

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

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MEMORANDUM

May 20, 2016

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

Fr: Committee on Energy and Commerce Democratic Staff

Re: Legislative Hearing on 17 FTC Bills

On **Tuesday, May 24, 2016, at 10:00 a.m. in room 2123 of the Rayburn House Office Building**, the Subcommittee on Commerce, Manufacturing, and Trade will hold a hearing titled “Legislative Hearing on 17 FTC Bills.”

I. BACKGROUND

The Federal Trade Commission (FTC) is the foremost federal agency dedicated to advancing consumer interests. Among other responsibilities, FTC is charged with preventing “unfair methods of competition” and “unfair or deceptive acts or practices” in or affecting commerce.¹

Three bureaus within FTC help the agency achieve its dual mission. The Bureau of Consumer Protection works to prevent unfair and deceptive business practices by conducting investigations, bringing legal actions, and educating consumers and businesses about such practices. The Bureau of Competition focuses on enforcement of antitrust laws and works to promote consumer interests by supporting a free market that provides for lower prices, better quality, and more consumer choice. The Bureau of Economics aids the work of the other bureaus by providing economic analysis of market processes and direct support for the agency’s investigations, enforcement actions, rulemakings, and advocacy efforts.²

¹ 15 U.S.C. § 45.

² Federal Trade Commission, *Bureaus & Offices* (online at www.ftc.gov/about-ftc/bureaus-offices) (accessed Feb. 21, 2014).

II. BRIEF SUMMARIES OF BILLS TO BE CONSIDERED

A. Bills Affecting the Administrative Process of FTC

1. H.R. 5239, Protecting Consumers in Commerce Act of 2016.—This bill, introduced by Rep. McNerney (D-CA), would give FTC authority over common carriers, including the ability to bring enforcement cases for unfair or deceptive acts or practices.

2. H.R. 5255, To amend the Federal Trade Commission Act to permit the Federal Trade Commission to enforce such Act against certain tax-exempt organizations.—This bill, introduced by Rep. Bobby L. Rush (D-IL), would give FTC authority over non-profit organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code.

3. H.R. 5093, Technological Innovation through Modernizing Enforcement (TIME) Act.—Subcommittee Chairman Michael Burgess (R-TX) introduced the TIME Act, which 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.

4. H.R. 5115, Statement on Unfairness Reinforcement and Emphasis (SURE) Act.—This bill, introduced by Rep. Markwayne Mullin (R-OK), would prohibit 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. The bill mirrors select language in FTC's policy statement on unfairness written in 1980.

5. H.R. 5097, Start Taking Action on Lingering Liabilities (STALL) Act.—Rep. Susan Brooks (R-IN) introduced the STALL Act, which 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 Commission votes to extend the investigation.

6. H.R. 5109, Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act.—Rep. Brett Guthrie (R-KY) introduced the CLEAR Act. This bill 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.

7. H.R. 5116, Freeing Responsible and Effective Exchanges (FREE) Act.—This bill, introduced by Rep. Pete Olson (R-TX), 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. H.R. 5136, Revealing Economic Conclusions for Suggestions (RECS) Act.—Rep. Mike Pompeo (R-KS) introduced the RECS Act, which 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.

9. H.R. 5118, Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act.—Rep. Pompeo also introduced the SHIELD Act. This bill 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.

10. H.R. 5098, FTC Robust Elderly Protections and Organizational Requirements to Track Scams (REPORTS) Act.—This bill, introduced by Rep. Gus Bilirakis (R-FL), 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.

B. Bills Addressing Specific Issues

1. H.R. 4460, Youth Sports Concussion Act.—Introduced by Rep. Bill Pascrell (D-NJ) with bipartisan support, this bill would give FTC civil penalty authority in cases in which a seller or importer makes any deceptive claim with respect to the safety benefits of athletic sporting equipment. It would also give state attorneys general authority to enforce the provisions of this bill.

2. H.R. 4526, Stop Online Booking Scams Act.—Rep. Lois Frankel (D-FL) introduced this bill with bipartisan support, which would require third party online hotel reservation sellers to disclose that they are not affiliated with the hotel for which the traveler is ultimately making the reservation. The bill would give state attorneys general authority to enforce the provisions of this bill. It would also require FTC to produce a study on the effect of this fraud on consumers.

3. H.R. 5111, Consumer Review Fairness Act of 2016.—This bill, which was introduced by Rep. Leonard Lance (R-NJ) with bipartisan support, 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.

4. H.R. 5104, Better On-line Ticket Sales Act of 2016 (BOTS Act).—Rep. Marsha Blackburn (R-TN) introduced the BOTS Act on April 28, 2016, with bipartisan support.³ The bill prohibits the use or sale of software that circumvents ticket sale control measures on a ticket

³ 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.

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.

5. H.R. 5245, Better Oversight of Secondary Sales and Accountability in Concert Ticketing Act of 2016 (BOSS ACT).—Rep. Pascrell also introduced the BOSS ACT, which would direct FTC to promulgate rules that require certain disclosures by primary ticket sellers and secondary market sellers. It would also make it illegal for employees of any venue, promotion company, artist, primary ticketing company, secondary market company (brokers), or box office to resell tickets to events they are involved in at more than their face value. The bill further would prohibit the use of circumvention software and the sale of a ticket knowingly obtained through the use of such software. Finally, the bill would direct FTC to conduct a study of the ticket market and to report its findings to Congress within one year of enactment.

6. H.R. 5212, Bereaved Consumer's Bill of Rights Act of 2016.—Rep. Rush introduced H.R. 5212, which would direct FTC to promulgate rules prohibiting unfair or deceptive acts or practices in the provision of funeral goods or funeral services, and that require disclosure of cemetery rules, services and merchandise, and prices. The bill also directs the FTC to conduct a rulemaking to prohibit providers of funeral goods or funeral services from misrepresenting federal, state, and local law requirements; imposing certain conditions, such as bundling on the sale of these goods or services; and to require that cemeteries retain certain records. The rules promulgated by FTC would apply to all providers of funeral, burial, or cremation goods or services except for cemeteries run by religious organizations or run by a nonprofit entity on behalf of a religious organization.

7. H.R. 5092, Reinforcing American-Made Products Act of 2016.—Rep. Gregg 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, Reinforcing American-Made Products Act of 2015, as passed out of the Senate Committee on Commerce, Science, and Transportation.

III. WITNESSES

Panel One

Edith Ramirez
Chairwoman
Federal Trade Commission

Panel Two

Daniel Castro
Vice President
Information Technology and Innovation Foundation

Geoffrey Manne
Executive Director
International Center for Law and Economics

Abigail Slater
Vice President of Legal and Regulatory Policy
Internet Association

David C. Vladeck
Professor of Law
Georgetown University Law Center

Joshua D. Wright
University Professor
George Mason University School of Law
Former Commissioner
Federal Trade Commission

Panel Three

Robert Arrington
President
National Funeral Directors Association

Michael Best
Senior Policy Associate
Consumer Federation of America

John Breyault
Vice President of Public Policy, Telecommunications and Fraud
National Consumers League

Gil Genn
Capitol Hill Strategic Advocates, LLC
On behalf of the Maryland Sports and Entertainment Industry Coalition

Richard Hendrickson
President and CEO
Lifetime Products

Dr. Gregory J. O'Shanick
Medical Director
Center for Neurorehabilitation Services

Jamie Pena
Vice President, Revenue Strategy & Global Distribution

Omni Hotels & Resorts

Steve Shur

President

Travel Technology Association