

114TH CONGRESS
2D SESSION

H. R. 5111

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

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
5 Fairness Act of 2016”.

1 **SEC. 2. CONSUMER REVIEW PROTECTION.**

2 (a) DEFINITIONS.—In this section:

3 (1) COMMISSION.—The term “Commission”
4 means the Federal Trade Commission.

5 (2) COVERED COMMUNICATION.—The term
6 “covered communication” means a written, oral, or
7 pictorial review, performance assessment of, or other
8 similar analysis of, including by electronic means,
9 the goods, services, or conduct of a person by an in-
10 dividual who is party to a form contract with respect
11 to which such person is also a party.

12 (3) FORM CONTRACT.—

13 (A) IN GENERAL.—Except as provided in
14 subparagraph (B), the term “form contract”
15 means a contract with standardized terms—

16 (i) used by a person in the course of
17 selling or leasing the person’s goods or
18 services; and

19 (ii) imposed on an individual without
20 a meaningful opportunity for such indi-
21 vidual to negotiate the standardized terms.

22 (B) EXCEPTION.—The term “form con-
23 tract” does not include an employer-employee
24 or independent contractor contract.

1 (4) PICTORIAL.—The term “pictorial” includes
2 pictures, photographs, video, illustrations, and sym-
3 bols.

4 (b) INVALIDITY OF CONTRACTS THAT IMPEDE CON-
5 SUMER REVIEWS.—

6 (1) IN GENERAL.—Except as provided in para-
7 graphs (2) and (3), a provision of a form contract
8 is void from the inception of such contract if such
9 provision—

10 (A) prohibits or restricts the ability of an
11 individual who is a party to the form contract
12 to engage in a covered communication;

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

16 (C) transfers or requires an individual who
17 is a party to the form contract to transfer to
18 any person any intellectual property rights in
19 review or feedback content, with the exception
20 of a non-exclusive license to use the content,
21 that the individual may have in any otherwise
22 lawful covered communication about such per-
23 son or the goods or services provided by such
24 person.

1 (2) RULE OF CONSTRUCTION.—Nothing in
2 paragraph (1) shall be construed to affect—

3 (A) any duty of confidentiality imposed by
4 law (including agency guidance);

5 (B) any civil cause of action for defama-
6 tion, libel, or slander, or any similar cause of
7 action;

8 (C) any party's right to remove or refuse
9 to display publicly on an Internet website or
10 webpage owned, operated, or otherwise con-
11 trolled by such party any content of a covered
12 communication that—

13 (i) contains the personal information
14 or likeness of another person or is libelous,
15 harassing, abusive, obscene, vulgar, sexu-
16 ally explicit, or inappropriate with respect
17 to race, gender, sexuality, ethnicity, or
18 other intrinsic characteristic;

19 (ii) is unrelated to the goods or serv-
20 ices offered by or available at such party's
21 Internet website or webpage; or

22 (iii) is clearly false or misleading; or

23 (D) a party's right to establish terms and
24 conditions with respect to the creation of photo-
25 graphs or video of such party's property when

1 those photographs or video are created by an
2 employee or independent contractor of a com-
3 mercial entity and solely intended for commer-
4 cial purposes by that entity.

5 (3) EXCEPTIONS.—Paragraph (1) shall not
6 apply to the extent that a provision of a form con-
7 tract prohibits disclosure or submission of, or re-
8 serves the right of a person or business that hosts
9 online consumer reviews or comments to remove—

10 (A) trade secrets or commercial or finan-
11 cial information obtained from a person and
12 considered privileged or confidential;

13 (B) personnel and medical files and similar
14 information the disclosure of which would con-
15 stitute a clearly unwarranted invasion of per-
16 sonal privacy;

17 (C) records or information compiled for
18 law enforcement purposes, the disclosure of
19 which would constitute a clearly unwarranted
20 invasion of personal privacy;

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

23 (E) content that contains any computer vi-
24 ruses, worms, or other potentially damaging

1 computer code, processes, programs, applica-
2 tions, or files.

3 (c) PROHIBITION.—It shall be unlawful for a person
4 to offer a form contract containing a provision described
5 as void in subsection (b).

6 (d) ENFORCEMENT BY COMMISSION.—

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

16 (2) POWERS OF COMMISSION.—

17 (A) IN GENERAL.—The Commission shall
18 enforce this section in the same manner, by the
19 same means, and with the same jurisdiction,
20 powers, and duties as though all applicable
21 terms and provisions of the Federal Trade
22 Commission Act (15 U.S.C. 41 et seq.) were in-
23 corporated into and made a part of this Act.

24 (B) PRIVILEGES AND IMMUNITIES.—Any
25 person who violates this section shall be subject

1 to the penalties and entitled to the privileges
2 and immunities provided in the Federal Trade
3 Commission Act (15 U.S.C. 41 et seq.).

4 (e) ENFORCEMENT BY STATES.—

5 (1) AUTHORIZATION.—Subject to subparagraph
6 (B), in any case in which the attorney general of a
7 State has reason to believe that an interest of the
8 residents of the State has been or is threatened or
9 adversely affected by the engagement of any person
10 subject to subsection (c) in a practice that violates
11 such subsection, the attorney general of the State
12 may, as *parens patriae*, bring a civil action on behalf
13 of the residents of the State in an appropriate dis-
14 trict court of the United States to obtain appro-
15 priate relief.

16 (2) RIGHTS OF FEDERAL TRADE COMMIS-
17 SION.—

18 (A) NOTICE TO FEDERAL TRADE COMMIS-
19 SION.—

20 (i) IN GENERAL.—Except as provided
21 in clause (iii), the attorney general of a
22 State shall notify the Commission in writ-
23 ing that the attorney general intends to
24 bring a civil action under paragraph (1)

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

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

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

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

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

20 (ii) upon intervening—

21 (I) be heard on all matters aris-
22 ing in the civil action; and

23 (II) file petitions for appeal of a
24 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
5 State to conduct investigations, to administer oaths
6 or affirmations, or to compel the attendance of wit-
7 nesses or the production of documentary or other
8 evidence.

9 (4) PREEMPTIVE ACTION BY FEDERAL TRADE
10 COMMISSION.—If the Federal Trade Commission in-
11 stitutes a civil action or an administrative action
12 with respect to a violation of subsection (c), the at-
13 torney general of a State may not, during the pend-
14 ency of such action, bring a civil action under para-
15 graph (1) against any defendant named in the com-
16 plaint of the Commission for the violation with re-
17 spect to which the Commission instituted such ac-
18 tion.

19 (5) VENUE; SERVICE OF PROCESS.—

20 (A) VENUE.—Any action brought under
21 paragraph (1) may be brought in—

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

1 (ii) another court of competent juris-
2 diction.

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

6 (i) is an inhabitant; or

7 (ii) may be found.

8 (6) ACTIONS BY OTHER STATE OFFICIALS.—

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

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

23 (f) EDUCATION AND OUTREACH FOR BUSINESSES.—
24 Not later than 60 days after the date of the enactment
25 of this Act, the Commission shall commence conducting

1 education and outreach that provides businesses with non-
2 binding best practices for compliance with this Act.

3 (g) RELATION TO STATE CAUSES OF ACTION.—

4 Nothing in this section shall be construed to affect any
5 cause of action brought by a person that exists or may
6 exist under State law.

7 (h) EFFECTIVE DATES.—This section shall take ef-
8 fect on the date of the enactment of this Act, except
9 that—

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

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

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