

118TH CONGRESS
1ST SESSION

S. 1073

To amend the Clayton Act to prevent conflicts of interest and promote competition in the sale and purchase of digital advertising.

IN THE SENATE OF THE UNITED STATES

MARCH 30, 2023

Mr. LEE (for himself, Ms. KLOBUCHAR, Mr. CRUZ, Mr. BLUMENTHAL, Mr. RUBIO, Ms. WARREN, Mr. SCHMITT, Mr. HAWLEY, Mr. KENNEDY, Mr. GRAHAM, and Mr. VANCE) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

A BILL

To amend the Clayton Act to prevent conflicts of interest and promote competition in the sale and purchase of digital advertising.

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 “Advertising Middlemen
5 Endangering Rigorous Internet Competition Account-
6 ability Act” or the “AMERICA Act”.

1 **SEC. 2. DIGITAL ADVERTISING TRADING TRANSPARENCY**
2 **AND COMPETITION.**

3 The Clayton Act (15 U.S.C. 12 et seq.) is amended
4 by inserting after section 8 (15 U.S.C. 19) the following:

5 **“SEC. 8A. COMPETITION AND TRANSPARENCY IN DIGITAL**
6 **ADVERTISING.**

7 “(a) DEFINITIONS.—In this section:

8 “(1) BROKERAGE CUSTOMER.—The term ‘bro-
9 kerage customer’ means a person who has purchased
10 or sold digital advertisements, or directly related
11 goods or services, through a buy-side brokerage or a
12 sell-side brokerage.

13 “(2) BUY-SIDE BROKERAGE.—The term ‘buy-
14 side brokerage’ means a person in the business of ef-
15 fecting transactions on digital advertising exchanges,
16 including by offering software or services that assist
17 in serving or displaying digital advertisements, for
18 other buyers.

19 “(3) DIGITAL ADVERTISEMENT.—The term
20 ‘digital advertisement’ means an advertisement that
21 is served electronically over a computer network, in-
22 cluding the internet.

23 “(4) DIGITAL ADVERTISING EXCHANGE.—The
24 term ‘digital advertising exchange’ means a person
25 who constitutes, maintains, or provides a market-
26 place for or facilitates bringing together buyers and

1 1 or more third-party sellers of digital advertise-
2 ments, or for otherwise performing with respect to
3 digital advertising the functions commonly per-
4 formed by a digital advertising marketplace.

5 “(5) DIGITAL ADVERTISING REVENUE.—The
6 term ‘digital advertising revenue’ means the greater
7 of—

8 “(A) global revenue derived from or di-
9 rectly related to the operation of a digital ad-
10 vertising exchange, a buy-side brokerage, or a
11 sell-side brokerage;

12 “(B) the sum of the clearing prices of all
13 digital advertisements bought or sold from or
14 through a digital advertising exchange;

15 “(C) the total value of the gross adver-
16 tising spending managed by a buy-side broker-
17 age; or

18 “(D) the total value of the gross adver-
19 tising sales managed by a sell-side brokerage.

20 “(6) DIVESTITURE DEADLINE.—The term ‘di-
21 vestiture deadline’ means the later of—

22 “(A) 30 days after the date on which the
23 Attorney General approves or denies a required
24 divestiture; or

1 “(B) 30 days after the expiration of any
2 applicable waiting period specified in section
3 7A.

4 “(7) EFFECTIVE DATE.—The term ‘effective
5 date’ means the date that is 1 year after the date
6 of enactment of this section.

7 “(8) OWN.—The term ‘own’ means to own, op-
8 erate, or control, directly or indirectly, in whole or
9 in part.

10 “(9) PERSON.—The term ‘person’ includes—

11 “(A) any subsidiary of an entity; and

12 “(B) any corporate parent of an entity.

13 “(10) REQUIRED DIVESTITURE.—The term ‘re-
14 quired divestiture’—

15 “(A) means a divestiture, sale, or other
16 transaction undertaken to comply with any pro-
17 vision of this Act; and

18 “(B) does not include any action required
19 by a court of the United States.

20 “(11) SELL-SIDE BROKERAGE.—The term ‘sell-
21 side brokerage’ means a person in the business of ef-
22 fecting transactions on digital advertising exchanges,
23 including by offering software or services that assist
24 in serving or displaying digital advertisements, for
25 third-party sellers.

1 “(12) THIRD-PARTY.—The term ‘third-party’
2 means, for each person subject to this Act, an entity
3 that—

4 “(A) neither owns nor is owned by the per-
5 son; and

6 “(B) is not affiliated with the person
7 through direct or indirect ownership or control.

8 “(b) PROHIBITIONS.—No person with more than
9 \$20,000,000,000 (as adjusted each year on January 1 by
10 an amount equal to the percentage increase, if any, in the
11 Consumer Price Index, as determined by the Department
12 of Labor or its successor) in digital advertising revenue
13 during the previous calendar year may, after the effective
14 date—

15 “(1) own a digital advertising exchange if the
16 person—

17 “(A) owns a sell-side brokerage or a buy-
18 side brokerage; or

19 “(B) is a seller of digital advertising space;

20 “(2) own a sell-side brokerage if the person
21 owns a buy-side brokerage; or

22 “(3) own a buy-side brokerage or a sell-side
23 brokerage if the person is a buyer or seller of digital
24 advertising space.

1 “(c) REQUIREMENTS.—On and after the effective
2 date, any person with more than \$5,000,000,000 (as ad-
3 justed each year on January 1 by an amount equal to the
4 percentage increase, if any, in the Consumer Price Index,
5 as determined by the Department of Labor or its suc-
6 cessor) in digital advertising revenue during the previous
7 calendar year shall be subject to the following require-
8 ments:

9 “(1) BEST INTEREST DUTY.—A buy-side bro-
10 kerage or sell-side brokerage—

11 “(A) shall, in the course of providing serv-
12 ices as a brokerage, use reasonable diligence,
13 care, and skill to act in the best interests of the
14 brokerage customers; and

15 “(B) may not put the interests of the bro-
16 kerage ahead of those of the brokerage cus-
17 tomers.

18 “(2) BEST EXECUTION DUTY.—A buy-side bro-
19 kerage or sell-side brokerage shall seek the most fa-
20 vorable terms reasonably available under the cir-
21 cumstances for each order transaction of the broker-
22 age customer.

23 “(3) TRANSPARENCY REQUIREMENTS.—

24 “(A) IN GENERAL.—Upon written request
25 from a brokerage customer, a buy-side broker-

1 age or sell-side brokerage shall supply to the
2 brokerage customer, within a reasonable time,
3 information sufficient to permit the brokerage
4 customer to verify compliance of the brokerage
5 with the obligations under paragraphs (1) and
6 (2).

7 “(B) CONTENTS.—The information de-
8 scribed in subparagraph (A) shall include, if re-
9 quested and to the extent such information is
10 collected by the brokerage in the ordinary
11 course of business—

12 “(i) in the case of a sell-side broker-
13 age providing information to a sell-side
14 brokerage customer—

15 “(I) a unique and persistent
16 identifier that identifies each unique
17 digital advertising space for sale;

18 “(II) for each identifier described
19 in subclause (I), all bids received, and,
20 for each bid received, the bid sub-
21 mitted to the digital advertising ex-
22 change on behalf of the buy-side bro-
23 kerage customer, the winning price,
24 the uniform resource locator or other
25 property identifier at the lowest level

1 of granularity, the identity of the dig-
2 ital advertising exchange or other dig-
3 ital advertising venue returning the
4 bid, date, time that the bid response
5 was received in microseconds or a
6 lower level of granularity, web domain
7 associated with the advertising cre-
8 ative, the advertising creative size and
9 format, and whether the bid won the
10 impression of the seller;

11 “(III) the nature of any data col-
12 lected or derived from the brokerage
13 customer or any user or customer of
14 the brokerage customer, and the ways
15 in which the data is used by the sell-
16 side brokerage;

17 “(IV) the order or bid routing
18 practices or processes, including any
19 material exceptions to the standard
20 practice of the brokerage; and

21 “(V) the source and nature of
22 any compensation paid or received in
23 connection with transactions; and

1 “(ii) in the case of a buy-side broker-
2 age providing information to a buy-side
3 brokerage customer—

4 “(I) all bids won by the buy-side
5 brokerage customer, and for each bid
6 won, the maximum allowed bid of the
7 advertiser, if any, the uniform re-
8 source locator or other property iden-
9 tifier at the lowest level of granu-
10 larity, date, the digital advertising ex-
11 change, the web domain associated
12 with the advertising creative, the ad-
13 vertising creative size and format, the
14 winning price, the bid submitted to
15 the digital advertising exchange on be-
16 half of the buy-side brokerage cus-
17 tomer, and, if possible, whether the ad
18 served and whether the ad rendered;

19 “(II) the order or bid routing
20 practices or processes; and

21 “(III) the source and nature of
22 any compensation paid or received in
23 connection with transactions.

24 “(C) RETENTION OF RECORDS.—

25 Brokerages shall retain the applicable records

1 specified in subparagraph (B) collected in the
2 ordinary course of business until provided to a
3 requesting brokerage customer but not longer
4 than 90 days. Brokerages shall retain billing in-
5 formation for brokerage customers for not
6 fewer than 12 months.

7 “(D) USER PRIVACY.—

8 “(i) IN GENERAL.—When providing
9 information to a brokerage customer in re-
10 sponse to a request authorized by subpara-
11 graph (A), the brokerage shall, to the
12 greatest extent possible consistent with the
13 purpose of subparagraph (A), anonymize,
14 hash, or otherwise render the information
15 incapable of being tied to an individual web
16 user.

17 “(ii) PROHIBITING TRACKING.—A
18 brokerage customer may not use data or
19 information received in response to a re-
20 quest made under subparagraph (A) for
21 any purpose other than—

22 “(I) verifying compliance of a
23 brokerage with the obligations under
24 paragraphs (1) and (2); or

1 “(II) bringing an action under
2 subsection (d)(3).

3 “(4) FIREWALLS.—

4 “(A) BUY-SIDE AND SELL-SIDE
5 BROKERAGES.—Buy-side brokerages and sell-
6 side brokerages shall establish, maintain, and
7 enforce written policies and procedures reason-
8 ably designed to ensure compliance with the ob-
9 ligations under this subsection.

10 “(B) OTHER PERSONS.—Persons not sub-
11 ject to prohibitions under subsection (b) shall
12 establish, maintain, and enforce written policies
13 and procedures reasonably designed to ensure
14 that the buy-side brokerage, sell-side brokerage,
15 digital advertising exchange, and role as a
16 buyer or seller of digital advertising, as applica-
17 ble, operate separate and independent from one
18 another and transact business at arm’s length.

19 “(5) FAIR ACCESS DUTY.—A digital advertising
20 exchange shall provide every buyer and seller in the
21 exchange fair access, including with respect to oper-
22 ations of the exchange, colocation, any technology
23 systems or data, information related to transactions,
24 service, or products offered, exchange processes, and
25 functionality.

1 “(6) TIME SYNCHRONIZATION.—A digital ad-
2 vertising exchange, buy-side brokerage, or sell-side
3 brokerage shall—

4 “(A) synchronize its business clocks at a
5 minimum to within a 2 milliseconds tolerance of
6 the time maintained by the atomic clock of the
7 National Institute of Standards and Tech-
8 nology; and

9 “(B) maintain the synchronization de-
10 scribed in subparagraph (A).

11 “(7) DATA OWNERSHIP.—All records pertaining
12 to an order solicited or submitted by a brokerage
13 customer, and the subsequent result of the order,
14 shall remain the property of the customer, including
15 any bids solicited from or submitted to any digital
16 advertising exchange, unless the information is oth-
17 erwise publicly available.

18 “(8) ROUTING PRACTICES DISCLOSURE.—

19 “(A) IN GENERAL.—Every sell-side broker-
20 age and buy-side brokerage shall—

21 “(i) make publicly available for each
22 calendar quarter a report on the order
23 routing practices of the sell-side brokerage
24 or buy-side brokerage, as applicable, for

1 digital advertisements during the quarter
2 broken down by calendar month; and

3 “(ii) retain the report described in
4 clause (i) posted on an internet website
5 that is free and readily accessible to the
6 public for the 3-year period beginning on
7 the date on which the report is posted.

8 “(B) FORMAT.—Reports made available
9 pursuant to subparagraph (A) shall—

10 “(i) be rendered in a format that
11 makes the reports readily informative to
12 the average brokerage customer; and

13 “(ii) include for the 10 venues to
14 which the largest number of total bid re-
15 quests or bid responses were routed for
16 execution and for any venue to which 5
17 percent or more of bid requests or bid re-
18 sponses were routed for execution—

19 “(I) the total number of bids
20 routed;

21 “(II) the total number of bids ex-
22 ecuted;

23 “(III) the fill rate of bids;

24 “(IV) the average net execution
25 fee or rebate per 1,000 impressions;

1 “(V) the average time in milli-
2 seconds between when a bid request is
3 sent and when a bid response is re-
4 ceived; and

5 “(VI) the value and form of any
6 compensation given in exchange for
7 routing or execution.

8 “(9) CERTIFICATION.—A digital advertising ex-
9 change, buy-side brokerage, or sell-side brokerage
10 shall certify to the Attorney General on an annual
11 basis that the digital advertising exchange has com-
12 plied with the requirements under this subsection.

13 “(d) ENFORCEMENT.—

14 “(1) ATTORNEY GENERAL AND STATE ATTOR-
15 NEYS GENERAL.—

16 “(A) DEFINITION.—In this paragraph, the
17 term ‘Fund’ means the Antitrust Consumer
18 Damages Fund established under subparagraph
19 (D).

20 “(B) CIVIL ACTION.—The Attorney Gen-
21 eral and State attorneys general may bring an
22 action on behalf of persons in the United States
23 injured in their business or property by reason
24 of any violation of this section in any district
25 court of the United States in the district in

1 which the defendant resides or is found or has
2 an agent, without respect to the amount in con-
3 troversy, and shall—

4 “(i) in a case brought by the Attorney
5 General or a State attorney general, be en-
6 titled to injunctive relief; and

7 “(ii) in a case brought by the Attor-
8 ney General, recover damages sustained by
9 such persons.

10 “(C) DAMAGES.—

11 “(i) IN GENERAL.—The court may
12 award under this subsection, pursuant to a
13 motion by the Attorney General promptly
14 made, simple interest on actual damages in
15 accordance with subparagraph (B).

16 “(ii) NO DUPLICATIVE AWARD.—A
17 court may not award any damages under
18 this subparagraph that are duplicative of
19 damages awarded before the date of the
20 award under this subparagraph in a sepa-
21 rate civil action pertaining to the same
22 conduct and injured party.

23 “(iii) PAYMENTS.—A court awarding
24 damages to a person in a civil action after
25 the date of an award of damages under

1 this subsection that would be duplicative of
 2 damages awarded to the Attorney General
 3 on behalf of the person shall direct that
 4 such damages shall first be paid by the At-
 5 torney General from amounts in the Fund
 6 and, to the extent such damages are not
 7 fully paid from amounts in the Fund, shall
 8 be paid by the defendant.

9 “(D) ANTITRUST CONSUMER DAMAGES
 10 FUND.—

11 “(i) IN GENERAL.—There is estab-
 12 lished in the Treasury of the United States
 13 a fund to be known as the ‘Antitrust Con-
 14 sumer Damages Fund’, which shall consist
 15 of amounts deposited under clause (ii).

16 “(ii) DEPOSITS AND AVAILABILITY.—
 17 Notwithstanding section 3302 of title 31,
 18 United States Code, any amounts received
 19 by the Attorney General under an award
 20 under this subsection—

21 “(I) shall be deposited in the
 22 Fund; and

23 “(II) shall be available to the At-
 24 torney General, without further ap-
 25 propriation, for distribution to persons

1 in the United States harmed by the
2 applicable violation of the Sherman
3 Act (15 U.S.C. 1 et seq.).

4 “(iii) DEPOSITS INTO GENERAL
5 FUND.—Effective on the day after the date
6 that is 10 years after the date on which an
7 award is received under this paragraph,
8 the unobligated balances in the Fund of
9 amounts that were received under the
10 award are rescinded and shall be deposited
11 in the general fund of the Treasury.

12 “(2) DIVESTITURE ENFORCEMENT.—The Attor-
13 ney General may bring an action on behalf of the
14 United States in any district court of the United
15 States in the district in which the defendant resides
16 or is found or has an agent, and may obtain injunc-
17 tive relief upon showing by a preponderance of the
18 evidence that the defendant has—

19 “(A) violated a requirement of subsection
20 (e); or

21 “(B) undertaken a required divestiture
22 that unnecessarily harms or threatens competi-
23 tion in any market.

24 “(3) PRIVATE RIGHT OF ACTION.—

1 “(A) IN GENERAL.—A brokerage customer
2 harmed by a knowing violation of subsection (c)
3 by a person with more than \$20,000,000,000
4 (as adjusted each year on January 1 by an
5 amount equal to the percentage increase, if any,
6 in the Consumer Price Index, as determined by
7 the Department of Labor or its successor) in
8 digital advertising revenue during the previous
9 calendar year may bring a civil action in an ap-
10 propriate court to obtain injunctive relief, if ap-
11 propriate, and recover damages in the amount
12 of the greater of—

13 “(i) \$1,000,000 for each month in
14 which the violation occurred and reason-
15 able attorney’s fees; or

16 “(ii) actual damages and reasonable
17 attorney’s fees.

18 “(B) NO CLASS ACTION WAIVER.—No per-
19 son covered by this section may require a class
20 action waiver for claims under this section, in-
21 cluding for arbitration.

22 “(C) TIMING.—A civil action for a viola-
23 tion of subsection (b) may be brought at any
24 time after the later of—

1 “(i) the expiration of any applicable
2 divestiture deadline; or

3 “(ii) the expiration of the deadline de-
4 scribed in subsection (e)(1) if no filing has
5 been made.

6 “(e) DIVESTITURE.—

7 “(1) FILING.—Any agreement or other docu-
8 ment setting out the terms of a required divestiture
9 shall be filed with the Attorney General not later
10 than the later of—

11 “(A) the effective date; or

12 “(B) the earlier of—

13 “(i) 30 days after the date on which
14 an agreement making a required divesti-
15 ture under this Act is executed; or

16 “(ii) 180 days after meeting the cri-
17 teria specified in any paragraph of sub-
18 section (b).

19 “(2) ATTORNEY GENERAL REVIEW.—The At-
20 torney General shall approve a required divestiture
21 upon a showing by the person making the divestiture
22 that the terms of the divestiture, including the quali-
23 fications of any counterparty to the divestiture, will
24 not unnecessarily harm or threaten competition in
25 any market.

1 “(3) TIMING.—

2 “(A) IN GENERAL.—The Attorney General
3 shall grant or deny approval of a required di-
4 vestiture, unless agreed to by the parties, not
5 later than the later of—

6 “(i) 60 days after receipt of all infor-
7 mation obtained pursuant to subparagraph
8 (5); or

9 “(ii) 60 days after receipt of the filing
10 made under subparagraph (1).

11 “(B) COMPLETION.—A divestiture shall be
12 completed not later than the divestiture dead-
13 line.

14 “(4) GUIDANCE.—The Attorney General shall—

15 “(A) not later than 120 days after the date
16 of enactment of this section, issue guidance on
17 the divestiture process under this subsection
18 and the certification requirement under sub-
19 section (c)(9); and

20 “(B) update the guidance described in sub-
21 paragraph (A) as the Attorney General deter-
22 mines is appropriate.

23 “(5) COMPULSORY PROCESS.—The Attorney
24 General may request or issue a civil investigative de-
25 mand under section 3 of the Antitrust Civil Process

1 Act (15 U.S.C. 1312) for documents from any per-
2 son involved in a required divestiture to determine
3 the competitive effects of the divestiture.

4 “(f) RULES OF CONSTRUCTION.—Nothing in this
5 section shall—

6 “(1) prohibit a person from—

7 “(A) selling their own inventory of adver-
8 tising space if—

9 “(i) the inventory was not acquired
10 solely for the purposes of resale, except to
11 monetize the content or intellectual prop-
12 erty of the person; and

13 “(ii) the person does not also assist a
14 third party in the sale or purchase of ad-
15 vertising space, other than purchasing ad-
16 vertising space from the person; or

17 “(B) buying inventory to market the prod-
18 ucts or services of the person;

19 “(2) abridge or supersede any provision of, or
20 rules issued pursuant to, section 7A;

21 “(3) prohibit a person from, consistent with the
22 antitrust laws, entering into a joint venture or other
23 collaboration to prevent harm from spam, fraud, or
24 other forms of abuse in digital advertising; or

1 “(4) require the disclosure of information if the
2 disclosure would violate a law of the United States
3 or a foreign country.”.

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