WILMERHALE

House Subcommittee Pushes FTC Overhaul, Restricting Investigations and Consent Orders

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In an effort to “reduce some of the ambiguous legal liability” that exists under Section 5 of the FTC Act, the House Energy and Commerce trade subcommittee advanced eleven legislative initiatives consolidated into four bills to “modernize” the Federal Trade Commission last Thursday. Three bills give the FTC additional authority to police "gag clauses" and online ticket sales and to standardize "Made in the USA" labeling. The final bill—the FTC Process and Transparency Reform Act—contains eight Republican-sponsored reform bills examined at a subcommittee hearing in late May.

These reform bills could significantly alter the FTC's responsibilities under the FTC Act, and they include the following proposals:

- H.R. 5093, the Technological Innovation through Modernizing Enforcement (TIME) Act;
- H.R. 5097, the Start Taking Action on Lingering Liabilities (STALL) Act;
- H.R. 5098, the FTC Robust Elderly Protections and Organizational Requirements to Track Scams Act;
- H.R. 5109, the Clarifying Legality and Enforcement Action Reasoning (CLEAR) Act;
- H.R. 5115, the Statement on Unfairness Reinforcement and Emphasis Act (SURE) Act;
- H.R. 5116, the Freeing Responsible and Effective Exchanges (FREE) Act;
- H.R. 5118, the Solidifying Habitual and Institutional Explanations of Liability and Defenses (SHIELD) Act; and
- H.R. 5136, the Revealing Economic Conclusions for Suggestions (RECS) Act.

In brief, these measures impose restrictions on FTC investigations and consent orders, establish a "safe harbor" for compliance with FTC guidance, and require additional reports and documentation from the FTC. A more detailed breakdown of the eight substantive sections of the FTC Process and Transparency Reform Act follows.

Codify the FTC's 1980 Policy Statement on Unfairness: Section 2 captures the SURE Act, which would amend the FTC Act to codify the FTC's test for substantial injury from its Unfairness Policy Statement. The FTC would be statutorily required to consider whether an act or practice results in monetary harm, unwarranted health or safety risks, or "only in emotional or other more subjective harm," which would not qualify. Further, acts or practices may not be deemed unfair unless the FTC can conclude they are injurious in their "net effects." In written testimony last month, Chairwoman Ramirez cautioned that this codification effort could undermine the FTC's efforts "to prevent likely substantial harm before it occurs."

Limit FTC Consent Orders to Eight-Year Durations: Section 3 incorporates the TIME Act and imposes an eight-year limit on most FTC consent orders. In determining the time limit for any consent order, the FTC shall consider: (1) the impact of technological progress on the continuing relevance of the order; and (2) whether there is reason to believe the entity will continue to engage in the alleged activities after eight years. No order may last longer than eight years unless it relates to alleged fraud and requires a longer time frame based on these two factors. Moreover, companies subject to consent orders lasting longer than five years (including existing consent orders) may petition the FTC to evaluate whether provisions in the consent order continue to serve their initial purposes. Consent orders may be terminated early based upon this evaluation.

Report on FTC Unfair and Deceptive Investigations Annually: Section 4 captures the CLEAR Act, which would require the FTC to publish an annual report to Congress on its consumer protection investigations. This report would include information about both open and closed matters. Specifically, the report must detail: (1) the number of investigations begun by the FTC; (2) the number of investigations closed with no official action, (3) the disposition of any investigation resulting in agency action, and (4) for any closed action, a description sufficient "to indicate the legal analysis supporting the Commission's decision not to continue such investigation, and the industry sectors of the entities subject to each such investigation." Privacy protections would be put in place to ensure no description identifies a person subject to an investigation.

Require FTC Recommendations Be Supported by Economic Analysis: Section 5 describes the RECS Act, which would amend the FTC Act to require that any legislative or regulatory recommendation sought by the Commission to be accompanied by an economic analysis from the Bureau of Economics. This analysis must: (1) be sufficient to demonstrate that the FTC has identified a problem it determines should be addressed; (2) include the rationale for the FTC's determination that private markets or public institutions could not adequately address the issue; and (3) be supported by on a determination that the benefits of the recommended action outweigh its costs.

Clarify that FTC Policy Guidance Does Not Provide an Independent Basis of Liability: Section 6 incorporates the SHIELD Act, which would limit the ability of the FTC to bring an enforcement action based solely on a Respondent’s practices being inconsistent with FTC-issued industry guidance. Further, companies could use compliance with FTC guidance as evidence of legal compliance, creating a "safe harbor" of sorts. While the bill states that it is not to construed to "negate any authority of the Commission to issue guidelines, general statements of policy, or similar guidance," Commissioner Ramirez has expressed concern that this provision would preclude the ability of the FTC to consider "the law's applicability to the specific facts and circumstances of the case" and would chill the FTC's efforts to provide informal guidance to industry through workshops and reports.

T**erminate Investigations After Six Months:** Section 7 captures the STALL Act, requiring the termination of an FTC investigation if the FTC fails to contact the target of an investigation with a "verifiable" written communication every six months or unless the FTC formally votes to continue the investigation.

Permit Closed-Door Meetings with a Bipartisan Majority of FTC Commissioners: Section 8 incorporates the FREE Act, which would permit a bipartisan majority of commissioners to hold a closed-door meeting to discuss official business. These meetings would be subject to transparency requirements provided by the Sunshine Act, and the FTC also would be required to publish online a list of any attendees to these meetings.

Require an Annual Report on Elder Fraud: Finally, Section 9 would require the FTC to submit an annual report to Congress that details the Commission's policy and rulemaking work with respect to elder fraud. Commissioner Ramirez has suggested that while the FTC is "happy to continue to keep the Subcommittee apprised of Commission activities" and would support "broadening the report to capture all of what the FTC is doing on behalf of seniors," she is concerned that the specification required by Section 9 could "impair the FTC's ability to respond to emergent issues, or would not produce helpful additional information."

The markup had limited bipartisan support, and it is unclear whether or when the full committee will take up these measures.