



June 6, 2016

TO: Members, Subcommittee on Commerce, Manufacturing, and Trade

FROM: Committee Majority Staff

RE: Subcommittee Markup of Four Bills

The Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup on June 8 and 9, 2016, in 2123 Rayburn House Office Building.

On Wednesday, June 8, 2016, at 5:00 p.m., the Subcommittee will convene for opening statements only. The Subcommittee will reconvene on Thursday, June 9, 2016, at 10:00 a.m. to consider the following:

- H.R. ____, FTC Process and Transparency Reform Act of 2016;
- H.R. 5111, Consumer Review Fairness Act;
- H.R. 5092, Reinforcing American Made Products Act; and
- H.R. 5104, Better Online Ticket Sales (BOTS) Act.

In keeping with Chairman Upton's announced policy, Members must submit any amendments they may have two hours before they are offered during this markup. Members may submit amendments by email to Peter.Kielty@mail.house.gov. Any information with respect to the amendment's parliamentary standard (e.g., its germaneness) should be submitted at this time as well.

I. BACKGROUND

A. Process Reform and Transparency Legislation

The "Disrupter Series" of hearings held by this Subcommittee examined a number of novel technologies and business models, including unmanned aircraft systems (UAS),¹ sharing platforms,² mobile payments,³ and the Internet of Things.⁴ As the hearings highlighted, these innovations pose novel policy questions related to consumer protection, but have also brought novel benefits to consumers that are still being accounted for and understood. For example,

¹ <https://energycommerce.house.gov/hearings-and-votes/hearings/disrupter-series-fast-evolving-uses-and-economic-impacts-drones>

² <https://energycommerce.house.gov/hearings-and-votes/hearings/disrupter-series-how-sharing-economy-creates-jobs-benefits-consumers-and>

³ <https://energycommerce.house.gov/hearings-and-votes/hearings/disrupter-series-mobile-payments>

⁴ <https://energycommerce.house.gov/hearings-and-votes/hearings/internet-things-exploring-next-technology-frontier>

although UAS are already helping improve worker safety and reduce costs,⁵ the technologies continue to evolve and shape future uses. In turn, novel safety issues and consumer protection problems must be addressed.⁶

The Federal Trade Commission's (FTC or Commission) consumer protection mandate to enjoin "unfair or deceptive acts or practices in or affecting commerce"⁷ is a flexible framework that has allowed these technologies to progress without prior regulatory permission. However, the FTC settles most of its consumer protection cases,⁸ especially in areas involving newer technologies such as data security.⁹ Settling a high percentage of cases avoids costly litigation, but carries risks in terms of appropriate cost-benefit analysis and offering certainty to industry for investment and innovation.¹⁰ H.R. ____, the FTC Process and Transparency Reform Act of 2016, would help ensure that the FTC's framework appropriately balances consumer protection with safeguarding innovations that may pose theoretical risks, but have not led to concrete harm.

The discussion draft would make targeted amendments to the FTC's processes and help provide transparency as it carries out its consumer protection mission under Section 5 of the FTC Act. This discussion draft is designed to help companies better predict their liability under Section 5 to facilitate and encourage innovative product and service development for consumers. For example, Section 4 of the draft bill would require the FTC to disclose its reasoning when it decides not to bring a case under Section 5 of the FTC Act. Section 7 of the discussion draft would require the FTC to close investigations that have gone inactive for six months, unless the Commission votes to keep them open.

B. Industry Specific Bills

These three bills seek to address issues that pertain to specific industry sectors. For example, H.R. 5104, Better Online Ticket Sales (BOTS) Act, would prohibit the sale or use of software used to purchase bulk event tickets in a manner that circumvents the seller's defenses. Another bill, H.R. 5111, Consumer Review Fairness Act, would prohibit sellers from restricting consumers' ability to give truthful reviews about products. The third bill, H.R. 5092, Reinforcing American Made Products Act, would establish that the FTC's authority to prohibit deceptive

⁵ See *The Disrupter Series: The Fast-Evolving Uses and Economic Impacts of Drones: Hearing Before the H. Comm. on Energy & Commerce, Subcomm. on Commerce, Mfg., & Trade*, 114th Cong. 3 (2015) (statement of Brian Wynne, President and CEO, Ass'n for Unmanned Vehicle Sys. Int'l (AUVSI)) available at <http://docs.house.gov/meetings/IF/IF17/20151119/104207/HHRG-114-IF17-Wstate-WynneB-20151119.pdf>.

⁶ See https://www.ntia.doc.gov/files/ntia/publications/voluntary_best_practices_for_uas_privacy_transparency_and_accountability.pdf

⁷ 15 U.S.C. § 45(a)(1).

⁸ <https://www.ftc.gov/enforcement/cases-proceedings>

⁹ Out of 62 data security cases listed on the FTC's website, the only two defendants that have not settled are LabMD, Inc. and Wyndham Worldwide Corporation. See <https://www.ftc.gov/enforcement/cases-proceedings/terms/249>.

¹⁰ See Gerard Stegmaier & Wendell Bartnick, *Essay: Psychics, Russian Roulette, and Data Security: The FTC's Hidden Data-Security Requirements*, 20 GEO. MASON L. REV. 673, 693 (2013) ("It is unclear whether nonparties to the investigation should attempt to follow the complaint, the consent order, or both when complying with Section 5, or whether the failure to implement some or all of the measures would result in a prohibited unfair practice.").

Made in USA labeling is the sole national standard on such labeling practices, preempting State Made in USA rules.

II. LEGISLATIVE HISTORY

On May 24, 2016, the Subcommittee on Commerce, Manufacturing, and Trade held a hearing on H.R. 5111, H.R. 5092, and H.R. 5104. During the hearing, the Subcommittee also reviewed H.R. 5109, H.R. 5116, H.R. 5098, H.R. 5136, H.R. 5118, H.R. 5097, H.R. 5115, and H.R. 5093. These bills have been combined into the discussion draft H.R. ____, the FTC Process and Transparency Reform Act of 2016.

On March 7, 2016, the Senate Committee on Commerce, Science, and Transportation (Senate Commerce) reported S. 1518, Reinforcing American Made Products Act, without amendment, by a voice vote. On December 8, 2015, Senate Commerce reported S. 2044, Consumer Review Freedom Act of 2015, as amended, by a voice vote, and on December 14, 2015, the bill passed the Senate, as amended, by unanimous consent. The text of H.R. 5111, Consumer Review Fairness Act of 2016, is identical to S. 2044 as passed the Senate.

III. SECTION-BY-SECTIONS

A. H.R. ____, FTC Process and Transparency Reform Act of 2016

Section 1. Short Title.

Section 1 provides that the Act may be cited as the “FTC Process and Transparency Reform Act of 2016.”

Section 2. Unlawful Act or Practice.

This section states that an act or practice does not cause substantial injury to consumers if the injury or harm resulting from such act or practice is trivial or merely speculative. An injury may be sufficiently substantial if the injury does a small harm to a large number of people, and may be likely to cause substantial injury if it raises a significant risk of concrete harm.

This section requires that an act or practice is not unfair unless it is injurious in its net effects. To make this determination, the Commission shall consider the various costs for a remedy, the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and other similar matters. The Commission may not second-guess the wisdom of particular consumer decisions, but may consider whether there is an obstacle to the free exercise of consumer decision making.

Section 3. Time Limitation for Consent Orders.

This section requires any consent order entered into by the Commission to include a termination clause that such consent order expire not later than eight years after it is entered into, unless the consent order relates to alleged fraud and the Commission determines that the order should last longer based on consideration of the impact on technological progress and risk of future violations of the order.

This section requires a review of any consent order five years after the date on which the order is entered into unless the consent order is related to alleged fraud outlined in this section, and allows entities to request such a review. If the consent order no longer serves its stated purposes, the Commission shall terminate the consent order.

Section 4. Annual Reporting on the Status of Investigations.

This section requires the Commission to submit an annual report to Congress on investigations relating to unfair or deceptive acts or practices in or affecting commerce, including information on the number of investigations commenced, the number of investigations closed with no official agency action, the disposition of such closed investigations, and a description of such closed investigations sufficient to indicate the legal analysis supporting the Commission's decision to close the investigation with privacy limitations for the entities investigated.

Section 5. Requirement of Analysis and Rationale for Legislative and Regulatory Recommendations.

This section prohibits the FTC from submitting recommendations for legislative or regulatory action without an economic analysis by the Bureau of Economics sufficient to demonstrate that the FTC has identified a problem that cannot be addressed under current law and showing that the benefits of the recommended action outweigh its costs.

Section 6. Effects of Guidelines, General Statements of Policy, and Similar Guidance.

This section clarifies that in any enforcement action, the Commission shall prove a violation of a provision of law enforced by the Commission. The Commission may not base an enforcement action on, or execute a consent order based on acts or practices that are alleged to be inconsistent with any guidelines, general statements of policy, or similar guidance issued by the Commission unless the acts or practices violate a provision of law enforced by the Commission. Such guidelines, general statements of policy, or similar guidance may be used as evidence of compliance with the provision under which they were issued. Nothing in this section confers authority upon or negates existing authority of the Commission to issue such materials.

Section 7. Termination of Inactive Investigations.

This section requires the Commission to terminate a covered investigation at the end of a six-month period beginning on the date that a covered verifiable written communication is sent by the Commission, unless the Commission sends additional covered verifiable written communications or the Commission votes to extend the covered investigation.

Section 8. Nonpublic Collaborative Discussions.

This section authorizes a bipartisan majority of FTC Commissioners to hold a non-public meeting as long as no votes or agency actions are taken at the meeting, each person present at the meeting is a Commissioner or employee of the Commission, and an attorney from the Office of General Counsel of the Commission is present at the meeting. This section also requires that the Commission publish a disclosure of the meeting on its Internet website within two business days of the meeting that includes a list of meeting attendees and a summary of the matters discussed at the meeting, except for matters that the Commission has determined are not in the public interest to disclose. This section includes a provision preserving open meeting requirements for agency action. This section also includes definitions for terms used in the bill.

Section 8. Annual Plan Required.

This section requires the FTC to publish and submit to Congress on December 1 of each year, an annual plan for the next calendar year describing the projected activities of the Commission. The annual plan must include a description of the Commission's policy priorities, projected rulemakings, plans to develop guidelines, plans to restructure the Commission or establish or alter working groups, planned projects or initiatives, and any projected dates and timelines associated with those initiatives.

This section also requires the FTC to publish and submit to Congress an annual report on the Commission's enforcement actions involving allegations of elder fraud. The report is required to include a description of the Commission's enforcement actions, the disposition of those enforcement actions, and the proportion of enforcement actions involving elder fraud as a percentage of all enforcement action relating to unfair or deceptive acts or practices.

B. Industry Specific Legislation

1. H.R. 5092, Reinforcing American-Made Products Act

Section 1. Short Title.

Section 1 provides that the Act may be cited as the "Reinforcing American-Made Products Act."

Section 2. Exclusivity of Federal Authority to Regulate Labeling of Products Made in the United States and Introduced in Interstate or Foreign Commerce.

This section establishes that the provisions of the FTC Act that authorize the Commission to regulate the extent to which a product may be labeled "Made in the U.S.A" or "Made in America" supersede any corresponding provision of State law.

2. H.R. 5111, Consumer Review Fairness Act

Section 1. Short Title.

Section 1 provides that the Act may be cited as the “Consumer Review Fairness Act of 2016.”

Section 2. Consumer Review Protection.

This section voids form contract provisions if the provision prohibits or restricts an individual who is a party to the form contract from engaging in a covered communication, imposes a penalty or fee against such an individual for engaging in covered communications, or requires the transfer of intellectual property rights in review or feedback content, but allows non-exclusive licenses in such content.

This section does not affect any duty of confidentiality imposed by law; any civil cause of action for defamation, libel, or slander, or similar cause of action; any party’s right to remove or refuse to display on an Internet website or webpage controlled by such party that contains personal information or likeness of a person or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic; is unrelated to the goods or services available on such Internet website or webpage; or is clearly false or misleading. This section does not impact a party’s right to establish terms and conditions for content creation by an employee or independent contractor of a commercial entity in certain circumstances.

This section shall not apply to a provision of a form contract that prohibits disclosure or submission of, or reserves the right of a person or business that hosts online consumer reviews or comments, to remove trade secrets or commercial or financial information considered privileged or confidential; personnel and medical files; records compiled for law enforcement purposes; unlawful content; and potentially damaging code, processes, programs, applications, or files.

This section outlines the enforcement responsibilities of the Federal Trade Commission, State attorneys general, and consumer protection officials. This section outlines venue and service of process requirements.

3. H.R. 5104, Better On-line Ticket Sales (BOTS) Act of 2016

Section 1. Short Title.

Section 1 provides that the Act may be cited as the “Better On-line Ticket Sales Act of 2016” or the “BOTS Act.”

Section 2. Unfair and Deceptive Acts and Practices Relating to Use of Ticket Access Circumvention Software.

This section makes it unlawful for any person to intentionally use or sell software to circumvent a security measure, access control system, or other control or measure on a ticket seller's Internet website. It also makes it unlawful for any person to sell any ticket that has knowingly been obtained by that person, or another, using circumvention software. This section sets forth that a violation of this Act will be treated as an unfair and deceptive act of practice under the FTC Act.

Section 3. Civil Action.

This section authorizes any person who suffers an injury as a result of another person's violation of this Act to bring a civil action against the person in a U.S. district court and recover damages for the injury.

IV. STAFF CONTACTS

If you have any questions regarding this hearing, please contact Paul Nagle or Graham Dufault of the Committee staff at (202) 225-2927.