

ONE HUNDRED SEVENTEENTH 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
Minority (202) 225-3641

June 30, 2022

The Honorable Maureen K. Ohlhausen
Former Acting-Chair, Federal Trade Commission
Co-Chair, 21st Century Privacy Coalition
700 K Street NW
Washington, DC 20001

Dear Ms. Ohlhausen:

Thank you for appearing before the Subcommittee on Consumer Protection and Commerce on Tuesday, June 14, 2022, at the hearing entitled “Protecting America’s Consumers: Bipartisan Legislation to Strengthen Data Privacy and Security.” I appreciate the time and effort you gave as a witness before the Committee on Energy and Commerce.

Pursuant to Rule 3 of the Committee on Energy and Commerce, members are permitted to submit additional questions to the witnesses for their responses, which will be included in the hearing record. Attached is a question directed to you from a member of the Committee. In preparing your answer to this question, please address your response to the member who has submitted the question in the space provided.

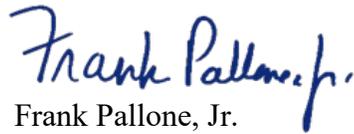
To facilitate the printing of the hearing record, please submit your response to this question no later than the close of business on Thursday, July 15, 2022. As previously noted, this transmittal letter and your response, as well as the responses from the other witnesses appearing at the hearing, will all be included in the hearing record. Your written responses should be transmitted by e-mail in the Word document provided to Ed Kaczmarek, Policy Analyst, at ed.kaczmarek@mail.house.gov. To help in maintaining the proper format for hearing records, please use the document provided to complete your responses.

Ms. Maureen Ohlhausen

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Thank you for your prompt attention to this request. If you need additional information or have other questions, please contact Ed Kaczmariski with the Committee staff at (202) 225-2927.

Sincerely,

A handwritten signature in blue ink that reads "Frank Pallone, Jr." in a cursive style.

Frank Pallone, Jr.
Chairman

Attachment

cc: The Honorable Cathy McMorris Rodgers
Ranking Member
Committee on Energy and Commerce

The Honorable Jan Schakowsky
Chair
Subcommittee on Consumer Protection and Commerce

The Honorable Gus Bilirakis
Ranking Member
Subcommittee on Consumer Protection and Commerce

Attachment—Additional Questions for the Record

**Subcommittee on Consumer Protection and Commerce
Hearing on
“Protecting America’s Consumers: Bipartisan Legislation to Strengthen Data Privacy and
Security”
June 14, 2022**

The Honorable Maureen K. Ohlhausen, Former Acting Chair, Federal Trade Commission, Co-
Chair 21st Century Privacy Coalition

The Honorable Michael Burgess (R-TX)

1. Mrs. Ohlhausen, in the 114th Congress, I was chairman of this subcommittee and introduced a bill to combat patent trolls, called the Targeting Rogue and Opaque Letters – or TROL – Act. I am pleased to see this legislation includes a process to help prevent abusive demand letters. As written, this legislation requires a person seeking a private right of action to first notify the Federal Trade Commission and their State Attorney General with their intent to seek to action and to wait 60 days before proceeding with a private right of action should the FTC and State Attorney General choose not to pursue the case.
 - a. Do you believe this provides sufficient protection against abusive demand letters? If not, do you have suggestions to strengthen this part of the legislation?

Response: Rep. Burgess, thank you for your questions and for your work on this urgently needed legislation. While I agree that any private right of action included in this legislation must be accompanied by strong guardrails, I believe this provision, while helpful, is unlikely on its own to prevent abusive, frivolous, and excessive litigation. In practice, a 60-day waiting period is unlikely to significantly deter abusive demand letters because many letters are likely to receive no response from the FTC or a State Attorney General. Instead, as outlined in my testimony, I believe further improvements to the private right of action are necessary before this Committee takes any further action.

- b. How does this language provide necessary guardrails for businesses?

Response: As noted in my response to Question 1(a), I believe the language as currently drafted is unlikely to provide sufficient guardrails for businesses. For that reason, I believe covered entities should have an opportunity to cure any violations under the Act before individuals can avail themselves of a private right of action. Currently, Section 403(c) limits a right to cure only to actions for

injunctive relief or pursuant to section 209 of the Act, and I am concerned that such a limitation opens the door to a broad variety of potentially abusive claims.

2. Mrs. Ohlhausen, this draft legislation provides for FTC rulemakings that correspond to specific sections of the bill rather than provide broad rulemaking authority. This legislation also authorizes the FTC to be appropriated such sums as may be necessary. I am generally opposed to an appropriation of “such sums...” because we can lose control over actions of the implementing agency.
 - a. Have there been any estimates or evaluations on the amount of funding the FTC will require to implement this legislation?

Response: Although I am not aware of any specific estimate or evaluations, it is vital that Congress appropriate adequate resources for the FTC to vigorously investigate and enforce violations of the law, efficiently implement the bill’s required rulemaking, develop guidance for industry, and hire sufficient FTEs to fulfill the legislation’s sweeping mandate. Currently, Section 401(a) of this legislation requires the FTC to create a new Bureau of Privacy, “comparable in structure, size, organization, and authority” to the existing Bureaus of Competition and Consumer Protection. In FY2022, for example, the Bureau of Consumer Protection operated on a budget of \$191.4 million, while the Bureau of Competition had a budget of \$159.5 million.¹ In light of the complexity of this legislation and its broad mandate, it is likely that a similar amount of funding will be necessary for the FTC to fulfill its statutory mission under this bill.

¹ FED. TRADE COMM’N, Fiscal Year 2023 Congressional Budget Justification – Bureau and Office Descriptions, at 51, https://www.ftc.gov/system/files/ftc_gov/pdf/P859900FY23CBJ.pdf.