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ONE HUNDRED THIRTEENTH CONGRESS
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House of Representatives
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October 2, 2014

Mr. Robert H. Lande
Venable Professor of Law
University of Baltimore School of Law
Angelos Law 1106
1401 North Charles Street
Baltimore, MD 21201

Dear Mr. Lande,

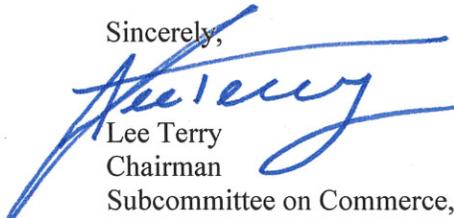
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Friday, February 28, 2014 to testify at the hearing entitled "The FTC at 100: Views from the Academic Experts?"

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. You mentioned that the arrival of Obamacare may lead to an "increased number of anticompetitive consolidations and joint ventures" in the health sector. Could you elaborate on why the law is likely to have that effect?

The Honorable Henry A. Waxman

1. In November, Chairwoman Edith Ramirez presented Federal Trade Commission (FTC) testimony on the agency's antitrust work to the House Judiciary Committee. One area this testimony emphasized was the agency's record of promoting competition in health care markets, including through its scrutiny of health care provider consolidation and efforts by branded pharmaceutical manufacturers to stifle generic drug competition.
 - a. How can Section 5 of the FTC Act play a role in enforcement against anticompetitive conduct in health care markets? Are there ways that the FTC could use its current authorities more effectively?
 - b. I understand that anticompetitive conduct in health care markets can lead to higher costs without improved quality of care – could you please discuss what impact such conduct might also have on consumer choice?
 - c. I was very glad to see the Supreme Court rule in *FTC v. Actavis* that federal regulators can sue brand-name drug makers for anticompetitive practices to keep generic drugs off the market. But I fear that brand-name drug manufacturers may just move on to new tactics, such as by abusing the Risk Evaluation and Mitigation Strategies (REMS) safety protocols or through "product hopping," which is making minor non-therapeutic changes to a drug in order to preserve a monopoly on prescriptions of that medication. What do

you believe the FTC should do to catch these tactics being used in an anticompetitive manner, if they are? Do you believe the FTC is well-positioned to address issues like these?

- d. Are you concerned about the PBM (pharmacy benefit manager) marketplace, with the new Express Scripts and CVS Caremark accounting for more than 80% of the market? Please explain.
 - e. Do you believe that the FTC should have jurisdiction over the business of insurance, or at least the ability to study the business of insurance? If so, why?
2. One topic that has received plenty of recent Congressional attention pertains to patent assertion entities, also known as patent trolls, about which there is an ongoing Section 6(b) study being conducted by the FTC. The Commission also held a joint workshop on the topic with the Department of Justice in December 2012. According to news reports, the Senate Commerce Committee is considering a bill by Senators McCaskill and Rockefeller to fight inappropriate demand letters from these entities. It appears the proposal may give the FTC authority to write and enforce rules for patent demand letters.

Do you believe there is adequate evidence at this time for the FTC to take action against these letters, which are said to be vague, threatening, and sent with the predominant purpose of seeking a quick payday, in the form of licensing fees, from a business? What are your thoughts on the matter?

3. The Hart-Scott-Rodino Amendments of 1976 and 2001 gave the FTC a vital responsibility to investigate proposed mergers between companies and decide if a merger would restrict competition in the marketplace. Today, the need for antitrust has never been greater. Anticompetitive arrangements between companies are dynamic, as is the nature of our economy. The Internet, in particular, poses new challenges to regulators as it grows in importance as a commercial platform.
- a. Vertical mergers – in which a company acquires a key supplier or service provider – can create cost savings due to improved coordination, but can also make it hard for other companies to compete in the same market. Are the current FTC guidelines concerning vertical mergers sufficient to address this concern?

Antitrust laws do not merely serve to maximize efficiency in our economy, however. In fact, constraining monopolies and anticompetitive practices in the market mirrors the goals of a democratic system of government, which seeks to avoid the consolidation of authority and encourage decentralization of power among small groups. Antitrust actions, therefore, reflect our country's political and social values.

- b. Are antitrust statutes important solely for reasons of economic efficiency, or do you believe they have a broader political or social significance? Please explain.

- c. Do you see the non-economic benefits of antitrust laws (e.g., decentralization of power, freedom of choice, and increased trust in the free market system) as essential to how these laws and the enforcement of these laws are ultimately analyzed and judged?

The Honorable Jan Schakowsky

1. The FTC has an important role to play in preventing anticompetitive conduct.
 - a. If you had to choose three areas on which you would recommend the FTC focus its enforcement efforts, what would they be, and why?
 - b. Do you believe there are legislative changes that, if made, would facilitate the FTC's antitrust efforts and lead to improved outcomes? If so, what are they, why do you believe the proposed changes would lead to better outcomes, and how would those outcomes be in the public interest?
 - c. Should the FTC have jurisdiction to oversee anticompetitive conduct by non-profit entities? Please explain your answer.
 - d. I would also be interested in your thoughts on the merger review process. Are there ways in which you believe that process could be made simpler, while maintaining equally stringent or even improving scrutiny of potentially anticompetitive factors? Would moving toward a consumer choice approach help?
2. Some witnesses at the Subcommittee's February 28, 2014, hearing suggested in their testimony that the Commission overreaches in its enforcement authority, particularly in the antitrust context.
 - a. Is the FTC exceeding its authority to enforce antitrust laws? Do you believe there is convincing evidence to support the position that the Commission is acting in an unrestrained manner?
 - b. To your knowledge, has there been a significant "chilling effect" on business as a result of the FTC's recent enforcement of the antitrust laws?
 - c. In your testimony, you suggested a number of areas in which the FTC possesses the authority to act against anticompetitive conduct but has not done so. Given the extent of consolidation in certain industries in recent decades, do you think there are circumstances or types of cases in which the FTC has been reluctant to act?
 - d. Do you believe the FTC has an adequate understanding of how its competition policy decisions ultimately turn out, over the long term? Do you believe the FTC (or outside entities that could advise the FTC) adequately test or evaluate previous competition policy, and do you think long-term lessons play a large enough role in influencing future policy decisions?