect to electric vehicle charging stations, including location, in terms of the State, city, or county; status (operational, under construction, or planned); and charging type, in terms of Level 2 charging equipment or Direct Current Fast Charging Equipment: *Provided further*, That the Secretary of Transportation and the Secretary of Energy shall cooperatively administer the Joint Office consistent with this paragraph in this Act: *Provided further*, That the Secretary of Transportation and the Secretary of Energy may transfer funds between the Department of Transportation and the Department of Energy from funds provided under this paragraph in this Act to establish the Joint Office and to carry out its duties under this paragraph in this Act and any such funds or portions thereof transferred to the Joint Office may be transferred back to and merged with this account: *Provided further*, That the Secretary of Transportation and the Secretary of Energy shall notify the House and Senate Committees on Appropriations not less than 15 days prior to transferring any funds under the previous proviso: *Provided further*, That for the purposes of funds made available under this paragraph in this Act: (1) the term "State" has the meaning given such term in section 101 of title 23, United States Code; and (2) the term "Federal-aid highway" means a public highway eligible for assistance under chapter 1 of title 23, United States Code, other than a highway functionally classified as a local road or rural minor collector: *Provided further*, That, of the funds made available in this division or division A of this Act for the Federal lands transportation program under section 203 of title 23, United States Code, not less than \$7,000,000 shall be made available for each Federal agency otherwise eligible to compete for amounts made available under that section for each of fiscal years 2022 through 2026;

FACT SHEET: The Biden-Harris Electric Vehicle Charging Action Plan

December 13, 2021

Vice President Kamala Harris to Announce Action Plan that Fast Tracks Bipartisan Infrastructure Law Investments

President Biden has united automakers and autoworkers to drive American leadership forward on clean cars, and he set an [ambitious target](#) of 50% of electric vehicle (EV) sale shares in the U.S. by 2030. Now, the Bipartisan Infrastructure Law will supercharge America's efforts to lead the electric future, Building a Better America where we can strengthen domestic supply chains, outcompete the world, and make electric cars cheaper for working families.

President Biden, American families, automakers, and autoworkers agree: the future of transportation is electric. The electric car future is cleaner, more equitable, more affordable, and an economic opportunity to support good-paying, union jobs across American supply chains as automakers continue investing in manufacturing clean vehicles and the batteries that power them.

Today, the Biden-Harris-Administration is releasing an EV Charging Action Plan to outline steps federal agencies are taking to support developing and deploying chargers in American communities across the country. As a result of the Bipartisan Infrastructure Law, the Department of Energy (DOE) and Department of Transportation (DOT) will establish a Joint Office of Energy and Transportation focused on deploying EV infrastructure, working hand-in-hand to collect input and guidance from industry leaders, manufacturers, workers, and other stakeholders that will ensure the national network provides convenient charging for all. The initial focus will be building a convenient, reliable public charging network that can build public confidence, with a focus on filling gaps in rural, disadvantaged, and hard-to-reach locations.

The Bipartisan Infrastructure Law makes the most transformative investment in electric vehicle charging in U.S. history that will put us on the path to a convenient and equitable network of 500,000 chargers and make EVs accessible to all Americans for both local and long-distance trips. The Bipartisan Infrastructure Law includes \$5 billion in formula funding for [states](#) with a goal to build a national charging network. 10% is set-aside each year for the Secretary to provide grants to States to help fill gaps in the network. The Law also provides \$2.5 billion for communities and corridors through a competitive grant program that will support innovative approaches and ensure that charger deployment meets Administration priorities such as supporting rural charging, improving local air quality and increasing EV charging access in disadvantaged communities. Together, this is the largest-ever U.S. investment in EV charging and will be a transformative down payment on the transition to a zero-emission future.

With the historic investments in the Bipartisan Infrastructure Law, the Biden-Harris Administration is laying the foundation for a nationwide network of EV charging infrastructure to provide a reliable, affordable, convenient, seamless user experience that is equitable and accessible for all Americans. This network will enable:

- An accelerated adoption of electric vehicles for all private consumers and commercial fleets, including those who cannot reliably charge at their home that

can improve our air quality, reduce emissions, put us on a path to net-zero emissions by no later than 2050, and position U.S. industries to lead global efforts.

- Targeted equity benefits for disadvantaged communities, reducing mobility and energy burdens while also creating jobs and supporting businesses.
- Create family-sustaining union jobs that can't be outsourced.

Electric Vehicle Infrastructure

Today, the Biden-Harris Administration is announcing the following actions:

- **Establishing a Joint Office of Energy and Transportation:** Tomorrow, Energy Secretary Jennifer Granholm and Transportation Secretary Pete Buttigieg will sign an agreement enabling them to leverage the best resources, talent, and experience at the DOT and the DOE, including the DOE's National Labs. The Joint Office will ensure the agencies can work together to implement the EV charging network and other electrification provisions in the Bipartisan Infrastructure Law. This will provide states, communities, industry, labor, and consumer groups with a coordinated Federal approach and a "one-stop-shop" for resources on EV Charging and related topics. The agencies will complete a Memorandum of Understanding on December 14th to formally launch the Joint Office.
 - **Gathering Diverse Stakeholder Input:** The White House is convening a series of initial stakeholder meetings on topics including partnerships with state and local government, domestic manufacturing, equity and environmental justice, civil rights, partnering with tribal communities, and maximizing environmental benefits. DOT and DOE will also launch a new Advisory Committee on Electric Vehicles and is targeting to appoint members to this committee by the end of the first quarter of 2022. DOT released an updated guide to deploying EV Charging in highway right-of-way in response to stakeholder interest. To gather input from the widest possible array of stakeholders, DOT has a new EV Charging Request for Information, where stakeholders can submit their priorities for Federal standards and guidance for consideration.
 - **Preparing to Issue Guidance and Standards for States and Cities:** The Administration is already hard at work developing the guidance and standards described in the Bipartisan Infrastructure Law. No later than February 11th, DOT will publish guidance for States and cities to strategically deploy EV charging stations to build out a national network along our nation's highway system. This guidance will look at where we already have EV charging and where we need—or will need—more of it. It will focus on the needs of disadvantaged and rural communities, catalyze further private investment in EV charging, and ensure we're smartly connecting to our electric grid. No later than May 13th, DOT will publish standards for EV chargers in the national network to ensure they work, they're safe, and they're accessible to everyone.
 - **Requesting Information from Domestic Manufacturers:** EV charger manufacturing, assembly, installation, and maintenance all have the potential to not only support our sustainability and climate goals, but also to drive domestic competitiveness and create good-paying, union jobs in the United States. To ensure this network of EV chargers can be built in America, by America, DOT
-

and DOE are working directly with manufacturers, automakers and labor to understand what domestic sourcing is available today, and what may be possible in the future. In November, DOT and DOE released a request for information from domestic manufacturers to identify EV chargers and other charging related components that meet USDOT Buy America requirements and to highlight the benefits of shifting all manufacturing and assembly processes to the United States.

- **New Solicitation for Alternative Fuel Corridors:** Today, the DOT is announcing a forthcoming solicitation for the 6th round of Alternative Fuel Corridors designations. This program, created by the FAST Act in 2015, recognizes highway segments that have infrastructure plans to allow travel on alternative fuels, including electricity. FHWA will establish a recurring process to regularly update these corridors.

The current network of over 100,000 public chargers operates with different plug types, payment options, data availability, and hardware hookups. Today's actions will establish a more uniform approach, provide greater convenience for customers, and offer increased confidence for industry. These federal programs will spur additional private sector investments and drive the build-out of a user-friendly, cost-effective, and financially sustainable national network creating well-paying jobs across manufacturing, installation, and operation. A ubiquitous charging infrastructure targeted to meet different consumers' needs will provide equitable benefits to all Americans and provide flexibility for future investments, effective integration with a clean power system, and support a growing and diversifying fleet of electrified vehicles.

[Electric Vehicle Batteries](#)

Another key component of our electric vehicle strategy is to increase domestic manufacturing of EV batteries and components and advance environmentally responsible domestic sourcing and recycling of critical minerals.

In June, the Biden-Harris Administration released [100-day reviews](#) of the supply chains of four critical products, including high-capacity batteries and critical minerals and materials. The reviews made dozens of recommendations across Federal agencies securing a reliable and sustainable end-to-end domestic supply chain for advanced batteries. These recommendations include supporting sustainable and responsible domestic mining and processing of key battery minerals, such as lithium, cobalt, and nickel, and ensuring new domestic automotive battery production adheres to high-road labor standards.

- The Federal Consortium for Advanced Batteries released the [National Blueprint for Lithium Batteries](#), codifying the findings of the battery supply chain review in a 10-year, whole-of-government plan to urgently develop a domestic lithium battery supply chain that combats the climate crisis by creating good-paying clean energy jobs across America.
 - The DOE Loan Programs Office (LPO) published new [guidance](#) and a [fact sheet](#) for the approximately \$17 billion in loan authority in the Advanced Technology Vehicles Manufacturing Loan Program (ATVM) to support the domestic battery supply chain. LPO will leverage full statutory authority to finance key strategic areas of development and fill deficits in the domestic supply chain capacity. This will include the ATVM program making loans to manufacturers
-

of advanced technology vehicle battery cells and packs for re-equipping, expanding or establishing such manufacturing facilities in the United States.

- DOE's Federal Energy Management Program (FEMP) launched a new effort to support deployment of energy storage projects by federal agencies, including a federal government-wide energy storage review that will evaluate the current opportunity for deploying battery storage at federal sites and a call for projects from federal sites interested in deploying energy storage projects. These actions build on steps taken earlier this year to leverage \$13 million in FEMP's Assisting Federal Facilities with Energy Conservation Technologies grants to unlock an estimated \$260 million or more in project investments, including battery storage projects.

There are already promising signs that the Administration strategy is working and industry is ready to step up. For example, Lithium is a critical input to batteries where the United States currently has very little domestic supply. The Biden Administration has funded two dozen teams to expand sourcing of lithium from geothermal brines and approved a permit for the Nevada-based Thacker Pass lithium mine. Automakers are also signing contracts that leverage domestic supply, including Ford sourcing lithium from recycled content through Redwood Materials, GM sourcing lithium from geothermal brines in the Salton Sea with Controlled Thermal Resources, and Tesla sourcing lithium from a Piedmont project in North Carolina.

The investments proposed by the Biden Administration will accelerate and amplify this progress. The Bipartisan Infrastructure Law includes more than \$7 billion in funding to accelerate innovations and facilities across the battery supply chain from battery materials refining, processing and manufacturing to battery manufacturing, including components, to battery recycling and reuse. These investments will support the development of a North American battery supply chain, help expand manufacturing and recycling facilities in the United States and substantially advance the battery recycling through research, development and demonstration projects in collaboration with retailers as well as state and local governments.

The Bipartisan Infrastructure Law includes:

- \$3 billion in competitive grants for battery minerals and refined materials aimed at accelerating the development of the North American battery supply chain.
 - An additional \$3 billion for competitive grants aimed at building, retooling, or expanding manufacturing of batteries and battery components (such as cathodes, anodes, and electrolytes), and to establish recycling facilities in the United States.
 - Recognizing the need for innovative and practical approaches to battery and critical mineral recycling, the act includes research, development, and demonstration recycling projects (\$60 million) and efforts in cooperation with retailers (\$15 million) and state and local governments (\$50 million) to increase the collection of spent batteries for reuse, recycling or proper disposal. The electric drive vehicle battery recycling and second-life applications program (\$200 million) is focused on making electric vehicles batteries (e.g., optimized designs) easier to recycle and utilize in secondary applications before recycling.
-

- An additional \$750 million “Advanced Energy Manufacturing and Recycling Grant Program” to re-equip, expand or establish an industrial or manufacturing facility to reduce GHG emissions of that facility substantially below current best practices.
-

President Biden, USDOT and USDOE Announce \$5 Billion over Five Years for National EV Charging Network, Made Possible by Bipartisan Infrastructure Law

February 10, 2022

Joint Energy and Transportation Office and DriveElectric.gov Available to Assist States with Electric Vehicle Infrastructure Deployment Plans

FHWA 05-22

WASHINGTON, D.C. – The U.S. Departments of Transportation and Energy today announced nearly \$5 billion that will be made available under the new National Electric Vehicle Infrastructure (NEVI) Formula Program established by President Biden’s Bipartisan Infrastructure Law, to build out a national electric vehicle charging network, an important step towards making electric vehicle (EV) charging accessible to all Americans.

The program will provide nearly \$5 billion over five years to help states create a network of EV charging stations along designated Alternative Fuel Corridors, particularly along the Interstate Highway System. The total amount available to states in Fiscal Year 2022 under the NEVI Formula Program is \$615 million. States must submit an EV Infrastructure Deployment Plan before they can access these funds. A second, competitive grant program designed to further increase EV charging access in locations throughout the country, including in rural and underserved communities, will be announced later this year.

“A century ago, America ushered in the modern automotive era; now America must lead the electric vehicle revolution,” said U.S. Transportation Secretary Pete Buttigieg. “The President’s Bipartisan Infrastructure Law will help us win the EV race by working with states, labor, and the private sector to deploy a historic nationwide charging network that will make EV charging accessible for more Americans.”

“We are modernizing America’s national highway system for drivers in cities large and small, towns and rural communities, to take advantage of the benefits of driving electric,” said U.S. Secretary of Energy Jennifer M. Granholm. “The Bipartisan Infrastructure Law is helping states to make electric vehicle charging more accessible by building the necessary infrastructure for drivers across America to save money and go the distance, from coast-to-coast.”

Today’s news follows President Biden’s announcement earlier this week on EV manufacturing, and the [White House Fact Sheet](#) on actions taken to date to prepare for this historic EV investment.

To access these new Bipartisan Infrastructure Law funds – and to help ensure a convenient, reliable, affordable, and equitable charging experience for all users – each state is required to submit an EV Infrastructure Deployment Plan to the new Joint Office of Energy and Transportation that describes how the state intends to use its

share of NEVI Formula Program funds consistent with Federal Highway Administration (FHWA) guidance.

These plans are expected to build on [Alternative Fuel Corridors](#) that nearly every state has designated over the past six years of this program. These corridors will be the spine of the new national EV charging network. The Joint Office will play a key role in the implementation of the NEVI Formula Program by providing direct technical assistance and support to help states develop their plans before they are reviewed and approved by the Federal Highway Administration, which administers the funding.

“Americans need to know that they can purchase an electric vehicle and find convenient charging stations when they are using Interstates and other major highways,” Deputy Federal Highway Administrator Stephanie Pollack said. “The new EV formula program will provide states with the resources they need to provide their residents with reliable access to an EV charging station as they travel.”

The new Joint Office of Energy and Transportation also launched a new website this week at [DriveElectric.gov](#). There, officials can find links to technical assistance, data and tools for states, and careers. To join the Joint Office and support a future where everyone can ride and drive electric, individuals are encouraged to [apply](#) to be an EV charging fellow.

As part of today’s announcement, FHWA released the NEVI Formula Program funding to states that will be available following approval of state plans for [Fiscal Year 2022](#) in addition to the [Program Guidance](#) and a [Request for Nominations](#) for states to expand their existing Alternative Fuel Corridors. Here is [state-by-state NEVI funding for Fiscal Years 2022-2026](#).

FY 2022 Funding*

Picker, Platforms

Page 447

State	National Electric Vehicle Formula Program
Alabama	11,738,801
Alaska	7,758,240
Arizona	11,320,762
Arkansas	8,010,850
California	56,789,406
Colorado	8,368,277
Connecticut	7,771,342
Delaware	2,617,339
Dist. of Col.	2,468,807
Florida	29,315,442
Georgia	19,978,342
Hawaii	2,616,956
Idaho	4,425,511
Illinois	21,998,178
Indiana	14,743,125
Iowa	7,604,168
Kansas	5,847,059
Kentucky	10,280,470
Louisiana	10,859,512
Maine	2,856,158
Maryland	9,298,080
Massachusetts	9,397,238
Michigan	16,290,764
Minnesota	10,089,418
Mississippi	7,483,268
Missouri	14,647,722
Montana	6,348,350
Nebraska	4,472,243
Nevada	5,618,414
New Hampshire	2,556,450
New Jersey	15,448,790
New Mexico	5,681,977
New York	25,971,644
North Carolina	16,137,196
North Dakota	3,841,352
Ohio	20,739,853
Oklahoma	9,812,934
Oregon	7,733,679
Pennsylvania	25,386,631
Puerto Rico	2,020,490
Rhode Island	3,383,835
South Carolina	10,360,855

South Dakota	4,363,463
Tennessee	13,074,884
Texas	60,356,706
Utah	5,372,731
Vermont	3,140,247
Virginia	15,745,244
Washington	10,489,110
West Virginia	6,761,785
Wisconsin	11,642,061
Wyoming	3,963,841
Total	615,000,000

*Funds available pending approval of state plans.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA,)
)
 Plaintiff,)
)
 v.)
)
 MICROSOFT CORPORATION,)
)
 Defendant.)

Civil Action No. 98-1232 (TPJ)

FILED

JUN 07 2000

NANCY MAYER WHITTINGTON, CLERK
U.S. DISTRICT COURT

STATE OF NEW YORK, et al.,)
)
 Plaintiffs,)
)
 v.)
)
 MICROSOFT CORPORATION,)
)
 Defendant.)

Civil Action No. 98-1233 (TPJ)

MICROSOFT CORPORATION,)
)
 Counterclaim-Plaintiff,)
)
 v.)
)
 ELIOT SPITZER, attorney general of the)
 State of New York, in his official)
 capacity, et al.,)
)
 Counterclaim-Defendants.)

FINAL JUDGMENT

Plaintiff, United States of America, having filed its complaint herein on May 18, 1998;

Plaintiff States, having filed their complaint herein on the same day;

Defendant Microsoft Corporation (“Microsoft”) having appeared and filed its answer to such complaints;

The Court having jurisdiction of the parties hereto and of the subject matter hereof and having conducted a trial thereon and entered Findings of Fact on November 5, 1999, and Conclusions of Law on April 3, 2000;

The Court having entered judgment in accordance with the Findings of Fact and the Conclusions of Law on April 3, 2000, that Microsoft has violated §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, as well as the following state law provisions: Cal Bus. & Prof. Code §§ 16720, 16726, 16727, 17200; Conn. Gen. Stat. §§ 35-26, 35-27, 35-29; D.C. Code §§ 28-4502, 28-4503; Fla. Stat. chs. 501.204(1), 542.18, 542.19; 740 Ill. Comp. Stat. ch. 10/3; Iowa Code §§ 553.4, 553.5; Kan. Stat. §§ 50-101 et seq.; Ky. Rev. Stat. §§ 367.170, 367.175; La. Rev. Stat. §§ 51:122, 51:123, 51:1405; Md. Com. Law II Code Ann. § 11-204; Mass. Gen. Laws ch. 93A, § 2; Mich. Comp. Laws §§ 445.772, 445.773; Minn. Stat. § 325D.52; N.M. Stat. §§ 57-1-1, 57-1-2; N.Y. Gen. Bus. Law § 340; N.C. Gen. Stat. §§ 75-1.1, 75-2.1; Ohio Rev. Code §§ 1331.01, 1331.02; Utah Code § 76-10-914; W.Va. Code §§ 47-18-3, 47-18-4; Wis. Stat. § 133.03(1)-(2); and

Upon the record at trial and all prior and subsequent proceedings herein, it is this  day of June, 2000, hereby:

ORDERED, ADJUDGED, AND DECREED as follows:

1. Divestiture
 - a. Not later than four months after entry of this Final Judgment, Microsoft shall submit to the Court and the Plaintiffs a proposed plan of divestiture. The Plaintiffs shall submit any objections to the proposed plan of divestiture to the Court within 60 days of receipt of the plan, and Microsoft shall submit its response within 30 days of receipt of the plaintiffs’ objections.
 - b. Following approval of a final plan of divestiture by the Court (the “Plan”)¹ (and the expiration of the stay pending appeal set forth in section 6.a), Microsoft shall implement such Plan.
 - c. The Plan shall provide for the completion, within 12 months of the expiration of the stay pending appeal set forth in section 6.a., of the following steps:
 - i. The separation of the Operating Systems Business from the Applications Business, and the transfer of the assets of one of them (the “Separated

¹ Definitions of capitalized terms are set forth in section 7, below.

Business”) to a separate entity along with (a) all personnel, systems, and other tangible and intangible assets (including Intellectual Property) used to develop, produce, distribute, market, promote, sell, license and support the products and services of the Separated Business, and (b) such other assets as are necessary to operate the Separated Business as an independent and economically viable entity.

- ii. Intellectual Property that is used both in a product developed, distributed, or sold by the Applications Business and in a product developed, distributed, or sold by the Operating Systems Business as of April 27, 2000, shall be assigned to the Applications Business, and the Operating Systems Business shall be granted a perpetual, royalty-free license to license and distribute such Intellectual Property in its products, and, except with respect to such Intellectual Property related to the Internet browser, to develop, license and distribute modified or derivative versions of such Intellectual Property, provided that the Operating Systems Business does not grant rights to such versions to the Applications Business. In the case of such Intellectual Property that is related to the Internet browser, the license shall not grant the Operating Systems Business any right to develop, license, or distribute modified or derivative versions of the Internet browser.
 - iii. The transfer of ownership of the Separated Business by means of a distribution of stock of the Separated Business to Non-Covered Shareholders of Microsoft, or by other disposition that does not result in a Covered Shareholder owning stock in both the Separated Business and the Remaining Business.
- d. Until Implementation of the Plan, Microsoft shall:
- i. preserve, maintain, and operate the Operating Systems Business and the Applications Business as ongoing, economically viable businesses, with management, sales, products, and operations of each business held as separate, distinct and apart from one another as they were on April 27, 2000, except to provide the accounting, management, and information services or other necessary support functions provided by Microsoft prior to the entry of this Final Judgment;
 - ii. use all reasonable efforts to maintain and increase the sales and revenues of both the products produced or sold by the Operating Systems Business and those produced or sold by the Applications Business prior to the Implementation of the Plan and to support research and development and

business development efforts of both the Operating Systems Business and the Applications Business;

- iii. take no action that undermines, frustrates, interferes with, or makes more difficult the divestiture required by this Final Judgment without the prior approval of the Court; and
- iv. file a report with the Court 90 days after entry of this Final Judgment on the steps Microsoft has taken to comply with the requirements of this section 1.d.

2. Provisions Implementing Divestiture

- a. After Implementation of the Plan, and throughout the term of this Final Judgment, neither the Operating Systems Business nor the Applications Business, nor any member of their respective Boards of Directors, shall acquire any securities or assets of the other Business; no Covered Shareholder holding securities of either the Operating Systems Business or the Applications Business shall acquire any securities or assets of or shall be an officer, director, or employee of the other Business; and no person who is an officer, director, or employee of the Operating Systems Business or the Applications Business shall be an officer, director, or employee of the other Business.
- b. After Implementation of the Plan and throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall be prohibited from:
 - i. merging or otherwise recombining, or entering into any joint venture with one another;
 - ii. entering into any Agreement with one another under which one of the Businesses develops, sells, licenses for sale or distribution, or distributes products or services (other than the technologies referred to in the following sentence) developed, sold, licensed, or distributed by the other Business;
 - iii. providing to the other any APIs, Technical Information, Communications Interfaces, or technical information that is not simultaneously published, disclosed, or made readily available to ISVs, IHVs, and OEMs; and
 - iv. licensing, selling or otherwise providing to the other Business any product or service on terms more favorable than those available to any similarly situated third party.

Section 2.b.ii shall not prohibit the Operating Systems Business and the Applications Business from licensing technologies (other than Middleware Products) to each other for use in each others' products or services provided that such technology (i) is not and has not been separately sold, licensed, or offered as a product, and (ii) is licensed on terms that are otherwise consistent with this Final Judgment.

- c. Three months after Implementation of the Plan and once every three months thereafter throughout the term of this Final Judgment, the Operating Systems Business and the Applications Business shall file with the Plaintiffs a copy of each Agreement (and a memorandum describing each oral Agreement) entered into between them.
 - d. Throughout the term of this Final Judgment, Microsoft, the Operating Systems Business and the Applications Business shall be prohibited from taking adverse action against any person or entity in whole or in part because such person or entity provided evidence in this case.
 - e. The obligations and restrictions set forth in sections 3 and 4 herein shall, after the Implementation of the Plan, apply only to the Operating Systems Business.
3. Provisions In Effect Until Full Implementation of the Plan of Divestiture . The provisions in this section 3 shall remain in effect until the earlier of three years after the Implementation of the Plan or the expiration of the term of this Final Judgment.
- a. OEM Relations.
 - i. Ban on Adverse Actions for Supporting Competing Products. Microsoft shall not take or threaten any action adversely affecting any OEM (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that OEM:
 - (1) to use, distribute, promote, license, develop, produce or sell any product or service that competes with any Microsoft product or service; or

- (2) to exercise any of the options or alternatives provided under this Final Judgment.
- ii. Uniform Terms for Windows Operating System Products Licensed to Covered OEMs. Microsoft shall license Windows Operating System Products to Covered OEMs pursuant to uniform license agreements with uniform terms and conditions and shall not employ market development allowances or discounts in connection with Windows Operating System Products. Without limiting the foregoing, Microsoft shall charge each Covered OEM the applicable royalty for Windows Operating System Products as set forth on a schedule, to be established by Microsoft and published on a web site accessible to plaintiffs and all Covered OEMs, that provides for uniform royalties for Windows Operating System Products, except that –
 - (1) the schedule may specify different royalties for different language versions, and
 - (2) the schedule may specify reasonable volume discounts based upon actual volume of total shipments of Windows Operating System Products.

Without limiting the foregoing, Microsoft shall afford Covered OEMs equal access to licensing terms; discounts; technical, marketing, and sales support; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos. The foregoing requirement insofar as it relates to access to technical information and information about future plans shall not apply to any bona fide joint development effort by Microsoft and a Covered OEM with respect to confidential matters within the scope of that effort. Microsoft shall not terminate a Covered OEM's license for a Windows Operating System Product without having first given the Covered OEM written notice of the reason for the proposed termination and not less than thirty days' opportunity to cure. Microsoft shall not enforce any provision in any Agreement with a Covered OEM that is inconsistent with this Final Judgment.

- iii. OEM Flexibility in Product Configuration. Microsoft shall not restrict (by contract or otherwise, including but not limited to granting or withholding consideration) an OEM from modifying the boot sequence, startup folder, internet connection wizard, desktop, preferences, favorites, start page, first screen, or other aspect of a Windows Operating System Product to –

- (1) include a registration sequence to obtain subscription or other information from the user;
 - (2) display icons of or otherwise feature other products or services, regardless of the size or shape of such icons or features, or to remove the icons, folders, start menu entries, or favorites of Microsoft products or services;
 - (3) display any user interfaces, provided that an icon is also displayed that allows the user to access the Windows user interface; or
 - (4) launch automatically any non-Microsoft Middleware, Operating System or application, offer its own Internet access provider or other start-up sequence, or offer an option to make non-Microsoft Middleware the Default Middleware and to remove the means of End-User Access for Microsoft's Middleware Product.
- b. Disclosure of APIs, Communications Interfaces and Technical Information. Microsoft shall disclose to ISVs, IHVs, and OEMs in a Timely Manner, in whatever media Microsoft disseminates such information to its own personnel, all APIs, Technical Information and Communications Interfaces that Microsoft employs to enable –
- i. Microsoft applications to interoperate with Microsoft Platform Software installed on the same Personal Computer, or
 - ii. a Microsoft Middleware Product to interoperate with Windows Operating System software (or Middleware distributed with such Operating System) installed on the same Personal Computer, or
 - iii. any Microsoft software installed on one computer (including but not limited to server Operating Systems and operating systems for handheld devices) to interoperate with a Windows Operating System (or Middleware distributed with such Operating System) installed on a Personal Computer.

To facilitate compliance, and monitoring of compliance, with the foregoing, Microsoft shall create a secure facility where qualified representatives of OEMs, ISVs, and IHVs shall be permitted to study, interrogate and interact with relevant and necessary portions of the source code and any related documentation of Microsoft Platform Software for the sole purpose of enabling their products to interoperate effectively with Microsoft Platform Software (including exercising any of the options in section 3.a.iii).

- c. **Knowing Interference with Performance.** Microsoft shall not take any action that it knows will interfere with or degrade the performance of any non-Microsoft Middleware when interoperating with any Windows Operating System Product without notifying the supplier of such non-Microsoft Middleware in writing that Microsoft intends to take such action, Microsoft's reasons for taking the action, and any ways known to Microsoft for the supplier to avoid or reduce interference with, or the degrading of, the performance of the supplier's Middleware.
- d. **Developer Relations.** Microsoft shall not take or threaten any action affecting any ISV or IHV (including but not limited to giving or withholding any consideration such as licensing terms; discounts; technical, marketing, and sales support; enabling programs; product information; technical information; information about future plans; developer tools or developer support; hardware certification; and permission to display trademarks or logos) based directly or indirectly, in whole or in part, on any actual or contemplated action by that ISV or IHV to –
 - i. use, distribute, promote or support any Microsoft product or service, or
 - ii. develop, use, distribute, promote or support software that runs on non-Microsoft Middleware or a non-Microsoft Operating System or that competes with any Microsoft product or service, or
 - iii. exercise any of the options or alternatives provided under this Final Judgment.
- e. **Ban on Exclusive Dealing.** Microsoft shall not enter into or enforce any Agreement in which a third party agrees, or is offered or granted consideration, to –
 - i. restrict its development, production, distribution, promotion or use of, or payment for, any non-Microsoft Platform Software,
 - ii. distribute, promote or use any Microsoft Platform Software exclusively,
 - iii. degrade the performance of any non-Microsoft Platform Software, or
 - iv. in the case of an agreement with an Internet access provider or Internet content provider, distribute, promote or use Microsoft software in exchange for placement with respect to any aspect of a Windows Operating System Product.
- f. **Ban on Contractual Tying.** Microsoft shall not condition the granting of a Windows Operating System Product license, or the terms or administration of

such license, on an OEM or other licensee agreeing to license, promote, or distribute any other Microsoft software product that Microsoft distributes separately from the Windows Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, whether or not for a separate or positive price.

- g. **Restriction on Binding Middleware Products to Operating System Products.** Microsoft shall not, in any Operating System Product distributed six or more months after the effective date of this Final Judgment, Bind any Middleware Product to a Windows Operating System unless:
- i. Microsoft also offers an otherwise identical version of that Operating System Product in which all means of End-User Access to that Middleware Product can readily be removed (a) by OEMs as part of standard OEM preinstallation kits and (b) by end users using add-remove utilities readily accessible in the initial boot process and from the Windows desktop; and
 - ii. when an OEM removes End-User Access to a Middleware Product from any Personal Computer on which Windows is preinstalled, the royalty paid by that OEM for that copy of Windows is reduced in an amount not less than the product of the otherwise applicable royalty and the ratio of the number of amount in bytes of binary code of (a) the Middleware Product as distributed separately from a Windows Operating System Product to (b) the applicable version of Windows.
- h. **Agreements Limiting Competition.** Microsoft shall not offer, agree to provide, or provide any consideration to any actual or potential Platform Software competitor in exchange for such competitor's agreeing to refrain or refraining in whole or in part from developing, licensing, promoting or distributing any Operating System Product or Middleware Product competitive with any Windows Operating System Product or Middleware Product.
- i. **Continued Licensing of Predecessor Version.** Microsoft shall, when it makes a major Windows Operating System Product release (such as Windows 95, OSR 2.0, OSR 2.5, Windows 98, Windows 2000 Professional, Windows "Millennium," "Whistler," "Blackcomb," and successors to these), continue for three years after said release to license on the same terms and conditions the previous Windows Operating System Product to any OEM that desires such a license. The net royalty rate for the previous Windows Operating System Product shall be no more than the average royalty paid by the OEM for such Product prior to the release. The OEM shall be free to market Personal Computers in which it preinstalls such

an Operating System Product in the same manner in which it markets Personal Computers preinstalled with other Windows Operating System Products.

4. Internal Antitrust Compliance. This section shall remain in effect throughout the term of this Final Judgment, provided that, consistent with section 2.e, this section shall not apply to the Applications Business after the Implementation of the Plan.
- a. Within 90 days after the effective date of this Final Judgment, Microsoft shall establish a Compliance Committee of its corporate Board of Directors, consisting of not fewer than three members of the Board of Directors who are not present or former employees of Microsoft.
 - b. The Compliance Committee shall hire a Chief Compliance Officer, who shall report directly to the Compliance Committee and to the Chief Executive Officer of Microsoft.
 - c. The Chief Compliance Officer shall be responsible for development and supervision of Microsoft's internal programs to ensure compliance with the antitrust laws and this Final Judgment.
 - d. Microsoft shall give the Chief Compliance Officer sufficient authority and resources to discharge the responsibilities listed herein.
 - e. The Chief Compliance Officer shall:
 - i. within 90 days after entry of this Final Judgment, cause to be delivered to each Microsoft officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs, or IHVs, a copy of this Final Judgment together with additional informational materials describing the conduct prohibited and required by this Final Judgment;
 - ii. distribute in a timely manner a copy of this Final Judgment and such additional informational materials to any person who succeeds to a position of officer, director, or Manager, or platform software developer or employee involved in relations with OEMs, ISVs or IHVs;
 - iii. obtain from each officer, director, and Manager, and each platform software developer and employee involved in relations with OEMs, ISVs or IHVs, within 90 days of entry of this Final Judgment, and for each person thereafter succeeding to such a position within 5 days of such succession, a written certification that he or she:

- (1) has read, understands, and agrees to abide by the terms of this Final Judgment; and
 - (2) has been advised and understands that his or her failure to comply with this Final Judgment may result in conviction for criminal contempt of court;
 - iv. maintain a record of persons to whom this Final Judgment has been distributed and from whom, pursuant to Section 4.e.iii, such certifications have been obtained;
 - v. establish and maintain a means by which employees can report potential violations of this Final Judgment or the antitrust laws on a confidential basis; and
 - vi. report immediately to Plaintiffs and the Court any violation of this Final Judgment.
 - f. The Chief Compliance Officer may be removed only by the Chief Executive Officer with the concurrence of the Compliance Committee.
 - g. Microsoft shall, with the supervision of the Chief Compliance Officer, maintain for a period of at least four years the e-mail of all Microsoft officers, directors and managers engaged in software development, marketing, sales and developer relations related to Platform Software.
5. Compliance Inspection. This section shall remain in effect throughout the term of this Final Judgment.
- a. For purposes of determining or securing implementation of or compliance with this Final Judgment, including the provisions requiring a plan of divestiture, or determining whether this Final Judgment should be modified or vacated, and subject to any legally recognized privilege, from time to time:
 - i. Duly authorized representatives of a Plaintiff, upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, and on reasonable notice to Microsoft made to its principal office, shall be permitted:
 - (1) Access during office hours to inspect and copy or, at Plaintiffs' option, demand Microsoft provide copies of all books, ledgers, accounts, correspondence, memoranda, source code, and other records and

documents in the possession or under the control of Microsoft (which may have counsel present), relating to the matters contained in this Final Judgment; and

(2) Subject to the reasonable convenience of Microsoft and without restraint or interference from it, to interview, either informally or on the record, its officers, employees, and agents, who may have their individual counsel present, regarding any such matters.

- ii. Upon the written request of the Assistant Attorney General in charge of the Antitrust Division of the United States Department of Justice, or the Attorney General of a Plaintiff State, as the case may be, made to Microsoft at its principal offices, Microsoft shall submit such written reports, under oath if requested, as may be requested with respect to any matter contained in this Final Judgment.
- iii. No information or documents obtained by the means provided in this section shall be divulged by a representative of a Plaintiff to any person other than a duly authorized representative of a Plaintiff, except in the course of legal proceedings to which the Plaintiff is a party (including grand jury proceedings), or for the purpose of securing compliance with this Final Judgment, or as otherwise required by law.
- iv. If at the time information or documents are furnished by Microsoft to a Plaintiff, Microsoft represents and identifies in writing the material in any such information or documents to which a claim of protection may be asserted under Rule 26(c)(7) of the Federal Rules of Civil Procedure, and Microsoft marks each pertinent page of such material, "Subject to claim of protection under Rule 26(c)(7) of the Federal Rules of Civil Procedure," then 10 calendar days notice shall be given by a Plaintiff to Microsoft prior to divulging such material in any legal proceeding (other than a grand jury proceeding) to which Microsoft is not a party.

6. Effective Date, Term, Retention of Jurisdiction, Modification.

- a. This Final Judgment shall take effect 90 days after the date on which it is entered; provided, however that sections 1.b and 2 (except 2.d) shall be stayed pending completion of any appeals from this Final Judgment.
- b. Except as provided in section 2.e, the provisions of this Final Judgment apply to Microsoft as defined in section 7.o of this Final Judgment.

- c. This Final Judgment shall expire at the end of ten years from the date on which it takes effect.
- d. The Court may act sua sponte to issue orders or directions for the construction or carrying out of this Final Judgment, for the enforcement of compliance therewith, and for the punishment of any violation thereof.
- e. Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders or directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification of any of the provisions hereof, for the enforcement of compliance herewith, and for the punishment of any violation hereof.
- f. In accordance with the Court's Conclusions of Law, the plaintiff States shall submit a motion for costs and fees, with supporting documents as necessary, no later than 45 days after the entry of this Final Judgment.

7. Definitions.

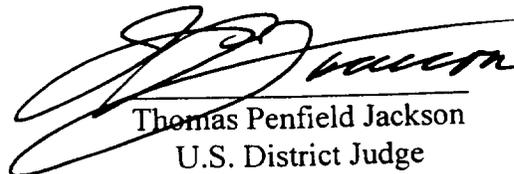
- a. "Agreement" means any agreement, arrangement, alliance, understanding or joint venture, whether written or oral.
- b. "Application Programming Interfaces (APIs)" means the interfaces, service provider interfaces, and protocols that enable a hardware device or an application, Middleware, or server Operating System to obtain services from (or provide services in response to requests from) Platform Software in a Personal Computer and to use, benefit from, and rely on the resources, facilities, and capabilities of such Platform Software.
- c. "Applications Business" means all businesses carried on by Microsoft Corporation on the effective date of this Final Judgment except the Operating Systems Business. Applications Business includes but is not limited to the development, licensing, promotion, and support of client and server applications and Middleware (e.g., Office, BackOffice, Internet Information Server, SQL Server, etc.), Internet Explorer, Mobile Explorer and other web browsers, Streaming Audio and Video client and server software, transaction server software, SNA server software, indexing server software, XML servers and parsers, Microsoft Management Server, Java virtual machines, Frontpage Express (and other web authoring tools), Outlook Express (and other e-mail clients), Media player, voice recognition software, Net Meeting (and other collaboration software), developer tools, hardware, MSN, MSNBC, Slate, Expedia, and all investments owned by Microsoft in partners or joint venturers, or in ISVs, IHVs,

- OEMs or other distributors, developers, and promoters of Microsoft products, or in other information technology or communications businesses.
- d. “Bind” means to include a product in an Operating System Product in such a way that either an OEM or an end user cannot readily remove or uninstall the product.
 - e. “Business” means the Operating Systems Business or the Applications Business.
 - f. “Communications Interfaces” means the interfaces and protocols that enable software installed on other computers (including servers and handheld devices) to interoperate with the Microsoft Platform Software on a Personal Computer.
 - g. “Covered OEM” means one of the 20 OEMs with the highest volume of licenses of Windows Operating System Products from Microsoft in the calendar year preceding the effective date of the Final Judgment. At the beginning of each year, starting on January 1, 2002, Microsoft shall redetermine the Covered OEMs for the new calendar year, based on sales volume during the preceding calendar year.
 - h. “Covered Shareholder” means a shareholder of Microsoft on the date of entry of this Final Judgment who is a present or former employee, officer or director of Microsoft and who owns directly or beneficially more than 5 percent of the voting stock of the firm.
 - i. “Default Middleware” means Middleware configured to launch automatically (that is, by “default”) to provide particular functionality when other Middleware has not been selected for this purpose. For example, a default browser is Middleware configured to launch automatically to display Web pages transmitted over the Internet or an intranet that bear the .htm extension, when other software has not been selected for this purpose.
 - j. “End-User Access” means the invocation of Middleware directly or indirectly by an end user of a Personal Computer or the ability of such an end user to invoke Middleware. “End-User Access” includes invocation of Middleware by end users which is compelled by the design of the Operating System Product.
 - k. “IHV” means an independent hardware vendor that develops hardware to be included in or used with a Personal Computer.
 - l. “Implementation of the Plan” means full completion of all of the steps described in section 1.c.
 - m. “Intellectual Property” means copyrights, patents, trademarks and trade secrets used by Microsoft or licensed by Microsoft to third parties.

- n. “ISV” means any entity other than Microsoft (or any subsidiary, division, or other operating unit of any such other entity) that is engaged in the development and licensing (or other marketing) of software products intended to interoperate with Microsoft Platform Software.
- o. “Manager” means a Microsoft employee who is responsible for the direct or indirect supervision of more than 100 other employees.
- p. “Microsoft” means Microsoft Corporation, the Separated Business, the Remaining Business, their successors and assigns (including any transferee or assignee of any ownership rights to, control of, or ability to license the patents referred to in this Final Judgment), their subsidiaries, affiliates, directors, officers, managers, agents, and employees, and all other persons in active concert or participation with any of them who shall have received actual notice of this Final Judgment by personal service or otherwise.
- q. “Middleware” means software that operates, directly or through other software, between an Operating System and another type of software (such as an application, a server Operating System, or a database management system) by offering services via APIs or Communications Interfaces to such other software, and could, if ported to or interoperable with multiple Operating Systems, enable software products written for that Middleware to be run on multiple Operating System Products. Examples of Middleware within the meaning of this Final Judgment include Internet browsers, e-mail client software, multimedia viewing software, Office, and the Java Virtual Machine. Examples of software that are not Middleware within the meaning of this Final Judgment are disk compression and memory management.
- r. “Middleware Product” means
- i. Internet browsers, e-mail client software, multimedia viewing software, instant messaging software, and voice recognition software, or
 - ii. software distributed by Microsoft that –
 - (1) is, or has in the applicable preceding year been, distributed separately from an Operating System Product in the retail channel or through Internet access providers, Internet content providers, ISVs or OEMs, and
 - (2) provides functionality similar to that provided by Middleware offered by a competitor to Microsoft.

- s. “Non-Covered Shareholder” means a shareholder of Microsoft on the record date for the transaction that effects the transfer of ownership of the Separated Business under Section 1.c.iii who is not a Covered Shareholder on the date of entry of this Final Judgment.
- t. “OEM” means the manufacturer or assembler of a personal computer.
- u. “Operating System” means the software that controls the allocation and usage of hardware resources (such as memory, central processing unit time, disk space, and peripheral devices) of a computer, providing a “platform” by exposing APIs that applications use to “call upon” the Operating System’s underlying software routines in order to perform functions.
- v. “Operating System Product” means an Operating System and additional software shipped with the Operating System, whether or not such additional software is marketed for a positive price. An Operating System Product includes Operating System Product upgrades that may be distributed separately from the Operating System Product.
- w. “Operating Systems Business” means the development, licensing, promotion, and support of Operating System Products for computing devices including but not limited to (i) Personal Computers, (ii) other computers based on Intel x86 or competitive microprocessors, such as servers, (iii) handheld devices such as personal digital assistants and cellular telephones, and (iv) television set-top boxes.
- x. “Personal Computer” means any computer configured so that its primary purpose is to be used by one person at a time, that uses a video display and keyboard (whether or not the video display and keyboard are actually included), and that contains an Intel x86, successor, or competitive microprocessor, and computers that are commercial substitutes for such computers.
- y. “Plaintiff” means the United States or any of the plaintiff States in this action.
- z. “Plan” means the final plan of divestiture approved by the Court.
- aa. “Platform Software” means an Operating System or Middleware or a combination of an Operating System and Middleware.
- bb. “Remaining Business” means whichever of the Operating Systems Business and the Applications Businesses is not transferred to a separate entity pursuant to the Plan.

- cc. “Separated Business” means whichever of the Operating Systems Business and the Applications Businesses is transferred to a separate entity pursuant to the Plan.
- dd. “Technical Information” means all information regarding the identification and means of using APIs and Communications Interfaces that competent software developers require to make their products running on any computer interoperate effectively with Microsoft Platform Software running on a Personal Computer. Technical information includes but is not limited to reference implementations, communications protocols, file formats, data formats, syntaxes and grammars, data structure definitions and layouts, error codes, memory allocation and deallocation conventions, threading and synchronization conventions, functional specifications and descriptions, algorithms for data translation or reformatting (including compression/decompression algorithms and encryption/decryption algorithms), registry settings, and field contents.
- ee. “Timely Manner”: disclosure of APIs, Technical Information and Communications Interfaces in a timely manner means, at a minimum, publication on a web site accessible by ISVs, IHVs, and OEMs at the earliest of the time that such APIs, Technical Information, or Communications Interfaces are (1) disclosed to Microsoft’s applications developers, (2) used by Microsoft’s own Platform Software developers in software released by Microsoft in alpha, beta, release candidate, final or other form, (3) disclosed to any third party, or (4) within 90 days of a final release of a Windows Operating System Product, no less than 5 days after a material change is made between the most recent beta or release candidate version and the final release.
- ff. “Windows Operating System Product” means software code (including source code and binary code, and any other form in which Microsoft distributes its Windows Operating Systems for Personal Computers) of Windows 95, Windows 98, Windows 2000 Professional, and their successors, including the Windows Operating Systems for Personal Computers codenamed “Millennium,” “Whistler,” and “Blackcomb,” and their successors.



Thomas Penfield Jackson
U.S. District Judge

Massachusetts v. Microsoft Corp.

373 F.3d 1199 (D.C. Cir. 2004)

GINSBURG, Chief Judge: In *United States v. Microsoft Corp.*, [253 F.3d 34](#) (D.C. Cir. 2001) (*Microsoft III*), we affirmed in part and reversed in part the judgment of the district court holding Microsoft had violated §§ 1 and 2 of the Sherman Antitrust Act, vacated the associated remedial order, and directed the district court, on the basis of further proceedings, to devise a remedy “tailored to fit the wrong creating the occasion” therefor, *id.* at 107, 118-19. On remand, the United States and certain of the plaintiff states entered into a settlement agreement with Microsoft. Pursuant to the Antitrust Procedures and Penalties (Tunney) Act, 15 U.S.C. §§ 16(b)-(h), the district court held the parties’ proposed consent decree, as amended to allow the court to act *sua sponte* to enforce the decree, was in “the public interest.” Meanwhile, the Commonwealth of Massachusetts and several other plaintiff states refused to settle with Microsoft and instead litigated to judgment a separate remedial decree. The judgment entered by the district court in their case closely parallels the consent decree negotiated by the United States.

Massachusetts alone appeals the district court’s entry of that decree. ***

A. Remedial Proposals

Massachusetts objects to several provisions the district court included in the remedial decree. The Commonwealth also appeals the district court’s refusal to adopt certain other provisions proposed by the States.

1. Commingling

In *Microsoft III* we upheld the district court’s finding that Microsoft’s integration of IE and the Windows operating system generally “prevented OEMs from pre-installing other browsers and deterred consumers from using them.” [253 F.3d at 63-64](#). Because they could not remove IE, installing another browser meant the OEM would incur the costs of supporting two browsers. *Id.* at 64. *** Accordingly, the district court instead approved the proposed requirement that Microsoft “permit OEMs to remove end-user access to aspects of the Windows operating system which perform middle-ware functionality.” *States’ Remedy*, at 159. Specifically, § III.H of the decree requires Microsoft to “[a]llow end users ... and OEMs ... to enable or remove access to each Microsoft Middleware Product or Non-Microsoft Middleware Product....” *Id.* at 270. ***

The district court’s decision to fashion a remedy directed at the effect of Microsoft’s commingling, rather than to prohibit commingling, was within its discretion. *** The district court fashioned a remedy aimed at reducing the costs an OEM might face in having to support multiple internet browsers. The court thereby addressed itself to Microsoft’s efforts to reduce software developers’ interest in writing to the Application Program Interfaces (APIs) exposed by any operating system other than Windows. Far from abusing its discretion, therefore, the district court, by remedying the anticompetitive effect of commingling, went to the heart of the problem Microsoft had created, and it did so without intruding itself into the design and engineering of the Windows operating system. We say, Well done!

But soft! Massachusetts and the *amici* claim the district court nonetheless erred in rejecting a “code removal” remedy for Microsoft’s commingling, principally insofar as the court was concerned with “Microsoft’s ability to provide a consistent API set,”

which Microsoft referred to as the problem of Windows’ “fragmentation.” They argue that any effort to keep software developers writing to Microsoft’s APIs—and thereby avoiding “fragmentation”—is not procompetitive but rather “an argument against competition.” ***

Letting a thousand flowers bloom is usually a good idea, but here the court found evidence, as discussed above, that such drastic fragmentation would likely harm consumers. Although it is almost certainly true, as both Massachusetts and the *amici* claim, that such fragmentation would also pose a threat to Microsoft’s ability to keep software developers focused upon its APIs, addressing the applications barrier to entry in a manner likely to harm consumers is not self-evidently an appropriate way to remedy an antitrust violation.

The district court’s end-user access provision fosters competition by opening the channels of distribution to non-Microsoft middleware. It was Microsoft’s foreclosure of those channels that squelched nascent middleware threats and furthered the dominance of the API set exposed by its operating system. The exclusive contracts into which Microsoft entered with IAPs were likewise aimed at foreclosing channels through which rival middleware might otherwise have been distributed. Prohibiting Microsoft from continuing those exclusive arrangements, *see States’ Remedy* § III.G, at 269-70, would not have the same deleterious effect upon consumers as would the fragmentation of Windows. ***

3. Forward-looking provisions

The district court exercised its discretion to fashion appropriate relief by adopting what it called “forward-looking” provisions, which require Microsoft to disclose certain of its APIs and communications protocols. Although non-disclosure of this proprietary information had played no role in our holding Microsoft violated the antitrust laws, “both proposed remedies recommend[ed] the mandatory disclosure of certain Microsoft APIs, technical information, and communications protocols for the purposes of fostering interoperation.” *States’ Remedy*, at 171. In approving a form of such disclosure—while, as discussed below, rejecting the States’ proposal for vastly more—the district court explained “the remedy [must] not [be] so expansive as to be unduly regulatory or provide a blanket prohibition on all future anticompetitive conduct.” *Id.* (citing *Zenith Radio Corp. v. Hazeltine Research, Inc.*, [395 U.S. 100, 133](#) (1969)). ***

a. Disclosure of APIs

The district court recognized the “hallmark of the platform threat” to the Windows monopoly posed by rival middleware is the ability to run on multiple operating systems: The “ready ability to interoperate with the already dominant operating system will bolster the ability of such middleware to support a wide range of applications so as to serve as a platform.” *States’ Remedy*, at 172. In order to facilitate such interoperation the district court required Microsoft to disclose APIs “used by Microsoft Middleware to interoperate with a Windows Operating System Product.” *Id.* § III.D, at 268. ***

Massachusetts further argues the district court made no finding the required disclosure of APIs under the decree would “meaningfully assist” developers of middleware. Massachusetts objects both to the breadth of disclosure—that is, the number of APIs to be disclosed under § III.D—and to the “depth” or detail of the disclosure, with respect to which Massachusetts claims “the remedy fails to require the disclosure of

sufficient information to ensure that the mandated disclosure may be effectively utilized.” ***

In sum, the district court’s findings are fully adequate to support its decision with respect to disclosure. *** We do not find persuasive Massachusetts’ arguments that the district court overstated or misapprehended the significance of the disclosure required by the decree. In light of the forward-looking nature of the API disclosure provision, the court reasonably balanced its goal of enhanced interoperability with the need to avoid requiring overly broad disclosure, which it determined could have adverse economic and technological effects, including the cloning of Microsoft’s software. Moreover, we cannot overlook the threat—as documented in the district court’s findings of fact in the liability phase—posed by Netscape and Java, which relied upon Microsoft’s then more limited disclosure of APIs. Microsoft managed to squelch those threats, at least for a time, but that does not diminish the competitive significance of the disclosure of Microsoft’s APIs, a disclosure enhanced by the decree.

We therefore hold the district court did not abuse its discretion in fashioning the remedial provision concerning Microsoft’s disclosure of APIs.

b. Disclosure of communications protocols

The district court also included in the decree a provision requiring Microsoft to disclose certain communications protocols. *See States’ Remedy* § III.E, at 269. As with APIs, we did not hold Microsoft’s disclosure practices with respect to communications protocols violated § 2 of the Sherman Act. Communications protocols involve technologies—servers and server operating systems—that are not “middleware” as we used that term in our prior decision. *See Microsoft III*, at 53-54. It is therefore not surprising the district court described the provision requiring the disclosure of communications protocols as the “most forward-looking” in the decree. *States’ Remedy*, at 173 (emphasis in original).

Communications protocols provide a common “language” for “clients” and “servers” in a computing network. A network typically involves interoperation between one or more large, central computers (the servers) and a number of PCs (the clients). By interoperating with the server, the clients may communicate with each other and store data or run applications directly on the server. The district court found that servers may use any of several different operating systems, *id.* at 121, but most clients run a version of Windows.” ***

Massachusetts argues § III.E will not enhance interoperability and there is no evidence, and the district court made no finding, that it will. Microsoft responds that “a substantial degree of interoperability already exists between Windows desktop operating systems and non-Microsoft server operating systems” and the ability of third parties to license those protocols from Microsoft pursuant to § III.E will enhance interoperability. The parties’ divergent predictions point up the difficulties inherent in crafting a forward-looking provision concerning a type of business conduct as to which there has not been a violation of the law. ***

Massachusetts objects that the district court should not have limited the disclosure requirement of § III.E to protocols for native communications, which the district court found is only “one of at least five basic approaches to achieving interoperability between Windows client operating systems and non-Microsoft server operating systems.” *States’ Remedy*, at 234 (*citing* Short ¶ 35, 6 J.A. (II) at 3535). We think the district

court prudently sought not to achieve complete interoperability but only to “advance” the ability of non-Microsoft server operating systems to interoperate with Windows and thereby serve as platforms for applications. It was not an abuse of discretion for the court not to go further; indeed, to have done so in the absence of related liability findings would have been risky. ***

4. Web Services

Massachusetts next argues the district court erred by failing to adopt a remedy addressed to Web services. In particular, Massachusetts claims the court should have extended Microsoft’s disclosure obligation beyond interoperation of server operating systems and PCs running Windows to reach interoperation among “other nodes of the network encompassed by network-based computing and the Web services paradigm, such as multiple servers or handheld devices.”¹⁷ Microsoft responds by pointing out there was no mention of Web services in the liability phase of this case, and by claiming it has no monopoly power in the market for Web services, “if such a [market] exists.” Also, the district court found “Web-browsing software of the type addressed during the liability phase will play no role in the creation, delivery, or use of many Web services.” *States’ Remedy*, at 127.

*** Far from ignoring this area of rapid innovation, as Massachusetts claims, the district court concluded Web services are simply too far removed from the source of Microsoft’s liability in this case—as to which the relevant market is operating systems for Intel-compatible PCs—to be implicated in the remedy. Nor did the court think the States had sufficiently “explained how the increase in the use of non-PC devices in conjunction with Web services will reduce Microsoft’s monopoly in the market for PC operating systems.” *Id.* at 134.

Massachusetts claims the district court excluded Web services based upon the clearly erroneous premise “that this new paradigm is a threat to the PC, and not to Windows.” For a correct understanding Massachusetts points us to the testimony of Jonathon Schwartz, Chief Strategy Officer at Sun Microsystems: “[S]o long as consumers can access Web services using competing devices and operating systems, they are free to switch away from Windows if competing alternatives are more attractive.” Direct Testimony ¶ 37, 2 J.A. (II) at 882. According to Massachusetts, the district court acknowledged as much when it stated:

The Chief Strategy Officer for Sun Microsystems, Inc., Jonathon Schwartz, testifying on behalf of Plaintiffs ... theorized that “[i]f the most popular applications are delivered as Web services, instead of [as] stand-alone PC applications, the applications barrier protecting Windows could be substantially eroded.”

States’ Remedy, at 127 (brackets in original). Clearly, however, the district court expressed its view that Schwartz was “theoriz[ing],” not stating a conclusion based upon fact. In any event, the district court was primarily—and correctly—focused upon whether a provision addressing Web services could be linked to Microsoft’s liability in *Microsoft III*; it could not.

¹⁷ Although Massachusetts does not mention it, the States’ proposal would have done just that, see SPR § C, 6 J.A. (II) at 3172; see also SPR § 4, *id.* at 3172-73, extending Microsoft’s disclosure obligation to interoperability with respect to, among others, “Handheld Computing Devices”—a term defined in the SPR to include “cellular telephone[s], personal digital assistant[s], and Pocket PC[s],” SPR § 22.k, *id.* at 3194.

Moreover, it does not follow that, because a proposed requirement could reduce the applications barrier to entry, it must be adopted. Recall the applications barrier to entry arose only in part because of Microsoft's unlawful practices; it was also the product of "positive network effects." [84 F.Supp.2d at 20](#). If the court is not to risk harming consumers, then the remedy must address the applications barrier to entry in a manner traceable to our decision in *Microsoft III*. This the decree does by opening the channels of distribution for non-Microsoft middleware. The district court reasonably determined, based upon evidence in the record, a provision addressing Web services might not be so benign. *States' Remedy*, at 134. ***

6. Open Source Internet Explorer

Massachusetts argues the district court abused its discretion in rejecting the States' "open-source IE" provision, which would require that

Microsoft ... disclose and license all source code for all Browser software [and that the license] grant a royalty-free, non-exclusive perpetual right on a non-discriminatory basis to make, use, modify and distribute without limitation products implementing or derived from Microsoft's source code....

SPR § 12, 6 J.A. (II) at 3178. Microsoft responds that this type of remedy is unnecessary because the decree already proscribes the anticompetitive conduct by which Microsoft had unlawfully raised the applications barrier to entry and thereby diminished the threat posed by platforms rivaling Microsoft's operating system.

The district court rejected the States' proposal for three reasons. First, the open-source IE proposal "ignores the theory of liability in this case," which was directed at Microsoft's unlawful "response to cross-platform applications, not operating systems," *States' Remedy*, at 185; the proposed remedy would directly benefit makers of non-Microsoft operating systems, even though the harm, if any, to them was indirect. Second, the proposal would "provide [a] significant benefit to competitors but [has] not been shown to benefit competition." *Id.* Finally, the proposal would work a "de facto divestiture" and therefore should be analyzed as a structural remedy pursuant to this court's opinion on liability. *Id.* at 186. Here the court carefully considered the "causal connection" between Microsoft's anticompetitive conduct and its dominance of the market for operating systems, and held the causal link insufficient to warrant a structural remedy. *States' Remedy*, at 186.

Massachusetts argues the district court "improperly ignored evidence that IE's dominance is competitively important for Microsoft" and complains that Microsoft "advantage[s] its own middleware by using the browser to limit the functionality of competing products." These are not objections, however, to the district court's reasons for rejecting the States' proposal. Rather, they are criticisms of what Massachusetts terms the district court's "implicit determination that [certain] facts were not relevant" to its analysis of the open-source IE provision. For instance, Massachusetts points to the testimony of David Richards of RealNetworks stating there would be "substantial end user benefit" if Microsoft disclosed enough APIs to allow competitors such as RealNetworks to create their own versions of the "Media Bar," one of Microsoft's recent additions to the IE interface. According to Richards, the Media Bar is a version of Microsoft's Windows Media Player "embedded as the default media player" in IE. ¶ 79, *id.* at 1094-95. If Microsoft were to disclose the internal architecture of the Media Bar, including the APIs upon which it relies, he says, then end users could "play back more digital formats within the [IE] browser than [Microsoft's] Windows Media

Player, including our own RealAudio and RealVideo formats.” ¶¶ 81, 82, *id.* at 1098. ***

The district court’s premise, as discussed more fully below, was that the fruit of Microsoft’s unlawful conduct was not the harm particular competitors may have suffered but rather Microsoft’s freedom from platform threats posed by makers of rival middleware. *See* Part II.B.1. The district court properly focused, therefore, upon opening the channels of distribution to such rivals; facts tending to show harm to specific competitors are not relevant to that task. Also recall the district court was properly concerned with avoiding a disclosure requirement so broad it could lead to the cloning of Microsoft’s products. That, in essence, appears to be what the cited testimony would require with respect to Microsoft’s Media Bar. ***

Massachusetts next argues the district court “misunderstood” that the States’ open-source IE proposal could “reestablish a cross-platform browser,” thereby allowing applications to be written to APIs exposed by IE and, as a result, lower the applications barrier to entry. As discussed in preceding sections of this opinion, the decree the district court approved includes several provisions addressed directly to Microsoft’s efforts to extinguish nascent threats to its operating system. Specifically, the decree restores the conditions necessary for rival middleware to serve as a platform threat to Windows and thereby speaks directly to our holding with respect to liability. *See Microsoft III*. Moreover, the district court found the States’ open-source IE proposal ignores the theory of liability in this case not because the court “misunderstood” the implications of the proposal but because the proposal would most likely benefit makers of competing operating systems, namely, Apple and Linux, rather than restore competitive conditions for potential developers of rival middleware. *States’ Remedy*, at 242-43. That is why the court concluded the open-source IE proposal would help specific competitors but not the process of competition. There is more than one way to redress Microsoft’s having unlawfully raised the applications barrier. And it was certainly within the district court’s discretion to address the applications barrier to entry as it did, namely, by restoring the conditions in which rival makers of middleware may freely compete with Windows. Indeed, to have addressed itself narrowly to aiding specific competitors, let alone competitors that were not the target of Microsoft’s unlawful efforts to maintain its monopoly, could well have put the remedy in opposition to the purpose of the antitrust laws.

Massachusetts also complains the district court, in rejecting the open-source IE provision, erred by probing the causal connection between Microsoft’s unlawful acts and harm to consumers. In response Microsoft points out that the district court viewed the States’ proposed relief as structural and therefore applied a test of causation along the lines we set out in *Microsoft III*. *See* [253 F.3d at 106-07](#). Our instruction to the district court was to consider on remand whether divestiture was an appropriate remedy in light of the “causal connection between Microsoft’s anticompetitive conduct and its dominant position in the ... market [for operating systems].” *Id.* at 106. ***

As Massachusetts correctly notes, we were there addressing the district court’s order to split Microsoft into two separate companies, whereas on remand, the district court was addressing the States’ open-source IE proposal. But the district court reasonably analogized that proposal to a divestiture of Microsoft’s assets. *States’ Remedy*, at 185, 244. The court pointed to testimony both of Microsoft’s and of the States’ economic experts characterizing the open-source IE remedy as “structural” in nature. *Id.* at 244.

Although Microsoft could continue to use its intellectual property under the open-source IE proposal, the “royalty-free, non-exclusive perpetual right” of others to use it as well would confiscate much of the value of Microsoft’s investment, which Gates put at more than \$750 million, ¶ 128, 8 J.A. (II) at 4714, and the court clearly found to be of considerable value. *See States’ Remedy*, at 241, 244.

Massachusetts claims *United States v. National Lead Co.*, [332 U.S. 319](#) (1947), upheld compulsory licensing as a remedy while at the same time rejecting the need for divestiture. The licenses in *National Lead*, however, were not to be free; on the contrary, the Supreme Court specifically pointed out that reducing “all royalties automatically to a total of zero ... appears, on its face, to be inequitable without special proof to support such a conclusion.” *Id.* at 349. (The Court left open the possibility that royalties might be set at zero or at a nominal rate, but only where the patent was found to be of nominal value.) Here the States proposed Microsoft be required to license IE “royalty-free,” SPR § 12, 6 J.A. (II) at 3178. Therefore, *National Lead* is worse than no support for the States’ proposal; it tells us that proposal is “on its face ... inequitable.” [332 U.S. at 349](#).

Finally, Massachusetts claims the district court erred in rejecting the open-source IE proposal on the ground it “is predicated not upon the causal connection between Microsoft’s illegal acts and its position in the PC operating system market, but rather the connection between the illegal acts and the harm visited upon Navigator.” This plainly misstates the issue as we remanded it. We were concerned a drastic remedy, such as divestiture, would be inappropriate if Microsoft’s dominant position in the operating system market could not be attributed to its unlawful conduct. *Microsoft III*, at 106-07. The district court did not abuse its discretion by insisting that an analogous form of structural relief—namely, divesting Microsoft of much of the value of its intellectual property—likewise meets the test of causation. Massachusetts’ statement that the open-source IE provision “is predicated ... [upon] the connection between the illegal acts and the harm visited upon Navigator” highlights precisely why the district court was right to reject that provision: The remedy in this case must be addressed to the harm to competition, not the harm visited upon a competitor.

The district court’s remedy is appropriately addressed to the channels of distribution for non-Microsoft middleware, including rival browsers such as Netscape Navigator. The court did not abuse its discretion by refusing to adopt the States’ proposed open-source IE provision for the benefit of Microsoft’s competitors.

7. Java must-carry

Massachusetts argues the district court erred in refusing to require Microsoft to distribute with Windows or IE a Sun-compliant Java runtime environment, as the States had proposed. Consider:

For a period of 10 years from the date of entry of the Final Judgment, Microsoft shall distribute free of charge, in binary form, with all copies of its Windows Operating System Product and Browser ... a competitively performing Windows-compatible version of the Java runtime environment ... compliant with the latest Sun Microsystems Technology Compatibility Kit.

SPR § 13, 6 J.A. (II) at 3179-80. The district court rejected this proposal because it did not think appropriate a remedy that “singles out particular competitors and anoints them with special treatment not accorded to other competitors in the industry.” *States’*

Remedy, at 189. Microsoft adds that the proposal would give “Sun’s Java technology a free-ride on Microsoft’s OEM distribution channel.”

Massachusetts argues the district court was wrong as a matter of law in thinking that mandated distribution of Java would benefit a competitor and not competition: “If the district court were correct that broad distribution of Java did not benefit competition, then this Court could not have held that Microsoft’s undermining of Java’s distribution was anticompetitive.” Not surprisingly, this *non sequitur* misrepresents the reasoning of the district court. That court focused upon remedying Microsoft’s unlawful foreclosure of distribution channels for rival middleware, not upon propping up a particular competitor. Massachusetts also complains that if any measure that helps a “would-be competitor of a monopolist” is rejected out of hand, then “competition can never be restored to a monopolized market.” There is a real difference, however, between redressing the harm done to competition by providing aid to a particular competitor and redressing that harm by restoring conditions in which the competitive process is revived and any number of competitors may flourish (or not) based upon the merits of their offerings. Even in the latter instance, of course, a competitor identifiable *ex ante* may benefit but not because it was singled out for favorable treatment.

Massachusetts also complains the district court ignored evidence “that the widespread availability of the cross-platform Java runtime environment on PCs would reduce the applications barrier to entry.” According to Massachusetts, only if Java is available on PCs at “a percentage that approaches the percentage of PCs running Windows” will developers write to it. Testimony cited by Massachusetts extolling the benefits of Java ubiquity, *e.g.*, Green ¶ 53, 2 J.A. (II) at 949; Shapiro ¶ 131, *id.* at 840, does not, however, call into question the district court’s rejection of the States’ proposal as “market engineering,” *States’ Remedy*, at 262 (quoting Murphy ¶ 239, 5 J.A. (II) at 2678), aimed at benefitting a specific competitor.

B. Cross-cutting Objections

Massachusetts also raises arguments that pertain to multiple provisions of the remedial decree. One such objection goes to the district court’s overall approach to fashioning a remedy.

1. “Fruits”

Massachusetts also objects that, because the district court did not require open-source IE licensing and mandatory distribution of Sun’s Java technology, the decree fails to “deny Microsoft the fruits of its exclusionary conduct.” *** The present decree, however, does not require that Microsoft be broken up. Nor did the district court adopt any other of the States’ proposals it deemed structural in nature—open-source IE, as discussed above, and the “porting” of Microsoft Office. The district court also specifically rejected the idea that IE was the fruit of Microsoft’s anticompetitive conduct, finding, “[n]either the evidentiary record from the liability phase, nor the record in this portion of the proceeding, establishes that the present success of IE is attributable entirely, or even in predominant part, to Microsoft’s illegal conduct.” *States’ Remedy*, at 185–86 n. 81; *see also id.* at 244 n. 121. Rather, the fruit of its violation was Microsoft’s freedom from the possibility rival middleware vendors would pose a threat to its monopoly of the market for Intelcompatible PC operating systems. The district court therefore reasonably identified opening the channels of distribution for rival middleware as an appropriate goal for its remedy. By “pry[ing] open” these channels, *International Salt*, [332 U.S. at 401](#) the district court denied Microsoft the ability again to limit

a nascent threat to its operating system monopoly. The district court certainly did not abuse its discretion by adopting a remedy that denies Microsoft the ability to take the same or similar actions to limit competition in the future rather than a remedy aimed narrowly at redressing the harm suffered by specific competitors in the past. This distinction underlies the difference between a case brought in equity by the Government and a damage action brought by a private plaintiff.

Massachusetts also complains the district court erred in applying a “stringent but-for test” of causation in determining whether “advantages gained by Microsoft could be considered a fruit of Microsoft’s illegality.” Here it points to a footnote in which the district court, in the course of rejecting the States’ open-source IE proposal, questioned the extent to which the success of IE could be traced to Microsoft’s unlawful conduct. *See States’ Remedy*, at 242 & n. 119. We have already determined the district court properly refused to impose that structural remedy without finding a significant causal connection “between Microsoft’s anticompetitive conduct and its dominant position in the ... market [for operating systems].” *Microsoft III*, at 106; *see also* Part II.A.6. More important, the fruit of Microsoft’s unlawful conduct, as mentioned, was its ability to deflect nascent threats to its operating system by limiting substantially the channels available for the distribution of non-Microsoft middleware. *** Finally, even if stunting Navigator and Java specifically were deemed the fruits of Microsoft’s violations, the decree would still be adequate because it opens the way to their distribution, both directly through the end-user access provision in § III.H and generally through the other conduct prohibitions found in § III of the decree. ***

IV. Conclusion

The remedial order of the district court in No. 02-7155 is affirmed. In No. 03-5030, the order denying intervention is reversed and the order approving the consent decree in the public interest is affirmed.

So ordered.

II

Calendar No. 275

117TH CONGRESS
2D SESSION

S. 2710

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

AUGUST 11 (legislative day, AUGUST 10), 2021

Mr. BLUMENTHAL (for himself, Mrs. BLACKBURN, Ms. KLOBUCHAR, Mr. RUBIO, Ms. LUMMIS, Mr. BOOKER, Mr. GRAHAM, Mr. KENNEDY, Ms. HIRONO, Mr. HAWLEY, and Mr. DURBIN) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

FEBRUARY 17, 2022

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in *italic*]

A BILL

To promote competition and reduce gatekeeper power in the
app economy, increase choice, improve quality, and re-
duce 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”.

1 **SEC. 2. DEFINITIONS.**

2 In this Act:

3 (1) APP.—The term “App” means a software
4 application or electronic service that may be run or
5 directed by a user on a computer, a mobile device,
6 or any other general purpose computing device.

7 (2) APP STORE.—The term “App Store” means
8 a publicly available website, software application, or
9 other electronic service that distributes Apps from
10 third-party developers to users of a computer, a mo-
11 bile device, or any other general purpose computing
12 device.

13 (3) COVERED COMPANY.—The term “Covered
14 Company” means any person that owns or controls
15 an App Store for which users in the United States
16 exceed 50,000,000.

17 (4) DEVELOPER.—The term “developer” means
18 a person that owns or controls an App or an App
19 Store.

20 (5) IN-APP PAYMENT SYSTEM.—The term “In-
21 App Payment System” means an application, serv-
22 ice, or user interface to process the payments from
23 users of an App.

24 (6) NON-PUBLIC BUSINESS INFORMATION.—
25 The term “non-public business information” means
26 non-public data that is—

1 (A) derived from a developer or an App or
2 App Store owned or controlled by a developer,
3 including interactions between users and the
4 App or App Store of the developer; and

5 (B) collected by a Covered Company in the
6 course of operating an App Store or providing
7 an operating system.

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

9 (a) **EXCLUSIVITY AND TYING.**—A Covered Company
10 shall not—

11 (1) require developers to use an In-App Pay-
12 ment System owned or controlled by the Covered
13 Company or any of its business partners as a condi-
14 tion of being distributed on an App Store or acces-
15 sible on an operating system;

16 (2) require as a term of distribution on an App
17 Store that pricing terms or conditions of sale be
18 equal to or more favorable on its App Store than the
19 terms or conditions under another App Store; or

20 (3) take punitive action or otherwise impose
21 less favorable terms and conditions against a devel-
22 oper for using or offering different pricing terms or
23 conditions of sale through another In-App Payment
24 System or on another App Store.

1 (b) INTERFERENCE WITH LEGITIMATE BUSINESS
2 COMMUNICATIONS.—A Covered Company shall not impose
3 restrictions on communications of developers with the
4 users of the App through an App or direct outreach to
5 a user concerning legitimate business offers, such as pri-
6 ing terms and product or service offerings.

7 (c) NON-PUBLIC BUSINESS INFORMATION.—A Cov-
8 ered Company shall not use non-public business informa-
9 tion derived from a third-party App for the purpose of
10 competing with that App.

11 (d) INTEROPERABILITY.—A Covered Company that
12 controls the operating system or operating system configu-
13 ration on which its App Store operates shall allow and pro-
14 vide the readily accessible means for users of that oper-
15 ating system to—

16 (1) choose third-party Apps or App Stores as
17 defaults for categories appropriate to the App or
18 App Store;

19 (2) install third-party Apps or App Stores
20 through means other than its App Store; and

21 (3) hide or delete Apps or App Stores provided
22 or preinstalled by the App Store owner or any of its
23 business partners.

24 (e) SELF-PREFERENCING IN SEARCH.—

1 (1) IN GENERAL.—A Covered Company shall
2 not provide unequal treatment of Apps in an App
3 Store through unreasonably preferencing or ranking
4 the Apps of the Covered Company or any of its busi-
5 ness partners over those of other Apps.

6 (2) CONSIDERATIONS.—Unreasonably
7 preferencing—

8 (A) includes applying ranking schemes or
9 algorithms that prioritize Apps based on a cri-
10 terion of ownership interest by the Covered
11 Company or its business partners; and

12 (B) does not include clearly disclosed ad-
13 vertising.

14 (f) OPEN APP DEVELOPMENT.—Access to operating
15 system interfaces, development information, and hardware
16 and software features shall be provided to developers on
17 a timely basis and on terms that are equivalent or func-
18 tionally-equivalent to the terms for access by similar Apps
19 or functions provided by the Covered Company or to its
20 business partners.

21 **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**
22 **USERS.**

23 (a) IN GENERAL.—Subject to section (b), a Covered
24 Company shall not be in violation of a subsection of sec-
25 tion 3 for an action that is—

1 (1) necessary to achieve user privacy, security,
2 or digital safety;

3 (2) taken to prevent spam or fraud; or

4 (3) taken to prevent a violation of, or comply
5 with, Federal or State law.

6 (b) REQUIREMENTS.—Section (a) shall only apply if
7 the Covered Company establishes by clear and convincing
8 evidence that the action described is—

9 (1) applied on a demonstrably consistent basis
10 to Apps of the Covered Company or its business
11 partners and to other Apps;

12 (2) not used as a pretext to exclude, or impose
13 unnecessary or discriminatory terms on, third-party
14 Apps, In-App Payment Systems, or App Stores; and

15 (3) narrowly tailored and could not be achieved
16 through a less discriminatory and technically pos-
17 sible means.

18 **SEC. 5. ENFORCEMENT.**

19 (a) ENFORCEMENT.—

20 (1) IN GENERAL.—The Federal Trade Commis-
21 sion, the Attorney General, and any attorney general
22 of a State subject to the requirements in paragraph
23 (4) shall enforce this Act in the same manner, by
24 the same means, and with the same jurisdiction,
25 powers, and duties as though all applicable terms

1 and provisions of the Federal Trade Commission Act
2 (15 U.S.C. 41 et seq.) or the Clayton Act (15 U.S.C.
3 12 et seq.); as appropriate, were incorporated into
4 and made a part of this Act.

5 (2) UNFAIR METHODS OF COMPETITION.—A
6 violation of this Act shall also constitute an unfair
7 method of competition under section 5 of the Fed-
8 eral Trade Commission Act (15 U.S.C. 5).

9 (3) FEDERAL TRADE COMMISSION INDE-
10 PENDENT LITIGATION AUTHORITY.—If the Federal
11 Trade Commission has reason to believe that a Cov-
12 ered Company violated this Act, the Federal Trade
13 Commission may commence a civil action, in its own
14 name by any of its attorneys designated by it for
15 such purpose, to recover a civil penalty and seek
16 other appropriate relief in a district court of the
17 United States against the covered platform operator.

18 (4) PARENS PATRIAE.—Any attorney general of
19 a State may bring a civil action in the name of such
20 State for a violation of this Act as parens patriae on
21 behalf of natural persons residing in such State, in
22 any district court of the United States having juris-
23 diction of the defendant, and may secure any form
24 of relief provided for in this section.

25 (b) SUITS BY DEVELOPERS INJURED.—

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

20 (A) whether such developer or the opposing
21 party, or either party’s representative, made
22 motions or asserted claims or defenses so lack-
23 ing in merit as to show that such party or rep-
24 resentative acted intentionally for delay, or oth-
25 erwise acted in bad faith;

1 (B) whether, in the course of the action in-
2 volved, such developer or the opposing party, or
3 either party's representative, violated any appli-
4 cable rule, statute, or court order providing for
5 sanctions for dilatory behavior or otherwise pro-
6 viding for expeditious proceedings; and

7 (C) whether such developer or the opposing
8 party, or either party's representative, engaged
9 in conduct primarily for the purpose of delaying
10 the litigation or increasing the cost thereof.

11 (2) ~~INJUNCTIVE RELIEF.~~—Any developer shall
12 be entitled to sue for and have injunctive relief, in
13 any court of the United States having jurisdiction
14 over the parties, against threatened loss or damage
15 by a violation of this Act, when and under the same
16 conditions and principles as injunctive relief against
17 threatened conduct that will cause loss or damage is
18 granted by courts of equity, under the rules gov-
19 erning such proceedings, and upon the execution of
20 proper bond against damages for an injunction im-
21 providently granted and a showing that the danger
22 of irreparable loss or damage is immediate, a pre-
23 liminary injunction may issue. In any action under
24 this paragraph in which the plaintiff substantially

1 prevails, the court shall award the cost of suit, in-
2 cluding a reasonable attorney's fee, to such plaintiff.

3 **SEC. 6. RULE OF CONSTRUCTION.**

4 Nothing in this Act shall be construed to limit any
5 authority of the Attorney General or the Federal Trade
6 Commission under the antitrust laws (as defined in the
7 first section of the Clayton Act (15 U.S.C. 12)), the Fed-
8 eral Trade Commission Act (15 U.S.C. 41 et seq.), or any
9 other provision of law or to limit the application of any
10 law.

11 **SEC. 7. SEVERABILITY.**

12 If any provision of this Act, or the application of such
13 a provision to any person or circumstance, is held to be
14 unconstitutional, the remaining provisions of this Act, and
15 the application of the provision held to be unconstitutional
16 to any other person or circumstance, shall not be affected
17 thereby.

18 **SECTION 1. SHORT TITLE.**

19 *This Act may be cited as the "Open App Markets Act".*

20 **SEC. 2. DEFINITIONS.**

21 *In this Act:*

22 (1) *APP.*—The term "app" means a software ap-
23 plication or electronic service that may be run or di-
24 rected by a user on a computer, a mobile device, or
25 any other general purpose computing device.

1 (2) *APP STORE*.—The term “app store” means a
2 publicly available website, software application, or
3 other electronic service that distributes apps from
4 third-party developers to users of a computer, a mo-
5 bile device, or any other general purpose computing
6 device.

7 (3) *COVERED COMPANY*.—The term “covered
8 company” means any person that owns or controls an
9 app store for which users in the United States exceed
10 50,000,000.

11 (4) *DEVELOPER*.—The term “developer” means a
12 person that owns or controls an app or an app store.

13 (5) *IN-APP PAYMENT SYSTEM*.—The term “in-
14 app payment system” means an application, service,
15 or user interface to manage billing or process the pay-
16 ments from users of an app.

17 (6) *NONPUBLIC BUSINESS INFORMATION*.—The
18 term “nonpublic business information” means non-
19 public data that is—

20 (A) derived from a developer or an app or
21 app store owned or controlled by a developer, in-
22 cluding interactions between users and the app
23 or app store of the developer; and

1 (B) collected by a covered company in the
2 course of operating an app store or providing an
3 operating system.

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

5 (a) *EXCLUSIVITY AND TYING.*—A covered company
6 shall not—

7 (1) require developers to use or enable an in-app
8 payment system owned or controlled by the covered
9 company or any of its business partners as a condi-
10 tion of the distribution of an app on an app store or
11 accessible on an operating system;

12 (2) require as a term of distribution on an app
13 store that pricing terms or conditions of sale be equal
14 to or more favorable on its app store than the terms
15 or conditions under another app store; or

16 (3) take punitive action or otherwise impose less
17 favorable terms and conditions against a developer for
18 using or offering different pricing terms or conditions
19 of sale through another in-app payment system or on
20 another app store.

21 (b) *INTERFERENCE WITH LEGITIMATE BUSINESS*
22 *COMMUNICATIONS.*—A covered company shall not impose
23 restrictions on communications of developers with the users
24 of an app of the developer through the app or direct out-
25 reach to a user concerning legitimate business offers, such

1 *as pricing terms and product or service offerings. Nothing*
2 *in this subsection shall prohibit a covered company from*
3 *providing a user the option to offer consent prior to the*
4 *collection and sharing of the data of the user by an app.*

5 *(c) NONPUBLIC BUSINESS INFORMATION.—A covered*
6 *company shall not use nonpublic business information de-*
7 *rived from a third-party app for the purpose of competing*
8 *with that app.*

9 *(d) INTEROPERABILITY.—A covered company that con-*
10 *trols the operating system or operating system configura-*
11 *tion on which its app store operates shall allow and provide*
12 *readily accessible means for users of that operating system*
13 *to—*

14 *(1) choose third-party apps or app stores as de-*
15 *faults for categories appropriate to the app or app*
16 *store;*

17 *(2) install third-party apps or app stores*
18 *through means other than its app store; and*

19 *(3) hide or delete apps or app stores provided or*
20 *preinstalled by the app store owner or any of its busi-*
21 *ness partners.*

22 *(e) SELF-PREFERENCING IN SEARCH.—*

23 *(1) IN GENERAL.—A covered company shall not*
24 *provide unequal treatment of apps in an app store*
25 *through unreasonably preferencing or ranking the*

1 *apps of the covered company or any of its business*
2 *partners over those of other apps in organic search re-*
3 *sults.*

4 (2) *CONSIDERATIONS.—Unreasonably*
5 *preferencing—*

6 (A) *includes applying ranking schemes or*
7 *algorithms that prioritize apps based on a cri-*
8 *terion of ownership interest by the covered com-*
9 *pany or its business partners; and*

10 (B) *does not include clearly disclosed adver-*
11 *tising.*

12 (f) *OPEN APP DEVELOPMENT.—A covered company*
13 *shall provide access to operating system interfaces, develop-*
14 *ment information, and hardware and software features to*
15 *developers on a timely basis and on terms that are equiva-*
16 *lent or functionally equivalent to the terms for access by*
17 *similar apps or functions provided by the covered company*
18 *or to its business partners.*

19 **SEC. 4. PROTECTING THE SECURITY AND PRIVACY OF**
20 **USERS.**

21 (a) *IN GENERAL.—*

22 (1) *NO VIOLATION.—Subject to section (b), a cov-*
23 *ered company shall not be in violation of section 3 for*
24 *an action that is—*

1 (A) necessary to achieve user privacy, secu-
2 rity, or digital safety;

3 (B) taken to prevent spam or fraud;

4 (C) necessary to prevent unlawful infringe-
5 ment of preexisting intellectual property; or

6 (D) taken to prevent a violation of, or com-
7 ply with, Federal or State law.

8 (2) *PRIVACY AND SECURITY PROTECTIONS.*—*In*
9 *paragraph (1), the term “necessary to achieve user*
10 *privacy, security, or digital safety” includes—*

11 (A) allowing an end user to opt in, and
12 providing information regarding the reasonable
13 risks, prior to enabling installation of the third-
14 party apps or app stores;

15 (B) removing malicious or fraudulent apps
16 or app stores from an end user device;

17 (C) providing an end user with the tech-
18 nical means to verify the authenticity and origin
19 of third-party apps or app stores; and

20 (D) providing an end user with option to
21 limit the collection sharing of the data of the
22 user with third-party apps or app stores.

23 (b) *REQUIREMENTS.*—*Subsection (a) shall only apply*
24 *if the covered company establishes by a preponderance of*
25 *the evidence that the action described in that subsection is—*

- 1 (1) *applied on a demonstrably consistent basis*
2 *to—*
- 3 (A) *apps of the covered company or its busi-*
4 *ness partners; and*
- 5 (B) *other apps;*
- 6 (2) *not used as a pretext to exclude, or impose*
7 *unnecessary or discriminatory terms on, third-party*
8 *apps, in-app payment systems, or app stores; and*
- 9 (3) *narrowly tailored and could not be achieved*
10 *through a less discriminatory and technically possible*
11 *means.*

12 **SEC. 5. ENFORCEMENT.**

13 (a) *ENFORCEMENT.—*

14 (1) *IN GENERAL.—The Federal Trade Commis-*
15 *sion, the Attorney General, and any attorney general*
16 *of a State subject to the requirements in paragraph*
17 *(3) shall enforce this Act in the same manner, by the*
18 *same means, and with the same jurisdiction, powers,*
19 *and duties as though all applicable terms and provi-*
20 *sions of the Federal Trade Commission Act (15*
21 *U.S.C. 41 et seq.), the Sherman Act (15 U.S.C. 1 et*
22 *seq.), the Clayton Act (15 U.S.C. 12 et seq.), and*
23 *Antitrust Civil Process Act (15 U.S.C. 1311 et seq.),*
24 *as appropriate, were incorporated into and made a*
25 *part of this Act.*

1 (2) *FEDERAL TRADE COMMISSION INDEPENDENT*
2 *LITIGATION AUTHORITY.*—*If the Federal Trade Com-*
3 *mission has reason to believe that a covered company*
4 *violated this Act, the Federal Trade Commission may*
5 *commence a civil action, in its own name by any of*
6 *its attorneys designated by it for such purpose, to re-*
7 *cover a civil penalty and seek other appropriate relief*
8 *in a district court of the United States against the*
9 *covered company.*

10 (3) *PARENS PATRIAE.*—*Any attorney general of*
11 *a State may bring a civil action in the name of such*
12 *State for a violation of this Act as parens patriae on*
13 *behalf of natural persons residing in such State, in*
14 *any district court of the United States having juris-*
15 *isdiction of the defendant, and may secure any form of*
16 *relief provided for in this section.*

17 (b) *SUITS BY DEVELOPERS INJURED.*—

18 (1) *IN GENERAL.*—*Except as provided in para-*
19 *graph (3), any developer injured by reason of any-*
20 *thing forbidden in this Act may sue therefor in any*
21 *district court of the United States in the district in*
22 *which the defendant resides or is found or has an*
23 *agent, without respect to the amount in controversy,*
24 *and shall recover threefold the damages by the devel-*
25 *oper sustained and the cost of suit, including a rea-*

1 *sonable attorney’s fee. The court may award under*
2 *this paragraph, pursuant to a motion by such devel-*
3 *oper promptly made, simple interest on actual dam-*
4 *ages for the period beginning on the date of service of*
5 *the pleading of the developer setting forth a claim*
6 *under this Act and ending on the date of judgment,*
7 *or for any shorter period therein, if the court finds*
8 *that the award of such interest for such period is just*
9 *in the circumstances. In determining whether an*
10 *award of interest under this paragraph for any pe-*
11 *riod is just in the circumstances, the court shall con-*
12 *sider only—*

13 *(A) whether the developer or the opposing*
14 *party, or either party’s representative, made mo-*
15 *tions or asserted claims or defenses so lacking in*
16 *merit as to show that such party or representa-*
17 *tive acted intentionally for delay or otherwise*
18 *acted in bad faith;*

19 *(B) whether, in the course of the action in-*
20 *volved, the developer or the opposing party, or ei-*
21 *ther party’s representative, violated any applica-*
22 *ble rule, statute, or court order providing for*
23 *sanctions for dilatory behavior or otherwise pro-*
24 *viding for expeditious proceedings; and*

1 (C) whether the developer or the opposing
2 party, or either party's representative, engaged
3 in conduct primarily for the purpose of delaying
4 the litigation or increasing the cost thereof.

5 (2) *INJUNCTIVE RELIEF.*—Except as provided in
6 paragraph (3), any developer shall be entitled to sue
7 for and have injunctive relief, in any court of the
8 United States having jurisdiction over the parties,
9 against threatened loss or damage by a violation of
10 this Act, when and under the same conditions and
11 principles as injunctive relief against threatened con-
12 duct that will cause loss or damage is granted by
13 courts of equity, under the rules governing such pro-
14 ceedings, and upon the execution of proper bond
15 against damages for an injunction improvidently
16 granted and a showing that the danger of irreparable
17 loss or damage is immediate, a preliminary injunc-
18 tion may issue. In any action under this paragraph
19 in which the plaintiff substantially prevails, the court
20 shall award the cost of suit, including a reasonable
21 attorney's fee, to such plaintiff.

22 (3) *FOREIGN STATE-OWNED ENTERPRISES.*—A
23 developer of an app that is owned by, or under the
24 control of, a foreign state may not bring an action
25 under this subsection.

1 **SEC. 6. REPORTING.**

2 *Not later than 3 years after the date of enactment of*
3 *this Act, the Federal Trade Commission, the Comptroller*
4 *General of the United States, and the Antitrust Division*
5 *of the Department of Justice shall each separately review*
6 *and provide an in-depth analysis of the impact of this Act*
7 *on competition, innovation, barriers to entry, and con-*
8 *centrations of market power or market share after the date*
9 *of enactment of this Act.*

10 **SEC. 7. RULE OF CONSTRUCTION.**

11 *Nothing in this Act may be construed—*

12 *(1) to limit—*

13 *(A) any authority of the Attorney General*
14 *or the Federal Trade Commission under the*
15 *antitrust laws (as defined in the first section of*
16 *the Clayton Act (15 U.S.C. 12), the Federal*
17 *Trade Commission Act (15 U.S.C. 41 et seq.), or*
18 *any other provision of law; or*

19 *(B) the application of any law;*

20 *(2) to require—*

21 *(A) a covered company to provide service*
22 *under a hardware or software warranty for*
23 *damage caused by third-party apps or app stores*
24 *installed through means other than the app store*
25 *of the covered company; or*

1 (B) customer service for the installation or
2 operation of third-party apps or app stores de-
3 scribed in subparagraph (A);

4 (3) to prevent an action taken by a covered com-
5 pany that is reasonably tailored to protect the rights
6 of third parties under section 106, 1101, 1201, or
7 1401 of title 17, United States Code, or rights action-
8 able under sections 32 or 43 of the Act entitled “An
9 Act to provide for the registration and protection of
10 trademarks used in commerce, to carry out the provi-
11 sions of certain international conventions, and for
12 other purposes”, approved July 5, 1946 (commonly
13 known as the “Lanham Act” or the “Trademark Act
14 of 1946”) (15 U.S.C. 1114, 1125), or corollary State
15 law;

16 (4) to require a covered company to license any
17 intellectual property, including any trade secrets,
18 owned by or licensed to the covered company;

19 (5) to prevent a covered company from asserting
20 preexisting rights of the covered company under intel-
21 lectual property law to prevent the unlawful use of
22 any intellectual property owned by or duly licensed
23 to the covered company; or

24 (6) to require a covered company to interoperate
25 or share data with persons or business users that—

1 (A) are on any list maintained by the Fed-
2 eral Government by which entities are identified
3 as limited or prohibited from engaging in eco-
4 nomic transactions as part of United States
5 sanctions or export control regimes; or

6 (B) have been identified by the Federal Gov-
7 ernment as national security, intelligence, or law
8 enforcement risks.

9 **SEC. 8. SEVERABILITY.**

10 *If any provision of this Act, or the application of such*
11 *a provision to any person or circumstance, is held to be*
12 *unconstitutional, the remaining provisions of this Act, and*
13 *the application of such provisions to any person or cir-*
14 *cumstance shall not be affected thereby.*

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

16 *This Act shall take effect on the date that is 180 days*
17 *after the date of enactment of this Act.*

Calendar No. 275

117TH CONGRESS
2^D SESSION
S. 2710

A BILL

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

FEBRUARY 17, 2022

Reported with an amendment

II

Calendar No. 301

117TH CONGRESS
2D SESSION

S. 2992

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

IN THE SENATE OF THE UNITED STATES

OCTOBER 18, 2021

Ms. KLOBUCHAR (for herself, Mr. GRASSLEY, Mr. DURBIN, Mr. GRAHAM, Mr. BLUMENTHAL, Mr. KENNEDY, Mr. BOOKER, Ms. LUMMIS, Ms. HIRONO, Mr. WARNER, Mr. HAWLEY, and Mr. DAINES) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

MARCH 2, 2022

Reported by Mr. DURBIN, with an amendment

[Strike out all after the enacting clause and insert the part printed in italic]

A BILL

To provide that certain discriminatory conduct by covered platforms shall be unlawful, 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 “American Innovation
5 and Choice Online Act”.

1 **SEC. 2. UNLAWFUL CONDUCT.**

2 (a) VIOLATION.—It shall be unlawful for a person op-
3 erating a covered platform, in or affecting commerce, if
4 it is shown, by a preponderance of the evidence, that the
5 person has engaged in conduct that would—

6 (1) unfairly preference the covered platform op-
7 erator’s own products, services, or lines of business
8 over those of another business user on the covered
9 platform in a manner that would materially harm
10 competition on the covered platform;

11 (2) unfairly limit the ability of another business
12 user’s products, services, or lines of business to com-
13 pete on the covered platform relative to the covered
14 platform operator’s own products, services, or lines
15 of business in a manner that would materially harm
16 competition on the covered platform; or

17 (3) discriminate in the application or enforce-
18 ment of the covered platform’s terms of service
19 among similarly situated business users in a manner
20 that may materially harm competition on the cov-
21 ered platform.

22 (b) UNLAWFUL CONDUCT.—It shall be unlawful for
23 a person operating a covered platform, in or affecting com-
24 merce, if it is shown, by a preponderance of the evidence,
25 that the person has engaged in conduct that would—

1 (1) materially restrict or impede the capacity of
2 a business user to access or interoperate with the
3 same platform, operating system, hardware or soft-
4 ware features that are available to the covered plat-
5 form operator's own products, services, or lines of
6 business that compete or would compete with prod-
7 ucts or services offered by business users on the cov-
8 ered platform;

9 (2) condition access to the covered platform or
10 preferred status or placement on the covered plat-
11 form on the purchase or use of other products or
12 services offered by the covered platform operator
13 that are not part of or intrinsic to the covered plat-
14 form itself;

15 (3) use non-public data that are obtained from
16 or generated on the covered platform by the activi-
17 ties of a business user or by the interaction of a cov-
18 ered platform user with the products or services of
19 a business user to offer, or support the offering of,
20 the covered platform operator's own products or
21 services that compete or would compete with prod-
22 ucts or services offered by business users on the cov-
23 ered platform;

24 (4) materially restrict or impede a business user
25 from accessing data generated on the covered plat-

1 form by the activities of the business user, or
2 through an interaction of a covered platform user
3 with the business user's products or services, such as
4 by establishing contractual or technical restrictions
5 that prevent the portability of the business user's
6 data by the business user to other systems or appli-
7 cations;

8 (5) unless necessary for the security or func-
9 tioning of the covered platform, materially restrict or
10 impede covered platform users from un-installing
11 software applications that have been preinstalled on
12 the covered platform or changing default settings
13 that direct or steer covered platform users to prod-
14 ucts or services offered by the covered platform op-
15 erator;

16 (6) in connection with any covered platform
17 user interface, including search or ranking
18 functionality offered by the covered platform, treat
19 the covered platform operator's own products, serv-
20 ices, or lines of business more favorably relative to
21 those of another business user than they would be
22 treated under standards mandating the neutral, fair,
23 and non-discriminatory treatment of all business
24 users; or

1 (7) retaliate against any business user or cov-
2 ered platform user that raises concerns with any law
3 enforcement authority about actual or potential vio-
4 lations of State or Federal law.

5 (e) RULE OF CONSTRUCTION.—Subsections (a) and
6 (b) shall not be construed to require a covered platform
7 operator to divulge, license, or otherwise grant the use of
8 the covered platform operator’s intellectual property, trade
9 or business secrets, or other confidential proprietary busi-
10 ness processes to a business user.

11 (d) AFFIRMATIVE DEFENSES.—

12 (1) IN GENERAL.—Subsection (a) shall not
13 apply if the defendant establishes by a preponder-
14 ance of the evidence that the conduct described in
15 subsections (a) was narrowly tailored, was
16 nonpretextual, and was necessary to—

17 (A) prevent a violation of, or comply with,
18 Federal or State law;

19 (B) protect safety, user privacy, the secu-
20 rity of non-public data, or the security of the
21 covered platform; or

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

24 (2) UNLAWFUL CONDUCT.—Subsection (b) shall
25 not apply if the defendant establishes by a prepon-

1 derance of the evidence that the conduct described
2 in subsection (b)—

3 (A) has not resulted in and would not re-
4 sult in material harm to the competitive process
5 by restricting or impeding legitimate activity by
6 business users; or

7 (B) was narrowly tailored, could not be
8 achieved through less discriminatory means,
9 was nonpretextual, and was necessary to—

10 (i) prevent a violation of, or comply
11 with, Federal or State law;

12 (ii) protect safety, user privacy, the
13 security of non-public data, or the security
14 of the covered platform; or

15 (iii) maintain or enhance the core
16 functionality of the covered platform.

17 (e) COVERED PLATFORM DESIGNATION.—The Fed-
18 eral Trade Commission and Department of Justice may
19 jointly, with concurrence of the other, designate a covered
20 platform for the purpose of implementing and enforcing
21 this Act. Such designation shall—

22 (1) be based on a finding that the criteria set
23 forth in clauses (i) through (iii) of subsection (h)(4)
24 are met;

1 (2) be issued in writing and published in the
2 Federal Register; and

3 (3) apply for 7 years from its issuance regard-
4 less of whether there is a change in control or own-
5 ership over the covered platform unless the Commis-
6 sion or the Department of Justice removes the des-
7 ignation under subsection (f).

8 (f) REMOVAL OF COVERED PLATFORM DESIGNA-
9 TION.—The Commission or the Department of Justice
10 shall—

11 (1) consider whether its designation of a cov-
12 ered platform under subsection (e) should be re-
13 moved prior to the expiration of the 7-year period if
14 the covered platform operator files a request with
15 the Commission or the Department of Justice, which
16 shows that the online platform no longer meets the
17 criteria set forth in clauses (i) through (iii) of sub-
18 section (h)(4);

19 (2) determine whether to grant a request sub-
20 mitted under paragraph 1 not later than 120 days
21 after the date of the filing of such request; and

22 (3) obtain the concurrence of the Commission
23 or the Department of Justice, as appropriate, before
24 granting a request submitted under paragraph (1).

1 (g) REMEDIES.—The remedies provided in this sub-
2 section are in addition to, and not in lieu of, any other
3 remedy available under Federal or State law.

4 (1) CIVIL PENALTY.—Any person who is found
5 to have violated subsections (a) or (b) shall be liable
6 to the United States or the Commission for a civil
7 penalty, which shall accrue to the United States
8 Treasury, in an amount not more than 15 percent
9 of the total United States revenue of the person for
10 the period of time the violation occurred.

11 (2) INJUNCTIONS.—The Assistant Attorney
12 General of the Antitrust Division, the Commission,
13 or the attorney general of any State may seek, and
14 the court may order, relief in equity as necessary to
15 prevent, restrain, or prohibit violations of this Act.

16 (3) REPEAT OFFENDERS.—If the fact finder
17 determines that a person has engaged in a pattern
18 or practice of violating this Act, the court shall con-
19 sider requiring, and may order, that the Chief Exec-
20 utive Officer, and any other corporate officer as ap-
21 propriate to deter violations of this Act, forfeit to
22 the United States Treasury any compensation re-
23 ceived by that person during the 12 months pre-
24 ceeding or following the filing of a complaint for an
25 alleged violation of this Act.

1 (h) DEFINITIONS.—In this section:

2 (1) ANTITRUST LAWS.—The term “antitrust
3 laws” has the meaning given the term in subsection
4 (a) of section 1 of the Clayton Act (15 U.S.C. 12).

5 (2) BUSINESS USER.—The term “Business
6 User” means a person that utilizes or is likely to
7 utilize the covered platform for the sale or provision
8 of products or services, including such persons that
9 are operating a covered platform or are controlled by
10 a covered platform operator.

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

13 (4) COVERED PLATFORM.—The term “covered
14 platform” means an online platform—

15 (A) that has been designated as a covered
16 platform under section 2(e); or

17 (B) that—

18 (i) at any point during the 12 months
19 preceding a designation under section 2(e)
20 or at any point during the 12 months pre-
21 ceeding the filing of a complaint for an al-
22 leged violation of this Act—

23 (I) has at least 50,000,000
24 United States-based monthly active
25 users on the online platform; or

10

1 (II) has at least 100,000 United
2 States-based monthly active business
3 users on the online platform;

4 (ii) at any point during the 2 years
5 preceeding a designation under section 2(e)
6 or at any point during the 2 years pre-
7 ceeding the filing of a complaint for an al-
8 leged violation of this Act, is owned or con-
9 trolled by a person with United States net
10 annual sales or a market capitalization
11 greater than \$550,000,000,000, adjusted
12 for inflation on the basis of the Consumer
13 Price Index; and

14 (iii) is a critical trading partner for
15 the sale or provision of any product or
16 service offered on or directly related to the
17 online platform.

18 (5) ~~CRITICAL TRADING PARTNER.~~—The term
19 “critical trading partner” means a person that has
20 the ability to restrict or materially impede the access
21 of—

22 (A) a business user to its users or cus-
23 tomers; or

1 ~~(B)~~ a business user to a tool or service
2 that it needs to effectively serve its users or
3 customers.

4 ~~(6)~~ PERSON.—The term “person” has the
5 meaning given the term in subsection (a) of section
6 1 of the Clayton Act (~~15~~ U.S.C. 12).

7 ~~(7)~~ DATA.—

8 ~~(A)~~ IN GENERAL.—Not later than 6
9 months after the date of enactment of this Act,
10 the Commission shall adopt rules in accordance
11 with section 553 of title 5, United States Code,
12 to define the term “data” for the purpose of
13 implementing and enforcing this Act.

14 ~~(B)~~ DATA.—The term “data” shall include
15 information that is collected by or provided to
16 a covered platform or business user that is
17 linked, or reasonably linkable, to a specific—

18 (i) user or customer of the covered
19 platform; or

20 (ii) user or customer of a business
21 user.

22 ~~(8)~~ ONLINE PLATFORM.—The term “online
23 platform” means a website, online or mobile applica-
24 tion, operating system, digital assistant, or online
25 service that—

12

1 (A) enables a user to generate content that
2 can be viewed by other users on the platform or
3 to interact with other content on the platform;

4 (B) facilitates the offering, sale, purchase,
5 payment, or shipping of products or services,
6 including software applications, between and
7 among consumers or businesses not controlled
8 by the platform operator; or

9 (C) enables user searches or queries that
10 access or display a large volume of information.

11 (9) CONTROL.—The term “control” with re-
12 spect to a person means—

13 (A) holding 25 percent or more of the
14 stock of the person;

15 (B) having the right to 25 percent or more
16 of the profits of the person;

17 (C) having the right to 25 percent or more
18 of the assets of the person, in the event of the
19 person’s dissolution;

20 (D) if the person is a corporation, having
21 the power to designate 25 percent or more of
22 the directors of the person;

23 (E) if the person is a trust, having the
24 power to designate 25 percent or more of the
25 trustees; or

1 ~~(F)~~ otherwise exercises substantial control
2 over the person.

3 ~~(10)~~ STATE.—The term “State” means a State,
4 the District of Columbia, the Commonwealth of
5 Puerto Rico, and any other territory or possession of
6 the United States.

7 ~~(i)~~ ENFORCEMENT.—

8 ~~(1)~~ IN GENERAL.—Except as otherwise pro-
9 vided in this Act—

10 ~~(A)~~ the Commission shall enforce this Act
11 in the same manner, by the same means, and
12 with the same jurisdiction, powers, and duties
13 as though all applicable terms of the Federal
14 Trade Commission Act (15 U.S.C. 41 et seq.)
15 were incorporated into and made a part of this
16 Act;

17 ~~(B)~~ the Attorney General shall enforce this
18 Act in the same manner, by the same means,
19 and with the same jurisdiction, powers and du-
20 ties as though all applicable terms of the Sher-
21 man Act (15 U.S.C. 1 et seq.), Clayton Act (15
22 U.S.C. 12 et seq.), and Antitrust Civil Process
23 Act (15 U.S.C. 1311 et seq.) were incorporated
24 into and made a part of this Act; and

1 (~~C~~) any attorney general of a State shall
2 enforce this Act in the same manner, by the
3 same means, and with the same jurisdiction,
4 powers and duties as though all applicable
5 terms of the Sherman Act (15 U.S.C. 1 et seq.)
6 and the Clayton Act (15 U.S.C. 12 et seq.)
7 were incorporated into and made a part of this
8 Act.

9 (~~2~~) UNFAIR METHODS OF COMPETITION.—A
10 violation of this Act shall also constitute an unfair
11 method of competition under section 5 of the Fed-
12 eral Trade Commission Act (15 U.S.C. 45).

13 (~~3~~) COMMISSION INDEPENDENT LITIGATION AU-
14 THORITY.—If the Commission has reason to believe
15 that a person violated this Act, the Commission may
16 commence a civil action, in its own name by any of
17 its attorneys designated by it for such purpose, to
18 recover a civil penalty and seek other appropriate re-
19 lief in a district court of the United States.

20 (~~4~~) PARENS PATRIAE.—Any attorney general of
21 a State may bring a civil action in the name of such
22 State for a violation of this Act as parens patriae on
23 behalf of natural persons residing in such State, in
24 any district court of the United States having juris-

1 dictation of the defendant, and may secure any form
2 of relief provided for in this section.

3 ~~(j) EMERGENCY RELIEF.—~~

4 ~~(1) IN GENERAL.—~~The Commission, Assistant
5 Attorney General of the Antitrust Division, or any
6 attorney general of a State may seek a temporary
7 injunction requiring the covered platform operator to
8 take or stop taking any action for not more than
9 120 days and the court may grant such relief if the
10 Commission, the United States, or the attorney gen-
11 eral of a State proves—

12 ~~(A)~~ there is a claim that a covered plat-
13 form operator took an action that would violate
14 this Act; and

15 ~~(B)~~ that action impairs the ability of busi-
16 ness users to compete with the covered platform
17 operator.

18 ~~(2) EMERGENCY RELIEF.—~~The emergency re-
19 lief shall not last more than 120 days from the filing
20 of the complaint.

21 ~~(3) TERMINATION.—~~The court shall terminate
22 the emergency relief at any time that the covered
23 platform operator proves that the Commission, the
24 United States, or the attorney general of the State
25 seeking relief under this section has not taken rea-

1 sonable steps to investigate whether a violation has
2 occurred.

3 (4) OTHER EQUITABLE RELIEF.—Nothing in
4 this subsection prevents or limits the Commission,
5 the United States, or any attorney general of any
6 State from seeking other equitable relief as provided
7 in subsection (g) of this section.

8 (k) STATUTE OF LIMITATIONS.—A proceeding for a
9 violation of this section may be commenced not later than
10 6 years after such violation occurs.

11 **SEC. 3. JUDICIAL REVIEW.**

12 (a) IN GENERAL.—Any party that is subject to a cov-
13 ered platform designation under section 2(e) of this Act,
14 a decision in response to a request to remove a covered
15 platform designation under section 2(f) of this Act, a final
16 order issued in any district court of the United States
17 under this Act, or a final order of the Commission issued
18 in an administrative adjudicative proceeding under this
19 Act may within 30 days of the issuance of such designa-
20 tion, decision, or order, petition for review of such designa-
21 tion, decision, or order in the United States Court of Ap-
22 peals for the District of Columbia Circuit.

23 (b) TREATMENT OF FINDINGS.—In a proceeding for
24 judicial review of a covered platform designation under
25 section 2(e) of this Act, a decision in response to a request

1 to remove a covered platform designation under section
2 2(f) of this Act, or a final order of the Commission issued
3 in an administrative adjudicative proceeding under this
4 Act, the findings of the Commission or the Assistant At-
5 torney General as to the facts, if supported by evidence,
6 shall be conclusive.

7 **SEC. 4. ENFORCEMENT GUIDELINES.**

8 (a) **IN GENERAL.**—Not later than 1 year after the
9 date of enactment of this Act, the Commission and the
10 Assistant Attorney General of the Antitrust Division shall
11 jointly issue guidelines outlining policies and practices, re-
12 lating to agency enforcement of this Act, including policies
13 for determining the appropriate amount of a civil penalty
14 to be sought under section 2(g)(1) of this Act, with the
15 goal of promoting transparency, deterring violations, and
16 imposing sanctions proportionate to the gravity of indi-
17 vidual violations.

18 (b) **UPDATES.**—The Commission and the Assistant
19 Attorney General of the Antitrust Division shall update
20 the joint guidelines issued under subsection (a), as needed
21 to reflect current agency policies and practices, but not
22 less frequently than once every 4 years beginning on the
23 date of enactment of this Act.

24 (c) **OPERATION.**—The Joint Guidelines issued under
25 this section do not confer any rights upon any person;

1 State, or locality, nor shall they operate to bind the Com-
2 mission, Department of Justice, or any person, State, or
3 locality to the approach recommended in such Guidelines.

4 **SEC. 5. RULE OF CONSTRUCTION.**

5 (a) Notwithstanding any other provision of law,
6 whether user conduct would constitute a violation of sec-
7 tion 1030 of title 18 of the United States Code is not dis-
8 positive of whether the defendant has established an af-
9 firmative defense under this Act.

10 (b) An action taken by a covered platform operator
11 that is reasonably tailored to protect the rights of third
12 parties under sections 106, 1101, 1201, or 1401 of title
13 17 of the United States Code or rights actionable under
14 sections 32 or 43 of the Lanham Act (15 U.S.C. 1114,
15 1125), or corollary state law, shall not be considered un-
16 lawful conduct under subsection 2(a) or (b) of this Act.

17 (c) Nothing in this Act shall be construed to limit
18 any authority of the Attorney General or the Commission
19 under the antitrust laws, the Federal Trade Commission
20 Act (15 U.S.C. 45), or any other provision of law or to
21 limit the application of any law.

22 **SEC. 6. SEVERABILITY.**

23 If any provision of this Act, an amendment made by
24 this Act, or the application of such provision or amend-
25 ment to any person or circumstance is held to be unconsti-

1 tutional; the remainder of this Act and of the amendments
2 made by this Act, and the application of the remaining
3 provisions of this Act and amendments to any person or
4 circumstance shall not be affected.

5 **SECTION 1. SHORT TITLE.**

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

8 **SEC. 2. DEFINITIONS.**

9 *(a) IN GENERAL.—In this Act:*

10 *(1) ANTITRUST LAWS; PERSON.—The terms*
11 *“antitrust laws” and “person” have the meanings*
12 *given the terms in subsection (a) of the first section*
13 *of the Clayton Act (15 U.S.C. 12).*

14 *(2) BUSINESS USER.—The term “business*
15 *user”—*

16 *(A) means a person that uses or is likely to*
17 *use a covered platform for the advertising, sale,*
18 *or provision of products or services, including*
19 *such persons that are operating a covered plat-*
20 *form or are controlled by a covered platform op-*
21 *erator; and*

22 *(B) does not include a person that—*

23 *(i) is a clear national security risk; or*

1 (ii) is controlled by the Government of
2 the People’s Republic of China or the gov-
3 ernment of another foreign adversary.

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

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

8 (A) holding 25 percent or more of the stock
9 of the person;

10 (B) having the right to 25 percent or more
11 of the profits of the person;

12 (C) in the event of the dissolution of the
13 person, having the right to 25 percent or more
14 of the assets of the person;

15 (D) if the person is a corporation, having
16 the power to designate 25 percent or more of the
17 directors of the person;

18 (E) if the person is a trust, having the
19 power to designate 25 percent or more of the
20 trustees; or

21 (F) otherwise exercising substantial control
22 over the person.

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

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

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

5 (i) is a publicly traded company; and

6 (ii)(I) at any point during the 12
7 months preceding a designation under sec-
8 tion 3(d) or the 12 months preceding the fil-
9 ing of a complaint for an alleged violation
10 of this Act has at least—

11 (aa) 50,000,000 United States-
12 based monthly active users on the on-
13 line platform; or

14 (bb) 100,000 United States-based
15 monthly active business users on the
16 online platform;

17 (II) during—

18 (aa) the 2 years preceding a des-
19 ignation under section 3(d), or the 2
20 years preceding the filing of a com-
21 plaint for an alleged violation of this
22 Act—

23 (AA) at any point, is owned
24 or controlled by a person with
25 United States net annual sales of

22

1 greater than \$550,000,000,000,
2 adjusted for inflation on the basis
3 of the Consumer Price Index; or

4 (BB) during any 180-day
5 period during the 2-year period,
6 an average market capitalization
7 greater than \$550,000,000,000,
8 adjusted for inflation on the basis
9 of the Consumer Price Index or

10 (bb) the 12 months preceding a
11 designation under section 3(d), or at
12 any point during the 12 months pre-
13 ceding the filing of a complaint for an
14 alleged violation of this Act, has at
15 least 1,000,000,000 worldwide monthly
16 active users on the online platform;
17 and

18 (III) is a critical trading partner for
19 the sale or provision of any product or serv-
20 ice offered on or directly related to the on-
21 line platform; or

22 (C) is owned or controlled by a person
23 that—

24 (i) is not a publicly traded company;
25 and

23

1 (ii)(I) at any point during the 12
2 months preceding a designation under sec-
3 tion 3(d), or the 12 months preceding the
4 filing of a complaint for an alleged viola-
5 tion of this Act has at least—

6 (aa) 50,000,000 United States-
7 based monthly active users on the on-
8 line platform; or

9 (bb) 100,000 United States-based
10 monthly active business users on the
11 online platform;

12 (II) at any point—

13 (aa) during the 2 years preceding
14 a designation under section 3(d), or
15 the 2 years preceding the filing of a
16 complaint for an alleged violation of
17 this Act, is owned or controlled by a
18 person with earnings, before interest,
19 taxes, depreciation, and amortization,
20 in the previous fiscal year of greater
21 than \$30,000,000,000, adjusted for in-
22 flation on the basis of the Consumer
23 Price Index; or

24 (bb) during the 12 months pre-
25 ceding a designation under section

1 3(d), or the 12 months preceding the
2 filing of a complaint for an alleged
3 violation of this Act, has at least
4 1,000,000,000 worldwide monthly ac-
5 tive users on the online platform; and
6 (III) is a critical trading partner for
7 the sale or provision of any product or serv-
8 ice offered on or directly related to the on-
9 line platform.

10 (6) *CRITICAL TRADING PARTNER.*—The term
11 “critical trading partner” means a person that has
12 the ability to restrict or materially impede the access
13 of—

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

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

19 (7) *DATA.*—The term “data” includes informa-
20 tion that is collected by or provided to a covered plat-
21 form or business user that is linked, or reasonably
22 linkable, to a specific—

23 (A) user or customer of the covered plat-
24 form; or

25 (B) user or customer of a business user.

1 (8) *FOREIGN ADVERSARY*.—The term “foreign
2 *adversary*” has the meaning given the term in section
3 8(c) of the *Secure and Trusted Communications Net-*
4 *works Act of 2019 (47 U.S.C. 1607(c))*.

5 (9) *ONLINE PLATFORM*.—The term “online plat-
6 *form*” means a website, online or mobile application,
7 operating system, digital assistant, or online service
8 that—

9 (A) enables a user to generate content that
10 can be viewed by other users on the platform or
11 to interact with other content on the platform;

12 (B) facilitates the offering, advertising, sale,
13 purchase, payment, or shipping of products or
14 services, including software applications, between
15 and among consumers or businesses not con-
16 trolled by the platform operator; or

17 (C) enables user searches or queries that ac-
18 cess or display a large volume of information.

19 (10) *PUBLICLY TRADED COMPANY*.—The term
20 “publicly traded company”—

21 (A) means any company whose principal
22 class of shares—

23 (i) is listed on a stock exchange; and

24 (ii) can be readily purchased or sold
25 by the public; and

1 (B) includes all subsidiaries of a company
2 described in subparagraph (A).

3 (11) STATE.—The term “State” means a State,
4 the District of Columbia, the Commonwealth of Puer-
5 to Rico, and any other territory or possession of the
6 United States.

7 (b) REGULATIONS.—Not later than 180 days after the
8 date of enactment of this Act, the Commission shall promul-
9 gate regulations in accordance with section 553 of title 5,
10 United States Code, to define the term data for the purpose
11 of implementing and enforcing this Act.

12 **SEC. 3. UNLAWFUL CONDUCT.**

13 (a) IN GENERAL.—It shall be unlawful for a person
14 operating a covered platform in or affecting commerce to
15 engage in conduct, as demonstrated by a preponderance of
16 the evidence, that would—

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

21 (2) limit the ability of the products, services, or
22 lines of business of another business user to compete
23 on the covered platform relative to the products, serv-
24 ices, or lines of business of the covered platform oper-

1 *ator in a manner that would materially harm com-*
2 *petition;*

3 *(3) discriminate in the application or enforce-*
4 *ment of the terms of service of the covered platform*
5 *among similarly situated business users in a manner*
6 *that would materially harm competition;*

7 *(4) materially restrict, impede, or unreasonably*
8 *delay the capacity of a business user to access or*
9 *interoperate with the same platform, operating sys-*
10 *tem, or hardware or software features that are avail-*
11 *able to the products, services, or lines of business of*
12 *the covered platform operator that compete or would*
13 *compete with products or services offered by business*
14 *users on the covered platform;*

15 *(5) condition access to the covered platform or*
16 *preferred status or placement on the covered platform*
17 *on the purchase or use of other products or services*
18 *offered by the covered platform operator that are not*
19 *part of or intrinsic to the covered platform;*

20 *(6) use nonpublic data that are obtained from or*
21 *generated on the covered platform by the activities of*
22 *a business user or by the interaction of a covered*
23 *platform user with the products or services of a busi-*
24 *ness user to offer, or support the offering of, the prod-*
25 *ucts or services of the covered platform operator that*

1 *compete or would compete with products or services*
2 *offered by business users on the covered platform;*

3 *(7) materially restrict or impede a business user*
4 *from accessing data generated on the covered platform*
5 *by the activities of the business user, or through an*
6 *interaction of a covered platform user with the prod-*
7 *ucts or services of the business user, such as by estab-*
8 *lishing contractual or technical restrictions that pre-*
9 *vent the portability by the business user to other sys-*
10 *tems or applications of the data of the business user;*

11 *(8) materially restrict or impede covered plat-*
12 *form users from uninstalling software applications*
13 *that have been preinstalled on the covered platform or*
14 *changing default settings that direct or steer covered*
15 *platform users to products or services offered by the*
16 *covered platform operator, unless necessary—*

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

19 *(B) to prevent data from the covered plat-*
20 *form operator or another business user from*
21 *being transferred to the Government of the Peo-*
22 *ple’s Republic of China or the government of an-*
23 *other foreign adversary;*

24 *(9) in connection with any covered platform user*
25 *interface, including search or ranking functionality*

1 *offered by the covered platform, treat the products,*
2 *services, or lines of business of the covered platform*
3 *operator more favorably relative to those of another*
4 *business user than under standards mandating the*
5 *neutral, fair, and nondiscriminatory treatment of all*
6 *business users; or*

7 (10) *retaliate against any business user or cov-*
8 *ered platform user that raises concerns with any law*
9 *enforcement authority about actual or potential viola-*
10 *tions of State or Federal law.*

11 (b) *AFFIRMATIVE DEFENSES.—*

12 (1) *IN GENERAL.—It shall be an affirmative de-*
13 *fense to an action under paragraph (1), (2), or (3) of*
14 *subsection (a) if the defendant establishes by a pre-*
15 *ponderance of the evidence that the conduct was nar-*
16 *rowly tailored, nonpretextual, and reasonably nec-*
17 *essary to—*

18 (A) *prevent a violation of, or comply with,*
19 *Federal or State law;*

20 (B) *protect safety, user privacy, the security*
21 *of nonpublic data, or the security of the covered*
22 *platform; or*

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

1 (2) *OTHER UNLAWFUL CONDUCT.*—*It shall be an*
2 *affirmative defense to an action under paragraph (4),*
3 *(5), (6), (7), (8), (9), or (10) of subsection (a) if the*
4 *defendant establishes by a preponderance of the evi-*
5 *dence that the conduct—*

6 (A) *has not resulted in and would not result*
7 *in material harm to competition; or*

8 (B) *was narrowly tailored, could not be*
9 *achieved through less discriminatory means, was*
10 *nonpretextual, and was reasonably necessary*
11 *to—*

12 (i) *prevent a violation of, or comply*
13 *with, Federal or State law;*

14 (ii) *protect safety, user privacy, the se-*
15 *curity of non-public data, or the security of*
16 *the covered platform; or*

17 (iii) *maintain or substantially enhance*
18 *the core functionality of the covered plat-*
19 *form.*

20 (3) *EFFECT OF OTHER LAWS.*—*Notwithstanding*
21 *any other provision of law, whether user conduct*
22 *would constitute a violation of section 1030 of title*
23 *18, United States Code, shall have no effect on wheth-*
24 *er the defendant has established an affirmative defense*
25 *under this Act.*

1 (c) *ENFORCEMENT.*—

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

4 (A) *the Commission shall enforce this Act in*
5 *the same manner, by the same means, and with*
6 *the same jurisdiction, powers, and duties as*
7 *though all applicable terms of the Federal Trade*
8 *Commission Act (15 U.S.C. 41 et seq.) were in-*
9 *corporated into and made a part of this Act;*

10 (B) *the Attorney General shall enforce this*
11 *Act in the same manner, by the same means,*
12 *and with the same jurisdiction, powers, and du-*
13 *ties as though all applicable terms of the Sher-*
14 *man Act (15 U.S.C. 1 et seq.), Clayton Act (15*
15 *U.S.C. 12 et seq.), and Antitrust Civil Process*
16 *Act (15 U.S.C. 1311 et seq.) were incorporated*
17 *into and made a part of this Act; and*

18 (C) *any attorney general of a State shall*
19 *enforce this Act in the same manner, by the same*
20 *means, and with the same jurisdiction, powers,*
21 *and duties as though all applicable terms of the*
22 *Sherman Act (15 U.S.C. 1 et seq.) and the Clay-*
23 *ton Act (15 U.S.C. 12 et seq.) were incorporated*
24 *into and made a part of this Act.*

1 (2) *COMMISSION INDEPENDENT LITIGATION AU-*
2 *THORITY.*—*If the Commission has reason to believe*
3 *that a person violated this Act, the Commission may*
4 *commence a civil action, in its own name by any of*
5 *its attorneys designated by it for such purpose, to re-*
6 *cover a civil penalty and seek other appropriate relief*
7 *in a district court of the United States.*

8 (3) *PARENS PATRIAE.*—*Any attorney general of*
9 *a State may bring a civil action in the name of such*
10 *State for a violation of this Act as parens patriae on*
11 *behalf of natural persons residing in such State, in*
12 *any district court of the United States having juris-*
13 *isdiction of the defendant for any form of relief pro-*
14 *vided for in this section.*

15 (4) *ENFORCEMENT IN FEDERAL DISTRICT*
16 *COURT.*—*The Commission, Attorney General, or any*
17 *attorney general of a State shall only be able to en-*
18 *force this Act through a civil action brought before a*
19 *district court of the United States.*

20 (5) *REMEDIES.*—

21 (A) *IN GENERAL.*—*The remedies provided*
22 *in this paragraph are in addition to, and not in*
23 *lieu of, any other remedy available under Fed-*
24 *eral or State law.*

1 (B) *CIVIL PENALTY.*—Any person who vio-
2 lates this Act shall be liable to the United States
3 or the Commission for a civil penalty, which
4 shall accrue to the United States Treasury, in an
5 amount not greater than 15 percent of the total
6 United States revenue of the person for the pe-
7 riod of time the violation occurred.

8 (C) *INJUNCTIONS.*—

9 (i) *IN GENERAL.*—The Assistant Attor-
10 ney General in charge of the Antitrust Divi-
11 sion, the Commission, or the attorney gen-
12 eral of any State may seek, and the court
13 may order, relief in equity as necessary to
14 prevent, restrain, or prohibit violations of
15 this Act.

16 (ii) *TEMPORARY INJUNCTIONS.*—

17 (I) *IN GENERAL.*—The Commis-
18 sion, Assistant Attorney General in
19 charge of the Antitrust Division, or
20 any attorney general of a State may
21 seek a temporary injunction requiring
22 the covered platform operator to take
23 or stop taking any action for not more
24 than 120 days.

1 (II) *GRANT.*—*The court may*
2 *grant a temporary injunction under*
3 *this clause if the Commission, the*
4 *United States, or the attorney general*
5 *of a State, as applicable, proves—*

6 *(aa) there is a plausible*
7 *claim, supported by evidence, that*
8 *a covered platform operator took*
9 *an action that would violate this*
10 *Act;*

11 *(bb) that action materially*
12 *impairs the ability of business*
13 *users to compete with the covered*
14 *platform operator; and*

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

17 (III) *DURATION.*—*A temporary*
18 *injunction under this clause shall ex-*
19 *pire not later than the date that is 120*
20 *days after the date on which a com-*
21 *plaint under this subsection is filed.*

22 (IV) *TERMINATION.*—*The court*
23 *shall terminate a temporary injunction*
24 *under this clause if the covered plat-*
25 *form operator proves that—*

1 (aa) the Commission, the
2 United States, or the attorney
3 general of the State seeking relief
4 under this subsection has not
5 taken reasonable steps to inves-
6 tigate whether a violation has oc-
7 curred; or

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

11 (V) OTHER EQUITABLE RELIEF.—
12 Nothing in this clause shall prevent or
13 limit the Commission, the United
14 States, or any attorney general of any
15 State from seeking other equitable re-
16 lief, including the relief provided in
17 this paragraph.

18 (D) FORFEITURE FOR REPEAT OFFEND-
19 ERS.—If a person has engaged in a pattern or
20 practice of violating this Act, the court shall con-
21 sider requiring, and may order, that the chief ex-
22 ecutive officer, and any other corporate officer as
23 appropriate to deter violations of this Act, forfeit
24 to the United States Treasury any compensation
25 received by that person during the 12 months

1 *preceding or following the filing of a complaint*
2 *for an alleged violation of this Act.*

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

6 (7) *RULES OF CONSTRUCTION.*—

7 (A) *IN GENERAL.*—*Nothing in subsection*
8 (i) *may be construed—*

9 (i) *to require a covered platform oper-*
10 *ator to divulge or license any intellectual*
11 *property, including any trade secrets, busi-*
12 *ness secrets, or other confidential propri-*
13 *etary business processes, owned by or li-*
14 *censed to the covered platform operator;*

15 (ii) *to prevent a covered platform oper-*
16 *ator from asserting its preexisting rights*
17 *under intellectual property law to prevent*
18 *the unauthorized use of any intellectual*
19 *property owned by or duly licensed to the*
20 *covered platform operator;*

21 (iii) *to require a covered platform op-*
22 *erator to interoperate or share data with*
23 *persons or business users that are on any*
24 *list maintained by the Federal Government*
25 *by which entities—*

1 (I) are identified as limited or
2 prohibited from engaging in economic
3 transactions as part of United States
4 sanctions or export-control regimes; or

5 (II) have been identified as na-
6 tional security, intelligence, or law en-
7 forcement risks;

8 (iv) to prohibit a covered platform op-
9 erator from promptly requesting and ob-
10 taining the consent of a covered platform
11 user prior to providing access to the non-
12 public, personally identifiable information
13 of the user to a covered platform user under
14 that subsection;

15 (v) in a manner that would likely re-
16 sult in data on the covered platform or data
17 from another business user being transferred
18 to the Government of the People's Republic
19 of China or the government of another for-
20 eign adversary; or

21 (vi) to impose liability on a covered
22 platform operator solely for offering—

23 (I) full end-to-end encrypted mes-
24 saging or communication products or

1 *services that allow communication be-*
2 *tween covered platform users; or*

3 *(II) a fee-for-service subscription*
4 *that provides benefits to covered plat-*
5 *form users on the covered platform.*

6 *(B) COPYRIGHT AND TRADEMARK VIOLA-*
7 *TIONS.—An action taken by a covered platform*
8 *operator that is reasonably tailored to protect the*
9 *rights of third parties under section 106, 1101,*
10 *1201, or 1401 of title 17, United States Code, or*
11 *rights actionable under section 32 or 43 of the*
12 *Act entitled “An Act to provide for the registra-*
13 *tion and protection of trademarks used in com-*
14 *merce, to carry out the provisions of certain*
15 *international conventions, and for other pur-*
16 *poses”, approved July 5, 1946 (commonly known*
17 *as the “Lanham Act” or the “Trademark Act of*
18 *1946”) (15 U.S.C. 1114, 1125), or corollary*
19 *State law, shall not be considered unlawful con-*
20 *duct under subsection (a).*

21 *(d) COVERED PLATFORM DESIGNATION.—*

22 *(1) IN GENERAL.—The Commission and Depart-*
23 *ment of Justice may jointly, with concurrence of the*
24 *other, designate an online platform as a covered plat-*

1 *form for the purpose of implementing and enforcing*
2 *this Act, which shall—*

3 *(A) be based on a finding that the criteria*
4 *set forth in subparagraph (B) or (C) of section*
5 *2(a)(5) are met;*

6 *(B) be issued in writing and published in*
7 *the Federal Register; and*

8 *(C) except as provided in paragraph (2),*
9 *apply for a 7-year period beginning on the date*
10 *on which the designation is issued, regardless of*
11 *whether there is a change in control or owner-*
12 *ship over the covered platform.*

13 *(2) REMOVAL OF COVERED PLATFORM DESIGNA-*
14 *TION.—The Commission or the Department of Justice*
15 *shall—*

16 *(A) consider whether a designation of a cov-*
17 *ered platform under paragraph (1) should be re-*
18 *moved prior to the expiration of the 7-year pe-*
19 *riod if the covered platform operator files a re-*
20 *quest with the Commission or the Department of*
21 *Justice that shows that the online platform no*
22 *longer meets the criteria set forth in subpara-*
23 *graphs (B) and (C);*

24 *(B) determine whether to grant a request*
25 *submitted under subparagraph (A) not later*

1 *than 120 days after the date on which the re-*
2 *quest is filed; and*

3 *(C) obtain the concurrence of the Commis-*
4 *sion or the Department of Justice, as appro-*
5 *priate, before granting a request submitted under*
6 *subparagraph (A).*

7 (3) *JUDICIAL REVIEW.*—

8 (A) *IN GENERAL.*—*Any person aggrieved by*
9 *a designation under paragraph (1), a decision in*
10 *response to a request under paragraph (2), or a*
11 *final order issued in any district court of the*
12 *United States under this Act may, within 30*
13 *days of the issuance of such designation, deci-*
14 *sion, or order, petition for review of such des-*
15 *ignation, decision, or order in the United States*
16 *Court of Appeals for the District of Columbia*
17 *Circuit.*

18 (B) *TREATMENT OF FINDINGS.*—*In a pro-*
19 *ceeding for judicial review of a designation*
20 *under paragraph (1) or a decision in response to*
21 *a request under paragraph (2), the findings of*
22 *fact by the Commission or the Department of*
23 *Justice, if supported by evidence, shall be conclu-*
24 *sive.*

1 **SEC. 4. ENFORCEMENT GUIDELINES.**

2 (a) *IN GENERAL.*—Not later than 270 days after the
3 date of enactment of this Act, the Commission and the As-
4 sistant Attorney General in charge of the Antitrust Divi-
5 sion, in consultation with other relevant Federal agencies
6 and State attorneys general, shall jointly issue agency en-
7 forcement guidelines outlining policies and practices relat-
8 ing to conduct that may materially harm competition
9 under section 3(a), agency interpretations of the affirmative
10 defenses under section 3(b), and policies for determining the
11 appropriate amount of a civil penalty to be sought under
12 section 3(c), with the goal of promoting transparency, deter-
13 ring violations, fostering innovation and procompetitive
14 conduct, and imposing sanctions proportionate to the grav-
15 ity of individual violations.

16 (b) *UPDATES.*—The Commission and the Assistant At-
17 torney General in charge of the Antitrust Division shall up-
18 date the joint guidelines issued under subsection (a) as
19 needed to reflect current agency policies and practices, but
20 not less frequently than once every 4 years beginning on
21 the date of enactment of this Act.

22 (c) *PUBLIC NOTICE AND COMMENT.*—Before issuing
23 guidelines, or updates to those guidelines, under this section,
24 the Commission and the Assistant Attorney General in
25 charge of the Antitrust Division shall—

1 (1) *publish proposed guidelines in draft form;*
2 *and*

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

6 (d) *OPERATION.—The joint guidelines issued under*
7 *this section do not—*

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

10 (2) *operate to bind the Commission, Department*
11 *of Justice, or any person, State, or locality to the ap-*
12 *proach recommended in the guidelines.*

13 **SEC. 5. RULE OF CONSTRUCTION.**

14 *Nothing in this Act may be construed to limit—*

15 (1) *any authority of the Attorney General or the*
16 *Commission under the antitrust laws, section 5 of the*
17 *Federal Trade Commission Act (15 U.S.C. 45), or*
18 *any other provision of law; or*

19 (2) *the application of any law.*

20 **SEC. 6. SEVERABILITY.**

21 *If any provision of this Act, or the application of such*
22 *provision to any person or circumstance, is held to be un-*
23 *constitutional, the remainder of this Act, and the applica-*
24 *tion of the remaining provisions of this Act, to any person*
25 *or circumstance, shall not be affected.*

1 **SEC. 7. EFFECTIVE DATE.**

2 (a) *IN GENERAL.*—*Except as provided in subsection*

3 *(b), this Act shall take effect on the date of enactment of*

4 *this Act.*

5 (b) *EXCEPTION.*—*Section 3(a) shall take effect on the*

6 *date that is 1 year after the date of enactment of this Act.*

7 (c) *AUTHORITY.*—*The exception in subsection (b) shall*

8 *not limit the authority of the Commission or Department*

9 *of Justice to implement other sections of this Act.*

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117TH CONGRESS
2^D SESSION
S. 2992

A BILL

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

MARCH 2, 2022

Reported with an amendment