

114TH CONGRESS  
2D SESSION

# H. R. 5510

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

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## IN THE HOUSE OF REPRESENTATIVES

JUNE 16, 2016

Mr. BURGESS introduced the following bill; which was referred to the Committee on Energy and Commerce, and in addition to the Committee on the Judiciary, for a period to be subsequently determined by the Speaker, in each case for consideration of such provisions as fall within the jurisdiction of the committee concerned

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## 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 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.

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  
21 may be sufficiently substantial if the injury

1 does a small harm to a large number of people.  
2 An act or practice may be likely to cause a sub-  
3 stantial injury if the act or practice raises a sig-  
4 nificant risk of concrete harm.

5 “(C) CONSIDERATIONS REQUIRED.—In de-  
6 termining whether an act or practice causes or  
7 is likely to cause substantial injury to con-  
8 sumers under this subsection, the Commission  
9 shall consider the following:

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

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

14 “(iii) Whether the act or practice re-  
15 sults only in emotional or other more sub-  
16 jective harm.

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

18 “(A) CONSIDERATIONS REQUIRED.—An  
19 act or practice is not unfair unless the act or  
20 practice is injurious in its net effects. In deter-  
21 mining whether an act or practice is injurious  
22 in its net effects, the Commission shall consider  
23 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 relating to alleged unfair or deceptive acts or  
4 practices by the person, partnership, or corporation, sub-  
5 ject to the consent order shall include a termination clause  
6 that the consent order shall expire not later than 8 years  
7 after the date on which the consent order is entered into,  
8 unless the consent order relates to alleged fraud by the  
9 person, partnership, or corporation subject to the consent  
10 order or requires a time limit longer than 8 years based  
11 on the factors described in this subsection. In determining  
12 the time limit for any termination clause, the Commission  
13 shall consider each of the following factors:

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

16           “(2) Whether there is reason to believe that the  
17 person, partnership, or corporation would continue  
18 to engage in activities that violate this section with-  
19 out the consent order.

20           “(p) CONSENT ORDER REVIEW.—Any consent order  
21 entered into by the Commission that is unrelated to al-  
22 leged fraud by the person, partnership, or corporation sub-  
23 ject to the consent order and has a termination date more  
24 than 5 years after such consent order is entered into shall  
25 include a clause providing for Commission review of the

1 consent order 5 years after the date on which the order  
2 is entered into. Such clause shall require the Commission  
3 to evaluate whether the consent order has achieved its ini-  
4 tial purposes based on the factors described in subsection  
5 (o). The clause shall provide that if, based on such evalua-  
6 tion, the Commission determines that the consent order  
7 has achieved its purposes, the Commission shall terminate  
8 the consent order.

9       “(q) PETITION FOR REVIEW OF EXISTING CONSENT  
10 ORDERS.—Any person, partnership, or corporation that as  
11 of the effective date of this subsection is subject to a con-  
12 sent order that is unrelated to alleged fraud and has been  
13 effective for a period of at least five years may petition  
14 the Commission to terminate such consent order. In evalu-  
15 ating a petition to terminate a consent order under this  
16 subsection, the Commission shall consider whether the  
17 consent order has achieved its initial purposes based on  
18 each of the factors described in subsection (o). If, based  
19 on such evaluation, the Commission determines that the  
20 consent order has achieved its purposes, the Commission  
21 shall terminate the consent order.”.

22       (b) EFFECTIVE DATE; APPLICABILITY.—The amend-  
23 ment made by subsection (a) shall take effect on the date  
24 of enactment of this Act and with respect to subsections  
25 (o) and (p) of section 5 of the Federal Trade Commission

1 Act (15 U.S.C. 45), as added by subsection (a), shall apply  
2 with respect to any consent order entered into after such  
3 date.

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

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

9 “(r) REPORT ON INVESTIGATIONS.—

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

16 “(A) the number of such investigations the  
17 Commission has commenced;

18 “(B) the number of such investigations the  
19 Commission has closed with no official agency  
20 action;

21 “(C) the disposition of such investigations,  
22 if such investigations have concluded and re-  
23 sulted in official agency action; and

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

4                   “(i) sufficient to indicate the legal  
5 analysis supporting the Commission’s deci-  
6 sion not to continue such investigation;  
7 and

8                   “(ii) of the industry sectors of the  
9 persons, partnerships, or corporations who  
10 are subjects of such investigation.

11           “(2) CONSENT REQUIRED.—The Commission  
12 shall not include in a report required under para-  
13 graph (1) the description required under subpara-  
14 graph (D) of such paragraph unless the Commission  
15 has—

16                   “(A) provided to each person, partnership,  
17 or corporation who is a subject of the investiga-  
18 tion a notification containing the description to  
19 be included in the report; and

20                   “(B) obtained the consent of each such  
21 person, partnership, or corporation to the inclu-  
22 sion of the description in the report.

23           “(3) PRIVACY PROTECTION.—The description  
24 required under paragraph (1)(D) shall not include  
25 the identity of any person, partnership, or corpora-

1       tion who is a subject of the investigation or any  
2       other information that identifies the person, partner-  
3       ship, or corporation.”.

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

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

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

11       “(a) IN GENERAL.—Except as provided in subsection  
12 (b), the Commission may not publish a recommendation  
13 for legislative or regulatory action without publishing the  
14 economic analysis or advice prepared by the Bureau of Ec-  
15 onomics of the Commission relating to such recommenda-  
16 tion. If no such economic analysis or advice was prepared,  
17 the Commission shall indicate, in writing as part of the  
18 recommendation, that no such analysis or advice was  
19 given.

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

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

1           “(2) the recommendation is made to a State or  
2           local government entity; or

3           “(3) the recommendation is requested by and  
4           submitted to any member or committee of Congress,  
5           including the Committee on Energy and Commerce  
6           of the House of Representatives.”.

7   **SEC. 6. EFFECTS OF GUIDELINES, GENERAL STATEMENTS**  
8                           **OF POLICY, AND SIMILAR GUIDANCE.**

9           Section 18(a) of the Federal Trade Commission Act  
10   (15 U.S.C. 57a(a)) is amended by adding at the end the  
11   following:

12           “(3)(A) No guidelines, general statements of policy,  
13   or similar guidance related either to unfair methods of  
14   competition or to unfair or deceptive acts or practices, in  
15   or affecting commerce, issued by the Commission shall  
16   confer any rights upon any person, State, or locality, nor  
17   shall operate to bind the Commission or any person, State,  
18   or locality to the approach recommended in such guide-  
19   lines, general statements of policy, or similar guidance. In  
20   any enforcement action, the Commission shall prove a vio-  
21   lation of a provision of law enforced by the Commission.  
22   The Commission may not base an enforcement action on,  
23   or execute a consent order based on, acts or practices that  
24   are alleged to be inconsistent with any such guidelines,  
25   general statements of policy, or similar guidance, unless

1 the acts or practices violate a provision of law enforced  
2 by the Commission.

3 “(B) Compliance with any guidelines, general state-  
4 ment of policy, or similar guidance issued by the Commis-  
5 sion may be used as evidence of compliance with the provi-  
6 sion of law under which the guidelines, general statement  
7 of policy, or guidance was issued.

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

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

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

15 (1) by redesignating subsection (j) as sub-  
16 section (k); and

17 (2) by inserting after subsection (i) the fol-  
18 lowing new subsection:

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

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

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

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

6           “(B) the Commission votes to extend the  
7 covered investigation before the expiration of  
8 such period; or

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

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

18           “(A) COVERED INVESTIGATION.—The term  
19 ‘covered investigation’ means an investigation  
20 conducted pursuant to this section in which the  
21 Commission has notified the person, partner-  
22 ship, or corporation that is the subject of the  
23 investigation by verifiable written communica-  
24 tion.

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

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

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

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

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

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

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

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

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

6               “(1) a list of the persons who attended such  
7 meeting; and

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

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

17       “(d) DEFINITIONS.—In this section:

18               “(1) AGENCY ACTION.—The term ‘agency ac-  
19 tion’ has the meaning given such term in section  
20 551 of title 5, United States Code.

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

24                       “(A) is a group of two or more Commis-  
25 sioners; and

1           “(B) includes, for each political party of  
2           which any Commissioner is a member, at least  
3           1 Commissioner who is a member of such polit-  
4           ical party, and, if any Commissioner has no po-  
5           litical party affiliation, at least 1 unaffiliated  
6           Commissioner.”.

7 **SEC. 9. ANNUAL PLAN REQUIRED.**

8           (a) AMENDMENTS.—The Federal Trade Commission  
9 Act (15 U.S.C. 41 et seq.), as amended by section 8, is  
10 further amended—

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

12           and

13           (2) by inserting after section 27 the following  
14           new sections:

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

16           “Not later than December 1 of each year, the Com-  
17 mission shall publish and submit to the Committees on  
18 the Judiciary and Commerce, Science, and Transportation  
19 of the Senate and the Committees on the Judiciary and  
20 Energy and Commerce of the House of Representatives  
21 a plan for the next calendar year describing the projected  
22 activities of the Commission, including each of the fol-  
23 lowing:

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

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

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

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

7           “(5) Any planned projects or initiatives of the  
8 Commission, including workshops, conferences, and  
9 reports.

10           “(6) With respect to any activities of the Com-  
11 mission, including workshops, conferences, reports,  
12 working groups, guidance documents, or rulemak-  
13 ings, that relate specifically to combating unfair or  
14 deceptive acts or practices that target or signifi-  
15 cantly affect individuals who are 65 years of age or  
16 older, a description of how such activities will ad-  
17 dress such acts or practices.

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

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

21           “Not later than January 31 of each year, the Com-  
22 mission shall publish and submit to the Committee on  
23 Commerce, Science, and Transportation of the Senate and  
24 the Committee on Energy and Commerce of the House  
25 of Representatives a report on the Commission’s enforce-

1 ment actions to address unfair or deceptive acts or prac-  
2 tices that may have targeted or significantly affected indi-  
3 viduals who are 65 years of age or older during the pre-  
4 vious calendar year, including each of the following:

5           “(1) A brief description of each such enforce-  
6 ment action.

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

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

13       (b) **RULE OF CONSTRUCTION.**—Nothing in the  
14 amendments made by subsection (a) shall be construed to  
15 limit or restrict the Federal Trade Commission’s activities  
16 or disclosure of information to the public, consistent with  
17 applicable law.

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

○