

FTC PROCESS AND TRANSPARENCY REFORM ACT OF 2016

DECEMBER 13, 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

together with

DISSENTING VIEWS

[To accompany H.R. 5510]

[Including cost estimate of the Congressional Budget Office]

The Committee on Energy and Commerce, to whom was referred the bill (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, 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; TABLE OF CONTENTS.

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

(b) TABLE OF CONTENTS.—The table of contents for 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.

SEC. 2. UNLAWFUL ACT OR PRACTICE.

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

“(n) UNLAWFUL ACT OR PRACTICE.—

“(1) SUBSTANTIAL INJURY REQUIRED.—

“(A) IN GENERAL.—The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.

“(B) SUBSTANTIAL INJURY TO CONSUMERS.—For purposes of this subsection, an act or practice does not cause and is not likely to cause substantial injury to consumers if the injury or harm resulting from such act or practice is trivial or merely speculative. An injury may be sufficiently substantial if the injury does a small harm to a large number of people. An act or practice may be likely to cause a substantial injury if the act or practice raises a significant risk of concrete harm.

“(C) CONSIDERATIONS REQUIRED.—In determining whether an act or practice causes or is likely to cause substantial injury to consumers under this subsection, the Commission shall consider the following:

- “(i) Whether the act or practice results in monetary harm.
- “(ii) Whether the act or practice results in unwarranted health or safety risk.
- “(iii) Whether the act or practice results only in emotional or other more subjective harm.

“(2) NET EFFECTS OF INJURY REQUIRED.—

“(A) CONSIDERATIONS REQUIRED.—An act or practice is not unfair unless the act or practice is injurious in its net effects. In determining whether an act or practice is injurious in its net effects, the Commission shall consider the following:

- “(i) The various costs for a remedy, including the costs to the parties directly before the Commission.
- “(ii) The burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and other similar matters.

“(B) CONSUMER DECISIONS.—The Commission may not second-guess the wisdom of particular consumer decisions, but may consider whether the act or practice unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.

“(3) PUBLIC POLICY CONSIDERATIONS.—In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.”.

SEC. 3. TIME LIMITATION FOR CONSENT ORDERS.

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

“(o) TERMINATION CLAUSE REQUIRED FOR CONSENT ORDERS.—Any consent order entered into by the Commission relating to alleged unfair or deceptive acts or prac-

tices by the person, partnership, or corporation, subject to the consent order shall include a termination clause that the consent order shall expire not later than 8 years after the date on which the consent order is entered into, unless the consent order relates to alleged fraud by the person, partnership, or corporation subject to the consent order or requires a time limit longer than 8 years based on the factors described in this subsection. In determining the time limit for any termination clause, the Commission shall consider each of the following factors:

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

“(2) Whether there is reason to believe that the person, partnership, or corporation would continue to engage in activities that violate this section without the consent order.

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

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

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

SEC. 4. ANNUAL REPORTING ON THE STATUS OF INVESTIGATIONS.

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

“(r) **REPORT ON INVESTIGATIONS.**—

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

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

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

“(C) the disposition of such investigations, if such investigations have concluded and resulted in official agency action; and

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

“(i) sufficient to indicate the legal analysis supporting the Commission’s decision not to continue such investigation; and

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

“(2) **CONSENT REQUIRED.**—The Commission shall not include in a report required under paragraph (1) the description required under subparagraph (D) of such paragraph unless the Commission has—

“(A) provided to each person, partnership, or corporation who is a subject of the investigation a notification containing the description to be included in the report; and

“(B) obtained the consent of each such person, partnership, or corporation to the inclusion of the description in the report.

“(3) **PRIVACY PROTECTION.**—The description required under paragraph (1)(D) shall not include the identity of any person, partnership, or corporation who is a subject of the investigation or any other information that identifies the person, partnership, or corporation.”.

SEC. 5. REQUIREMENT OF ANALYSIS AND RATIONALE FOR LEGISLATIVE AND REGULATORY RECOMMENDATIONS.

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

“SEC. 6A. ECONOMIC ANALYSIS REQUIRED.

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

“(1) the Commission publishes any economic analysis or advice prepared by the Bureau of Economics of the Commission relating to such recommendation; or

“(2) if no such economic analysis or advice was prepared, the Commission indicates, in writing as part of such recommendation, that no such analysis or advice was given.

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

“(1) the recommendation for legislative or regulatory action is made as part of an appearance by a Commissioner before Congress;

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

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

“(4) the recommendation is submitted to another Federal agency in response to a notice of proposed rulemaking, including comments to the Federal Communications Commission; or

“(5) the recommendation is submitted to the United Kingdom, the European Union or members thereof, including recommendations to the European Parliament, the European Commission, or any data protection authorities of any member state with regard to cross-border data flows and other privacy and data security matters.”.

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

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

“(3)(A) No guidelines, general statements of policy, or similar guidance related either to unfair methods of competition or to unfair or deceptive acts or practices, in or affecting commerce, issued by the Commission shall confer any rights upon any person, State, or locality, nor shall operate to bind the Commission or any person, State, or locality to the approach recommended in such guidelines, general statements of policy, or similar guidance. In any enforcement action, the Commission shall prove a violation of a provision of law enforced by the Commission. The Commission may not base an enforcement action on, or execute a consent order based on, acts or practices that are alleged to be inconsistent with any such guidelines, general statements of policy, or similar guidance, unless the acts or practices violate a provision of law enforced by the Commission.

“(B) Compliance with any guidelines, general statement of policy, or similar guidance issued by the Commission may be used as evidence of compliance with the provision of law under which the guidelines, general statement of policy, or guidance was issued.

“(C) Nothing in this paragraph shall be construed to confer any authority upon or negate any authority of the Commission to issue guidelines, general statements of policy, or similar guidance.”.

SEC. 7. TERMINATION OF INACTIVE INVESTIGATIONS.

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

(1) by redesignating subsection (j) as subsection (k); and

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

“(j) TERMINATION OF INACTIVE INVESTIGATION.—

“(1) IN GENERAL.—Except as provided in paragraph (2), a covered investigation shall terminate at the expiration of the six-month period beginning on the date on which a covered verifiable written communication is sent by the Commission.

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

“(A) an additional covered verifiable written communication is sent by the Commission during the period described in paragraph (1);

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

“(C) the Commission determines in a vote, within 30 days after the expiration of such period, that the Commission did not send a covered verifiable written communication during such period because of excusable neglect or

a circumstance beyond the control of the Commission that rendered notification during such period impossible.

“(3) DEFINITIONS.—In this subsection:

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

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

SEC. 8. NONPUBLIC COLLABORATIVE DISCUSSIONS.

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

“SEC. 27. NONPUBLIC COLLABORATIVE DISCUSSIONS.

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

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

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

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

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

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

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

“(c) PRESERVATION OF OPEN MEETINGS REQUIREMENTS FOR AGENCY ACTION.—Nothing in this section shall alter or supersede section 552b of title 5, United States Code, with respect to any meeting of Commissioners other than a meeting held under subsection (a).

“(d) DEFINITIONS.—In this section:

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

“(2) BIPARTISAN MAJORITY.—The term ‘bipartisan majority’ means, when used with respect to a group of Commissioners, that such group—

“(A) is a group of two or more Commissioners; and

“(B) includes, for each political party of which any Commissioner is a member, at least 1 Commissioner who is a member of such political party, and, if any Commissioner has no political party affiliation, at least 1 unaffiliated Commissioner.”.

SEC. 9. ANNUAL PLAN REQUIRED.

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

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

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

“SEC. 28. ANNUAL PLAN REQUIRED.

“Not later than December 1 of each year, the Commission shall publish and submit to the Committees on the Judiciary and Commerce, Science, and Transportation of the Senate and the Committees on the Judiciary and Energy and Commerce of the House of Representatives a plan for the next calendar year describing the projected activities of the Commission, including each of the following:

“(1) The policy priorities of the Commission.

“(2) Any rulemakings projected to be commenced.

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

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

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

“(6) With respect to any activities of the Commission, including workshops, conferences, reports, working groups, guidance documents, or rulemakings, that

relate specifically to combating unfair or deceptive acts or practices that target or significantly affect individuals who are 65 years of age or older, a description of how such activities will address such acts or practices.

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

“SEC. 29. REPORT ON ELDER FRAUD REQUIRED.

“Not later than January 31 of each year, the Commission shall publish and submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives a report on the Commission’s enforcement actions to address unfair or deceptive acts or practices that may have targeted or significantly affected individuals who are 65 years of age or older during the previous calendar year, including each of the following:

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

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

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

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

(c) **EFFECTIVE DATE; APPLICABILITY.**—The amendments made by subsection (a) shall take effect on the date of enactment of this Act and shall apply with respect to the first December 1 and January 31, as applicable, occurring after such effective date.

PURPOSE AND SUMMARY

The purposes of H.R. 5510 are to clarify companies’ liability under Section 5 of the Federal Trade Commission (FTC or Commission) Act; to require the FTC to disclose its economic analyses for certain policy recommendations; to require the FTC to close certain inactive investigations; to shorten certain consent orders; to allow a bipartisan majority of Commissioners to hold private meetings in certain circumstances; to require the FTC to report annually on its activities; and to clarify that FTC guidelines are not an independent basis for liability.

BACKGROUND AND NEED FOR LEGISLATION

The FTC enforces a broad statute that empowers the Commission to declare unlawful “unfair or deceptive acts or practices in or affecting commerce”¹ The breadth of this statutory prohibition enables the Commission to take a flexible approach to consumer protection in a wide set of U.S. markets. The FTC has general rulemaking authority under the FTC Act, but its rulemaking process requirements differ from those imposed on most other independent agencies.²

Much of the Commission’s attention is directed to newer and evolving technologies. For example, over the past sixteen years or so, the Commission has exerted its consumer protection authority to prevent unfair or deceptive electronic data security practices.³ The FTC is also active in protecting consumers’ privacy online through guidance for businesses, conferences, and enforcement actions.⁴ The FTC settles most of its consumer protection cases,⁵ and

¹ 15 U.S.C. § 45(a)(1).

² 15 U.S.C. § 57a; *but cf.* 5 U.S.C. § 553.

³ See Fed. Trade Comm’n, Cases Tagged with Data Security <https://www.ftc.gov/enforcement/cases-proceedings/terms/249> (last visited Aug. 1, 2016).

⁴ See, e.g., Fed. Trade Comm’n, Privacy and Security, <https://www.ftc.gov/tips-advice/business-center/privacy-and-security> (last visited Aug. 1, 2016).

⁵ Fed. Trade Comm’n, Cases and Proceedings, <https://www.ftc.gov/enforcement/cases-proceedings> (last visited Aug. 1, 2016).

has settled almost all of its data security cases.⁶ Due to the evolving nature and properties of electronic data, shifting consumer expectations, mutable contextual considerations, and continuously improving available security measures, the elements necessary for a data security or privacy program the FTC considers adequate will change over time.⁷ These changing factors, coupled with the fact that settling out of court leads to so few judicial decisions,⁸ creates some uncertainty—especially in sectors heavily reliant on evolving technologies—as to the types of activity that are illegal under Section 5 of the FTC Act.

Section 2 of H.R. 5510 builds on Section 5(n) of the FTC Act as codified at 15 U.S.C. § 45(n). This section provides, in part, that the Commission shall have “no authority . . . to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.”⁹ This provision was adapted from a portion of the FTC’s unfairness policy statement: “To justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.”¹⁰ The provision originated in the Senate and became part of the FTC reauthorization conference report, signed into law in 1994.¹¹ As Senator Slade Gorton explained during the Senate’s consideration of the conference report, “the conferees were able to reach a compromise by removing the absolute ban [on advertising rulemaking] while retaining the definition of unfairness that the FTC has been using since it promulgated a policy statement on unfairness in 1980.”¹² Similarly, the purpose of Section 2 of H.R. 5510 is not to redefine or curtail the FTC’s unfairness authority. Rather, its purpose is to retain the definition of unfairness that the FTC has been using since 1980 and prevent the FTC from adopting any significant reinterpretations of its unfairness authority.

Section 2 would codify certain sections of the Commission’s Policy Statement on Unfairness.¹³ Under Section 2, the Commission may meet its burden to show that an act or practice is “likely” to cause substantial harm—as is required under current law—if it shows that the act or practice “raises a significant risk of concrete harm.” In determining whether an act or practice is likely to cause sub-

⁶Out of approximately data security cases listed on the FTC’s website, the only two defendants that have not settled are LabMD, Inc. and Wyndham Worldwide Corporation (*see id.*).

⁷*See* Daniel Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 608 (2014) (arguing that FTC enforcement “has certainly changed over the course of the past fifteen years. . .”).

⁸Solove & Hartzog, 114 Colum. L. Rev. at 606 (“In nearly all of the FTC’s Section 5 cases and complaints . . . the final disposition of the matter is a settlement, default judgment, or abandonment of the action by the FTC in the investigatory stage. The result is that there are hardly any judicial decisions in this area.”).

⁹15 U.S.C. § 45(n).

¹⁰Fed. Trade Comm’n, FTC Policy Statement on Unfairness, <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (last visited Aug. 19, 2016) [Unfairness Statement].

¹¹H.R. Rep. No. 103-617, at 12 (1994) (Conf. Rep.); Federal Trade Commission Act amendments of 1994, Pub. L. No. 103-312 (1994).

¹²140 Cong. Rec. S11316 (daily ed. Aug. 11, 1994) (statement of Sen. Gorton).

¹³Unfairness Statement, *supra* note 10.

stantial harm, Section 2 would also require the Commission to consider at least three factors. These factors are not exclusive, and the Commission would be free to consider additional factors it deems relevant or necessary. In determining whether the benefits are outweighed by the harm of an act or practice—as required under current law—the Commission would be required to consider two factors. These factors are not exclusive and the Commission would be free to consider any additional factors it considers relevant or necessary. Finally, Section 2 prohibits the Commission from second-guessing the “wisdom of consumer decisions,” providing that the Commission may consider whether the act or practice “unreasonably creates or takes advantage of” obstacles to the free exercise of free consumer decision-making. For example, a company’s decision to charge more for an allegedly inferior product is not by itself an unfair practice, unless the company creates a circumstance that prevents or impedes a consumer from knowing the relative quality or cost of the product compared to others.

In 1995, the FTC adopted a policy statement indicating that consent orders entered into under its consumer protection and competition authorities would automatically sunset after twenty years.¹⁴ Since then, the Committee is unaware of a consumer protection consent order with a sunset date of less than twenty years after its inception, although some orders have included requirements running for less than the 20-year period of the underlying order.¹⁵ Given the Commission’s focus on markets driven by advanced technology, the Committee believes that the Commission should reconsider whether a twenty-year term is the only appropriate timeframe for each and every consent order.

Section 3 of H.R. 5510 would require the Commission to make a case-by-case determination as to how long certain consent orders should run, imposing a default term of eight years on consumer protection consent orders that are unrelated to alleged fraud. A company signing a consent order may be likely to continue the illegal behavior at issue in the complaint or similar misconduct even after twenty years. Under Section 3, the Commission may choose to impose a consent order that is longer than eight years if there is reason to believe the respondent is likely to continue engaging in illegal behavior without the order. The Committee believes this flexibility is necessary, but acknowledges that the Commission’s preferred avenue for stopping willful violations, including fraud, is to seek injunctions and other equitable relief through Section 13(b) of the FTC Act.¹⁶ Section 3 also allows respondents to petition for the Commission to sunset an order after five years and requires the Commission to sunset the order if it determines that the order’s

¹⁴Fed. Trade Comm’n, Policy Statement Regarding Duration of Competition and Consumer Protection Orders, 60 Fed. Reg. 42569 (Aug. 15, 1995), *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/950816durationofcompetitionandconsumer.pdf>.

¹⁵*See Legislative Hearing on 17 FTC Bills Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 114th Cong. 14, n.30 (2016) (statement of Hon. Edith Ramirez, Chairwoman, Fed. Trade Comm’n) (describing two consent orders with Dave & Buster’s and Twitter, in which the requirement for biannual data security assessments in both cases expired after 10 years).

¹⁶J. Howard Beales III and Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?* 83 GEO. WASH. L. REV. 2157, 2161 (Jan. 2016) (“Relying on section 13(b) of the FTC Act, and working with other federal and state agencies, and more recently agencies in other countries, the Commission has brought hundreds of cases, stopping myriad frauds, returning large sums of money to consumers, and helping sister enforcers jail the worst offenders.”).

purposes have been achieved. This section differs from the provision in Section 5 of the existing FTC Act, which only requires the Commission to consider such petitions and render a decision within 120 days.¹⁷

Although the FTC's consumer protection cases have mostly avoided judicial decisions on the merits, the Commission provides guidance for various industries and covering certain types of cases. The Commission also publishes consent orders and complaints, which provide companies some insights into acts and practices that may fail to meet the FTC's expectations. However, these guideposts do not always provide examples of behavior that does meet the Commission's expectations. Nor do they offer examples where a court would or has sided with a defendant, which published judicial decisions would provide. Section 4 of the legislation would require the FTC to describe why an investigation target's activities do not run afoul of the FTC Act. Similar to closing letters, which the Commission occasionally publishes, these descriptions should give entities that were not subject to an investigation some helpful examples showing behavior that will not draw enforcement action. Additionally, they would allow Congress to conduct better oversight.

Section 5 of H.R. 5510 would require the Commission to publish advice or analyses by its economists only to the extent such advice or analysis is, in fact, provided to staff responsible for drafting FTC recommendations. If the Bureau of Economics does not provide any advice associated with a policy recommendation to be published by the Commission, the FTC would simply be required to indicate that no such advice or analysis was performed. The FTC would not need to provide either of these disclosures if any of the five circumstances listed in the section apply.

The FTC has indicated that its economists play an integral role in FTC activities.¹⁸ However, especially where the FTC provides unsolicited advice to Congress, economic analysis showing how costs are outweighed by the benefits of proposed legislation would help Congress independently evaluate the proposal. For example, it is unclear how or whether the Commission's own economic analysis supports its conclusion that Congress should enact baseline privacy legislation.¹⁹

Section 6 of H.R. 5510 would clarify that guidelines issued by the Commission do not create independent sources of liability. The section parallels language found in various sections of the Code of Federal Regulations clarifying the effect of guidance. For example, the FTC has clarified that guidance issued by the Commission regarding the marketing of jewelry, precious metals, and pewter do

¹⁷ 15 U.S.C. § 45(b) ("The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph(2) not later than 120 days after the date of the filing of such request.").

¹⁸ See *Legislative Hearing on 17 FTC Bills Before the Subcomm. on Commerce, Manufacturing, and Trade of the H. Comm. on Energy and Commerce*, 114th Cong. 21 (2016) (statement of Hon. Edith Ramirez, Chairwoman, Fed. Trade Comm'n) ("[Bureau of Economics] is involved in almost everything the Commission does, providing Commission and staff with thorough, objective, and independent analyses.").

¹⁹ See Fed. Trade Comm'n, *Protecting Consumer Privacy in an Era of Rapid Change: Recommendations for Businesses and Policymakers* 72 (March 2012) ("The FTC recommends that Congress consider baseline privacy legislation while industry implements the final privacy framework through individual company initiatives and through strong and enforceable self-regulatory initiatives."); Fed. Trade Comm'n, *Internet of Things: Privacy & Security in a Connected World* 50 (Jan. 2015) ("Commission staff thus again recommends that Congress consider enacting broad-based . . . privacy legislation.").

not “bind the FTC or the public” and that in any enforcement action, the Commission must “prove that the challenged act or practice is unfair or deceptive in violation of Section 5 of the FTC Act.”²⁰ These provisions apply to various types of guidance and many differ slightly. Section 6 of H.R. 5510 would clarify that any guidance issued by the Commission would have the same legal effect.

Section 7 of H.R. 5510 would require the Commission to close any investigation of which the target is aware, if the investigation is allowed to go “inactive.” Specifically, if the Commission has not communicated with an investigated entity within six months after making initial contact with the entity, the Commission would be required to terminate that investigation. There are two exceptions to the termination provision in this section. If no communication was made due to excusable neglect or if no communication was made due to circumstances that made sending such a communication impossible, the Commission would be allowed to vote to keep the investigation open up to 30 days after the expiration of the six-month period.

Section 8 of H.R. 5510 would allow a bipartisan majority comprised of a group of two or more Commissioners to hold a meeting that is closed to the public to discuss official business, subject to certain constraints. The purpose of this section is to enable collaboration and productive discussion among Commissioners without impeding public accountability.

Section 9 of H.R. 5510 would require the Commission to publish two separate reports. On December 1 of every year, the Commission would be required to report its planned activities and policy priorities in the following year. Similarly, on January 31 of every year, the Commission would be required to report on its activities undertaken the previous year related to unfair or deceptive acts or practices that target persons 65 years of age or older. The purpose of this section is to assist in public accountability and Congressional oversight efforts, as well as to provide a better understanding of how the Commission is approaching unfair or deceptive acts or practices aimed at seniors.

HEARINGS

The Subcommittee on Commerce, Manufacturing, and Trade held a hearing on H.R. 5104, 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;

²⁰ 16 C.F.R. Part 23.0(d); see also 16 C.F.R. parts 1.5, 239.1, 240.1, 254.0(b), 260.1(a).

- Richard Hendrickson, President and CEO, 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 and 9, 2016, the Subcommittee on Commerce, Manufacturing, and Trade met in open markup session and forwarded a Committee Print entitled "FTC Process and Transparency Reform Act of 2016," as amended, to the full Committee by a record vote of 12 yeas and 8 nays. On July 12, 13, and 14, 2016, the full Committee on Energy and Commerce met in open markup session and ordered H.R. 5510, as amended, favorably reported to the House by a record vote of 30 yeas and 20 nays.

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. The following reflects the record votes taken during the Committee consideration:

COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 78

BILL: H.R. 5510, "FTC Process and Transparency Reform Act of 2016"

AMENDMENT: An amendment offered by Mr. Pallone, No. 2, to provide that when prescribing a rule regarding consumer privacy or data security, the Federal Trade Commission shall prescribe such rule under section 18(a)(1)(B) in accordance with 553 of the Administrative Procedure Act.

DISPOSITION: NOT AGREED TO, by a roll call vote of 17 yeas and 27 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton				Mr. Rush			
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts		X		Mr. Green	X		
Mr. Walden		X		Ms. DeGette			
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch			
Mr. Olson		X		Mr. Lujan			
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loeb sack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas			
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson							
Mr. Collins		X					
Mr. Cramer		X					

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 79**

BILL: H.R. 5510, "FTC Process and Transparency Reform Act of 2016"

AMENDMENT: An amendment offered by Mr. McNerney, No. 8, to provide that any consent order entered into by the Federal Trade Commission relating to alleged unfair or deceptive acts or practices by the person, partnership, or corporation, subject to the consent order shall include a termination clause that the consent order shall expire not later than 8 years after the date on which the consent order is entered into, unless the consent order relates to alleged unfair or deceptive acts or practices affecting veterans, including cases in which a person commits unfair or deceptive acts or practices regarding applications for Enhanced Pension with Aid and Attendance.

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas and 25 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts				Mr. Green			
Mr. Walden		X		Ms. DeGette			
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn				Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loeb sack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas			
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson							
Mr. Collins		X					
Mr. Cramer							

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 80**

BILL: H.R. 5510, "FTC Process and Transparency Reform Act of 2016"

AMENDMENT: An amendment offered by Mr. Rush, No. 6, to amend the meaning of the word "Corporation," as defined in section 4 of the Federal Trade Commission Act, to include "any organization described in section 501(c)(3) of the Internal Revenue Code of 1986 that is exempt from taxation under section 501(a) of such Code."

DISPOSITION: NOT AGREED TO, by a roll call vote of 19 yeas and 25 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton		X		Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts				Mr. Green			
Mr. Walden		X		Ms. DeGette			
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn				Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loeb sack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas			
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson							
Mr. Collins		X					
Mr. Cramer							

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 81**

BILL: H.R. 5510, "FTC Process and Transparency Reform Act of 2016"

AMENDMENT: An amendment offered by Mr. Kennedy, No.10, to provide that nothing in the "FTC Process and Transparency Reform Act of 2016" shall be construed to affect the authority of the Federal Trade Commission to act in the interest of consumers.

DISPOSITION: NOT AGREED TO, by a roll call vote of 21 yeas and 28 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton		X		Mr. Pallone	X		
Mr. Barton				Mr. Rush	X		
Mr. Whitfield		X		Ms. Eshoo	X		
Mr. Shimkus		X		Mr. Engel			
Mr. Pitts		X		Mr. Green	X		
Mr. Walden		X		Ms. DeGette	X		
Mr. Murphy		X		Ms. Capps	X		
Mr. Burgess		X		Mr. Doyle	X		
Mrs. Blackburn		X		Ms. Schakowsky	X		
Mr. Scalise				Mr. Butterfield	X		
Mr. Latta		X		Ms. Matsui	X		
Mrs. McMorris Rodgers		X		Ms. Castor	X		
Mr. Harper		X		Mr. Sarbanes	X		
Mr. Lance		X		Mr. McNerney	X		
Mr. Guthrie		X		Mr. Welch	X		
Mr. Olson		X		Mr. Lujan	X		
Mr. McKinley		X		Mr. Tonko	X		
Mr. Pompeo				Mr. Yarmuth	X		
Mr. Kinzinger		X		Ms. Clarke	X		
Mr. Griffith		X		Mr. Loeb sack	X		
Mr. Bilirakis		X		Mr. Schrader	X		
Mr. Johnson		X		Mr. Kennedy	X		
Mr. Long		X		Mr. Cardenas			
Mrs. Ellmers		X					
Mr. Bucshon		X					
Mr. Flores		X					
Mrs. Brooks		X					
Mr. Mullin		X					
Mr. Hudson		X					
Mr. Collins		X					
Mr. Cramer		X					

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**COMMITTEE ON ENERGY AND COMMERCE -- 114TH CONGRESS
ROLL CALL VOTE # 82**

BILL: H.R. 5510, "FTC Process and Transparency Reform Act of 2016"

AMENDMENT: A motion by Mr. Upton to order H.R. 5510 favorably reported to the House, as amended.
(Final Passage)

DISPOSITION: AGREED TO, by a roll call vote of 30 yeas and 20 nays.

REPRESENTATIVE	YEAS	NAYS	PRESENT	REPRESENTATIVE	YEAS	NAYS	PRESENT
Mr. Upton	X			Mr. Pallone		X	
Mr. Barton	X			Mr. Rush		X	
Mr. Whitfield	X			Ms. Eshoo		X	
Mr. Shimkus	X			Mr. Engel			
Mr. Pitts	X			Mr. Green		X	
Mr. Walden	X			Ms. DeGette		X	
Mr. Murphy	X			Ms. Capps		X	
Mr. Burgess	X			Mr. Doyle		X	
Mrs. Blackburn	X			Ms. Schakowsky		X	
Mr. Scalise				Mr. Butterfield		X	
Mr. Latta	X			Ms. Matsui		X	
Mrs. McMorris Rodgers	X			Ms. Castor		X	
Mr. Harper	X			Mr. Sarbanes		X	
Mr. Lance	X			Mr. McNerney		X	
Mr. Guthrie	X			Mr. Welch		X	
Mr. Olson	X			Mr. Lujan		X	
Mr. McKinley	X			Mr. Tonko		X	
Mr. Pompeo				Mr. Yarmuth		X	
Mr. Kinzinger	X			Ms. Clarke		X	
Mr. Griffith	X			Mr. Loeb sack		X	
Mr. Bilirakis	X			Mr. Schrader	X		
Mr. Johnson	X			Mr. Kennedy		X	
Mr. Long	X			Mr. Cardenas			
Mrs. Ellmers	X						
Mr. Bucshon	X						
Mr. Flores	X						
Mrs. Brooks	X						
Mr. Mullin	X						
Mr. Hudson	X						
Mr. Collins	X						
Mr. Cramer	X						

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COMMITTEE OVERSIGHT FINDINGS

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

STATEMENT OF GENERAL PERFORMANCE GOALS AND OBJECTIVES

The goal of H.R. 5510 is to provide the public with more transparency as to the FTC's economic analyses; to require inactive FTC investigations to be closed; to shorten certain FTC consent orders; to clarify the requirements of FTC unfairness analyses; and to provide the public with a better understanding of how the FTC determines whether certain conduct is illegal under Section 5 of the FTC Act.

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. 5510 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. 5510 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

Pursuant to clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, September 9, 2016.

Hon. FRED UPTON,
*Chairman, Committee on Energy and Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 5510, the FTC Process and Transparency Reform Act of 2016.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent.

Sincerely,

KEITH HALL.

Enclosure.

H.R. 5510—FTC Process and Transparency Reform Act of 2016

H.R. 5510 would make several changes to how the Federal Trade Commission (FTC) conducts its investigations and issues new rules and would increase the agency's annual reporting requirements. Specifically, the bill would codify the definition of "substantial injury" used to determine which acts or practices the agency can declare unlawful, require the agency to consider the costs of regulation weighed against the injury caused by the act or practice when making such a determination, and expand the type of information defendants can use as evidence in cases brought by the FTC. H.R. 5510 also would require the FTC, when providing recommendations of proposed regulations, to publish its economic analysis of such regulations unless certain criteria are met. Lastly, the bill would require the FTC to publish an annual plan describing its anticipated activities for the year and an annual report on the status of its enforcement actions pertaining to elder fraud.

On the basis of information from the FTC, CBO estimates that implementing H.R. 5510 would increase the agency's administrative costs by less than \$500,000 annually. That increase in spending by the FTC, which would be subject to the availability of appropriated funds, would support two or three additional staff that CBO expects would be needed to comply with new annual reporting requirements.

A portion of the amount that the FTC collects in civil monetary penalties is remitted to the Treasury and is recorded as revenues. By changing procedures for how the FTC initiates and litigates violations of its rules, CBO expects that enacting H.R. 5510 could decrease those revenues; therefore, pay-as-you-go procedures apply. However, CBO estimates that any such decrease would be insignificant because of the small number of cases that CBO estimates would be affected by the changes. Enacting the bill would not affect direct spending.

CBO estimates that enacting H.R. 5510 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2027.

H.R. 5510 contains no intergovernmental or private-sector mandates as defined in Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephen Rabent. 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. 5510 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. 5510 specifically directs to be completed no 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 “FTC Process and Transparency Reform Act of 2016.”

Section 2. Unlawful act or practice

This section states that an act or practice does not cause substantial injury to consumers if the injury or harm resulting from such act or practice is trivial or merely speculative. An injury may be sufficiently substantial if the injury does a small harm to a large number of people, and may be likely to cause substantial injury if it raises a significant risk of concrete harm.

This section requires that an act or practice is not unfair unless it is injurious in its net effects. To make this determination, the Commission shall consider the various costs for a remedy, the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and other similar matters. The Commission may not second-guess the wisdom of particular consumer decisions, but may consider whether there is an obstacle to the free exercise of consumer decision making.

Section 3. Time limitation for consent orders

This section requires any consent order entered into by the Commission related to unfair or deceptive acts or practices to include a termination clause that such consent order expire not later than eight years after it is entered into, unless the consent order relates to alleged fraud or the Commission determines that the order should last longer based on consideration of the impact on technological progress and risk of future violations of the order.

This section requires a review of any consent order five years after the date on which the order is entered into unless the consent order is related to alleged fraud outlined in this section, and allows entities to request such a review. If the consent order has not achieved its stated purposes, the Commission shall terminate the consent order.

Section 4. Annual reporting on the status of investigations

This section requires the Commission to submit an annual report to Congress on investigations relating to unfair or deceptive acts or practices, or unfair methods of competition, in or affecting commerce, including information on the number of investigations commenced, the number of investigations closed with no official agency action, the disposition of such closed investigations, and a description of such closed investigations sufficient to indicate the legal analysis supporting the Commission's decision to close the investigation with privacy limitations for the entities investigated. If the subjects of the investigations required to be described under this section do not consent to their publication, the Commission may not publish the descriptions that are otherwise required in the section.

Section 5. Requirement of analysis and rationale for legislative and regulatory recommendations

This section prohibits the FTC from submitting recommendations for legislative or regulatory action without an economic analysis or advice prepared by the Bureau of Economics. If no such economic analysis or advice is prepared, the FTC must indicate that no advice or economic analysis was prepared by the Bureau of Economics for the recommendations. These requirements do not apply if (1) the recommendation is made as part of an appearance by a FTC Commissioner before Congress; (2) the recommendation is made to a state or local government entity; (3) the recommendation is requested by and submitted to a member or committee of Congress; (4) the recommendation is submitted to another Federal agency in response to a notice of proposed rulemaking; or (5) the recommendation is submitted to the United Kingdom, the European Union or members thereof, or data protection authorities of any member state with regard to cross-border data flows.

Section 6. Effects of guidelines, general statements of policy, and similar guidance

This section clarifies that in any enforcement action, the Commission shall prove a violation of a provision of law enforced by the Commission. The Commission may not base an enforcement action on, or execute a consent order based on acts or practices that are alleged to be inconsistent with any guidelines, general statements of policy, or similar guidance issued by the Commission unless the acts or practices violate a provision of law enforced by the Commission. Such guidelines, general statements of policy, or similar guidance may be used as evidence of compliance with the provision under which they were issued. Nothing in this section confers authority upon or negates existing authority of the Commission to issue such materials.

Section 7. Termination of inactive investigations

This section requires the Commission to terminate a covered investigation at the end of a six-month period beginning on the date that a covered verifiable written communication is sent by the Commission, unless the Commission sends additional covered verifiable written communications or the Commission votes to extend the covered investigation. The requirement does not apply if

the Commission, within thirty days of the expiration of the six-month period, determines that it did not send a verifiable written communication because of either excusable neglect or a circumstance beyond the control of the Commission making sending the communication impossible.

Section 8. Nonpublic collaborative discussions

This section authorizes a bipartisan majority of FTC Commissioners to hold a non-public meeting as long as no votes or agency actions are taken at the meeting, each person present at the meeting is a Commissioner or employee of the Commission, and an attorney from the Office of General Counsel of the Commission is present at the meeting. This section also requires that the Commission publish a disclosure of the meeting on its Internet website within two business days of the meeting that includes a list of meeting attendees and a summary of the matters discussed at the meeting, except for matters that the Commission has determined are not in the public interest to disclose. This section includes a provision preserving open meeting requirements for agency action. This section also includes definitions for terms used in the section.

Section 9. Annual plan required

This section requires the FTC to publish and submit to Congress on December 1 of each year, an annual plan for the next calendar year describing the projected activities of the Commission. The annual plan must include a description of the Commission's policy priorities, projected rulemakings, plans to develop guidelines, plans to restructure the Commission or establish or alter working groups, planned projects or initiatives, and any projected dates and timelines associated with those initiatives.

This section also requires the FTC to publish and submit to Congress an annual report on the Commission's enforcement actions involving alleged unfair or deceptive acts or practices targeting or significantly affecting persons who are 65 years of age or older. The report is required to include a description of the Commission's enforcement actions, the disposition of those enforcement actions, and the proportion of enforcement actions involving elder fraud as a percentage of all enforcement action relating to unfair or deceptive acts or practices. The report must also include workshops, guidance documents, working groups, and conferences related to unfair or deceptive acts or practices that target or significantly affect individuals who are 65 years of age or older.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

FEDERAL TRADE COMMISSION ACT

* * * * *

SEC. 5. (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and

upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall

have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or certified mail as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set

aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 19(a)(2), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the man-

date, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order,

with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(C)(1) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

[(n) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.]

(n) UNLAWFUL ACT OR PRACTICE.—

(1) SUBSTANTIAL INJURY REQUIRED.—

(A) IN GENERAL.—*The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.*

(B) SUBSTANTIAL INJURY TO CONSUMERS.—*For purposes of this subsection, an act or practice does not cause and is not likely to cause substantial injury to consumers if the in-*

jury or harm resulting from such act or practice is trivial or merely speculative. An injury may be sufficiently substantial if the injury does a small harm to a large number of people. An act or practice may be likely to cause a substantial injury if the act or practice raises a significant risk of concrete harm.

(C) CONSIDERATIONS REQUIRED.—In determining whether an act or practice causes or is likely to cause substantial injury to consumers under this subsection, the Commission shall consider the following:

(i) Whether the act or practice results in monetary harm.

(ii) Whether the act or practice results in unwarranted health or safety risk.

(iii) Whether the act or practice results only in emotional or other more subjective harm.

(2) NET EFFECTS OF INJURY REQUIRED.—

(A) CONSIDERATIONS REQUIRED.—An act or practice is not unfair unless the act or practice is injurious in its net effects. In determining whether an act or practice is injurious in its net effects, the Commission shall consider the following:

(i) The various costs for a remedy, including the costs to the parties directly before the Commission.

(ii) The burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation and capital formation, and other similar matters.

(B) CONSUMER DECISIONS.—The Commission may not second-guess the wisdom of particular consumer decisions, but may consider whether the act or practice unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decisionmaking.

(3) PUBLIC POLICY CONSIDERATIONS.—In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

(o) TERMINATION CLAUSE REQUIRED FOR CONSENT ORDERS.—Any consent order entered into by the Commission relating to alleged unfair or deceptive acts or practices by the person, partnership, or corporation, subject to the consent order shall include a termination clause that the consent order shall expire not later than 8 years after the date on which the consent order is entered into, unless the consent order relates to alleged fraud by the person, partnership, or corporation subject to the consent order or requires a time limit longer than 8 years based on the factors described in this subsection. In determining the time limit for any termination clause, the Commission shall consider each of the following factors:

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

(2) Whether there is reason to believe that the person, partnership, or corporation would continue to engage in activities that violate this section without the consent order.

(p) *CONSENT ORDER REVIEW.*—Any consent order entered into by the Commission that is unrelated to alleged fraud by the person, partnership, or corporation subject to the consent order and has a termination date more than 5 years after such consent order is entered into shall include a clause providing for Commission review of the consent order 5 years after the date on which the order is entered into. Such clause shall require the Commission to evaluate whether the consent order has achieved its initial purposes based on the factors described in subsection (o). The clause shall provide that if, based on such evaluation, the Commission determines that the consent order has achieved its purposes, the Commission shall terminate the consent order.

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

(r) *REPORT ON INVESTIGATIONS.*—

(1) *IN GENERAL.*—The Commission shall, on an annual basis, submit a report to Congress on investigations with respect to unfair or deceptive acts or practices, and with respect to unfair methods of competition, in or affecting commerce (within the meaning of subsection (a)(1)), detailing—

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

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

(C) the disposition of such investigations, if such investigations have concluded and resulted in official agency action; and

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

(i) sufficient to indicate the legal analysis supporting the Commission's decision not to continue such investigation; and

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

(2) *CONSENT REQUIRED.*—The Commission shall not include in a report required under paragraph (1) the description required under subparagraph (D) of such paragraph unless the Commission has—

(A) provided to each person, partnership, or corporation who is a subject of the investigation a notification containing the description to be included in the report; and

(B) obtained the consent of each such person, partnership, or corporation to the inclusion of the description in the report.

(3) *PRIVACY PROTECTION.*—The description required under paragraph (1)(D) shall not include the identity of any person, partnership, or corporation who is a subject of the investigation or any other information that identifies the person, partnership, or corporation.

* * * * *

SEC. 6A. ECONOMIC ANALYSIS REQUIRED.

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

(1) the Commission publishes any economic analysis or advice prepared by the Bureau of Economics of the Commission relating to such recommendation; or

(2) if no such economic analysis or advice was prepared, the Commission indicates, in writing as part of such recommendation, that no such analysis or advice was given.

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

(1) the recommendation for legislative or regulatory action is made as part of an appearance by a Commissioner before Congress;

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

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

(4) the recommendation is submitted to another Federal agency in response to a notice of proposed rulemaking, including comments to the Federal Communications Commission; or

(5) the recommendation is submitted to the United Kingdom, the European Union or members thereof, including recommendations to the European Parliament, the European Commission, or any data protection authorities of any member state with regard to cross-border data flows and other privacy and data security matters.

* * * * *

SEC. 18. (a)(1) Except as provided in subsection (h), the Commission may prescribe—

(A) interpretive rules and general statements of policy with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1) of this Act), and

(B) rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce (within the meaning of such section 5(a)(1)), except that the Commission shall not develop or promulgate any trade rule or regulation with regard to the regulation of the development and utilization of the standards and certification activities pursuant to this section. Rules under this subparagraph may include requirements prescribed for the purpose of preventing such acts or practices.

(2) The Commission shall have no authority under this Act, other than its authority under this section, to prescribe any rule with respect to unfair or deceptive acts or practices in or affecting com-

merce (within the meaning of section 5(a)(1)). The preceding sentence shall not affect any authority of the Commission to prescribe rules (including interpretive rules), and general statements of policy, with respect to unfair methods of competition in or affecting commerce.

(3)(A) *No guidelines, general statements of policy, or similar guidance related either to unfair methods of competition or to unfair or deceptive acts or practices, in or affecting commerce, issued by the Commission shall confer any rights upon any person, State, or locality, nor shall operate to bind the Commission or any person, State, or locality to the approach recommended in such guidelines, general statements of policy, or similar guidance. In any enforcement action, the Commission shall prove a violation of a provision of law enforced by the Commission. The Commission may not base an enforcement action on, or execute a consent order based on, acts or practices that are alleged to be inconsistent with any such guidelines, general statements of policy, or similar guidance, unless the acts or practices violate a provision of law enforced by the Commission.*

(B) *Compliance with any guidelines, general statement of policy, or similar guidance issued by the Commission may be used as evidence of compliance with the provision of law under which the guidelines, general statement of policy, or guidance was issued.*

(C) *Nothing in this paragraph shall be construed to confer any authority upon or negate any authority of the Commission to issue guidelines, general statements of policy, or similar guidance.*

(b)(1) When prescribing a rule under subsection (a)(1)(B) of this section, the Commission shall proceed in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), and shall also (A) publish a notice of proposed rulemaking stating with particularity the text of the rule, including any alternatives, which the Commission proposes to promulgate, and the reason for the proposed rule; (B) allow interested persons to submit written data, views, and arguments, and make all such submissions publicly available; (C) provide an opportunity for an informal hearing in accordance with subsection (c); and (D) promulgate, if appropriate, a final rule based on the matter in the rule-making record (as defined in subsection (e)(1)(B)), together with a statement of basis and purpose.

(2)(A) Prior to the publication of any notice of proposed rulemaking pursuant to paragraph (1)(A), the Commission shall publish an advance notice of proposed rulemaking in the Federal Register. Such advance notice shall—

(i) contain a brief description of the area of inquiry under consideration, the objectives which the Commission seeks to achieve, and possible regulatory alternatives under consideration by the Commission; and

(ii) invite the response of interested parties with respect to such proposed rulemaking, including any suggestions or alternative methods for achieving such objectives.

(B) The Commission shall submit such advance notice of proposed rulemaking to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives. The Commission may

use such additional mechanisms as the Commission considers useful to obtain suggestions regarding the content of the area of inquiry before the publication of a general notice of proposed rulemaking under paragraph (1)(A).

(C) The Commission shall, 30 days before the publication of a notice of proposed rulemaking pursuant to paragraph (1)(A), submit such notice to the Committee on Commerce, Science, and Transportation of the Senate and to the Committee on Energy and Commerce of the House of Representatives.

(3) The Commission shall issue a notice of proposed rulemaking pursuant to paragraph (1)(A) only where it has reason to believe that the unfair or deceptive acts or practices which are the subject of the proposed rulemaking are prevalent. The Commission shall make a determination that unfair or deceptive acts or practices are prevalent under this paragraph only if—

(A) it has issued cease and desist orders regarding such acts or practices, or

(B) any other information available to the Commission indicates a widespread pattern of unfair or deceptive acts or practices.

(c) The Commission shall conduct any informal hearings required by subsection (b)(1)(c) of this section in accordance with the following procedure:

(1)(A) The Commission shall provide for the conduct of proceedings under this subsection by hearing officers who shall perform their functions in accordance with the requirements of this subsection.

(B) The officer who presides over the rulemaking proceedings shall be responsible to a chief presiding officer who shall not be responsible to any other officer or employee of the Commission. The officer who presides over the rulemaking proceeding shall make a recommended decision based upon the findings and conclusions of such officer as to all relevant and material evidence, except that such recommended decision may be made by another officer if the officer who presided over the proceeding is no longer available to the Commission.

(C) Except as required for the disposition of ex parte matters as authorized by law, no presiding officer shall consult any person or party with respect to any fact in issue unless such officer gives notice and opportunity for all parties to participate.

(2) Subject to paragraph (3) of this subsection, an interested person is entitled—

(A) to present his position orally or by documentary submissions (or both), and

(B) if the Commission determines that there are disputed issues of material fact it is necessary to resolve, to present such rebuttal submissions and to conduct (or have conducted under paragraph (3)(B)) such cross-examination of persons as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to such issues.

(3) The Commission may prescribe such rules and make such rulings concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay. Such rules or rulings may include (A) imposition of reasonable time limits on each interested person's

oral presentations, and (B) requirements that any cross-examination to which a person may be entitled under paragraph (2) be conducted by the Commission on behalf of that person in such manner as the Commission determines (i) to be appropriate, and (ii) to be required for a full and true disclosure with respect to disputed issues of material fact.

(4)(A) Except as provided in subparagraph (B), if a group of persons each of whom under paragraphs (2) and (3) would be entitled to conduct (or have conducted) cross-examination and who are determined by the Commission to have the same or similar interests in the proceeding cannot agree upon a single representative of such interests for purposes of cross-examination, the Commission may make rules and rulings (i) limiting the representation of such interest, for such purposes, and (ii) governing the manner in which such cross-examination shall be limited.

(B) When any person who is a member of a group with respect to which the Commission has made a determination under subparagraph (A) is unable to agree upon group representation with the other members of the group, then such person shall not be denied under the authority of subparagraph (A) the opportunity to conduct (or have conducted) cross-examination as to issues affecting his particular interests if (i) he satisfies the Commission that he has made a reasonable and good faith effort to reach agreement upon group representation with the other members of the group and (ii) the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative.

(5) A verbatim transcript shall be taken of any oral presentation, and cross-examination, in an informal hearing to which this subsection applies. Such transcript shall be available to the public.

(d)(1) The Commission's statement of basis and purpose to accompany a rule promulgated under subsection (a)(1)(B) shall include (A) a statement as to the prevalence of the acts or practices treated by the rule; (B) a statement as to the manner and context in which such acts or practices are unfair or deceptive; and (C) a statement as to the economic effect of the rule, taking into account the effect on small business and consumers.

(2)(A) The term "Commission" as used in this subsection and subsections (b) and (c) includes any person authorized to act in behalf of the Commission in any part of the rulemaking proceeding.

(B) A substantive amendment to, or repeal of, a rule promulgated under subsection (a)(1)(B) shall be prescribed, and subject to judicial review, in the same manner as a rule prescribed under such subsection. An exemption under subsection (g) shall not be treated as an amendment or repeal of a rule.

(3) When any rule under subsection (a)(1)(B) takes effect a subsequent violation thereof shall constitute an unfair or deceptive act or practice in violation of section 5(a)(1) of this Act, unless the Commission otherwise expressly provides in such rule.

(e)(1)(A) Not later than 60 days after a rule is promulgated under subsection (a)(1)(B) by the Commission, any interested person (including a consumer or consumer organization) may file a petition, in the United States Court of Appeals for the District of Columbia circuit or for the circuit in which such person resides or has his principal place of business, for judicial review of such rule. Copies

of the petition shall be forthwith transmitted by the clerk of the court to the Commission or other officer designated by it for that purpose. The provisions of section 2112 of title 28, United States Code, shall apply to the filing of the rulemaking record of proceedings on which the Commission based its rule and to the transfer of proceedings in the courts of appeals.

(B) For purposes of this section, the term “rulemaking record” means the rule, its statement of basis and purpose, the transcript required by subsection (c)(5), any written submissions, and any other information which the Commission considers relevant to such rule.

(2) If the petitioner or the Commission applies to the court for leave to make additional oral submissions or written presentations and shows to the satisfaction of the court that such submissions and presentations would be material and that there were reasonable grounds for the submissions and failure to make such submissions and presentations in the proceeding before the Commission, the court may order the Commission to provide additional opportunity to make such submissions and presentations. The Commission may modify or set aside its rule or make a new rule by reason of the additional submissions and presentations and shall file such modified or new rule, and the rule’s statement of basis of purpose, with the return of such submissions and presentations. The court shall thereafter review such new or modified rule.

(3) Upon the filing of the petition under paragraph (1) of this subsection, the court shall have jurisdiction to review the rule in accordance with chapter 7 of title 5, United States Code, and to grant appropriate relief, including interim relief, as provided in such chapter. The court shall hold unlawful and set aside the rule on any ground specified in subparagraphs (A), (B), (C), or (D) of section 706(2) of title 5, United States Code (taking due account of the rule of prejudicial error), or if—

(A) the court finds that the Commission’s action is not supported by substantial evidence in the rulemaking record (as defined in paragraph (1)(B) of this subsection) taken as a whole, or

(B) the court finds that—

(i) a Commission determination under subsection (c) that the petitioner is not entitled to conduct cross-examination or make rebuttal submissions, or

(ii) a Commission rule or ruling under subsection (c) limiting the petitioner’s cross-examination or rebuttal submissions,

has precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole.

The term “evidence,” as used in this paragraph, means any matter in the rulemaking record.

(4) The judgment of the court affirming or setting aside, in whole or in part, any such rule shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification, as provided in section 1254 of title 28, United States Code.

(5)(A) Remedies under the preceding paragraphs of this subsection are in addition to and not in lieu of any other remedies provided by law.

(B) The United States Courts of Appeals shall have exclusive jurisdiction of any action to obtain judicial review (other than in an enforcement proceeding) of a rule prescribed under subsection (a)(1)(B), if any district court of the United States would have had jurisdiction of such action but for this subparagraph. Any such action shall be brought in the United States Court of Appeals for the District of Columbia circuit, or for any circuit which includes a judicial district in which the action could have been brought but for this subparagraph.

(C) A determination, rule, or ruling of the Commission described in paragraph (3)(B) (i) or (ii) may be reviewed only in a proceeding under this subsection and only in accordance with paragraph (3)(B). Section 706(2)(E) of title 5, United States Code, shall not apply to any rule promulgated under subsection (a)(1)(B). The contents and adequacy of any statement required by subsection (b)(1)(D) shall not be subject to judicial review in any respect.

(f) DEFINITIONS OF BANKS, SAVINGS AND LOAN INSTITUTIONS, AND FEDERAL CREDIT UNIONS.—

(1)

(2) DEFINITION.—For purposes of this Act, the term “bank” means—

(A) national banks and Federal branches and Federal agencies of foreign banks;

(B) member banks of the Federal Reserve System (other than national banks), branches and agencies of foreign banks (other than Federal branches, Federal agencies, and insured State branches of foreign banks), commercial lending companies owned or controlled by foreign banks, and organizations operating under section 25 or 25A of the Federal Reserve Act; and

(C) banks insured by the Federal Deposit Insurance Corporation (other than banks referred to in subparagraph (A) or (B)) and insured State branches of foreign banks.

(3) For purposes of this Act, the term “savings and loan institution” has the same meaning as in section 3 of the Federal Deposit Insurance Act.

(4) For purposes of this Act, the term “Federal credit union” has the same meaning as in sections 120 and 206 of the Federal Credit Union Act (12 U.S.C. 1766 and 1786).

The terms used in this paragraph that are not defined in the Federal Trade Commission Act or otherwise defined in section 3(s) of the Federal Deposit Insurance Act (12 U.S.C. 1813(s)) shall have the meaning given to them in section 1(b) of the International Banking Act of 1978 (12 U.S.C. 3101).

(g)(1) Any person to whom a rule under subsection (a)(1)(B) of this section applies may petition the Commission for an exemption from such rule.

(2) If, on its own motion or on the basis of a petition under paragraph (1), the Commission finds that the application of a rule prescribed under subsection (a)(1)(B) to any person or class or persons is not necessary to prevent the unfair or deceptive act or practice to which the rule relates, the Commission may exempt such person or class from all or part of such rule. Section 553 of title 5, United States Code, shall apply to action under this paragraph.

(3) Neither the pendency of a proceeding under this subsection respecting an exemption from a rule, nor the pendency of judicial proceedings to review the Commission's action or failure to act under this subsection, shall stay the applicability of such rule under subsection (a)(1)(B).

(h) The Commission shall not have any authority to promulgate any rule in the children's advertising proceeding pending on the date of the enactment of the Federal Trade Commission Improvements Act of 1980 or in any substantially similar proceeding on the basis of a determination by the Commission that such advertising constitutes an unfair act or practice in or affecting commerce.

(i)(1) For purposes of this subsection, the term "outside party" means any person other than (A) a Commissioner; (B) an officer or employee of the Commission; or (C) any person who has entered into a contract or any other agreement or arrangement with the Commission to provide any goods or services (including consulting services) to the Commission.

(2) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall authorize the Commission or any Commissioner to meet with any outside party concerning any rulemaking proceeding of the Commission. Such rule shall provide that—

(A) notice of any such meeting shall be included in any weekly calendar prepared by the Commission; and

(B) a verbatim record or a summary of any such meeting, or of any communication relating to any such meeting, shall be kept, made available to the public, and included in the rulemaking record.

(j) Not later than 60 days after the date of the enactment of the Federal Trade Commission Improvements Act of 1980, the Commission shall publish a proposed rule, and not later than 180 days after such date of enactment the Commission shall promulgate a final rule, which shall prohibit any officer, employee, or agent of the Commission with any investigative responsibility or other responsibility relating to any rulemaking proceeding within any operating bureau of the Commission, from communicating or causing to be communicated to any Commissioner or to the personal staff of any Commissioner any fact which is relevant to the merits of such proceeding and which is not on the rulemaking record of such proceeding, unless such communication is made available to the public and is included in the rulemaking record. The provisions of this subsection shall not apply to any communication to the extent such communication is required for the disposition of ex parte matters as authorized by law.

* * * * *

SEC. 20. (a) For purposes of this section:

(1) The terms "civil investigative demand" and "demand" mean any demand issued by the Commission under subsection (c)(1).

(2) The term "Commission investigation" means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce

(within the meaning of section 5(a)(1)) or in any antitrust violations.

(3) The term “Commission investigator” means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)) or any provisions relating to antitrust violations.

(4) The term “custodian” means the custodian or any deputy custodian designated under section 21(b)(2)(A).

(5) The term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(6) The term “person” means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.

(7) The term “violation” means any act or omission constituting an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1)) or any antitrust violation.

(8) The term “antitrust violation” means—

(A) any unfair method of competition (within the meaning of section 5(a)(1));

(B) any violation of the Clayton Act or of any other Federal statute that prohibits, or makes available to the Commission a civil remedy with respect to, any restraint upon or monopolization of interstate or foreign trade or commerce;

(C) with respect to the International Antitrust Enforcement Assistance Act of 1994, any violation of any of the foreign antitrust laws (as defined in section 12 of such Act) with respect to which a request is made under section 3 of such Act; or

(D) any activity in preparation for a merger, acquisition, joint venture, or similar transaction, which if consummated, may result in any such unfair method of competition or in any such violation.

(b) For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), or to antitrust violations, the Commission may, before the institution of any proceedings under this Act, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2) Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

(3) Each civil investigative demand for the production of documentary material shall—

(A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available.

(4) Each civil investigative demand for the submission of tangible things shall—

(A) describe each class of tangible things to be submitted under the demand with such definiteness and certainty as to permit such things to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted; and

(C) identify the custodian to whom such things shall be submitted.

(5) Each civil investigative demand for written reports or answers to questions shall—

(A) propound with definiteness and certainty the reports to be produced or the questions to be answered;

(B) prescribe a date or dates at which time written reports or answers to questions shall be submitted; and

(C) identify the custodian to whom such reports or answers shall be submitted.

(6) Each civil investigative demand for the giving of oral testimony shall—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted.

(7)(A) Any civil investigative demand may be served by any Commission investigator at any place within the territorial jurisdiction of any court of the United States.

(B) Any such demand or any enforcement petition filed under this section may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation.

(C) To the extent that the courts of the United States have authority to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such district court would have if such person were personally within the jurisdiction of such district court.

(8) Service of any civil investigative demand or any enforcement petition filed under this section may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering a duly executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of such partnership, corporation, association, or other legal entity, or to any agent of such partnership, corporation, association, or other legal entity authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or other legal entity;

(B) delivering a duly executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or other legal entity to be served; or

(C) depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or other legal entity at its principal office or place of business.

(9) Service of any civil investigative demand or of any enforcement petition filed under this section may be made upon any natural person by—

(A) delivering a duly executed copy of such demand or petition to the person to be served; or

(B) depositing a duly executed copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

(10) A verified return by the individual serving any civil investigative demand or any enforcement petition filed under this section setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or enforcement petition.

(11) The production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(12) The submission of tangible things in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand and in the possession, custody, or control of the person to whom the demand is directed have been submitted to the custodian.

(13) Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be

submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(14)(A) Any Commission investigator before whom oral testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by any individual acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. After the testimony is fully transcribed, the Commission investigator before whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(B) Any Commission investigator before whom oral testimony is to be taken shall exclude from the place where the testimony is to be taken all other persons except the person giving the testimony, his attorney, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(C) The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the judicial district of the United States in which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the Commission investigator before whom the oral testimony of such person is to be taken and such person.

(D)(i) Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney. The attorney may advise such person, in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

(ii) Such person or attorney may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not himself or through his attorney otherwise interrupt the oral examination. If such person refuses to answer any question, the Commission may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question.

(iii) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18, United States Code.

(E)(i) After the testimony of any witness is fully transcribed, the Commission investigator shall afford the witness (who may be accompanied by an attorney) a reasonable opportunity to examine the transcript. The transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make

shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign.

(ii) If the transcript is not signed by the witness during the 30-day period following the date upon which the witness is first afforded a reasonable opportunity to examine it, the Commission investigator shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

(F) The Commission investigator shall certify on the transcript that the witness was duly sworn by him and that the transcript is a true record of the testimony given by the witness, and the Commission investigator shall promptly deliver the transcript or send it by registered or certified mail to the custodian.

(G) The Commission investigator shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Commission may for good cause limit such witness to inspection of the official transcript of his testimony.

(H) Any witness appearing for the taking of oral testimony pursuant to a civil investigative demand shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

(d) Materials received as a result of a civil investigative demand shall be subject to the procedures established in section 21.

(e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section. All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

(f)(1) Not later than 20 days after the service of any civil investigative demand upon any person under subsection (c), or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Commission investigator named in the demand, such person may file with the Commission a petition for an order by the Commission modifying or setting aside the demand.

(2) The time permitted for compliance with the demand in whole or in part, as deemed proper and ordered by the Commission, shall not run during the pendency of such petition at the Commission, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of the demand to

comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.

(g) At any time during which any custodian is in custody or control of any documentary material, tangible things, reports, answers to questions, or transcripts of oral testimony given by any person in compliance with any civil investigative demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section or section 21.

(h) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28, United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of such court.

(i) Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information, under authority of this Act or any other provision of law, unless such subpoena or demand for information is signed by a Commissioner acting pursuant to a Commission resolution. The Commission shall not delegate the power conferred by this section to sign subpoenas or demands for information to any other person.

(j) *TERMINATION OF INACTIVE INVESTIGATION.*—

(1) *IN GENERAL.*—*Except as provided in paragraph (2), a covered investigation shall terminate at the expiration of the six-month period beginning on the date on which a covered verifiable written communication is sent by the Commission.*

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

(A) *an additional covered verifiable written communication is sent by the Commission during the period described in paragraph (1);*

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

(C) *the Commission determines in a vote, within 30 days after the expiration of such period, that the Commission did not send a covered verifiable written communication during such period because of excusable neglect or a circumstance beyond the control of the Commission that rendered notification during such period impossible.*

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

(A) *COVERED INVESTIGATION.*—*The term “covered investigation” means an investigation conducted pursuant to this section in which the Commission has notified the person, partnership, or corporation that is the subject of the investigation by verifiable written communication.*

(B) *COVERED VERIFIABLE WRITTEN COMMUNICATION.*—*The term “covered verifiable written communication” means a verifiable written communication relating to an investigation conducted pursuant to this section that is sent to the person, partnership, or corporation that is the subject of the investigation.*

[(j)] (k) The provisions of this section shall not—

(1) apply to any proceeding under section 5(b), any proceeding under section 11(b) of the Clayton Act (15 U.S.C. 21(b)), or any adjudicative proceeding under any other provision of law; or

(2) apply to or affect the jurisdiction, duties, or powers of any agency of the Federal Government, other than the Commission.

* * * * *

SEC. 27. NONPUBLIC COLLABORATIVE DISCUSSIONS.

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

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

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

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

(b) *DISCLOSURE OF NONPUBLIC COLLABORATIVE DISCUSSIONS.*—Not later than 2 business days after the conclusion of a meeting held under subsection (a), the Commission shall publish on its Internet website a disclosure of such meeting, including—

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

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

(c) *PRESERVATION OF OPEN MEETINGS REQUIREMENTS FOR AGENCY ACTION.*—Nothing in this section shall alter or supersede section 552b of title 5, United States Code, with respect to any meeting of Commissioners other than a meeting held under subsection (a).

(d) *DEFINITIONS.*—In this section:

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

(2) *BIPARTISAN MAJORITY.*—The term “bipartisan majority” means, when used with respect to a group of Commissioners, that such group—

(A) is a group of two or more Commissioners; and

(B) includes, for each political party of which any Commissioner is a member, at least 1 Commissioner who is a member of such political party, and, if any Commissioner has no political party affiliation, at least 1 unaffiliated Commissioner.

SEC. 28. ANNUAL PLAN REQUIRED.

Not later than December 1 of each year, the Commission shall publish and submit to the Committees on the Judiciary and Commerce, Science, and Transportation of the Senate and the Committees on the Judiciary and Energy and Commerce of the House of Representatives a plan for the next calendar year describing the projected activities of the Commission, including each of the following:

(1) The policy priorities of the Commission.

(2) Any rulemakings projected to be commenced.

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

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

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

(6) *With respect to any activities of the Commission, including workshops, conferences, reports, working groups, guidance documents, or rulemakings, that relate specifically to combating unfair or deceptive acts or practices that target or significantly affect individuals who are 65 years of age or older, a description of how such activities will address such acts or practices.*

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

SEC. 29. REPORT ON ELDER FRAUD REQUIRED.

Not later than January 31 of each year, the Commission shall publish and submit to the Committee on Commerce, Science, and Transportation of the Senate and the Committee on Energy and Commerce of the House of Representatives a report on the Commission's enforcement actions to address unfair or deceptive acts or practices that may have targeted or significantly affected individuals who are 65 years of age or older during the previous calendar year, including each of the following:

(1) A brief description of each such enforcement action.

(2) The disposition of such enforcement actions, broken down by category.

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

SEC. [28.] 30. This Act may be cited as the "Federal Trade Commission Act".

DISSENTING VIEWS

We cannot support H.R. 5510, FTC Process and Transparency Reform Act of 2016, as reported by the Committee on Energy and Commerce on July 14, 2016. This bill is a systematic attempt to dismantle the primary agency, the Federal Trade Commission, responsible for protecting consumers from unscrupulous actors in the marketplace.

Our views on specific provisions in H.R. 5510 and the Committee's consideration of the bill are set forth below.

I. H.R. 5510, AS REPORTED

This bill contravenes the FTC's consumer protection mission. This bill pits the interests of industry against the interests of consumers, and under the bill consumers lose. But it does not have to be one or the other. Consumer protection and innovation can and should go hand-in-hand.

Section two of the bill codifies select portions of the FTC's unfairness statement, which was published in 1980. But the portions that would be codified in section two would make it very difficult for the FTC to continue helping consumers by preventing harms. The core of FTC's mission is laid out in Section 5 of the FTC Act, which states that the Commission is empowered and directed to prevent the use of unfair methods of competition and unfair or deceptive acts or practices. But this bill would obliterate that statutory directive and needlessly put consumers at risk. Rather than provide more clarity, this bill would shake up the system by essentially throwing out more than 30 years' worth of experience with the standard as it is.

Section three of the bill would place an eight year cap on consent decrees used in FTC's consumer protection enforcement actions and requires review of FTC consent decrees after five years in most cases. Currently, most consent decrees, or portions thereof, are generally in place for 20 years. Instead of settling cases through consent decrees negotiated between the FTC and a company, this time limit may lead to more cases going to court where the penalties imposed on a company could be much harsher. Moreover, since the FTC cannot impose financial penalties unless that bad actor is under a consent decree, this provision ultimately harms consumers by limiting the Commission's ability to prevent repeat offenses.

Section four of the bill would require FTC to submit an annual report to Congress that includes the number of investigations begun, the 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. For each investigation summarized, FTC would be required to notify each party that had been investigated

and obtain that party's consent to the inclusion of a description of the investigation in the report. This report is a waste of Commission resources that would harm consumers without much benefit to industry. FTC cannot pursue investigations of all the allegations of unfair or deceptive practices it receives. The Commission must prioritize which investigations to continue based on a number of factors, such as emerging trends or lack of resources. Those explanations do nothing to help businesses reading these reports make better decisions about their business practices. At the same time, the report forces the Commission to redirect resources from protecting consumers to completing the report, leaving consumers at risk.

Section five of the bill would require the inclusion of an economic analysis for any legislative or regulatory recommendations made by FTC, or a statement that no economic analysis was conducted. This section also includes certain exceptions to the requirement. This provision is clearly not intended to increase the role of the Bureau of Economics or to ensure that more thought is given to the costs of agency actions. The economic analysis requirement applies to recommendations the FTC makes to others, not to actions taken by the FTC itself. It is a waste of time and resources with no benefit.

Moreover, the Commission legislative recommendations are most often made to Congress, and the Commission rarely provides completely unsolicited advice to Congress anyway. Regardless, the bill specifically exempts recommendations to Congress from this provision further proving this provision has no positive value.

Section six of the bill would prohibit FTC from basing any enforcement action on guidelines. The FTC does not use guidance in place of statutes in the first place, so that portion of this provision is wholly unnecessary. In addition, section six allows companies to use compliance with FTC guidelines as evidence of compliance with a statute. As the majority recognizes, nonbinding guidelines are not the same as laws. Yet this bill allows companies to evade accountability by showing that they complied with the same nonbinding guidance instead of having to prove that they complied with actual law, even if the guidance used is outdated, superseded by updated guidance, or otherwise inapplicable. Moreover, these companies would not have to prove that they relied on the guidance at the time they violated the law. In fact, they do not even have to show they knew about the guidance. It allows them instead to try to justify their actions after the fact by finding any one-off statement or comment to argue that they are not liable. This provision may result in the Commission issuing less guidance, which would harm companies trying to comply with the law.

Section seven of the bill would require that an FTC investigation, in which the person or entity being investigated has been notified of the existence of the investigation, be automatically terminated after six months if there is no communication to the person being investigated, unless FTC votes to extend the investigation. The commission may also vote to extend the investigation within 30 days after the six-month time limit runs, if it determines that the expiration of the time was due to excusable neglect or a circumstance beyond the control of the commission. This provision is a solution in search of a problem. This busy work for the agency

could harm businesses by reminding the public that they are still under investigation. Also, when investigations do take longer than normal, the targets of the investigations can be the cause of delays in investigations. Additionally, it will harm consumers by hampering the FTC's ability to reprioritize their investigations in the event of more immediate harms. For example, after natural disasters, such as Hurricane Katrina, scammers and fraudsters come out of the woodwork to prey on consumers in times they are most vulnerable. By automatically closing cases after six months, this provision prevents the FTC from putting some investigations on hold to address these emergency situations.

Section eight of the bill 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. Contrary to the name of this bill, section eight could reduce transparency. This provision would exclude the FTC from a government transparency law, written in 1976, applying to all commissions. Congress may not want to carve out one agency from an open government law that applies to all government commissions until it can consider how such a change in law affects all of the other commissions.

Section nine of the bill would require FTC to publish an annual plan of its projected activities for the year. It would also require a separate report on enforcement actions involving elder fraud for the previous calendar year. This section may seem innocuous, but the Commission expressed its concerns about being held to the specifics of the report and not being able to stay flexible and adapt quickly. FTC must be able to turn on a dime and attack new creative ways scammers try to deceive consumers. Moreover, the annual report on senior fraud seems intended to pressure the FTC to focus its enforcement on cases that affect seniors only, not the population as a whole, including cases regarding data security and data breaches. The Commission testified at the hearing of the Subcommittee on Commerce, Manufacturing, and Trade that "older Americans are not necessarily defrauded at higher rates than younger consumers" but that . . . "certain types of scams are more likely to impact older Americans, such as scams related to health care." FTC should be able to have the freedom and flexibility to protect seniors as well as all Americans from unfair or deceptive acts or practices.

H.R. 5510 does not promote innovation. Instead, it makes consumers less confident that they are being protected and therefore less likely to trust the newest technologies. This bill would strip the FTC of even its limited authorities.

II. COMMITTEE CONSIDERATION

A. AMENDMENTS OFFERED IN SUBCOMMITTEE

The Subcommittee on Commerce, Manufacturing, and Trade held a markup of the discussion draft of the bill on June 8–9, 2016. During consideration of the discussion draft, Representative Burgess (R-TX) offered an amendment in the nature of a substitute, to which three amendments were offered by Democratic members.

Representative Butterfield (D–NC) offered an amendment that created an exception to the economic analysis requirement of the bill for recommendations requested by and submitted to members of Congress. The amendment was adopted by a voice vote.

Representative Yvette Clarke (D–NY) offered and withdrew an amendment that would have created an exception to the bill’s eight-year cap on consent decrees for enforcement cases relating to unfair or deceptive practices affecting seniors. The majority committed to work with Representative Clarke on her amendment at full committee markup.

Representative Schakowsky (D–IL) offered an amendment creating an exception to the requirement that FTC prove concrete harm in data security and privacy cases, including cases against companies that monitor users through internet-connected cameras without disclosure to the user. The amendment was rejected along party lines by a vote of 12–8.

Representative Burgess’s amendment in the nature of a substitute, as amended by the Butterfield amendment, was adopted by voice vote. Ultimately, the bill was favorably reported out of the subcommittee by a vote of 12 to 8, with no Democratic members supporting final passage.

B. AMENDMENTS OFFERED IN FULL COMMITTEE

On Jul 12–14, 2016, the full Committee on Energy and Commerce considered H.R. 5510, FTC Process and Transparency Reform Act of 2016. Three amendments were adopted at Full Committee markup. Representative Burgess offered an amendment that made technical changes to section five of the bill, which requires an economic analysis for legislative and regulatory recommendations submitted by the Commission. Representative Butterfield (D–NC) offered an amendment that created an exception to the economic analysis requirement for FTC comments to other federal agencies. Representative Tonko (D–NY) offered an amendment that created an exception to the economic analysis requirement for recommendations made to the European Union, its member countries, and the United Kingdom.

In addition, seven amendments were offered by minority members, which were voted down along party lines. Representative McNerney (D–CA) offered an amendment that would have lifted the common carrier exemption that currently limits FTC’s jurisdiction over communications companies subject to FCC jurisdiction. Ranking Member Pallone (D–NJ) offered an amendment that would have given FTC authority to promulgate rules in accordance with the Administrative Procedure Act regarding consumer privacy and data security. These amendments would have given the Commission the ability to ensure that consumers across the internet are adequately protected with regard to privacy and data security.

An amendment offered by Representative Rush (D–IL) would have lifted the non-profit exemption that currently limits FTC’s ability to pursue unfair and deceptive practices by nonprofits and sham charities. As with the amendments offered by Ranking Member Pallone and Representative McNerney, this amendment would have expanded the Commission’s authority to protect consumers from unfair and deceptive acts and practices.

Representative Schakowsky (D-IL) offered an amendment that would have created an exception to the requirement in section two of the bill that FTC prove a concrete harm for data security and privacy cases, including peeping tom cases. Representative McNerney offered another amendment, which would have created an exception to the eight-year cap on consent decrees for unfair or deceptive practices that affect veterans. Representative Yvette Clarke (D-NY) offered an amendment, which would have created an exception to the eight-year cap on consent decrees for unfair or deceptive practices that affect minorities. Representative Kennedy (D-MA) offered an amendment intended to preserve the Commission's authority to act in the interest of consumers.

The bill was favorably reported out of the committee by a vote of 30-20, basically on party lines.

For the reasons stated above, we dissent from the views contained in the Committee's report.

FRANK PALLONE, Jr.,
Ranking Member.

JAN SCHAKOWSKY,
Ranking Member, Sub-
committee on Commerce,
Manufacturing, and
Trade.

