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

IN THE SENATE OF THE UNITED STATES

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

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.

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

SECTION 1. SHORT TITLE.

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

SEC. 2. FINDINGS AND PURPOSES.

(a) FINDINGS.—Congress finds that—
(1) competitive markets, in which multiple firms compete to buy and sell products and services, are critical to ensuring economic opportunity for all people in the United States;

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

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

(4) in the United States economy today, the exercise of market power is substantial and growing;

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

(6) when dominant sellers exercise market power, they harm buyers by overcharging them, reducing product or service quality, limiting their choices, and impairing innovation;

(7) when dominant buyers exercise market power, they harm suppliers by underpaying them, limiting their business opportunities, and impairing innovation;
(8) when dominant employers exercise market power, they harm workers by paying them low wages, reducing their benefits, and limiting their future employment opportunities;

(9) nascent or potential rivals can be an important source of competitive discipline for dominant firms;

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

(11) the courts of the United States have improperly implied immunity from the antitrust laws based on Federal regulatory statutes, even limiting the application of statutory antitrust savings clauses passed by Congress.

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

(1) deter exclusionary conduct that harms competition, particularly by dominant firms; and
(2) enhance antitrust enforcement by the Department of Justice, the Federal Trade Commission, the State enforcement agencies, and private parties.

SEC. 3. DEFINITION.

In this Act, the term “antitrust laws”—

(1) has the meaning given the term in subsection (a) of section 1 of the Clayton Act (15 U.S.C. 12);

(2) includes—

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

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

SEC. 4. EXCLUSIONARY CONDUCT.

(a) In General.—The Clayton Act (15 U.S.C. 12 et seq.) is amended by inserting after section 26 (15 U.S.C. 26a) the following:

“SEC. 26A. EXCLUSIONARY CONDUCT.

“(a) Definitions.—In this section:

“(1) Exclusionary Conduct.—

“(A) In General.—The term ‘exclusionary conduct’ means conduct that—
“(i) materially disadvantages 1 or more actual or potential competitors; or

“(ii) tends to foreclose or limit the opportunity of 1 or more actual or potential competitors to compete.

“(B) LIMITATIONS.—

“(i) Applying for or enforcing a patent, trademark, or copyright, unless such applications or enforcement actions are baseless or made in bad faith, shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

“(ii) Conduct that is necessary to comply with Federal or State law shall not alone constitute exclusionary conduct, but such actions may be considered as part of a course of conduct that constitutes exclusionary conduct.

“(2) MARKET POWER.—The term ‘market power’ means the ability of a person, or a group of persons acting in concert, to profitably impose transaction terms on counterparties, including terms regarding price, quantity, product or service quality,
or other terms affecting the value of consideration exchanged in the transaction, that are more favorable to the person or group of persons than what the person or group of persons could obtain in a competitive market.

“(b) Violation.—

“(1) In general.—It shall be unlawful for a person, acting alone or in concert with other persons, to engage in exclusionary conduct that presents an appreciable risk of harming competition.


“(c) Presumption.—

“(1) In general.—Exclusionary conduct shall be presumed to present an appreciable risk of harming competition and shall be a violation of subsection (b)(1) if the exclusionary conduct is undertaken, with respect to a relevant market, by a person or by a group of more than 1 person acting in concert that—

“(A) has a market share of greater than 50 percent as a seller or a buyer in the relevant market; or
“(B) otherwise has significant market power in the relevant market.

“(2) EXCEPTION.—The presumption in paragraph (1) shall be rebutted if the defendant establishes, by a preponderance of the evidence, that—

“(A) distinct procompetitive benefits of the exclusionary conduct in the relevant market eliminate the risk of harming competition presented by the exclusionary conduct;

“(B) 1 or more persons, not including any person participating in or facilitating the exclusionary conduct, have entered or expanded their presence in the market with the effect of eliminating the risk of harming competition posed by the exclusionary conduct; or

“(C) the exclusionary conduct does not present an appreciable risk of harming competition.

“(d) CONSIDERATIONS.—If the presumption in subsection (c) does not apply, the determination of whether exclusionary conduct presents an appreciable risk of harming competition shall be based on the totality of the circumstances, which may include consideration of—

“(1) the extent to which any distinct procompetitive benefits of the exclusionary conduct substan-
tionally eliminate the risk of harming to competition
presented by the exclusionary conduct; and

“(2) whether 1 or more persons, not including
any person participating in or facilitating the exclu-
sionary conduct, have entered or expanded their
presence in the market, substantially eliminating the
risk of harming competition presented by the exclu-
sionary conduct.

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

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

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

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

“(4) that the conduct of the defendant makes
no economic sense apart from its tendency to reduce
competition.
“(f) Civil Penalties.—Any person who violates subsection (b)(1) shall be liable to the United States for a civil penalty, which may be recovered in a civil action brought by the Attorney General of the United States, of not more than the greater of—

“(1) 15 percent of the total United States revenues of the person for the previous calendar year; or

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

(b) Federal Trade Commission Act.—

(1) Civil Penalties.—Section 5 of the Federal Trade Commission Act (15 U.S.C. 45) is amended by adding at the end the following:

“(o) Civil Penalty for Violation of Section 26A of the Clayton Act.—The Commission may commence a civil action in a district court of the United States against any person, partnership, or corporation who violates subsection (a)(1) respecting an unfair method of competition that constitutes a violation of section 26A of the Clayton Act to recover a civil penalty, which shall accrue to the United States, in an amount not more than the greater of—
“(1) 15 percent of the total United States revenues of the person, partnership, or corporation for the previous calendar year; or

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

(2) COMMISSION LITIGATION AUTHORITY.—Section 16(a)(2) of the Federal Trade Commission Act (15 U.S.C. 56(a)(2)) is amended—

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

(B) in subparagraph (E)—

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

(ii) by inserting “or” after the semicolon; and

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

“(F) to recover civil penalties under section 5(o) of this Act;”.

SEC. 5. JOINT ENFORCEMENT GUIDELINES.

(a) IN GENERAL.—Not later than 1 year after the date of enactment of this Act, the Attorney General and the Federal Trade Commission shall issue joint guidelines
outlining policies, practices, and analytical techniques relating to agency enforcement under section 26A of the Clayton Act, as added by section 4 of this Act, including agency policies for determining the appropriate amount of a civil penalty to be sought under section 26A of the Clayton Act and subsection (o) of section 5 of the Federal Trade Commission Act (15 U.S.C. 45), as added by section 4 of this Act, with the goal of promoting transparency and deterring violations of section 26A of the Clayton Act.

(b) PENALTY CONSIDERATIONS.—In establishing the guidelines described in subsection (a) regarding civil penalties, the Attorney General and the Federal Trade Commission shall consider the relevant factors to be used for calculating an appropriate civil penalty for a particular violation, including—

(1) the volume of commerce affected;

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

(3) the intent of the person undertaking the unlawful conduct;

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

(5) whether the civil penalty is to be applied in combination with other remedies for violations of section 26A of the Clayton Act, including—
(A) structural remedies, behavioral conditions, or equitable disgorgement; or

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

(6) whether the person has previously engaged in the same or similar anticompetitive conduct; and

(7) whether the person undertook the conduct in violation of a preexisting consent decree or court order.

(c) Updates.—The Attorney General and the Federal Trade Commission shall update the joint guidelines issued under subsection (a), as needed to reflect current agency policies and practices, but not less frequently than once every 5 years beginning on the date of enactment of this Act.

(d) Public Notice and Comment.—

(1) Guidelines.—Before issuing guidelines under subsection (a) or subsection (c), the Attorney General and the Federal Trade Commission shall publish proposed guidelines in draft form and provide public notice and opportunity for comment for not less than 60 days after the date on which the guidelines are published.
(2) Inapplicability of rule making provisions.—The provisions of section 553 of title 5, United States Code, shall not apply to the guidelines issued under paragraph (1).

SEC. 6. MARKET DEFINITION.

(a) In General.—Establishing liability under the antitrust laws does not require the definition of a relevant market, except when the definition of a relevant market is required, to establish a presumption or to resolve a claim, under a statutory provision that explicitly references relevant market, market concentration, or market share.

(b) Direct Evidence.—If direct evidence is proffered of actual or likely harm to competition or an appreciable risk to competition sufficient to satisfy the applicable statutory standard, or that the effect of an acquisition subject to section 7 of the Clayton Act (15 U.S.C. 18) may be substantially to lessen competition or tend to create a monopoly, neither a court nor the Federal Trade Commission shall require definition of a relevant market in order to evaluate the evidence, to find liability, or to find that a claim has been stated under the antitrust laws.

(e) Rule of Construction.—Nothing in this section may be construed to prevent a court or the Federal Trade Commission from considering evidence relating to
the definition of proposed relevant markets to evaluate the merits of a claim under the antitrust laws.

SEC. 7. LIMITATIONS ON IMPLIED IMMUNITY FROM THE ANTITRUST LAWS.

(a) IN GENERAL.—In any action or proceeding to enforce the antitrust laws with respect to conduct that is regulated under Federal statute, no court or adjudicatory body may find that the Federal statute, or any rule or regulation promulgated in accordance with the Federal statute, implicitly precludes application of the antitrust laws to the conduct unless—

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

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

(3) Federal agency or department rules or regulations, adopted by rulemaking or adjudication, explicitly require or authorize the defendant to undertake the conduct.

(b) EXISTING FEDERAL REGULATION.—In any action or proceeding described in subsection (a), the antitrust laws shall be applied fully and without qualification or limitation, and the scope of the antitrust laws shall not
be defined more narrowly on account of the existence of Federal rules, regulations, or regulatory agencies or departments, unless application of the antitrust laws is precluded or limited by—

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

(2) an implied immunity that satisfies the requirements under subsection (a).

SEC. 8. ADDITIONAL REMEDIES; RULES OF CONSTRUCTION.

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

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

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

(2) prohibit any other remedy provided by Federal law.