

Calendar No. 316

114TH CONGRESS }
1st Session }

SENATE

{ REPORT
114-175

CONSUMER REVIEW FREEDOM ACT OF 2015

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND
TRANSPORTATION

ON

S. 2044



DECEMBER 8, 2015.—Ordered to be printed

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SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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Mr. THUNE, from the Committee on Commerce, Science, and
Transportation, submitted the following

R E P O R T

[To accompany S. 2044]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2044) to prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes, having considered the same, reports favorably thereon with an amendment (in the nature of a substitute) and recommends that the bill (as amended) do pass.

PURPOSE OF THE BILL

The purpose of S. 2044, the Consumer Review Freedom Act of 2015, is to prohibit the use of certain clauses in form contracts that restrict the ability of a consumer to communicate regarding the goods or services offered in interstate commerce that were the subject of the contract, and for other purposes.

BACKGROUND AND NEEDS

Consumers increasingly rely on websites and other platforms that allow consumers to share information about goods and services and, as a result, to benefit from the experiences of others. In particular, consumer reviews have become a powerful informational tool because consumers place a high value on the truthful reviews of other consumers. As a result, businesses are at times frustrated by what they perceive as unfair criticism and some have turned to questionable legal remedies in an effort to protect their reputations, including non-negotiable terms in form contracts that prohibit consumers from publicly “disparaging” a business. Such

clauses go beyond protecting businesses from defamation because they also restrict or bar truthful statements, often by imposing financial penalties if the provision is violated. For example, one online retailer assessed a penalty of \$3,500 against a consumer for a truthful, yet negative, review. When the consumer refused to pay the penalty, the online retailer reported the penalty as a “debt” to credit agencies. Another online retailer prohibited consumers from even proposing to make negative public statements about the retailer. When one consumer did not receive her order from the online retailer, she informed the retailer she would contact her credit card company. In response, the retailer demanded the consumer pay \$250 for violation of the company’s terms of sale.

The consequences of these non-disparagement clauses are far ranging. Penalties and lawsuits that emanate from non-disparagement clauses stifle the speech of consumers, and thus interstate commerce, by not permitting fair criticism of a business even when that feedback is an honest reflection of consumers’ experiences. Non-disparagement clauses also distort public reviews of a business because that business may receive more positive feedback than warranted, thus harming consumers who rely on such reviews.

SUMMARY OF PROVISIONS

S. 2044 would invalidate non-disparagement clauses in form contracts and make it unlawful for a person to offer or enter into a contract containing a non-negotiable non-disparagement clause as defined in the legislation. Violation of the legislation would be treated as an unfair or deceptive act or practice under the Federal Trade Commission Act (FTC Act, 15 U.S.C. 41 et seq.). The legislation would provide a rule of construction and three exceptions that limit the reach of the statute. For example, S. 2044 would not limit the ability of a person or business to file a civil action for defamation, libel, slander, or any similar cause of action under State law.

Under the legislation, the Federal Trade Commission (FTC) and State attorneys general would have enforcement authority. State attorneys general are precluded from State enforcement actions under the legislation during the pendency of FTC enforcement. State attorneys general would also be required to notify the FTC in writing when they bring civil actions under the statute.

It is the intention of the Committee that enforcement of the statute be focused on businesses or individuals imposing the non-disparagement clause on consumers.

LEGISLATIVE HISTORY

On September 16, 2015, Chairman Thune, along with Senators Schatz and Moran, introduced the Consumer Review Freedom Act of 2015 (S. 2044). The legislation is co-sponsored by Ranking Member Nelson and Senators Blumenthal, McCaskill, Daines, and Booker. Similar legislation was introduced in the House of Representatives by Congressman Issa on April 29, 2015 (H.R. 2110).

On November 4, 2015, the Committee held a hearing entitled “Zero Stars: How Gagging Honest Reviews Harms Consumers and the Economy.” The Committee received compelling testimony about the impact of non-disparagement clauses in form contracts and the need for S. 2044. Witnesses testified that non-disparagement

clauses have been used in many industries, including health care, retail, and hospitality. One witness estimated that over 1 million Americans signed non-disparagement clauses due to a form contract that was used in the health industry. The Committee received testimony that one State, California, has enacted a law to bar such clauses in non-negotiable form contracts. The Committee also learned that the FTC has brought an enforcement action against one company, alleging, *inter alia*, that the firm's threats to enforce a gag provision against consumers to stop them from posting negative reviews and testimonials online constitute an unfair trade practice in violation of section 5 of the FTC Act. In some cases, judges have refused to enforce non-disparagement clauses in form contracts usually on the grounds of unconscionability. Despite the persuasive rationale of such decisions, however, the legality of such clauses remains murky. Therefore, S. 2044 is necessary to eliminate any ambiguity over the enforceability of non-disparagement clauses.

On November 18, 2015, the Committee held an Executive Session, during which S. 2044 was considered. Chairman Thune offered a substitute amendment to S. 2044. During the Executive Session, the Committee ordered by voice vote that S. 2044, as amended, be favorably reported with an amendment in the nature of a substitute.

ESTIMATED COSTS

In compliance with subsection (a)(3) of paragraph 11 of rule XXVI of the Standing Rules of the Senate, the Committee states that, in its opinion, it is necessary to dispense with the requirements of paragraphs (1) and (2) of that subsection in order to expedite the business of the Senate.

REGULATORY IMPACT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

The bill would affect parties to a form contract used in the course of selling or leasing a person's goods or services. Because the bill would invalidate non-disparagement clauses in form contracts and would make it unlawful for a person to enter into a contract containing a non-disparagement clause, as defined in the legislation, millions of consumers could be protected under the bill. S. 2044 would not authorize any new regulations and therefore would not subject any individuals or businesses to new regulations.

ECONOMIC IMPACT

This legislation would not have an adverse economic impact on the Nation. The bill would promote consumer protection by making certain non-disparagement clauses unlawful, thus allowing consumers to make better informed decisions when procuring goods and services, and rewarding companies that offer quality goods and services.

PRIVACY

The bill would not have any adverse impact on the personal privacy of individuals.

PAPERWORK

The Committee does not anticipate a major increase in paperwork burdens resulting from the passage of this legislation.

CONGRESSIONALLY DIRECTED SPENDING

In compliance with paragraph 4(b) of rule XLIV of the Standing Rules of the Senate, the Committee provides that no provisions contained in the bill, as reported, meet the definition of congressionally directed spending items under the rule.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title.

Section 1 would designate the short title of this Act as the “Consumer Review Freedom Act of 2015.”

Section 2. Consumer review protection.

Section 2(a) of this bill would provide definitions for this section.

Section 2(b) would invalidate non-disparagement clauses in standardized form contracts where the terms are imposed on an individual without a meaningful opportunity for the individual to negotiate such terms, including provisions that seek to impose a penalty or fee on a consumer for engaging in a covered communication section 2(b)(1)(B)) or that seek to transfer intellectual property rights an individual may have in a covered communication section 2(b)(1)(C). The latter prohibition prevents consumers from being accused of copyright infringement or similar violations simply for sharing their own communications.

The substitute amendment, as modified, that was favorably reported by the Committee provided a narrow exception to section 2(b)(1)(C) that would permit a party to a form contract to use the content of a review pursuant to a non-exclusive license. For example, under this exception a website owner may lawfully include in its terms and conditions a non-exclusive license to a comment left on the owner’s website and use the content for marketing purposes.

Section 2(b)(2) would clarify that the bill should not be construed to affect: (1) any duty of confidentiality imposed by law; or (2) actions for defamation, libel, slander, or similar causes for action. The aforementioned substitute amendment would further clarify that the bill should not be construed to affect: (1) removal by a website owner of a review that is libelous, abusive, obscene, vulgar, or sexually explicit, among other factors; or (2) the ability of a property owner to restrict photography and videography on its premises used by commercial entities for solely commercial purposes.

Section 2(b)(3) would provide that the ban on non-disparagement clauses does not apply to the extent a provision in a form contract prohibits disclosure of: (1) trade secrets or financial information; (2) personnel and medical files that would constitute a clearly unwarranted invasion of personal privacy; and (3) law enforcement records that would constitute a clearly unwarranted invasion of

personal privacy. It is the intention of the Committee that a website owner or operator may remove content from its website that is unlawful, whether by statute, regulation, requirement, standard, or other provision having the force or effect of law. For example, the Committee understands that website operators may be required to remove unlawful content from a website under laws governing export control, consumer protection, computer fraud and abuse, intellectual property rights, unfair competition, anti-discrimination, or false advertising, among other matters.

Section 2(c) would make it unlawful for a person to offer or enter into such a form contract containing a non-disparagement clause.

Sections 2(d) and (e) of section 2 would authorize the FTC and State attorneys general, respectively, to enforce the provisions of the bill. Under these subsections, State attorneys general would be stayed from action while a Federal action is pending and the FTC may intervene in any pending State action. Section 2(e)(6)(A) would permit State consumer protection authorities, when authorized, to bring a cause of action under this legislation. The Committee intends for enforcement to apply on those entities that impose contracts with non-disparagement clauses on consumers.

Section 2(f) would require the FTC to conduct outreach and education that provides businesses with non-binding best practices for compliance with the Act.

Section 2(h) would provide that the ban on non-disparagement clauses in form contracts become effective 90 days after the date of passage of the Act, whereas the enforcement mechanisms in the bill apply to form contracts would become effective 1 year after the date of enactment of the Act.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, the Committee states that the bill as reported would make no change to existing law.

