STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

ON

H.R. 2745

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JUNE 16, 2015

STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015

TUESDAY, JUNE 16, 2015

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 2:09 p.m., in room 2141, Rayburn House Office Building, the Honorable Tom Marino (Chairman of the Subcommittee) presiding.

Present: Representatives Marino, Goodlatte, Farenthold, Collins, Bishop, Johnson, Conyers, DelBene, and Peters.

Also Present: (Majority) Anthony Grossi, Counsel; Andrea Lindsey, Clerk; and (Minority) Slade Bond, Counsel.

Mr. MARINO. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law will come to order. Without objection, the Chair is authorized to declare recesses of the Committee at any time.

We welcome everyone to today's hearing on H.R. 2745, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015." I will recognize myself for an opening statement.

Today's hearing is on the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015," known as the "SMARTER Act." This legislation enacts an Antitrust Modernization Commission recommendation that the standards and processes applied in the merger review process should be identical between our two antitrust enforcement agencies.

Since 1914, two Federal agencies have enforced our Nation's antitrust laws, the Department of Justice and the Federal Trade Commission. When a company wishes to merge with or purchase another company, it notifies both antitrust enforcement agencies of the proposed transaction. Ultimately, only one agency reviews the transaction to determine whether it violates the antitrust laws, and there is no fixed rule to determine which agency will conduct this review.

When the reviewing antitrust enforcement agency concludes that the proposed transaction violates the antitrust laws, it then seeks to prevent the parties from consummating the deal. It is at this

stage of the merger review process that the AMC identified a problem.

The AMC noted that there are different standards applied and processes available to the FTC and DOJ when each agency seeks to block a proposed transaction. Each agency is subject to a different preliminary injunction standard.

Additionally, the FTC has the option to unwind or prevent the closing of the transaction through administrative litigation, DOJ on the other hand cannot.

The AMC concluded that, although certain of the differences between the FTC and DOJ may have some benefits, the disparities between the dual merger review processes result in unfairness and uncertainty. In light of this finding, the AMC recommended that Congress harmonize the merger review processes and standards between the two antitrust enforcement agencies.

The SMARTER Act effectuates this recommendation. This legislation was carefully drafted to reform only the merger review process. The SMARTER Act does not prevent the FTC from pursuing administrative litigation in conduct cases, against consummated transactions, or in any other context outside of the merger review. This narrow construction is consistent with the AMC's recommendations.

Our witnesses today come with experience in the FTC, the DOJ, the AMC, and in private practice. I look forward to hearing their testimony on the important reforms contained in the SMARTER Act.

[The bill, H.R. 2745, follows:]

I

114TH CONGRESS
1ST SESSION

H. R. 2745

To amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as the Attorney General exercises such authority.

IN THE HOUSE OF REPRESENTATIVES

JUNE 12, 2015

Mr. FARENTHOLD (for himself, Mr. GOODLATTE, and Mr. MARINO) introduced the following bill; which was referred to the Committee on the Judiciary

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A BILL

To amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as the Attorney General exercises such authority.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015".

SEC. 2. AMENDMENTS TO THE CLAYTON ACT.

The Clayton Act (15 U.S.C. 12 et seq.) is amended—

(1) by striking section 4F and inserting the following:

"SEC. 4F. ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES OR THE FEDERAL TRADE COMMISSION.

"(a) Whenever the Attorney General of the United States has brought an action under the antitrust laws or the Federal Trade Commission has brought an action under section 7, and the Attorney General or Federal Trade Commission, as applicable, has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws or section 7, the Attorney General or Federal Trade Commission, as applicable, shall promptly give written notification thereof to such State attorney general.

"(b) To assist a State attorney general in evaluating the notice described in subsection (a) or in bringing any action under this Act, the Attorney General of the United States or Federal Trade Commission, as applicable, shall, upon request by such State attorney general, make available to the State attorney general, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.";

(2) in section 5—

(A) in subsection (a) by inserting "(including a proceeding brought by the Federal Trade Commission with respect to a violation of section 7)" after "United States under the antitrust laws"; and

(B) in subsection (i) by inserting "(including a proceeding instituted by the Federal Trade Commission with respect to a violation of section 7)" after "antitrust laws";

(3) in section 11, by adding at the end the following:

"(m)(1) Except as provided in paragraph (2), in enforcing compliance with section 7, the Federal Trade Commission shall enforce compliance with that section in the same manner as the Attorney General in accordance with section 15.

"(2) If the Federal Trade Commission approves an agreement with the parties to the transaction that contains a consent order with respect to a violation of section 7, the Commission shall enforce compliance with that section in accordance with this section.";

(4) in section 13, by inserting "(including a suit, action, or proceeding brought by the Federal

Trade Commission with respect to a violation of section 7)'' before ''subpoenas''; and

(5) in section 15, by inserting ''and the duty of the Federal Trade Commission with respect to a violation of section 7,'' after ''General,''.

SEC. 3. AMENDMENTS TO THE FEDERAL TRADE COMMISSION ACT.

The Federal Trade Commission Act (15 U.S.C. 41) is amended—

(1) in section 5(b), by inserting ''(excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18), except in cases where the Commission approves an agreement with the parties to the transaction that contains a consent order)'' after ''unfair method of competition'';

(2) in section 9, by inserting after the fourth undesignated paragraph the following:

''Upon the application of the commission with respect to any activity related to the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18) that may result in any unfair method of competition, the district courts of the United States shall have jurisdic-

tion to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.";

(3) in section 13(b)(1), by inserting "(excluding section 7 of the Clayton Act (15 U.S.C. 18) and section 5(a)(1) with respect to the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18))" after "Commission"; and

(4) in section 20(c)(1), by inserting "or under section 7 of the Clayton Act (15 U.S.C. 18), where applicable," after "Act,".

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

(b) APPLICATION OF AMENDMENTS.—The amendments made by this Act shall not apply to any of the following that occurs before the date of enactment of this Act:

(1) A violation of section 7 of the Clayton Act (15 U.S.C. 18).

(2) A transaction with respect to which there is compliance with section 7A of the Clayton Act (15 U.S.C. 18a).

(3) A case in which a preliminary injunction has been filed in a district court of the United States.

○

Mr. MARINO. And I now recognize the Ranking Member of the Subcommittee on Regulatory Reform, Commercial and Antitrust Law, Mr. Johnson of Georgia, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman.

Today's hearing is an important opportunity to consider the Federal Trade Commission's critical role in developing and enforcing antitrust law.

Congress first established the Federal Trade Commission in 1914 to safeguard consumers against anticompetitive behavior by specifically empowering the Commission with the authority to enforce, clarify, and develop antitrust law. Under the process of administrative litigation, also known as Part III litigation, the Committee may seek permanent injunctions in its own administrative court in addition to its ability to seek preliminary injunctions in Federal district court.

This additional authority is a unique mechanism that takes advantage of the Commission's longstanding expertise to develop some of the most complex issues in antitrust law.

Today, this Subcommittee will consider the Standard Merger and Acquisition Review Through Equal Rules, or SMARTER Act. This bill would create a uniform standard for preliminary injunctions in cases involving mergers, acquisitions, joint ventures, or similar transactions and, alarmingly, eliminate the Commission's century-old authority to administratively litigate these cases.

Proponents of the SMARTER Act argue that divergent standards for enjoining mergers may undermine the public's trust in the efficient and fair outcomes of merger cases. But it is unclear that these differences are material, let alone that the differences have led to divergent outcomes in merger cases.

In the absence of any evidence, it is difficult to support wholesale changes to longstanding antitrust practices at the FTC for consistency's sake alone based solely on speculative harms. But even assuming that there are material differences in cases brought under these standards, we should strike a balance in favor of competition by lowering the burden of proof in cases brought by the Justice Department, not by raising the Commission's burden for obtaining preliminary injunctions. Courts already require a lower burden of proof in cases brought by the Commission and Justice Department precisely because both are expert agencies equipped with large staffs of economists who analyze numerous mergers on a regular basis that may only bring cases that are in the public interest.

To the extent that we should address perceived differences in the standard for preliminary injunctions in merger cases, legislation should favor increased competition, not the interest of merging parties.

The SMARTER Act would also eliminate the FTC's authority to administratively litigate mergers and other transactions under Section 5(b) of the FTC Act. Leading authorities in antitrust across party lines have expressed serious reservations with eliminating the Commission's administrative litigation authority.

For instance, Bill Kovacic, a former Republican chair of the Commission, has referred to this aspect of the bill as "rubbish," noting that the Commission has used administrative litigation to win a string of novel antitrust cases that courts have ultimately upheld

where the Commission has had to fight every single foot along the way.

Edith Ramirez, the chairwoman of the FTC, likewise wrote last Congress that eliminating the FTC's administrative litigation authority would "fundamentally alter the nature and function of the FTC."

In light of these concerns, I sincerely hope that we can work to find an evenhanded solution that promotes competition in the market and protects the public interest.

And with that, I thank the Chairman, and I yield back.

Mr. MARINO. Thank you, Mr. Johnson.

The Chair now recognizes the Chairman of the full Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his opening statement.

Mr. GOODLATTE. Thank you, Mr. Chairman.

I believe our Nation's antitrust laws serve an important function in rooting out anti-competitive and discriminatory behavior in the marketplace. I also believe that to be effective, these laws must be administered fairly and consistently.

Today's hearing focuses on the "Standard Merger and Acquisition Reviews Through Equal Rules Act," or the "SMARTER Act," which makes important reforms to ensure that our antitrust laws are prosecuted in this manner. Specifically, the bill amends the standards and processes applied to proposed transactions so that they are no longer determined by the flip of a coin.

One of the responsibilities of the Judiciary Committee is to ensure that the enforcement of our Nation's antitrust laws is fair, consistent, and predictable. We discharge this responsibility through vigorous oversight of the antitrust enforcement agencies and vigilant supervision of the existing antitrust laws. To assist the Committee in its antitrust oversight, the Antitrust Modernization Commission was formed and charged with conducting a comprehensive examination of the antitrust laws and existing enforcement practices.

Following this review, the AMC issued a 540-page report that detailed the issues it examined and provided a number of recommendations for legislative, administrative, and judicial action. One of the issues the AMC examined was the existing disparities in the standards applied to, and processes used by, the Department of Justice and the Federal Trade Commission when they seek to prevent the consummation of a proposed transaction.

As the AMC report states, "Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or DOJ reviews their merger. A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction."

The subject of today's hearing, the SMARTER Act, solves the issue highlighted by the AMC. Specifically, the bill eliminates the disparities in the merger review process so that companies face the same standards and processes regardless of whether the FTC or DOJ reviews their proposed transaction.

The SMARTER Act contains two principal reforms to the antitrust laws. First is the harmonization of the preliminary injunction standards that DOJ and the FTC must meet in court. The second reform is the removal of the FTC's ability to pursue administrative litigation following judicial denial of a preliminary injunction request.

The Department of Justice cannot conduct administrative litigation, and it is unfair for some parties to be subject to administrative litigation while others avoid this prospect merely as a result of the identity of the reviewing antitrust enforcement agency. Notably, the removal of the FTC's administrative powers is constructed narrowly and applies solely to the context of merger review cases.

The AMC recommended this removal and went on to state, "elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general, it appears unlikely to add significant value beyond that developed in Federal court proceedings for injunctive relief in HSR Act merger cases. Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and litigation costs."

The SMARTER Act is a common-sense, straightforward measure that implements reforms advanced by the bi-partisan members of the AMC. Furthermore, it is an important step to achieving this Committee's goal of ensuring our Nation's antitrust laws are enforced in a manner that is fair, consistent, and predictable.

I look forward to hearing today's testimony from our esteemed panel of witnesses regarding the SMARTER Act, and I yield back the balance of my time.

Mr. MARINO. Thank you, Chairman Goodlatte.

The Chair recognizes the full Judiciary Committee Ranking Member, Mr. Conyers of Michigan, for his opening statement.

Mr. CONYERS. Thank you, Mr. Chairman, and to my colleagues. This so-called SMARTER Act would make the Federal Trade Commission adhere to the same merger enforcement procedures as the Justice Department's Antitrust Division for proposed mergers, acquisitions, and other similar transactions. There are several reasons that lead me not to recommend this measure.

By weakening the Commission's independence this bill, in fact, undermines Congress' original intent in creating the Commission in the first place. For good reasons that are still relevant today, Congress established the Commission to be an independent administrative agency, and we must be mindful of these reasons as we consider arguments in favor of the SMARTER Act.

Even though the Justice Department's antitrust enforcement authority already existed at the time the Congress created the Commission in 1914, Congress established this agency in direct response to the Department's failure to enforce the Sherman Antitrust Act of 1890, as well as the Act's perceived failure to stop the wave of mergers and corporate abuses that occurred during the 24 years following its enactment.

The Commission is an independent body of experts tasked with the developing antitrust law and policy free from political influence and particularly executive branch influence. Congress specifically

gave the Commission broad administrative powers to investigate and enforce laws to stop unfair methods of competition, as well as the authority to use an administrative adjudication process to help it develop policy expertise rather than requiring the Commission to try cases before a generalist Federal judge.

Unfortunately, the SMARTER Act, rather than strengthening the Commission's authority, does the opposite.

A greater concern is the act's elimination of the administrative adjudication process for merger cases under Section 5(b) of the Federal Trade Commission Act. By doing so, the bill effectively transforms the Commission from an independent administrative agency into another enforcement agency indistinguishable, in fact, from the Justice Department.

The Commission's administrative authority is designed to serve its role as an independent administrative agency. Eliminating it, therefore, threatens the Commission's distinctive role and independence. Make no mistake, eliminating the Commission's administrative authority opens the door for ultimate elimination of the Commission's role in competition and antitrust enforcement and policy development.

You don't have to take my word for it alone. While supporting the bill's harmonization of preliminary injunction standards applicable to two antitrust enforcement agencies, the former Republican Commission Chairman has also publicly said that the rest of the SMARTER Act is "rubbish." The former Chairman understood the ultimate effect of the SMARTER Act, and so do I, when he commented, let me put it this way, behind the rest of the SMARTER Act is the fundamental question of whether you want the Federal Trade Commission involved in competition law.

Similarly, Commission Chairwoman Ramirez observed last year that the bill would have far-reaching immediate effects and fundamentally alter the nature and function of the Commission, as well as the potential for significant unintended consequences.

So, finally, the SMARTER Act is problematic because it may apply to conduct well beyond large mergers, which could further curtail the Commission's effectiveness. In particular, the SMARTER Act would eliminate the Commission's authority to use administrative adjudications not just for the largest mergers, but for any "proposed merger."

It also removes such authority to review a joint venture or similar transaction. Moreover, the measure could be read to eliminate the use of administrative processes for already consummated acquisitions, joint ventures, and other types of transactions that are not mergers as currently drafted.

I recognize that the bill's authors have tried in good faith to respond to some of the concerns expressed by myself and by the Commission last year in response to an early draft of the SMARTER Act, and I appreciate these efforts. Moreover, I recognize that the Commission itself earlier this year changed its procedural rules to make it easier to end the use of administrative litigation where it loses a preliminary injunction proceeding in court.

My disagreement with the sponsors, however, is more fundamental, at least regarding whether the Commission should retain its administrative litigation authority at all in merger cases. This

disagreement leads me to oppose the so-called SMARTER Act, even in its written form.

I thank the Chair and yield back my time.

Mr. MARINO. Thank you, Mr. Conyers.

Without objection, other Members' opening statements will be made part of the record.

Would the witnesses please rise to be sworn in and raise your right hand?

Do you swear that the testimony you are about to give before this Committee is the truth, the whole truth, and nothing but the truth, so help you God?

Let the record reflect that the witnesses have answered in the affirmative.

Please be seated.

I am going to begin by introducing all of the witnesses, and then we will come back for your opening statements. If I mispronounce your name, please do not hesitate to tell me.

Our first witness is Ms. Garza, the co-chair of Covington & Burling's antitrust and competition law practice group. In private practice, she has been involved in some of the largest antitrust matters in the last 30 years, and many other litigation and regulatory matters on behalf of Fortune 500 companies. Before joining Covington, Ms. Garza served as acting Assistant Attorney General in charge of the Antitrust Division at the Department of Justice.

Ms. Garza also was appointed by President George W. Bush to chair the Antitrust Modernization Commission, a bipartisan, blue-ribbon panel created by Congress to study and report to the President and Congress on the state of antitrust enforcement in the United States. The AMC report has been widely praised for providing a valuable framework for policy proposals.

Ms. Garza received her B.S. from Northern Illinois University and her J.D. from the University of Chicago.

Welcome, Ms. Garza.

Mr. Clanton as the senior counsel at Baker & McKenzie, where he also served as head of the firm's global and North American antitrust practice groups. Mr. Clanton has over 30 years of experience representing clients in high-profile and complex antitrust matters. Prior to joining the law firm, Mr. Clanton served as a commissioner and acting chairman of the Federal Trade Commission.

Mr. Clanton received his B.A. from Andrews University and his J.D. from Wayne Law School, where he served on law review.

Welcome, Mr. Clanton.

Mr. Tad Lipsky is a partner in the Washington, D.C., office of Latham & Watkins. He is recognized internationally for his work on both U.S. and global antitrust law and policy, and has handled antitrust matters throughout the world.

Before Latham & Watkins, Mr. Lipsky served as the chief antitrust lawyer for the Coca-Cola Company for 10 years. Mr. Lipsky also served as Deputy Assistant Attorney General under William F. Baxter, who sparked profound antitrust law changes while serving as President Reagan's Chief Antitrust Official.

Mr. Lipsky received his B.A. from Amherst College, his M.A. from Stanford University, and his J.D. from Stanford Law School.

Welcome, sir.

Our final witness is Mr. Bert Foer, the founder and former president of the American Antitrust Institute. Prior to founding AAI, Mr. Foer served in both private and public capacities in the antitrust field. His public service includes serving as the Assistant Director and Acting Deputy Director of the Federal Trade Commission's Bureau of Competition. His private sector experience includes working at Hogan & Hartson, serving as the CEO of a midsize chain of retail jewelry stores, working in various trade associations and nonprofit leadership positions, and teaching antitrust to undergraduate and graduate business school students.

Mr. Foer received his B.A. magna cum laude from Brandeis University, and M.A. in political science from Washington University, and his J.D. from the University of Chicago Law School where he was an associate law review editor.

Welcome, sir.

Each of the witnesses' written statements will be entered into the record in its entirety. I ask that each witness summarize his or her testimony in 5 minutes or less. And to help you with that, you have timing lights in front of you. A light will switch from green to yellow, indicating that you have 1 minute to conclude your testimony. And when the light turns red, it indicates that the witness's 5 minutes have expired. When it gets to the point of when the light flashes red, I know you are intent on getting in your statement, I will politely pick up my hammer and just give you a little indication to please wrap up.

Ms. Garza, your 5-minute opening statement, please?

TESTIMONY OF DEBORAH A. GARZA ESQ., PARTNER, COVINGTON & BURLING LLP

Ms. GARZA. Thank you, Chairman Marino, Vice Chairman Farenthold, and Members of the Judiciary Committee and the Subcommittee. It is a pleasure to testify in support of the SMARTER Act as the former chair of Congress' Antitrust Modernization Commission. That Commission was a 12-member bipartisan, blue-ribbon panel comprised of six Democrats, five Republicans, and one independent. It was a bipartisan panel. We were an engaged group of experienced practitioners, several former enforcers and zealous advocates of strong antitrust enforcement, including a former general counsel of the Federal Trade Commission during the Clinton administration, and two former heads of the Antitrust Division during Democratic administrations.

So I wanted to put that out there. It is not in my opening statement, but I wanted to be clear that we were Congress' committee and we were structured to be bipartisan, and that is the way that our recommendations came out.

The AMC made three recommendations, each of them with bipartisan support, that relate to the subject matter of this hearing, which is creating greater parity between the DOJ and the FTC with respect to merger enforcement.

One recommendation was that the FTC should adopt a policy that when it seeks to block a merger, it should seek both a preliminary injunction and permanent relief, and consolidate those two into a single hearing as long as agreement can be reached between the enforcement agency and the parties on an appropriate sched-

uling order. All of the commissioners joined in that recommendation, with the exception of one Democrat, so five Democrats joined in that recommendation.

Second, the AMC recommended that Congress should amend Section 13(b) of the FTC Act to prohibit the Federal Trade Commission from pursuing further administrative litigation if it lost its motion for a preliminary injunction. One Democratic Commissioner declined to join on the basis that, at the time, the FTC had adopted a policy statement saying that it would rarely actually pursue administrative proceedings after losing a preliminary injunction motion.

I should say that that policy statement, which was in place at the time of the AMC vote, was revoked. This was the Pitofsky rule that Mr. Lipsky refers to in his testimony, and I do in mine.

Third, the AMC recommended that Congress act to ensure that the same standard for the grant of a preliminary injunction apply to both the FTC and the DOJ. Five Democrats joined in that recommendation.

The SMARTER Act accomplishes the objectives of each of these recommendations. The premise of the AMC recommendations and the SMARTER Act is very simple: Mergers should not be treated differently depending on which agency happens to review it. The regulatory outcome should not be determined by an agency flip of the coin.

I would like to emphasize that this is not anti-enforcement legislation, at least not by the lights of the AMC. We regard it to be pro-enforcement. We regarded that legislative change was important to maintain consensus about the value of a strong enforcement regime and that a perception of unequal or unfair treatment undermines that consensus.

Chairman Goodlatte had this in his statement, but I want to read the carefully crafted words of the Commission in explaining its recommendation. "Parties to mergers should receive comparable treatment and face similar burdens, regardless of whether the FTC or the DOJ reviews the merger. A divergence undermines the public trust that the antitrust agencies will review transactions efficiently and fairly. More importantly, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews a transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining parties' assent to a consent decree."

In closing, I would like to say that no one on the AMC believed at the time, and I do not believe today, that this legislation would make it difficult or impossible for the Federal Trade Commission to do its job. The Justice Department has done very well in pursuing its merger enforcement agenda working with the standards that apply to it. And I firmly believe that the Federal Trade Commission can do so as well. Thank you.

[The prepared statement of Ms. Garza follows:]

PREPARED STATEMENT
OF DEBORAH A. GARZA
FORMER CHAIR, ANTITRUST MODERNIZATION COMMISSION
PARTNER, COVINGTON & BURLING LLP

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

HEARING ON

H.R. 2745
THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES (SMARTER) ACT OF 2015"

WASHINGTON, D.C.
JUNE 16, 2015

Statement of
Deborah A. Garza

Hearing on
H.R 2745
The "Standard Merger and Acquisition Reviews
Through Equal Rules (SMARTER) Act of 2015"

Chairman Goodlatte, Ranking Member Conyers, and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. In May 2007, I testified before the Judiciary Committee's Antitrust Task Force as former Chair of the Antitrust Modernization Commission ("AMC") regarding the AMC's Report and Recommendations.[1] Three of those recommendations—all of which had bipartisan support—are relevant to this hearing. One of them called specifically for legislation like the SMARTER Act to equalize the merger enforcement authority of the U.S. Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") by prohibiting the FTC from pursuing administrative litigation against transactions notified under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").[2] I also testified on April 3, 2014, in support of the prior version of the SMARTER Act. It is a great pleasure for me to be here today to testify again in support of the

[1] I am currently a partner at Covington & Burling, where I co-chair the firm's global competition law practice. For the past two years I have also served as International Officer of the American Bar Association Antitrust Section, which actively comments on proposed competition law policies of jurisdictions around the globe; as a non-governmental advisor to the International Competition Network; and as a member of the Executive Committee of the Federalist Society's Corporations, Securities and Antitrust Practice Group. In addition to serving as Chair of the AMC, it has been my honor to serve three times in the U.S. Justice Department Antitrust Division, most recently as a Deputy Assistant Attorney General and Acting Assistant Attorney General. I have counseled many clients over the past 34 years with respect to transactions reviewed by both the DOJ and the FTC, as well as parties objecting to transactions.

[2] *See* Recommendation 25 of the Report and Recommendations of the Antitrust Modernization Commission (April 2007) (Hereinafter referred to as "AMC Report").

SMARTER Act. Eight years is a while, but I have never lost faith that the good government vision of the AMC recommendations would prevail.

The premise of SMARTER is simple: A merger should not be treated differently depending on which antitrust enforcement agency – DOJ or the FTC – happens to review it. Regulatory outcome should not be determined by a flip of the merger agency coin.

Why is this Legislation Needed?

This legislation is needed because it is important to maintain consensus about the value of a strong antitrust enforcement regime. A perception of unequal or unfair treatment undermines that consensus.

As the AMC explained:

> Parties to a merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties' assent to a consent decree.[3]

As I will explain further, the need for corrective legislation is even more evident today than when the AMC issued its findings and recommendations in 2007.

[3] AMC Report at 138-39.

How the Problem Arises

The problem arises because, while the FTC and DOJ have essentially identical authority to enforce the Clayton Act[4] against mergers they believe to be anticompetitive, the processes they use and the judicial standards they face are very different.

Different Processes. Because of its institutional structure as an administrative agency, the FTC has a potentially enormous advantage vis-à-vis DOJ and leverage over the parties with respect to the mergers it chooses to challenge. Indeed, under current law, one could argue that the FTC is in a "heads we win, tails you lose" position. As a result, merging parties are justifiably concerned that their fates may be different depending on whether it is the FTC or DOJ that reviews their merger.

Each of the FTC and DOJ are authorized to seek both preliminary and permanent federal court injunctions blocking a merger.[5] But their practices with respect to seeking permanent injunctions have differed importantly.

For its part, DOJ typically agrees with merging parties to consolidate proceedings for preliminary and permanent relief under Rule 65(a)(2) of the Federal Rules of Civil Procedure (assuming they can agree to a reasonable schedule). This ensures the parties a timely, full hearing on the merits, with DOJ having to prove its case based on a preponderance of the evidence.

In contrast, the FTC has never to my knowledge agreed to a consolidated proceeding and, indeed, has affirmatively resisted it. Despite the FTC's legal ability to seek permanent

[4] 15 U.S.C. § 12. DOJ has sole jurisdiction with respect to banks, railroads, airlines and certain telecommunications firms. But the agencies otherwise share jurisdiction and are each active in the defense, healthcare, high-tech and other industries, even sometimes "trading" back and forth transactions involving certain industries and even certain companies.

[5] *See* 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC).

relief from the district court, it prefers to seek a preliminary injunction only, to preserve the status quo while it proceeds with its administrative litigation.

This approach has great strategic significance. First, the standard for obtaining a preliminary injunction in government merger challenges is lower than the standard for obtaining a permanent injunction. That is, it is easier to get a preliminary injunction.

Second, as a practical matter, the grant of a preliminary injunction is typically sufficient to end the matter. In nearly every case, the parties will abandon their transaction rather than incur the heavy cost and uncertainty of trying to hold the merger together through further proceedings—which is why merging parties typically seek to consolidate proceedings for preliminary and permanent relief under Rule 65(a)(2). Time is of the essence. As one witness testified before the AMC, "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" after the issuance of a preliminary injunction.[6]

Third, even if the court *denies* the FTC its preliminary injunction and the parties close their merger, the FTC can still continue to pursue an administrative challenge with an eye to undoing or restructuring the transaction – as it often does. This is the "heads I win, tails you lose" aspect of the situation today. It is very difficult for the parties to get to the point of a full hearing in court given the effect of time on transactions, even with the FTC's expedited administrative procedures adopted in about 2008.

To appreciate what happens, I encourage the Subcommittee members to study the FTC's challenge in 2008 to the proposed acquisition by Inova Health Systems Foundation of

[6] Testimony of Michael Sohn before the Antitrust Modernization Commission, Federal Enforcement Institutions Hearing, at 11 (Nov. 3, 2005). In fact, by the time a preliminary injunction issues, a merger will already likely have been under investigation and in litigation for more than a year.

Prince William Health System, Inc..[7] In that matter, the FTC commenced its own administrative proceedings at around the same time that it sued to get a preliminary injunction in federal district court, clearly signaling that the administrative litigation would proceed regardless of what the district court might do. For good measure, the FTC appointed then-Commissioner Rosch as the administrative law judge. He imposed a "fast track" schedule under which the administrative hearing would begin within about two months after the court was expected to rule. He also promised to issue his initial decision soon after the hearing concluded, and the Commission said it would decide any appeal of the initial decision within 90 days. While this fast-track procedure was packaged as a way to shorten how long the parties would have to wait for their full day in court, its only apparent certain effect was to encourage the court to issue a preliminary injunction and the parties to terminate their merger agreement. In a press release, the parties attributed their decision to abandon the deal to "the unusual process changes by the [FTC that] threatened to prolong the completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve."[8] In his testimony on the SMARTER Act, Mr. Lipsky provides additional case examples of the length of time involved in an FTC HSR challenge involving an administrative hearing.

As explained in further detail by Mr. Lipsky, in 1995, the FTC adopted a policy (dubbed the "Pitofsky Rule" for the then Chair of the FTC) not to automatically move to administrative hearing following the loss of a preliminary injunction. While the policy left some wiggle room

[7] Neither I nor my firm was involved in any way in that transaction.

[8] Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available at http://newsroom.inova.org/article_display.cfm?article_id=5135.

for the FTC, it was understood at the time that the FTC would litigate internally only in the rare case. As Mr. Lipsky has explained, this policy was perceived by many as a response to unhappiness about the FTC's prior use of administrative proceedings.

Shortly after the AMC issued its report, however, the FTC dropped the Pitofsky Rule. It seemed clear to many at the time that the FTC perceived the ability to resort to administrative proceedings even after losing a motion for preliminary injunction to have great strategic value. First, it could be used to convince courts to apply a more deferential standard to the FTC when deciding a motion for preliminary hearing; second, it could be used as a club over the heads of merging parties considering putting the FTC to its burden of proving illegality.

Recently, the FTC has in essence gone back to the Pitofsky Rule, possibly in response to the concerns that have given rise to the SMARTER Act. Under its new procedures, parties can move to dismiss an administrative proceeding if the FTC has lost a motion for preliminary injunction and the FTC will consider whether to proceed on a case-by-case basis.

Different Judicial Standards. In at least some courts (including, importantly, the U.S. District Court for the District of Columbia), the standard applied in deciding whether to issue a preliminary injunction is significantly less burdensome for the FTC than for DOJ.

The FTC must meet a public interest standard under Section 13(b) of the FTC Act. Under that standard, an injunction shall be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of success, such action would be in the public interest."[9]

[9] 15 U.S.C. § 53(b).

Courts have applied a variety of formulations in describing the FTC's burden under this public interest standard, including that the FTC need merely have raised questions "so serious, substantial, difficult and doubtful as to make them fair ground for further investigation."[10] That means, even after having investigated a case for four, six, or even twelve months (depending on the case), the FTC need only raise serious questions to win a preliminary injunction.

In contrast, under Section 15 of the Clayton Act, courts generally apply a traditional equities test requiring DOJ to show a reasonable likelihood of success on the merits—not merely that there is "fair ground for further investigation."

AMC Recommendations

As I stated at the outset, the AMC offered three sets of interrelated recommendations and findings. The first was that the FTC "should adopt a policy that when it seeks injunctive relief in HSR Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties."[11] The FTC pretty clearly rejected that advice. I would suggest that the agency saw no particular advantage in disarming itself.

The second was for Congress to amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR merger cases. Four of the 12 AMC

[10] FTC v H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001). *See also* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1034-35 (D.C. Cir. 2008).

[11] AMC Report Recommendation 24. Only AMC Commissioners Cannon (R) and Yarowsky (D) did not join in this recommendation.

Commissioners did not join this recommendation.[12] Commissioner Burchfield explained that he declined to join in part because he thought the legislation would be practically meaningless so long as the FTC could circumvent the law by instituting administrative proceedings as soon as the merger closed after the denial of a preliminary injunction. Commissioners Jacobson and I explained that we declined to join based on the FTC's then-policy and practice of not routinely pursuing follow-on administrative litigation where a preliminary injunction had been denied (the so-called Pitofsky Rule). As discussed above, however, shortly after the AMC issued its recommendation, the FTC dropped the Pitofsky Rule in favor of a procedural approach many perceived was designed to make it more difficult for parties to litigate merger challenges. After introduction of the first version of the SMARTER act, the FTC re-instituted the Pitofsky Rule. While I applaud that decision, I now think it is appropriate for Congress to set it in stone.

Third, the AMC recommended that Congress act to ensure that the same standard for a grant of a preliminary injunction applies to both the FTC and DOJ. Only one AMC Commissioner declined to join this recommendation (Burchfield) based on his view that case law was already clear that the traditional equities test applies except where Congress has expressly said otherwise ("this evolving authority suggests that the DOJ and FTC confront the same preliminary injunction standards"). Unfortunately, however, the law has not evolved in the way that Commissioner Burchfield predicted it would.[13]

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[12] Burchfield (R), Kempf (R), Jacobson (D) and Garza (R) did not join.

[13] Commissioners Jacobson, Kemp and I joined the recommendation. We also expressed the belief that the standards were the same and that legislation accordingly might not be necessary, but advised we saw value in eliminating any doubt. I personally relied on testimony by officials of both the FTC and DOJ that they did not view the standards to be different. But that was then.

It is important to note the bipartisan nature of the vote on these recommendations, which were closely considered and seriously debated and discussed among the AMC commissioners. The recommendations were in no way intended to be "anti-enforcement." Indeed, as reflected in its Report, the AMC fully supported use of the antitrust laws to preserve competitive markets, which "drives an economy's resources to their fullest and most efficient uses, thereby providing a fundamental basis for economic development."[14] The objective of these three recommendations, rather, was to maintain a consensus about the value of a strong antitrust merger enforcement regime by ensuring both the reality and perception of fair and equal treatment.

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It appears to me that the SMARTER Act would accomplishes the full gist of these AMC recommendations. It ensures that transactions will be treated the same without regard to which federal antitrust enforcement agency reviews them and addresses the concern of many that the process rules were being stacked against them in a way that effectively prevented them from getting a fair hearing in court. Moreover, the legislation is narrowly crafted to resolve just this issue of mergers. It is not a general challenge to the FTC's use of administrative hearings in other contexts. For these reasons, I am pleased to testify in support and to thank this Subcommittee for the attention it has paid to the AMC recommendations.

[14] AMC Report at 2.

Mr. MARINO. Thank you, Ms. Garza.
Mr. Clanton?

TESTIMONY OF DAVID A. CLANTON, ESQ., SENIOR COUNSEL, BAKER & McKENZIE LLP

Mr. CLANTON. Thank you, Mr. Chairman, and Members of the Committee.

As you mentioned before, I served on the Commission right after the HSR Act was passed, and when we put into place the procedures, which largely are still there today after nearly 40 years.

And let me explain just briefly why I think this legislation is right on point. It is targeted. It deals with an issue of fairness that I will explain. And it does not—it does not, I emphasize that—create any wholesale revision to the FTC's administrative process.

This legislation will focus only on proposed mergers, which essentially are reportable and nonreportable mergers under the HSR Act. And when Congress passed that statute, it created essentially a unified structure for how proposed mergers are to be reported to the FTC and the timelines the FTC has and DOJ, because both agencies are equally involved in that process. The administration of the statute is jointly managed. The FTC is the lead manager in terms of the whole reporting process, but Justice has to concur.

In addition to that, over the years, the two agencies for reportable mergers have developed very extensive, substantive merger guidelines that the courts increasingly are accepting and have adopted.

So you really have a very unique structure that is specific to this idea and to this whole concept of how merger review should take place.

And let me just then go on to talk about what happens in this process. So the parties file merger notifications with both agencies. Both agencies then determine which agency is going to review it. Sometimes you know that in advance. Many times you don't know that in advance. So it could go to one agency or another.

After that, if there are antitrust concerns, which is why you end up in litigation, there is a very extensive discovery process, what we call a second request. And the whole process goes on for many, many months, typically 6 months or longer. And at the end of that, if there is a problem and the parties cannot work out a settlement, either the FTC or DOJ, depending on the agency, decides if they have to go to court.

And here is where the differences start to take place. They haven't occurred previously, but here the FTC has one process where they can go to court and seek a preliminary injunction. And if they get that, then they move forward on their administrative proceeding.

By contrast, DOJ goes into court exclusively, and what has happened over recent years, instead of seeking a preliminary injunction, the parties typically agree, and it is a hearing on the merits. And that hearing encompasses all of the substantive issues, and DOJ bears the burden of proving a violation of Section 7 of the Clayton Act. So you have a significant contrast right there.

And let me just explain briefly on the administrative process for the FTC, they go into court. They seek a preliminary injunction. That preliminary hearing may take several months.

There is a case that I mention in my testimony that is going on right now involving Sysco and U.S. Foods. That case was brought in February. The decision is probably going to happen fairly soon from the district court judge. The FTC administrative proceeding doesn't start until July 21 of this year, 5 months after the case was filed.

If you just look at the FTC rules, that case will then last for another 7 months. And at that point, it will probably be, based on the history of how long it takes DOJ cases which are on the merits, not a preliminary injunction, in the range of 5 or 6 months. And I give two examples of two cases where that happened, two significant cases, by the way.

So to get to the point quickly, just using those examples, and we could come up with others, the FTC administrative process takes roughly twice as long as it does to go into Federal court. And at the end of the day, the FTC hearing probably ends on a preliminary injunction decision. If the companies lose, they don't have the time. They have already probably invested a year-plus of the deal defending this and going through the investigative process. And at the end of that, they face another 7 months, not to mention potential judicial review.

So the process is inherently unfair and differential, and that is what the legislation seeks to change. And I think that makes sense. The FTC has all the authority in the world and has a lot of experience in bringing cases in Federal court. They are not going to be harmed by this.

Thank you.

[The prepared statement of Mr. Clanton follows:]

PREPARED STATEMENT OF

DAVID A. CLANTON

SENIOR COUNSEL, BAKER & MCKENZIE LLP

BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

HOUSE JUDICIARY COMMITTEE

HEARING ON

H.R. 2745, THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015"

WASHINGTON, DC

JUNE 16, 2015

Prepared Statement of

David A. Clanton

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 2745, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" ("SMARTER Act").

I support this reasonable legislation, which implements the recommendations of the Antitrust Modernization Commission. The bill sensibly harmonizes the FTC's procedural rights to challenge proposed mergers and acquisitions with the standards applicable to the DOJ Antitrust Division.

As a former FTC Commissioner, I served on the Commission when the HSR Act was enacted into law and during the development of the premerger notification rules. Since leaving the agency, I have been in private practice for more than 30 years, with substantial experience in merger investigations and enforcement actions. My experience also includes serving as a past chair of Baker & McKenzie's global antitrust practice.

At the outset, let me emphasize that I believe in the FTC's mission and the important contribution it makes to merger enforcement. This legislation would not in any way impair the Commission's ability to maintain a vigorous enforcement program. Rather, it would ensure that the same litigation procedures are used by both agencies in non-consummated mergers and acquisitions, which is consistent with the unified structure of the HSR statute.

The HSR Act was adopted precisely to give the agencies advance notice of significant proposed acquisitions and sufficient time to conduct a thorough investigation before a deal can be consummated. Almost everything about the statute requires close coordination between the

FTC and DOJ, including administration of the premerger notification program, issuance of well-received merger guidelines and determination of which agency will review a particular transaction. The vast majority of reportable deals present no antitrust issues and are cleared after a brief review, often in less than 30 days. The one major exception to this coordinated, shared responsibility is when an investigation cannot be resolved and goes to the litigation stage.

The litigation path in FTC and DOJ merger cases differs in two important respects – first, the standards for granting a preliminary injunction and, second, the venue for litigating the merits.

As to preliminary injunction standards, the FTC is governed by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes TROs and preliminary injunctions to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. . . ." In addition to eliminating the traditional irreparable injury requirement, a number of courts have interpreted the "likelihood of success" test to be satisfied if the FTC raises questions going to the merits "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[1]

Whatever this standard means, and it is hard to equate it with a likelihood of success (however weak the likelihood might be), it is based on the faulty premise that an injunction is necessary because there has not yet been "thorough investigation, study, deliberation and determination by the FTC." To the contrary, when FTC and DOJ merger cases get to court, the agencies have already conducted extensive investigations that typically take 6 months or longer. That is why DOJ is usually willing to proceed immediately to a trial on the merits and seek a

[1] *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 882 (D.C. Cir. 2008) (Tatel, J., concurring) (emphasis added).

permanent injunction. It is useful to note that Section 13(b) was enacted in 1973, three years before passage of the HSR Act. Prior to adoption of 13(b), the FTC was severely curtailed in obtaining preliminary injunctive relief and had to rely on the restrictive All-Writs Act, 28 U.S.C. § 53(a), to obtain temporary relief.[2]

While DOJ is governed by traditional equity standards when seeking a preliminary injunction, courts have relaxed the test to the degree that irreparable injury may be presumed if a likelihood of success can be shown and, in such circumstances, the balance of equities will generally favor the government.[3] Still, the Antitrust Division believes the FTC generally carries a lighter burden when seeking preliminary injunctive relief in merger cases. As outlined in the Division's staff manual,

> [t]he courts, in applying the FTC's statutory standard, have given it the liberal interpretation intended by Congress. *See, e.g., FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (Brown, J.) and 883 (Tatel, J.); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714, 727 (D.C. Cir. 2001); and *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1216-17 (11th Cir. 1991); and *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343 (D.C. Cir. 1980). In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b).[4]

Yet, there is no indication that the standard applied to DOJ has hampered its merger enforcement efforts and the Division's successful track record in recent years, whether by fully litigating cases or extracting more favorable settlements, is instructive.

Although Section 13(b) expressly authorizes district court judges to grant both preliminary and permanent injunctions, the FTC consistently takes the position that merits trials involving non-consummated mergers should be conducted in administrative proceedings and not

[2] *See FTC v. Dean Foods, Co.*, 384 U.S. 597 (1966).
[3] *See U.S. v. Siemens, Corp.*, 621 F.2d 499 (2d Cir. 1980); *U.S. v. UPM-Kymmene Oyj*, 2003 U.S. Dist. LEXIS 12820 (N.D. Ill. 2003).
[4] Antitrust Division Manual, Fifth Edition, at page IV-20 (last updated April 2015).

in the federal courts. Without FTC concurrence, federal judges are powerless to issue permanent injunctions.

The practical effect of the divergent litigation schemes at the FTC and DOJ is that in virtually all non-consummated merger cases involving the FTC the outcome is determined at the preliminary injunction stage, whereas DOJ cases typically consolidate the preliminary and permanent injunction hearing. In essence, for FTC cases, the preliminary injunction hearing is the *de facto* merits hearing, regardless of who wins. That means merging companies face a tougher hurdle in FTC cases than they do in DOJ cases where a permanent injunction hearing requires the government to prove a Section 7 violation by a preponderance of the evidence.

To illustrate, let me compare the timeline for a couple of DOJ cases – *Oracle*[5] and *H&R Block*[6] - that were litigated to conclusion in permanent injunction hearings with a pending FTC merger case – *FTC v. Sysco and US Foods*, No. 15-cv-00256 APM (D.D.C. 2015). The *Oracle* and *H&R Block* cases took a little over 6 and 5 months, respectively, from filing of the complaint to issuance of the district court's decision. In the ongoing FTC case, the Commission filed its administrative complaint on February 26 of this year and set a hearing date to begin on July 21, 2015, approximately 5 months later. As in virtually all FTC cases involving reportable transactions, there is a parallel federal court proceeding where the Commission is seeking a preliminary injunction to block the transaction pending conclusion of the administrative proceeding. The hearing in the court case is now over and the parties are awaiting the judge's ruling, which should be forthcoming later this month or sometime in July.

[5] *U.S. v. Oracle Corp.*, 331 F.Supp.2d 1098 (N.D. Cal. 2004).
[6] *U.S, v, H&R Block, Inc.*, 833 F.Supp.2d 36 (D.D.C. 2011).

Thus, in the above comparison, the FTC's preliminary injunction case will be completed in about the same length of time as the DOJ permanent injunction cases, but the key difference is that the FTC's administrative hearing will just be starting. Under the Commission's rules, that proceeding (including the trial, ALJ decision and appeals to the full Commission) will take another 7 months before the agency issues its final decision, resulting in litigation (court + agency) that is at least twice as long as a typical DOJ merger case. And, the FTC decision timeline takes into account rules changes that the Commission has adopted in recent years to speed up its administrative cases. It is, therefore, no surprise that mergers do not survive in FTC cases beyond the preliminary injunction stage, given the lengthy agency investigation, subsequent litigation and any appellate review.

Some may argue that the Commission's administrative process allows the agency to advance the development of effective merger policy through its own proceedings, as envisioned when the FTC was created. That may be true in other areas of antitrust and consumer protection where the law is less developed or primarily within the province of the agency. The Commission has made significant contributions in those areas , but a completely different paradigm exists for reportable acquisitions and mergers where, as noted above, the agencies enforce the law under a jointly developed program, including economically based substantive guidelines that are being accepted by the courts and integrated into their decisions. Moreover, the FTC's administrative process in HSR-reportable cases is not contributing to the development of merger law because the cases never get that far. Of course, the Commission's authority to litigate consummated mergers in administrative proceedings is left untouched by this legislation, and the agency has had recent success in such cases.

I would add one other comment. The bill, while harmonizing the FTC's litigation procedures with those of DOJ for non-consummated mergers and acquisitions, would not subject the Commission to Tunney Act review of merger litigation settlements. I agree with that approach. The Tunney Act procedures are awkward and ill-suited to the settlement of merger cases and should not be extended to the FTC.

In conclusion, the pending legislation is needed to correct an inequitable disparity between the FTC's and DOJ's litigation procedures.

Mr. MARINO. Thank you, Mr. Clanton.
Mr. Lipsky, your statement, please?

TESTIMONY OF ABBOTT B. LIPSKY JR., ESQ., PARTNER, LATHAM & WATKINS LLP

Mr. LIPSKY. Thank you, Mr. Chairman. I am very honored to be asked to testify today. I am glad to appear before you.

I just wanted to quickly echo some of the comments of the previous witnesses. I think I speak for everybody at the witness table here in saying that we all think that the United States was very wise to choose competition and vigorously enforced antitrust law as the main rule of economic organization for the United States. It is one of the things that has helped make the United States the leading economic powerhouse and innovator that it is today.

And I think if any of us thought that there was any possibility that this bill would diminish the value of the antitrust laws and antitrust agencies, we wouldn't be here testifying in support.

But I do testify in support like my colleagues, Mr. Clanton and Ms. Garza, because this bill I think very responsibly and in a very limited fashion corrects a very evident unfairness and an illogical aspect of the way that the procedures have come to work.

You will see my statement that I have taken this over a bit of history. I guess I have gotten to the point where I know more history than most people that are around. That is not a good comment. But this concern particularly about the use of administrative litigation following an FTC proceeding in court, it is actually based on some very tangible negative experience. And you will see I discuss the RR Donnelly, Meredith/Burda merger, which was proposed in 1989 and went through administrative litigation, which took 6 years. And ultimately, the Commission decided that the district court had been right in declining to enter a preliminary injunction.

And I also mentioned a case involving the Dr Pepper soft drink brand, an administrative litigation where the FTC actually won a preliminary injunction under Section 13(b) in 1986. And despite a declaration from the D.C. Circuit that that matter was moot because it was originally proposed to be acquired by the Coca-Cola Company, that was the merger that was enjoined. And then the Dr Pepper brand was sold off, eventually combined with the 7-Up brand to form the Dr Pepper Seven-Up Company.

But while all that wonderful soft drink industry history was proceeding, the Federal Trade Commission was going along with an administrative litigation. So the RR Donnelly case and the Dr Pepper case happened to culminate at about the same time, which was about 1995, shortly after Bob Pitofsky had been appointed Chairman of the Federal Trade Commission by President Clinton.

Bob Pitofsky knows a tremendous amount about the antitrust laws and before coming to the Commission as Chairman had been in several roles there, including as a commissioner in a prior administration. And he very wisely, I think, issued the so-called Pitofsky rule, 16 CFR 3.26, the policy statement.

Now the policy statement, if you read it carefully, is a little bit cagey. It doesn't make any commitments, but it does say that the decision to proceed to administrative litigation following a loss of preliminary injunction would be considered on a case-by-case basis.

And in the context of those two merger cases where the use of administrative litigation had been very heavily criticized in the bar, it was understood to essentially acknowledge the unfairness and the irrationality of having a situation where if your merger is judged in the Justice Department, you end up in a judicial proceeding, whereas if you are judged in the Federal Trade Commission, you face the possibility of this nearly endless administrative litigation. In the Dr Pepper situation, it was 9 years, and that was even before the final disposition by the appellate court.

So I think the Pitofsky rule was wise. I think that the Commission has largely acted in accordance with the Pitofsky rule. And all the SMARTER Act would do, really, is codify I think what is FTC's better judgment that if there is a loss in the district court, it is best that administrative litigation be foregone.

It is true that Congress originally foresaw a very special role in creating this administrative litigation for the FTC. But we also have to take into account that when the 13(b) statute, the injunction statute, was passed in 1973, it did provide the Commission with the possibility to seek a permanent injunction in the Federal district court. So the Commission has a very clear and obvious available authority so that it could decide to go to the district court.

I will stop there. Thank you.

[The prepared statement of Mr. Lipsky follows:]

CONGRESS OF THE UNITED STATES

HOUSE OF REPRESENTATIVES

COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON
REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

BOB GOODLATTE, CHAIRMAN

Testimony of

Abbott B. Lipsky, Jr.

Partner, Latham & Watkins LLP
Washington, D.C.

THE STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015

June 16, 2015

Mr. Chairman and Members of the Subcommittee, thank you for your invitation to testify regarding H.R. ____, the "SMARTER Act". I am a partner in the law firm of Latham & Watkins LLP, resident in the firm's Washington D.C. office. I am presenting this testimony on my own behalf, based solely on my own experience and understanding of the current Section 7 enforcement process. My views do not necessarily coincide with those of any other individual or entity, including Latham & Watkins LLP or its clients.

I have practiced antitrust law for almost forty years, serving in a variety of government antitrust enforcement and policy positions, including Deputy Assistant Attorney General for Antitrust in the U.S. Justice Department (1981-83), and as the chief global antitrust lawyer for The Coca-Cola Company (1992-2002). I have been active in the ABA Section of Antitrust Law and have held a variety of leadership positions in the Section. I currently serve as Co-Chair of the Section's International Task Force.

During my tenure as Deputy AAG for Antitrust, I was responsible for preparing the 1982 Merger Guidelines under the guidance of Assistant Attorney General William Baxter. These Guidelines revolutionized the Antitrust Division's approach to enforcement of Section 7 of the Clayton Act by explicitly incorporating economic concepts and criteria into every step of the merger enforcement process. While there have been several noteworthy modifications to the 1982 Merger Guidelines, the same fundamental economic approach continues to be followed not only at the Antitrust Division, but also at the Federal Trade Commission and at most antitrust agencies around the world, including scores of agencies that were created as competitive markets and antitrust rules spread worldwide following dissolution of the Soviet Union.

I have experience in both U.S. district court and administrative litigation, and have served as counsel in contested merger cases not only before the FTC and federal district courts, but also before a number of competition-law agencies in foreign jurisdictions, such as Canada, Chile, China, the E.U., Mexico and Venezuela. I also

have experience with agency proceedings involving mergers in many more jurisdictions around the world with actively enforced merger notification and approval regimes.

I previously testified in support of a draft version of the SMARTER Act that was the subject of a hearing before this subcommittee in the previous Congress (April 3, 2014). The current version of the SMARTER Act would accomplish a key objective, which is to place the two federal antitrust enforcement agencies on an equal procedural footing when they seek to challenge mergers as anticompetitive. This legislation makes no change in the ultimate substantive antitrust standard applied to transactions subject to Clayton Act Section 7.

PROCEDURAL OPTIONS IN CASES SUBJECT TO CLAYTON ACT SECTION 7

Parties invest significant resources in considering, planning and executing the type of fundamental structural transactions that are subject to Section 7 of the Clayton Act. Time, effort and money are spent studying their strategic logic in light of fundamental business objectives; a variety of consultants (business, marketing and financial strategy) as well as lawyers and accountants are often retained to provide support and analysis, and senior managers and other employees characteristically devote significant effort to considering the merits of the available options. In a significant fraction of such matters, the ability to obtain antitrust clearance in the U.S. and around the world becomes a critical variable. In the United States we must advise business clients on the basis of two independent potential procedural paths – either through the Antitrust Division, with the assessment depending on the potential for a disposition resulting from federal court litigation, or through the Federal Trade Commission, which has a variety of potential outcomes including various sequences involving both judicial and administrative litigation.

Because the so-called "clearance" process – the method by which the two US antitrust agencies decide which will investigate a particular matter – has no specified rules and therefore no reliably predictable outcome, neither agency can ever be completely ruled out as the possible ultimate reviewer, and therefor neither procedural pathway can ever be ruled out. While the fundamental legal standard in Section 7 is the

same for both agencies, the procedural differences can be profound, and sometimes dispositive. Where the Antitrust Division is concerned, the parties know that ultimately the matter may be determined by the outcome of litigation in court, including the possibility of appeal. The Antitrust Division has no direct authority to determine the legality of a transaction – it must persuade a federal district court to issue an order prohibiting or conditioning the transaction. Typically the Antitrust Division proceeds under its authority in 15 USC 25 to seek relief in a federal district court.

The ultimate fate of an FTC matter is less determinate in view of the Commission's option for administrative litigation and the potential interplay between that option and the Commission's judicial options, which are essentially the same as those available to the Antitrust Division. Typically the FTC will challenge a transaction by seeking a preliminary injunction under 15 USC 53(b), but I am not aware of any instance in which the Commission has sought a permanent injunction under the authority provided in that section. If it is unsuccessful in its request for a preliminary injunction the Commission may abandon its objections to a transaction, or it may appeal. But regardless of the ultimate outcome in court, it has the option of continuing the challenge through administrative litigation. For most structural transactions this is the alternative that presents the greatest potential for delay, expense and uncertainty.

Antitrust practitioners have long perceived that the possibility of continued administrative litigation by the FTC following a court decision constitutes a significant disincentive for parties to invest resources in transaction planning and execution. In a matter involving acquisition of the commercial printing firm Meredith Corp. by R.R. Donnelley, first announced in 1989, the Commission's request for preliminary injunction was denied, but the FTC continued litigation before an administrative law judge. The parties sought dismissal of the complaint based on issue preclusion, but this was rejected by the ALJ on the grounds that the eight-month investigation under the Hart-Scott-Rodino Act followed by the six-day preliminary injunction hearing did not provide a sufficient basis for assessing the competitive effects of the transaction.

The Commission refused to consider the parties' appeal from the ALJ's rejection of their dismissal motion on grounds of issue preclusion, because Commission rules did not provide for the possibility of an interlocutory appeal of the ALJ ruling. The parties then sought review in the Seventh Circuit Court of Appeals. In an opinion by Judge Easterbrook, the court dismissed the appeal for lack of jurisdiction (based on lack of a final order), while noting:

> We sympathize with Donnelley's frustration at its inability to get the Commissioners' attention, and we regret the high costs of litigation — especially if the outcome is foredoomed. Members of the public lose along with Donnelley if a protracted case raises the costs of its products.

R.R. Donnelley & Sons v. FTC, 931 F.2d 430, 433 (7th Cir. 1991). At the conclusion of the hearing the ALJ ruled that the transaction would be anticompetitive and ordered divestitures. The parties appealed to the full Commission and, almost six years after the announcement of the transaction, the Commission unanimously overruled the ALJ's initial decision, finding that the transaction was not anticompetitive and therefore did not violate Section 7 of the Clayton Act. 120 F.T.C. 36 (1995).

The Commission has also continued administrative litigation even in cases in which it successfully stopped a proposed transaction in court. This was the situation when the Coca-Cola Company proposed to acquire the Dr Pepper brand in 1985. The FTC conducted an investigation under the Hart-Scott-Rodino Act and obtained an injunction from the federal district court in Washington DC. *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated mem.*, 829 F.2d 191 (D.C. Cir. 1987). Although the parties took an immediate appeal to the U.S. Court of Appeals for the D.C. Circuit, shortly thereafter the transaction agreement was terminated by the parties and the Dr Pepper brand was conveyed to an unrelated bidder in a separate transaction. Over the objections of the Commission, the parties to the transaction obtained an order from the D.C. Circuit declaring the matter moot and vacating the district court judgment.

Despite the D.C. Circuit's holding that the matter had been rendered moot, the Commission continued the administrative litigation. The case was heard before an

administrative law judge, who found the transaction in violation of Section 7 and ordered relief. The ALJ decision on the merits was affirmed on appeal to the Commission. The parties sought review in the D.C. Circuit Court of Appeals. On May 18, 1995 – after years of administrative litigation, and at about the same time as the resolution of the R.R. Donnelley/Meredith litigation – while the Commission's decision was pending on review before the D.C. Circuit, the Commission and Coca-Cola settled the matter, terminating the litigation. Coca-Cola consented to entry of an order requiring prior approval by – or in some cases prior notice to -- the Commission of certain future transactions for ten years following entry of the order. That order expired ten years ago without any further noteworthy development.

The costs and delays inherent in the Commission's pursuit of administrative litigation following judicial disposition of the Commission's merger challenges were probably in the thoughts of Commission leadership when in 1995, shortly after the final disposition of the R.R. Donnelley/Meredith and Coca-Cola/Dr Pepper matters, it adopted the policy statement that has come to be referred to as the "Pitofsky Rule", after then-Chairman of the FTC Robert Pitofsky.[1] On its face the Statement appears to say little of substance. A Commission release that accompanied publication of the Statement offered a spirited defence of the differences between court litigation and administrative litigation. The Commission also reminded practitioners that continuation of administrative litigation following judicial disposition of a Commission injunction request is a matter to be resolved case-by-case on the basis of a public interest determination by the Commission. Arriving as it did in the immediate aftermath of the R. R. Donnelley/Meredith and Coca-Cola/Dr Pepper matters, however, the issuance of this Policy was widely understood to indicate that the Commission had gained a better appreciation of the burden of continuing multi-year administrative litigation following a judicial disposition of a Commission merger challenge. Perhaps the Commission took to heart Judge Easterbrook's sympathetic statement upon dismissal of the parties' interlocutory appeal in Donnelley/Meredith.

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[1] Statement of Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction. 60 Fed. Reg. 39743 (August 3, 1995).

The "Pitofsky Rule" – embodied in a specific provision of the Commission's Rules of Practice, 16 CFR 3.26 -- was largely followed by the Commission in subsequent merger cases involving a Commission loss on motion for preliminary injunction in the district court. There were proposals for major revisions in the rules of practice for FTC administrative litigation in 2008 that seemed intended to reverse the unspoken presumption of the 1995 Statement (among many other features) and establish a regular practice of placing merger cases in administrative litigation even where the Commission's injunction request had failed in court.[2] However, the FTC very recently took steps that would seem to at least partially restore the original understanding of the Pitofsky Rule.[3] Like the first such Statement, however, the more recent one says little of substance, but it does seem to suggest that the Commission will take seriously the possibility of dropping merger cases in which it has been unable to obtain preliminary relief in court.

The SMARTER Act is, fundamentally, a codification of the Commission's generally sound practice over the past twenty years (ignoring the apparent 2008 deviation), consistent with the original if largely unstated understanding surrounding the Pitofsky Rule. It will channel the Federal Trade Commission's merger challenges through federal district court, rather than through administrative litigation, as the Commission itself has chosen to do. In combination with the proposed restoration of equality in the standards for grant of injunctive relief, it will eliminate the troublesome divergence in the procedures available to each agency, and it will most notably eliminate the specter of additional years-long administrative litigation before the Commission for transactions that have been challenged before the federal district courts. This would be a welcome and salutary adjustment in the procedures applicable to structural transactions, and may enhance the options available to businesses that are

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[2] 16 CFR Parts 3 and 4 Rules of Practice; Proposed Rules, 73 Fed. Reg. 58832 (proposed Oct. 7, 2008); *see* N. Stoll and S. Goldfein, "Random Events in Merger Notices: 'Cleared to DOJ' vs. 'Cleared to FTC"', 240 N.Y.L.J. (Dec. 16, 2008).

[3] Changes to Commission Rule 3.26 re: Part 3 proceedings following federal court denial of a preliminary injunction (March 16, 2015), available at https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings (visited June 12, 2015).

anxious to conform their behavior to the antitrust laws. Ultimately, consumers will benefit from the resulting productivity enhancement.

STANDARDS FOR GRANT OF PRELIMINARY RELIEF

The need to restore equality between the preliminary injunction standards applicable to both FTC and Antitrust Division cases challenging transactions subject to Clayton Act Section 7 emerges from a series of recent merger cases that has created an apparent gap in the applicable injunction standards. The Antitrust Division's authority to seek a injunctions (preliminary and permanent) in Clayton Act cases is found in 15 USC 25. The applicable standard has long been understood to incorporate a sliding scale involving likelihood of success and an assessment of equitable factors, most notably the public interest. Although the wording of specific decisions can suggest subtle differences in approach from case to case, the logic of this standard is not difficult to understand. Once a structural transaction is consummated, it can becomes more costly and difficult to restore the *status quo ante* if it is determined that the transaction was likely to reduce competition substantially or create monopoly in a defined relevant market. Thus a preliminary injunction can serve the salutary purpose of suspending the transaction while its legality is assessed, so that it can be prohibited if it is proven to be illegal.

But the suspension of a transaction pending an assessment of its legality under Section 7 carries risk. The delay, cost, risk and inconvenience of proceedings may cause the parties to abandon the transaction. If the transaction was erroneously enjoined, the consumer suffers. Even if the deal ultimately goes through, the consumer foregoes some or possibly all of the competitive benefits of the transaction, at least for a time, and indirectly pays the cost of that mistake through higher prices necessary to cover the extra cost. Therefore broadly speaking the purpose of the preliminary injunction standard is to require a sensible balancing of the risks – to stop anticompetitive mergers and prevent harm, if the transaction is truly anticompetitive, and to assure that procompetitive mergers are consummated as soon as possible consistent with making a sensible judgment that they are not anticompetitive.

The Commission's authority to seek a preliminary injunction is based on 15 USC 53(b), and was intended by Congress to require this same sliding scale assessment. A transaction with a high risk of illegality usually ought to be enjoined since there is less fear that litigation will impose needless costs and delays. But a transaction with a low risk of illegality should not be enjoined, lest it be deterred or mistakenly terminated due to the burden of proceedings. The cumulative effect of several recent contested merger decisions has been to allow the FTC to argue that it needn't show likelihood of success in order to win a preliminary injunction; specifically these decisions suggest that the Commission need only show "serious, substantial, difficult and doubtful" questions regarding the merits.

I realize that the cases supply fodder for a much longer and more detailed analysis of the definition and application of these preliminary injunction standards. That would be unnecessary, however, because this subcommittee and other committees of Congress have received testimony on other occasions that engage in a much more extended analysis of legislative history and the recent case law in demonstrating the unintended emergence of this gap. For example, as former FTC Chair Tim Muris has testified before a Senate Subcommittee:

> Unfortunately, a few recent court decisions provide the FTC with a lower preliminary injunction standard than the standard for the DOJ. Because of this lower standard, it is now possible for the FTC to obtain a preliminary injunction to block a merger with evidence that would be insufficient for the DOJ to obtain the injunction. Because most preliminarily enjoined deals cannot, as a practical matter, survive the months (much less years) of delay attendant upon an FTC administrative proceeding, the FTC's relative ease in obtaining a preliminary injunction means that it can permanently foreclose more mergers than its counterpart.
>
> This result is fundamentally unfair. Because the FTC and DOJ divide merger review between them pursuant to an *ad hoc* agreement, the legality of some mergers today depends not on their underlying merits, but instead on which agency reviews them. In other words, the flip of a coin (to resolve a dispute between the two agencies over which agency should review the merger) could determine whether a merger survives antitrust scrutiny.[4]

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[4] Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers, Statement of Timothy J. Muris, Foundation Professor, George

Thus, there is a distinct need to return the preliminary injunction standards applied to merger challenges by the two distinct federal antitrust agencies to a state of equality, and that means a restoration of the FTC standard to its original level, equivalent to the standard applied to the Antitrust Division -- namely, the traditional injunction standard, applying what is in essence a sliding scale that considers both likelihood of success on the merits and an assessment of the equities, and primarily the public interest. The present bill seems to achieve both objectives in a direct and simple manner, and for all of these reasons I support passage of the bill.

Mason University School of Law, and of counsel, O'Melveny & Myers LLP, before the U.S. Senate, Committee on Commerce, Science and Transportation, Subcommittee on Consumer Protection, Product Safety and Insurance, Washington, D.C., March 17, 2010.

Mr. MARINO. Thank you, Mr. Lipsky.
Mr. Foer, your statement, please?

TESTIMONY OF ALBERT A. FOER, ESQ., SENIOR FELLOW, AMERICAN ANTITRUST INSTITUTE

Mr. FOER. Thank you, Mr. Chairman, Members of the Committee.

In previous hearings on the SMARTER Act, you heard from Professor John Kirkwood, like myself, a senior fellow of the American Antitrust Institute, and similarly well experienced at the FTC, albeit years ago. We sent the Committee a letter, and that is attached. This is a year ago, so that is attached to the testimony, and I understand it will be included.

Our position on this legislation, though, has not changed. Put simply, we do not think that the case has been made for new legislation. I will give three reasons.

First, while we agree there is no need for differently articulated standards for obtaining a preliminary injunction, we do not perceive that the differences between the FTC and the Justice Department that are addressed by this bill are differences that, in fact, make a difference.

Federal courts generally require both agencies to make strong showings of probable anticompetitive effect before a preliminary injunction is issued. In actual practice, it rarely if ever occurs that a merger outcome is influenced much less determined by the theoretically more lenient public interest test for a preliminary injunction under Section 13(b) of the FTC Act.

Second, if a single theoretical standard is somehow deemed so important, then we suggest, as I think Ranking Member Johnson suggested, that it would make more sense to modify the DOJ standard to conform to the FTC standard, so that the Department of Justice would share the presumption of expertise that is implicit in the FTC standard.

And third, prudence compels caution. I sound like a real conservative here. Prudence demands caution when tinkering with the system of dual enforcement, including but not limited to administrative adjudication at the FTC. This system emerged out of robust debate during the 1912 presidential election campaign. Congress then was concerned about leaving antitrust enforcement exclusively in the hands of generalist judges, preferring to establish a sister administrative agency with group decision-making by a body of experts.

It is no accident that modern merger law has been the result of administrative guidelines developed jointly by the two antitrust agencies rather than by judicial interpretations. It is administrative guidelines to which both agencies are particularly well-qualified to contribute which are the key to predictability and efficiency in merger controls.

Administrative adjudication of mergers offers an important outlet for the application of such guidelines.

Because of differences in the agency statutes and procedures, special care must be taken to foresee possible unintended consequences. To mention one such risk that can probably be fixed by additional drafting, consummated transactions involving nonprofit

organizations, such as some important hospital mergers, might be precluded from administrative adjudication by the FTC. I don't think that is intended. I don't think it would be wise.

But more important, if Congress takes away the FTC's administrative adjudication for mergers, it could be starting down one of those slippery slopes where brakes are likely to fail.

The Clayton Act Congress and the FTC Congress were one and the same. Those farsighted legislators valued a competitive marketplace, which they saw endangered by ever-growing commercial establishments with ever-growing economic and political power. And they became convinced that having two agencies conceived with different structures share the responsibility, that that would be best to ensure the competitive economy they wanted to maintain.

We at the AAI believe that the DOJ and FTC have contributed importantly to the evolution of merger law and policy, both as cooperators in a joint enterprise and occasionally as rivals, motivated by the desire to outshine the other in the public eye.

In this regard, I might mention that the FTC has shown that it has already heard the criticisms of the Antitrust Modernization Commission by taking important steps, including 3.26 of its rules to make their process both fairer and quicker.

So why act now? Why not let the FTC continue to work its way through? We have not seen a lot of examples of problems, and the examples we see are very old and before the FTC took its lessons from the modernization commission.

So I say, why fix a wheel that simply ain't broke?

Thank you for, again, listening to our views.

[The prepared statement of Mr. Foer follows:]

TESTIMONY
of
ALBERT A. FOER

On Behalf of The American Antitrust Institute

June 16, 2015

Before the House of Representatives Judiciary Committee
Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Re: H.R. 2745,

"Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015"

Chairman Marino and Members:

My name is Albert Foer. I founded the American Antitrust Institute in 1998 and served as its President until this past January. Today I am a Senior Fellow of the AAI, which is an independent not-for-profit education, research, and advocacy organization. See www.antitrustinstitute.org. I served as an Assistant Director and Acting Deputy Director of the FTC Bureau of Competition in the 1970's. In previous hearings on the SMARTER ACT, you heard from Professor John Kirkwood, another Senior Fellow with substantial experience at the FTC, and we wrote you a letter dated April 9, 2014, stating our views, which is attached.

Our position on this legislation has not changed. Put simply, we do not think a case has been made for new legislation.

First, while we agree there is no need for differently articulated standards for obtaining a preliminary injunction against a proposed merger, depending on which agency is bringing the action to court, *we do not perceive that the differences addressed by H.R. 2745 are differences that in fact make a difference.* Federal courts generally require both agencies to make strong showings of probable anticompetitive effect before a preliminary injunction is issued. In actual practice, it

rarely, if ever, occurs that a merger outcome is influenced, much less determined, by the theoretically more lenient public interest test for a preliminary injunction under Section 13(b) of the FTC Act.

Second, if a single theoretical standard is somehow deemed so important, then we suggest that it would make more sense to modify the DOJ standard to conform to the FTC standard, so that the Department of Justice would share the presumption of expertise that is implicit in the FTC standard.

Third, prudence compels caution in tinkering with a system of dual enforcement, including but not limited to administrative adjudication at the FTC, that emerged out of robust debate during the 1912 Presidential election campaign. Congress then was concerned about leaving antitrust enforcement exclusively in the hands of generalist judges, preferring to establish an administrative agency with group decision making by a body of experts. It is no accident that modern merger law has been the result of administrative guidelines developed jointly by the two antitrust agencies rather than judicial interpretations. It is administrative guidelines, to which both agencies are particularly well qualified to contribute, which are the key to predictability and efficiency in merger controls. Administrative adjudication of mergers offers an important outlet for the application of such guidelines.

Because of differences in the agencies' statutes and procedures, special care must be taken to foresee possible unintended consequences. To mention one such risk that can probably be fixed by additional drafting: consummated transactions involving non-profit organizations such as some important hospital mergers might be precluded from administrative adjudication by the FTC.

More important, if Congress takes away the FTC's administrative adjudication for mergers, it could be starting down one of those slippery slopes where brakes are likely to fail. The Clayton Act Congress and the FTC Congress were

one and the same. Those farsighted legislators valued a competitive marketplace, which they saw endangered by ever-growing commercial establishments with ever-growing economic and political power. After experiencing a generation of what they saw as inadequate enforcement up to that time by the Justice Department alone, working with a law that they realized was too inflexible to accomplish what was needed, they became convinced that having two agencies with different structures share the responsibility would best assure the competitive economy they wanted to maintain.

We at the AAI have criticized each of the agencies from time to time for not doing enough, but in general we believe both the DOJ and the FTC have contributed importantly to the evolution of merger law and policy, both as cooperators in a joint enterprise, and as occasional rivals motivated by the desire to outshine the other in the public's eye. In this regard, I might mention that the FTC has shown that it has already heard the criticisms of the Antitrust Modernization Commission by taking important steps to make its adjudicative process both fairer and quicker.

With little to be gained by this reform, we should weigh the inevitable disruption and potential diminution of overall enforcement that may accompany the fixing of a wheel that "ain't broke."

Thank you for again seeking our views.

Attachment: Letter, also available at http://www.antitrustinstitute.org/content/aai-letter-house-judiciary-smarter-act

April 9, 2014

The Honorable Spencer T. Bachus, III Chairman Subcommittee on Regulatory Reform,

Commercial and Antitrust Law House Committee on the Judiciary U.S. House of Representatives Washington, D.C. 20515

The Honorable Henry C. Johnson, Jr. Ranking Member Subcommittee on Regulatory Reform, Commercial and Antitrust Law House Committee on the Judiciary U.S. House of Representatives Washington, D.C. 20515

RE: The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"

Dear Chairman Bachus and Ranking Member Johnson:

The American Antitrust Institute ("AAI") respectfully requests that this letter become part of the record of your Subcommittee's April 3, 2014, hearing on the draft "Standard Merger and Acquisition Reviews through Equal Rules Act of 2014" (the "SMARTER Act"). AAI generally shares the concerns expressed at the hearing by John Kirkwood, a longtime Senior Fellow and distinguished member of AAI's Advisory Board, and the concerns set forth in FTC Chairwoman Ramirez's April 2, 2014, letter to the Subcommittee, particularly with regard to the proposed elimination of the FTC's authority to engage in administrative adjudication of mergers and unspecified other transactions. AAI believes the Subcommittee's initiative raises important questions of merger law and policy that warrant careful study over the months (or years) ahead, and it is premature to move in the direction of drafting any specific proposed legislation until that study is concluded. AAI's more specific perspectives on the issues presented by the proposed SMARTER Act are as follows:

1. AAI agrees that it is anomalous that there are different articulations of the standard for obtaining a preliminary injunction against a proposed merger depending on which enforcement agency is bringing the case to court: mergers challenged by DOJ can be preliminarily enjoined only if DOJ meets the traditional equity test including a showing of a substantial likelihood that the merger will violate Section 7; mergers challenged by the FTC can be preliminarily enjoined upon what some courts have held to be a more lenient public interest test under Section 13(b) of the FTC Act. But is this difference a real difference? AAI shares the skepticism of many observers that this difference matters in any material sense since courts generally require both agencies to make strong showings of probable anticompetitive effect before a preliminary injunction is entered, this notwithstanding that Section 7 of the Clayton Act bars acquisitions whose effect "*may be* substantially to lessen competition."1

Assuming this difference does matter, however, SMARTER Act supporters prematurely jump to the conclusion that the correct solution to this "unfairness" is to subject FTC challenges to the tougher standard applicable to DOJ. Why is it not better from a public policy standpoint to address the anomaly by extending the benefit of the Section 13(b) standard to DOJ challenges? A deferential standard for both agencies is warranted by the expertise and sophistication of the merger review process at both agencies, as well as by the "incipiency doctrine," which requires both agencies to "arrest in its incipiency . . . the substantial lessening of competition" from an acquisition.2 In any event, AAI suggests that the right choice between these two options depends on whether, in the current environment, the problem to be solved – if there is one – is over- enforcement by FTC or under-enforcement by DOJ. More on that question below.

2. A clearly more material difference between the two agencies' merger enforcement regimes is that DOJ merger challenges must be tried before "generalist" judges in district courts while FTC merger challenges can be tried within the FTC's own administrative adjudication process. Although this difference has been part of the merger enforcement landscape for 100 years, SMARTER Act supporters cite one lone example of an alleged abuse of the Commission's administrative option – two decades ago – as support for abolishing it.3 The cited concern is that, even when the FTC loses a motion for a preliminary injunction in court and the merger is then consummated, the FTC can subject the merger to a "second bite at the apple" – an administrative adjudication seeking to unwind it. But that concern was addressed in a 1995 Commission Policy Statement and an associated addition to the Commission's Rules of Practice.4 There is no apparent ongoing problem to be addressed; and, even if there is such a problem, the obvious solution would be legislation limited to precluding an administrative challenge in the aftermath of denial of a preliminary injunction rather than the far more drastic elimination of the administrative adjudication process for merger challenges altogether.

3. In any event, prudence compels caution in any tinkering with a system of dual enforcement including administrative adjudication that emerged out of robust debate in the course of the 1912 Presidential election campaign and that Congress adopted two years later in the face of grave concern over the fate of antitrust enforcement generally when left exclusively in the hands of generalist judges.5 That concern persists, as exemplified in a recent decision by a federal district court in the district of Minnesota that found no antitrust violation when the owner of the only drug that treats an acute condition of premature infants acquired its only rival drug and thereupon raised prices by more than 1400%.6

The system of dual enforcement is not broken. AAI has criticized merger enforcement and non-enforcement decisions of both agencies, but there is no doubt that both agencies have contributed importantly to the evolution of merger law and policy over many years. AAI fears the inevitable disruption and likely diminution of overall enforcement in this field that would accompany any legislative "fix" of the sort proposed by SMARTER Act supporters in the short term.

4. That said, however, AAI would welcome a broad in-depth study of the current dual enforcement system and related aspects of the current merger enforcement landscape with a view to developing consensus judgments regarding thoughtful reforms over the years ahead. Such a study should begin with a probing examination of the question identified hereinabove as to whether the existing enforcement apparatus results in either over-enforcement or under-enforcement of Section 7 strictures on merger activity. This is a question that should be explored not only with respect to U.S. enforcement processes but also with an eye on what has become a global enforcement system with many participants on other continents. AAI readily acknowledges its own strong inclination that there is significant under-enforcement, a function of many factors that include steadily increasing concentration in critical parts of the economy as a result of steadily increasing merger activity; inadequate funding of the enforcement agencies; and merger law standards that have become more complex than necessary or desirable, thereby steadily escalating both investigation and litigation costs. Surely, however, an objective nonpartisan study of this question should

precede any legislation that would change existing institutional structures.

5. If and when it becomes timely to explore institutional restructuring, AAI believes that eliminating FTC administrative adjudication would almost surely be counterproductive. We would thereby (a) lose the considerable benefits of expert agency policy evolution, the original Wilson/Brandeis vision giving rise to the FTC's creation a hundred years ago and more important than ever for sound evolution of merger policy in the 21st Century; and (b) exacerbate any inefficiency of dual enforcement generally since we would then have two enforcement agencies applying the same merger law standards and procedures to different companies in different industries in cases brought exclusively to generalist courts. A more logical course would be channeling all merger enforcement to the FTC and its expert administrative processes. Among the benefits would be enabling DOJ to shift more resources into its highly acclaimed criminal cartel enforcement activity (thereby likely to add even more to the already billions of dollars in fines it brings into the U.S. treasury year after year).

6. Notwithstanding all of the above, AAI believes that there is one aspect of institutional reform in the merger enforcement field that is now timely for Congressional consideration: inadequacies in both judicial and public vetting of merger settlements. The now-pending Tunney Act proceeding with regard to DOJ's U.S. Airways/American Airlines settlement highlights the problem. As AAI argued in an amicus brief filed in that proceeding last week, meaningful review under the Tunney Act process is undermined in particular by the common practice of allowing consummation of the merger at issue as soon as the proposed consent decree is filed and thus obviously before public comments are received or the presiding judge has even seen the proposed settlement terms. This same practice is common with respect to FTC merger settlements: the mergers that are settled are allowed to close as soon as the proffered consent orders are published and before any comments are received under the agency's administrative review process. AAI would welcome your Subcommittee's review of this problem and consideration of potential fixes for it.

Our thanks for your consideration of our perspectives.

Sincerely,

Albert A. Foer
President, American Antitrust Institute

1 15 U.S.C. § 18 (emphasis added).

2 United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 589 (1957).

3 R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995). Deborah Garza, in her testimony supporting the SMARTER Act, offered a rendition of what happened in a 2008 FTC challenge of a hospital merger in which the parties abandoned their proposed transaction

before a court ruling on the FTC's preliminary injunction motion as a further basis for the proposed legislation. See Garza Statement at 4-5. AAI finds that episode to be of no relevance to the issue at hand.

4 Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995); 16 C.F.R. § 3.26 (2009). The rule adopted in the immediate aftermath of that policy statement and now set forth in 16 C.F.R. § 3.26 invites respondent, in the wake of a court's denial of a preliminary injunction, to move for dismissal of the associated administrative proceeding or for a new Commission determination of whether continued litigation is in the public interest.

5 As the Commission observed in its above-referenced 1995 Statement of Policy, the FTC "was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions. Congress intended that the Commission would play a 'leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission' [quoting Hospital Corp. of America v. FTC, 807 F.2d 1381, 1388 (7th Cir. 1986)]. . . . Especially because the Supreme Court has addressed substantive issues of merger law only rarely in recent decades, and because antitrust law during that time has evolved in response to economic learning, the Commission's opinions have been an important vehicle to provide guidance to the business community on how to analyze complex merger issues." 60 Fed. Reg. 39,741 at 39,742

6 FTC v. Lundbeck, Inc., 2010 WL 3810015 (D. Minn. 2010).

Mr. MARINO. Thank you, sir.

We begin now with our questioning for 5 minutes. I am going to ask each of the Members to keep their questions to 5 minutes.

Please bear in mind that we like to get to ask each of you a question, so keep your answers as succinct as possible.

I am going to begin with Ms. Garza, please. Ms. Garza, some suggest that the SMARTER Act will make merger enforcement more difficult for the FTC. Do you think DOJ is effective at preventing anticompetitive transactions? And is there any reason to think that the FTC cannot be equally as effective operating under the same rules?

Ms. GARZA. Congressman, I think the FTC can be equally effective, and they have shown themselves to be in a number of cases.

The way it works now is that after investigating a transaction pursuant to the HSR Act, as Mr. Clanton has mentioned, after undertaking discovery and investigating for 3, 4, 6, 8, 12 months, the Justice Department then generally goes to court, if it believes there is a problem. And it produces its evidence and has been successful in a number of cases in proving its case or in extracting a consent judgment from the parties that it feels adequately addresses the issues.

There is no reason why the Federal Trade Commission that has the equal ability to get the same discovery for the same length of time cannot do the very same thing, go into a Federal court, prove that a merger is anticompetitive, and prevail in that way.

All we are talking about here is basically giving the parties a chance to actually have that day in court. The concern is that the deal will not hold together. The concern is that the FTC has the ability and has been exploiting the process to try to win, not by the merits but by the process, and that is a problem.

Mr. MARINO. Thank you.

Mr. Clanton, the FTC recently reinstated the Pitofsky rule that purports to create a higher threshold for proceeding with administrative litigation against a proposed transaction.

Do you believe this rule is sufficient on its own, or is the SMARTER Act still necessary?

Mr. CLANTON. Mr. Chairman, I think the change made sense. The Commission did the right thing. But it only dealt with one part of the problem, and that relates to transactions where the Commission loses and the parties close the transaction and the Commission continues to litigate. I think they have not done that in a long time.

There were some bad examples going back a few years, but my concern really is what happens when the FTC wins and then you start another phased administrative hearing that ends up doubling the length of time that you would have if you went into Federal court directly on the merits.

Mr. MARINO. Thank you, sir.

Mr. Lipsky, in your testimony you discussed two cases where the FTC pursued administrative litigation after a Federal court ruling. In one case, the FTC continued administrative litigation for nearly 6 years after a Federal court denied its preliminary injunction request. In the other, the FTC continued administrative litigation

after they had won in Federal court and the parties abandoned the transaction.

Would these administrative litigation cases have been allowed to continue if the SMARTER Act was enacted into law?

Mr. LIPSKY. No, Mr. Chairman. I think they would be prohibited by the SMARTER Act, and I think that is the great virtue.

I think the intent of the Pitofsky rule and the revision enacted this year is to try to achieve that same result. And I think this act is an improvement over the mere administrative policy statements, because it gives parties the assurance that the Commission will, indeed, act as it suggests it will act in these policy statements.

And we have to remember that in 2008, there was a retrenchment. I believe Ms. Garza mentioned that they actually reversed the Pitofsky rule for a time back in 2008 when they were focusing on the acceleration of administrative litigation and involving the Commission much more directly in the conduct of the hearings.

So this is a classic example of a good policy that the Commission has followed since 1995, by and large. But one of the primary merits of the legislation is that it would give parties the assurance that the Commission would adhere to that sound policy.

Mr. MARINO. Mr. Foer, in 20 seconds, why should some companies be subject to FTC standards and processes and others to DOJ standards and processes? Does having different standards and processes result in fair and consistent enforcement for our antitrust laws?

Mr. FOER. I am not certain I understood the question.

Mr. MARINO. Having different standards and processes, is that fair and consistent?

Mr. FOER. The question is theoretical because, in theory, there are some differences. But my point is that, in fact, the way things work, these differences don't really make a difference and are not sufficiently large, in view of the downside potentials, to justify legislation right now.

Mr. MARINO. Thank you, sir.

The Chair now recognizes the Ranking Member, the gentleman from Georgia, Mr. Johnson.

Mr. JOHNSON. Thank you, Mr. Chairman.

Ms. Garza, in your statement, you write, "The premise of SMARTER is simple. A merger should not be treated differently depending on which antitrust enforcement agency, DOJ or FTC, happens to review it. Regulatory outcomes should not be determined by a flip of the merger agency coin."

I was puzzled by your characterization of how the agencies go about determining which one will assert jurisdiction.

Can you explain what you mean by the flip of a merger agency coin?

Ms. GARZA. Representative Johnson, there was a time when, I can honestly tell you, we seriously discussed coin flips when I was at the Justice Department.

The issue is that, by and large, the FTC and the DOJ have concurrent jurisdiction to review a merger.

Mr. JOHNSON. And they have determined between themselves when they will assert jurisdiction over a particular matter, depend-

ing upon each agency's decades of experience over the relevant merging parties' industry. Isn't that correct?

Ms. GARZA. Not exactly. There are some industries that tend to be looked at by one agency.

Mr. JOHNSON. Well, then in those instances where it can't be determined, the agencies go through a careful process outlined by the antitrust laws and in some cases implemented through the Code of Federal Regulations. Isn't that correct?

Ms. GARZA. I am not sure I caught all of that. But what I would suggest to you is that it is not always——

Mr. JOHNSON. Well, I guess what I am suggesting is that it is a little bit more than just simply a coin flip in 99.9 percent of the cases. Isn't that correct?

Ms. GARZA. I probably don't agree with you on that. But I would ask you the question of why should one industry like the paper industry be subjected to a different standard than, I don't know, another industry, like the pharma industry.

The problem is, if you are going to have two very diametrically different processes, Congress should consider, well, is there a reason why one industry—let's just assume, for the sake of argument, that——

Mr. JOHNSON. Well, I don't want you to take up all of my time.

Ms. GARZA. Okay, I don't want to do that either. I can follow up in writing.

Mr. JOHNSON. Okay.

I would like to hear Mr. Foer's response to what you have said in response to my questions.

Mr. FOER. Look, I would say that, I said before, there is a theoretical difference in the standards of how a preliminary injunction can be issued. But in point of practice, that doesn't seem to make much difference.

So the real difference comes down to whether or not the FTC ought to be able to bring a case in front of the administrative process. And yes, that does take time.

But one question we should look at, and the elephant in the room, I think, is what do we want our merger policy to be? We are only talking about less than 3 percent of those mergers big enough to notify get a second request. And only about half of those, about 1.5 percent a year, go through any kind of process that leads to a change in the terms or to stopping a merger.

So it is a very small percentage of just those mergers that are really important for the country.

Now, how much time do we think we should spend on understanding those mergers? If we spend very little time by rushing it through preliminary and final injunctions, which is the way we try to do it, then we are giving the advantage to the merger. If we take a lot of time, we are giving advantage to the government. We need to find the right balance.

I think the FTC has a pretty good balance here, which says——

Mr. JOHNSON. Well, let me ask then, Mr. Lipsky, you cited a couple cases—and excuse me for interrupting—one back in 1987 and the other in 1991. Can you cite any more recent cases that show where the FTC continuing to litigate after a preliminary injunction

has been denied has worked an undue hardship on one of the parties due to the length of time?

Mr. LIPSKY. I think probably the lead example of where the Commission was using its administrative procedures to really put tremendous pressure on the parties is the more recent Inova case.

As I mentioned, since the issuance of the Pitofsky rule in 1995, the Commission has been pretty good about adhering to that rule. It is just their persistent declining to affirm that that would be the rule—they say they have discretion to do what they have been doing, but they will never quite promise to do what they have been doing. I think that is where this legislation would really give the assurance to all the businesses that have to think about and plan for this process that is necessary to establish the rationality of the enforcement regime.

Mr. JOHNSON. Thank you. I yield back.

Mr. MARINO. Thank you, Mr. Johnson.

The Chair now recognizes the other gentleman from Georgia, Mr. Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

I appreciate this hearing, again. As we have done a lot, it is time to get some stuff that we have done last Congress, it is time to get it again this Congress. Let us move some stuff forward. So I am hoping this will lead toward mark up and lead toward the floor, because we have had a very similar hearing to this last year. In fact, I think three of you were witnesses in the last hearing we did on this.

But I want to make it clear that I am strongly in favor of a strong antitrust enforcement to prevent anticompetitive behavior, as I think are most the Members here today.

But that said, Mr. Lipsky you mentioned in the last hearing, and we do go back and actually look at those, but it stuck with me. You said that, in some cases, the cost and duration of administrative litigation can discourage stakeholders from behavior that is actually procompetitive.

Now, I don't know if you still feel that way or not, but it did stick with me at that point.

You seem to want to make a comment. Do you still feel that way?

Mr. LIPSKY. Yes, absolutely.

Mr. COLLINS. I think that is the interesting thing, because we don't want to do something in preventing anticompetitive behavior and get into discouraging procompetitive behavior. I believe this bill is a step in the right direction to ensure that, and I think that our antitrust laws and enforcement efforts are functioning effectively.

So I think some questions I want to follow up on, Ms. Garza, as you know, in the 2003 Antitrust Modernization Commission report, it stated that parties to a proposed merger should receive comparable treatment and face similar burdens, regardless of whether it is FTC or DOJ reviews of the merger, and highlighted that differing treatment could undermine the public trust that transactions are reviewed efficiently and fairly.

Last Congress, we discussed the importance of the process. I want to touch on that again. In your opinion, is there a real or per-

ceived disparity in enforcement by the two agencies? And how does the process play into that disparity?

Ms. GARZA. So it is clear that there is a perception that there is a disparity. We heard that over and over again in testimony before the Commission, and it was something that the commissioners believed. As I mentioned, a lot of our commissioners are very experienced both in the government enforcement side and the advisory side.

I believe that if you sat down in a bar with folks over at the DOJ and the FTC and have a discussion with them, they would agree with you, too.

The fact of the matter is that in one case, if I am at DOJ, I am able to count on, if I want to, being able to have a day in court. I know that the DOJ is going to agree to do a consolidated preliminary injunction, permanent injunction hearing. It is going to take a while. It could still take more than a year, which is a long time to hold a deal together, but I know that I am going to get a hearing. There is some certainty.

If I am at the Federal Trade Commission right now, I know that I am going to go through that same very lengthy investigation process, and then I am going to go to court where they are going to seek a preliminary injunction, and I would argue to you that if it is in the District of Columbia where a lot of these cases are going to be, I am going to have a deferential standard applied, whereas Rich Parker described it last year as sort of if it is a tie, the tie goes to the FTC, unlike with the DOJ. The DOJ actually has to prove its case.

For the FTC, arguably, all they have to do is get to a tie, and then that gets them to an administrative hearing with several months more with an ALJ who is an FTC employee, and then possibly to an appeal to the Commission that issued the complaint, and then possibly back to the court, which applies a deferential standard. That is a difference in process.

Mr. COLLINS. You just said something that was not in my questions, but you just made a comment that I think highlights a bigger issue that goes even beyond this hearing. It is the general perception of the public and what we do up here not only on the Capitol Hill and in Congress, but also the administrative agencies and executive branch agencies.

And what you said—I don't think you meant what I am going to talk about, but I am going to at least take up what you said—is the American public today, and whether it is with going through agencies that don't turn over emails or going through problems of budgeting, they always feel like the tie goes to the government. The tie goes to the government.

That is an interesting process here where we talk about where you said the DOJ has to prove the case. I think what we have to do, and I think this bill from my friend from Texas actually does that. But I think when we talk about this, whether it is anticompetitive or procompetitive, the government should not be in the way. This is not baseball where the tie goes to the—this should not be the tie goes to the government. It should be what is best for the American people, the very ones who put us here.

And I think, Mr. Foer, in your testimony, one of things you actually had sort of implied is they try to outshine each other, that basically I think is the way you termed that.

How do we get by that? I think that is the reason for this hearing. I think that is why this is actually a good bill.

And that is why, Mr. Chairman, I am proud to have done that.

But I think you raised a great point on that.

And with that, Mr. Chairman, I yield back.

Mr. MARINO. Thank you, Mr. Collins.

The Chair now recognizes the Ranking Member of the full Committee, the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. Thank you, Mr. Chairman.

And I thank the witnesses for the discussion here.

There is a 1989 report on the role of the Federal Trade Commission. The American Bar Association's Antitrust Law Section recognized that merger enforcement was probably the FTC's most important antitrust role.

Mr. Foer, what is your response to that?

Mr. FOER. Sir, would you mind repeating the case you are talking about?

Mr. CONYERS. Yes, the American Bar Association's Antitrust Law Section thought that the merger enforcement role was probably the FTC's most important activity as an antitrust provider.

Mr. FOER. I am sorry, I am not catching on to what rule we are talking about here.

Mr. CONYERS. Mr. Lipsky, are you familiar with that?

Mr. LIPSKY. I think that is referred to as Kirkpatrick 2. It was an ABA report. It was a very broad report on all the functions of the FTC, right?

Mr. CONYERS. Yes.

Mr. LIPSKY. I think you would probably agree with that or maybe you don't.

Mr. FOER. I think it was an extremely important document that led directly to the rebirth of the FTC as a functioning agency, a reputable agency of government.

Mr. CONYERS. Let me ask this question, Mr. Foer, why might the SMARTER Act threaten to create a slippery slope to ending joint enforcement of antitrust law by both FTC and DOJ?

Mr. FOER. The problem is, why do we need an FTC? Ultimately, the question would be asked, why do we need a second body to enforce the laws if, for example, the administrative process is considered a failure here? "It takes too long. We have to make everything move faster."

The slippery slope is that the precedent of removing this power of adjudication can lead people to believe that the adjudication is not an appropriate way to deal with antitrust cases. For those of us who believe in strong antitrust enforcement, and possibly everybody at the table would agree, I don't know, but I think it would be a disaster.

Mr. CONYERS. Mr. Lipsky, am I reading too much into your comments to suggest that you might not feel too badly if we end the FTC's antitrust enforcement role?

Mr. LIPSKY. Oh, I wouldn't support that statement at all. I think that is the kind of thing that would require a much more com-

prehensive look at the whole enforcement system. We are just talking about one very limited but impactful aspect of the enforcement system and a very targeted way of correcting it, and that is why I support the legislation, not because I have any broader argument with the existence of the FTC.

Mr. CONYERS. I am glad to hear that.

Back to Bert Foer again, why is it important for the FTC to retain its ability to use administrative adjudication in merger cases?

Mr. FOER. The importance is probably not central, because a lot of cases could be dealt with through the preliminary injunction route and are.

But there ought to be and there are reserved under this Commission rule 3.26 the possibility under various circumstances where the public interest would actually require holding a trial. And the FTC made it clear it won't use that ability very frequently or very easily, but we should not take that possibility away, and especially if we see it as being used in a responsible way.

Mr. CONYERS. Thank you very much.

And I thank the panel for their comments.

I yield back, Mr. Chairman.

Mr. MARINO. Thank you, Mr. Conyers.

The Chair now recognizes the Congresswoman from the State of Washington, Ms. DelBene.

Ms. DELBENE. Thank you, Mr. Chair.

Thanks to all of you for being here today. We appreciate your time.

I kind of have a question for everyone, and so we will see how we go here, but it could be argued that one of the strengths of administrative litigation is the ability of the Commission to consider novel legal theories and employ innovative forms of economic analysis, things that the DOJ may not be able to do.

So how does the Commission use of innovative evidence and novel legal theories advance antitrust law, especially in today's complex and rapidly changing digital economy where there may not be precedents out there to rely on?

I guess I will start with you, Ms. Garza.

Ms. GARZA. I don't think I understand the premise of the question. Both the DOJ and the FTC follow the same merger guidelines that they have jointly developed and issued. It is not clear to me what innovative approaches anyone has in mind with respect to mergers, but to the extent that there are any, it is not clear to me why the DOJ would be less well placed to pursue them than the FTC.

Ms. DELBENE. Part of, I think, the question has been around having people who have expertise in a given area and understanding, and are able to bring that expertise to the table, especially on a newer industry or newer type of technology.

Ms. GARZA. But then again, what you are suggesting is that—you still have the role of the court, of the FTC, in deciding whether or not there should be a preliminary injunction. So there is the issue of whether they should have a lesser standard. Then it goes to a single ALJ, which is an employee of the FTC.

The question is, why would the ALJ be in any better position to assess a merger than any of our judges that we have?

Bert talks about the difference between a generalist court and a specialist court, but the problem, I think what people perceive, is that what you are really setting up is a system where you get a lower standard for a preliminary injunction, and then it goes to a judge who is an employee of the Federal Trade Commission, and then it goes to the Commission that issued the complaint in the first place.

I am not aware of any evidence such suggests that somehow or other that ALJ is in any better position than would be a district court judge in the District of Columbia or any other district to consider the arguments and the evidence that the DOJ or the Federal Trade Commission would put forward as to why a transaction would be anticompetitive.

Ms. DELBENE. Okay. Mr. Foer, if I could get your feedback on that?

Mr. FOER. I think that the ALJ problem is a problem. You have to make sure that you have top level, top quality ALJs. But an ALJ who deals with antitrust issues day in and day out over years is likely to be much more expert and much more able to contribute to the systematic development of the law than a whole bunch of Federal district court judges, many of whom are not trained in economics at all and none of whom get very much experience with these cases. Very few Federal district court judges deal with more than a few merger cases, let's say, in any given year or maybe in a lifetime in a court.

So there is a big difference between attempting to develop in a systematic, predictable way a pattern of law, and we are doing that largely through guidelines, jointly written guidelines, which is great, but we are not getting much assistance from the courts in developing this body of law.

There are probably two reasons for that. One I gave you, the lack of expertise. But these cases are very fact intensive, and it is hard to have appeals or to develop appellate jurisprudence in these kinds of cases. In fact, we could have a guess about how long it has been since the Supreme Court took on a merger case. I don't know if any of us remember one in our lifetimes.

So it is very useful, I think, to have a body of experts that can handle this law.

Ms. DELBENE. Thank you.

Also, Mr. Foer, I think in your testimony you had talked about any concern about the SMARTER Act reaching transactions other than proposed Hart-Scott-Rodino mergers, so I wondered what your thoughts were on that and whether you think the bill would apply to other things like consummated transactions or non-merger activity, or move into that area.

Mr. FOER. Well, I don't think it is going to apply outside of merger, joint venture, and whatever similar transactions might mean, although that in itself is an interesting question.

It could give rise to some litigation down the road of what is covered and what is not covered. But I don't think that monopolization cases or cartel cases are going to be affected by this, nor would nonconsummated mergers. I did raise a question about nonprofits in that regard, but, hopefully, this bill would be interpreted so as not to create a problem that way.

And it is intended to be narrow. I think it largely achieves that goal. But it is not bad in the sense that this bill will change areas outside of mergers.

Ms. DELBENE. Thank you.

And I yield back my time, or I am out of time. Thanks.

Mr. MARINO. Thank you, Ms. DelBene.

Seeing no other Members to ask questions, and I am told that we are going to be voting within the next 10 or 15 minutes, this concludes today's hearing.

I want to thank the witnesses for attending. It was very insightful and pleasant to hear a discussion from four lawyers who are very, very well-qualified and just brilliant in their field. So I want to thank you all for being here.

Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

I want to thank the people in the gallery for being here, and this hearing is adjourned.

[Whereupon, at 3:24 p.m., the hearing was adjourned.]

APPENDIX

Material Submitted for the Hearing Record

HOUSE JUDICIARY COMMITTEE HEARING ON H.R. 2745

QUESTIONS FOR THE RECORD

Responses from David Clanton

1. **Do you think that the SMARTER Act will impair or affect the FTC's ability to develop antitrust law through the administrative litigation process?**

   Response:

   No, the proposed legislation will not in any way impair the FTC's ability to develop antitrust law through administrative litigation.

   First, the SMARTER Act only applies to acquisitions and mergers. It does not affect any other area of antitrust law subject to the FTC's jurisdiction.

   Second, even as to acquisitions and mergers, the bill focuses solely on proposed transactions, typically HSR-reportable deals. In the past 20 years there has not been a single transaction where the FTC sought a preliminary injunction ("PI") to block a proposed merger and then completed the related administrative proceeding – not a single one, regardless of whether the Commission won or lost the PI case. In short, in cases covered by the legislation, the FTC has not been developing any antitrust law through administrative litigation.

   Most recently, following the Committee's hearing on June 16, the U.S. District Court for the District of Columbia issued a decision granting the FTC's request for a PI to block Sysco's proposed acquisition of US Foods[1] pending the Commission's administrative proceeding. As explained in my testimony, due to the Commission's lengthy follow-up administrative litigation, companies that lose at the PI stage almost always abandon their transactions rather than wait another 7 months or longer for completion of the administrative case. Thus, it is not surprising that, shortly after the court's ruling, Sysco announced that it was terminating its merger agreement with US Foods. This result once again illustrates the sharp contrast between the FTC and DOJ in how such cases are decided, as a practical matter, at the litigation stage. Put succinctly, a PI standard effectively determines the outcome of FTC cases challenging proposed transactions, whereas DOJ bears a heavier burden in a permanent injunction hearing to prove that a non-consummated transaction violates Section 7 of the Clayton Act.

   Third, for consummated transactions outside the scope of the SMARTER Act, the Commission can continue to use administrative litigation to develop antitrust merger law. In two recent cases, *ProMedica*[2] and *Polypore*,[3] the FTC successfully challenged consummated transactions. In those cases the agency issued administrative decisions, which were upheld on appeal, finding that the transactions violated Section 7 of the Clayton Act.

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[1] FTC. v. Sysco Corp., 2015 U.S. Dist. LEXIS 83482 (D.D.C., June 23, 2015).
[2] ProMedica Health Sys., 2012 FTC LEXIS 58 (FTC 2012), *aff'd*, ProMedica Health Sys. v. FTC, 749 F.3d 559 (6th Cir. 2014) (hospital systems).
[3] Polypore Int'l, 2010 FTC LEXIS 97 (FTC 2010), *aff'd*, Polypore Int'l v. FTC, 686 F.3d 1208 (11th Cir. 2012) (battery separators).

2. The SMARTER Act was narrowly constructed intentionally to avoid restricting the FTC's administrative litigation authority outside of proposed transaction reviews. In your view, does the SMARTER Act achieve its goal?

Response:

Yes, the SMARTER Act would achieve its goal of restricting the FTC's administrative litigation authority only to proposed acquisitions and mergers. The bill would not apply to consummated transactions, such as the *ProMedica* and *Polypore* cases referenced in my response to the first question. It also would not affect the FTC's existing administrative procedures for settling merger cases, whether consummated or non-consummated.

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The American Antitrust Institute

July 30, 2015

Honorable Bob Goodlatte, Chairman
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: H.R. 2745, Hearing on June 16, 2015

Dear Chairman Goodlatte:

The following are my responses to your letter dated July 10, 2015, providing questions submitted for the Record from Committee Ranking Member Conyers and Subcommittee Ranking Member Johnson, regarding my testimony at the above hearing.

1. Do you agree that eliminating the Federal Trade Commission's (FTC) adjudicative authority is a step in the direction of neutering the FTC and decreasing its role in consumer protection and antitrust enforcement?

Yes, I agree. The proposed bill aims at eliminating the FTC's adjudicative authority over most, if not all, merger challenges. If the adjudication process is eliminated for this large and important category of the FTC's competition mission, opponents of the FTC will likely be encouraged to argue that all FTC litigation should be carried on in the federal courts, and from there it is but a short step to argue that all antitrust enforcement should be conducted by the U.S. Department of Justice (DOJ).

This is no time to reduce the tools that the government has to stop anticompetitive mergers or introduce uncertainty (and likely litigation) over those tools. As a respected columnist in the Wall Street Journal recently noted, the current merger wave may represent "a decline in competition as market power becomes concentrated in the hands of fewer companies," leading to decreased investment, fewer start-ups, a slowdown in productivity, and perhaps increased inequality. Greg Ip, *Why Corporate America Needs Some More Competition*, Wall St. J., July 9, 2015, A2. He concludes that "finding a way to rejuvenate competition could have widespread benefits." The proposed legislation moves in precisely the opposite direction.

2. Why is it important for the FTC to retain its ability to use administrative adjudication in merger cases?

"One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determinations of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act,

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which was passed at the same as the statute creating the Commission." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.).

The same is true today. Allowing the FTC to proceed through adjudication takes advantage of the expertise of the Commission, and allows the Commission to shape a record from which it can elucidate important issues. Keep in mind that very few federal judges have much experience with antitrust or mergers, whereas the administrative law judges at the FTC and the FTC Commissioners have very substantial relevant expertise. One need look no further than the FTC's recent adjudicatory success in the Supreme Court involving state action to see the benefits of this process in a non-merger case. *See N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) (affirming FTC's adjudicatory decision holding self-interested dental board liable under antitrust laws). The adjudicatory process offers the same benefits in merger cases. Indeed, since much merger enforcement is grounded on administrative merger guidelines, it is important to allow the FTC the opportunity to elucidate those guidelines by applying them in adjudicatory proceedings.

As former (Republican) FTC Chairman Bill Kovacic has explained:

> An important application of administrative adjudication is to write opinions . . . that suggest better ways to analyze difficult antitrust issues . . . or refine commonly used analytic techniques . . . . Administrative adjudications give the FTC an opportunity to surpass the results attainable through the resolution of suits in the federal district courts and to build analytical templates whose persuasiveness compel emulation by federal judges. FTC opinions of this type include . . . merger policy questions in *Chicago Bridge and Iron* and *Evanston*.[1]

Insofar as the proposed legislation "merely" seeks to eliminate the FTC's ability to use the adjudicatory process for unconsummated mergers subject to the Hart-Scott-Rodino (HSR) Act, the arguments in support do not withstand scrutiny. The ability to use the adjudicatory process to elucidate merger analysis is important in both unconsummated and consummated transactions.[2] Moreover, Hart-Scott-Rodino Act pre-notified transactions are, by definition, large in the first place; and, in fact, the FTC and DOJ together conduct "second requests" for information on only about 3 percent of these transactions. About half of these, 1.5 percent of the total, are either stopped or modified, including the small percentage that go to trial or administrative hearing. Thus, it is a very small fraction of transactions, the largest and most potentially impactful on the economy that we are discussing. Enough time should be devoted to such cases that they are thoroughly analyzed before a final decision is made. There should be no presumption in favor of large firms in concentrated markets who want to merge and they should not be benefitted by a system that is rigged to their advantage by a seemingly technical, procedural change in the law.

It needs to be recognized that moving too quickly generally benefits the transacting parties, because they have the informational advantage and often the resource advantage over the agency enforcers. If the process moves too slowly, on the other hand, it may benefit the agencies because the

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[1] *Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 20; *see Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *In re Evanston Nw. Health Care Corp.*, 2007 WL 2286195 (FTC 2007).

[2] *See, e.g., Promedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014) (upholding FTC adjudicatory decision to block merger after preliminary injunction had been granted).

transacting parties often have some practical time constraints on their deal. The FTC's procedure of seeking a preliminary injunction simultaneously with instituting the administrative process represents a fair and appropriate balance. Recent reforms by the Commission indicate that it has already listened to the Antitrust Modernization Commission and taken appropriate actions to streamline its processes.[3] And its stated policy is that it will only take further action after a preliminary injunction has been denied where there are very strong reasons to do so. Only rarely does the FTC go through an administrative hearing after a preliminary injunction has been denied, and there is every reason to expect this to continue to be a rare situation because of the difficulty of fashioning meaningful relief after the "eggs have been scrambled." The FTC's judicious use of its authority is exemplified by the recent *Phoebe Putney* case, in which the federal court refused to enjoin the merger (on state action grounds) and the FTC continued to pursue the matter in administrative proceedings after the Supreme Court reversed on the state-action issue.[4]

While many merger cases can be handled with finality via preliminary injunction hearings in federal courts, it is not necessarily good policy to rush all cases through a process that combines preliminary and permanent injunction hearings, as the DOJ usually agrees to do and the bill would apparently require of the FTC. And if the bill leaves open, as it appears to do, the possibility that the DOJ and the FTC can refuse to combine preliminary and permanent hearings, then there is no assurance that the permanent injunction process will be completed sooner or be more expeditious than an adjudicative hearing.

3. Why is it important to maintain the distinctive enforcement processes between the FTC and the DOJ?

As explained above, it is important to maintain the FTC's distinctive adjudicatory process for competition cases in general, and merger cases in particular. Indeed, if a single agency or process were to be selected for all mergers, there is a good case that it should be the FTC's process of seeking a preliminary injunction in federal court and then pursuing an administrative hearing if necessary.[5] On the other hand, it is not important to maintain the slight and, in practice, unimportant difference in the standards that a federal judge should apply in considering whether to grant a preliminary injunction, depending on whether the movant is the DOJ or the FTC. This has proven to be a difference that does not make a difference. To the extent that the Congress wants to remove the technical difference in standards, it should modify the DOJ standard to conform to the FTC's "public interest" standard and thereby accord the same deference to agency expertise without regard to whether the movant is the FTC or the DOJ.

4. Are you concerned that the SMARTER Act may reach transactions other than proposed Hart-Scott-Rodino Act mergers? Would the bill arguably apply to consummated transactions, or non-merger activity?

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[3] *See* J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 Sedona Conf. J. 101, 102 (2013) ("To help resolve the timing problem, the Commission revised its Rules of Practice in 2009 to guarantee a fast proceeding (from complaint to ALJ decision) in every case.").

[4] *FTC v. Phoebe Putney Health System*, 133 S. Ct. 1003 (2013).

[5] As former chairman Kovacic has noted, "[T]he aim in the FTC Act and the Clayton Act was to create concurrent authority, but Congress seems to have expected that the commission would be the leading agency for enforcement outside the criminal realm." *Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 13.

As I read the bill, it is intended to apply only to a "proposed" (i.e., unconsummated) merger, acquisition, joint venture, or "similar" transaction subject to Clayton Act Section 7, but there are others who are concerned that the bill is not so clear on this point. There is no justification whatsoever to eliminate the FTC's adjudicatory authority over consummated transactions. Indeed, the Antitrust Modernization Commission, while recommending that the FTC not be able to pursue administrative litigation when it loses a preliminary injunction motion in an HSR Act case, expressly recommended that the FTC be able to pursue administrative litigation after the consummation of a merger, when it is no longer in the time-sensitive stage of the HSR Act. If the bill goes forward, it is very important to make it crystal clear that consummated transactions may be subjected to the FTC's adjudicatory process.

5. According to the Antitrust Modernization Commission's report, the value of administrative litigation in Hart-Scott-Rodino Act merger cases is "outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs." Would the SMARTER Act create legal certainty or reduce litigation costs, and even if so, how would this promote competition?

   In 2007, the Commission ruled that the acquisition of Highland Park Hospital by Evanston Northwestern Healthcare violated Section 7 of the Clayton Act after an Administrative judge found that the acquisition "resulted in higher prices and substantially lessened competition for acute care inpatient services in parts of Chicago's northwestern suburbs." What is the significance of this case?

If mergers are able to occur faster and with a greater likelihood of success by eliminating the adjudicative process, there would likely be some savings of litigation costs primarily for the merging parties in those relatively few cases that would have gone through the adjudicative process following the denial of a preliminary injunction. On the other hand, the bill would increase uncertainty and litigation expense as the new statute is applied and interpreted by the courts, diverting the FTC's attention and resources at a time when it is hard pressed to keep up with the current merger wave. And it is hard to see how competition is helped by a process that rushes big mergers through a quick injunction process rather than subjecting them to potential additional review by the expert agency.

The *Evanston* case involved a post-consummation challenge to a hospital merger. It is is significant because it "laid the groundwork for future FTC victories in the hospital merger and physician group acquisition areas."[6]

6. Would the Commission have been able to require conduct remedies for the Evanston-Highland Park merger, or have prevented or required remedies for other hospital mergers that have occurred since, without its ability to advance antitrust through administrative litigation?

The Commission's success in *Evanston*, as well its subsequent successes in blocking mergers of hospitals and physician practice groups, can be attributed in significant part to the fact that it was

[6] Lisa Jose Fales & Paul Feinstein, *How to Turn a Losing Streak into Wins: The FTC and Hospital Merger Enforcement*, 29 Antitrust, Fall 2014, 31, 32 ("In addition to ending the FTC's losing streak, *Evanston* is significant because it announced the Commission's thorough rejection of its prior approach to geographic market definition.").

able to use administrative litigation to develop a record and modify its approach to hospital mergers.[7]

7. How would the SMARTER Act affect the Commission's authority over non-profits, which includes merging hospitals?

The bill does not speak specifically to the Commission's authority over non-profits. The Commission's ability to use administrative litigation for mergers involving non-profits, including non-profit hospitals, would be limited by the Act, as for other mergers.

Sincerely,

Albert A. Foer
Founder and Senior Fellow
American Antitrust Institute

cc: Honorable John Conyers, Jr., Ranking Member

[7] *See id.* FTC Competition Bureau Chief Debbie Feinstein has made a similar point. *See Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 18 ("[T]hrough retrospective studies and Part III administrative litigation we were able to develop the record that supported our concerns about anticompetitive hospital mergers and led to a long winning streak in the federal courts.").

American Hospital Association

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June 16, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte:

On behalf of our nearly 5,000 member hospitals, health systems and other health care organizations, and our 43,000 individual members, the American Hospital Association (AHA) is pleased to support H.R. 2745, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, also known as the SMARTER Act.

We do so because of the importance of standardizing the merger review process between the two federal antitrust agencies: the Department of Justice's (DOJ) Antitrust Division and the Federal Trade Commission (FTC). Hospitals, in particular, have been adversely impacted by the ability of the FTC to use its own internal administrative process to challenge a transaction. Specifically, while the DOJ litigates its merger cases entirely in federal court before an impartial judge, the FTC has used the difference in authority between the two federal antitrust agencies to subject hospital transactions to what amounts to double jeopardy: commencing administrative litigation while at the same time pursuing a preliminary injunction in federal court. This unfair and punitive tactic should not be permitted. Recently, the FTC has volunteered to change this practice, but legislation remains necessary, as the FTC has previously volunteered then reinstated the practice of administrative litigation. Only legislation will ensure the end of this maneuver. While AHA supports enforcement of the antitrust laws, relying exclusively on the federal courts to determine the competitiveness of a transaction ensures that hospitals, and others, receive a full hearing on the merits.

If you have any questions, please contact Erik Rasmussen, vice president for legislative affairs, at erasmussen@aha.org or (202) 626-2981.

Sincerely,

Rick Pollack
Executive Vice President

Cc: The Honorable Blake Farenthold
Subcommittee Vice-Chairman
Regulatory Reform, Commercial and Antitrust Law

Representative Bob Goodlatte
2309 Rayburn HOB
Washington, D.C. 20515

Representative John Conyers, Jr.
2426 Rayburn HOB
Washington, DC 20515

Dear Congressmen Goodlatte and Conyers:

We, the undersigned antitrust law and economics professors, write to urge your support of the SMARTER Act. The legislation is modeled after the bipartisan Antitrust Modernization Commission's recommendation to establish a common preliminary injunction standard for mergers. It would have whichever agency is reviewing the merger, the Department of Justice Antitrust Division (Antitrust Division) or the Federal Trade Commission (FTC), seek a permanent injunction if the agency decides to block a merger in federal court.

This legislation is based upon common sense and represents good governance. It should not matter whether the Antitrust Division or the FTC reviews a merger - the procedures and the standards for review should be the same. If a merger is pro-competitive it should be allowed, if it is anti-competitive it should be blocked.

The vast majority of proposed mergers raise few, if any, antitrust concerns. When concerns do arise, the merging parties are typically able to offer the necessary concessions to avoid Antitrust Division or FTC objections. The SMARTER ACT only addresses the rare few cases in which the merging parties and the antitrust agencies fail to reach an agreement on terms that allow a merger to proceed, forcing the antitrust agencies to seek to block the merger.

The Antitrust Division's approach to blocking a merger is straightforward - it goes to court. However, the FTC process, which starts and finishes in court, is much longer. The FTC generally seeks a preliminary injunction in court under a different standard than the Antitrust Division. Regardless of whether that challenge is successful, the FTC often commences its own internal administrative trial that culminates with a vote by the FTC Commissioners. If the FTC Commissioners vote to block the merger, the merging parties have the chance to appeal the decision in court.

This lengthy FTC process takes far longer than the Antitrust Division approach and with no readily identifiable benefits. If anything the FTC process raises potential procedural fairness questions. For example, the FTC has in the past lost its attempt to get a federal court to grant a preliminary injunction, but decided to pursue its internal administrative process. Such actions raise serious questions regarding abuse of agency power. Even when the FTC wins a preliminary injunction, mergers are time sensitive in nature. The FTC process in comparison to that of the Antitrust Division takes too long for the merging parties to sustain the transaction through the drawn out process that may go to appeal. It would be more efficient for both the FTC and the merging parties at the time of the preliminary injunction to combine that proceeding in court

with a trial on a permanent injunction in the same way as is done by the Antitrust Division when the Antitrust Division seeks to block a merger.

The FTC is a very impressive agency that plays a valuable role in antitrust enforcement. The SMARTER ACT does nothing to undermine the FTC's authority; it simply ensures that the merger review processes and standards are equally applied to merger parties regardless of which agency reviews the transaction. Given our combined experience with well-established U.S. merger law and having watched countless merger reviews undertaken by both the Antitrust Division and the FTC, the SMARTER ACT represents a straightforward approach to better align antitrust institutional design.

Sincerely,

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Emory University School of Law

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Walter J. Matherly Professor of Economics
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Damien Geradin
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Emory University School of Law

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Bernard J. Ward Centennial Professor
University of Texas Law School

cc: Representative Thomas Marino, Representative Blake Farenthold and Representative Hank Johnson

ConsumersUnion
POLICY & ACTION FROM CONSUMER REPORTS

June 25, 2015

The Honorable Bob Goodlatte, Chairman
The Honorable John Conyers, Jr., Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Tom Marino, Chairman
The Honorable Hank Johnson, Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte, Ranking Member Conyers, Chairman Marino, and Ranking Member Johnson:

Consumers Union, the policy and advocacy arm of Consumer Reports, urges the Committee to oppose H.R. 2745, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015." We are concerned that the changes proposed in this bill are not necessary for addressing any actual present-day problem, and that they risk undermining the Federal Trade Commission's enforcement authority.

Throughout our 79-year existence, Consumers Union has supported vigorous and sound antitrust enforcement as a means of helping ensure that the free marketplace works in the interests of consumers, by protecting the competition that gives consumers meaningful choice, and thus encourages businesses to strive to give consumers quality and innovation at affordable prices. We appreciate the Committee's steadfast bipartisan support over the years for the antitrust laws, and your thoughtful and cautious consideration of proposals to amend these important bedrock laws. We would urge such caution here.

We are aware that the Antitrust Modernization Commission's 2007 report identified two differences in the respective statutes of the FTC and the Justice Department's Antitrust Division, as they pertain to merger enforcement, as potential areas for congressional action. But we do not believe the case has been made, then or now, that there is a material problem here that warrants making alterations to the FTC's fundamental enforcement structure.

Accordingly, the bill proposes to require the FTC to use the Antitrust Division procedure and standard for seeking a preliminary injunction against a pending merger, and to eliminate the FTC's ability to use its administrative enforcement authority to challenge a pending merger.

The fact that the mechanisms for enforcing the antitrust laws in the merger area are not precisely identical between the two enforcement agencies does not pose a problem for sound antitrust enforcement. The differences are a product of Congress's carefully considered intent in establishing the FTC as a separate, independent antitrust authority. Congress's judgment that creating the FTC as an expert administrative body would promote development of sound antitrust enforcement policy has proven wise. Americans have benefitted greatly from the strong antitrust enforcement agency that Congress created in the FTC.

We are concerned that carving these exceptions into the FTC's administrative enforcement structure, as the bill proposes, could not only create unintended hurdles to effective and sound enforcement, but would also set the stage for further tinkering – both of which risk undermining what is now a coherent, consistent, well-established, familiar enforcement procedure within the FTC.

We share the concern that the bill as drafted may impact the FTC's administrative enforcement authority more broadly than just as to pending mergers. But our concerns go more broadly. We are concerned that this quest to achieve precise technical consistency between the two enforcement agencies will, by tampering with the FTC's enforcement structure, create *actual* inconsistencies *within* that structure. In our view, these new internal inconsistencies that would be created are more likely to cause unintended enforcement uncertainties and problems than do the differences that exist now in how the two agencies operate – differences that have existed for a century, and to which antitrust lawyers have long been fully accustomed.

Contrary to what some might suppose, the two differences identified by the AMC do not create uncertainty or undue burden in the business community. Merger enforcement impacts only large corporations, who invariably hire experienced legal teams to navigate all aspects of a proposed merger – including experienced antitrust lawyers, who are well acquainted with these two differences, and able to handle them without difficulty.

We are not aware of any evidence that either of these differences resulted in over-enforcement – that is, led to pro-competitive mergers being challenged and abandoned, mergers that would actually have been good for consumers and competition. In fact, if anything, there are indications that there may have been *under*-enforcement against mergers over the years -- that too many mergers have gone forward without challenge that later have proven to be *anti*-competitive, resulting in significant price increases and reductions in consumer choice.[1] The evidence certainly does not warrant statutory alterations that could undermine the FTC's merger enforcement authority.

The FTC has had the same administrative authority for merger enforcement for the entire century of its existence. The differences in the details of that procedure from the Antitrust Division's are a product of the structure Congress created for the FTC. And there is no indication that these differences in procedure lead to differences in outcome. Importantly, both enforcement agencies have the option of pursuing a merger challenge after being denied a preliminary injunction at the outset of the challenge. Neither agency legally blocks a merger

[1] *See, e.g.*, John E. Kwoka, Does Merger Control Work? A Retrospective on U.S. Enforcement Actions and Merger Outcomes, Antitrust Law Journal, Vol. 78, 2013, available at http://ssrn.com/abstract=1954849, John E Kwoka, Mergers, Merger Control, and Remedies: A Retrospective Analysis of U.S. Policy, MIT Press 2014.

from going forward simply by bringing the challenge. A merger challenge in either agency, when actually litigated, runs its full course in roughly the same period of time. Both provide meaningful opportunity for effective review.

The paucity of examples proponents cite further demonstrates that the changes being proposed are not needed for addressing any actual present-day problem. The two primary cases cited are from an earlier era – one from the mid-1980s, one from the early 1990s.[2] Without getting into the specifics of those cases, which would reveal a more complex picture than described by the proponents, since that time, the FTC has addressed the process concerns that underlie the changes proposed in this bill. Back in 1995, the FTC issued a policy statement – still in effect, and reaffirmed just this spring – that sets forth the factors under which it decides whether continued administrative challenge is warranted after a preliminary injunction is denied. The FTC makes that determination promptly, and suspends all further legal proceedings until it is made. In the 2009 revision to its rules of practice, the FTC tightened the timeframes in a number of respects so as to expedite its enforcement actions. The timeframe experienced in the earlier cases could never occur in the present-day era.

In short, we believe the FTC has used its enforcement powers responsibly, that it has been appropriately sensitive to the concerns of business, and that its structure as an independent administrative body has proven itself, over the course of a century, to have served consumers and the public interest well. We believe tinkering with that structure in a quest to eliminate technical inconsistencies between its procedure and the Antitrust Division's is unnecessary, unwarranted, and not in service to safeguarding our free market economy in the interests of competition and consumers.

We believe the interests of competition and consumers will be better served by opposing H.R. 2745.

Respectfully,

George P. Slover
Senior Policy Counsel
Consumers Union

cc: Members, House Judiciary Committee

[2] A more recent case that some have cited, a 2008 merger challenge to Inova Health System, does not support the need for change. In that case, the FTC was required to file its challenge in a district court under whose local practice preliminary injunctions are decided without evidentiary hearing. The FTC filed its challenge and its request for preliminary injunction simultaneously. Inova abandoned plans for the merger before any further proceedings.

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