

114TH CONGRESS  
1ST SESSION

# 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.

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## IN THE SENATE OF THE UNITED STATES

SEPTEMBER 16, 2015

Mr. THUNE (for himself, Mr. SCHATZ, and Mr. MORAN) introduced the following bill; which was read twice and referred to the Committee on Commerce, Science, and Transportation

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## A BILL

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.

1 *Be it enacted by the Senate and House of Representa-*  
2 *tives of the United States of America in Congress assembled,*

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:

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

3           (2) COVERED COMMUNICATION.—The term  
4 “covered communication” means a written, verbal,  
5 or pictorial review, performance assessment of, or  
6 other similar analysis of, the products, services, or  
7 conduct of a person by an individual who is party to  
8 a form contract with respect to which such person  
9 is also a party.

10          (3) FORM CONTRACT.—The term “form con-  
11 tract” means a standardized contract used by a per-  
12 son and imposed on an individual without a mean-  
13 ingful opportunity for such individual to negotiate  
14 the standardized terms, but does not include a con-  
15 tract establishing an employer-employee or inde-  
16 pendent contractor relationship.

17          (4) PICTORIAL.—The term “pictorial” includes  
18 pictures, photographs, and video provided by elec-  
19 tronic means.

20          (5) VERBAL.—The term “verbal” includes  
21 speech provided by electronic means.

22          (6) WRITTEN.—The term “written” includes  
23 words provided by electronic means.

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 that  
14          the individual may have in any otherwise lawful  
15          covered communication about such person or  
16          the goods or services provided by such person.

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

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

21                   (B) any civil action for defamation, libel,  
22          or slander, or any similar cause of action.

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

1 (A) Trade secrets or commercial or finan-  
2 cial information obtained from a person and  
3 considered privileged or confidential.

4 (B) Personnel and medical files and simi-  
5 lar information the disclosure of which would  
6 constitute a clearly unwarranted invasion of  
7 personal privacy.

8 (C) Records or information compiled for  
9 law enforcement purposes, the disclosure of  
10 which would constitute a clearly unwarranted  
11 invasion of personal privacy.

12 (c) PROHIBITION.—It shall be unlawful for a person  
13 to offer or enter into a form contract containing a provi-  
14 sion described as void in subsection (b).

15 (d) ENFORCEMENT BY COMMISSION.—

16 (1) UNFAIR OR DECEPTIVE ACTS OR PRAC-  
17 TICES.—A violation of subsection (c) by a person  
18 with respect to which the Commission is empowered  
19 under section 5(a)(2) of the Federal Trade Commis-  
20 sion Act (15 U.S.C. 45(a)(2)) shall be treated as a  
21 violation of a rule defining an unfair or deceptive act  
22 or practice prescribed under section 18(a)(1)(B) of  
23 the Federal Trade Commission Act (15 U.S.C.  
24 57a(a)(1)(B)).

25 (2) POWERS OF COMMISSION.—

1 (A) IN GENERAL.—The Commission shall  
2 enforce this section in the same manner, by the  
3 same means, and with the same jurisdiction,  
4 powers, and duties as though all applicable  
5 terms and provisions of the Federal Trade  
6 Commission Act (15 U.S.C. 41 et seq.) were in-  
7 corporated into and made a part of this Act.

8 (B) PRIVILEGES AND IMMUNITIES.—Any  
9 person who violates this section shall be subject  
10 to the penalties and entitled to the privileges  
11 and immunities provided in the Federal Trade  
12 Commission Act (15 U.S.C. 41 et seq.).

13 (e) ENFORCEMENT BY STATES.—

14 (1) IN GENERAL.—In any case in which the at-  
15 torney general of a State has reason to believe that  
16 an interest of the residents of the State has been or  
17 is threatened or adversely affected by the engage-  
18 ment of any person subject to subsection (c) in a  
19 practice that violates such subsection, the attorney  
20 general of the State may, as *parens patriae*, bring  
21 a civil action on behalf of the residents of the State  
22 in an appropriate district court of the United States  
23 to obtain appropriate relief.

24 (2) RIGHTS OF FEDERAL TRADE COMMIS-  
25 SION.—

1 (A) NOTICE TO FEDERAL TRADE COMMIS-  
2 SION.—

3 (i) IN GENERAL.—Except as provided  
4 in clause (iii), the attorney general of a  
5 State shall notify the Commission in writ-  
6 ing that the attorney general intends to  
7 bring a civil action under paragraph (1)  
8 before initiating the civil action against a  
9 person described in subsection (d)(1).

10 (ii) CONTENTS.—The notification re-  
11 quired by clause (i) with respect to a civil  
12 action shall include a copy of the complaint  
13 to be filed to initiate the civil action.

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

21 (B) INTERVENTION BY FEDERAL TRADE  
22 COMMISSION.—The Commission may—

23 (i) intervene in any civil action  
24 brought by the attorney general of a State

1 under paragraph (1) against a person de-  
2 scribed in subsection (d)(1); and

3 (ii) upon intervening—

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

6 (II) file petitions for appeal of a  
7 decision in the civil action.

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

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

1 (5) VENUE; SERVICE OF PROCESS.—

2 (A) VENUE.—Any action brought under  
3 paragraph (1) may be brought in—

4 (i) the district court of the United  
5 States that meets applicable requirements  
6 relating to venue under section 1391 of  
7 title 28, United States Code; or

8 (ii) another court of competent juris-  
9 diction.

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

13 (i) is an inhabitant; or

14 (ii) may be found.

15 (6) ACTIONS BY OTHER STATE OFFICIALS.—

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

24 (B) SAVINGS PROVISION.—Nothing in this  
25 subsection may be construed to prohibit an au-



1           thorized official of a State from initiating or  
2           continuing any proceeding in a court of the  
3           State for a violation of any civil or criminal law  
4           of the State.

5           (7) PROHIBITION ON ENTERING INTO CONTIN-  
6           GENCY FEE AGREEMENT WITH OUTSIDE COUNSEL  
7           FOR STATE ENFORCEMENT.—

8                   (A) CONTINGENCY FEE AGREEMENT DE-  
9                   FINED.—For purposes of this paragraph, the  
10                   term “contingency fee agreement” means a con-  
11                   tract or other agreement to provide services  
12                   under which the amount or the payment of the  
13                   fee for services is contingent in whole or in part  
14                   on the outcome of the matter for which the  
15                   services were obtained.

16                   (B) PROHIBITION.—An attorney general of  
17                   a State, or any State or local law enforcement  
18                   agency, may not enter into a contingency fee  
19                   agreement for legal or expert witness services  
20                   relating to an action commenced under para-  
21                   graph (1).

22           (f) EDUCATION AND OUTREACH FOR BUSINESSES.—  
23           Not later than 60 days after the date of the enactment  
24           of this Act, the Commission shall commence conducting

1 education and outreach that provides businesses with non-  
2 binding best practices for compliance with this Act.

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

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

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

10 (1) subsections (b) and (c) shall apply with re-  
11 spect to contracts in effect on or after the date of  
12 the enactment of this Act; and

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

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