

117TH CONGRESS
2D SESSION

S. 4258

To prevent conflicts of interest and promote competition in the sale and purchase of digital advertising.

IN THE SENATE OF THE UNITED STATES

MAY 19 (legislative day, MAY 17), 2022

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

A BILL

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 “Competition and
5 Transparency in Digital Advertising Act”.

6 **SEC. 2. DIGITAL ADVERTISING TRADING TRANSPARENCY**
7 **AND COMPETITION.**

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

1 **“SEC. 8A. COMPETITION AND TRANSPARENCY IN DIGITAL**
2 **ADVERTISING.**

3 “(a) DEFINITIONS.—In this section:

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

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

15 “(3) DIGITAL ADVERTISEMENT.—The term
16 ‘digital advertisement’ means an advertisement that
17 is served electronically over a computer network, in-
18 cluding the internet.

19 “(4) DIGITAL ADVERTISING EXCHANGE.—The
20 term ‘digital advertising exchange’ means a person
21 who constitutes, maintains, or provides a market-
22 place for or facilitates bringing together buyers and
23 1 or more sellers of digital advertisements, or for
24 otherwise performing with respect to digital adver-
25 tising the functions commonly performed by a digital
26 advertising marketplace.

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

4 “(A) global revenue derived from or di-
 5 rectly related to the operation of a digital ad-
 6 vertising exchange, a buy-side brokerage, or a
 7 sell-side brokerage; or

8 “(B) the greater of—

9 “(i) the sum of the clearing prices of
 10 all digital advertisements bought or sold
 11 from or through a digital advertising ex-
 12 change;

13 “(ii) the total value of the gross ad-
 14 vertising spending managed by a buy-side
 15 brokerage; or

16 “(iii) the total value of the gross ad-
 17 vertising sales managed by a sell-side bro-
 18 kerage.

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

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

24 “(B) 30 days after the expiration of any
 25 applicable waiting period under section 7A.

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

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

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

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

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

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

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

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

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

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

1 “(A) neither owns nor is owned by that
2 person; and

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

5 “(b) PROHIBITIONS.—No person with more than
6 \$20,000,000,000 (as adjusted each year on January 1 by
7 an amount equal to the percentage increase, if any, in the
8 Consumer Price Index, as determined by the Department
9 of Labor or its successor) in digital advertising revenue
10 during the previous calendar year may, after the effective
11 date—

12 “(1) own a digital advertising exchange if that
13 person owns either a sell-side brokerage or a buy-
14 side brokerage, or is a seller of digital advertising
15 space;

16 “(2) own a sell-side brokerage if that person
17 owns a buy-side brokerage; or

18 “(3) own a buy-side brokerage or a sell-side
19 brokerage if that person is also a buyer or seller of
20 digital advertising space.

21 “(c) REQUIREMENTS.—Any person with more than
22 \$5,000,000,000 (as adjusted each year on January 1 by
23 an amount equal to the percentage increase, if any, in the
24 Consumer Price Index, as determined by the Department
25 of Labor or its successor) in digital advertising revenue

1 during the previous calendar year shall be subject to, as
2 of the effective date, the following requirements:

3 “(1) BEST INTEREST DUTY.—A buy-side bro-
4 kerage or sell-side brokerage shall, in the course of
5 providing services as a brokerage, use reasonable
6 diligence, care, and skill to act in the best interests
7 of their brokerage customers, and may not put their
8 own interests ahead of those of their brokerage cus-
9 tomers.

10 “(2) BEST EXECUTION DUTY.—A buy-side bro-
11 kerage or sell-side brokerage shall seek the most fa-
12 vorable terms reasonably available under the cir-
13 cumstances for each order transaction of the broker-
14 age customer.

15 “(3) TRANSPARENCY REQUIREMENTS.—

16 “(A) IN GENERAL.—Upon written request
17 from a brokerage customer, a buy-side broker-
18 age or sell-side brokerage shall supply to that
19 brokerage customer, within a reasonable time,
20 information sufficient to permit the brokerage
21 customer to verify compliance of the brokerage
22 with its obligations under paragraphs (1) and
23 (2).

24 “(B) CONTENTS.—The information de-
25 scribed in subparagraph (A) shall include, if re-

1 requested and to the extent such information is
 2 collected by the brokerage in the ordinary
 3 course of business—

4 “(i) in the case of a sell-side broker-
 5 age providing information to a sell-side
 6 brokerage customer—

7 “(I) a unique and persistent
 8 identifier that identifies each unique
 9 digital advertising space for sale;

10 “(II) for each identifier described
 11 in subclause (I), all bids received, and,
 12 for each bid received, the bid sub-
 13 mitted to the digital advertising ex-
 14 change on behalf of the buy-side bro-
 15 kerage customer, the winning price,
 16 the uniform resource locator or other
 17 property identifier at the lowest level
 18 of granularity, the identity of the dig-
 19 ital advertising exchange or other dig-
 20 ital advertising venue returning the
 21 bid, date, time that the bid response
 22 was received in microseconds or a
 23 lower level of granularity, web domain
 24 associated with the advertising cre-
 25 ative, the advertising creative size and

1 format, and whether the bid won the
2 seller's impression;

3 “(III) the nature of any data col-
4 lected or derived from the brokerage
5 customer or any user or customer of
6 the brokerage customer, and the ways
7 in which that data is used by the sell-
8 side brokerage;

9 “(IV) the order or bid routing
10 practices or processes, including any
11 material exceptions to the standard
12 practice of the brokerage; and

13 “(V) the source and nature of
14 any compensation paid or received in
15 connection with transactions; and

16 “(ii) in the case of a buy-side broker-
17 age providing information to a buy-side
18 brokerage customer—

19 “(I) all bids won by the buy-side
20 brokerage customer, and for each bid
21 won, the maximum allowed bid of the
22 advertiser, if any, the uniform re-
23 source locator or other property iden-
24 tifier at the lowest level of granu-
25 larity, date, the digital advertising ex-

change, the web domain associated with the advertising creative, the advertising creative size and format, the winning price, the bid submitted to the digital advertising exchange on behalf of the buy-side brokerage customer, and, if possible, whether the ad served and whether the ad rendered;

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

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

“(C) RETENTION OF RECORDS.—

Brokerages shall retain the records specified in subparagraph (B), where applicable and when collected in the ordinary course of business, until provided to a requesting brokerage customer but not longer than 90 days. Brokerages shall retain billing information for their brokerage customers for not fewer than 12 months.

“(D) USER PRIVACY.—

“(i) IN GENERAL.—When providing information to a brokerage customer in response to a request authorized by subpara-

graph (A), the brokerage shall, to the greatest extent possible consistent with the purpose of subparagraph (A), anonymize, hash, or otherwise render the information incapable of being tied to an individual web user.

“(ii) PROHIBITING TRACKING.—A brokerage customer may not use data or information received in response to a request made under subparagraph (A) for any purpose other than—

“(I) verifying compliance of a brokerage with its obligations under paragraphs (1) and (2); or

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

“(4) FIREWALLS.—

“(A) BUY-SIDE AND SELL-SIDE BROKERAGES.—Buy-side brokerages and sell-side brokerages shall establish, maintain, and enforce written policies and procedures reasonably designed to ensure compliance with the obligations under this subsection.

“(B) OTHER PERSONS.—Persons not subject to prohibitions under subsection (b) shall

1 establish, maintain, and enforce written policies
2 and procedures reasonably designed to ensure
3 that their buy-side brokerage, sell-side broker-
4 age, digital advertising exchange, and role as a
5 buyer or seller of digital advertising, where ap-
6 plicable, operate separate and independent from
7 one another and transact business at arm's
8 length.

9 “(5) FAIR ACCESS DUTY.—A digital advertising
10 exchange shall provide every buyer and seller in the
11 exchange fair access, including with respect to oper-
12 ations of the exchange, co-location, any technology
13 systems or data, information related to transactions,
14 service, or products offered, exchange processes, and
15 functionality.

16 “(6) TIME SYNCHRONIZATION.—A digital ad-
17 vertising exchange, buy-side brokerage, or sell-side
18 brokerage shall—

19 “(A) synchronize its business clocks at a
20 minimum to within a 2 milliseconds tolerance of
21 the time maintained by the atomic clock of the
22 National Institute of Standards and Tech-
23 nology; and

24 “(B) maintain the synchronization de-
25 scribed in subparagraph (A).

1 “(7) DATA OWNERSHIP.—All records pertaining
 2 to an order solicited or submitted by a brokerage
 3 customer, and the subsequent result of that order,
 4 shall remain the property of that customer, includ-
 5 ing any bids solicited from or submitted to any dig-
 6 ital advertising exchange, unless the information is
 7 otherwise publicly available.

8 “(8) ROUTING PRACTICES DISCLOSURE.—

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

11 “(i) make publicly available for each
 12 calendar quarter a report on the order
 13 routing practices of the sell-side brokerage
 14 or buy-side brokerage, as applicable, for
 15 digital advertisements during that quarter
 16 broken down by calendar month; and

17 “(ii) retain the report described in
 18 clause (i) posted on an internet website
 19 that is free and readily accessible to the
 20 public for 3-year period beginning on the
 21 date on which the report is posted.

22 “(B) FORMAT.—Reports made available
 23 pursuant to subparagraph (A) shall—

1 “(i) be rendered in a format that
 2 makes the reports readily informative to
 3 the average brokerage customer; and

4 “(ii) include for the 10 venues to
 5 which the largest number of total bid re-
 6 quests or bid responses were routed for
 7 execution and for any venue to which 5
 8 percent or more of bid requests or bid re-
 9 sponses were routed for execution—

10 “(I) the total number of bids
 11 routed;

12 “(II) the total number of bids ex-
 13 ecuted;

14 “(III) the fill rate of bids;

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

17 “(V) the average time in milli-
 18 seconds between when a bid request is
 19 sent and when a bid response is re-
 20 ceived; and

21 “(VI) the value and form of any
 22 compensation given in exchange for
 23 routing or execution.

24 “(9) CERTIFICATION.—A digital advertising ex-
 25 change, buy-side brokerage, or sell-side brokerage

1 shall certify to the Attorney General on an annual
 2 basis that the digital advertising exchange has com-
 3 plied with the requirements under this subsection.

4 “(d) ENFORCEMENT.—

5 “(1) ATTORNEY GENERAL AND STATE ATTOR-
 6 NEYS GENERAL.—

7 “(A) IN GENERAL.—The Attorney General
 8 and State attorneys general may bring an ac-
 9 tion on behalf of persons in the United States
 10 injured in their business or property by reason
 11 of any violation of this Act in any district court
 12 of the United States in the district in which the
 13 defendant resides or is found or has an agent,
 14 without respect to the amount in controversy,
 15 and shall—

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

19 “(ii) in a case brought by the Attor-
 20 ney General, recover damages sustained by
 21 such persons.

22 “(B) DAMAGES.—

23 “(i) IN GENERAL.—The court may
 24 award under this subsection, pursuant to a
 25 motion by the Attorney General promptly

1 made, simple interest on actual damages in
2 accordance with the requirements under
3 subparagraph (A).

4 “(ii) NO DUPLICATIVE AWARD.—A
5 court may not award any damages under
6 this subparagraph that are duplicative of
7 damages awarded before the date of the
8 award under this subparagraph in a sepa-
9 rate civil action pertaining to the same
10 conduct and injured party.

11 “(iii) PAYMENTS.—A court awarding
12 damages to a person in a civil action after
13 the date of an award of damages under
14 this subsection that would be duplicative of
15 damages awarded to the Attorney General
16 on behalf of the person shall direct that
17 such damages shall first be paid by the At-
18 torney General from amounts in the Fund
19 and, to the extent such damages are not
20 fully paid from amounts in the Fund, shall
21 be paid by the defendant.

22 “(C) ANTITRUST CONSUMER DAMAGES
23 FUND.—

24 “(i) IN GENERAL.—There is estab-
25 lished in the Treasury of the United States

1 a fund to be known as the ‘Antitrust Con-
2 sumer Damages Fund’ (in this subsection
3 referred to as the ‘Fund’), which shall con-
4 sist of amounts deposited under clause (ii).

5 “(ii) DEPOSITS AND AVAILABILITY.—
6 Notwithstanding section 3302 of title 31,
7 United States Code, any amounts received
8 by the Attorney General under an award
9 under this subsection—

10 “(I) shall be deposited in the
11 Fund; and

12 “(II) shall be available to the At-
13 torney General, without further ap-
14 propriation, for distribution to persons
15 in the United States harmed by the
16 applicable violation of the Sherman
17 Act (15 U.S.C. 1 et seq.).

18 “(iii) DEPOSITS INTO GENERAL
19 FUND.—Effective on the day after the date
20 that is 10 years after the date on which an
21 award is received under this paragraph,
22 the unobligated balances in the Fund of
23 amounts that were received under the
24 award are rescinded and shall be deposited
25 in the general fund of the Treasury.

1 “(2) DIVESTITURE ENFORCEMENT.—The Attor-
 2 ney General may bring an action on behalf of the
 3 United States 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, and may obtain injunc-
 6 tive relief upon showing by a preponderance of the
 7 evidence that the defendant has

8 “(A) violated a requirement of subsection
 9 (e); or

10 “(B) undertaken a required divestiture
 11 that unnecessarily harms or threatens competi-
 12 tion in any market.

13 “(3) PRIVATE RIGHT OF ACTION.—

14 “(A) IN GENERAL.—A brokerage customer
 15 harmed by a knowing violation of subsection (c)
 16 by a person with more than \$20,000,000,000
 17 (as adjusted each year on January 1 by an
 18 amount equal to the percentage increase, if any,
 19 in the Consumer Price Index, as determined by
 20 the Department of Labor or its successor) in
 21 digital advertising revenue during the previous
 22 calendar year may bring a civil action in an ap-
 23 propriate court to obtain injunctive relief, where
 24 appropriate, and recover damages in the
 25 amount of the greater of—

1 “(i) \$1,000,000 for each month in
2 which a violation of this Act occurred and
3 reasonable attorney’s fees; or

4 “(ii) actual damages and reasonable
5 attorney’s fees.

6 “(B) NO CLASS ACTION WAIVER.—No per-
7 son covered by this Act may require a class ac-
8 tion waiver for claims under this Act, including
9 for arbitration.

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

13 “(i) the expiration of any applicable
14 divestiture deadline; or

15 “(ii) the expiration of the deadline in
16 subsection (e)(1) if no filing has been
17 made.

18 “(e) DIVESTITURE.—

19 “(1) FILING.—Any agreement or other docu-
20 ment setting out the terms of a required divestiture
21 shall be filed with the Attorney General not later
22 than the later of—

23 “(A) the effective date; or

24 “(B) the earlier of—

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

4 “(ii) 180 days after meeting the cri-
5 teria specified in any paragraph of sub-
6 section (b).

7 “(2) ATTORNEY GENERAL REVIEW.—The At-
8 torney General shall approve a required divestiture
9 upon a showing by the person making the divestiture
10 that the terms of the divestiture, including the quali-
11 fications of any counter parties thereto, will not un-
12 necessarily harm or threaten competition in any
13 market.

14 “(3) TIMING.—

15 “(A) IN GENERAL.—The Attorney General
16 shall grant or deny approval of a required di-
17 vestiture, unless agreed to by the parties, no
18 later than the later of—

19 “(i) 60 days after receipt of all infor-
20 mation obtained pursuant to subparagraph
21 (5); or

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

1 “(B) COMPLETION.—A divestiture shall be
2 completed not later than the divestiture dead-
3 line.

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

5 “(A) not later than 120 days after the date
6 of enactment of this section, issue guidance on
7 the divestiture process under this subsection
8 and the certification requirement under sub-
9 section (c)(6); and

10 “(B) update the guidance described in sub-
11 paragraph (A) as the Attorney General deter-
12 mines is appropriate.

13 “(5) COMPULSORY PROCESS.—The Attorney
14 General may request or issue a civil investigative de-
15 mand under section 3 of the Antitrust Civil Process
16 Act (15 U.S.C. 1312) for documents from any per-
17 son involved in a required divestiture to determine
18 the competitive effects of the divestiture.

19 “(f) RULES OF CONSTRUCTION.—Nothing in this
20 section shall—

21 “(1) prohibit a person from—

22 “(A) selling their own inventory of adver-
23 tising space if—

24 “(i) the inventory was not acquired
25 solely for the purposes of resale, except to

1 monetize the person’s own content or intel-
2 lectual property; and

3 “(ii) the person does not also assist a
4 third-party in the sale or purchase of ad-
5 vertising space, other than purchasing ad-
6 vertising space from that person; or

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

9 “(2) abridge or supersede any provision of or
10 rules issued pursuant to section 7A;

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

15 “(4) require the disclosure of information if
16 such disclosure would violate a law of the United
17 States or a foreign country.”.

○