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.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the “Consumer Review Fairness Act of 2016”.

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SEC. 2. CONSUMER REVIEW PROTECTION.

(a) DEFINITIONS.—In this section:

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

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

(3) FORM CONTRACT.—

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

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

(ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

(B) EXCEPTION.—The term “form contract” does not include an employer-employee or independent contractor contract.
(4) **PICTORIAL.**—The term “pictorial” includes pictures, photographs, video, illustrations, and symbols.

(b) **INVALIDITY OF CONTRACTS THAT IMPEDIE CONSUMER REVIEWS.**—

(1) **IN GENERAL.**—Except as provided in paragraphs (2) and (3), a provision of a form contract is void from the inception of such contract if such provision—

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

(B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or

(C) transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.
(2) **Rule of construction.**—Nothing in paragraph (1) shall be construed to affect—

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

(B) any civil cause of action for defamation, libel, or slander, or any similar cause of action;

(C) any party’s right to remove or refuse to display publicly on an Internet website or webpage owned, operated, or otherwise controlled by such party any content of a covered communication that—

   (i) contains the personal information or likeness of another person or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic;

   (ii) is unrelated to the goods or services offered by or available at such party’s Internet website or webpage; or

   (iii) is clearly false or misleading; or

(D) a party’s right to establish terms and conditions with respect to the creation of photographs or video of such party’s property when
those photographs or video are created by an
employee or independent contractor of a com-
mercial entity and solely intended for commer-
cial purposes by that entity.

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

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

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

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

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

(E) content that contains any computer vi-
ruses, worms, or other potentially damaging
computer code, processes, programs, applications, or files.

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

(d) ENFORCEMENT BY COMMISSION.—

(1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of subsection (c) by a person with respect to which the Commission is empowered under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF COMMISSION.—

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

(B) PRIVILEGES AND IMMUNITIES.—Any person who violates this section shall be subject
to the penalties and entitled to the privileges
and immunities provided in the Federal Trade
Commission Act (15 U.S.C. 41 et seq.).

(c) Enforcement by States.—

(1) Authorization.—Subject to subparagraph (B), in any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person subject to subsection (c) in a practice that violates such subsection, the attorney general of the State may, as parens patriae, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

(2) Rights of Federal Trade Commission.—

(A) Notice to Federal Trade Commission.—

(i) In general.—Except as provided in clause (iii), the attorney general of a State shall notify the Commission in writing that the attorney general intends to bring a civil action under paragraph (1)
before initiating the civil action against a
person described in subsection (d)(1).

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

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

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

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

(ii) upon intervening—

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

(II) file petitions for appeal of a
decision in the civil action.
(3) Investigatory powers.—Nothing in this subsection may be construed to prevent the attorney general of a State from exercising the powers conferred on the attorney general by the laws of the State to conduct investigations, to administer oaths or affirmations, or to compel the attendance of witnesses or the production of documentary or other evidence.

(4) Preemptive action by Federal Trade Commission.—If the Federal Trade Commission institutes a civil action or an administrative action with respect to a violation of subsection (c), the attorney general of a State may not, during the pendency of such action, bring a civil action under paragraph (1) against any defendant named in the complaint of the Commission for the violation with respect to which the Commission instituted such action.

(5) Venue; service of process.—

(A) Venue.—Any action brought under paragraph (1) may be brought in—

(i) the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code; or
(ii) another court of competent jurisdiction.

(B) Service of Process.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

(i) is an inhabitant; or

(ii) may be found.

(6) Actions by Other State Officials.—

(A) In General.—In addition to civil actions brought by attorneys general under paragraph (1), any other consumer protection officer of a State who is authorized by the State to do so may bring a civil action under paragraph (1), subject to the same requirements and limitations that apply under this subsection to civil actions brought by attorneys general.

(B) Savings Provision.—Nothing in this subsection may be construed to prohibit an authorized official of a State from initiating or continuing any proceeding in a court of the State for a violation of any civil or criminal law of the State.

(f) Education and Outreach for Businesses.—

Not later than 60 days after the date of the enactment of this Act, the Commission shall commence conducting
education and outreach that provides businesses with non-
binding best practices for compliance with this Act.

(g) Relation to State Causes of Action.—Nothing in this section shall be construed to affect any
cause of action brought by a person that exists or may
exist under State law.

(h) Effective Dates.—This section shall take ef-
fect on the date of the enactment of this Act, except
that—

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

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