

118TH CONGRESS
2D SESSION

S. 3686

To prevent anticompetitive conduct through the use of pricing algorithms by prohibiting the use of pricing algorithms that can facilitate collusion through the use of nonpublic competitor data, creating an antitrust law enforcement audit tool, increasing transparency, and enforcing violations through the Sherman Act and Federal Trade Commission Act, and for other purposes.

IN THE SENATE OF THE UNITED STATES

JANUARY 30, 2024

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

A BILL

To prevent anticompetitive conduct through the use of pricing algorithms by prohibiting the use of pricing algorithms that can facilitate collusion through the use of nonpublic competitor data, creating an antitrust law enforcement audit tool, increasing transparency, and enforcing violations through the Sherman Act and Federal Trade Commission Act, 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,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Preventing Algorithmic
3 Collusion Act of 2024”.

4 **SEC. 2. DEFINITIONS.**

5 In this Act:

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

8 (A) has the meaning given that term in
9 subsection (a) of the first section of the Clayton
10 Act (15 U.S.C. 12); and

11 (B) includes section 5 of the Federal
12 Trade Commission Act (15 U.S.C. 45).

13 (2) **COMMERCIAL TERMS.**—The term “commer-
14 cial terms” means—

15 (A) level of service;

16 (B) availability;

17 (C) output, including quantities of prod-
18 ucts produced or distributed or the amount or
19 level of service provided; or

20 (D) rebates or discounts made available.

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

23 (4) **DISTRIBUTE; DISTRIBUTION; DISTRIB-**
24 **UTING.**—The terms “distribute”, “distribution”, and
25 “distributing” include selling, licensing, providing
26 access to, or otherwise making available by any

1 means, including through a subscription or the sale
2 of a service.

3 (5) NONPUBLIC COMPETITOR DATA.—The term
4 “nonpublic competitor data”—

5 (A) means nonpublic data that is derived
6 from or otherwise provided by another person
7 that competes in the same market as a person,
8 or a related market; and

9 (B) does not include information distrib-
10 uted, reported, or otherwise communicated in a
11 way that does not reveal any underlying data
12 from a competitor, such as narrative industry
13 reports, news reports, business commentaries,
14 or generalized industry survey results.

15 (6) NONPUBLIC DATA.—The term “nonpublic
16 data” means information that is not widely available
17 or easily accessible to the public, including informa-
18 tion about price, commercial terms, and related
19 products or services, regardless of whether the data
20 is attributable to a specific competitor or
21 anonymized.

22 (7) PERSON.—The term “person” has the
23 meaning given that term in subsection (a) of the
24 first section of the Clayton Act (15 U.S.C. 12).

1 (8) PRICE.—The term “price” means the
2 amount of money or other thing of value, whether
3 tangible or not, expected, required, or given in pay-
4 ment for any product or service, including com-
5 pensation paid to an employee or independent con-
6 tractor for services provided.

7 (9) PRICING ALGORITHM.—The term “pricing
8 algorithm” means any computational process, in-
9 cluding a computational process derived from ma-
10 chine learning or other artificial intelligence tech-
11 niques, that processes data to recommend or set a
12 price or commercial term that is in or affecting
13 interstate or foreign commerce.

14 **SEC. 3. COMPETITION LAW ENFORCEMENT AUDIT.**

15 (a) IN GENERAL.—A person using or distributing a
16 pricing algorithm, upon a written request by the Attorney
17 General or the Commission, shall, not later than 30 days
18 after the date of the written request, or any later date
19 approved by the Attorney General or the Commission, re-
20 spectively, provide to the Attorney General or the Commis-
21 sion, respectively, a written report on each pricing algo-
22 rithm identified in the request.

23 (b) REPORT CONTENTS.—Each report under sub-
24 section (a) shall include—

1 (1) information on whether the person is re-
2 sponsible for the development or distribution of the
3 pricing algorithm, or whether a third party is re-
4 sponsible for the development or distribution of the
5 pricing algorithm, including the identity and contact
6 information of any other person responsible for the
7 development or distribution of the pricing algorithm;

8 (2) information on whether the pricing algo-
9 rithm autonomously sets prices or commercial terms
10 and whether there is human review of any rec-
11 ommendation or decision of the pricing algorithm;

12 (3) an explanation of the rules or processes that
13 the pricing algorithm uses to set or recommend
14 prices or commercial terms;

15 (4) a description of all data the pricing algo-
16 rithm uses to set or recommend prices or commer-
17 cial terms, including data used to train the algo-
18 rithm;

19 (5) all sources and collection processes, includ-
20 ing the frequency of collection, of any data that the
21 pricing algorithm uses to set or recommend prices or
22 commercial terms;

23 (6) whether the pricing algorithm engages in
24 price discrimination by setting or recommending dif-
25 ferent prices or commercial terms for—

1 (A) different customers seeking identical or
2 nearly identical products or services, and if so,
3 the factors used in differentiating among such
4 customers; or

5 (B) different employees or independent
6 contractors providing substantially similar serv-
7 ices, and if so, the factors used in differen-
8 tiating among such employees or independent
9 contractors; and

10 (7) any changes made to the pricing algorithm
11 between the date of receipt of the request under sub-
12 section (a) and the date of certification under sub-
13 section (c).

14 (c) CERTIFICATION OF REPORT.—The Chief Execu-
15 tive Officer, Chief Economist, Chief Technology Officer,
16 or a corporate officer of similar authority of a person shall
17 certify, under penalty of perjury, the accuracy of a report
18 under subsection (a) submitted by the person.

19 (d) CONFIDENTIALITY.—All information submitted
20 in a report under subsection (a) shall be treated as con-
21 fidential and shall be considered to be privileged and con-
22 fidential trade secrets and commercial or financial infor-
23 mation exempt under subsection (b)(4) of section 552 of
24 title 5, United States Code, from being made available to
25 the public under subsection (a) of that section.

1 (e) INFORMATION SHARING.—

2 (1) IN GENERAL.—A report under subsection
3 (a) may be shared—

4 (A) between the Department of Justice
5 and the Commission; and

6 (B) with the National Institute of Stand-
7 ards and Technology for technical assistance in
8 understanding the report.

9 (2) LIMITATION.—The National Institute of
10 Standards and Technology shall not disclose the con-
11 tents of a report shared under paragraph (1) or the
12 analysis of the report by the National Institute of
13 Standards and Technology to any person, except the
14 Department of Justice or Commission, whichever
15 sought the technical assistance.

16 (f) RULES OF CONSTRUCTION.—Nothing in this sec-
17 tion shall—

18 (1) limit the ability of the Commission or the
19 Attorney General to issue a civil investigative de-
20 mand, to issue a subpoena, to seek discovery in the
21 course of litigation, or otherwise obtain information
22 through other means available to the Commission or
23 the Attorney General; or

24 (2) restrict the use of information submitted in
25 a report under subsection (a) in the course of a for-

1 mal investigation, enforcement action, litigation,
2 trial, or other proceeding, in accordance with the
3 confidentiality procedures applicable to such pro-
4 ceeding.

5 **SEC. 4. PREVENTING COLLUSIVE ACTIVITY IN PRICING AL-**
6 **GORITHMS.**

7 (a) IN GENERAL.—It shall be unlawful for a person
8 to use or distribute any pricing algorithm that uses, incor-
9 porates, or was trained with nonpublic competitor data.

10 (b) CIVIL ACTION.—If the Commission or the Attor-
11 ney General has reason to believe that a person has vio-
12 lated subsection (a), the Commission, in its own name by
13 any of its attorneys designated by it for such purpose, or
14 the Attorney General may bring a civil action against the
15 person in an appropriate district court of the United
16 States to seek to recover—

17 (1) a civil penalty of—

18 (A) not less than \$10,000, adjusted for in-
19flation on the basis of the Consumer Price
20 Index, for each day during which the violation
21 occurs or continues to occur; or

22 (B) the sum of the price of each product
23 or service sold using the pricing algorithm in
24 violation of subsection (a); and

1 (2) other appropriate relief, including an in-
2 junction or other equitable relief.

3 (c) EFFECTIVE DATE.—Subsection (a) shall take ef-
4 fect on the date that is 90 days after the date of enact-
5 ment of this Act.

6 **SEC. 5. ALGORITHMIC PRICE FIXING.**

7 (a) PRESUMPTION OF AGREEMENT.—With respect to
8 the use of a pricing algorithm that would violate section
9 4 of this Act, there shall be a presumption for purposes
10 of section 1 of the Sherman Act (15 U.S.C. 1) that the
11 defendant entered into an agreement, contract, combina-
12 tion, or conspiracy in restraint of trade and for purposes
13 of section 5(a) of the Federal Trade Commission Act (15
14 U.S.C. 45(a)) that the defendant has engaged in an unfair
15 method of competition if the plaintiff establishes that—

16 (1) the defendant distributed the pricing algo-
17 rithm to 2 or more persons—

18 (A) with the intent that the pricing algo-
19 rithm be used to set or recommend a price or
20 commercial term of a product or service in the
21 same market or a related market; or

22 (B) and 2 or more persons used the pric-
23 ing algorithm to set or recommend a price or
24 commercial term of a product or service in the
25 same market or a related market; or

1 (2)(A) the defendant used the pricing algorithm
2 to set or recommend a price or commercial term of
3 a product or service; and

4 (B) the pricing algorithm was used by another
5 person to set or recommend a price or commercial
6 term of a product or service in the same market or
7 a related market.

8 (b) REBUTTAL.—The presumption under subsection
9 (a) shall not apply to a defendant if the defendant did
10 not develop or distribute the pricing algorithm and the de-
11 fendant demonstrates by clear and convincing evidence
12 that the defendant did not have actual knowledge or could
13 not have reasonably known that the pricing algorithm used
14 nonpublic competitor data.

15 (c) JOINT AND SEVERAL LIABILITY.—In a civil case
16 in which the presumption under subsection (a) is applica-
17 ble, any persons that distributed the pricing algorithm and
18 knew, or could reasonably have known, that the pricing
19 algorithm would use, incorporate, or be trained with non-
20 public competitor data shall be jointly and severally liable
21 for any violation of section 1 of the Sherman Act (15
22 U.S.C. 1) or section 5(a) of the Federal Trade Commis-
23 sion Act (15 U.S.C. 45(a)).

1 (d) RELATION TO ANTITRUST LAWS.—Nothing in
2 this section shall impair or limit the applicability of the
3 antitrust laws.

4 (e) EFFECTIVE DATE.—Subsection (a) shall take ef-
5 fect on the date that is 90 days after the date of enact-
6 ment of this Act.

7 **SEC. 6. TRANSPARENCY IN PRICING ALGORITHMS.**

8 (a) IN GENERAL.—Any person that has \$5,000,000
9 or more in annual revenue that uses a pricing algorithm
10 to recommend or set a price or commercial term shall
11 clearly disclose, as applicable—

12 (1) to a customer, before the customer pur-
13 chases the relevant product or service, that the price
14 or a commercial term, as applicable, is set or rec-
15 ommended by a pricing algorithm; and

16 (2) to a current or prospective employee or
17 independent contractor that the price or a commer-
18 cial term for services rendered as an employee or
19 independent contractor is set or recommended by a
20 pricing algorithm.

21 (b) ADDITIONAL DISCLOSURES.—

22 (1) PRICE DISCRIMINATION.—If applicable, a
23 disclosure under subsection (a) shall state that the
24 pricing algorithm sets or recommends different
25 prices or commercial terms for—

1 (A) different customers seeking identical or
2 nearly identical products or services; or

3 (B) employees or independent contractors
4 providing substantially similar services.

5 (2) THIRD-PARTY ALGORITHM.—If applicable, a
6 disclosure under subsection (a) shall—

7 (A) state that the pricing algorithm was
8 developed or distributed by a person other than
9 the person making the disclosure; and

10 (B) provide the identity of the person that
11 developed or distributed the pricing algorithm.

12 (c) ENFORCEMENT.—Failure to provide a disclosure
13 under subsection (a), including the information required
14 under subsection (b), shall constitute an unfair or decep-
15 tive act or practice under section 5 of the Federal Trade
16 Commission Act (15 U.S.C. 45).

17 (d) CIVIL ACTION.—If the Commission has reason to
18 believe that a person has violated subsection (a) or (b),
19 the Commission, in its own name by any of its attorneys
20 designated by it for such purpose, may bring a civil action
21 in an appropriate district court of the United States to
22 recover—

23 (1) a civil penalty of not less than \$5,000, ad-
24 justed for inflation on the basis of the Consumer

1 Price Index, for each day during which the violation
2 occurs or continues to occur; and

3 (2) other appropriate relief, including an in-
4 junction or other equitable relief.

5 (e) RELATION TO ANTITRUST LAWS.—Nothing in
6 this section shall impair or limit the applicability of the
7 antitrust laws.

8 **SEC. 7. FTC STUDY.**

9 Not later than 2 years after the date of enactment
10 of this Act, the Commission shall publish the results of
11 a study of the use of pricing algorithms, including infor-
12 mation on—

13 (1) the prevalence of pricing algorithms;

14 (2) the frequency of the use of pricing algo-
15 rithms to engage in price or wage discrimination;

16 (3) the potential for persons to use pricing algo-
17 rithms to engage in behavior that increases prices,
18 lowers wages, reduces output, lowers quality, deters
19 innovation, or otherwise harms the competitive proc-
20 ess outside of the price fixing context;

21 (4) the potential benefits or efficiencies of pric-
22 ing algorithms;

23 (5) any industries, sectors, or markets in which
24 pricing algorithms may warrant additional oversight

1 or regulation to protect competition and consumers;
2 and
3 (6) recommendations for additional legislation,
4 regulation, or rulemaking relating to competition
5 and consumer protection issues arising from the use
6 of pricing algorithms.

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