

The Honorable Michael C. Burgess, M.D.

1. RECS Act. The Federal Trade Commission stated in testimony that the requirements in the Revealing Economic Conclusions for Suggestions (RECS) Act would be too burdensome for the Commission to comply with. For example, in responding to a question from Congressman Pompeo asking for clarification as to the Chairwoman's primary issue with the RECS Act, Chairwoman Ramirez responded that because the RECS Act would require a "comprehensive" economic analysis, providing any recommendations on legislative action would be "resource prohibitive." However, I worry that this assessment of the legislation makes two inaccurate assumptions. I want to address these assumptions one at a time and ask your thoughts on each.

a. First, "comprehensive" does not appear anywhere in the bill. Given your expertise as an economist, does the bill's required analysis imply some level of "comprehensiveness" that does not appear in the bill's text?

b. Second, it is my understanding that the Bureau of Economics (B.E.) already provides independent advice to the other Bureaus when preparing reports or recommendations. However, I understand that the Bureau of Economics' influence may not be as strong as it once was and I worry that the other bureaus, by controlling communications to the public, may have little incentive to take B.E.'s advice seriously. Assuming it is true that B.E. provides advice to the Bureau of Consumer Protection for all of its recommendations, would a requirement to provide such an analysis, as the RECS Act does, obligate B.E. to provide a more rigorous or "comprehensive" version of B.E.'s typical analysis?

Chairman Burgess, thank you for the opportunity to respond to your questions about the Requirement Of Analysis And Rationale For Legislative And Regulatory Recommendations ("RECS Act"). The key institutional challenge facing the Federal Trade Commission ("FTC") in its consumer protection mission, in my view, is more deeply integrating economic analysis at all levels of decision-making, from enforcement staff to the Commissioners themselves.

The RECS Act would facilitate positive change along these lines by ensuring close collaboration between FTC staff and the Bureau of Economics ("BE") to "identif[y] a problem [the Commission] determines should be addressed, including the rationale for the Commission's determination that private markets or public institutions could not adequately address the issue, and that its recommended legislative or regulatory

action is based on a reasoned determination that the benefits of the recommended action outweigh its costs”¹

As an economist, I am familiar with issues that arise when recommending decisions based upon incomplete or incomprehensive data or evidence. I understand that some have interpreted the RECS Act as imposing a new requirement that BE complete a “comprehensive” economic analysis before recommending action and, on those grounds, have objected to the bill because it would be too burdensome for the FTC. I cannot find support for that proposition in the text of the bill itself, in my experience as an economist, or as a former FTC Commissioner.

In both consumer protection and antitrust litigation, economists regularly rely upon the data that companies have collected and produced to the FTC; this data is rarely “comprehensive.” Indeed, a BE recommendation based upon the information available is the rule, whereas “comprehensive” analysis is the occasional exception. However, this does not mean that BE is unable to provide insightful economic analysis in the absence of a so-called comprehensive analysis.² For example, in litigation, BE provides economic analysis about incentives, information, and revealed preferences, among other things. BE staff also assists BCP in designing copy tests and calculating consumer redress or civil penalties. With regards to policy research and development, BE designed the FTC Consumer Fraud Survey and provided analysis of particular government regulations, such as the Children’s Online Privacy Protection Rule. Although BE staff already regularly assists BCP in various enforcement and policy matters, the RECS Act would increase BE’s involvement. Perhaps most importantly, the RECS Act would increase BE’s ability to influence Commission decision-making on consumer protection enforcement matters and policy.

Because BCP has greater control over the FTC’s communications to the public than BE, the RECS Act would fulfill an important goal: to ensure that BCP seriously considers economic analysis when deciding to litigate. As former BE Director Michael Salinger and former Deputy Director Paul Pautler have noted, the separate

¹ Revealing Economic Conclusions for Suggestions Act, H.R. 5136, 114th Cong. (2016).

² Jessica Rich & Francine Lafontaine, The Role of the Bureau of Economics in Consumer Protection: A Conversation with Bureau Directors, Federal Trade Commission Blog (Nov 9, 2015 9:39AM) <https://www.ftc.gov/news-events/blogs/business-blog/2015/11/role-bureau-economics-consumer-protection-conversation>.

organizational structure of BE “ensures clear communication up and down the chain of command” and “provides the Commission with advice that is rooted in cost-benefit analysis” on the consumer protection side of the Agency.³ The RECS Act bridges the gap between BE’s ability to provide independent recommendations and agency decision-making by requiring the FTC to make a “reasoned determination” that the benefits of a particular recommended legislative or regulatory action outweigh its costs.

Where the FTC has followed the recipe of mindfully integrating economic thinking and research into its new enforcement and policy endeavors, it has performed very well. When it has not, it has faltered and been the subject of serious criticism. Chairwoman Ramirez has demonstrated during her tenure that she places a high priority on integrating economic analysis into the FTC’s consumer protection activities, including with her recent appointment of a consumer protection economist, Ginger Jin, as the newest Director of the Bureau of Economics. However, a requirement under the RECS Act will not differ greatly from the economic analysis BE already provides to BCP and thus will not be cost prohibitive. A requirement to include economic analysis in BCP cases will only help to advance the agency’s consumer protection mission.

³ Michael Salinger & Paul A. Pautler, *The Bureau of Economics at the US Federal Trade Commission*, in GLOBAL COMPETITION REVIEW, THE 2006 HANDBOOK OF COMPETITION ECONOMISTS 3, 4 (2006).