

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

COMMITTEE ON ENERGY AND COMMERCE

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WASHINGTON, DC 20515-6115

Majority (202) 225-2927  
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September 12, 2016

The Honorable Edith Ramirez  
Chairwoman  
Federal Trade Commission  
600 Pennsylvania Ave, N.W.  
Washington, DC 20530

Dear Chairwoman Ramirez,

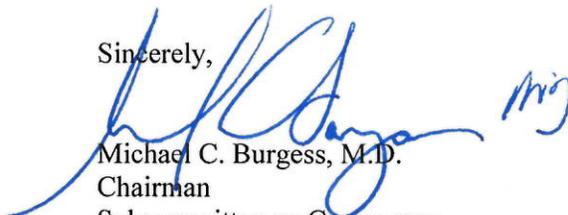
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Tuesday, May 24, 2016, to testify at the hearing entitled "Legislative Hearing on 17 FTC Bills."

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, October 10, 2016, unless otherwise indicated below. 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. One of the cases that was discussed in the context of H.R. 5111, the Consumer Review Fairness Act, was the case against Roca Labs, *FTC v. Roca Labs, Inc.* Please provide more detail regarding this case.
2. What is the process by which investigations are initiated and upgraded, production requests and demands are issued, and investigations closed?
  - a. Does the Bureau of Economics participate on all investigations the FTC initiates? Does BE conduct an analysis of the facts and render conclusions as to each of these investigations?
  - b. If the Bureau of Economics already participates in all or most investigations, how many additional hours, on average, would it take for BE to convert its preexisting analysis with respect to investigations closed without Commission action into a report or separate statement?
  - c. Section 3.5.1.4 of the current Operating Manual requires, for Transmittal Memoranda recommending that an initial investigation be upgraded into a full investigation, an analysis of the “Extent of consumer injury inflicted by the practices to be investigated, the benefits to be achieved by the Commission action and/or the extent of competitive injury.”
    - i. What is the role of the Bureau of Economics, Bureau of Competition, and the Bureau of Consumer Protection in performing this analysis?
    - ii. Why does the Operating Manual not specify that the Bureau of Economics shall perform this analysis?
    - iii. Why does the required analysis not track the requirements of Section 5?
3. What plans does the FTC have to update its rules or Operating Manual governing its investigation and enforcement processes?
  - a. What is the role of the Operating Manual relative to the FTC’s procedural rules?
  - b. What would be the process by which the Manual would be updated? Would a vote by the Commission be required?

4. How many economists from the Bureau of Economics are primarily assigned to consumer protection matters? How many are primarily assigned to competition matters?
  - a. Does BCP solicit and utilize input from the Bureau of Economics on its workshops and reports? BCP's reports rarely cite to economists. In what ways do BCP's suggestions and conclusions reflect the input of its economists?
5. The FTC has acknowledged that consumers rarely read privacy policies. Given that most consumers do not actually read these policies; are all statements they contain considered "material"? How does the FTC determine which statements contained in privacy policies are material and which are not? Does economic analysis play a role in that determination?
6. Please describe the process by which consent orders are negotiated and completed. In addition to your answer:
  - a. Please discuss the process by which divergent recommendations between BC, BCP and BE are resolved.
  - b. Please discuss why you would support or not support a requirement for BE to publish an economic analysis of the Commission's action when it enters into a consent decree.

*The following documents and information may be provided by close of business on October 24, 2016.*

7. Please provide the following information without revealing identities of investigated parties:
  - a. The total number of investigations for the last 5 years initiated by staff;
  - b. The total number of investigations for the last 5 years approved by a single Commissioner;
  - c. A copy of the specific authorization for the investigations pursuant to 15 U.S.C. 57b-1(i); and
  - d. The number of investigations for which the target of the investigation was notified, but the Commission did not contact the target for a period of six months.
  - e. Please provide information relating to:
    - i. Whether each of the terms that were included in consent orders had already been agreed to at the time the Commission voted the issuance of a complaint (total amount in the last 5 years);

- ii. How often staff issues dissenting recommendations against bringing a complaint or issuing a consent order (total amount in the last 5 years);
  - iii. How often the Commission accepted or rejected a staff recommendation against bringing a complaint or issuing a consent order (total amount in the last 5 years), and
  - iv. How many consent orders do not contain a 20-year time period in any of their provisions (total amount in the last 5 years).
- f. Please provide representative samples of the following (in at least two cases involving unfairness claims and at least two cases involving deception claims, de-identified to obscure the identity of the companies involved). In each case, please also explain the role of the Bureau of Economics if that is not apparent from the materials themselves:
- v. Staff memoranda recommending the issuance of a complaint;
  - vi. Staff memoranda recommending *against* the issuance of a complaint;
  - vii. Staff memoranda recommending the issuance of a consent order;
  - viii. Staff memoranda recommending closing the investigation;
    - 1. For the same cases, any communications with the target about the rationale for closing the investigation.
- g. Please provide information (in total numbers for the last 5 years) relating to:
- ix. How often BE staff issue recommendations regarding issuing complaints and consent orders;
  - x. How often recommendations diverge between BCP and BE; and
  - xi. How often the Commission acted on the basis of BE's recommendation instead of BCP's.
8. In the last twenty years, has the FTC brought any complaints or entered into any consent decrees based on actions in compliance with FTC guidelines? If so, please provide relevant details.

**The Honorable Jan Schakowsky**

1. In 1980, the FTC issued a statement on the scope of its unfairness jurisdiction in response to an inquiry from Congress. That statement spells out the FTC's policy on unfairness in detail, giving consumers and business important information on how the

Commission applies its unfairness jurisdiction. H.R. 5115 incorporates selected portions of that unfairness statement focusing on injuries suffered by consumers. Can you detail how the bill is different from FTC's statement and how codifying only selected portions of the unfairness statement would damage FTC authority? What kinds of cases may be affected or not be brought because of this bill?

2. Currently, evidence that a company under FTC jurisdiction complied with FTC guidance is permitted to be used as evidence of the company's good faith. H.R. 5118 would allow companies to use evidence of compliance with guidance as evidence of compliance with law. How would this bill constrain the FTC's enforcement abilities? How would creating such an affirmative defense shift the burden of proof back to the FTC?

3. When critiquing the unfairness statement, Former FTC Commissioner Joshua Wright mentioned In the Matter of Apple Inc. regarding in-app purchases, stating that the FTC's decision imposed "a remedy which essentially amounted to a redesign of certain features of Apple's products." However, when reading Commissioner Ohlhausen's statement, she explained that Apple's iterative approach to software was not the problem; notice in billing was the problem. Can you explain why the lack of notice to consumers was the real problem?