

ONE HUNDRED FOURTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**

COMMITTEE ON ENERGY AND COMMERCE

2125 RAYBURN HOUSE OFFICE BUILDING  
WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
Minority (202) 225-3641

September 12, 2016

Mr. Geoffrey Manne  
Founder and Executive Director  
International Center for Law and Economics  
3333 N.E. Sandy Boulevard, Suite 207  
Portland, OR 97232

Dear Mr. Manne,

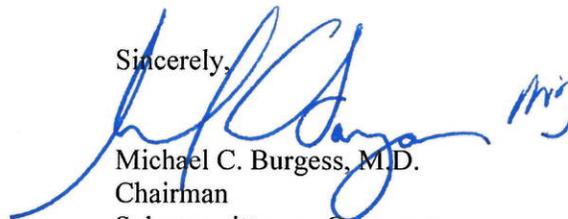
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, May 24, 2016, to testify at the hearing entitled "Legislative Hearing on 17 FTC Bills."

Pursuant to the Rules of the Committee on Energy and Commerce, the hearing record remains open for ten business days to permit Members to submit additional questions for the record, which are attached. The format of your responses to these questions should be as follows: (1) the name of the Member whose question you are addressing, (2) the complete text of the question you are addressing in bold, and (3) your answer to that question in plain text.

To facilitate the printing of the hearing record, please respond to these questions by the close of business on Monday, September 26, 2016. Your responses should be mailed to Giulia Giannangeli, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, DC 20515 and e-mailed in Word format to [Giulia.Giannangeli@mail.house.gov](mailto:Giulia.Giannangeli@mail.house.gov).

Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,



Michael C. Burgess, M.D.  
Chairman  
Subcommittee on Commerce,  
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

Attachment

Attachment - Additional Questions for the Record

**The Honorable Michael C. Burgess, M.D.**

1. H.R. 5115, the Statement on Unfairness Reinforcement and Emphasis (SURE) Act, would codify additional language from the Federal Trade Commission's Unfairness Policy Statement. However, the Federal Trade Commission argues that the legislation may "have the unintended consequence of impairing the Commission's ability to stop harmful practices . . ." Specifically, the Commission is concerned that the legislation "might undermine the Commission's efforts to prevent likely substantial harm before it occurs . . ."
  - a. My understanding is that at least the substantial majority of unfairness cases involve evidence of observed harm. In other words, the FTC has always been on its surest legal footing when "substantial risk of concrete harm" involves a demonstration that the harm does, in fact, result from the act or practice—which clearly demonstrates the "substantial risk" that the harm will result from the act or practice. However, there may be cases where harm has not been observed to result from the specific act or practice in question, but nonetheless is demonstrably "concrete," and where it can be shown that the act or practice at issue raises a "substantial risk" that the harm results. Are there cases where the FTC has addressed harm that is not observed to have resulted from the specific act or practice at issue, yet nonetheless was within its authority under Section 5?
  - b. Are there cases where the FTC has gone beyond its authority to prevent unobserved harms, yet nonetheless obtained a settlement? Do you think the decision by the defendant to settle is due in part to the ambiguity around how the FTC interprets the unfairness balancing test?
  - c. Doesn't the SURE Act's clarification that an act or practice "may be likely to cause a substantial injury if the act or practice raises a significant risk of concrete harm" contradict the FTC's belief that the SURE Act would curb the FTC's current authority over harms that have not yet occurred?
  - d. Does the FTC Act give the FTC the authority to prohibit practices that may result in "trivial or merely speculative" harms? Is it desirable for Congress to give the FTC expanded authority to prohibit acts or practices that do not raise a substantial likelihood of concrete harms?
2. I understand that the FTC's omnibus resolutions set parameters as to the scope of compulsory information requests, such as civil investigative demands (CIDs) for a given industry. Further, the full Commission must vote on such omnibus resolutions, and they provide for a streamlined investigation process allowing FTC staff to obtain approval for an initial CID from a single commissioner. However, more commissioner-level involvement in investigation decisions may help provide some oversight over the

decision to launch certain investigations as well as their scope. How often does the Commission reconsider omnibus resolutions?

- a. Do other commissioners ever review the decision of the commissioner who signs off on certain investigative demands?
  - b. Are there approaches you would recommend that would either provide better oversight over investigatory decisions—whether with respect to scope or other discretionary matters—made by FTC staff?
  - c. Please discuss other issues that may be of interest, such as the process of upgrading initial investigations to full investigations, or approving individual production requests.
3. The target of an FTC investigation can challenge the scope of a civil investigative demand (or CID) from the FTC, and the Commission may grant a request to change the scope. But what about formally challenging the CID? For example, can companies challenge a CID as outside the scope of the omnibus resolution under which the FTC draws its authority to investigate?
- a. Are there concerns with respect to the fact that a formal challenge would be made on a public record? What might be changed about this process?

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September 12, 2016  
Majority (202) 225-8007  
Minority (202) 225-3641

Mr. Richard Hendrickson  
President and CEO  
Lifetime Products  
P.O. Box 160010  
Freeport Center Building  
Clearfield, Utah 84016

Dear Mr. Hendrickson,

Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, May 24, 2016, to testify at the hearing entitled "Legislative Hearing on 17 FTC Bills."

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Thank you again for your time and effort preparing and delivering testimony before the Subcommittee.

Sincerely,

Michael C. Burgess, M.D.  
Chairman  
Subcommittee on Commerce,  
Manufacturing, and Trade

cc: Jan Schakowsky, Ranking Member, Subcommittee on Commerce, Manufacturing, and Trade

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Attachment - Additional Questions for the Record

**The Honorable Gregg Harper**

1. Why is the FTC's Made in America standard the most appropriate to use in keeping consumers informed about the nature of the products they buy?
2. How will the FTC's standard do more to ensure U.S. manufacturers keep making their products here at home?