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(Original Signature of Member)

114TH CONGRESS
2D SESSION

H. R. _____

To amend the Federal Trade Commission Act to establish new requirements relating to investigations, consent orders, and reporting requirements, and for other purposes.

IN THE HOUSE OF REPRESENTATIVES

Mr. BURGESS introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Federal Trade Commission Act to establish new requirements relating to investigations, consent orders, and reporting requirements, and for other purposes.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

3 **SECTION 1. SHORT TITLE; TABLE OF CONTENTS.**

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

6 (b) TABLE OF CONTENTS.—The table of contents for
7 this Act are 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.

1 SEC. 2. 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 **SEC. 3. TIME LIMITATION FOR CONSENT ORDERS.**

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

1 “(o) TERMINATION CLAUSE REQUIRED FOR CON-
2 SENT ORDERS.—Any consent order entered into by the
3 Commission shall include a termination clause that the
4 consent order shall expire not later than 8 years after the
5 date on which the consent order is entered into, unless
6 such consent order relates to alleged fraud by the entity
7 subject to the consent order and requires a time limit
8 longer than 8 years based on the factors described in this
9 subsection. In determining the time limit for any termi-
10 nation clause, the Commission shall consider each of the
11 following factors:

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

14 “(2) Whether there is reason to believe that the
15 entity would engage in activities that violate this sec-
16 tion without the consent order 8 years after the con-
17 sent order is entered into by the Commission.

18 “(p) CONSENT ORDER REVIEW.—Any consent order
19 entered into by the Commission that is unrelated to al-
20 leged fraud by the entity subject to the consent order and
21 has a termination date more than 5 years after such con-
22 sent order is entered into shall include a clause providing
23 for Commission review of the consent order 5 years after
24 the date on which the order is entered into. Such clause
25 shall require the Commission to evaluate whether the con-

1 sent order continues to serve its initial purposes based on
2 the factors described in subsection (o). The clause shall
3 provide that if, based on such evaluation, the Commission
4 determines that the consent order no longer serves its pur-
5 poses, the Commission shall terminate the consent order.

6 “(q) PETITION FOR REVIEW OF EXISTING CONSENT
7 ORDERS.—Any entity that as of the effective date of this
8 subsection is subject to a consent order that is unrelated
9 to alleged fraud and has been effective for a period of at
10 least five years may petition the Commission to terminate
11 such consent order. In evaluating a petition to terminate
12 a consent order under this subsection, the Commission
13 shall consider whether the consent order continues to serve
14 its initial purposes based on each of the factors described
15 in subsection (o). If, based on such evaluation, the Com-
16 mission determines that the consent order no longer serves
17 its purposes, the Commission shall terminate the consent
18 order.”.

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

1 **SEC. 4. ANNUAL REPORTING ON THE STATUS OF INVES-**
2 **TIGATIONS.**

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

6 “(r) REPORT ON INVESTIGATIONS.—

7 “(1) IN GENERAL.—The Commission shall, on
8 an annual basis, submit a report to Congress on in-
9 vestigations with respect to unfair or deceptive acts
10 or practices in or affecting commerce (within the
11 meaning of subsection (a)(1)), detailing—

12 “(A) the number of such investigations the
13 Commission has commenced;

14 “(B) the number of such investigations the
15 Commission has closed with no official agency
16 action;

17 “(C) the disposition of such investigations,
18 if such investigations have concluded and re-
19 sulted in official agency action; and

20 “(D) for each such investigation that was
21 closed with no official agency action, a descrip-
22 tion sufficient to indicate the legal analysis sup-
23 porting the Commission’s decision not to con-
24 tinue such investigation, and the industry sec-
25 tors of the entities subject to each such inves-
26 tigation.

1 “(2) PRIVACY PROTECTION.—The description
2 required under paragraph (1)(D) shall not include
3 the identity of the person who is the subject of an
4 investigation or any other information that identifies
5 the person.”.

6 **SEC. 5. REQUIREMENT OF ANALYSIS AND RATIONALE FOR**
7 **LEGISLATIVE AND REGULATORY REC-**
8 **COMMENDATIONS.**

9 Section 6(f) of the Federal Trade Commission Act
10 (15 U.S.C. 46(f)) is amended by inserting after “That the
11 Commission” the following: “shall not submit any rec-
12 ommendations for legislative or regulatory action without
13 an economic analysis by the Bureau of Economics of the
14 Commission sufficient to demonstrate that the Commis-
15 sion has identified a problem it determines should be ad-
16 dressed, including the rationale for the Commission’s de-
17 termination that private markets or public institutions
18 could not adequately address the issue, and that its rec-
19 ommended legislative or regulatory action is based on a
20 reasoned determination that the benefits of the rec-
21 ommended action outweigh its costs: *Provided further,*
22 That the Commission”.

1 **SEC. 6. EFFECTS OF GUIDELINES, GENERAL STATEMENTS**
2 **OF POLICY, AND SIMILAR GUIDANCE.**

3 Section 18(a) of the Federal Trade Commission Act
4 (15 U.S.C. 57a(a)) is amended by adding at the end the
5 following:

6 “(3)(A) No guidelines, general statements of policy,
7 or similar guidance issued by the Commission shall confer
8 any rights upon any person, State, or locality, nor shall
9 operate to bind the Commission or any person, State, or
10 locality to the approach recommended in such guidelines,
11 general statements of policy, or similar guidance. In any
12 enforcement action, the Commission shall prove a violation
13 of a provision of law enforced by the Commission. The
14 Commission may not base an enforcement action on, or
15 execute a consent order based on, acts or practices that
16 are alleged to be inconsistent with any such guidelines,
17 general statements of policy, or similar guidance, unless
18 the acts or practices violate a provision of law enforced
19 by the Commission.

20 “(B) Compliance with any guidelines, general state-
21 ment of policy, or similar guidance issued by the Commis-
22 sion may be used as evidence of compliance with the provi-
23 sion of law under which the guidelines, general statement
24 of policy, or guidance was issued.

25 “(C) Nothing in this paragraph shall be construed to
26 confer any authority upon or negate any authority of the

1 Commission to issue guidelines, general statements of pol-
2 icy, or similar guidance.”.

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

4 Section 20 of the Federal Trade Commission Act (15
5 U.S.C. 57b–1) is amended—

6 (1) by redesignating subsection (j) as sub-
7 section (k); and

8 (2) by inserting after subsection (i) the fol-
9 lowing new subsection:

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

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

16 “(2) **EXCEPTION.**—Paragraph (1) shall not
17 apply if—

18 “(A) an additional covered verifiable writ-
19 ten communication is sent by the Commission
20 during the period described in paragraph (1); or

21 “(B) the Commission votes to extend the
22 covered investigation before the expiration of
23 such period.

24 “(3) **DEFINITIONS.**—In this subsection:

1 “(A) COVERED INVESTIGATION.—The term
2 ‘covered investigation’ means an investigation
3 conducted pursuant to this section in which the
4 Commission has notified the person that is the
5 subject of the investigation by verifiable written
6 communication.

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

14 **SEC. 8. NONPUBLIC COLLABORATIVE DISCUSSIONS.**

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

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

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

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

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

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

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

12 “(1) a list of the persons who attended such
13 meeting; and

14 “(2) a summary of the matters discussed at
15 such meeting, except for such matters as the Com-
16 mission determines may be withheld under section
17 552b(c) of title 5, United States Code.

18 “(c) PRESERVATION OF OPEN MEETINGS REQUIRE-
19 MENTS FOR AGENCY ACTION.—Nothing in this section
20 shall limit the applicability of section 552b of title 5,
21 United States Code, with respect to a meeting of Commis-
22 sioners other than that described in subsection (a).

23 “(d) DEFINITIONS.—In this section:

1 “(1) AGENCY ACTION.—The term ‘agency ac-
2 tion’ has the meaning given such term in section
3 551 of title 5, United States Code.

4 “(2) BIPARTISAN MAJORITY.—The term ‘bipar-
5 tisan majority’ means, when used with respect to a
6 group of Commissioners, that such group—

7 “(A) is a group of 3 or more Commis-
8 sioners; and

9 “(B) includes, for each political party of
10 which any Commissioner is a member, at least
11 1 Commissioner who is a member of such polit-
12 ical party, and, if any Commissioner has no po-
13 litical party affiliation, at least one unaffiliated
14 Commissioner.”.

15 **SEC. 9. ANNUAL PLAN REQUIRED.**

16 (a) AMENDMENT.—The Federal Trade Commission
17 Act (15 U.S.C. 41 et seq.), as amended by section 8, is
18 further amended—

19 (1) by redesignating section 28 as section 30;
20 and

21 (2) by inserting after section 27 the following
22 new sections:

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

24 “Not later than December 1 of each year, the Com-
25 mission shall publish and submit to the Committees on

1 the Judiciary and Commerce, Science, and Transportation
2 of the Senate and the Committees on the Judiciary and
3 Energy and Commerce of the House of Representatives
4 a plan for the next calendar year describing the projected
5 activities of the Commission, including each of the fol-
6 lowing:

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

8 “(2) Any rulemakings projected to be com-
9 menced.

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

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

14 “(5) Any planned projects or initiatives of the
15 Commission, including workshops, conferences, and
16 reports.

17 “(6) With respect to any activities of the Com-
18 mission, including workshops, conferences, reports,
19 working groups, guidance documents, or
20 rulemakings that relate specifically to combating
21 fraud against individuals who are 65 years of age or
22 older, a description of how such activities will ad-
23 dress such fraud.

24 “(7) Projected dates and timelines associated
25 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 involving allegations of fraud targeting indi-
8 viduals who are 65 years of age or older during the pre-
9 vious calendar year, including each of the following:

10 “(1) A brief description of each enforcement ac-
11 tion by the Commission involving allegations of
12 fraud against such individuals.

13 “(2) The disposition of enforcement actions in-
14 volving allegations of fraud against such individuals,
15 broken down by category.

16 “(3) The proportion of enforcement actions in-
17 volving allegations of fraud against such individuals
18 as a percentage of all enforcement actions relating
19 to unfair or deceptive acts or practices in or affect-
20 ing commerce brought by the Commission.”.

21 (b) EFFECTIVE DATE; APPLICABILITY.—The amend-
22 ment made by subsection (a) shall take effect on the date
23 of enactment of this Act and shall apply with respect to
24 the first December 1 and January 31, as applicable, occur-
25 ring after such effective date.