

FEDERAL TRADE COMMISSION REAUTHORIZATION ACT OF
1996

AUGUST 2, 1996.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. BLILEY, from the Committee on Commerce,
submitted the following

R E P O R T

together with

ADDITIONAL VIEWS

[To accompany H.R. 3553]

[Including cost estimate of the Congressional Budget Office]

The Committee on Commerce, to whom was referred the bill (H.R. 3553) to amend the Federal Trade Commission Act to authorize appropriations for the Federal Trade Commission, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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PURPOSE AND SUMMARY

The legislation amends the Federal Trade Commission Act (15 U.S.C. 41, et seq.) to authorize appropriations of \$107 million in Fiscal Year 1997 and \$111 million in Fiscal Year 1998 for the Federal Trade Commission ("FTC"). These authorization levels represent a current services authorization level and envision no expansion of personnel.

BACKGROUND AND NEED FOR LEGISLATION

In July of 1994, the Congress passed the Federal Trade Commission Act Amendments of 1994 (P.L. 103-312), the first reauthorization of the FTC since 1980. The 1994 Amendments reauthorized the agency and made a number of substantive changes to its authorizing statute. Earlier that year, the Congress passed the Telemarketing and Consumer Fraud and Abuse Prevention Act (P.L. 103-297) (hereinafter "Telemarketing Fraud Act") which gave the FTC new statutory tools to combat deceptive and abusive telemarketing practices. Taken together, these two Acts represented a major step forward in addressing the responsibilities and authority of the FTC.

In light of these major changes to the FTC's authorizing statutes and as the current authorization is set to expire, the Committee is faced with its own responsibility of evaluating the agency's performance. As H.R. 3553 demonstrates, the Committee does not believe that significant changes to the Federal Trade Commission Act, or other statutes administered by the agency within this Committee's jurisdiction, are necessary at this time.

The FTC's unique role in the marketplace requires that it strike a delicate balance between its role as an independent law enforcement agency, and its role as a marketplace regulator. As discussed extensively in the Committee's report accompanying the Federal Trade Commission Act Amendments of 1993 (H. Rpt. 103-138), the primary mission of the agency is to "promote the efficient functioning of the marketplace by seeking to protect consumers from unfair or deceptive acts or practices and to promote vigorous competition." At the same time, the FTC must guard against imposing measures which impinge on legitimate commercial speech. The agency can prosecute wrongdoing through the use of a variety of powerful legal and administrative tools, including rules, enforcement actions, criminal actions, or enforcement guidelines. No matter which mode of enforcement the FTC ultimately chooses, the FTC should act to protect businesses and consumers from those in society who, either intentionally or through ignorance, would seek to unfairly manipulate the market to their own advantage.

While both the FTC and the consumer benefit from the agency's broad authority to seek out and prosecute those who do wrong in the marketplace, the potential for abuse continues to be an issue of concern to the Committee. Any business which finds itself the target of an FTC investigation must devote resources—monetary, legal, and human—to respond to such charges, which can cripple any small- to medium-sized business. While the Committee will continue to monitor this situation in the future, it is encouraged by the assurances of the FTC Chairman that the Commission and its

staff will continue to consider this factor when deciding which mode of enforcement to pursue, particularly in cases where any potential violation does not appear to be intentional.

Because the FTC has a unique role as an independent law enforcement agency, it must make every effort to maintain its independence, both in practice and in appearance. The agency is outside of the Executive Branch and has strict rules governing the disclosure of information to other government agencies and the Congress, precisely to insulate it from political pressure. The agency must continue to work to ensure that it remains impartial in disputes between competitors or interest groups that might seek to use the formidable power of the FTC to their own advantage.

The Committee concurs in the report language recently adopted by the Committee on Appropriations (H. Rpt. 104-676) concerning the Commission's activities relative to franchiser abuse. During the previous Congress, the Committee held a hearing on problems in the franchise industry (Serial No. 103-157). The Committee urges the Commission to consider appropriate improvements to its Franchise Rule and to devote suitable resources to investigative and enforcement efforts in this important area.

The Committee is particularly pleased with the FTC's efforts to aggressively enforce rules against telemarketing fraud, particularly since the passage of the Telemarketing Fraud Act. Even under the FTC's existing section 5 authority, the agency had such notable successes as *Project: Telesweep*; *Project: Roadblock*; *Operation: Senior Sentinel*; and the *Chattanooga Telemarketing Fraud Project*. Since the Telemarketing Sales Rule became effective, the FTC has led four major operations, including *Operation: Payback*; *Operation: Loan Shark*; *Operation Copycat*; and their largest operation to date, *Operation: Jackpot*. Since January 1, 1996, there have been 103 enforcement actions brought against individuals and corporations for violations of the Telemarketing Sales Rule by both the FTC and State officials under the Telemarketing Fraud Act. Further, the FTC has demonstrated a great deal of foresight in pursuing unscrupulous business people who exploit the nation's newest marketplace, the Internet. The Committee encourages the FTC to continue these efforts to aggressively ferret out wrongdoers so that the Internet may remain free for legitimate commerce.

Finally, the Committee notes that the FTC's aggressive effort to review old rules, orders, and other administrative guidance serves as an important example to other government agencies. As FTC Chairman Pitofsky testified, "the agency has found that a number of its actions from the distant past have outlived their utility and may hinder the operation of the marketplace by imposing burdens that are no longer justified." In the past year, the Commission has rescinded 32 percent of its Trade Regulation Rules and 30 percent of its Consumer Protection Guides and policy statements that are now outdated or obsolete. By eliminating burdensome regulations on its own, the FTC is fulfilling its primary mission—to ensure that the marketplace functions correctly. The Committee commends these efforts, started first by former Chairman Steiger and continued by current Chairman Pitofsky, and urges the Commission to continue to look for ways to streamline the agency and achieve further efficiencies.

HEARINGS

The Subcommittee on Commerce, Trade, and Hazardous Materials held a hearing on H.R. 3553, the Federal Trade Commission Reauthorization Act of 1996, on July 11, 1996. Witnesses at the hearing included the Honorable Robert Pitofsky, Chairman of the Federal Trade Commission; the Honorable Mary L. Azcuenaga, Commissioner, Federal Trade Commission; the Honorable Roscoe B. Starek III, Commissioner, Federal Trade Commission; the Honorable Janet T. Steiger, Commissioner, Federal Trade Commission; and the Honorable Christine A. Varney, Commissioner, Federal Trade Commission. All of the witnesses testified in favor of the legislation.

COMMITTEE CONSIDERATION

On July 18, 1996, the Subcommittee on Commerce, Trade, and Hazardous Materials met in open markup session and approved H.R. 3553, the Federal Trade Commission Reauthorization Act of 1996, for Full Committee consideration, without amendment, by a voice vote.

On July 24, 1996, the Committee on Commerce met in open markup session and ordered H.R. 3553 reported to the House, without amendment, by a voice vote.

ROLLCALL VOTES

Clause 2(1)(2)(B) of rule XI of the Rules of the House of Representatives requires the Committee to list the recorded votes on the motion to report legislation and amendments thereto. There were no recorded votes taken in connection with ordering H.R. 3553 reported. A motion by Mr. Bliley to order H.R. 3553 reported to the House, without amendment, was agreed to by a voice vote, a quorum being present.

COMMITTEE OVERSIGHT FINDINGS

Pursuant to clause 2(1)(3)(A) of rule XI of the Rules of the House of Representatives, the Committee held a legislative hearing and made findings that are reflected in this report.

COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

Pursuant to clause 2(1)(3)(D) of rule XI of the Rules of the House of Representatives, no oversight findings have been submitted to the Committee by the Committee on Government Reform and Oversight.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

In compliance with clause 2(1)(3)(B) of rule XI of the Rules of the House of Representatives, the Committee states that H.R. 3553 would result in no new or increased budget authority or tax expenditures or revenues.

COMMITTEE COST ESTIMATE

The Committee adopts as its own the cost estimate prepared by the Director of the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974.

CONGRESSIONAL BUDGET OFFICE ESTIMATE

Pursuant to clause 2(1)(3)(C) of rule XI of the Rules of the House of Representatives, the following is the cost estimate provided by the Congressional Budget Office pursuant to section 403 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 25, 1996.

Hon. THOMAS J. BLILEY, Jr.,
*Chairman, Committee on Commerce,
House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 3553, the Federal Trade Commission Reauthorization Act of 1996.

Enactment of H.R. 3553 would not affect direct spending or receipts. Therefore, pay-as-you-go procedures would not apply to the bill.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

JUNE E. O'NEILL, *Director.*

Enclosure.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

1. Bill number: H.R. 3553.
2. Bill title: Federal Trade Commission Reauthorization Act of 1996.
3. Bill status: As ordered reported by the House Committee on Commerce on July 24, 1996.
4. Bill purpose: H.R. 3553 would authorize appropriations of \$107 million for 1997 and \$111 million for 1998 for the Federal Trade Commission.
5. Estimated cost to the Federal Government: Assuming appropriation of the authorized amounts, CBO estimates that enacting H.R. 3553 would result in costs to the federal government of \$218 million over the 1997–2002 period. Estimated outlays are based on historical spending rates for the authorized activities. The following table summarizes the estimated budgetary effects of H.R. 3553.

[By fiscal year, in millions of dollars]

	1996	1997	1998	1999	2000	2001	2002
SPENDING SUBJECT TO APPROPRIATION							
Spending Under Current Law:							
Budget Authority	79	.....	.....	.....	.....	.....	.....
Estimated Outlays	80	6	.....	.....	.....	.....	.....
Proposed Changes:							
Authorization Level .....	.....	107	111	.....	.....	.....	.....

[By fiscal year, in millions of dollars]

	1996	1997	1998	1999	2000	2001	2002
Estimated Outlays		98	111	9			
Projected Spending Under H.R. 3553:							
Authorization Level ¹	79	107	111				
Estimated Outlays	80	104	111	9			

¹The 1996 level is the amount appropriated for that year.

The costs of this bill fall within budget function 370.

6. Pay-as-you-go considerations: None.

7. Estimated impact on State, local, and tribal governments: H.R. 3553 contains no intergovernmental mandates as defined in Public Law 104-4 and would have no impact on the budgets of state, local, or tribal governments.

8. Estimated impact on the private sector: This bill would impose no new private-sector mandates as defined in Public Law 104-4.

9. Previous CBO estimate: On June 14, 1996, CBO provided a cost estimate for S. 1840, the Federal Trade Commission Reauthorization Act of 1996, as ordered reported by the Senate Committee on Commerce, Science, and Transportation on June 6, 1996. The bills are identical as are the two estimates.

10. Estimate prepared by: Federal cost estimate: Rachel Forward. State and local government impact: Leo Lex. Private sector impact: Amy Downs.

11. Estimate approved by: Robert A. Sunshine (for Paul N. Van de Water, Assistant Director for Budget Analysis).

INFLATIONARY IMPACT STATEMENT

Pursuant to clause 2(1)(4) of rule XI of the Rules of the House of Representatives, the Committee finds that the bill would have no inflationary impact.

ADVISORY COMMITTEE STATEMENT

No advisory committees within the meaning of section 5(b) of the Federal Advisory Committee Act were created by this legislation.

SECTION-BY-SECTION ANALYSIS OF THE LEGISLATION

SECTION 1. SHORT TITLE

This section provides the short title of the bill, the "Federal Trade Commission Reauthorization Act of 1996."

SECTION 2. REAUTHORIZATION

This section amends section 25 of the Federal Trade Commission Act (15 U.S.C. 57c) to authorize appropriations in the amounts of \$107 million in Fiscal Year 1997, and \$111 million in Fiscal Year 1998 to carry out the functions, powers, and duties of the Commission.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted

is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

SECTION 25 OF THE FEDERAL TRADE COMMISSION ACT

SEC. 25. There are authorized to be appropriated to carry out the functions, powers, and duties of the Commission not to exceed \$92,700,000 for fiscal year 1994; not to exceed \$99,000,000 for fiscal year 1995; **[and]** not to exceed \$102,000,000 for fiscal year 1996; *not to exceed \$107,000,000 for fiscal year 1997; and not to exceed \$111,000,000 for fiscal year 1998.*

ADDITIONAL VIEWS OF THE HONORABLE CHARLIE
NORWOOD

My opposition to this legislation should not be interpreted to mean that I believe the Federal Trade Commission (FTC) does not serve a legitimate function in the United States in protecting Americans from businesses engaging in anti-competitive behavior. It is not my intention to say that the FTC has no purpose in the anti-trust activities of this country. However, in some cases, the FTC has shown itself, through its strict and unyielding interpretation of the law, to be the guardian of large and ever expanding businesses in particular sectors of our economy at the expense of true competition, lower cost to consumers, and quality improvements in services.

The market to which I am referring is the health care market. Over the past 20 years, managed care organizations have continued to expand their power in the health care market. According to some estimates, over 135 million people in this country are enrolled in some form of managed care plan. While managed care certainly did provide competition to traditional fee-for-service medicine when it was first promoted by the federal government in the 1970s, it has been able to overtake fee-for-service medicine by creating economies of scale, consolidating administrative functions, and capitating services. In many ways, these changes have been good.

As managed care continued to grow, health care providers recognized that, as individuals, they would not be able to compete with managed care on the scale necessary to create similar efficiencies unless they banded together. Unfortunately, the FTC has often interpreted the collaboration of providers on issues of mutual pricing, consolidation of administrative services, and the collective assumption of risk as anti-competitive behavior between providers and deemed those arrangements as *per se illegal* under federal laws governing anti-competitive market behavior.

To allow legitimate provider networks to operate, the FTC must recognize that we no longer exist in a fee-for-service environment where providers may have been the primary competitors. By and large, providers do not compete for contractual arrangements with employers to provide health services for employees. In the era of managed care, employers negotiate with insurance companies or managed care plans themselves, who in turn negotiate their contracts with health care providers. With that understanding, allowing providers to create networks to allow them to compete for contracts and negotiate with employers is the only way to insure that true competition exists in the market for the delivery of health care services.

Unfortunately, too often the FTC did not recognize the genuine intentions of these providers. Rather than collusion between competitors to raise prices and therefore damage consumers, health

care professionals banded together to create provider networks to allow them to compete with integrated managed care networks. Providers began to form these networks because they were concerned that health care decision-making was moving away from the control of the providers, who were trained to make medical decisions, to accountants and insurance company bean-counters who were, by nature, more interested in ensuring a profit for their CEOs and share-holders than they were for the well-being of their patients.

In some cases, not only has the FTC used its power to limit the formation of provider networks, it has also abused its power by becoming a tool for big business. In one case I have been following, the FTC may have used its power to intimidate small health care entrepreneurs into joining managed care organizations despite the fact that these same providers decided not to join that organization. In my opinion, this coercion goes well beyond the scope of the FTC's power, and should be considered by Congress. It is neither the place nor the function of the FTC to act as a strongman for dominant players in any market. The moment a federal governmental agency, with the full force of the United States government behind it, decides to join sides with members of an industry it is meant to regulate, it abuses its power and delegitimizes itself and the role it was intended to play.

Until only recently and under the threat of Congressional action, the FTC has resisted changes in its consideration of legitimate networks from *per se* illegality to considering the real life effects of the network operations under a *rule of reason* analysis. Rule of reason does not preclude the FTC from finding that a network which is acting in an anti-competitive manner is illegal under the nation's anti-trust laws. It simply requires the FTC to consider the totality of circumstances that contribute to the formation of a provider network, including variegated market share, a network's level of integration, and its pro-competitive effects on the health care market in which it operates.

In January 1996, House Judiciary Committee Chairman Henry Hyde of Illinois introduced legislation that would have required the FTC to apply rule of reason analysis to providers that join together to compete with large integrated managed care networks. As a co-sponsor of this legislation, I feel very strongly that, unless the FTC adapts its interpretations of federal law to consider the sum and substance of provider networks as pro-competitive endeavors, legislative action will be necessary to ensure that providers who form these legitimate networks with the best of intentions and in a pro-competitive manner are allowed to do so without unnecessary and counterproductive hassles from the federal government.

Unfortunately, members of Congress have been subjected to a coordinated effort by insurance companies and managed care organizations to thwart action on reforming the FTC's interpretations of federal law regarding provider networking arrangements. This is understandable and should be an important sign to the FTC that there are, inherent in its interpretations, premises that protect big businesses from true competition. Such a lobbying effort has, in my opinion, been undertaken because these businesses recognize that

rule of reason analysis of provider networks will lead to genuine competition in the health care market.

I recently met with several representatives of the FTC, including FTC Chairman Robert Pitofsky, and have been somewhat reassured that the FTC is making a good faith effort to recalibrate its thinking on the issue of provider networks. I felt that the Commerce Committee's consideration of a bill to reauthorize the FTC offered the appropriate opportunity to remind the FTC that members of Congress are prepared to act if, upon release of the upcoming guidelines, no significant changes are made to allow providers to compete with managed care. While it may not be the best alternative, Congress will be forced to act to insure that the FTC makes the proper interpretation of federal law.

In conclusion, as the former President of the Georgia Dental Association and a practicing dentist, I can attest to the fact that the strict interpretation of the nation's anti-trust laws by the FTC has damaged competition in the health care market. I have seen it occur across the nation. I have seen it occur in my own back yard. I know that health care providers in my state would have long ago engaged in the establishment of provider networks had it not been for the FTC's often unreasonable and punitive reaction to their creation. Unfortunately, the FTC has created a climate of fear and has made legitimate attempts by providers to network together, not only to compete with massive corporations, but also to regain some level of control over the medical decision making process, to feel like they are criminals. By foisting this chilling effect on America's health care providers, the FTC has denied patients the improvement of the quality of care that competition between provider networks and managed care networks could bring to the market. This is the best reason for the FTC to reconsider its interpretations in this area.

This nation's economy is based on the solid foundation of the free market that includes maximum competition on appropriate levels of scale. The Sherman Act and its sister acts were drafted to ensure that those competitive assumptions were retained in the face of monopolistic and anti-competitive behavior. When these laws, designed to ensure competition, are used to insulate big business from competition, something must be done to readjust those laws. That is why I had serious reservations about reauthorizing the Federal Trade Commission and why I will continue to oppose the narrow interpretation of the law that betrays its original intent.

CHARLIE NORWOOD.

