Letter to the Editor

Published in *POLITICO*, November 9, 2011

While I supported the Federal Trade Commission's challenge of anticompetitive, "pay-for-delay" settlements between brand-name and generic drugmakers in the past, I oppose Chairman Jon Leibowitz's opinion piece, "To Cut Deficit, Cut Sweetheart Drug Deals" (POLITICO, Nov. 1).

First, the proposed legislation does not treat all these settlements as "sweetheart deals," or even treat all deals involving payment and delayed entry as pay-for-delay deals to be summarily condemned. The settlements are more complex.

Some settlements have no quid pro quo between the payment and the delay. In other cases, the quid pro quo may just reflect the parties' reckoning of the patent strength. Hence, this proposed legislation shifts to the parties the burden of justifying their settlement.

Second, this proposed legislation provides that the parties meet their burden with "clear and convincing evidence." This heightened standard of proof has not been required in other types of settlements. Indeed, the parties arguably should bear only the burden of producing some evidence justifying their settlement, and the commission arguably should always bear the burden of proving that the settlement is anticompetitive.

Thus, the proposed legislation may be doubly inappropriate.

Third, it is incorrect to assert that the savings from this proposed bill is "billions" of dollars. That may have been true of earlier legislation that condemned pay-for-delay settlements as per se violations of the antitrust laws. But it does not describe the current, more nuanced, proposal. Any projected savings are inherently speculative.

This legislation therefore should not be tacked onto any other piece of legislation, including that being considered by the supercommittee.

That tactic has been tried before — and failed. The legislation should be considered on its own merits by Congress.

J. Thomas Rosch

Commissioner

Federal Trade Commission

He is speaking only for himself.