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ONE HUNDRED THIRTEENTH CONGRESS  
**Congress of the United States**  
**House of Representatives**  
COMMITTEE ON ENERGY AND COMMERCE  
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October 2, 2014

Mr. J. Howard Beales  
Professor  
Strategic Management and Public Policy  
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Washington, D.C. 20052

Dear Mr. Beales,

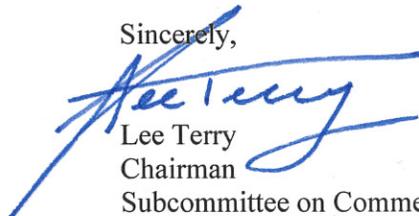
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Friday, February 28, 2014 to testify at the hearing entitled "The FTC at 100: Views from the Academic Experts?"

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 Thursday, October 16, 2014. Your responses should be e-mailed to the Legislative Clerk in Word format at [Kirby.Howard@mail.house.gov](mailto:Kirby.Howard@mail.house.gov) and mailed to Kirby Howard, Legislative Clerk, Committee on Energy and Commerce, 2125 Rayburn House Office Building, Washington, D.C. 20515.

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

Sincerely,



Lee Terry  
Chairman  
Subcommittee on Commerce,  
Manufacturing, and Trade

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

## Additional Questions for the Record

### The Honorable Lee Terry

1. In 1975 and 1980, this Committee placed safeguards on the FTC's authority following a number of large and significant rules the agency issued in the 1970's, including a very controversial rule to regulate children's advertising. These rules have been in place for about 35 years in order to ensure the Commission can promulgate the best rules possible for all businesses and consumers. Congress acted in part because the FTC (unlike some other agencies that have narrower jurisdiction) has vast authority to identify and sanction unfair and deceptive acts or practices across nearly every sector of the economy, and it doesn't focus on specific industry technology or practices. In fact, former FTC Chairman Kovacic has said that "no regulatory agency in the United States matches the breadth and economic reach of the Commission's mandates."
  - a. Do you think the FTC has been effective in protecting consumers during the 35-plus years since the FTC Act was amended and changed the procedures for their rule writing authority?
  - b. Do you agree that, as current law requires, the FTC should ensure that its rules are narrowly tailored, based on sufficient information, and able to withstand appropriate judicial review?
2. Here are some of the differences between the FTC Act and the "notice-and-comment" rulemaking that is undertaken by some other agencies.
  - **Prevalence:** The FTC must identify a pattern of activity – a prevalence, as opposed to one instance – before engaging in a rulemaking. There is no similar requirement in notice-and-comment rulemaking.
  - **Disputed issues.** If the FTC concludes that there is a disputed issue of material fact in a rulemaking, the agency must permit cross-examination of witnesses in a pre-rulemaking hearing and afford the right to offer rebuttal comment. That gives all parties the opportunity to participate. Those requirements don't apply notice-and-comment rulemaking.
  - **Economic effect.** When the FTC issues a rule, it is required to provide "a statement as to the economic effect of the rule, taking into account the effect on small business and consumers." That seems eminently reasonable to me, yet it is not required by notice-and-comment rulemaking.

Do you agree that these are good protections both for consumers and businesses?

3. It appears to me that those who argue for the FTC to have general notice-and-comment rulemaking authority under the APA must believe that the FTC does not possess sufficient

authority today to identify, penalize and prevent bad actors from taking actions detrimental to consumers. Yet we've heard testimony today and in the past repeatedly about how effective the FTC is, so that doesn't seem consistent. What are your thoughts here?

4. In some specific areas, the Congress has given the FTC targeted authority to use notice-and-comment rulemaking. Some of these instances include the Telemarketing and Consumer Fraud and Abuse Prevention Act (1994), the Children's On-Line Privacy rulemaking required in 1998, and the Gramm-Leach-Bliley Act (1999) regarding financial institutions and consumer privacy. This "case-by-case" approach to notice-and-comment rulemaking ensures that, where it is needed, the FTC can address a specific issue in the manner that Congress has determined.
  - a. Do you agree that these specific directions from Congress have been working well?
  - b. Would you agree with former FTC Chairman Kovacic when he stated that this is the best approach to FTC rulemaking, given the broad subject matter authority and economic effects that FTC decisions can have across the economy?
5. You have articulated that restricting advertising because some consumers will misunderstand will leave the majority of consumers in relative ignorance. You state the Commission needs to return its focus to the average viewer. How would this help consumers? How do we get the FTC to change its focus?
6. The FTC's recent path on advertising substantiation for dietary supplements has required two randomized, placebo controlled, double blind clinical trials to satisfy the substantiation requirements.
  - a. What effect will that requirement have on the ability of supplement manufacturers to advertise?
  - b. Does the new requirement effectively displace the Commission's guide: "Dietary Supplements: An Advertising Guide for Industry"?
  - c. Are consumers harmed by restricted advertising? How?
  - d. What would the effect on consumer welfare be if the same standard were applied to advertising claims for "healthy" food?
  - e. Have the FTC's new substantiation requirements effectively reversed Congressional intent established in the Dietary Supplement and Health Education Act? If yes, what should Congress do to fix this?
7. You stated the recent expansion of the 13(b) authority the FTC may use to freeze assets or force disgorgement of ill-gotten gains --historically used in fraud cases -- is being used for consumer redress in cases involving questions about substantiation in national advertising

campaigns. Your testimony mentioned this threatens to undermine the FTC's consumer protection mission. Could you please explain why? Why do you say it is wrong as a matter of law?

8. When the Commission pursues substantiation cases for products whose majority of sales are not related to the claim, what is the opportunity cost? Is the Commission neglecting actual fraud cases?
9. You referenced the Commission's Deception Policy Statement adopted in 1983. What prompted the development and adoption of this policy statement? What was the effect of issuing the policy statement?
10. What is the practical effect of issuing guidelines? For instance, you referenced the "privacy framework" the Commission recently adopted. Should we be concerned that such guidelines or frameworks become a de facto standard or rule – one that is born outside of the rulemaking process?
11. You point out that while too stringent regulation or enforcement can stifle innovation in the technology space, too little regulation or enforcement increases the risk of consumer harm in terms of privacy, so it is a question of balance. How do you believe the FTC is doing in performing this balancing act?
12. You suggest that one way to reduce the risk of overregulation or enforcement is "by focusing on real and identifiable harms." How would you define this? Is this something Congress needs to do or is the FTC equipped to do this?