



POLICY & ACTION FROM CONSUMER REPORTS

May 23, 2016

The Honorable Michael C. Burgess, M.D., Chairman
The Honorable Jan Schakowsky, Ranking Member
U.S. House Committee on Energy and Commerce
Subcommittee on Commerce, Manufacturing, and Trade
2125 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Burgess and Ranking Member Schakowsky:

Consumers Union, the policy arm of Consumer Reports, writes regarding legislation the Subcommittee is considering that would alter the processes used by the Federal Trade Commission (FTC) to carry out its work. We are very concerned that several of the bills may harm the FTC's ability to crack down on scam artists and protect consumers from unfair, misleading, or anticompetitive business practices.

Congress has long empowered and directed the FTC under the FTC Act to “prevent ... unfair methods of competition ... and unfair or deceptive acts or practices in or affecting commerce.”¹ For over a century, the agency has used this authority to stand up for the interests of consumers when threatened by unlawful behavior, such as predatory sales tactics, false advertising, price fixing, or abusive communications. The Commission—operating on a bipartisan basis and often via consensus—investigates consumer complaints and takes legal action as appropriate to stop illegal practices and deter others from engaging in them.

As a result of these actions, consumers enjoy a far fairer, far more reasonable and dependable marketplace than otherwise would exist. Moreover, businesses operating fairly and honestly are rewarded with a more level playing field, where bad actors do not as readily profit off of their illegal activity. All members of Congress should recognize these benefits, and seek to preserve or enhance the statutory authorities that have enabled them.²

However, several of the bills currently before the Subcommittee appear to inhibit, rather than improve, the FTC's ability to take action on behalf of consumers. Our concerns include the following:

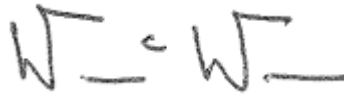
- 1. H.R. 5093, the TIME Act:** By capping the length of an FTC consent decree at eight years, and requiring the FTC to justify continuing non-fraud decrees for more than five years, this bill would undermine the FTC's ability to prevent repeat offenses. The FTC can in most cases only fine a company (and thus penalize a repeat offense) for violating an order, not simply for re-committing the offense itself.

2. **H.R. 5097, the STALL Act:** By requiring the termination of any investigation after six months, unless the FTC sends the target of the investigation a written communication or votes to keep the investigation open, this bill could result in critical investigations ending arbitrarily or their confidentiality being compromised. The FTC should have the flexibility to prioritize its time working on investigations in a manner consistent with the public interest, and to take the time necessary to determine how best to protect consumers. We are also concerned that, even absent the need to keep an investigation confidential, a simple mix-up, such as a company misinterpreting a letter or simply a communication getting lost, could result in an arbitrary cut-off of an investigation.
3. **H.R. 5109, the CLEAR Act:** By requiring the FTC to submit a report to Congress describing in some detail the investigations it decides to close without taking enforcement action, this bill could make it possible to deduce which company had been the target of a closed investigation, even without the company name being disclosed. The confidentiality of closed investigations is a long-established law enforcement practice that protects companies from being tarred as presumed law-breakers due merely to the fact of being investigated. This practice also gives the FTC the leeway it needs to conduct appropriate investigations of serious complaints without having to worry that doing so could lead to undeserved damage to a company's reputation. The result of this bill would likely be more company reputations damaged even though no wrongdoing was found, but also fewer investigations conducted than should be, and more unscrupulous practices in the marketplace that are not halted by the agency.
4. **H.R. 5115, the SURE Act:** By casting in statutory concrete portions of the FTC's 35-year-old Policy Statement on Unfairness, but leaving out key context and references, this bill would constrain and rigidify the agency's authority to find that an act or practice is unfair. We are particularly concerned it would undermine the agency's authority to find that an act or practice is unfair even in the absence of physical effects, such as the impact of harassing late-night telephone calls.
5. **H.R. 5118, the SHIELD Act:** By allowing "[c]ompliance with any guidelines, general statement of policy, or similar guidance issued by the Commission" to be used as evidence of compliance with the law—rather than merely as evidence of a good-faith effort to comply with the law—this bill could thoroughly undermine the Commission's enforcement of the FTC Act. A company that is the target of an enforcement action or subject to a consent order could hunt for and cite a wide variety of general statements by the agency to evade liability for violating the law. Under these circumstances, the FTC might have to rescind the guidance it has given to businesses and consumers, and stop giving new guidance, in order to preserve its enforcement capabilities.
6. **H.R. 5136, the RECS Act:** By prohibiting the FTC from making any recommendations for legislative or regulatory action without a detailed economic analysis justifying them, this bill would significantly reduce the important role the FTC has played in providing expert opinions and advice to a wide range of policymakers. The FTC already involves its team of economists in planning action it takes. Requiring this unnecessary additional

layer of highly time-consuming and resource-intensive analytical explanation would sharply constrain the FTC's ability to share its expertise with federal, state, or local government entities; with foreign agencies; or even with Congress.

As the Subcommittee meets to examine these bills, we ask you to carefully consider the concerns we have raised. The FTC's work to promote competition and protect consumers from unfair or deceptive acts or practices is critical to the fair functioning of the marketplace. We urge you not to advance legislation that would undermine these efforts.

Sincerely,

A handwritten signature in black ink, appearing to read 'W. C. Wallace', with a stylized flourish at the end.

William C. Wallace
Policy Analyst
Consumers Union

cc: The Honorable Fred Upton, Chairman
Committee on Energy and Commerce

The Honorable Frank Pallone, Jr., Ranking Member
Committee on Energy and Commerce

Members of the Subcommittee on Commerce, Manufacturing, and Trade

¹ 15 U.S.C. § 45.

² In this regard, we are pleased that the Subcommittee is considering legislation that would clarify the FTC's jurisdiction over common carriers and non-profit organizations.