

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  
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**MEMORANDUM**

**June 21, 2016**

**To: Committee on Energy and Commerce Democratic Members and Staff**

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

**Re: Markup of H.R. 5510, FTC Process and Transparency Reform Act of 2016; H.R. 5111, Consumer Review Fairness Act; H.R. 5092, Reinforcing American-Made Products Act; H.R. 5104, Better Online Ticket Sales (BOTS) Act; and H.R. 1301, the Amateur Radio Parity Act of 2015**

On **Wednesday, June 22, 2016, at 5:00 p.m. in room 2123 of the Rayburn House Office Building**, the Committee on Energy and Commerce will meet in open markup session for opening statements on H.R. 5510, FTC Process and Transparency Reform Act of 2016; H.R. 5111, Consumer Review Fairness Act; H.R. 5092, Reinforcing American Made Products Act; H.R. 5104, Better Online Ticket Sales (BOTS) Act; and H.R. 1301, the Amateur Radio Parity Act of 2015. The Committee will reconvene on **Thursday, June 23, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**.

**I. H.R. 5510, FTC PROCESS AND TRANSPARENCY REFORM ACT OF 2016**

**A. Hearing and Subcommittee Markup**

On May 24, 2016, the Subcommittee on Commerce, Manufacturing, and Trade held a legislative hearing and received testimony on 17 bills, ten of which related to general processes of the Federal Trade Commission (FTC). The other seven bills related to specific consumer concerns.

Eight of the FTC process bills, all introduced by Republican members, were combined into H.R. 5510, the “FTC Process and Transparency Reform Act of 2016,” which was introduced by subcommittee Chairman Burgess (R-TX) on June 16, 2016.

The subcommittee held a markup of the discussion draft of the bill on June 8-9, 2016. During consideration of the discussion draft, Rep. Burgess offered an amendment in the nature of a substitute, to which three amendments were offered by Democratic members.

***1. Democratic Amendments at Subcommittee Markup***

Rep. Butterfield (D-NC) offered an amendment that created an exception to the economic analysis requirement of the bill for recommendations requested by and submitted to members of Congress. The amendment was adopted by a voice vote.

Rep. Clarke (D-NY) offered and withdrew an amendment that would have created an exception to the bill's eight-year cap on consent decrees for enforcement cases relating to unfair or deceptive practices affecting seniors. The majority committed to work with Rep. Clarke on her amendment for the full committee markup.

Subcommittee Ranking Member Schakowsky (D-IL) offered an amendment that would have created an exception to the requirement that FTC prove that a concrete harm for data security and privacy cases, including cases against companies that monitor users through internet-connected cameras without disclosure to the user. The amendment was rejected along party lines by a vote of 12-8.

***2. Republican Amendment in the Nature of a Substitute, As Amended***

Chairman Burgess's amendment in the nature of a substitute, as amended by the Butterfield amendment, was adopted by voice vote. Ultimately, the bill was favorably reported out of the subcommittee by a vote of 12 to 8, with no Democratic members supporting final passage.

**B. Summary of H.R. 5510**

H.R. 5510 is similar to the subcommittee mark with three differences. The bill as introduced includes the language of the Butterfield amendment as passed by the subcommittee and changes the language of sections 4 and 6, making them apply both to FTC consumer protection and competition actions.

***1. Unlawful Act or Practice***

Section 2 of the bill would prohibit the 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 contained in the FTC's nine-page policy statement on unfairness, written in 1980.

***2. Time Limitation for Consent Orders***

Section 3 of the bill would place an eight year cap on consent decrees used in FTC's consumer protection 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, or portions of consent decrees, are generally in place for 20 years. This section does not apply to consent orders used in antitrust cases.

### **3. *Annual Reporting on the Status of Investigations***

Section 4 of the bill would require FTC to submit an annual report to Congress that includes the number of investigations begun, the 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. For each investigation summarized, FTC would be required to notify each party that had been investigated and get consent that a description of the investigation will be included in the report.

### **4. *Requirement of Analysis and Rationale for Legislative and Regulatory Recommendations***

Section 5 of the bill would require the inclusion of an economic analysis for any legislative or regulatory recommendations made by FTC, or a statement that no economic analysis was conducted. No economic analysis would be required for recommendations made as part of the appearance of a Commissioner before Congress; recommendations made to a state or local government; or recommendations requested by and submitted to any member of Congress.

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

Section 6 of the bill would prohibit FTC from basing any enforcement action on guidelines, but allows compliance with FTC guidelines to be used by companies as evidence of compliance with a statute.

### **6. *Termination of Inactive Investigations***

Section 7 of the bill 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 FTC votes to extend the investigation. The Commission may also vote to extend the investigation within 30 days after the six-month time limit runs, if it determines that the expiration of the time was due to excusable neglect or a circumstance beyond the control of the Commission.

### **7. *Nonpublic Collaborative Discussions***

Section 8 of the bill 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.

## **8. *Annual Plan Required***

Section 9 of the bill 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**

### **A. Hearing and Subcommittee Markup**

H.R. 5111 was considered during the subcommittee on Commerce, Manufacturing, and Trade's legislative hearing on May 24, 2016. It was also considered at the subcommittee markup held on June 8-9, 2016. No amendments were offered and the bill was favorably reported out of the subcommittee by voice vote.

### **B. Summary of H.R. 5111**

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**

### **A. Hearing and Subcommittee Markup**

H.R. 5092 was considered during the Subcommittee on Commerce, Manufacturing, and Trade's legislative hearing on May 24, 2016. It was also considered at the subcommittee markup held on June 8-9, 2016. At the markup, Rep. Kennedy (D-MA) offered and withdrew an amendment that would have created a single federal standard, but allowed states to pass state laws with standards identical to the federal standard. It would have also allowed for enforcement of the federal standard by state attorneys general. In addition, the amendment would have preserved the right of California, currently the only state with its own law on Made in America labeling, to use its current enforcement tools to enforce the standard established by FTC.

### **B. Summary of H.R. 5092**

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)**

##### **A. Hearing and Subcommittee Markup**

H.R. 5104 was considered during the Subcommittee on Commerce, Manufacturing, and Trade’s legislative hearing on May 24, 2016. It was also considered at the subcommittee markup held on June 8-9, 2016. Rep. Blackburn (R-TX) offered an amendment in the nature of a substitute that made clarifying changes to the bill, removed the private right of action, and allowed for enforcement by state attorneys general. The amendment in the nature of a substitute was adopted by voice vote.

Ranking Member Pallone offered two amendments at the subcommittee markup, which were both defeated by voice vote. The first amendment would have added requirements for increased transparency, providing additional information about ticket cost and availability, in the online ticket sales marketplace. The second amendment would have directed the Government Accountability Office (GAO) to conduct a study of the ticket sales marketplace and submit a report to Congress.

The bill was favorably forwarded to the full committee, as amended, by a voice vote.

##### **B. Summary of H.R. 5104**

Rep. Blackburn (R-TN) introduced the BOTS Act on April 28, 2016, with bipartisan support. The bill prohibits the sale of software that circumvents technological ticket sale control measures on a ticket seller’s website, except for investigation or research purposes. It also enables FTC to bring enforcement actions for violations as unfair or deceptive acts or practices. In addition, the bill allows for enforcement by state attorneys general.

#### **V. H.R. 1301, AMATEUR RADIO PARITY ACT OF 2015**

##### **A. Hearing and Subcommittee Markup**

The Subcommittee on Communications and Technology held a legislative hearing on H.R. 1301 on January 12, 2016.<sup>1</sup> At the hearing, Ranking Member Eshoo raised concerns about the impact of H.R. 1301 on homeowners associations. Additionally, the Community Associations Institute filed a statement for the record of the hearing that also raised concerns that

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<sup>1</sup> For additional background information on the bill, see Democratic Staff memo for “Legislative Hearing on Four Communications Bills” (Jan. 10, 2016).

the bill would override private contracts, but offered specific amendments.<sup>2</sup> The American Radio Relay League (ARRL), which is the largest membership association for amateur radio operators and enthusiasts in the country, filed a letter with the subcommittee in support of H.R. 1301, indicating that the bill does not take “any jurisdiction or decisionmaking authority away from homeowners’ associations whatsoever.”<sup>3</sup>

The subcommittee held a markup of H.R. 1301 on February 11, 2016, where the bill was favorably reported by voice vote and without amendment.

**B. Summary of H.R. 1301**

H.R. 1301, as introduced, would direct the FCC to amend its amateur radio rules to prohibit any private land use restrictions that (1) preclude amateur radio communications, (2) fail to reasonably accommodate such communications, or (3) are not the minimum practicable restriction.

**C. Amendment In the Nature of a Substitute**

The Majority has also noticed an amendment in the nature of the substitute for the Amateur Radio Parity Act. That amendment would require the FCC to modify its rules relating to amateur radio antennas so that those rules prohibit private land use restrictions that

- (1) facially preclude amateur radio communications,
- (2) do not permit an amateur radio licensee to install and maintain an outdoor antenna on private, exclusively held property, or
- (3) do not constitute the “minimum practicable” restriction on amateur radios.

On the other hand, the amendment would also require the FCC to modify its rules so that those rules:

- (1) ensure that amateur radio licensees get preapproval from their community associations when constructing an outdoor antenna,
- (2) permit community associations to prohibit antennas constructed on commonly held property, and
- (3) permit community associations to establish reasonable written rules relating to the dimensions of an amateur radio antenna structure.

Finally, the amendment would reaffirm that state and local regulations of amateur radio antenna structures must not preclude the use of amateur radios altogether.

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<sup>2</sup> See Statement of Thomas M. Skiba, CAE, Chief Executive Officer, Community Associations Institute, on H.R. 1301, the Amateur Radio Parity Act, Submitted to the Committee on Energy and Commerce, Subcommittee on Communications and Technology (Jan. 12, 2016).

<sup>3</sup> See Letter from Christopher D. Imlay to Chairman Greg Walden and Ranking Member Anna G. Eshoo (Jan. 11, 2016).