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Calendar No. 769

107th Congress
2d Session

SENATE

REPORT
107–348

FEDERAL TRADE COMMISSION REAUTHORIZATION ACT OF 2002

R E P O R T

OF THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 2946

NOVEMBER 19, 2002.—Ordered to be printed

U.S. GOVERNMENT PRINTING OFFICE
19–010 WASHINGTON : 2002

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SEVENTH CONGRESS

SECOND SESSION

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Mr. HOLLINGS, from the Committee on Commerce, Science, and Transportation, submitted the following

R E P O R T

[To accompany S. 2946]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 2946) to reauthorize the Federal Trade Commission for fiscal years 2003, 2004, and 2005, and for other purposes, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

PURPOSE OF THE BILL

The purpose of the legislation is to reauthorize the Federal Trade Commission (FTC or Commission) for the next three fiscal years, to amend the FTC Act (15 U.S.C. 41 et seq) to include telecommunications common carriers within the jurisdiction of the FTC, to authorize the Commission to receive donations of books and volunteer services, and to authorize reimbursement for law enforcement expenses.

BACKGROUND AND NEEDS

The FTC is an independent Federal agency, established by statute (Federal Trade Commission Act, 15 U.S.C. Sec. 41) in 1914 to protect American consumers. The Commission's mandate has two distinct components: first, to protect consumers from unfair or deceptive acts or practices in or affecting commerce; and second, to protect consumers from unfair methods of competition. As part of this authority, the agency enforces some 46 statutes and is the only Federal agency with both consumer protection and competition jurisdiction in broad sectors of the economy.

The Commission's consumer protection authority is provided under the FTC Act (15 U.S.C. Section 41 et seq). The Commission is charged with preventing a broad range of consumer abuses, including deceptive or misleading advertising practices, telemarketing fraud, credit report errors, labeling regulations, and telemarketing services. The Act also grants the FTC jurisdiction over unfair methods of competition and unfair or deceptive acts or practices that unreasonably impede a consumer's ability to make an informed choice or create fraudulent contractual inducements.

The Commission's antitrust authority is derived from the Sherman Act (prohibiting unlawful restraints and monopolization), the Clayton Act (prohibiting arrangements, mergers, and acquisitions that threaten competition—the Hart-Scott-Rodino Act (requiring merger review) is derived from this Act), and the Robinson-Patman Act, (barring price discrimination). Each of the Federal antitrust statues is administered concurrently by the FTC and the Department of Justice.

The FTC is not currently authorized. The last reauthorization statute was passed in 1996 (P.L. 104-216), which authorized funding for fiscal years 1997 and 1998. The FTC's current budget for FY 2002 is $156 million with approximately 1065 full-time staff. The Commission requested an increase for the next three fiscal years, in both dollars and staff, due in part to the planned implementation of a national registry for consumers to remove their names from telemarketing sales-call lists and the proposed expansion of its jurisdiction to include telecommunications common carriers. The FTC's budget request is as follows:

FTC-REQUESTED BUDGET AND STAFF FOR FISCAL YEARS 2003, 2004, AND 2005

Fiscal Year	Budget (in millions)	Full-time Staff
2003	$179	1,087
2004	$207	1,158
2005	$224	1,208

Throughout the 1980s, the Commission's staffing levels decreased each year, falling from 1,719 in FY 1980 to 894 in FY 1989. In the 1990s, the Commission's staffing levels increased from 903 in 1990 to 964 in 1999. S. 2946 would authorize staffing levels of 1,087 in FY 2003, 1,158 in FY 2004, and 1,208 in FY 2005.

Currently, the FTC is unable to prosecute actions against telecommunications common carriers. The FTC does not have jurisdiction over these entities; therefore, telecommunications consumers do not benefit from established FTC protections against deceptive and unfair marketing, advertising, and billing practices. Staff at the FTC and the Federal Communications Commission (FCC) have worked together to identify and address consumer protection concerns arising in the telecommunications industry. However, it has been observed that the common carrier exemption frustrates effective consumer protection both with respect to common carrier and non-common carrier activities in the telecommunications industry. Ultimately, some believe that the existing distinction leads to inefficient use of both FTC and FCC staff consumer-protection resources.

For example, there have been instances where consumers have received exorbitant phone bills for international audiotext and videotext services received on their phone lines without their informed authorization. The FTC has sued bill aggregators and vendors, as in the action against Verity International LTD. In that case, the FTC fought a motion to dismiss raised by Verity based on the common carrier exemption. The FCC filed an amicus brief in support of the FTC's position. Although the FTC was successful at the Federal district court level, the resolution of the issue had consumed FTC and FCC resources that may otherwise have been used to protect consumers.

The common carrier exemption also has affected enforcement actions against cramming. Cramming is the placement of unauthorized charges on consumers' telephone bills. The FTC has successfully filed over a dozen cases to stop the cramming of unauthorized non-telecommunications charges onto consumers' phone bills. In similar cases where the potential defendant was or claimed to be a common carrier, the FTC did not bring charges against those companies due to the jurisdictional prohibition.

It also has been found that some businesses, in an attempt to avoid FTC prosecution, will assert that they are common carriers when there is a question as to whether their core businesses would qualify for that designation. For example, in one investigation of an entity that charged consumers and institutional customers such as schools and hospitals for unauthorized audiotext services, a joint investigation with the FCC was necessary because the entity under investigation claimed that it was a common carrier. The entity's alleged common carrier activities significantly complicated an investigation that otherwise would have been a routine prosecution. In another instance, the FTC considered bringing an action against a company that the staff believed may have made misrepresentations regarding the online security it provided its customers. However, the entity also provided common carriage to its customers. The security representations it made in its business were dependent on the representations it made as a common carrier. Because the two issues were so intertwined, the FTC faced a substantial litigation risk of being denied jurisdiction.

The difficulty the FTC faces when it decides whether to bring an action against a defendant with connections to telecommunication common carriage is delineating between what is, and what is not, a common carrier activity. The removal of the exemption in part or in full could reduce the potential for gamesmanship.

The Commission also has received numerous complaints alleging deceptive advertising and marketing of pre-paid phone cards, particularly to the immigrant community. The FTC has brought a small number of cases involving the marketing of pre-paid phone cards. However, because of the common carrier exemption, the FTC does not have jurisdiction over all of the entities involved in the marketing of these phone cards, and in some instances may not have jurisdiction over the entities primarily responsible for the misrepresentations at issue.

Consumers are inundated with marketing and advertising by the telecommunications industry every day. The industry spent $3.9 billion in 1999 on long-distance advertising alone. The volume of advertising and marketing calls for additional resources to protect

consumers in light of known fraudulent and deceptive acts occurring within the telecommunications marketplace. FTC jurisdiction over telecommunications common carriers may provide the additional resources and expertise that would protect consumers and serve the public interest.

The FTC, in carrying out its consumer protection mission, often works cooperatively with State and foreign agencies. An additional change in authority would grant the FTC the ability to accept reimbursement for these joint enforcement actions, thereby better utilizing Commission funds. However, current statutory authority does not authorize the FTC to accept reimbursement for expenses when it works cooperatively with a State or foreign agency. Commission staff has been working closely with domestic and foreign law enforcement authorities to combat the dramatic rise in consumer protection violations and unfair methods of competition both domestically and abroad. These partnerships have resulted in enhanced law enforcement efforts and sharing of information. In certain matters, the FTC occasionally provides investigative or other services to a requesting law enforcement authority with no expectation of the Commission's participation in any enforcement proceeding. In other instances, particularly involving State actions, the Commission partners with the State to both investigate and prosecute the matter. In some of these situations, the foreign or domestic partner may be interested in reimbursing the Commission for the services it has provided or in sharing some of the investigation and prosecution costs.

Unless authorized by law, a Federal agency may not keep money it receives from sources other than Congressional appropriations, but must deposit such funds in the Treasury. The Securities and Exchange Commission currently has authority to accept payment and reimbursement for investigative or other assistance that it provides to a foreign securities authority. The FTC would like to be able to accept reimbursement if offered, but it would not seek reimbursement for routine or statutorily required services that it already provides.

Another change in statutory authority that would enhance the ability of the FTC to carry out its duties is gift-acceptance authority. Under Federal appropriations law, agencies have authority to spend only what the Congress appropriates. Thus, the Comptroller General has determined that, unless specifically authorized by law, agencies may not accept gifts, including volunteer services, because to do so would constitute an improper augmentation of appropriated funds.

The FTC points out that this broad restriction on acceptance of gifts occasionally limits its ability to fulfill its mission in the most cost-effective manner, such as using volunteer services in the consumer complaint and information center. As a result of these restrictions, the Commission sometimes receives gifts of items that it is not in a position to accept. For example, the acceptance of a trade regulation publication that might be useful in the Commission library is barred. In order to accept such publications, the Commission needs statutory authority as proposed by S. 2946. Numerous agencies, including the Office of Government Ethics, the FCC and the Consumer Product Safety Commission, have this authority. The FTC is mindful of the need to employ any gift accept-

ance authority that it may receive in a manner that avoids the appearance of impropriety.

LEGISLATIVE HISTORY

The Subcommittee on Consumer Affairs, Foreign Commerce and Tourism held an oversight hearing on the FTC on July 17, 2002, where the full Commission testified, and asked Congress to amend its statute to include the provisions in S. 2946. The Subcommittee also heard from consumer and industry representatives. Senator Dorgan, Chairman of the Subcommittee, along with Senator Hollings, Chairman of the Committee on Commerce, Science, and Transportation, introduced S. 2946, the Federal Trade Commission Reauthorization Act of 2002, on September 17, 2002. The full Committee considered S. 2946 during an executive session on September 19, 2002, and reported the measure by a vote of sixteen to seven.

ESTIMATED COSTS

In compliance with subsection (a)(3) of paragraph 11 of rule XXVI of the Standing Rules of the Senate, the Committee states that, in its opinion, it is necessary to dispense with the requirements of paragraphs (1) and (2) of that subsection in order to expedite the business of the Senate.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported:

NUMBER OF PERSONS COVERED

S. 2946 would re-authorize the Commission to continue its dual missions of protecting American consumers and preventing unfair methods of competition. Additionally, the legislation would expand the Commission's jurisdiction to include telecommunications common carriers. Therefore, S. 2946 would affect all persons who are currently subject to FTC protections and enforcement, as well as persons who are providers and consumers of telecommunication common carriage.

ECONOMIC IMPACT

S. 2946 would authorize funds for the Commission to continue its current responsibilities. Telecommunication common carriers may experience new costs due to the need to maintain compliance with FTC regulations they were not subject to because of the common carrier exemption.

PRIVACY

S. 2946 would be expected to help increase the personal privacy of American consumers, since it is part of the FTC's mission to protect the public from illegal intrusions into personal privacy and to prosecute identity theft. S. 2946 would reauthorize the Commission to continue its duties concerning the protection of consumer privacy.

PAPERWORK

S. 2946 would change the jurisdictional responsibilities of the FTC to include telecommunication common carriers, creating concurrent jurisdiction with the FCC and the Department of Justice. The legislation should generate similar amounts of administrative paperwork as other legislation requiring multiple agency enforcement.

SECTION-BY-SECTION ANALYSIS

Section 1. Short title

This section provides that the Act be cited as the "Federal Trade Commission Reauthorization Act of 2002."

Section 2. Reauthorization

This section would authorize the appropriation of funds for the Commission at $179 million for fiscal year (FY) 2003, $208 million for FY 2004, and $224 million for FY 2005.

Section 3. Common carriers regulated by the Communication Act of 1934

This section would provide the FTC jurisdiction over telecommunications common-carriers by rescinding the current telephone common carrier exemption in the FTC Act (see sections 45 and 46 of title 15 U.S.C.). The removal of this part of the exemption would create concurrent jurisdiction with the FCC for matters concerning fraudulent advertising, deceptive business practices, and other consumer protection issues involving telecommunications companies where both agencies have enforcement authority.

It is intended that S. 2946 would establish concurrent jurisdiction to better protect consumers who face questionable marketing and business practices by telecommunications common carriers and businesses that claim to be common carriers, although their core businesses are not common carriage. The FTC shares jurisdiction with several other Federal agencies in accomplishing its dual mission of consumer protection and the prevention of unfair methods of competition. Currently, the FTC shares jurisdiction and has two cooperative enforcement agreements with the FCC, therefore the expansion of FTC's jurisdiction in regard to telecommunications common carriers would not create a new venture between the agencies. The FTC also shares enforcement and investigatory responsibilities with the Department of Justice, the United States Department of Agriculture, the Food and Drug Administration, the Small Business Administration, the Federal Power Commission, the Department of Housing and Urban Development, the Office of the Comptroller of Currency, the Federal Deposit Insurance Corporation, the National Credit Union Administration, the Office of Thrift Supervision, and the Board of Governors of the Federal Reserve System. In light of the new jurisdictional regime that would be created by the legislation, it is intended that the FTC and the FCC, per normal agency practice, would prepare a cooperative enforcement agreement to avoid duplicative enforcement and the inefficient use of resources.

Another effect of including telecommunications common carriers within the FTC's jurisdiction is the ability for the FTC to under-

take a merger review involving a telecommunications common carrier. When the common carrier exception was placed in the FTC Act, there was only one telephone common carrier, the AT&T monopoly. Since the breakup of AT&T in 1984, there have been numerous mergers involving telecommunications common carriers, and these same common carriers are increasingly involved in non-common carriage activities, such as billing and collection services for membership clubs and merchandise vendors, Internet services and electronic data, and entertainment services. In the context of the growth of the telecommunications industry and the need to protect the marketplace from harmful concentrations of market power, the creation of concurrent jurisdiction over telecommunication common carrier mergers may better serve the public interest. It is recognized that as a policy matter, the 1993 Clearance Procedures for Investigations between the Antitrust Division of the Department of Justice and the Bureau of Competition of the FTC assign merger review authority to the agency with the greater expertise in a particular area. This Act is not intended to supercede the current agreement between the agencies in any fashion.

Section 4. Authority to accept reimbursements, gifts and voluntary and uncompensated services

This section would allow the FTC to accept reimbursements from domestic and international law enforcement agencies for services rendered by the FTC in support of an activity or statute administered by the agency. Those payments would be considered as reimbursement to the appropriated funds of the Commission. This section also would authorize the FTC to accept gifts, donations, and volunteer services, provide that no conflict of interest, or appearance of such conflict, occurs.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 2946:

The Committee ordered S. 2946 reported without amendment by a rollcall vote of 16 yeas and 7 nays as follows:

YEAS—16	NAYS—7
Mr. Hollings	Mr. Burns
Mr. Inouye	Mr. Lott[1]
Mr. Rockefeller[1]	Mr. Brownback
Mr. Kerry[1]	Mr. Fitzgerald
Mr. Breaux	Mr. Ensign
Mr. Dorgan	Mr. Allen
Mr. Wyden	Mrs. Hutchison
Mr. Cleland	
Mrs. Boxer[1]	
Mr. Edwards[1]	
Mrs. Carnahan	
Mr. Nelson	
Mr. McCain	
Mr. Stevens	
Ms. Snowe	
Mr. Smith	

[1]By proxy

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, 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 material is printed in italic, existing law in which no change is proposed is shown in roman):

FEDERAL TRADE COMMISSION ACT

DEFINITIONS

[15 U.S.C. 44]

SEC. 4. The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, ex-

cept partnerships, which is organized to carry on business for its own profit or that of its members.

"Documentary evidence" includes all documents, papers, correspondence, books of account, and financial and corporate records.

[“Acts to regulate commerce" means the Act entitled "An Act to regulate commerce," approved February 14, 1887, and all Acts amendatory thereof and supplementary thereto and the Communications Act of 1934 and all Acts amendatory thereof and supplementary thereto.]

"Acts to regulate commerce" means subtitle IV of title 49, United States Code, and all Acts amendatory thereof and supplementary thereto.

"Antitrust Acts" means the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," approved July 2, 1890; also sections 73 to 77 inclusive, of an Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes," approved August 27, 1894; also the Act entitled "An Act to amend sections 73 and 76, of the Act of August 27, 1894, entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' " approved February 12, 1913; and also the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914.

"Banks" means the types of banks and other financial institutions referred to in section 18(f)(2).

* * * * * * *

AUTHORIZATION OF APPROPRIATIONS

[15 U.S.C. 57c]

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; 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.] *There are authorized to be appropriated to carry out the functions, powers, and duties of the Commission not to exceed $179,271,000 for fiscal year 2003, $207,691,000 for fiscal year 2004, and $224,493,000 for fiscal year 2005.*

* * * * * * *

SEC. 26. REIMBURSEMENT OF EXPENSES.

The Commission may accept payment or reimbursement, in cash or in kind, from a domestic or foreign law enforcement authority, or payment or reimbursement made on behalf of such authority, for expenses incurred by the Commission, its members, or employees in carrying out any activity pursuant to a statute administered by the Commission without regard to any other provision of law. Any such payments or reimbursements shall be considered a reimbursement to the appropriated funds of the Commission.

SEC. 27. GIFTS AND VOLUNTARY AND UNCOMPENSATED SERVICES.

(a) IN GENERAL.—In furtherance of its functions the Commission may accept, hold, administer, and use unconditional gifts, donations, and bequests of real, personal, and other property and, notwithstanding section 1342 of title 31, United States Code, accept voluntary and uncompensated services.

(b) LIMITATIONS.—

(1) CONFLICTS OF INTEREST.—Notwithstanding subsection (a), the Commission may not accept, hold, administer, or use a gift, donation, or bequest if the acceptance, holding, administration, or use would create a conflict of interest or the appearance of a conflict of interest.

(2) VOLUNTARY SERVICES.—A person who provides voluntary and uncompensated service under subsection (a) shall not be considered a Federal employee for any purpose other than for purposes of chapter 81 of title 5, United States Code, (relating to compensation for injury) and section 2671 through 2680 of title 28, United States Code, (relating to tort claims).

SHORT TITLE

[15 U.S.C. 58]

SEC. **[**26.**]** *28.* This Act may be cited as the "Federal Trade Commission Act".