



FEDERAL TRADE COMMISSION
Washington, DC 20580



DEPARTMENT OF JUSTICE
Washington, DC 20530

June 10, 2016

The Honorable Bill Cook
North Carolina Senate, 1st District
300 N. Salisbury Street, Room 525
Raleigh, NC 27603-5925

Re: North Carolina HB 436

Dear Senator Cook:

The staff of the Federal Trade Commission (the “FTC” or the “Commission”)¹ and the Antitrust Division of the U.S. Department of Justice (the “Division”) (together, the “Agencies”) welcome the opportunity to share our views on the definition of the practice of law and North Carolina House Bill 436 (“HB 436” or “the Bill”).² The Bill would exclude from the statutory definition of the practice of law the operation of a website that offers consumers access to interactive software that generates legal documents in response to consumer input. Such websites would have to comply with several conditions, including disclosing that the forms do not substitute for attorney advice or service.

The Division and FTC staff believe that “the practice of law” should mean activities for which specialized legal knowledge and training is demonstrably

¹ This letter expresses the views of the FTC’s Office of Policy Planning, Bureau of Competition, Bureau of Consumer Protection, and Bureau of Economics. The letter does not necessarily represent the views of the FTC or any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

² See Letter from Bill Cook, North Carolina State Senator, District 1, to Michael J. Bloom, Assistant Director, Office of Policy and Coordination, Bureau of Competition, Federal Trade Commission (July 28, 2015).

necessary to protect consumers and an attorney-client relationship is present. Overbroad scope-of-practice and unauthorized-practice-of-law policies can restrict competition between licensed attorneys and non-attorney providers of legal services, increasing the prices consumers must pay for legal services, and reducing consumers' choices.

Accordingly, the Agencies recommend that the North Carolina General Assembly consider the benefits of interactive websites for consumers and competition in evaluating HB 436. Interactive software for generating legal forms may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services. Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations.

The Agencies also recognize that such interactive software products may raise legitimate consumer protection issues. The Agencies recommend that any consumer protections, such as requiring disclosures, be narrowly tailored to avoid unnecessarily inhibiting competition and new ways of delivering legal services that may benefit consumers.

I. Interest and Experience of the Agencies

Competition is the core organizing principle of America's economy,³ and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality goods and services, greater access to goods and services, and innovation.⁴ The Agencies work to promote competition by enforcing the antitrust laws, which prohibit certain business practices and transactions that harm competition and consumers, and through competition advocacy, whereby the Agencies advocate for policies that promote competition

³ See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) ("Federal antitrust law is a central safeguard for the Nation's free market structures."); *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) ("The heart of our national economic policy long has been faith in the value of competition.").

⁴ See, e.g., *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (noting that the antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. . . . The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain – quality, service, safety, and durability – and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

and consumer welfare via comments on legislation, court filings, and discussions with regulators, among other means.

Because of the importance of legal services to consumers and the economy, the Agencies have long sought to foster competition in the legal services marketplace. The Agencies and their staff have provided comments to policymakers and stakeholders on the scope of the practice of law, the unauthorized practice of law, attorney advertising, and other aspects of the regulation of legal services.⁵ They have engaged in various activities relating specifically to innovation in the area of legal services.⁶ In particular, the Agencies have previously provided comments on the definition of the practice of law as it relates to interactive software for generating legal forms.⁷ The Agencies have also submitted amicus briefs to courts regarding the application of competition principles to the provision of legal services.⁸

The Agencies have generally encouraged legislatures, courts, and state bars to avoid restrictions on the performance of legal-related services that are not necessary to address legitimate and substantiated harms to consumers, and recommended that any such restrictions be narrowly drawn to minimize their anticompetitive impact.⁹ The Agencies recognize the important role of state legislatures, courts, and bar associations in protecting consumers of legal services

⁵ The Agencies' joint letters regarding the practice of law are available at FTC, ADVOCACY FILINGS, <https://www.ftc.gov/policy/advocacy/advocacy-filings> (Topic Filter: Attorneys); U.S. DEPARTMENT OF JUSTICE, ANTITRUST DIVISION, COMMENTS TO STATES AND OTHER ORGANIZATIONS, <https://www.justice.gov/atr/comments-states-and-other-organizations>.

⁶ See generally Submission of the United States to the Organisation for Economic Co-operation and Development Regarding Disruptive Innovations in Legal Services (May 30, 2016), [http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD\(2016\)4&docLanguage=En](http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP2/WD(2016)4&docLanguage=En) (summarizing DOJ and FTC activities).

⁷ DOJ-FTC Comments on the American Bar Association's Proposed Model Definition of the Practice of Law 10-12 (Dec. 20, 2002), <https://www.justice.gov/atr/comments-american-bar-associations-proposed-model-definition-practice-law> (hereinafter "DOJ-FTC 2002 ABA Comments").

⁸ See, e.g., Brief Amici Curiae of the FTC and United States of America, *McMahon v. Advanced Title Servs. Co. of W. Va.*, 216 W. Va. 413 (2004), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/05/ftc-amicus-curiae-brief-lorrie-mcmahon-et-al-v> (real estate settlement services); Brief of FTC as Amicus Curiae Supporting Neither Party, *Cleveland Bar Ass'n v. CompManagement, Inc.*, 104 Ohio St. 3d 168 (2004), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2004/07/ftc-amicus-curiae-brief-cleveland-bar-association> (representation in workers' compensation matters).

⁹ E.g., DOJ-FTC 2002 ABA Comments, *supra* note 7, at 13-15.

from harm. The Agencies have previously noted, however, that unnecessarily broad definitions of the practice of law or the unauthorized practice of law can impose significant competitive costs on consumers of legal services, restrict access to legal services, and inhibit the development of innovative ways to deliver legal services to consumers.¹⁰

The Agencies believe the definition of the practice of law should be limited to activities where: (1) specialized legal skills are required, such that there is an implicit representation of authority or competence to practice law, and (2) a client relationship of trust or reliance exists.¹¹ The Agencies have recognized District of Columbia Court of Appeals Rule 49 Commentary as instructive.¹²

In addition to its shared authority to enforce the antitrust laws, the FTC also combats fraud and promotes truthful and non-deceptive information in the marketplace.¹³ It has expertise in various other aspects of consumer protection that are relevant to interactive software for generating legal forms.¹⁴ The Commission has extensive expertise in the advertising and marketing of products and services, including disclosure issues.¹⁵ For instance, the FTC has

¹⁰ *E.g., id.* at 9-12.

¹¹ *E.g.,* DOJ-FTC Comments Before the Supreme Court of Hawaii on Revised Proposed Rule Concerning Unauthorized Practice of Law (Apr. 20, 2009), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2009/04/ftc-and-department-justice-comment-supreme-court>.

¹² *E.g., id.* at 2; *see also* D.C. Court of Appeals Commentary to Rule 49(b)(2) (Mar. 1, 2016), http://www.dccourts.gov/internet/documents/DCCA_Rules_02-04-2016.pdf (“[There are] two essential elements of the practice of law: The provision of legal advice or services, and a client relationship of trust or reliance. Where one provides such advice or services within such a relationship, there is an implicit representation that the provider is authorized or competent to provide them; just as one who provides any services requiring special skill gives an implied warranty that they are provided in a good and workmanlike manner. . . . The presumption that one’s engagement in [an activity] is the ‘practice of law’ may be rebutted by showing that there is no client relationship of trust or reliance, or that there is no explicit or implicit representation of authority or competence to practice law, or that both are absent.”) (internal citations omitted).

¹³ *See generally* FTC Policy Statement on Unfairness (Dec. 17, 1980), *appended to* Int’l Harvester Co., 104 F.T.C. 949, 1070 (1984), <https://www.ftc.gov/public-statements/1980/12/ftc-policy-statement-unfairness> (*see* 15 U.S.C. § 45(n)); FTC Policy Statement on Deception (Oct. 14, 1983), *appended to* Cliffdale Assocs., Inc., 103 F.T.C. 110, 174 (1984), <https://www.ftc.gov/public-statements/1983/10/ftc-policy-statement-deception>.

¹⁴ The comments in this letter regarding deception and disclosure issues are based on the FTC’s consumer protection experience. In particular, *see infra* Section IV.B. (discussing consumer protection considerations for HB 436).

¹⁵ For example, FTC staff has conducted research regarding consumer understanding of disclosures relating to mortgages. *See, e.g.,* JAMES M. LACKO & JANIS K. PAPPALARDO, IMPROVING

worked to combat scams by “notarios” claiming they can help with the immigration process,¹⁶ and to shut down an immigration services business that allegedly advertised and marketed its services online in a deceptive manner.¹⁷ More generally, FTC staff has issued guidance on how to make effective disclosures in the online context.¹⁸ The Commission also has significant consumer protection expertise in identifying data security, privacy, and identity theft issues that websites and other software applications may raise.¹⁹

II. The Legal Services Marketplace

Licensed attorneys have traditionally performed many legal services on behalf of clients. Non-lawyers have also historically performed many legal-related services that have not been deemed subject to regulation as “the practice of law.”²⁰ Defining the practice of law has been a difficult question for the legal

CONSUMER MORTGAGE DISCLOSURES: AN EMPIRICAL ASSESSMENT OF CURRENT AND PROTOTYPE DISCLOSURE FORMS (2007) (FTC Bureau of Economics Staff Report), <http://www.ftc.gov/os/2007/06/P025505MortgageDisclosureReport.pdf>; JAMES M. LACKO & JANIS K. PAPPALARDO, THE EFFECT OF MORTGAGE BROKER COMPENSATION DISCLOSURES ON CONSUMERS AND COMPETITION: A CONTROLLED EXPERIMENT (2004) (FTC Bureau of Economics Staff Report), <http://www.ftc.gov/os/2004/01/030123mortgagefullrpt.pdf>.

¹⁶ See generally FTC, SCAMS AGAINST IMMIGRANTS, <https://www.consumer.ftc.gov/articles/0141-scams-against-immigrants>.

¹⁷ See Press Release, FTC, FTC Action Bans Defendants from Providing Immigration Services (Jan. 24, 2012), <https://www.ftc.gov/news-events/press-releases/2012/01/ftc-action-bans-defendants-providing-immigration-services>.

¹⁸ FTC STAFF, .COM DISCLOSURES: HOW TO MAKE EFFECTIVE DISCLOSURES IN DIGITAL ADVERTISING (2013), <http://ftc.gov/os/2013/03/130312dotcomdisclosures.pdf>.

¹⁹ See FTC STAFF, MOBILE PRIVACY DISCLOSURES: BUILDING TRUST THROUGH TRANSPARENCY (2013), <http://www.ftc.gov/os/2013/02/130201mobileprivacyreport.pdf>.

²⁰ See generally HERBERT M. KRITZER, LEGAL ADVOCACY: LAWYERS AND NONLAWYERS AT WORK 11 (1998) (“[B]y one count, as of 1994, nonlawyers can appear as advocates before thirty-eight federal agencies.”). Non-lawyers have practiced before the U.S. Patent and Trademark Office from its inception, with the express approval of the Office and with the knowledge of Congress. *Sperry v. Florida ex rel. Fla. Bar*, 373 U.S. 379, 384-88 (1963). Accountants and other tax specialists may practice in tax matters before the Treasury Department. *Grace v. Allen*, 407 S.W.2d 321 (Tex. Civ. App. 1966) (accountants admitted to practice before Treasury Department in preparation and presentation of client’s protest of federal income tax assessment may perform some legal research and provide assistance to tax lawyers). Accredited non-attorney representatives may represent persons in immigration proceedings before immigration judges and the Board of Immigration Appeals. *Al Roumy v. Mukasey*, 290 F. App’x 856, 861 n.2 (6th Cir. 2008).

Non-attorney practice has also been allowed before a number of state administrative agencies. *E.g.*, *Cleveland Bar Ass’n v. CompManagement, Inc.*, 104 Ohio St. 3d 168 (2004) (non-lawyers who appear and practice in a representative capacity before the Ohio Industrial Commission and

profession for many years. The boundaries of the practice of law are frequently unclear and have varied significantly over time and from jurisdiction to jurisdiction.²¹

The legal services marketplace has experienced a number of changes in recent years. These trends include: client demands for more cost-effective and efficient services; unbundling of services and disaggregation of legal matters across multiple service providers; development of new billing models and law firm models; geographic expansion of law firms and other legal services providers; provision by non-law firms of certain services previously obtained exclusively from law firms; increased use of automation technologies; online matching, reviewing, and ranking of lawyers; and use of Internet, World Wide Web, and related computer technologies to deliver legal services. In particular, the increased use of computer, software, and online technologies has enabled non-lawyers to provide many services that historically were provided exclusively by lawyers and traditional law firms.

Notwithstanding these changes, there remains a well-known crisis in access to legal services for millions of American consumers, especially for low- and middle-income people. Surveys have repeatedly shown that many low- and middle-income Americans cannot afford the services of a licensed attorney, despite a generally increasing number of lawyers.²² This seeming paradox of unmet legal needs and an abundance of lawyers continues to persist.²³

In response to consumer demands for less expensive ways to address their legal needs, software companies, entrepreneurs, and law firms have developed inexpensive interactive software for generating legal documents. These programs allow users to create wills, trusts, articles of incorporation, and other

the Bureau of Workers' Compensation are not engaged in the unauthorized practice of law when they act in conformance with Industrial Commission standards of conduct); *Petition of Burson*, 909 S.W.2d 768, 777 (Tenn. 1995) (statute permitting non-attorney agents to represent taxpayers before boards of equalization did not sanction unauthorized practice of law).

²¹ See generally DOJ-FTC 2002 ABA Comments, *supra* note 7.

²² See generally LEGAL SERVICES CORP., DOCUMENTING THE JUSTICE GAP IN AMERICA: THE CURRENT UNMET CIVIL LEGAL NEEDS OF LOW-INCOME AMERICANS (2009), <http://www.lsc.gov/lsc-updates-october-1-2009>; ABA, LEGAL NEEDS AND CIVIL JUSTICE: A SURVEY OF AMERICANS (1994), <http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/legalneedstudy.authcheckdam.pdf>.

²³ See J.D. Smeallie, From BBA President: Connecting Supply With Demand to Fill the Justice Gap, BOSTON BAR ASS'N (July 17, 2013), <http://www.bostonbar.org/public-policy/public-policy-archive/2013/07/22/from-bba-president-connecting-supply-with-demand-to-fill-the-justice-gap>.

legal documents, based on answers to questions presented by the software. Such programs have included physical software products (e.g., CD-ROMs), as well as web-based internet applications and non-web-based internet applications (e.g., smartphone-type “native” applications). A number of courts²⁴ and government agencies²⁵ also now provide online legal forms for use in their jurisdiction. Prior to these developments, document generation assistance was available in a number of states through legal self-help books and standardized paper legal forms for completion by a consumer, as well as through attorneys.²⁶

Interactive software programs for generating legal documents appear to be responsive to consumer demands for more cost-effective and efficient ways to address their legal issues. These software products may expand consumer access to legal services, facilitate the unbundling of legal services, promote a more efficient allocation of resources (e.g., among licensed attorneys, non-attorney providers, and self-help efforts), reduce transaction costs, increase convenience, and help some consumers more effectively to address their legal situations. For example, a consumer who may be unable to afford to retain a licensed attorney both to draft and review a legal document may be able to use interactive software to generate a draft document, and pay an attorney only to review the document, if desired. At the same time, such programs may raise consumer protection issues regarding consumers’ understanding both of the generated forms, and whether or when it may be desirable for a consumer to seek the services of an attorney.

²⁴ E.g., CALIFORNIA COURTS, FORMS & RULES, <http://www.courts.ca.gov/forms.htm>; DELAWARE COURTS, FORMS, <http://courts.delaware.gov/forms/>; NORTH CAROLINA COURT SYSTEM, JUDICIAL FORMS, <http://www.nccourts.org/Forms/FormSearch.asp>; IDAHO JUDICIAL BRANCH COURT ASSISTANCE OFFICE, FORMS: INDIVIDUAL FORMS AND INSTRUCTIONS, <http://www.courtsselfhelp.idaho.gov/individual-forms-instructions>; IOWA JUDICIAL BRANCH, COURT RULES AND FORMS, http://www.iowacourts.gov/Court_Rules_Forms/Overview/; MASS. COURT SYSTEM, COURT FORMS, <http://www.mass.gov/courts/forms/>; U.S. COURTS, FORMS, <http://www.uscourts.gov/services-forms/forms>.

²⁵ E.g., NORTH CAROLINA DEP’T OF THE SECRETARY OF STATE, CORPORATE FORMS, <https://www.secretary.state.nc.us/corporations/printforms.aspx>; U.S. COPYRIGHT OFFICE, FORMS, <http://copyright.gov/forms/>; U.S. PATENT AND TRADEMARK OFFICE, PATENTS FORMS, <http://www.uspto.gov/patent/patents-forms> and TRADEMARK ELECTRONIC APPLICATION SYSTEM, <http://www.uspto.gov/trademarks-application-process/filing-online>.

²⁶ See, e.g., N.Y. Cnty. Lawyers’ Ass’n v. Dacey, 28 A.D.2d 161, 171 (N.Y. App. Div. 1st Dept. 1967) (Stevens, J., dissenting), *rev’d*, 21 N.Y.2d 694 (1967) (adopting dissenting opinion of Appellate Division, holding that incorporating legal forms into self-help book entitled “How to Avoid Probate!” was not the unauthorized practice of law). See also generally DOJ-FTC 2002 ABA Comments, *supra* note 7.

III. HB 436

HB 436, in its current version, would amend North Carolina General Statutes Section 84-2.1 to exclude from the statutory definition of the practice of law the operation of interactive websites that generate legal documents based on a consumer's answers to questions presented by the software.²⁷ A website would have to satisfy several conditions in order to be excluded from the definition of the practice of law, and thus for its provider not to be subject to prosecution for the unauthorized practice of law. These conditions include providing a disclosure that the forms are not a substitute for attorney advice or services, and disclosing the provider's legal name and physical location and address.²⁸

IV. Competition and Consumer Protection Considerations for HB 436

A. Competition Considerations

HB 436 appears meant to promote competition from interactive websites, and the Agencies recommend that the General Assembly consider the benefits of interactive software for consumers and competition.²⁹ The Agencies believe that

²⁷ H.B. 436, N.C. Gen. Assemb., 2015-16 Sess. (4th ed. Sept. 23, 2015), <http://www.ncleg.net/Sessions/2015/Bills/House/PDF/H436v4.pdf>. This version of the Bill is apparently meant to cover certain web-based interactive forms, such as LegalZoom.com. *See* LegalZoom.com, Inc. v. N.C. State Bar, 2015 NCBC 96 (Sup. Ct. N.C. Oct. 22, 2015) (Consent Judgment) ("The parties have agreed to mutually support and use best efforts to obtain passage by the North Carolina General Assembly of HB 436 in the form currently pending before the House Judiciary Committee."). This version of the Bill, in contrast to prior versions, does not appear to encompass other similar self-help products that may generate legal forms, however. The Agencies suggest that the North Carolina General Assembly consider expanding the Bill to encompass similar self-help products. As explained in Section IV.A. *infra*, a pro-competitive regulatory framework should not favor one type of competitor over another in addressing similar harms.

²⁸ The Bill would also require that: a consumer be able to see a blank template or completed document before final purchase; each blank template be reviewed by a North Carolina attorney; a provider not disclaim any warranties or liability, or limit damages or other remedies; and a provider not require a consumer to agree to jurisdiction or venue outside North Carolina.

²⁹ The Agencies also recommend that the General Assembly reconsider broadening the Bill to exclude similar self-help products from the definition of the practice of law. Doing so may further benefit consumers. The legislature may wish to consider the experience of Texas in this regard. The Texas Unauthorized Practice of Law Committee succeeded in having a federal district court enjoin the sale and distribution of Quicken Family Lawyer software as the unauthorized practice of law. *See* UPL Comm. v. Parsons Tech., Inc., 179 F.3d 956 (5th Cir. 1999). Texas subsequently enacted legislation amending the statutory definition of the practice of law to exclude from its definition such software and similar products, if they clearly and conspicuously state they are not a substitute for attorney advice. TEX. GOV'T CODE ANN. § 81.101(c) (1999).

consumers generally benefit from competition between lawyers and non-lawyers in the provision of legal-related services. Consumer demand should determine the range of choices in the marketplace, unless it is clear that specialized legal training is required to perform a legal-related service. Overbroad scope-of-practice and unauthorized-practice-of-law policies can increase prices, impede innovation, and otherwise harm competition and consumers.

Interactive websites that generate legal documents in response to consumer input may be more cost-effective for some consumers, may exert downward price pressure on licensed lawyer services, and may promote the more efficient and convenient provision of legal services.

Such products may also help increase access to legal services by providing consumers additional options for addressing their legal situations. They may especially benefit low- and middle-income consumers, those who live in rural areas where a lawyer is unavailable, and others who may not have convenient access to a traditional law office during typical working hours.³⁰

The Agencies recommend that the North Carolina General Assembly not adopt restrictions on such software products unless there is credible evidence that they harm consumers, any restriction is narrowly tailored to address that harm, and the benefits of the restriction will outweigh the harm that will likely result to competition. Should the General Assembly receive any claims of consumer harm from interactive websites or similar products, the Agencies urge the legislature to consider whether the evidence substantiates any such actual or predicted harm.

This analysis should also examine whether any harm from these products is materially greater than comparable harms posed by traditional attorney-client relationships or government provision of legal services or information, such as legal forms or other information available at the website of a government court or agency. As a matter of sound competition policy, a regulatory framework should not in purpose or effect favor one type of similarly situated competitor over others in addressing any identical or similar harms from these products.

Based on this legislation, the Fifth Circuit Court of Appeals vacated the injunction against the software.

³⁰ See generally NORTH CAROLINA EQUAL ACCESS TO JUSTICE COMMISSION, A COMMISSION OF THE NORTH CAROLINA SUPREME COURT, <http://ncequalaccesstojustice.org/about/> (collecting Commission reports finding that the number of low-income people in North Carolina needing legal assistance has continued to increase in recent years).

B. Consumer Protection Considerations

The Agencies recognize that licensing requirements and scope-of-practice policies can have valid consumer protection justifications. Some circumstances and tasks require the knowledge and skill of a person trained in the law. Policies to protect consumers in such situations are legitimate. As noted above, however, overbroad scope-of-practice and unauthorized-practice-of-law-policies can potentially inhibit new ways of delivering legal services that may benefit consumers.³¹

Providers of interactive software programs and other similar products should provide truthful, non-deceptive information about their characteristics.³² For example, a commercial software product for generating legal forms should not falsely represent, either expressly or impliedly, that it is a substitute for the specialized legal skills of a licensed attorney, or that it is affiliated with or endorsed by a government entity.³³ Providers also should not falsely represent, either expressly or impliedly, the scope or cost of the product or service, including whether they will initiate a legal submission to a government entity. For example, providers should not expressly or impliedly represent that a legal submission will be made to a government entity if, in fact, additional payment to the provider or to a government entity, or some other further action, is needed to execute a filing. Providers should provide truthful, non-deceptive information about the functions their products actually perform.

Regulation of interactive software for generating legal documents should therefore focus primarily on deterring unfair or deceptive advertising and marketing practices relating to the content of forms, their validity, liability, other terms of use, and any related filing fees, and addressing any other consumer protection issues. In the event the legislature receives evidence of significant

³¹ The following analysis of consumer protection considerations regarding HB 436 represents the views of the staff of the Federal Trade Commission, which, as discussed in Section I. above, has expertise in consumer protection issues. The U.S. Department of Justice Antitrust Division does not express any views on consumer protection considerations regarding HB 436.

³² See FTC Policy Statement on Unfairness and FTC Policy Statement on Deception, *supra* note 13.

³³ See generally FTC, Enforcement Policy Statement on Deceptively Formatted Advertisements n.17 (2015), <https://www.ftc.gov/news-events/press-releases/2015/12/ftc-issues-enforcement-policy-statement-addressing-native> (discussing commercial communications that mislead consumers that they are from the government and other examples of deceptively formatted ads).

consumer harm from interactive software, or similar products, any restrictions on their sale, distribution, or use should be tailored to address those harms.³⁴

HB 436 would require certain disclosures by providers of interactive websites. These appear designed to promote the dissemination of truthful and non-deceptive information to consumers. Requiring certain disclosures may be an efficient way to protect consumers from possible misunderstandings about the nature of these products.³⁵ But the existence of a disclosure should not serve as a safe harbor for making false or deceptive express or implied claims. The General Assembly may wish to consider the principles and examples for mobile and other online advertising disclosures provided in FTC staff's guidance document, *.com Disclosures: How to Make Effective Disclosures in Digital Advertising*.³⁶ Among other things, it emphasizes that advertisers should ensure that disclosures are clear and conspicuous on all devices and platforms consumers may use. Any disclosures should be made in the same language as the predominant language in which advertisements about the forms are communicated.³⁷ As discussed above, any such disclosure requirements should be reasonably tailored to avoid unnecessarily inhibiting the entry, operation, and expansion of new and innovative ways to serve consumers' legal needs.

³⁴ Requiring disclosures or other conditions on the sale, distribution, or use of interactive software, or similar products, may also raise First Amendment issues. *See generally* Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (articulating a four-part test for evaluating whether government regulations on commercial speech are constitutional).

³⁵ FTC staff recommends that the General Assembly consider evaluating available evidence regarding the effectiveness of any proposed disclosures. As noted above, the legislature may wish to consider the experience of Texas in this area. FTC staff research has demonstrated that disclosures developed even with the best intentions may confuse or mislead consumers, and that they can be improved substantially through the use of consumer research; in particular, well-controlled, quantitative testing can help to ensure that disclosures will work as intended. *See supra* note 15. FTC staff also recommends that the legislature and other relevant North Carolina authorities continue to monitor the effectiveness of any disclosures that are implemented, such as through conducting consumer surveys, to ensure that disclosures are, in fact, made in a clear and conspicuous manner to consumers, and they are otherwise achieving their underlying consumer protection objectives.

³⁶ *See supra* note 18.

³⁷ *See* FTC Enforcement Policy Statement on Deceptively Formatted Advertisements, *supra* note 33, at n.58 and related text.

The Honorable Bill Cook
June 10, 2016

V. Conclusion

The Agencies recommend that the North Carolina General Assembly consider the benefits of interactive websites for consumers and competition in evaluating HB 436. The Agencies also recognize that such products may raise legitimate consumer protection issues, and recommend that any necessary consumer protections be narrowly tailored to avoid unnecessarily restricting new forms of competition that may benefit consumers.

We appreciate this opportunity to present our views.

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