

**AMENDMENT TO THE AMENDMENT TO THE
NATURE OF A SUBSTITUTE FOR H.R. 2668
OFFERED BY M . _____**

At the end add the following new section:

1 **SEC. 3. UNLAWFUL ACT OR PRACTICE.**

2 Section 5(n) of the Federal Trade Commission Act
3 (15 U.S.C. 45(n)) is amended to read as follows:

4 “(n) UNLAWFUL ACT OR PRACTICE.—

5 “(1) SUBSTANTIAL INJURY REQUIRED.—

6 “(A) IN GENERAL.—The Commission shall
7 have no authority under this section or section
8 18 to declare unlawful an act or practice on the
9 grounds that such act or practice is unfair un-
10 less the act or practice causes or is likely to
11 cause substantial injury to consumers which is
12 not reasonably avoidable by consumers them-
13 selves and not outweighed by countervailing
14 benefits to consumers or to competition.

15 “(B) SUBSTANTIAL INJURY TO CON-
16 SUMERS.—For purposes of this subsection, an
17 act or practice does not cause and is not likely
18 to cause substantial injury to consumers if the
19 injury or harm resulting from such act or prac-

1 tice is trivial or merely speculative. An injury
2 may be sufficiently substantial if the injury
3 does a small harm to a large number of people.
4 An act or practice may be likely to cause a sub-
5 stantial injury if the act or practice raises a sig-
6 nificant risk of concrete harm.

7 “(C) CONSIDERATIONS REQUIRED.—In de-
8 termining whether an act or practice causes or
9 is likely to cause substantial injury to con-
10 sumers under this subsection, the Commission
11 shall consider the following:

12 “(i) Whether the act or practice re-
13 sults in monetary harm.

14 “(ii) Whether the act or practice re-
15 sults in unwarranted health or safety risk.

16 “(iii) Whether the act or practice re-
17 sults only in emotional or other more sub-
18 jective harm.

19 “(2) NET EFFECTS OF INJURY REQUIRED.—

20 “(A) CONSIDERATIONS REQUIRED.—An
21 act or practice is not unfair unless the act or
22 practice is injurious in its net effects. In deter-
23 mining whether an act or practice is injurious
24 in its net effects, the Commission shall consider
25 the following:

1 “(i) The various costs for a remedy,
2 including the costs to the parties directly
3 before the Commission.

4 “(ii) The burdens on society in gen-
5 eral in the form of increased paperwork,
6 increased regulatory burdens on the flow of
7 information, reduced incentives to innova-
8 tion and capital formation, and other simi-
9 lar matters.

10 “(B) CONSUMER DECISIONS.—The Com-
11 mission may not second-guess the wisdom of
12 particular consumer decisions, but may consider
13 whether the act or practice unreasonably cre-
14 ates or takes advantage of an obstacle to the
15 free exercise of consumer decisionmaking.

16 “(3) PUBLIC POLICY CONSIDERATIONS.—In de-
17 termining whether an act or practice is unfair, the
18 Commission may consider established public policies
19 as evidence to be considered with all other evidence.
20 Such public policy considerations may not serve as
21 a primary basis for such determination.

22 “(4) ECONOMIC ANALYSIS.—In determining
23 whether an act or practice is unfair, the Commission
24 shall consider an economic analysis from the Bureau

1 of Economics of the Commission with respect to the
2 act or practice.”.

