

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

**MEMORANDUM**

**June 7, 2016**

**To: Subcommittee on Commerce, Manufacturing, and Trade Democratic Members and Staff**

**Fr: Committee on Energy and Commerce Democratic Staff**

**Re: Markup of 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**

**On Wednesday, June 8, 2016, at 5:00 p.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Commerce, Manufacturing, and Trade will meet in open markup session for opening statements on 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. The Subcommittee will reconvene on **Thursday, June 9, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**.

**I. H.R. \_\_\_\_, FTC PROCESS AND TRANSPARENCY REFORM ACT OF 2016**

Eight of the bills introduced by Republican members and considered at the Subcommittee's legislative hearing on May 24, 2016, were combined into H.R. \_\_\_\_, the "FTC Process and Transparency Reform Act of 2016." An amendment in the nature of a substitute is expected to be offered at the markup.

**A. Unlawful Act or Practice**

Section 2 of the bill is based on H.R. 5115, the "Statement on Unfairness Reinforcement and Emphasis (SURE) Act." This section would prohibit the Federal Trade Commission (FTC) from declaring an act or practice unfair unless the act or practice is likely to cause substantial injury not reasonably avoidable by consumers and not outweighed by countervailing benefits to

consumers or competition. This section mirrors select language in FTC’s policy statement on unfairness written in 1980.

**B. Time Limitation for Consent Orders**

Section 3 of the bill is based on H.R. 5093, the “Technological Innovation through Modernizing Enforcement (TIME) Act.” Section 3 would place an eight year cap on consent decrees used in FTC enforcement actions and requires review of FTC consent decrees after five years, unless the case at issue is related to alleged fraud. Currently, consent decrees are generally in place for 20 years.

**C. Annual Reporting on the Status of Investigations**

Section 4 of the bill incorporates the language of H.R. 5109, the “Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act.” Section 4 would require FTC to submit an annual report to Congress that includes the number of investigations begun, number of investigations closed with no official action, the disposition of investigations that have resulted in official action, and for each investigation that closed without action, an explanation of the legal analysis supporting the agency’s decision to close the investigation.

**D. Requirement of Analysis and Rationale for Legislative and Regulatory Recommendations**

Section 5 of the bill incorporates the language of H.R. 5136, the “Revealing Economic Conclusions for Suggestions (RECS) Act.” Section 5 would require FTC’s Bureau of Economics to conduct a cost-benefit analysis for any legislative or regulatory recommendations, including a rationale for FTC’s determination that private markets or public institutions could not adequately address the issue that is the subject of the recommendation.

**E. Effects of Guidelines, General Statements of Policy, and Similar Guidance**

Section 6 of the bill is based on H.R. 5118, the “Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act.” Section 6 would prohibit FTC from basing an enforcement action on guidelines, but allows compliance with FTC guidelines to be used by companies as evidence of compliance with a statute.

**F. Termination of Inactive Investigations**

Section 7 incorporates the language of H.R. 5097, the “Start Taking Action on Lingering Liabilities (STALL) Act.” Section 7 would require that FTC investigations in which the person or entity being investigated has been notified of the investigation would automatically terminate after six months if there is no communication to the person being investigated, unless the FTC votes to extend the investigation.

**G. Nonpublic Collaborative Discussions**

Section 8 of the bill is based on H.R. 5116, the “Freeing Responsible and Effective Exchanges (FREE) Act.” Section 8 would allow a bipartisan majority of commissioners to hold a meeting that is closed to the public to discuss official business if: (1) no agency action is taken, (2) each person present is an FTC commissioner or employee, and (3) an attorney from the Office of General Counsel is present.

#### **H. Annual Plan Required**

Section 9 of the bill incorporates the language from H.R. 5098, the “FTC Robust Elderly Protections and Organizational Requirements to Track Scams (REPORTS) Act.” Section 9 would require FTC to publish an annual plan for the next year of its projected activities, including policy priorities; planned rulemakings and guidance documents; planned commission or working group restructurings; planned workshops, conferences, and reports; and projected timelines for these activities. It would also require a separate report on enforcement actions involving elder fraud for the previous calendar year.

### **II. H.R. 5111, CONSUMER REVIEW FAIRNESS ACT OF 2016**

H.R. 5111 was introduced by Rep. Lance (R-NJ) with bipartisan support. The bill would invalidate clauses in form contracts for the sale or lease of goods or services that prohibit a party to that contract from posting negative online reviews about the goods or services sold. The bill is identical to S. 2044, Consumer Review Freedom Act of 2015, as passed out of the Senate Committee on Commerce, Science, and Transportation.

### **III. H.R. 5092, REINFORCING AMERICAN-MADE PRODUCTS ACT OF 2016**

Rep. Harper (R-MS) introduced this bill, which would preempt state laws affecting how products having ‘Made in the U.S.A.,’ ‘Made in America,’ or some equivalent labeling are introduced, sold, advertised, or offered for sale in interstate or foreign commerce. Currently, only California has such a law. The bill is identical to S. 1518, the “Reinforcing American-Made Products Act of 2015,” as passed out of the Senate Committee on Commerce, Science, and Transportation.

### **IV. H.R. 5104, BETTER ON-LINE TICKET SALES ACT OF 2016 (BOTS ACT)**

Rep. Blackburn (R-TN) introduced the BOTS Act on April 28, 2016, with bipartisan support.<sup>1</sup> The bill prohibits the use or sale of software that circumvents ticket sale control measures on a ticket seller’s website and enables FTC to bring enforcement actions for violations as unfair or deceptive acts or practices. The bill also includes a private right of action for any person harmed as a result of a violation of the Act.

---

<sup>1</sup> A previous version of the bill (H.R. 708), which included enforcement by the Department of Justice, was introduced on March 16, 2016, but will not be considered at this hearing.