

December 15, 2021

TO THE MEMBERS OF THE UNITED STATES SENATE:

On behalf of the undersigned associations representing millions of legitimate businesses that seek to serve consumers and create jobs, we oppose the inclusion of Sections 31501 and 31502 in H.R. 5376, the “Build Back Better Act.” These provisions would create an unprecedented and unjustified broad civil penalty authority under Section 5 of the Federal Trade Commission (FTC) Act that does not presently exist in the law. This would constitute a major policy shift in FTC enforcement authority that would unfairly erode due process and would impose significant new costs on companies acting in good faith when serving consumers.

The business community respectfully requests that these provisions be removed from the reconciliation bill on the following grounds:

- ***Faulty CBO Score.*** The Congressional Budget Office’s (“CBO”) projected revenue from the FTC penalty provisions is based on unconstitutional presumptions of guilt. FTC and CBO estimates presume that companies will violate the FTC Act and the FTC’s authority under this section to impose fines in the first instance of an alleged violation will bring in \$3.6 billion¹ in revenue for privacy violations alone, leaving aside other actions that could be brought by the Commission under this new penalty authority. Not only is the revenue estimate inappropriately relying on a presumption of guilt (instead of the constitutional presumption of innocence) for defendants, but the scoring methodology also represents a stark departure from the FTC practice of not projecting future violations.²
- ***The Provisions Violate the Byrd Rule.*** The projected revenues from the anticipated use of the new civil penalty authority should be considered “extraneous provisions” because they are “merely incidental to the non-budgetary components of the provision,” which is one of the principal factors under the Byrd Rule for removing a provision from a reconciliation bill.³ The non-budgetary components of the provision are the *entire* provision itself, which would significantly alter the *enforcement* authority of a federal *enforcement* agency by granting a *new, permanent* civil penalty authority to enforce all alleged unfair and deceptive acts or practices under Section 5 of the FTC Act—broad new authority that Congress has never granted the agency.
- ***The Provisions Stifle Innovation.*** The new civil penalty authority will create a significant chilling effect on industry innovation in the provision of goods and services.

¹ <https://www.cbo.gov/publication/57623>

² Asked by the House Commerce & Consumer Protection Subcommittee Ranking Member whether the Federal Trade Commission “was able to predict how many violations would occur each year,” former Democratically appointed Director of Consumer Protection Jessica Rich answered a resounding “**No.**” <https://www.youtube.com/watch?v=IhNbl12rjqw> (December 9, 2021).

³ See text of Byrd Rule in Appendix of *The Budget Reconciliation Process: The Senate’s “Byrd Rule”*, Congressional Research Service, November 22, 2016, accessible here: <https://www.senate.gov/CRSPubs/95a2a72a-83f0-4a19-b0a8-5911712d3ce2.pdf>

The mere threat of being levied a very costly fine (up to \$43,792 per violation per affected consumer) by the FTC in an alleged first instance of an FTC Act violation will significantly harm economic growth and competition because companies will operate under the constant pressure of potential arbitrary enforcement without sufficient due process by an agency that has not fairly given it prior notice as to what specific business conduct or practice constitutes a violation of the FTC Act in order for that business to avoid such a fine.

Congress specifically balanced its current enforcement regime to prevent unfair enforcement under the FTC Act's vague and broad prohibition on unfair and deceptive practices.⁴ The approach proposed in H.R. 5376 permanently removes statutory due process protections. At a time when the Commission has demonstrated willingness to exceed its authority, such a policy change would be highly detrimental to legitimate businesses because the FTC would become the lawmaker, prosecutor, judge, and jury all at once, where businesses may never know which of their practices may later be adjudged to be illegal. The threat will be particularly severe for smaller companies that lack the legal expertise and capital to hire outside counsel to contest the FTC's proposed settlements backed by the threat of potentially bankrupting fines regardless of whether they believe their activities are completely lawful.

In conclusion, for all the above reasons, the FTC civil penalty authority should not be granted by Congress as part of a reconciliation bill, and it should be removed from H.R. 5376 by the Parliamentarian under the Byrd Rule. The overall negative impact of this provision on our national economy and American jobs, coupled with projected legal expenses and lost revenue chilled by a lack of due process, will cost U.S. industry and American consumers billions of dollars that far exceed the revenue projected by FTC and CBO.

We respectfully urge you to preserve the benefits consumers reap from continued innovation in the delivery of goods and services and protect the due process of legitimate businesses from an unbounded agency by opposing the proposed FTC civil penalty authority provisions in H.R. 5376.

Sincerely,

10th District American Advertising Federation (Arkansas,
Louisiana, Oklahoma, Texas)
Ad2 Houston
Ad2 SoCal
American Advertising Federation
American Advertising Federation Amarillo
American Advertising Federation Birmingham
American Advertising Federation Austin
American Advertising Federation Corpus Christi
American Advertising Federation Dothan

⁴ “The compromise was you’ve got to do what the FTC says, *but before it tells you to do something, it will find that what you’re doing now is wrong.*” *AMG Capital Management, LLC v. Federal Trade Commission*, J. Breyer during Oral Argument, No. 19-508 (2021) (emphasis added).

American Advertising Federation Dubuque
American Advertising Federation Greater Flint
American Advertising Federation Houston
American Advertising Federation Midlands
American Advertising Federation Mobile Bay
American Advertising Federation Montgomery
American Advertising Federation Nebraska
American Advertising Federation New Mexico
American Advertising Federation Northeast Louisiana
American Advertising Federation Roanoke
American Advertising Federation South Dakota
American Association of Advertising Agencies (4A's)
AFSA—American Financial Services Association
AHLA—American Hotel & Lodging Association
American Escrow Association
American Transaction Processors Coalition
Alabama Retail Association
ANA-Association of National Advertisers
Arizona Chamber of Commerce
Association of Test Publishers
California Retailers Association
Connecticut Business & Industry Association (CBIA)
Connecticut Retail Merchants Association
Consumer Consent Council
Consumer Data Industry Association
Council for Responsible Nutrition
DSA—Direct Selling Association
Electronic Transactions Association
Florida Retail Federation
FMI—The Food Industry Association
Georgia Retailers
Greater North Dakota Chamber
Idaho Advertising Federation
Idaho Falls Advertising Federation
Illinois Chamber of Commerce
Indiana Retail Council
Innovative Payments Association
Insights Association
International Franchise Association
Interactive Advertising Bureau (IAB)
Iowa Retail Federation
Kansas Retail Council
Kentucky Retail Federation
Louisiana Retailers Association
Mason City (Iowa) Chamber of Commerce
Maryland Retailers Association

Michigan Retailers Association
Missouri Retailers Association
Montana Retail Association
National Business Coalition on E-Commerce & Privacy
National Council of Chain Restaurants
National Retail Federation
National Restaurant Association
Nebraska Retail Federation
NetChoice
New Hampshire Retail Association
New Jersey Retail Merchants Association
North Carolina Retail Merchants Association
North Dakota Retail Association
Ohio Council of Retail Merchants
Pennsylvania Retailers Association
Professional Association for Customer Engagement
Real Estate Services Providers Council
Retail Council of New York State
Retail Merchants of Hawaii
Retailers Association of Massachusetts
Security Industry Association
South Carolina Retail Association
South Dakota Retailers Association
Upstate (South Carolina) Chamber Coalition
U.S. Chamber of Commerce
Utah Retail Merchants Association
Vermont Retail & Grocers Association
Virginia Chamber of Commerce
Virginia Retail Federation
Washington Retail Association
West Virginia Retailers Association