

AMENDMENT TO THE AMENDMENT IN THE NATURE OF A  
SUBSTITUTE TO **H.R. 2668 OFFERED BY M.** \_\_\_\_\_

At the end of the bill, insert the following:

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-  
20 tice is trivial or merely speculative. An injury

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

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

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

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

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

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

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

