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ONE HUNDRED THIRTEENTH CONGRESS
Congress of the United States
House of Representatives
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October 2, 2014

Mr. Daniel A. Crane
Associate Dean
Faculty and Research
Senior Professor of Law
University of Michigan
625 South State Street
Ann Arbor, MI 48104

Dear Mr. Crane,

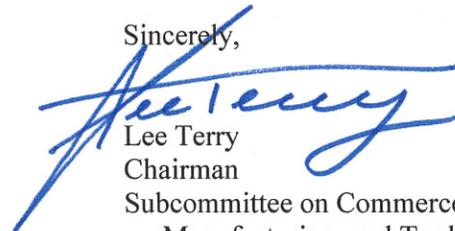
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Friday, February 28, 2014 to testify at the hearing entitled "The FTC at 100: Views from the Academic Experts?"

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 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. Some have raised concerns that because the FTC faces a lesser burden in obtaining a preliminary injunction from a federal judge than does the Department of Justice's Antitrust Division, merging parties can reasonably anticipate the possibility of different substantive outcomes depending on which agency has jurisdiction to review the matter. To avoid the potential for these different outcomes, should Congress require the FTC to litigate merger challenges in federal court just as the DOJ is required to?
6. You testified that "there is little distinction between the agencies in terms of antitrust expertise and economics expertise. Are you arguing that these two functions – the FTC antitrust function and the DOJ's antitrust function – are redundant? Are you arguing to dismantle the Bureau of Competition?
7. An overwhelming majority of the FTC's merger investigations are closed without any enforcement action. Unlike when the FTC files a complaint to challenge a merger, when the FTC closes an investigation, the public typically learns very little about how the agency analyzed the potential effects of the transaction. Such information can be incredibly important to businesses attempting to determine what types of transactions are permissible under federal law. Should the FTC do more to issue so-called "closing letters" to explain its analysis even when it closes a merger investigation?
8. Because the Department of Justice and Federal Trade Commission share jurisdiction to enforce our antitrust laws, there is a complex "clearance" process in place to determine which agency will review a proposed merger. As some have pointed out, the two agencies don't always agree on which should review a particular deal. A prolonged clearance fight could significantly delay the closing of major merger. What can Congress do to prevent these

“clearance” battles? Would a random assignment of cases between the two agencies be better?

9. You stated there is no substantial difference in overall expertise between the FTC and the DOJ Antitrust Division. So what is gained by maintaining two separate entities?
10. You testified that the FTC was designed to be politically independent, but you seem to criticize the agency for responding to the concerns of its authorizing committee. Surely you don't want the FTC to operate with unchecked power? The judicial system surely isn't enough with their limited resources.

The Honorable Jerry McNerney

1. In written testimony for the Subcommittee hearing on February 28, 2014, you discussed the relationship between the Department of Justice and the Federal Trade Commission with respect to Congressional intent in the FTC Act of 1914 and the Supreme Court's decision in *Humphrey's Executor*, and a more recent observation about how the agencies may have strayed from Congress' vision of political independence, superior expertise of one agency over another in certain areas, legislative and adjudicatory character, and cooperative partnership. As we move forward, can you expand upon how we can ensure that the Department of Justice and the FTC do not have duplicative roles and capabilities?