Questions from Senator Thom Tillis for Barry Lynn Witness for the Senate Judiciary Subcommittee on Competition Policy, Antitrust, and Consumer Rights Hearing "Baby Formula and Beyond: The Impact of Consolidation on Families and Consumers"

1. Data analysts recognized potential infant formula supply chain problems almost a year ago, what role did our regulatory scheme play in hampering our ability to adapt to foreseen shortages?

   Actually, any close analysis of the industry over the last 10 years would have provided evidence that a shortage was likely to occur at some point in the near future. The core problem is not lack of timely information, but that the capacity to produce the formula is too concentrated and constrained. This means that whenever something goes wrong, the resulting disruption will result in too little supply to go around. The main cause of this problem is the radical changes in U.S. regulation of competition beginning in the early 1980s, under the Reagan Administration, and in the 1990s, under the Clinton Administration. Until that point, U.S. competition agencies worked hard to ensure robust competition in the manufacture and delivery of all goods and services in America, at both the national and local levels. Ever since, however, the competition agencies have largely heeded the efficiency-fetishizing ideology of Robert Bork. Practically, this means they have largely turned a blind eye to extreme concentrations of capacity, even when these factors threaten U.S. national security and the security of domestic families. Fortunately, President Biden's Executive Order on Competition from July 2021 renounced this ideology as a "failed experiment" and has created the foundation for the long process of rebuilding U.S. industrial systems on a more safe and resilient basis.

2. What kinds of improvements need to be made in coordinating information and data sharing between agencies and the administration so as to avoid future critical failures in other crucial industries?

Americans have long understood that the best way to engineer stability and resiliency into industrial systems is to impose simple competition rules that limit how much of a national or local market that any one corporation can control. For most of the 20th Century, this included a rule designed to ensure that no corporation controlled more than 25% of the capacity to produce any particular good (see the 1968 Merger Guidelines, for example). Such simple rules - by ensuring ample redundancy within any system – have repeatedly proven effective at eliminating the likelihood that a single disruption can have outsized effects on society as a whole. Relatedly, competition enforcement agencies – under the control of both parties – also long sought to limit the power of middleman corporations such as retailers and transporters – to prevent them from using their power over suppliers to strip those suppliers of the profits they need to maintain and expand their production capacities. The idea that we can manage structural risk though better collection and sharing of data is dangerous, and often only increases the magnitude of the disruption when something inevitably goes wrong.

3. What sort of changes to tariff policy could we make that would allow the baby formula industry greater flexibility to pivot on production methods in times of shortages?

Before we can determine what sort of tariff policy we want, we must first clarify our vision of what sort of industrial structure we want. Our main goal should always be to ensure the safe distribution of capacity, at the international, national, and local levels. Or put more practically, that no chokepoint in capacity ever pose a threat to the security of the nation or the security of the families and individuals who live within the nation. Based on that simple goal, we can then structure tariffs, import quotas, and other policies related to international trade in ways that help keep ourselves and our nation safe. By contrast, absent such goals, simply reducing tariffs can actually make the situation worse, by making it easier for a well-capitalized overseas competitor to destroy domestic capacity while also concentrating capacity abroad. Such an outcome would increase the number of events that might potentially disrupt normal production while also concentrating the ability to raise prices and reduce quality. One way to understand how this works is to study the extreme concentration of semiconductor capacity in Taiwan over the last 25 years. This concentration poses existential threats to the wellbeing of the United States. It is entirely the result of the one-two subversion of traditional U.S competition policy in the domestic economy in the 1980s and of traditional U.S. trade policy in the 1990s.

4. How could the WIC (Women, Infants, and Children) program procurement policy be changed so that there is more incentive for new producers to break into the U.S. infant formula market?

One way to change WIC procurement policy within any state would be to ensure that no one corporation control more than 25% of the market for formula in that state or even any one region within that state. Such a rule can be further buttressed through stronger antimonopoly enforcement along the traditional lines described above. It can also be buttressed through other approaches to structuring markets. One potentially useful market regulatory model is the one Americans use to govern the manufacture and distribution of beer, wine, and liquor. Here, the careful protection of independent wholesalers and distributors has played a huge role in supporting the entry into the market of thousands of new brewers. The goal is achieved largely by requiring the industry to be divided into three separate “tiers” – with clear lines drawn between production, wholesale and distribution, and retail.