

CONSUMER REVIEW FAIRNESS ACT OF 2016

SEPTEMBER 9, 2016.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. UPTON, from the Committee on Energy and Commerce,
submitted the following

R E P O R T

[To accompany H.R. 5111]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (H.R. 5111) to prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

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The amendment is as follows:

Strike all after the enacting clause and insert the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the “Consumer Review Fairness Act of 2016”.

SEC. 2. CONSUMER REVIEW PROTECTION.

(a) **DEFINITIONS.**—In this section:

(1) **COMMISSION.**—The term “Commission” means the Federal Trade Commission.

(2) **COVERED COMMUNICATION.**—The term “covered communication” means a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.

(3) **FORM CONTRACT.**—

(A) **IN GENERAL.**—Except as provided in subparagraph (B), the term “form contract” means a contract with standardized terms—

(i) used by a person in the course of selling or leasing the person’s goods or services; and

(ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

(B) **EXCEPTION.**—The term “form contract” does not include an employer-employee or independent contractor contract.

(4) **PICTORIAL.**—The term “pictorial” includes pictures, photographs, video, illustrations, and symbols.

(b) **INVALIDITY OF CONTRACTS THAT IMPEDE CONSUMER REVIEWS.**—

(1) **IN GENERAL.**—Except as provided in paragraphs (2) and (3), a provision of a form contract is void from the inception of such contract if such provision—

(A) prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication;

(B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or

(C) transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.

(2) **RULE OF CONSTRUCTION.**—Nothing in paragraph (1) shall be construed to affect—

(A) any duty of confidentiality imposed by law (including agency guidance);

(B) any civil cause of action for defamation, libel, or slander, or any similar cause of action;

(C) any party’s right to remove or refuse to display publicly on an Internet website or webpage owned, operated, or otherwise controlled by such party any content of a covered communication that—

(i) contains the personal information or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic;

(ii) is unrelated to the goods or services offered by or available at such party’s Internet website or webpage; or

(iii) is clearly false or misleading; or

(D) a party’s right to establish terms and conditions with respect to the creation of photographs or video of such party’s property when those photographs or video are created by an employee or independent contractor of a commercial entity and solely intended for commercial purposes by that entity.

(3) **EXCEPTIONS.**—Paragraph (1) shall not apply to the extent that a provision of a form contract prohibits disclosure or submission of, or reserves the right of a person or business that hosts online consumer reviews or comments to remove—

(A) trade secrets or commercial or financial information obtained from a person and considered privileged or confidential;

(B) personnel and medical files and similar information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(C) records or information compiled for law enforcement purposes, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

- (D) content that is unlawful or otherwise meets the requirements of paragraph (2)(C); or
- (E) content that contains any computer viruses, worms, or other potentially damaging computer code, processes, programs, applications, or files.
- (c) PROHIBITION.—It shall be unlawful for a person to offer a form contract containing a provision described as void in subsection (b).
- (d) ENFORCEMENT BY COMMISSION.—
 - (1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of subsection (c) by a person with respect to which the Commission is empowered under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).
 - (2) POWERS OF COMMISSION.—
 - (A) IN GENERAL.—The Commission shall enforce this section in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of the Federal Trade Commission Act (15 U.S.C. 41 et seq.) were incorporated into and made a part of this Act.
 - (B) PRIVILEGES AND IMMUNITIES.—Any person who violates this section shall be subject to the penalties and entitled to the privileges and immunities provided in the Federal Trade Commission Act (15 U.S.C. 41 et seq.).
- (e) ENFORCEMENT BY STATES.—
 - (1) AUTHORIZATION.—Subject to paragraph (2), in any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person subject to subsection (c) in a practice that violates such subsection, the attorney general of the State may, as *parens patriae*, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.
 - (2) RIGHTS OF FEDERAL TRADE COMMISSION.—
 - (A) NOTICE TO FEDERAL TRADE COMMISSION.—
 - (i) IN GENERAL.—Except as provided in clause (iii), the attorney general of a State shall notify the Commission in writing that the attorney general intends to bring a civil action under paragraph (1) before initiating the civil action against a person described in subsection (d)(1).
 - (ii) CONTENTS.—The notification required by clause (i) with respect to a civil action shall include a copy of the complaint to be filed to initiate the civil action.
 - (iii) EXCEPTION.—If it is not feasible for the attorney general of a State to provide the notification required by clause (i) before initiating a civil action under paragraph (1), the attorney general shall notify the Commission immediately upon instituting the civil action.
 - (B) INTERVENTION BY FEDERAL TRADE COMMISSION.—The Commission may—
 - (i) intervene in any civil action brought by the attorney general of a State under paragraph (1) against a person described in subsection (d)(1); and
 - (ii) upon intervening—
 - (I) be heard on all matters arising in the civil action; and
 - (II) file petitions for appeal of a decision in the civil action.
 - (3) INVESTIGATORY POWERS.—Nothing in this subsection may be construed to prevent the attorney general of a State from exercising the powers conferred on the attorney general by the laws of the State to conduct investigations, to administer oaths or affirmations, or to compel the attendance of witnesses or the production of documentary or other evidence.
 - (4) PREEMPTIVE ACTION BY FEDERAL TRADE COMMISSION.—If the Federal Trade Commission institutes a civil action or an administrative action with respect to a violation of subsection (c), the attorney general of a State may not, during the pendency of such action, bring a civil action under paragraph (1) against any defendant named in the complaint of the Commission for the violation with respect to which the Commission instituted such action.
 - (5) VENUE; SERVICE OF PROCESS.—
 - (A) VENUE.—Any action brought under paragraph (1) may be brought in—
 - (i) the district court of the United States that meets applicable requirements relating to venue under section 1391 of title 28, United States Code; or
 - (ii) another court of competent jurisdiction.

(B) SERVICE OF PROCESS.—In an action brought under paragraph (1), process may be served in any district in which the defendant—

- (i) is an inhabitant; or
- (ii) may be found.

(6) ACTIONS BY OTHER STATE OFFICIALS.—

(A) IN GENERAL.—In addition to civil actions brought by attorneys general under paragraph (1), any other consumer protection officer of a State who is authorized by the State to do so may bring a civil action under paragraph (1), subject to the same requirements and limitations that apply under this subsection to civil actions brought by attorneys general.

(B) SAVINGS PROVISION.—Nothing in this subsection may be construed to prohibit an authorized official of a State from initiating or continuing any proceeding in a court of the State for a violation of any civil or criminal law of the State.

(f) EDUCATION AND OUTREACH FOR BUSINESSES.—Not later than 60 days after the date of the enactment of this Act, the Commission shall commence conducting education and outreach that provides businesses with non-binding best practices for compliance with this Act.

(g) RELATION TO STATE CAUSES OF ACTION.—Nothing in this section shall be construed to affect any cause of action brought by a person that exists or may exist under State law.

(h) SAVINGS PROVISION.—Nothing in this section shall be construed to limit, impair, or supersede the operation of the Federal Trade Commission Act or any other provision of Federal law.

(i) EFFECTIVE DATES.—This section shall take effect on the date of the enactment of this Act, except that—

- (1) subsections (b) and (c) shall apply with respect to contracts in effect on or after the date that is 90 days after the date of the enactment of this Act; and
- (2) subsections (d) and (e) shall apply with respect to contracts in effect on or after the date that is 1 year after the date of the enactment of this Act.

PURPOSE AND SUMMARY

The purpose of H.R. 5111, the Consumer Review Fairness Act of 2016, is to prohibit the use of certain non-disparagement clauses in form contracts that restrict the ability of a consumer to publicly review the goods or services offered in interstate commerce that were the subject of the contract. H.R. 5111 would invalidate such clauses subject to this legislation in form contracts and prohibit a person from offering a contract containing a non-disparagement clause, where a consumer has no meaningful opportunity to negotiate the terms. A violation of the legislation would be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under the Federal Trade Commission Act (FTC Act, 15 U.S.C. 41 et seq.). Such violations are punishable by civil penalties.

The Federal Trade Commission (FTC) is the primary enforcer of H.R. 5111. Subject to certain restraints outlined in the legislation, a State's attorney general may also enforce the provisions of H.R. 5111 if the State attorney general has reason to believe that an interest of the residents of the State has been threatened or adversely affected by the engagement of any person in a practice that violates H.R. 5111. State attorneys general would be required to notify the FTC in writing when they bring civil actions under the statute and are precluded from State enforcement actions during the pendency of an FTC enforcement action involving the same violation.

The legislation would provide a rule of construction and several exceptions. For example, H.R. 5111 would not limit the ability of a person or business that hosts online reviews to remove comments, including comments that contain personal information, comments that contain the likeness of a person, libelous, harassing, or

abusive comments, trade secrets, personnel and medical files, or content that contains computer viruses.

The Committee's view is that H.R. 5111 should prevent businesses and individuals from imposing non-disparagement clauses restricting truthful reviews in cases where consumers have no meaningful opportunity to bargain over the terms of a form contract.

BACKGROUND AND NEED FOR LEGISLATION

The Internet has enabled consumers to publish reviews of products and services widely at low cost, improving information flows to consumers and providers of goods and services. The wide availability of these reviews has caused consumers to rely on them more heavily as credible indicators of product or service quality.¹ In turn, businesses have sought to avoid negative reviews. Some businesses have attempted to suppress negative reviews, even if they are truthful, through provisions of form contracts with consumers restricting such reviews. These provisions typically impose monetary or other penalties for publishing negative comments regarding the provider's services or products.² The provisions have come to be known as gag clauses or non-disparagement clauses.

Gag clauses have been imposed by many different types of businesses and come in different forms. Some examples include a \$3,500 penalty imposed by online retailer KlearGear, a gag clause by a weight loss supplement seller,³ and a wedding vendor's prohibition on encouraging disparaging comments.⁴ In at least a few cases, when a consumer has refused to pay a fine, the offeror of a contract containing a non-disparagement clause has referred the monetary penalty to debt collectors, creating further headaches for the consumer. When KlearGear referred the \$3,500 penalty allegedly owed under the non-disparagement clause to a collection agency, the consumer sued KlearGear seeking damages and a declaratory judgment that the debt was not owed.⁵ The consumer ultimately won a judgment, and California passed a law banning non-disparagement clauses.⁶ However, their wider effect on state contract laws is unclear and common law doctrines may even evolve to accept them.⁷

Non-disparagement clauses interfere with the benefits consumers derive from ready access to "crowd-sourced" reviews of products and services. If such clauses become widely adopted, negative yet

¹ See, e.g., BrightLocal, Local Consumer Review Survey 2014 (2014), available at <https://www.brightlocal.com/learn/local-consumer-review-survey-2014/> (finding that 88% of consumers rely on online consumer reviews).

² See, e.g., Peter Wilkinson, *Guests Fined for Leaving Review of 'Filthy, Dirty Rotten' Hotel on TripAdvisor*, CNN (Nov. 19, 2014), available at <https://perma.cc/9PXX-5H67>; *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231-MSS-TBM (M.D. Fla. filed Sept. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc>.

³ *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231-MSS-TBM (M.D. Fla. filed Sept. 28, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/142-3255/roca-labs-inc>.

⁴ Chris Morran, *Wedding Company Contract Tries to Ban Bride & Groom From "Encouraging Negative Feedback"*, Consumerist (Apr. 20, 2015), available at <https://consumerist.com/2015/04/20/wedding-company-contract-tries-to-ban-bride-groom-from-encouraging-negative-feedback/>.

⁵ *Palmer v. KlearGear.com*, No. 1:13-cv-00175 (N.D. Utah, filed Dec. 18, 2013), available at <http://www.documentcloud.org/documents/929250-palmer-v-kleargear-complaint.html>.

⁶ CAL. CIV. CODE 1670.8.

⁷ See, e.g., Daniel D. Barnhizer, *Nancy Kim's Wrap Contracts Symposium: Escaping Toxic Contracts: How we have Lost the War on Assent in Wrap Contracts*, 44 SW. L. REV. 215 (2014) ("If such [non-disparagement] terms do become widespread, both common law doctrines, such as unconscionability and reasonable expectations, and statutory consumer protection regulations that are informed by commercial norms will be affected in favor of the drafters of such terms").

truthful reviews may be chilled, undermining the overall credibility of consumer reviews. The newfound utility of consumer reviews would then be reduced as trust in their veracity diminishes. H.R. 5111 seeks to curtail non-disparagement clauses in order to preserve the credibility and value of online consumer reviews.

HEARINGS

The Subcommittee on Commerce, Manufacturing, and Trade held a hearing on H.R. 5111, along with several other bills, on May 24, 2016. The Subcommittee received testimony from:

- Edith Ramirez, Chairwoman, Federal Trade Commission;
- Joshua D. Wright, University Professor, Antonin Scalia Law School at George Mason University;
- Geoffrey Manne, Founder and Executive Director, International Center for Law and Economics;
- Daniel Castro, Vice President, Information Technology and Innovation Foundation;
- Abigail Slater, General Counsel, Internet Association;
- Michael Best, Senior Policy Advocate, Consumer Federation of America;
- David Vladeck, Professor of Law, Georgetown Law;
- Richard Hendrickson, President and CEO of Lifetime Products;
- Greg O'Shanick, President and Medical Director, Center for Neurorehabilitation Services;
- Stephen Shur, President, Travel Technology Association;
- Robert Arrington, President, National Funeral Directors Association;
- John Breyault, Vice President of Public Policy, Telecommunications and Fraud, National Consumers League;
- Gil Genn, Maryland Sports and Entertainment Industry Coalition; and
- Jamie Pena, Vice President, Revenue Strategy and Global Distribution, Omni Hotels and Resorts.

COMMITTEE CONSIDERATION

On June 8, 2016, the Subcommittee on Commerce, Manufacturing, and Trade met in open markup session and forwarded H.R. 5111 to the full Committee by a voice vote. On July 12, 2016, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 5111 reported to the House, as amended, by a voice vote on July 13, 2016.

COMMITTEE VOTES

Clause 3(b) of rule XIII of the Rules of the House of Representatives requires the Committee to list the record votes on the motion to report legislation and amendments thereto. There were no record votes taken in connection with ordering H.R. 5111 reported.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee held a hearing and made findings that are reflected in this report.

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H.R. 5111 is to preserve the credibility and value of online consumer reviews by prohibiting non-disparagement clauses restricting negative, yet truthful, reviews of products and services by consumers.

NEW BUDGET AUTHORITY, ENTITLEMENT AUTHORITY, AND TAX EXPENDITURES

In compliance with clause 3(c)(2) of rule XIII of the Rules of the House of Representatives, the Committee finds that H.R. 5111 would result in no new or increased budget authority, entitlement authority, or tax expenditures or revenues.

EARMARK, LIMITED TAX BENEFITS, AND LIMITED TARIFF BENEFITS

In compliance with clause 9(e), 9(f), and 9(g) of rule XXI of the Rules of the House of Representatives, the Committee finds that H.R. 5111 contains no earmarks, limited tax benefits, or limited tariff benefits.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

H.R. 5111—Consumer Review Fairness Act of 2016

H.R. 5111 would void certain provisions in standard form contracts (those used in the course of selling or leasing goods and services) that impose restrictions or penalties for one party's review of the performance of another party under the contract. It also would void and prohibit certain contract provisions that would assign the intellectual property rights for one party's review of the performance of the contract to any other party. The bill would grant the Federal Trade Commission (FTC) the authority to enforce the new prohibitions and authorize the agency to levy civil penalties for violations. H.R. 5111 also would direct the FTC to develop an education and outreach program to provide businesses with best practices for complying with new restrictions.

CBO estimates that the cost of implementing H.R. 5111 would be insignificant because the FTC enforces similar prohibitions and provides compliance assistance under its existing general authorities.

CBO estimates that enacting H.R. 5111 would increase federal revenues from the new authority to collect civil penalties; therefore, pay-as-you-go procedures apply. However, CBO estimates those collections would be insignificant because of the small number of cases that the agency would probably pursue. CBO estimates that enacting the bill would not affect direct spending.

CBO estimates that enacting H.R. 5111 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5111 contains no intergovernmental mandates as defined in Unfunded Mandates Reform Act (UMRA) and would not affect the budgets of state, local, or tribal governments.

Although the FTC has begun to enforce prohibitions on contract provisions similar to those outlined in the bill under its existing authorities, to the extent that such provisions are not currently considered void in all jurisdictions, the bill would impose a private-sector mandate as defined in UMRA on entities that use such provisions in their contracts. The cost of the mandate would be the value of forgone income from out-of-court settlements and compensation for damages the entities could be awarded under a breach of contract claim. However, reliable and comprehensive information concerning the number of businesses that continue to use contracts containing such provisions, the number of those contracts that impose a monetary payment as a penalty, and the level of any such payments is not available. In addition, although the court cases in which consumers have challenged these provisions have resulted in judgments in favor of the consumer, the limited sample of such cases cannot be used to generalize about the results of such cases in other jurisdictions. Therefore, CBO cannot determine whether the cost of the mandate would exceed the annual threshold established in UMRA for private-sector mandates (\$154 million in 2016, adjusted annually for inflation).

On December 9, 2015, CBO transmitted a cost estimate for S. 2044, the Consumer Review Freedom Act of 2015, as reported by the Senate Committee on Commerce, Science, and Transportation on November 18, 2015. The two pieces of legislation are similar and CBO's estimates of their budgetary effects are the same.

The CBO staff contacts for this estimate are Stephen Rabent (for federal costs) and Logan Smith (for the impact on the private sector). The estimate was approved by Theresa Gullo, Assistant Director for Budget Analysis.

FEDERAL MANDATES STATEMENT

The Committee adopts as its own the estimate of Federal mandates prepared by the Director of the Congressional Budget Office pursuant to section 423 of the Unfunded Mandates Reform Act.

DUPLICATION OF FEDERAL PROGRAMS

No provision of H.R. 5111 establishes or reauthorizes a program of the Federal Government known to be duplicative of another Federal program, a program that was included in any report from the Government Accountability Office to Congress pursuant to section 21 of Public Law 111-139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

DISCLOSURE OF DIRECTED RULE MAKINGS

The Committee estimates that enacting H.R. 5111 specifically directs to be completed no rulemakings within the meaning of 5 U.S.C. 551.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

APPLICABILITY TO LEGISLATIVE BRANCH

The Committee finds that the legislation does not relate to the terms and conditions of employment or access to public services or accommodations within the meaning of section 102(b)(3) of the Congressional Accountability Act.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

Section 1. Short title

Section 1 provides that the Act may be cited as the “Consumer Review Fairness Act of 2016.”

Section 2. Consumer review protection

This section voids form contract provisions that prohibit or restrict an individual who is a party to the form contract from engaging in a covered communication, impose a penalty or fee against such an individual for engaging in covered communications, or require the transfer of intellectual property rights—except for non-exclusive licenses—in review or feedback content.

This section does not affect any duty of confidentiality imposed by law; any civil cause of action for defamation, libel, or slander, or similar cause of action; any party’s right to remove or refuse to display on an Internet website or webpage controlled by such party content of a covered communication, including content that contains personal information or likeness of a person or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic; is unrelated to the goods or services available on such Internet website or webpage; or is clearly false or misleading. This section does not affect a party’s right to establish terms and conditions for content creation by an employee or independent contractor of a commercial entity in certain circumstances.

This section shall not apply to a provision of a form contract that prohibits disclosure or submission of, or reserves the right of a person or business that hosts online consumer reviews or comments, to remove trade secrets or commercial or financial information considered privileged or confidential; personnel and medical files; records compiled for law enforcement purposes; unlawful content; and computer viruses, worms, or other potentially damaging code, processes, programs, applications, or files.

This section outlines the enforcement responsibilities of the FTC, State attorneys general, and consumer protection officials. This section also outlines venue and service of process requirements.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

This legislation does not amend any existing Federal statute.