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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. Geoffrey A. Manne
Executive Director
International Center for Law & Economics
2325 East Burnside Street, Suite 301
Portland, OR 97214

Dear Mr. Manne,

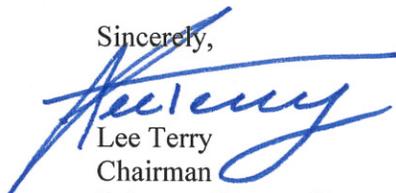
Thank you for appearing before the Subcommittee on Commerce, Manufacturing, and Trade on Friday, February 28, 2014 to testify at the hearing entitled "The FTC at 100: Views from the Academic Experts?"

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. Today the Federal Trade Commission has jurisdiction over a wide-range of high-tech markets, including computer hardware and software, online search engines, and audience measurement services. What are some of the challenges the agency faces in applying its competition and consumer protection authority to such rapidly changing markets?
6. In response to calls from members of Congress and her fellow Commissioners for formal guidelines on what constitutes an "unfair method of competition" under Section 5 of the FTC Act, Chairwoman Ramirez has said that guidelines are unnecessary because sufficient guidance already exists in the form of the Commission's settlement agreements. Do you believe the FTC's settlement agreements provide sufficient guidance about what conduct the agency will prosecute under its Section 5 authority?
7. (For Geoffrey Manne and/or Daniel Crane) Commissioner Wright has called on the FTC to issue a policy statement explaining the boundaries of the agency's authority to prosecute "unfair methods of competition." In his view, federal antitrust enforcement should not be a "game of gotcha," and businesses need to be able to distinguish between conduct that is lawful and conduct that is unlawful under Section 5. Do you agree that formal UMC guidance is important, and if so, why? Are there any reasons why the Commission should not issue such guidance?
8. You testified that "[t]he most important, most welfare-enhancing reform the FTC could undertake is to better incorporate sound economic- and evidence-based analysis." In what arenas does the FTC fail to do this? Why is it so important in your view? Conversely, what is the harm by not incorporating economic- or evidence-based analysis?

9. You quoted Commissioner Write in saying that he “weigh[s] evidence relative to the burdens of proof and production.” Can you explain why this is important? How can we formalize this?
10. I realize I’m asking an economist this question, but can you imagine a scenario where it would ever be appropriate to not consider economic analysis?
11. You highlight that Section 5’s “unfair acts or practices” prong is balanced by consideration of whether an injury is “outweighed by countervailing benefits to consumers or competition.” How would you grade the Commission on its consideration of that limitation in enforcement actions in recent years?
12. Is it appropriate for the FTC to issue 20 year consent agreements in every case, or to apply the same conditions in very different cases? Or should the FTC craft remedies that are commensurate to the conduct at issue? Would anyone else like to comment?
13. The FTC’s draft strategic plan, released last summer, says nothing about the role of economics or the Bureau of Economics. What should it have said?
14. Congress and the FTC spent a lot of time working out the standards for deception and unfairness. What are the limitations on an agency’s authority if it can push the law in new directions without a court ever weighing in to make sure they’re appropriately applying their legal mandate?
15. Do you believe the FTC is using its workshops properly? Are they really helping to inform the agency and prioritize its limited enforcement resources? Or are they being used as informal rulemakings to circumvent the Magnuson-Moss process by producing recommendations like “privacy by design” that, while technically non-binding, the FTC then treats as legal requirements or imposes in consent decrees?
16. In unfairness cases like the one previously pursued against Apple regarding in-app purchases, the FTC seems to aggregate diffuse harms on one side of the equation but does not consider the diffuse costs of their requirements, like time spent dealing with extra disclosures. Is the FTC stacking the deck? Could this be considered arbitrary and capricious if it ever wound up before a court?