



AMENDMENT NO. \_\_\_\_\_ Calendar No. \_\_\_\_\_

Purpose: In the nature of a substitute.

**IN THE SENATE OF THE UNITED STATES—114th Cong., 1st Sess.**

**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.

Referred to the Committee on \_\_\_\_\_ and ordered to be printed

Ordered to lie on the table and to be printed

AMENDMENT IN THE NATURE OF A SUBSTITUTE intended to be proposed by Mr. THUNE

Viz:

1 Strike all after the enacting clause and insert the fol-  
2 lowing:

3 **SECTION 1. SHORT TITLE.**

4 This Act may be cited as the “Consumer Review  
5 Freedom Act of 2015”.

6 **SEC. 2. CONSUMER REVIEW PROTECTION.**

7 (a) DEFINITIONS.—In this section:

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

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

8           (3) FORM CONTRACT.—

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

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

15                   (ii) imposed on an individual without  
16                   a meaningful opportunity for such indi-  
17                   vidual to negotiate the standardized terms.

18          (B) EXCEPTION.—The term “form con-  
19          tract” does not include an employer-employee  
20          or independent contractor contract.

21          (4) PICTORIAL.—The term “pictorial” includes  
22          pictures, photographs, video, illustrations, and sym-  
23          bols.

24          (b) INVALIDITY OF CONTRACTS THAT IMPEDE CON-  
25          SUMER REVIEWS.—

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

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

8                   (B) imposes a penalty or fee against an in-  
9           dividual who is a party to the form contract for  
10          engaging in a covered communication; or

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

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

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

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

1           (C) any party's right to remove or refuse  
2           to publish any statement on an Internet website  
3           owned or operated by such party that contains  
4           the personal information or likeness of another  
5           person or is libelous, harassing, abusive, ob-  
6           scene, vulgar, sexually explicit, inappropriate  
7           with respect to race, gender, sexuality, eth-  
8           nicity, or other intrinsic characteristic, or that  
9           is unrelated to the goods or services offered by  
10          such party; or

11          (D) a party's right to establish terms and  
12          conditions with respect to the creation of photo-  
13          graphs or video of such party's property when  
14          those photographs or video are created by an  
15          employee or independent contractor of a com-  
16          mercial entity and solely intended for commer-  
17          cial purposes by that entity.

18          (3) EXCEPTIONS.—Paragraph (1) shall not  
19          apply to the extent that a provision of a form con-  
20          tract prohibits disclosure of the following:

21               (A) Trade secrets or commercial or finan-  
22               cial information obtained from a person and  
23               considered privileged or confidential.

24               (B) Personnel and medical files and simi-  
25               lar information the disclosure of which would

1           constitute a clearly unwarranted invasion of  
2           personal privacy.

3           (C) Records or information compiled for  
4           law enforcement purposes, the disclosure of  
5           which would constitute a clearly unwarranted  
6           invasion of personal privacy.

7           (e) PROHIBITION.—It shall be unlawful for a person  
8           to offer or enter into a form contract containing a provi-  
9           sion described as void in subsection (b).

10          (d) ENFORCEMENT BY COMMISSION.—

11           (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-  
12           TICES.—A violation of subsection (e) by a person  
13           with respect to which the Commission is empowered  
14           under section 5(a)(2) of the Federal Trade Commis-  
15           sion Act (15 U.S.C. 45(a)(2)) shall be treated as a  
16           violation of a rule defining an unfair or deceptive act  
17           or practice prescribed under section 18(a)(1)(B) of  
18           the Federal Trade Commission Act (15 U.S.C.  
19           57a(a)(1)(B)).

20          (2) POWERS OF COMMISSION.—

21           (A) IN GENERAL.—The Commission shall  
22           enforce this section in the same manner, by the  
23           same means, and with the same jurisdiction,  
24           powers, and duties as though all applicable  
25           terms and provisions of the Federal Trade

1 Commission Act (15 U.S.C. 41 et seq.) were in-  
2 corporated into and made a part of this Act.

3 (B) PRIVILEGES AND IMMUNITIES.—Any  
4 person who violates this section shall be subject  
5 to the penalties and entitled to the privileges  
6 and immunities provided in the Federal Trade  
7 Commission Act (15 U.S.C. 41 et seq.).

8 (e) ENFORCEMENT BY STATES.—

9 (1) AUTHORIZATION.—Subject to subparagraph  
10 (B), in any case in which the attorney general of a  
11 State has reason to believe that an interest of the  
12 residents of the State has been or is threatened or  
13 adversely affected by the engagement of any person  
14 subject to subsection (c) in a practice that violates  
15 such subsection, the attorney general of the State  
16 may, as *parens patriae*, bring a civil action on behalf  
17 of the residents of the State in an appropriate dis-  
18 trict court of the United States to obtain appropri-  
19 ate relief.

20 (2) RIGHTS OF FEDERAL TRADE COMMIS-  
21 SION.—

22 (A) NOTICE TO FEDERAL TRADE COMMIS-  
23 SION.—

24 (i) IN GENERAL.—Except as provided  
25 in clause (iii), the attorney general of a

1 State shall notify the Commission in writ-  
2 ing that the attorney general intends to  
3 bring a civil action under paragraph (1)  
4 before initiating the civil action against a  
5 person described in subsection (d)(1).

6 (ii) CONTENTS.—The notification re-  
7 quired by clause (i) with respect to a civil  
8 action shall include a copy of the complaint  
9 to be filed to initiate the civil action.

10 (iii) EXCEPTION.—If it is not feasible  
11 for the attorney general of a State to pro-  
12 vide the notification required by clause (i)  
13 before initiating a civil action under para-  
14 graph (1), the attorney general shall notify  
15 the Commission immediately upon insti-  
16 tuting the civil action.

17 (B) INTERVENTION BY FEDERAL TRADE  
18 COMMISSION.—The Commission may—

19 (i) intervene in any civil action  
20 brought by the attorney general of a State  
21 under paragraph (1) against a person de-  
22 scribed in subsection (d)(1); and

23 (ii) upon intervening—

24 (I) be heard on all matters aris-  
25 ing in the civil action; and

1 (II) file petitions for appeal of a  
2 decision in the civil action.

3 (3) INVESTIGATORY POWERS.—Nothing in this  
4 subsection may be construed to prevent the attorney  
5 general of a State from exercising the powers con-  
6 ferred on the attorney general by the laws of the  
7 State to conduct investigations, to administer oaths  
8 or affirmations, or to compel the attendance of wit-  
9 nesses or the production of documentary or other  
10 evidence.

11 (4) PREEMPTIVE ACTION BY FEDERAL TRADE  
12 COMMISSION.—If the Federal Trade Commission in-  
13 stitutes a civil action or an administrative action  
14 with respect to a violation of subsection (e), the at-  
15 torney general of a State may not, during the pend-  
16 ency of such action, bring a civil action under para-  
17 graph (1) against any defendant named in the com-  
18 plaint of the Commission for the violation with re-  
19 spect to which the Commission instituted such ac-  
20 tion.

21 (5) VENUE; SERVICE OF PROCESS.—

22 (A) VENUE.—Any action brought under  
23 paragraph (1) may be brought in—

24 (i) the district court of the United  
25 States that meets applicable requirements



1 relating to venue under section 1391 of  
2 title 28, United States Code; or

3 (ii) another court of competent juris-  
4 diction.

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

8 (i) is an inhabitant; or

9 (ii) may be found.

10 (6) ACTIONS BY OTHER STATE OFFICIALS.—

11 (A) IN GENERAL.—In addition to civil ac-  
12 tions brought by attorneys general under para-  
13 graph (1), any other officer of a State who is  
14 authorized by the State to do so may bring a  
15 civil action under paragraph (1), subject to the  
16 same requirements and limitations that apply  
17 under this subsection to civil actions brought by  
18 attorneys general.

19 (B) SAVINGS PROVISION.—Nothing in this  
20 subsection may be construed to prohibit an au-  
21 thorized official of a State from initiating or  
22 continuing any proceeding in a court of the  
23 State for a violation of any civil or criminal law  
24 of the State.

1 (f) EDUCATION AND OUTREACH FOR BUSINESSES.—

2 Not later than 60 days after the date of the enactment  
3 of this Act, the Commission shall commence conducting  
4 education and outreach that provides businesses with non-  
5 binding best practices for compliance with this Act.

6 (g) RELATION TO STATE CAUSES OF ACTION.—

7 Nothing in this section shall be construed to affect any  
8 cause of action brought by a person that exists or may  
9 exist under State law.

10 (h) EFFECTIVE DATES.—This section shall take ef-  
11 fect on the date of the enactment of this Act, except  
12 that—

13 (1) subsections (b) and (c) shall apply with re-  
14 spect to contracts in effect on or after the date that  
15 is 90 days after the date of the enactment of this  
16 Act; and

17 (2) subsections (d) and (e) shall apply with re-  
18 spect to contracts in effect on or after the date that  
19 is 1 year after the date of the enactment of this Act.