

116TH CONGRESS  
2D SESSION

# S. 3426

To deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

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## IN THE SENATE OF THE UNITED STATES

MARCH 10, 2020

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

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## A BILL

To deter anticompetitive exclusionary conduct that harms competition and consumers, to enhance the ability of the Department of Justice and the Federal Trade Commission to enforce the antitrust laws, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Anticompetitive Exclu-  
5 sionary Conduct Prevention Act of 2020”.

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

7 (a) FINDINGS.—Congress finds that—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4 **SEC. 3. DEFINITION.**

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

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

9           (2) includes—

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

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

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

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

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

21           “(a) DEFINITIONS.—In this section:

22           “(1) EXCLUSIONARY CONDUCT.—

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

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

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

6           “(B) LIMITATIONS.—

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

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

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

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

6 “(b) VIOLATION.—

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

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

15 “(c) PRESUMPTION.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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



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

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

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

12       (b) FEDERAL TRADE COMMISSION ACT.—

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

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

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

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

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

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

13           (B) in subparagraph (E)—

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

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

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

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

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

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

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

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

16 (1) the volume of commerce affected;

17 (2) the duration and severity of the unlawful  
18 conduct;

19 (3) the intent of the person undertaking the un-  
20 lawful conduct;

21 (4) the extent to which the unlawful conduct  
22 was egregious or a clear violation of the law;

23 (5) whether the civil penalty is to be applied in  
24 combination with other remedies for violations of  
25 section 26A of the Clayton Act, including—

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

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

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

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

18 (d) PUBLIC NOTICE AND COMMENT.—

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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