

Union Calendar No. 685

114TH CONGRESS
2D SESSION

H. R. 5510

[Report No. 114–875, Part I]

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

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

DECEMBER 13, 2016

Reported from the Committee on Energy and Commerce with an amendment

[Strike out all after the enacting clause and insert the part printed in *italie*]

DECEMBER 13, 2016

The Committee on the Judiciary discharged; committed to the Committee of the Whole House on the State of the Union and ordered to be printed

[For text of introduced bill, see copy of bill as introduced on June 16, 2016]

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 rec-
ommendations.

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.

8 **SEC. 2. UNLAWFUL ACT OR PRACTICE.**

9 *Section 5(n) of the Federal Trade Commission Act (15*
 10 *U.S.C. 45(n)) is amended to read as follows:*

11 “(n) *UNLAWFUL ACT OR PRACTICE.*—

12 “(1) *SUBSTANTIAL INJURY REQUIRED.*—

13 “(A) *IN GENERAL.*—*The Commission shall*
 14 *have no authority under this section or section*
 15 *18 to declare unlawful an act or practice on the*
 16 *grounds that such act or practice is unfair unless*
 17 *the act or practice causes or is likely to cause*
 18 *substantial injury to consumers which is not rea-*
 19 *sonably avoidable by consumers themselves and*

1 *not outweighed by countervailing benefits to con-*
2 *sumers or to competition.*

3 “(B) *SUBSTANTIAL INJURY TO CON-*
4 *SUMERS.—For purposes of this subsection, an*
5 *act or practice does not cause and is not likely*
6 *to cause substantial injury to consumers if the*
7 *injury or harm resulting from such act or prac-*
8 *tice is trivial or merely speculative. An injury*
9 *may be sufficiently substantial if the injury does*
10 *a small harm to a large number of people. An*
11 *act or practice may be likely to cause a substan-*
12 *tial injury if the act or practice raises a signifi-*
13 *cant risk of concrete harm.*

14 “(C) *CONSIDERATIONS REQUIRED.—In de-*
15 *termining whether an act or practice causes or*
16 *is likely to cause substantial injury to consumers*
17 *under this subsection, the Commission shall con-*
18 *sider the following:*

19 “(i) *Whether the act or practice results*
20 *in monetary harm.*

21 “(ii) *Whether the act or practice results*
22 *in unwarranted health or safety risk.*

23 “(iii) *Whether the act or practice re-*
24 *sults only in emotional or other more sub-*
25 *jective harm.*

1 “(2) *NET EFFECTS OF INJURY REQUIRED.*—

2 “(A) *CONSIDERATIONS REQUIRED.*—*An act*
3 *or practice is not unfair unless the act or prac-*
4 *tice is injurious in its net effects. In determining*
5 *whether an act or practice is injurious in its net*
6 *effects, the Commission shall consider the fol-*
7 *lowing:*

8 “(i) *The various costs for a remedy, in-*
9 *cluding the costs to the parties directly be-*
10 *fore the Commission.*

11 “(ii) *The burdens on society in general*
12 *in the form of increased paperwork, in-*
13 *creased regulatory burdens on the flow of*
14 *information, reduced incentives to innova-*
15 *tion and capital formation, and other simi-*
16 *lar matters.*

17 “(B) *CONSUMER DECISIONS.*—*The Commis-*
18 *sion may not second-guess the wisdom of par-*
19 *ticular consumer decisions, but may consider*
20 *whether the act or practice unreasonably creates*
21 *or takes advantage of an obstacle to the free exer-*
22 *cise of consumer decisionmaking.*

23 “(3) *PUBLIC POLICY CONSIDERATIONS.*—*In de-*
24 *termining whether an act or practice is unfair, the*
25 *Commission may consider established public policies*

1 *as evidence to be considered with all other evidence.*
 2 *Such public policy considerations may not serve as a*
 3 *primary basis for such determination.”.*

4 **SEC. 3. TIME LIMITATION FOR CONSENT ORDERS.**

5 *(a) AMENDMENT.—Section 5 of the Federal Trade*
 6 *Commission Act (15 U.S.C. 45) is amended by adding at*
 7 *the end the following new subsections:*

8 *“(o) TERMINATION CLAUSE REQUIRED FOR CONSENT*
 9 *ORDERS.—Any consent order entered into by the Commis-*
 10 *sion relating to alleged unfair or deceptive acts or practices*
 11 *by the person, partnership, or corporation, subject to the*
 12 *consent order shall include a termination clause that the*
 13 *consent order shall expire not later than 8 years after the*
 14 *date on which the consent order is entered into, unless the*
 15 *consent order relates to alleged fraud by the person, partner-*
 16 *ship, or corporation subject to the consent order or requires*
 17 *a time limit longer than 8 years based on the factors de-*
 18 *scribed in this subsection. In determining the time limit*
 19 *for any termination clause, the Commission shall consider*
 20 *each of the following factors:*

21 *“(1) The impact of technological progress on the*
 22 *continuing relevance of the consent order.*

23 *“(2) Whether there is reason to believe that the*
 24 *person, partnership, or corporation would continue to*

1 *engage in activities that violate this section without*
2 *the consent order.*

3 “(p) *CONSENT ORDER REVIEW.—Any consent order*
4 *entered into by the Commission that is unrelated to alleged*
5 *fraud by the person, partnership, or corporation subject to*
6 *the consent order and has a termination date more than*
7 *5 years after such consent order is entered into shall include*
8 *a clause providing for Commission review of the consent*
9 *order 5 years after the date on which the order is entered*
10 *into. Such clause shall require the Commission to evaluate*
11 *whether the consent order has achieved its initial purposes*
12 *based on the factors described in subsection (o). The clause*
13 *shall provide that if, based on such evaluation, the Commis-*
14 *sion determines that the consent order has achieved its pur-*
15 *poses, the Commission shall terminate the consent order.*

16 “(q) *PETITION FOR REVIEW OF EXISTING CONSENT*
17 *ORDERS.—Any person, partnership, or corporation that as*
18 *of the effective date of this subsection is subject to a consent*
19 *order that is unrelated to alleged fraud and has been effec-*
20 *tive for a period of at least five years may petition the Com-*
21 *mission to terminate such consent order. In evaluating a*
22 *petition to terminate a consent order under this subsection,*
23 *the Commission shall consider whether the consent order has*
24 *achieved its initial purposes based on each of the factors*
25 *described in subsection (o). If, based on such evaluation,*

1 *the Commission determines that the consent order has*
 2 *achieved its purposes, the Commission shall terminate the*
 3 *consent order.”.*

4 *(b) EFFECTIVE DATE; APPLICABILITY.—The amend-*
 5 *ment made by subsection (a) shall take effect on the date*
 6 *of enactment of this Act and with respect to subsections (o)*
 7 *and (p) of section 5 of the Federal Trade Commission Act*
 8 *(15 U.S.C. 45), as added by subsection (a), shall apply with*
 9 *respect to any consent order entered into after such date.*

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

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

15 *“(r) REPORT ON INVESTIGATIONS.—*

16 *“(1) IN GENERAL.—The Commission shall, on an*
 17 *annual basis, submit a report to Congress on inves-*
 18 *tigations with respect to unfair or deceptive acts or*
 19 *practices, and with respect to unfair methods of com-*
 20 *petition, in or affecting commerce (within the mean-*
 21 *ing of subsection (a)(1)), detailing—*

22 *“(A) the number of such investigations the*
 23 *Commission has commenced;*

1 “(B) the number of such investigations the
2 Commission has closed with no official agency
3 action;

4 “(C) the disposition of such investigations,
5 if such investigations have concluded and re-
6 sulted in official agency action; and

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

10 “(i) sufficient to indicate the legal
11 analysis supporting the Commission’s deci-
12 sion not to continue such investigation; and

13 “(ii) of the industry sectors of the per-
14 sons, partnerships, or corporations who are
15 subjects of such investigation.

16 “(2) CONSENT REQUIRED.—The Commission
17 shall not include in a report required under para-
18 graph (1) the description required under subpara-
19 graph (D) of such paragraph unless the Commission
20 has—

21 “(A) provided to each person, partnership,
22 or corporation who is a subject of the investiga-
23 tion a notification containing the description to
24 be included in the report; and

1 “(B) obtained the consent of each such per-
 2 son, partnership, or corporation to the inclusion
 3 of the description in the report.

4 “(3) *PRIVACY PROTECTION*.—The description re-
 5 quired under paragraph (1)(D) shall not include the
 6 identity of any person, partnership, or corporation
 7 who is a subject of the investigation or any other in-
 8 formation that identifies the person, partnership, or
 9 corporation.”.

10 **SEC. 5. REQUIREMENT OF ANALYSIS AND RATIONALE FOR**
 11 **LEGISLATIVE AND REGULATORY REC-**
 12 **OMMENDATIONS.**

13 *The Federal Trade Commission Act (15 U.S.C. 41 et*
 14 *seq.) is amended by inserting after section 6 the following*
 15 *new section:*

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

17 “(a) *IN GENERAL*.—Except as provided in subsection
 18 (b), the Commission may not publish a recommendation for
 19 legislative or regulatory action unless—

20 “(1) the Commission publishes any economic
 21 analysis or advice prepared by the Bureau of Eco-
 22 nomics of the Commission relating to such rec-
 23 ommendation; or

24 “(2) if no such economic analysis or advice was
 25 prepared, the Commission indicates, in writing as

1 *part of such recommendation, that no such analysis*
2 *or advice was given.*

3 “(b) *EXCEPTION.—The requirement in subsection (a)*
4 *shall not apply if—*

5 “(1) *the recommendation for legislative or regu-*
6 *latory action is made as part of an appearance by a*
7 *Commissioner before Congress;*

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

10 “(3) *the recommendation is requested by and*
11 *submitted to any member or committee of Congress,*
12 *including the Committee on Energy and Commerce of*
13 *the House of Representatives;*

14 “(4) *the recommendation is submitted to another*
15 *Federal agency in response to a notice of proposed*
16 *rulemaking, including comments to the Federal Com-*
17 *munications Commission; or*

18 “(5) *the recommendation is submitted to the*
19 *United Kingdom, the European Union or members*
20 *thereof, including recommendations to the European*
21 *Parliament, the European Commission, or any data*
22 *protection authorities of any member state with re-*
23 *gard to cross-border data flows and other privacy and*
24 *data security matters.”.*

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, or*
7 *similar guidance related either to unfair methods of com-*
8 *petition or to unfair or deceptive acts or practices, in or*
9 *affecting commerce, issued by the Commission shall confer*
10 *any rights upon any person, State, or locality, nor shall*
11 *operate to bind the Commission or any person, State, or*
12 *locality to the approach recommended in such guidelines,*
13 *general statements of policy, or similar guidance. In any*
14 *enforcement action, the Commission shall prove a violation*
15 *of a provision of law enforced by the Commission. The Com-*
16 *mission may not base an enforcement action on, or execute*
17 *a consent order based on, acts or practices that are alleged*
18 *to be inconsistent with any such guidelines, general state-*
19 *ments of policy, or similar guidance, unless the acts or*
20 *practices violate a provision of law enforced by the Commis-*
21 *sion.*

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

1 “(C) *Nothing in this paragraph shall be construed to*
 2 *confer any authority upon or negate any authority of the*
 3 *Commission to issue guidelines, general statements of pol-*
 4 *icy, or similar guidance.”.*

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

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

8 *(1) by redesignating subsection (j) as subsection*
 9 *(k); and*

10 *(2) by inserting after subsection (i) the following*
 11 *new subsection:*

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

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

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

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

23 “(B) *the Commission votes to extend the*
 24 *covered investigation before the expiration of*
 25 *such period; or*

1 “(C) the Commission determines in a vote,
 2 within 30 days after the expiration of such pe-
 3 riod, that the Commission did not send a covered
 4 verifiable written communication during such
 5 period because of excusable neglect or a cir-
 6 cumstance beyond the control of the Commission
 7 that rendered notification during such period
 8 impossible.

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

10 “(A) COVERED INVESTIGATION.—The term
 11 ‘covered investigation’ means an investigation
 12 conducted pursuant to this section in which the
 13 Commission has notified the person, partnership,
 14 or corporation that is the subject of the investiga-
 15 tion by verifiable written communication.

16 “(B) COVERED VERIFIABLE WRITTEN COM-
 17 MUNICATION.—The term ‘covered verifiable writ-
 18 ten communication’ means a verifiable written
 19 communication relating to an investigation con-
 20 ducted pursuant to this section that is sent to the
 21 person, partnership, or corporation that is the
 22 subject of the investigation.”.

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

24 *The Federal Trade Commission Act (15 U.S.C. 41 et*
 25 *seq.) is amended by inserting after section 26 the following:*

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

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

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

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

10 “(3) an attorney from the Office of General
11 Counsel of the Commission is present at such meeting.

12 “(b) *DISCLOSURE OF NONPUBLIC COLLABORATIVE*
13 *DISCUSSIONS.*—Not later than 2 business days after the
14 conclusion of a meeting held under subsection (a), the Com-
15 mission shall publish on its Internet website a disclosure
16 of such meeting, including—

17 “(1) a list of the persons who attended such
18 meeting; and

19 “(2) a summary of the matters discussed at such
20 meeting, except for such matters as the Commission
21 determines may be withheld under section 552b(c) of
22 title 5, United States Code.

23 “(c) *PRESERVATION OF OPEN MEETINGS REQUIRE-*
24 *MENTS FOR AGENCY ACTION.*—Nothing in this section shall
25 alter or supersede section 552b of title 5, United States

1 *Code, with respect to any meeting of Commissioners other*
 2 *than a meeting held under subsection (a).*

3 “(d) *DEFINITIONS.—In this section:*

4 “(1) *AGENCY ACTION.—The term ‘agency action’*
 5 *has the meaning given such term in section 551 of*
 6 *title 5, United States Code.*

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

10 “(A) *is a group of two or more Commis-*
 11 *sioners; and*

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

18 **SEC. 9. ANNUAL PLAN REQUIRED.**

19 (a) *AMENDMENTS.—The Federal Trade Commission*
 20 *Act (15 U.S.C. 41 et seq.), as amended by section 8, is fur-*
 21 *ther amended—*

22 (1) *by redesignating section 28 as section 30;*
 23 *and*

24 (2) *by inserting after section 27 the following*
 25 *new sections:*

1 **“SEC. 28. ANNUAL PLAN REQUIRED.**

2 *“Not later than December 1 of each year, the Commis-*
3 *sion shall publish and submit to the Committees on the Ju-*
4 *diciary and Commerce, Science, and Transportation of the*
5 *Senate and the Committees on the Judiciary and Energy*
6 *and Commerce of the House of Representatives a plan for*
7 *the next calendar year describing the projected activities of*
8 *the Commission, including each of the following:*

9 *“(1) The policy priorities of the Commission.*

10 *“(2) Any rulemakings projected to be com-*
11 *menced.*

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

14 *“(4) Any plans to restructure the Commission or*
15 *establish or alter working groups.*

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

19 *“(6) With respect to any activities of the Com-*
20 *mission, including workshops, conferences, reports,*
21 *working groups, guidance documents, or rulemakings,*
22 *that relate specifically to combating unfair or decep-*
23 *tive acts or practices that target or significantly affect*
24 *individuals who are 65 years of age or older, a de-*
25 *scription of how such activities will address such acts*
26 *or practices.*

1 “(7) *Projected dates and timelines associated*
 2 *with any of the required disclosures in this section.*

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

4 *“Not later than January 31 of each year, the Commis-*
 5 *sion shall publish and submit to the Committee on Com-*
 6 *merce, Science, and Transportation of the Senate and the*
 7 *Committee on Energy and Commerce of the House of Rep-*
 8 *resentatives a report on the Commission’s enforcement ac-*
 9 *tions to address unfair or deceptive acts or practices that*
 10 *may have targeted or significantly affected individuals who*
 11 *are 65 years of age or older during the previous calendar*
 12 *year, including each of the following:*

13 *“(1) A brief description of each such enforcement*
 14 *action.*

15 *“(2) The disposition of such enforcement actions,*
 16 *broken down by category.*

17 *“(3) The proportion of such enforcement actions*
 18 *as a percentage of all enforcement actions relating to*
 19 *unfair or deceptive acts or practices in or affecting*
 20 *commerce brought by the Commission.”.*

21 **(b) RULE OF CONSTRUCTION.**—*Nothing in the amend-*
 22 *ments made by subsection (a) shall be construed to limit*
 23 *or restrict the Federal Trade Commission’s activities or dis-*
 24 *closure of information to the public, consistent with appli-*
 25 *cable law.*

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

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H. R. 5510

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