

AMENDMENT IN THE NATURE OF A SUBSTITUTE
TO H.R. _____
[BURGES __055]
OFFERED BY M__ . _____

Strike all after the enacting clause and insert the following:

1 SECTION 1. SHORT TITLE; TABLE OF CONTENTS.

2 (a) SHORT TITLE.—This Act may be cited as the
3 “FTC Process and Transparency Reform Act of 2016”.

4 (b) TABLE OF CONTENTS.—The table of contents for
5 this Act is as follows:

- Sec. 1. Short title; table of contents.
- Sec. 2. Unlawful Act or Practice.
- Sec. 3. Time limitation for consent orders.
- Sec. 4. Annual Reporting on the Status of Investigations.
- Sec. 5. Requirement of analysis and rationale for legislative and regulatory recommendations.
- Sec. 6. Effects of Guidelines, General Statements of Policy, and Similar Guidance.
- Sec. 7. Termination of inactive investigations.
- Sec. 8. Nonpublic Collaborative Discussions.
- Sec. 9. Annual Plan Required.

6 SEC. 2. UNLAWFUL ACT OR PRACTICE.

7 Section 5(n) of the Federal Trade Commission Act
8 (15 U.S.C. 45(n)) is amended to read as follows:

9 “(n) UNLAWFUL ACT OR PRACTICE.—

10 “(1) SUBSTANTIAL INJURY REQUIRED.—

1 “(A) IN GENERAL.—The Commission shall
2 have no authority under this section or section
3 18 to declare unlawful an act or practice on the
4 grounds that such act or practice is unfair un-
5 less the act or practice causes or is likely to
6 cause substantial injury to consumers which is
7 not reasonably avoidable by consumers them-
8 selves and not outweighed by countervailing
9 benefits to consumers or to competition.

10 “(B) SUBSTANTIAL INJURY TO CON-
11 SUMERS.—For purposes of this subsection, an
12 act or practice does not cause and is not likely
13 to cause substantial injury to consumers if the
14 injury or harm resulting from such act or prac-
15 tice is trivial or merely speculative. An injury
16 may be sufficiently substantial if the injury
17 does a small harm to a large number of people.
18 An act or practice may be likely to cause a sub-
19 stantial injury if the act or practice raises a sig-
20 nificant risk of concrete harm.

21 “(C) CONSIDERATIONS REQUIRED.—In de-
22 termining whether an act or practice causes or
23 is likely to cause substantial injury to con-
24 sumers under this subsection, the Commission
25 shall consider the following:

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

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

5 “(iii) Whether the act or practice re-
6 sults only in emotional or other more sub-
7 jective harm.

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

9 “(A) CONSIDERATIONS REQUIRED.—An
10 act or practice is not unfair unless the act or
11 practice is injurious in its net effects. In deter-
12 mining whether an act or practice is injurious
13 in its net effects, the Commission shall consider
14 the following:

15 “(i) The various costs for a remedy,
16 including the costs to the parties directly
17 before the Commission.

18 “(ii) The burdens on society in gen-
19 eral in the form of increased paperwork,
20 increased regulatory burdens on the flow of
21 information, reduced incentives to innova-
22 tion and capital formation, and other simi-
23 lar matters.

24 “(B) CONSUMER DECISIONS.—The Com-
25 mission may not second-guess the wisdom of

1 particular consumer decisions, but may consider
2 whether the act or practice unreasonably cre-
3 ates or takes advantage of an obstacle to the
4 free exercise of consumer decisionmaking.

5 “(3) PUBLIC POLICY CONSIDERATIONS.—In de-
6 termining whether an act or practice is unfair, the
7 Commission may consider established public policies
8 as evidence to be considered with all other evidence.
9 Such public policy considerations may not serve as
10 a primary basis for such determination.”.

11 **SEC. 3. TIME LIMITATION FOR CONSENT ORDERS.**

12 (a) AMENDMENT.—Section 5 of the Federal Trade
13 Commission Act (15 U.S.C. 45) is amended by adding at
14 the end the following new subsection:

15 “(o) TERMINATION CLAUSE REQUIRED FOR CON-
16 SENT ORDERS.—Any consent order entered into by the
17 Commission relating to alleged unfair or deceptive acts or
18 practices by the person, partnership, or corporation, sub-
19 ject to the consent order shall include a termination clause
20 that the consent order shall expire not later than 8 years
21 after the date on which the consent order is entered into,
22 unless the consent order relates to alleged fraud by the
23 person, partnership, or corporation subject to the consent
24 order or requires a time limit longer than 8 years based
25 on the factors described in this subsection. In determining

1 the time limit for any termination clause, the Commission
2 shall consider each of the following factors:

3 “(1) The impact of technological progress on
4 the continuing relevance of the consent order.

5 “(2) Whether there is reason to believe that the
6 person, partnership, or corporation would continue
7 to engage in activities that violate this section with-
8 out the consent order.

9 “(p) CONSENT ORDER REVIEW.—Any consent order
10 entered into by the Commission that is unrelated to al-
11 leged fraud by the person, partnership, or corporation sub-
12 ject to the consent order and has a termination date more
13 than 5 years after such consent order is entered into shall
14 include a clause providing for Commission review of the
15 consent order 5 years after the date on which the order
16 is entered into. Such clause shall require the Commission
17 to evaluate whether the consent order has achieved its ini-
18 tial purposes based on the factors described in subsection
19 (o). The clause shall provide that if, based on such evalua-
20 tion, the Commission determines that the consent order
21 has achieved its purposes, the Commission shall terminate
22 the consent order.

23 “(q) PETITION FOR REVIEW OF EXISTING CONSENT
24 ORDERS.—Any person, partnership, or corporation that as
25 of the effective date of this subsection is subject to a con-

1 sent order that is unrelated to alleged fraud and has been
2 effective for a period of at least five years may petition
3 the Commission to terminate such consent order. In evalu-
4 ating a petition to terminate a consent order under this
5 subsection, the Commission shall consider whether the
6 consent order has achieved its initial purposes based on
7 each of the factors described in subsection (o). If, based
8 on such evaluation, the Commission determines that the
9 consent order has achieved its purposes, the Commission
10 shall terminate the consent order.”.

11 (b) EFFECTIVE DATE; APPLICABILITY.—The amend-
12 ment made by subsection (a) shall take effect on the date
13 of enactment of this Act and with respect to subsections
14 (o) and (p) of section 5 of the Federal Trade Commission
15 Act (15 U.S.C. 45), as added by subsection (a), shall apply
16 with respect to any consent order entered into after such
17 date.

18 **SEC. 4. ANNUAL REPORTING ON THE STATUS OF INVES-**
19 **TIGATIONS.**

20 Section 5 of the Federal Trade Commission Act (15
21 U.S.C. 45), as amended by section 3, is further amended
22 by adding at the end the following new subsection:

23 “(r) REPORT ON INVESTIGATIONS.—

24 “(1) IN GENERAL.—The Commission shall, on
25 an annual basis, submit a report to Congress on in-

1 investigations with respect to unfair or deceptive acts
2 or practices in or affecting commerce (within the
3 meaning of subsection (a)(1)), detailing—

4 “(A) the number of such investigations the
5 Commission has commenced;

6 “(B) the number of such investigations the
7 Commission has closed with no official agency
8 action;

9 “(C) the disposition of such investigations,
10 if such investigations have concluded and re-
11 sulted in official agency action; and

12 “(D) for each such investigation that was
13 closed with no official agency action, subject to
14 paragraph (2), a description—

15 “(i) sufficient to indicate the legal
16 analysis supporting the Commission’s deci-
17 sion not to continue such investigation;
18 and

19 “(ii) of the industry sectors of the
20 persons, partnerships, or corporations who
21 are subjects of such investigation.

22 “(2) CONSENT REQUIRED.—The Commission
23 shall not include in a report required under para-
24 graph (1) the description required under subpara-

1 graph (D) of such paragraph unless the Commission
2 has—

3 “(A) provided to each person, partnership,
4 or corporation who is a subject of the investiga-
5 tion a notification containing the description to
6 be included in the report; and

7 “(B) obtained the consent of each such
8 person, partnership, or corporation to the inclu-
9 sion of the description in the report.

10 “(3) PRIVACY PROTECTION.—The description
11 required under paragraph (1)(D) shall not include
12 the identity of any person, partnership, or corpora-
13 tion who is a subject of the investigation or any
14 other information that identifies the person, partner-
15 ship, or corporation.”.

16 **SEC. 5. REQUIREMENT OF ANALYSIS AND RATIONALE FOR**
17 **LEGISLATIVE AND REGULATORY REC-**
18 **COMMENDATIONS.**

19 The Federal Trade Commission Act (15 U.S.C. 41
20 et seq.) is amended by inserting after section 6 the fol-
21 lowing new section:

22 **“SEC. 6A. ECONOMIC ANALYSIS REQUIRED.**

23 “(a) IN GENERAL.—Except as provided in subsection
24 (b), the Commission may not publish a recommendation
25 for legislative or regulatory action without publishing the

1 economic analysis or advice prepared by the Bureau of Ec-
2 onomics of the Commission relating to such recommenda-
3 tion. If no such economic analysis or advice was prepared,
4 the Commission shall indicate, in writing as part of the
5 recommendation, that no such analysis or advice was
6 given.

7 “(b) EXCEPTION.—The requirement in subsection (a)
8 shall not apply if—

9 “(1) the recommendation for legislative or regu-
10 latory action is made as part of an appearance by
11 a Commissioner before Congress; or

12 “(2) the recommendation is made to a State or
13 local government entity.”.

14 **SEC. 6. EFFECTS OF GUIDELINES, GENERAL STATEMENTS**
15 **OF POLICY, AND SIMILAR GUIDANCE.**

16 Section 18(a) of the Federal Trade Commission Act
17 (15 U.S.C. 57a(a)) is amended by adding at the end the
18 following:

19 “(3)(A) No guidelines, general statements of policy,
20 or similar guidance issued by the Commission shall confer
21 any rights upon any person, State, or locality, nor shall
22 operate to bind the Commission or any person, State, or
23 locality to the approach recommended in such guidelines,
24 general statements of policy, or similar guidance. In any
25 enforcement action, the Commission shall prove a violation

1 of a provision of law enforced by the Commission. The
2 Commission may not base an enforcement action on, or
3 execute a consent order based on, acts or practices that
4 are alleged to be inconsistent with any such guidelines,
5 general statements of policy, or similar guidance, unless
6 the acts or practices violate a provision of law enforced
7 by the Commission.

8 “(B) Compliance with any guidelines, general state-
9 ment of policy, or similar guidance issued by the Commis-
10 sion may be used as evidence of compliance with the provi-
11 sion of law under which the guidelines, general statement
12 of policy, or guidance was issued.

13 “(C) Nothing in this paragraph shall be construed to
14 confer any authority upon or negate any authority of the
15 Commission to issue guidelines, general statements of pol-
16 icy, or similar guidance.”.

17 **SEC. 7. TERMINATION OF INACTIVE INVESTIGATIONS.**

18 Section 20 of the Federal Trade Commission Act (15
19 U.S.C. 57b-1) is amended—

20 (1) by redesignating subsection (j) as sub-
21 section (k); and

22 (2) by inserting after subsection (i) the fol-
23 lowing new subsection:

24 “(j) **TERMINATION OF INACTIVE INVESTIGATION.—**

1 “(1) IN GENERAL.—Except as provided in para-
2 graph (2), a covered investigation shall terminate at
3 the expiration of the six-month period beginning on
4 the date on which a covered verifiable written com-
5 munication is sent by the Commission.

6 “(2) EXCEPTION.—Paragraph (1) does not
7 apply if—

8 “(A) an additional covered verifiable writ-
9 ten communication is sent by the Commission
10 during the period described in paragraph (1);

11 “(B) the Commission votes to extend the
12 covered investigation before the expiration of
13 such period; or

14 “(C) the Commission determines in a vote,
15 within 30 days after the expiration of such pe-
16 riod, that the Commission did not send a cov-
17 ered verifiable written communication during
18 such period because of excusable neglect or a
19 circumstance beyond the control of the Commis-
20 sion that rendered notification during such pe-
21 riod impossible.

22 “(3) DEFINITIONS.—In this subsection:

23 “(A) COVERED INVESTIGATION.—The term
24 ‘covered investigation’ means an investigation
25 conducted pursuant to this section in which the

1 Commission has notified the person, partner-
2 ship, or corporation that is the subject of the
3 investigation by verifiable written communica-
4 tion.

5 “(B) COVERED VERIFIABLE WRITTEN
6 COMMUNICATION.—The term ‘covered verifiable
7 written communication’ means a verifiable writ-
8 ten communication relating to an investigation
9 conducted pursuant to this section that is sent
10 to the person, partnership, or corporation that
11 is the subject of the investigation.”.

12 **SEC. 8. NONPUBLIC COLLABORATIVE DISCUSSIONS.**

13 The Federal Trade Commission Act (15 U.S.C. 41
14 et seq.) is amended by inserting after section 26 the fol-
15 lowing:

16 **“SEC. 27. NONPUBLIC COLLABORATIVE DISCUSSIONS.**

17 “(a) IN GENERAL.—Notwithstanding section 552b of
18 title 5, United States Code, a bipartisan majority of Com-
19 missioners may hold a meeting that is closed to the public
20 to discuss official business if—

21 “(1) a vote or any other agency action is not
22 taken at such meeting;

23 “(2) each person present at such meeting is a
24 Commissioner or an employee of the Commission;
25 and

1 “(3) an attorney from the Office of General
2 Counsel of the Commission is present at such meet-
3 ing.

4 “(b) DISCLOSURE OF NONPUBLIC COLLABORATIVE
5 DISCUSSIONS.—Not later than 2 business days after the
6 conclusion of a meeting held under subsection (a), the
7 Commission shall publish on its Internet website a disclo-
8 sure of such meeting, including—

9 “(1) a list of the persons who attended such
10 meeting; and

11 “(2) a summary of the matters discussed at
12 such meeting, except for such matters as the Com-
13 mission determines may be withheld under section
14 552b(c) of title 5, United States Code.

15 “(c) PRESERVATION OF OPEN MEETINGS REQUIRE-
16 MENTS FOR AGENCY ACTION.—Nothing in this section
17 shall alter or supersede section 552b of title 5, United
18 States Code, with respect to any meeting of Commis-
19 sioners other than a meeting held under subsection (a).

20 “(d) DEFINITIONS.—In this section:

21 “(1) AGENCY ACTION.—The term ‘agency ac-
22 tion’ has the meaning given such term in section
23 551 of title 5, United States Code.

1 “(2) BIPARTISAN MAJORITY.—The term ‘bipar-

2 tisan majority’ means, when used with respect to a

3 group of Commissioners, that such group—

4 “(A) is a group of 2 or more Commis-

5 sioners; and

6 “(B) includes, for each political party of

7 which any Commissioner is a member, at least

8 1 Commissioner who is a member of such polit-

9 ical party, and, if any Commissioner has no po-

10 litical party affiliation, at least 1 unaffiliated

11 Commissioner.”.

12 **SEC. 9. ANNUAL PLAN REQUIRED.**

13 (a) AMENDMENTS.—The Federal Trade Commission

14 Act (15 U.S.C. 41 et seq.), as amended by section 8, is

15 further amended—

16 (1) by redesignating section 28 as section 30;

17 and

18 (2) by inserting after section 27 the following

19 new sections:

20 **“SEC. 28. ANNUAL PLAN REQUIRED.**

21 “Not later than December 1 of each year, the Com-

22 mission shall publish and submit to the Committees on

23 the Judiciary and Commerce, Science, and Transportation

24 of the Senate and the Committees on the Judiciary and

25 Energy and Commerce of the House of Representatives

1 a plan for the next calendar year describing the projected
2 activities of the Commission, including each of the fol-
3 lowing:

4 “(1) The policy priorities of the Commission.

5 “(2) Any rulemakings projected to be com-
6 menced.

7 “(3) Any plans to develop guidelines or other
8 non-regulatory guidance documents.

9 “(4) Any plans to restructure the Commission
10 or establish or alter working groups.

11 “(5) Any planned projects or initiatives of the
12 Commission, including workshops, conferences, and
13 reports.

14 “(6) With respect to any activities of the Com-
15 mission, including workshops, conferences, reports,
16 working groups, guidance documents, or
17 rulemakings, that relate specifically to combating
18 unfair or deceptive acts or practices that target or
19 significantly affect individuals who are 65 years of
20 age or older, a description of how such activities will
21 address such acts or practices.

22 “(7) Projected dates and timelines associated
23 with any of the required disclosures in this section.

1 **“SEC. 29. REPORT ON ELDER FRAUD REQUIRED.**

2 “Not later than January 31 of each year, the Com-
3 mission shall publish and submit to the Committee on
4 Commerce, Science, and Transportation of the Senate and
5 the Committee on Energy and Commerce of the House
6 of Representatives a report on the Commission’s enforce-
7 ment actions to address unfair or deceptive acts or prac-
8 tices that may have targeted or significantly affected indi-
9 viduals who are 65 years of age or older during the pre-
10 vious calendar year, including each of the following:

11 “(1) A brief description of each such enforce-
12 ment action.

13 “(2) The disposition of such enforcement ac-
14 tions, broken down by category.

15 “(3) The proportion of such enforcement ac-
16 tions as a percentage of all enforcement actions re-
17 lating to unfair or deceptive acts or practices in or
18 affecting commerce brought by the Commission.”.

19 (b) **RULE OF CONSTRUCTION.**—Nothing in the
20 amendments made by subsection (a) shall be construed to
21 limit or restrict the Federal Trade Commission’s activities
22 or disclosure of information to the public, consistent with
23 applicable law.

24 (c) **EFFECTIVE DATE; APPLICABILITY.**—The amend-
25 ments made by subsection (a) shall take effect on the date
26 of enactment of this Act and shall apply with respect to

- 1 the first December 1 and January 31, as applicable, occur-
- 2 ring after such effective date.

