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H. R. 5111

[Report No. 114-]

To prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

APRIL 28, 2016

Mr. LANCE (for himself, Mr. KENNEDY, Mr. ISSA, Mr. SWALWELL of California, Mr. BURGESS, Mr. HARPER, Mr. POMPEO, Mr. MULLIN, and Mr. OLSON) introduced the following bill; which was referred to the Committee on Energy and Commerce

SEPTEMBER --, 2016

Reported with an amendment, committed to the Committee of the Whole House on the State of the Union, and ordered to be printed

[Strike out all after the enacting clause and insert the part printed in italic]

[For text of introduced bill, see copy of bill as introduced on April 28, 2016]

A BILL

To prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, 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 “Consumer Review Fair-*
5 *ness Act of 2016”.*

6 **SEC. 2. CONSUMER REVIEW PROTECTION.**

7 (a) *DEFINITIONS.—In this section:*

8 (1) *COMMISSION.—The term “Commission”*
9 *means the Federal Trade Commission.*

10 (2) *COVERED COMMUNICATION.—The term “cov-*
11 *ered communication” means a written, oral, or pic-*
12 *torial review, performance assessment of, or other*
13 *similar analysis of, including by electronic means, the*
14 *goods, services, or conduct of a person by an indi-*
15 *vidual who is party to a form contract with respect*
16 *to which such person is also a party.*

17 (3) *FORM CONTRACT.—*

18 (A) *IN GENERAL.—Except as provided in*
19 *subparagraph (B), the term “form contract”*
20 *means a contract with standardized terms—*

21 (i) *used by a person in the course of*
22 *selling or leasing the person’s goods or serv-*
23 *ices; and*

1 (ii) imposed on an individual without
2 a meaningful opportunity for such indi-
3 vidual to negotiate the standardized terms.

4 (B) *EXCEPTION.*—The term “form contract”
5 does not include an employer-employee or inde-
6 pendent contractor contract.

7 (4) *PICTORIAL.*—The term “pictorial” includes
8 pictures, photographs, video, illustrations, and sym-
9 bols.

10 (b) *INVALIDITY OF CONTRACTS THAT IMPEDE CON-*
11 *SUMER REVIEWS.*—

12 (1) *IN GENERAL.*—Except as provided in para-
13 graphs (2) and (3), a provision of a form contract is
14 void from the inception of such contract if such provi-
15 sion—

16 (A) prohibits or restricts the ability of an
17 individual who is a party to the form contract
18 to engage in a covered communication;

19 (B) imposes a penalty or fee against an in-
20 dividual who is a party to the form contract for
21 engaging in a covered communication; or

22 (C) transfers or requires an individual who
23 is a party to the form contract to transfer to any
24 person any intellectual property rights in review
25 or feedback content, with the exception of a non-

1 *exclusive license to use the content, that the indi-*
2 *vidual may have in any otherwise lawful covered*
3 *communication about such person or the goods or*
4 *services provided by such person.*

5 (2) *RULE OF CONSTRUCTION.*—*Nothing in para-*
6 *graph (1) shall be construed to affect—*

7 (A) *any duty of confidentiality imposed by*
8 *law (including agency guidance);*

9 (B) *any civil cause of action for defama-*
10 *tion, libel, or slander, or any similar cause of ac-*
11 *tion;*

12 (C) *any party's right to remove or refuse to*
13 *display publicly on an Internet website or*
14 *webpage owned, operated, or otherwise controlled*
15 *by such party any content of a covered commu-*
16 *nication that—*

17 (i) *contains the personal information*
18 *or likeness of another person, or is libelous,*
19 *harassing, abusive, obscene, vulgar, sexually*
20 *explicit, or is inappropriate with respect to*
21 *race, gender, sexuality, ethnicity, or other*
22 *intrinsic characteristic;*

23 (ii) *is unrelated to the goods or services*
24 *offered by or available at such party's Inter-*
25 *net website or webpage; or*

1 (iii) is clearly false or misleading; or

2 (D) a party's right to establish terms and
3 conditions with respect to the creation of photo-
4 graphs or video of such party's property when
5 those photographs or video are created by an em-
6 ployee or independent contractor of a commercial
7 entity and solely intended for commercial pur-
8 poses by that entity.

9 (3) *EXCEPTIONS.*—Paragraph (1) shall not
10 apply to the extent that a provision of a form con-
11 tract prohibits disclosure or submission of, or reserves
12 the right of a person or business that hosts online con-
13 sumer reviews or comments to remove—

14 (A) trade secrets or commercial or financial
15 information obtained from a person and consid-
16 ered privileged or confidential;

17 (B) personnel and medical files and similar
18 information the disclosure of which would con-
19 stitute a clearly unwarranted invasion of per-
20 sonal privacy;

21 (C) records or information compiled for law
22 enforcement purposes, the disclosure of which
23 would constitute a clearly unwarranted invasion
24 of personal privacy;

1 (D) content that is unlawful or otherwise
2 meets the requirements of paragraph (2)(C); or

3 (E) content that contains any computer vi-
4 ruses, worms, or other potentially damaging
5 computer code, processes, programs, applications,
6 or files.

7 (c) *PROHIBITION.*—It shall be unlawful for a person
8 to offer a form contract containing a provision described
9 as void in subsection (b).

10 (d) *ENFORCEMENT BY COMMISSION.*—

11 (1) *UNFAIR OR DECEPTIVE ACTS OR PRAC-*
12 *TICES.*—A violation of subsection (c) by a person with
13 respect to which the Commission is empowered under
14 section 5(a)(2) of the Federal Trade Commission Act
15 (15 U.S.C. 45(a)(2)) shall be treated as a violation of
16 a rule defining an unfair or deceptive act or practice
17 prescribed under section 18(a)(1)(B) of the Federal
18 Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

19 (2) *POWERS OF COMMISSION.*—

20 (A) *IN GENERAL.*—The Commission shall
21 enforce this section in the same manner, by the
22 same means, and with the same jurisdiction,
23 powers, and duties as though all applicable
24 terms and provisions of the Federal Trade Com-

1 *mission Act (15 U.S.C. 41 et seq.) were incor-*
2 *porated into and made a part of this Act.*

3 (B) *PRIVILEGES AND IMMUNITIES.*—*Any*
4 *person who violates this section shall be subject*
5 *to the penalties and entitled to the privileges and*
6 *immunities provided in the Federal Trade Com-*
7 *mission Act (15 U.S.C. 41 et seq.).*

8 (e) *ENFORCEMENT BY STATES.*—

9 (1) *AUTHORIZATION.*—*Subject to paragraph (2),*
10 *in any case in which the attorney general of a State*
11 *has reason to believe that an interest of the residents*
12 *of the State has been or is threatened or adversely af-*
13 *ected by the engagement of any person subject to sub-*
14 *section (c) in a practice that violates such subsection,*
15 *the attorney general of the State may, as parens*
16 *patriae, bring a civil action on behalf of the residents*
17 *of the State in an appropriate district court of the*
18 *United States to obtain appropriate relief.*

19 (2) *RIGHTS OF FEDERAL TRADE COMMISSION.*—

20 (A) *NOTICE TO FEDERAL TRADE COMMIS-*
21 *SION.*—

22 (i) *IN GENERAL.*—*Except as provided*
23 *in clause (iii), the attorney general of a*
24 *State shall notify the Commission in writ-*
25 *ing that the attorney general intends to*

1 bring a civil action under paragraph (1)
2 before initiating the civil action against a
3 person described in subsection (d)(1).

4 (ii) *CONTENTS.*—The notification re-
5 quired by clause (i) with respect to a civil
6 action shall include a copy of the complaint
7 to be filed to initiate the civil action.

8 (iii) *EXCEPTION.*—If it is not feasible
9 for the attorney general of a State to pro-
10 vide the notification required by clause (i)
11 before initiating a civil action under para-
12 graph (1), the attorney general shall notify
13 the Commission immediately upon insti-
14 tuting the civil action.

15 (B) *INTERVENTION BY FEDERAL TRADE*
16 *COMMISSION.*—The Commission may—

17 (i) *intervene in any civil action*
18 *brought by the attorney general of a State*
19 *under paragraph (1) against a person de-*
20 *scribed in subsection (d)(1); and*

21 (ii) *upon intervening—*

22 (I) *be heard on all matters arising*
23 *in the civil action; and*

24 (II) *file petitions for appeal of a*
25 *decision in the civil action.*

1 (3) *INVESTIGATORY POWERS.*—*Nothing in this*
2 *subsection may be construed to prevent the attorney*
3 *general of a State from exercising the powers con-*
4 *ferred on the attorney general by the laws of the State*
5 *to conduct investigations, to administer oaths or affir-*
6 *mations, or to compel the attendance of witnesses or*
7 *the production of documentary or other evidence.*

8 (4) *PREEMPTIVE ACTION BY FEDERAL TRADE*
9 *COMMISSION.*—*If the Federal Trade Commission in-*
10 *stitutes a civil action or an administrative action*
11 *with respect to a violation of subsection (c), the attor-*
12 *ney general of a State may not, during the pendency*
13 *of such action, bring a civil action under paragraph*
14 *(1) against any defendant named in the complaint of*
15 *the Commission for the violation with respect to*
16 *which the Commission instituted such action.*

17 (5) *VENUE; SERVICE OF PROCESS.*—

18 (A) *VENUE.*—*Any action brought under*
19 *paragraph (1) may be brought in—*

20 (i) *the district court of the United*
21 *States that meets applicable requirements*
22 *relating to venue under section 1391 of title*
23 *28, United States Code; or*

24 (ii) *another court of competent juris-*
25 *isdiction.*

1 (B) *SERVICE OF PROCESS.*—*In an action*
2 *brought under paragraph (1), process may be*
3 *served in any district in which the defendant—*

4 *(i) is an inhabitant; or*

5 *(ii) may be found.*

6 (6) *ACTIONS BY OTHER STATE OFFICIALS.*—

7 (A) *IN GENERAL.*—*In addition to civil ac-*
8 *tions brought by attorneys general under para-*
9 *graph (1), any other consumer protection officer*
10 *of a State who is authorized by the State to do*
11 *so may bring a civil action under paragraph*
12 *(1), subject to the same requirements and limita-*
13 *tions that apply under this subsection to civil*
14 *actions brought by attorneys general.*

15 (B) *SAVINGS PROVISION.*—*Nothing in this*
16 *subsection may be construed to prohibit an au-*
17 *thorized official of a State from initiating or*
18 *continuing any proceeding in a court of the*
19 *State for a violation of any civil or criminal law*
20 *of the State.*

21 (f) *EDUCATION AND OUTREACH FOR BUSINESSES.*—

22 *Not later than 60 days after the date of the enactment of*
23 *this Act, the Commission shall commence conducting edu-*
24 *cation and outreach that provides businesses with non-bind-*
25 *ing best practices for compliance with this Act.*

1 (g) *RELATION TO STATE CAUSES OF ACTION.*—*Noth-*
2 *ing in this section shall be construed to affect any cause*
3 *of action brought by a person that exists or may exist under*
4 *State law.*

5 (h) *SAVINGS PROVISION.*—*Nothing in this section shall*
6 *be construed to limit, impair, or supersede the operation*
7 *of the Federal Trade Commission Act or any other provi-*
8 *sion of Federal law.*

9 (i) *EFFECTIVE DATES.*—*This section shall take effect*
10 *on the date of the enactment of this Act, except that—*

11 (1) *subsections (b) and (c) shall apply with re-*
12 *spect to contracts in effect on or after the date that*
13 *is 90 days after the date of the enactment of this Act;*
14 *and*

15 (2) *subsections (d) and (e) shall apply with re-*
16 *spect to contracts in effect on or after the date that*
17 *is 1 year after the date of the enactment of this Act.*