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

(3) FORM CONTRACT.—

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

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

(ii) imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.

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

(4) PICTORIAL.—The term “pictorial” includes pictures, photographs, video, illustrations, and symbols.

(b) INVALIDITY OF CONTRACTS THAT IMPEDE CONSUMER REVIEWS.—
(1) IN GENERAL.—Except as provided in paragraphs (2) and (3), a provision of a form contract is void from the inception of such contract if such provision—

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

(B) imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or

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

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

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

(B) any civil action for defamation, libel, or slander, or any similar cause of action;
(C) any party's right to remove or refuse to publish any statement on an Internet website owned or operated by such party that contains the personal information or likeness of another person or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic, or that is unrelated to the goods or services offered by such party; or

(D) a party's right to establish terms and conditions with respect to the creation of photographs or video of such party's property when those photographs or video are created by an employee or independent contractor of a commercial entity and solely intended for commercial purposes by that entity.

(3) Exceptions.—Paragraph (1) shall not apply to the extent that a provision of a form contract prohibits disclosure of the following:

(A) Trade secrets or commercial or financial information obtained from a person and considered privileged or confidential.

(B) Personnel and medical files and similar information the disclosure of which would
constitute a clearly unwarranted invasion of personal privacy.

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

(c) PROHIBITION.—It shall be unlawful for a person to offer or enter into a form contract containing a provision described as void in subsection (b).

(d) ENFORCEMENT BY COMMISSION.—

(1) UNFAIR OR DECEPTIVE ACTS OR PRACTICES.—A violation of subsection (c) by a person with respect to which the Commission is empowered under section 5(a)(2) of the Federal Trade Commission Act (15 U.S.C. 45(a)(2)) shall be treated as a violation of a rule defining an unfair or deceptive act or practice prescribed under section 18(a)(1)(B) of the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)).

(2) POWERS OF COMMISSION.—

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

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

(c) ENFORCEMENT BY STATES.—

(1) AUTHORIZATION.—Subject to subparagraph (B), in any case in which the attorney general of a State has reason to believe that an interest of the residents of the State has been or is threatened or adversely affected by the engagement of any person subject to subsection (c) in a practice that violates such subsection, the attorney general of the State may, as parens patriae, bring a civil action on behalf of the residents of the State in an appropriate district court of the United States to obtain appropriate relief.

(2) RIGHTS OF FEDERAL TRADE COMMISSION.—

(A) NOTICE TO FEDERAL TRADE COMMISSION.—

(i) IN GENERAL.—Except as provided in clause (iii), the attorney general of a
State shall notify the Commission in writing that the attorney general intends to bring a civil action under paragraph (1) before initiating the civil action against a person described in subsection (d)(1).

(ii) CONTENTS.—The notification required by clause (i) with respect to a civil action shall include a copy of the complaint to be filed to initiate the civil action.

(iii) EXCEPTION.—If it is not feasible for the attorney general of a State to provide the notification required by clause (i) before initiating a civil action under paragraph (1), the attorney general shall notify the Commission immediately upon instituting the civil action.

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

(i) intervene in any civil action brought by the attorney general of a State under paragraph (1) against a person described in subsection (d)(1); and

(ii) upon intervening—

(I) be heard on all matters arising in the civil action; and
(II) file petitions for appeal of a decision in the civil action.

(3) INVESTIGATORY POWERS.—Nothing in this subsection may be construed to prevent the attorney general of a State from exercising the powers conferred on the attorney general by the laws of the State to conduct investigations, to administer oaths or affirmations, or to compel the attendance of witnesses or the production of documentary or other evidence.

(4) PREEMPTIVE ACTION BY FEDERAL TRADE COMMISSION.—If the Federal Trade Commission institutes a civil action or an administrative action with respect to a violation of subsection (e), the attorney general of a State may not, during the pendency of such action, bring a civil action under paragraph (1) against any defendant named in the complaint of the Commission for the violation with respect to which the Commission instituted such action.

(5) VENUE; SERVICE OF PROCESS.—

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

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

(ii) another court of competent jurisdic-
tion.

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

(i) is an inhabitant; or

(ii) may be found.

(6) ACTIONS BY OTHER STATE OFFICIALS.—

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

(B) SAVINGS PROVISION.—Nothing in this
subsection may be construed to prohibit an au-
thorized official of a State from initiating or
continuing any proceeding in a court of the
State for a violation of any civil or criminal law
of the State.
(f) EDUCATION AND OUTREACH FOR BUSINESSES.—
Not later than 60 days after the date of the enactment of this Act, the Commission shall commence conducting education and outreach that provides businesses with non-binding best practices for compliance with this Act.

(g) RELATION TO STATE CAUSES OF ACTION.—
Nothing in this section shall be construed to affect any cause of action brought by a person that exists or may exist under State law.

(h) EFFECTIVE DATES.—This section shall take effect on the date of the enactment of this Act, except that—

(1) subsections (b) and (e) shall apply with respect to contracts in effect on or after the date that is 90 days after the date of the enactment of this Act; and

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