

**S. 2102, THE STANDARD MERGER  
AND ACQUISITION REVIEWS THROUGH  
EQUAL RULES ACT OF 2015**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON ANTITRUST,  
COMPETITION POLICY AND  
CONSUMER RIGHTS  
OF THE  
COMMITTEE ON THE JUDICIARY  
UNITED STATES SENATE  
ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

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**S. 2102, THE STANDARD MERGER  
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EQUAL RULES ACT OF 2015**

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**WEDNESDAY, OCTOBER 7, 2015**

UNITED STATES SENATE,  
SUBCOMMITTEE ON ANTITRUST, COMPETITION  
POLICY, AND CONSUMER RIGHTS,  
COMMITTEE ON THE JUDICIARY,  
*Washington, DC.*

The Subcommittee met, pursuant to notice, at 10:10 a.m., in Room 226, Dirksen Senate Office Building, Hon. Michael S. Lee, Chairman of the Subcommittee, presiding.

Present: Senators Lee [presiding], Tillis, Hatch, Klobuchar, and Blumenthal.

**OPENING STATEMENT OF HON. MICHAEL S. LEE,  
A U.S. SENATOR FROM THE STATE OF UTAH**

Chairman LEE. Welcome. Senator Klobuchar, the Ranking Democrat, has been held up in another meeting. She may be joining us in a little while, but we are going to go ahead and proceed without her in the meantime.

Today's hearing focuses on the Standard Merger and Acquisition Reviews through Equal Rules Act, or the SMARTER Act. The SMARTER Act contains a series of important reforms that are designed to address existing disparities in the standards applied to and processes used by the two antitrust enforcement agencies—the Department of Justice and the Federal Trade Commission—when they seek to prevent the consummation of a proposed transaction.

These disparities were examined by the bipartisan Antitrust Modernization Commission, which was formed pursuant to the Antitrust Modernization Act and charged with conducting comprehensive examination of the antitrust laws and existing enforcement practices.

In the Commission's view, "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 importantly, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agencies—agency reviews the transaction."

Accordingly, the Commission recommended and the SMARTER Act implements two principal reforms. The first ensures that, re-

ardless of which agency reviews a proposed transaction, the standard by which a court grants a preliminary injunction is the same. The second requires the Federal Trade Commission to go to court, just like the Department of Justice, when it seeks an injunction of a proposed transaction, rather than using its internal administrative process to review the merits.

These reforms are necessary to ensure that the antitrust laws are applied in a manner that is consistent and fair to all parties. I look forward to our discussion.

We will proceed now with our first witness. Chairwoman Ramirez, will you please stand and be sworn? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Chairwoman RAMIREZ. I do.

[Witness is sworn in.]

Chairman LEE. Thank you.

Chairwoman Edith Ramirez was sworn in as Commissioner of the Federal Trade Commission in April 2010 and became Chairwoman of the FTC in March 2013. At the FTC Chairwoman Ramirez has focused on promoting competition and innovation in the technology and health care sectors, protecting consumers from deceptive and unfair practices, and safeguarding consumer privacy.

Before joining the FTC, Chairwoman Ramirez was a partner in the Los Angeles office of Quinn Emanuel Urquhart & Sullivan, where she litigated complex business disputes, including intellectual property, antitrust, unfair competition, and advertising matters. She is a graduate of Harvard Law School, where she was an editor of the Harvard Law Review, and also a graduate of Harvard College.

Chairwoman Ramirez, thank you for joining us, and we look forward to your testimony.

**STATEMENT OF HON. EDITH RAMIREZ, CHAIRWOMAN,  
FEDERAL TRADE COMMISSION, WASHINGTON, DC**

Chairwoman RAMIREZ. Thank you, Chairman Lee and Members of the Subcommittee, for inviting me to testify. I appreciate the opportunity to discuss the Federal Trade Commission's efforts to promote competition, the value of the Commission's merger enforcement process, and my concerns with the proposed legislation.

In my view, the bill is unnecessary and would remove authority that the Commission has used successfully for over 100 years to promote competition and advance consumer welfare. We all know, competition is the core of our economy. Robust competition leads to lower prices, higher-quality goods, and innovation. The FTC seeks to promote competition through a careful and thorough fact-intensive approach to law enforcement.

One of the Commission's most important responsibilities is preventing mergers that may substantially lessen competition in violation of Section 7 of the Clayton Act. Although most mergers do not raise competitive concerns, we seek to identify and, where necessary, challenge anticompetitive transactions. Those efforts have preserved competition in vital sectors of the economy, including health care, technology, consumer goods and services, and energy, among others.

Between FY 2010 and 2014, the FTC challenged approximately 21 mergers per year. Most of those proceeded with negotiated divestitures, but in one or two cases each year, the Commission filed suit in Federal court to block the merger pending an administrative trial. These numbers are similar to those of the Department of Justice during the same time period.

The FTC's administrative process has played an important role in challenging harmful mergers and advancing consumers' interests. As Congress intended, the Commission's administrative role has proven especially valuable for developing antitrust law in complex cases where the FTC has been able to apply its competition expertise.

The Commission's efforts to prevent anticompetitive consolidation among health care providers is an important example. After losing a number of hospital merger cases, the FTC used its information gathering and research capabilities to improve its approach to litigating hospital cases. The Commission's 2007 administrative decision in the *Evanston* case laid the groundwork for a string of successful FTC challenges against other anticompetitive hospital mergers and has likely deterred still more that similarly threatened higher prices and lower-quality care.

The Commission has brought its expertise to bear through the administrative process in other merger cases as well as in non-merger matters involving significant areas of antitrust law. These include pay-for-delay settlements between branded and generic pharmaceutical companies and the scope of the State action doctrine.

Importantly, FTC administrative decisions are subject to judicial review, and courts have affirmed Commission administrative decisions at a very high rate. This includes wins in 10 out of 13 Commission administrative competition decisions over the last two decades. This number rises to a 11 once we factor in that the Commission's 2003 ruling in *Schering-Plough*, which was reversed by the Eleventh Circuit, was ultimately vindicated by the Supreme Court's 2013 decision in the *Actavis* case.

I believe the proposed legislation risks undermining the Commission's beneficial administrative role in merger enforcement. Although the FTC's process for challenging mergers includes an administrative hearing, there is no evidence that the Commission's procedures prejudice the parties involved. In 2009, for instance, the FTC modified its rules to streamline the administrative process in response to concerns the process was too long. This included expediting the pretrial hearing and appeal phases as well as imposing tight deadlines for the Commission to rule on the merits of a case. As a result, the length of FTC administrative litigation is comparable to that in federal court.

Additionally, although the preliminary injunction standard in the FTC Act is worded differently than the one that applies to the Department of Justice, in my view there is no practical difference between what each agency must show to obtain a preliminary injunction. Both agencies must make a robust evidentiary and legal showing that a transaction is likely to substantially lessen competition.

In the Commission's two most recent PI actions—one a win and another a loss—both courts made clear that they were assessing the FTC's likelihood of success on the merits as well as balancing the equities, just as occurs in a DOJ case.

Furthermore, this past March, the Commission reaffirmed its policy that when a Federal court denies a request for preliminary injunction, it will carefully consider whether to press forward with administrative litigation. Notably, over the last 20 years, the Commission has not proceeded administratively following a loss at the preliminary injunction stage. In short, there is no evidence that the FTC's administrative process prejudices parties. In my view the bill's proposed modifications to the Commission's adjudicative authority are unnecessary and unwarranted.

Indeed, by eliminating the ability of the FTC to use its administrative process in certain merger cases, the proposed legislation would alter a fundamental feature of the FTC's institutional design, one that Congress very deliberately granted the agency more than 100 years ago. Such a change risks eroding the FTC's effectiveness in ensuring a competitive marketplace to the detriment of consumers. For these reasons, I have serious concerns about the bill.

Thank you, and I am happy to respond to any questions you may have.

[The prepared statement of Chairwoman Ramirez appears as a submission for the record.]

Chairman LEE. Thank you very much, Chairwoman Ramirez.

The Department of Justice's approach to blocking a merger is pretty straightforward. The Department of Justice seeks a preliminary injunction in Federal district court, and it then agrees with the parties to the transaction to combine these proceedings with respect to both the preliminary injunction and a permanent injunction.

The parties then litigate before a Federal District Judge, the same Federal District Judge, both the merits of the case and the preliminary injunction. This is one proceeding in front of one judge.

By contrast, the FTC's practice is to seek only a preliminary injunction in Federal court, and if the FTC first prevails in Federal court on its motion for a preliminary injunction, any trial on whether the transaction would be unwound would occur not in front of the same district judge that handled the PI, but in an entirely separate proceeding and at a later date.

Accordingly, the parties that end up before the FTC are, in effect, forced to litigate twice—the preliminary injunction in Federal court and then the merits in the FTC's administrative process. All this occurs simply because of the fact that the agency that is reviewing the transaction is the FTC rather than the Department of Justice.

Help me understand, Chairwoman Ramirez, is there a good reason for subjecting certain parties or certain industries to one process and other parties to another more onerous process? In other words, is there anything unique about the jurisdiction of the FTC and the types of industries or companies that are subject to the FTC's jurisdiction that makes your process uniquely suited to those types of transactions?

Chairwoman RAMIREZ. This was a decision that Congress made when it created the Federal Trade Commission back in 1914. It very deliberately authorized the FTC to have an administrative process. It wanted to have an expert bipartisan body that would have the ability to exercise its competition expertise in this arena. That was a very deliberate decision made by Congress.

Let me also say that, first of all, when the Department of Justice elects to combine its preliminary injunction phase along with the ultimate merits of the case, that is a decision that is made by the Department of Justice and the parties. In litigation, typically one goes through a preliminary injunction phase and then proceeds to ultimately litigate on the merits. That is just a choice that is made during the course of litigation by DOJ and the parties.

I believe that the process at the FTC, while certainly different and including an administrative process, is both fair, works quite well, and works to the advantage of consumers. My concern with eliminating this authority is that it will—it risks undermining the effectiveness of the FTC, which has played a very important and beneficial role in preserving competition.

Chairman LEE. You have got the authority to do that. I mean, the FTC seeks permanent injunctions in many other contexts, including some consummated mergers. It does not lack the authority to do so. It does not lack the authority to seek a permanent injunction. Why doesn't the FTC simply consolidate the PI with the permanent injunction proceedings in the same manner that DOJ does?

Chairwoman RAMIREZ. Again, the—this is part of the Federal Trade Commission's DNA. We were designed to have this administrative function, and that is an authority that I think the agency ought to use. It uses it I think quite ably as evidenced by the track record that we have.

I believe that the procedures, again, while different, are comparable and fair. I do not believe that the processes, the differing processes result in any different outcome for parties. They are different, but in my mind, they are fair, they work well, and I think altering that authority risks eroding a very important component of why it was that the FTC was created by Congress.

Chairman LEE. Sure. I understand that. I understand this has been in place for over a century and that Congress made a choice when it gave the FTC this authority. Of course, it is our job as a Congress to review these things from time to time and to figure out whether it still makes sense. I am not sure that there—I am not aware of any indication that Congress at the time was contemplating this particular dynamic, this particular disparity that we have now seen develop in this area of the law. We will follow up more on that in a minute, but my time has expired. We will go now to Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much, Mr. Chairman. I apologize for being late. I had a Steering Committee meeting, and it went over a little bit. I know we like to start these things on time. I welcome the Chairwoman. Chairwoman Ramirez, thank you so much for being here, and congratulations. She won a consumer award last night. I happened to be there, so congratulations for that.

Just to summarize, I think two of the arguments, while this is modest legislation, I think proposed for good reasons, from one side, in terms of the costs of doing this just to summarize because it is a complex subject, I think the first would be that just losing the benefits of the FTC applying its expertise in administrative litigation, in rare cases a court may deny a preliminary injunction because economic learning and research may develop faster than the legal doctrine. I suppose the argument would be that the FTC would eliminate—would not be allowed to pursue this possibility of administrative litigation or using its expertise; the second argument being sort of the risk of unintended consequences, that by passing this change, would we raise the standard for obtaining a preliminary injunction for both agencies, or despite that stated attempt, the courts apply the SMARTER Act provisions to unconsummated mergers or other conduct. Would that be fair to summarize the issues that you raise?

Chairwoman RAMIREZ. That is a fair summary, yes. Thank you.

Senator KLOBUCHAR. Okay. Just a question about whether eliminating this ability to use administrative litigation in challenging these unconsummated mergers. The argument would be that it would undermine the antitrust enforcement and, then thus, harm consumers. Is that right?

Chairwoman RAMIREZ. Yes.

Senator KLOBUCHAR. Okay. Some have said that the SMARTER Act represents modest changes to merger enforcement, sort of codifying some of the current project. Help me understand why the agency believes the SMARTER Act would undermine the ability to promote competition and protect consumers.

Chairwoman RAMIREZ. Let me back up a bit and also just say that—as I think is evidenced by both my oral testimony here this morning as well as the written testimony that we submitted, this is authority that we use in limited circumstances.

Senator KLOBUCHAR. Right.

Chairwoman RAMIREZ. In my view, the process does work well when it is used, but the bill risks, again, eroding our ability to use authority that Congress gave us and that I believe we have used quite ably over the course of our history, including—

Senator KLOBUCHAR. You have a right to be proud of that work, so thank you.

Chairwoman RAMIREZ. In addition to that, I also do not believe that there is any evidence that parties are prejudiced by the fact that our process includes an administrative component to it. If you look at the data and you look at how many cases are litigated as compared to the Department of Justice, if you look at how many cases are settled or abandoned when before the FTC as compared to the Department of Justice, I think you see that the numbers are quite comparable. In my mind, that suggests that the FTC exercises no greater leverage over parties. Otherwise, I think you would see a disparity in those numbers. In my mind, there is no evidence that this type of a change is necessary or warranted.

I also am concerned about unintended consequences. Whenever you have a change, a major institutional change of this nature, I believe that you risk creating uncertainty. We can anticipate what some of those questions might be, but then, in addition, there are

also ones that sitting here today I probably will not be able to anticipate, but that will play out when parties inevitably end up litigating over what these changes signify.

Senator KLOBUCHAR. Do you think there could be a situation in the future where the case law has not kept up with economic thinking or is too restrictive and the FTC actually brings a preliminary injunction to protect consumers from a transaction?

Chairwoman RAMIREZ. I do. I think that we, as an agency, have used our decisions to develop important areas of law. I think the reverse payment patent settlement cases are certainly one where, back in 2003, the Commission issued a decision that ultimately was vindicated by the Supreme Court in 2013. I do believe that the development of antitrust doctrine is a very important aspect of what the Commission does.

Senator KLOBUCHAR. Very good. Thank you very much. I also wanted—Mr. Chairman, with your permission, Senator Leahy, our Ranking Member on the Judiciary Committee, asked that you—that we put on the record that he was unable to attend today because of another commitment, but he has a statement for the record, Mr. Chairman.

Chairman LEE. Thank you very much, Senator Klobuchar. We have now been joined by Senator Hatch, who I want to thank for his cosponsorship of the SMARTER Act, and we now recognize you, Senator Hatch.

Senator HATCH. Thank you, Senator Lee. We appreciate you and your leadership on this matter. Let me just ask this question to you, Chairwoman Ramirez. I would like to read you a quote from the Antitrust Modernization Commission report:

“Parties to a proposed 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.”

If you would, tell me why you think the Antitrust Modernization Commission—this is a bipartisan Commission composed of experts who have spent years investigating ways to improve our Nation’s antitrust laws—was wrong.

Chairwoman RAMIREZ. Senator, I want to emphasize that the authority that we use when we exercise our authority to go into court, challenge a transaction, and then proceed administratively is authority that is used in very limited circumstances. Most of the transactions that we review are procompetitive and do not raise anticompetitive concerns. And so we really are talking about a very small number of transactions that ultimately are litigated.

As to those, I believe that, notwithstanding the differences in procedure, that parties do receive fair treatment and that our merger enforcement process works well. I do not believe that parties are prejudiced. I do not believe that they face a substantially greater burden. I do not believe that there is a difference in outcome depending on which agency a party is before. In my mind, the proposed legislation is neither necessary, nor is it warranted.

In addition, I feel that making such a change would risk hurting consumers, risk undermining the ability of the Federal Trade Commission to preserve competition in important areas, like health care, which has been a top priority for the agency over decades, among other sectors of the economy. I believe also that whenever you have this type of reform and change, I believe that it risks a number of unintended consequences and creates, frankly, more uncertainty.

As a litigator of 20 years and currently a law enforcer, I can tell you that I do not believe it is going to be a wise use of taxpayer money and limited FTC resources to be litigating over the precise contours of the proposed reforms.

Senator HATCH. You point in your testimony to a number of instances in which you say that Part 3 proceedings in merger cases yielded positive results for consumers. It is one thing to say look at Part 3, it has produced all these great results. It is another thing to say that Part 3 was necessary to achieve those results. Can you give me examples of instances in which Part 3 proceedings in merger cases yielded benefits to consumers that could not have been achieved throughout standard Section 7 district court litigation?

Chairwoman RAMIREZ. Senator, the authority that was given to the FTC was a very deliberate authority that was given by Congress. Congress elected in 1914, when it created the agency, to augment the then-existing antitrust authority that the Department of Justice had. I think that was a very deliberate decision. I think it has played out well.

Admittedly, it is authority that we have used in the unconsummated merger context rarely. That to me also suggests yet another reason why I believe this particular set of changes are unnecessary. I think if you look at a number of merger cases, including the *Evanston* case, the *Polypore* case, the *ProMedica* case, we have addressed complex issues of antitrust law, and we have been affirmed by the appellate courts. I think these have been important developments that have benefited consumers over the long term.

Senator HATCH. Okay. If the Commission cannot convince a court that blocking a merger is in the public interest, why does it make sense to allow the Commission to continue trying to stop a merger through its own internal administrative processes? If an independent adjudicator rejects the Commission's arguments, why should the Commission be able to continue prosecuting a case internally as both judge and jury?

Chairwoman RAMIREZ. Let me unpack your question, Senator, if I may.

Senator HATCH. Sure.

Chairwoman RAMIREZ. I want to make clear that the FTC can go into court to seek a preliminary injunction. If the FTC loses that request for preliminary injunction, at that point in time the Commission—we have a policy where we will examine whether it would be appropriate for us to continue with our administrative process. It has been a very long time since the Commission has elected to do that, and I assure you that in instances when that happens, the Commission will examine whether it is appropriate. It may not be

appropriate, and at that point the matter would then be dismissed from the Part 3 process. That is something that just does not happen as a matter of course. It is a very serious issue. The commission will examine it and look at it very, very carefully.

Senator HATCH. Thank you. Thank you, Mr. Chairman. My time is up.

Chairman LEE. Thank you, Senator Hatch. I want to note for the record that we will include Senator Leahy's statement for the record, without objection.

Chairman LEE. Senator Blumenthal.

Senator BLUMENTHAL. Thanks, Mr. Chairman. Thank you for being here, Chairwoman Ramirez, and for your extraordinary and distinguished service as a litigator and now as the Chairperson of the FTC.

I think in my humble opinion, with the greatest respect to the proponents of this legislation, the best thing about this proposal is its title, and I admire the creativity and ingenuity of its proponents because it seems to me that it is truly a solution in search of a problem. There is no real problem here. I want to just follow up on the point that you were just making because the Chairman of the Subcommittee has raised the specter of two separate trials or fact proceedings before two different judges imposing an inordinate burden on the parties. How often does that happen?

Chairwoman RAMIREZ. It happens very rarely. It has been more than two decades since that has happened.

Senator BLUMENTHAL. Two decades ago.

Chairwoman RAMIREZ. Yes.

Senator BLUMENTHAL. There has been no instance in the last two decades where, in fact, two different district court judges held factual hearings requiring the parties to come forward and present their cases.

Chairwoman RAMIREZ. It has been more than two decades since the Commission has lost a preliminary injunction and then proceeded administratively, correct.

Senator BLUMENTHAL. Because of the policy that you just mentioned, if you lose a preliminary injunction proceeding, it is a pretty good indication as to what the merits of the case are.

Chairwoman RAMIREZ. That maybe right.

Senator BLUMENTHAL. Let me ask you, in your experience—and you are a pretty experienced antitrust litigator—does this difference in procedure involved in Department of Justice versus FTC actions result in different outcomes?

Chairwoman RAMIREZ. In my view, it does not.

Senator BLUMENTHAL. That is because both agencies apply the same law. Is that correct?

Chairwoman RAMIREZ. Absolutely.

Senator BLUMENTHAL. Do the different procedures result in different costs or burdens on the parties?

Chairwoman RAMIREZ. The FTC procedure may be a longer procedure because typically it is a two-step process whereby we would first go into federal court and then proceed administratively. I will note that parties could stipulate to a PI and then proceed immediately to a Part 3 process. Given reforms that we undertook in

2009 to streamline our administrative process, I believe the time-frame would be comparable to that in federal court.

Senator BLUMENTHAL. If a merger fails to withstand the scrutiny of a preliminary injunction proceeding, it may also be an indication to the parties that they need to reconsider a merger. Correct?

Chairwoman RAMIREZ. Yes.

Senator BLUMENTHAL. Is it not a fact that a lot of mergers are abandoned after an unsuccessful defense in a preliminary injunction proceeding?

Chairwoman RAMIREZ. Yes, that is so.

Senator BLUMENTHAL. In the long run, actually it may save the parties some money and a lot of travail and inconvenience and, in fact, internal costs to know right away as a result of a preliminary injunction proceeding that they are not going to succeed.

Chairwoman RAMIREZ. It could very well.

Senator BLUMENTHAL. Let me just say I regard this legislation simply as an attempt to tinker with the current procedure without there being a real demonstrated need for it. In fact, it could have the effect of preventing or undermining effective antitrust scrutiny, which I think is all the more important today than ever before. The trend toward consolidation in various industries—airline, telecom, pharmaceutical, health care—in my view is bad for consumers, and I would ask, with the Chairman's permission to enter into the record a very cogent article written on July 8th by Greg Ip in the Wall Street Journal entitled, "Why Corporate America Could Use More Competition."

Chairman LEE. Without objection.

[The information appears as a submission for the record.]

Senator BLUMENTHAL. As well, a letter written by the Consumers Union on the subject of this legislation, which states very well the reasons that we ought to approach with a lot of skepticism this kind of legislation. It is October 6, 2015, written by the Consumer Union to the Chairman and Ranking Member of this Subcommittee.

Chairman LEE. Thank you, Senator Blumenthal. That will be received into the record.

[The information appears as a submission for the record.]

Chairman LEE. Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. Thank you for being here, Ms. Ramirez. I think I am the only non-attorney on the panel today, so I am not going to ask you a lot of legal questions. I am going to ask you a few practical questions.

How on Earth could we assume that the present policy is really a time saver or money saver for businesses that are going through this? I mean, it just defies logic, particularly, let us say that you are not successful with getting the injunction, the merger moves on, and then the administrative processes continue. Why would anybody think that when you consider the merger is moving on, you are going through the administrative process, how on Earth could this in any way be a positive thing for the business moving forward with a merger? I mean, why can't—and let me ask you another question as we are going along with that. That is probably rhetorical. It just does not make sense. Again, I am viewing it from a business perspective.

The Antitrust Commission report seemed to suggest that some of the changes that are proposed by the SMARTER Act may have merit. By the way, I am sure this is the first time in Congress that we have ever used a title like “smarter” to represent maybe an underlying bill that people would be opposed to. Can you give me some assessment—I assume you have read the Commission report and why you would disagree with the Commission’s report on certain things that seem to link two provisions of the SMARTER Act?

Chairwoman RAMIREZ. Let me address your first question. I want to clarify that I am not taking the position that the two-step process that is typically used by the Federal Trade Commission is a time saver. What I am saying is that I do not believe that our process prejudices parties; I do not believe that it enhances the leverage that the FTC exercises over parties in connection with merger challenges. I am saying also saying that the process does not have an impact on outcomes, and that it is ultimately comparable to what transpires when the Department of Justice is looking at transactions.

Then with regard to your second question, I will just make two points. One is just that the overarching process is a fair one and an appropriate one. Again, I will emphasize that this was—

Senator TILLIS. That does not really get to my question, though. I know that you have consistently responded with your belief that the current process is fair and open. What I am getting to specifically are some of the recommendations of the Commission report and why, rather than defending your position by saying you think it is fair and open, discuss why the proposed changes, some of which map to some of the SMARTER provisions do not make sense. In other words, let us get into a specific reason why the proposed changes represent a problem. To go back to your line of responses, explain to me why the changes would make it an unfair and inconsistent process.

Chairwoman RAMIREZ. A key concern expressed by the Commission was an issue about the preliminary injunction standard that is used by the Federal Trade Commission in contrast to the Department of Justice. I have to say that if one looks at how the courts have applied those standards—the standards are, in fact, stated differently—but the way that the courts have applied them, they apply them in the same way. Both the Federal Trade Commission and the Department of Justice have to make a rigorous evidentiary and legal showing that the proposed transaction is likely to substantially lessen competition, and it is only when that showing has been made that a court will grant a preliminary injunction.

That central concern of the Commission is one that when one actually examines what transpires in the courts—I do not believe is justified.

Senator TILLIS. Mr. Chair, I was running late to this Committee because I was in a Senate Armed Services Committee hearing. I repeatedly say in Senate Armed Services that I never want our men and women in uniform to go into a fair fight. In other words, I always want them to be better equipped and better trained. In this particular case, it seems to me that the devices that we have, that the Government has available to it now almost make it certain that businesses go under this with an unfair fight and an unfair advan-

tage. For that reason, I support the SMARTER Act, and I look forward to seeing it move through the Committee. Thank you, Mr. Chair.

Chairman LEE. Thank you, Senator Tillis.

Most merger cases tend to settle after the grant of a preliminary injunction. Doesn't this counsel in favor of having a bench trial on the merits at the same time? Wouldn't that suggest that we ought to have that? In other words, if the answer is no because the parties sometimes prevail in later litigation on the merits, isn't this an even stronger reason to ensure that the preliminary injunction and merits are litigated at the same time? Some of the same arguments you are using—one of the arguments you are using here is that, you know, you have not used this authority in 20 years, it rarely arises, and so why worry about it. I do worry about it because of the fact that if in practical effect most of the time you have one bite at the apple anyway, and in your case, in the case of something that under the jurisdiction of the FTC, if the bite at the apple tends to be at the preliminary injunction phase, then why not have the more fulsome type of review that you have when you have a whole review on the merits? Why not have that all at once?

I am sympathetic to the view in this and in every other area of the law that we do not want to adopt things that are solutions in search of problems. I think the same criticism can be made of the existing provision of law. If the existing provision of law is itself a solution in search of a problem, then why not make the two standards the same? Why not put people through the same process?

Chairwoman RAMIREZ. Mr. Chairman, I would argue that the parties can, under our current system—what they can do is that they can stipulate to a preliminary injunction, which is something that we seek in order to enable us to obtain meaningful relief at the conclusion of a merits trial. The parties could very easily stipulate to not consummate the particular merger or to a robust hold separate, and then proceed to a merits trial, and there you would then be before the Commission, and you would go through the merits trial before a Commission and then obviate a step before a federal court.

That is a process, if parties so choose, that is available to them. I would argue that that is another route that one can take, and one need not alter the existing system in order to allow for that, to address the concerns that you have expressed.

Chairman LEE. Yet that does not happen in this context, at least not with the same regularity that it happens—

Chairwoman RAMIREZ. Parties actually—

Chairman LEE [continuing]. When a matter is before the DOJ.

Chairwoman RAMIREZ. Apologies for interrupting you, but it actually does occur on occasion.

Chairman LEE. With the same regularity—

Chairwoman RAMIREZ. On occasion. We are speaking about a very small number of matters. The *Ardagh* case, that was a situation where there was such a stipulation, and then it proceeded to a merits trial. Ultimately they are resolved via settlement. Again, we are speaking about a very small universe of cases, and so the numbers are not large.

Chairman LEE. I want to make sure I understand your position correctly. Do you believe there is no difference between the preliminary injunction standard prescribed for the FTC under Section 13(b) of the FTC Act and the one that applies to the DOJ?

Chairwoman RAMIREZ. There is no question that the standards are worded differently. There is different language that is used under the authority that we exercise. But in my—

Chairman LEE. In effect, though—

Chairwoman RAMIREZ. In my view, in effect, they are the same—I believe district courts take their role very seriously. They absolutely understand the importance of this preliminary injunction phase. I think we see that evidenced by the two most recent matters in which we have sought a preliminary injunction: the *Sysco* matter, in which we prevailed and did get a grant of an injunction. The court wrote this incredibly detailed 130-page opinion. It was thorough, careful. Courts undertake this role very seriously, and I believe that they end up applying the same standard that they end up applying when the Department of Justice seeks the preliminary injunction.

Chairman LEE. If they are, in effect, the same, if they have the same practical effect, why not have them also be the same?

Chairwoman RAMIREZ. Ultimately, in the abstract, I have no issue with harmonizing the preliminary injunction standards. My fear, again, and I say this with 20 years of litigation experience and in my experience of several years as a law enforcer with the Commission, my fear is that a change in the standard—given that right now it is the same standard as the Department of Justice, my fear is that courts would then not understand the purpose of the change and perhaps end up imposing either a higher standard or it simply would create uncertainty as to what exactly the new standard ought to be. I think it risks uncertainty, but in theory, harmonization of the standards I do not see as a problem. I believe they are already de facto similar standards.

Chairman LEE. Okay. I think I understand your position there. I struggle with it just the same because if I am understanding you correctly, you are saying we have got two different standards, but they are interpreted the same way by courts. If we make the standards as they are written into the law literally the same, then the courts might make them different. I do struggle with that.

Chairwoman RAMIREZ. Senator, my point is simply that I do not believe there is a need to make a change here. My worry is that with any change, attorneys who zealously advocate for their clients and parties who, as you know, look for any argument that they can make, I just fear needless litigation over issues about what the standard might mean if there is a change, given that in my mind it is being applied appropriately today. Why make a change?

Furthermore, this particular bill goes far beyond that and then addresses, again, the adjudicative authority that we have. My concerns extend beyond simply harmonization of the PI standard.

Chairman LEE. What would you say responding to my concern that the courts, as a matter of—canons of statutory construction tell judges that they are not supposed to assume that differences in legislative language are irrelevant. They are not supposed to just lightly ignore surplus or minor differences. I mean, I think I

could—if what you are worried about is consistency in the application of the law, I could make a corresponding argument to yours that would say the greater risk is that at some point courts are going to realize, hey, these are not the same standard, there must be a difference, and that could change that way.

We, of course, do not have control over what the courts do, but we do have control over what the law says. If what you are telling me is that the law ought to provide for the same substantive standard, the same standard in effect, I do struggle with the idea that we should not change the law to make sure that the law actually says the same thing in these two areas. Do you want to respond to that?

Chairwoman RAMIREZ. Senator, let me take issue with the way that you have constructed your comment. The courts are not comparing the FTC standard to the Department of Justice standard. Let me also state that the standard that is applied, of course, with the Department of Justice is the traditional preliminary injunction standard that is in the common law, that is articulated by courts. They are not comparing the language that is in the FTC Act to that traditional standard. I think your point about statutory construction I do not believe it is opposite to the way courts approach this issue.

I would urge the Members of the Committee to look closely at the way that the courts in the *Sysco* matter, the decision in June, and also the recent decision in the *Steris* case, see how those courts apply the standard and compare that to the way courts have applied the standard in Department of Justice cases. You will see that same requirement—that the FTC must establish a likelihood of success on the merits. Again, in my mind, the way the standards are articulated end up no differently, and the outcomes in my mind are also not determinative, depending on who it is that you are in front of.

Chairman LEE. Harm could come from additional efforts at statutory clarity.

Chairwoman RAMIREZ. I am sorry?

Chairman LEE. If we attempt to clarify the standard, harm could come from that. That is your concern.

Chairwoman RAMIREZ. That is a worry. More fundamentally, my concerns are—go beyond the issue of harmonization of the PI standard. My major concern about this proposed legislation is with regard to the effort to eliminate the administrative process. That is the fundamental concern.

Chairman LEE. Got it. Thank you. Senator Klobuchar.

Senator KLOBUCHAR. Thank you very much. I just had one side question about pharmaceuticals. As you know, Turing Pharmaceuticals announced a 5,000-percent price increase on Daraprim, a drug used to prevent malaria and treat toxoplasmosis. Yesterday, I sent a letter to the FTC asking you to investigate whether Turing was restricting supply, and we are well aware of the price increase, but this is about whether or not they are restricting supply to prevent generics from getting on the market and to delay generic competition.

On Monday, the *New York Times* also covered price increases by Valeant Pharmaceuticals. What role do you see antitrust laws in

general, without maybe commenting on the specific situation as you look into it, what role does the FTC and antitrust laws have to play in this clearly emerging problematic area?

Chairwoman RAMIREZ. Senator, as I think you are well aware, it is a top priority for us to monitor the pharmaceutical industry. It is an area that we have been active in for decades. We share your concern when we see significant price hikes. We look closely when we do see price hikes. As a general matter, price hikes alone may not necessarily mean that there is anticompetitive conduct. If there is, we certainly will be taking appropriate action should we find there has been a violation of the antitrust laws.

Senator KLOBUCHAR. Do you think we are going to need a different legislative solution rather than antitrust laws if this kind of behavior is allowed and these patients are just at the mercy of people increasing prices if, in fact, there is not per se an antitrust violation?

Chairwoman RAMIREZ. I think that is an issue that certainly your Committee and other Members of Congress should examine. In the meantime, we are certainly going to do our job and ensure that the antitrust laws are appropriately enforced and that we do what we can to protect consumers.

Senator KLOBUCHAR. Okay. Thank you very much.

Chairman LEE. Thank you very much, Chairwoman Ramirez. We will give our next panel a few minutes to get situated, and then we will resume.

Chairwoman RAMIREZ. Thank you.

Chairman LEE. Thank you very much.

[Setting up second panel.]

Chairman LEE. Okay. Can I get this panel of witnesses to now stand and be sworn? Do you affirm that the testimony you are about to give before the Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. GARZA. I do.

Mr. CLANTON. I do.

Mr. LIPSKY. I do.

Mr. JACOBSON. I do.

[Witnesses are sworn in.]

Chairman LEE. Thank you. Okay. I will introduce all of the witnesses together, and then we will come back to you for your opening statements.

Ms. Deborah Garza is the co-chair of Covington & Burling's Antitrust and Competition Law Practice Group. With more than 30 years of experience in both the private and public sectors, Ms. Garza has been involved in some of the largest antitrust matters in the last 30 years, including the merger of Exxon and Mobil, the U.S. Government's suit against Microsoft, the USFL suit against the NFL, 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. She was also appointed by President George W. Bush to chair the Antitrust Modernization Commission, the 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. Ms. Garza re-

ceived her bachelor's degree from Northern Illinois University and her J.D. from the University of Chicago—which happens to be Senator Klobuchar's alma mater.

Mr. David Clanton is senior counsel at Baker & McKenzie, where he also serves 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 Baker & McKenzie, Mr. Clanton served as a Commissioner and as Acting Chairman of the Federal Trade Commission. Mr. Clanton received his bachelor's degree from Andrews University and his J.D. from Wayne Law School, where he served on the Law Review.

Mr. Tad Lipsky is a partner in the Washington, DC 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 chief antitrust lawyer for The Coca-Cola Company for 10 years. Mr. Lipsky also served as Deputy Assistant Attorney General under William F. Baxter. Mr. Lipsky received his B.A. from Amherst College, his M.A. from Stanford, and his J.D. from Stanford.

Mr. Jonathan Jacobson is a partner in the New York office of Wilson Sonsini Goodrich & Rosati. He has significant merger experience, including trials in cases brought by the Justice Department and Federal Trade Commission, as well as numerous fully cleared transactions and consent decrees. He currently serves as vice chair of the ABA's Section of Antitrust Law, having previously served as an officer, council member, and in several other Antitrust Section positions, including editorial chair of Antitrust Law Developments. Prior to joining Wilson Sonsini, Jonathan was a partner at Akin Gump Strauss Hauer & Feld's New York office, where he co-chaired the firm's National Antitrust Practice. He served as a Commissioner on the Antitrust Modernization Commission.

All the witnesses' written statements will be entered into the record in their entirety. I ask that each witness summarize her or his testimony in 5 minutes or less. Thank you for being here.

Ms. Garza, the floor is yours.

**STATEMENT OF DEBORAH GARZA, FORMER CHAIR,  
ANTITRUST MODERNIZATION COMMISSION, AND PARTNER,  
COVINGTON & BURLING LLP, WASHINGTON, DC**

Ms. GARZA. Chairman Lee, Ranking Member Klobuchar and fellow Chicago alum, and staff and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. I would like to join my voice to those of the folks who commented in the prior panel about how great the title is. I also think it is a great title.

As you mentioned, from May 2003 through May 2007, I served as chair of the bipartisan Antitrust Modernization Commission, which was created by Congress to review and report on the state of U.S. antitrust law enforcement. The AMC Report included three recommendations that are relevant to this hearing.

The first was that when the FTC seeks injunctive relief in HSR Act merger cases in Federal court, it should seek both preliminary

relief and permanent injunctive relief, and it should seek to consolidate those proceedings so long as it is able to do so by reaching an agreement with an appropriate scheduling order with the parties.

Two, Congress should amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR merger cases.

Three, Congress should ensure that the same standard for granting a preliminary injunction in a merger case should apply to both the FTC and the DOJ.

The SMARTER Act essentially adopts those recommendations, and it is a great honor and pleasure to be here today to testify in support of the Act. Although it has been 8 years since the AMC made its recommendation, I have never lost faith that the good-government vision of those recommendations would someday prevail. I will note that there are a lot more recommendations in the report, should you ever want to consider any of those as well.

The premise of the SMARTER Act is simple: A merger should not be treated differently depending on which antitrust enforcement agency—the DOJ or the FTC—happens to review it. Regulatory outcomes should not be determined by a flip of the merger agency coin. I know there is a question that a number of the Senators have about how exactly the differences could potentially affect outcomes, and I look forward to talking about that in the Q&A.

I think the 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.

When the AMC was considering what issues to study and examine and report on, we decided to include this issue in a very large group of issues we were considering precisely because we did hear from people that they did perceive, and I think for good reason, that there were significant differences between the ways that the two agencies looked at pre-notified mergers that needed to be addressed.

I would like to close—I will not repeat my favorite part of the AMC—well, maybe I will. I guess I will. It has been said three or four times, but I like it so much I will say, 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. That is bad for antitrust enforcement.

I would like to close by making three points clear about the AMC's recommendations and the SMARTER Act:

One, they are not anti-FTC. I think the FTC has done a terrific job. I admire Chairwoman Ramirez and all of her staff at the FTC. The AMC recommendations and the SMARTER Act are not anti-enforcement. This is not about tying the FTC's hands or doing anything to inhibit merger enforcement.

The recommendations in the SMARTER Act I do not think should be perceived as partisan. Five of six Commissioners ap-

pointed by Democrats agree to the first recommendation, including Mr. Jacobson. Five of six Commissioners appointed by Democrats agree to the second recommendation. Mr. Jacobson was a dissenter. All six Commissioners appointed by Democrats agree to the third recommendation. While we may have differences on what is the best way to proceed—and there are some complex questions here—I hope that will not be treated as a political issue but, rather, as a good-government issue.

[The prepared statement of Ms. Garza appears as a submission for the record.]

Chairman LEE. Thank you very much, Ms. Garza. I figure better late than never as far as the delay between the issuance of the report—I love the conviction with which you have described the report and quoted it. For a minute there, I thought you were going to break into song in describing—

Ms. GARZA. You would not want me to break into song.

[Laughter.]

Chairman LEE. Senator Klobuchar and I had a hearing a few months ago where we had a bunch of songwriters, and one of them was a country music songwriter. Senator Klobuchar observed that everything the man said sounded as if it were a country music song.

Senator KLOBUCHAR. We have high standards.

Chairman LEE. High standards here, yes. Mr. Clanton.

**STATEMENT OF DAVID A. CLANTON, SENIOR  
COUNSEL, BAKER & MCKENZIE LLP, WASHINGTON, DC**

Mr. CLANTON. Chairman Lee, Senator Klobuchar, thanks for inviting me.

What I would like to do to follow up on what Ms. Garza mentioned is to focus on the changes to the administrative process, primarily, and come back and talk about the injunction standards. It is important to take a step back and look at the fact that this legislation is primarily focused on HSR reportable transactions. That was the whole thrust of the AMC recommendation.

The reason for that is, unlike any other area that the antitrust enforce, statute is one that was designed to have the agencies work together to create a system whereby would have opportunity to review transactions, get the information they need to conduct a thorough investigation, and hold up the deal until a chance to. I can tell you from personal experience—and all of us can do that investigative process takes a long time. It takes many months in most cases.

Frequent reference has been made to the *Sysco* case, where the Commission did win a preliminary injunction. The investigation there from before the parties went to court was over a year, slightly over a year. Then after that, you had a preliminary injunction hearing that lasted about 4 months, and after that, the parties abandoned the transaction before the matter went back to an administrative hearing. This is really where the specific issue comes into play in terms of what happens.

At the end of that lengthy process, whether it is 6 months, 8 months, 10 months, or a year, the agency and the parties are ready to go to trial, and they are ready to go to trial on the merits, not

just a preliminary injunction. Frankly, that is what you see happening at the Department of Justice.

Typically, in recent years DOJ, the parties have agreed to consolidate the proceeding and have a trial on the merits, which gives the parties an opportunity to defend and requires the Government to prove by a preponderance of evidence that the transaction Section 7 of the Clayton Act.

By contrast, on the FTC side, the process works this way: The agency goes to seek a preliminary injunction. The parties defend that. The evidence that is put in preliminary injunction is pretty much the same evidence that would go into a trial on the merits. There might be fewer witnesses than would be in an administrative hearing or in a consolidated hearing. By and large, the investigation has been completed by that time.

The question then is, what is the reasonable process for litigating those issues and how do you get to a point where you have a decision that is on the merits or a reasonable opportunity. Just use the *Sysco* case as an example, since it is current—and I refer to it in my statement took a year for the investigation. It took for the preliminary injunction hearing. Then if the parties had not abandoned the transaction and the case had gone through an administrative process, would have taken—from the time of decision, another 8 months: a month until the hearing date started and then another 7 months under the Commission rules for a final decision.

I think it is important to keep in mind that not only is it, but if you look at the Commission process—and the Commission has done a good job in trying to speed up its rules, and I will give them credit. It is a two-stage. You have got an administrative law judge a hearing, which would be analogous to a district court hearing on the merits. Then after that, issues a decision. Then there is an appeal to the full Commission. The full Commission reviews and issues its decision as a mini-internal appellate court.

When you add all those elements together, it is a long time, and it is a lot longer. I gave as two examples cases that DOJ went through and handled in a consolidated fashion, a few years ago. One of those lasted 5 months, the other lasted 6 months, for the entire trial on the merits.

We are talking about, using *Sysco*, if it had been tried—and it was not. If it had been tried administratively, it would have taken twice as long from the end of the investigation until you get a final decision. That does not even take into account appellate court if either party wants to appeal.

You add all that up, it is not surprising that the *Sysco* parties decided to abandon, because at the end of all that would have been two years or you would have gotten a final decision on the merits.

I think it is important to understand how that process works and what the implications are, and I might say that reference made that the Commission has not continued a proceeding where they lost the preliminary injunction in 20 years. There has not been an administrative hearing they in 20 years. There has been no administrative decisions articulating the law in the last 20 years either way, whether the Commission wins or loses.

Suggests to me that changing this law and having everything handled at the court level is not going to on the Commission's ad-

ministrative process, and the cases that Chairwoman Ramirez cited, *Evanston*, *Polypore*, *ProMedica*. All consummated. They would not have been covered by this legislation. The Commission still has an opportunity to articulate its views in those matters.

I am over my time. Thank you.

[The prepared statement of Mr. Clanton appears as a submission for the record.]

Chairman LEE. Thank you. Mr. Lipsky.

**STATEMENT OF ABBOTT B. LIPSKY, JR.,  
PARTNER, LATHAM & WATKINS LLP, WASHINGTON, DC**

Mr. LIPSKY. Thank you, Mr. Chairman and Senator Klobuchar. I am very grateful for the opportunity to testify.

I guess—very much enjoyed that very substantive exchange with Chairwoman Ramirez. A very interesting conversation. Having come after two other excellent witnesses, I guess I am in the position where everything that needs to be said probably has been said, but just not by me. I am going to try to limit myself to supplemental points.

I did want to state that I am here as somebody who totally supports the idea of a competitive market and sound enforcement of antitrust as a means of maintaining a competitive market to maximize American productivity and innovation. I totally support the antitrust mission. I support this legislation because I believe it will improve in the conduct of that mission.

It has been mentioned that it has been 20 years since there was an administrative litigation involving a case where there was a preliminary injunction loss. I want to point out that was because of sound activity at the Commission itself. As I have described at some length in my testimony, there was a 9-year litigation involving a post-transaction hearing involving the Coca-Cola attempt to acquire Dr Pepper. There was a 6-year litigation when R.R. Donnelley tried to acquire Meredith/Burda.

The consensus professional learning from those two experiences was that those hearings were a waste of public resources, and the Commission, under the democratically appointed Chairman Bob Pitofsky, to his great credit, implemented the 1995 policy statement and adopted 16 CFR 3.26, which, although it did not say this in so many words, was widely understood in the profession as essentially implementing what came to be called the “Pitofsky rule,” namely, that administrative litigation would not be used in those circumstances. That piece prevailed until the amendment of the rule in 2008, I believe it was. 16 CFR 3.26 was actually repealed, although it was recently reinstated, I believe at least partially in consciousness of the possibility of this legislation going forward.

What we are asking for fundamentally in this legislation is that the sound administration that began with Chairman Pitofsky and proceeded until 2008, that that essentially be codified. As other witnesses have described, we do not think that will have any significant impact on the Commission’s antitrust mission.

The other thing that I think has not been emphasized that I would like to hear emphasized in consideration of this legislation is that merger activity is one type of competitive conduct where speed and efficiency in decision making is particularly critical. In

a situation where an agency begins an investigation over something that has occurred in the past, whether it is a price-fixing cartel, the formation of a trade association or the activities of some other body, the record is, as the investigation reveals and discovers it, and the agency can—and, of course, it is always good to have efficient and speedy procedures. In a merger and acquisition situation, everybody is waiting for the decision in order for their business history to be written.

It is only fairly recently that the Commission has been given some very substantial powers to prevent transactions from occurring. Remember, 13(b) was passed in 1973, and at that time the only ability of the Commission to go in and stop a prospective merger would be to invoke the—go to a Federal appellate court and invoke the All Writs Act and seek an injunction under what was a terribly punishing standard. The Commission has to establish that divestiture following consummation of the transaction would be—I think the phrase is “nearly impossible,” which is much more than likelihood of success on the merits and balance of the equities.

Then shortly thereafter, we got the Hart-Scott-Rodino Act, which basically blows the whistle on any substantial acquisition until the agency has a full opportunity to investigate and opine on the legality of the merger. With those two extremely powerful tools in their toolkit, the Commission has a very adequate means of investigating and then going to court and using that permanent injunction standard in 13(b)—permanent injunction authority in 13(b), as, Mr. Chairman, I think you very effectively suggested they might try to do. Thank you very much.

[The prepared statement of Mr. Lipsky appears as a submission for the record.]

Chairman LEE. Thank you. Mr. Jacobson.

**STATEMENT OF JONATHAN M. JACOBSON, PARTNER,  
WILSON SONSINI GOODRICH & ROSATI, PC,  
NEW YORK, NEW YORK, AND FORMER COMMISSIONER,  
ANTITRUST MODERNIZATION COMMISSION**

Mr. JACOBSON. Chairman Lee, thank you very much for having me here today. I oppose that part of this bill that would eliminate Part 3 administrative adjudication in HSR cases.

I want to start by answering a question that you posed earlier today, and that is, why should there be a second shot by the FTC? Here is the reason: Sometimes courts get it really, really wrong, and I think our experience with the hospital merger cases in the 1990s shows that quite convincingly.

What do you do when the courts are getting it really, really wrong? Well, the Justice Department has only one avenue, which is to appeal. The FTC is an administrative agency, and like the IRS' ability to nonacquiesce in court decisions, the FTC here has comparable authority in—to take the case into a Part 3 and get an administrative adjudication, which will later be reviewed by a court of appeals, but on a basis where a record can be established. There may be new theories. There may be new ways of looking at the evidence that a busy district judge who, you know, has many other matters pending just is not going to have the time to address appropriately. I would suggest that the Part 3 process that has been

in place for so long is a necessary and very important part of the basic administrative mission of the Federal Trade Commission.

One of the basic premises of the bill is that the availability of these proceedings makes it harder to get an FTC deal through and concluded than one cleared to DOJ, and that has just not been my experience. My experience to the contrary is that the idea that one agency has an advantage over the other is a myth.

The potential to commence a Part 3 proceeding can be used in negotiations. I have never heard it, but it is certainly theoretically possible. What really matters when you are trying to get your deal through is what staff has been assigned to your deal. It is not just, you know, the clearance process, which is something the AMC recommended Congress address, and I would strongly urge you, Senator Lee, to take a look at that series of recommendations. In terms of what really matters in getting the deals through, it is the staff, and the staffs at the DOJ are different. There are different merger shops at the DOJ. The staffs at the FTC are different. There is no advantage in getting the deal through, which is really what the companies really care about. The fact of a potential Part 3, which has not happened in over 20 years, just does not play a role in the negotiations in the real world.

The FTC's case-by-case approach is the appropriate approach. There has been no occasion to use this authority for a long period of time. Where it is—and I mentioned the hospital type of cases—that is something where consumers are going to benefit from a careful review by the agency, subject to appellate review by the court of appeals of the defendant's choice.

A lot has been said about the inconvenience to the parties. It is important to recognize that if the preliminary injunction has been denied, the deal can close. The stockholders get their money. The bankers get their fees, which is, you know, very important to them, certainly. There is additional legal expense, but there is no delay. The legal expense is not different than you face in any merger context. A merger can always be challenged post-consummation. It can be challenged by the DOJ. There is no statute of limitations applicable to post-consummation challenges by the DOJ. It can be challenged within 4 years by private parties or by any of the various State attorneys general. This is an inherent risk that you get in every case, and the fact of the Part 3 proceedings really does not exacerbate it at all.

Finally, I would refer you to my written statement. There are some language issues in terms of the draft of the legislation, so if it does go forward, I would urge you to look at the proposed changes in my written remarks. Thank you.

[The prepared statement of Mr. Jacobson appears as a submission for the record.]

Chairman LEE. Thank you very much. I would like to start with Ms. Garza. The FTC's administrative process, as we have established today, has been used rarely, if at all, in roughly 20 years to block an unconsummated merger. Tell me what your opinion about—what is the best case you can make about what, if any, value there is to the FTC of that unused proceeding, you know, separate and apart from any value of the FTC's administrative processes more generally. I am talking about in this context.

Ms. GARZA. I think the FTC does perceive a value in it, and I think to see how that works, you might consider the context of the hospital mergers that we have been talking about. There was a long period of time in which both the Justice Department and the Federal Trade Commission had poor success in convincing courts to block mergers, and this is an example, by the way, of where both the DOJ and the FTC do happen to look at mergers in the same industry in hospital cases. There had been a series of losses.

As people have said in their testimony, their written testimony and a bit today, the FTC focused on how to change that, which is fine, which is what you would want an agency to do. One of the ways was to—was the *Evanston* case, which is a post-consummation proceeding at which they used to develop the evidence and to show how that a hospital merger could be anticompetitive so they had that to use.

Then you come to the Inova merger in Northern Virginia, where, in part with the leadership of Commissioner Tom Rosch, the FTC made a concerted effort to turn their track record around. What they did there was, in part, they had basically withdrawn, as Tad said, as Mr. Lipsky said, withdrawn the Pitofsky rule, so they said no longer are—we are not bound anymore by our policy of not pursuing administrative hearings if we lose a preliminary injunction.

They amended their rules for administrative hearings to make it somewhat more efficient and streamlined and quicker. Then they went into the court and tried to convince the court to give—I would say to apply a less severe or less difficult standard to the issuance of a preliminary injunction by telling the court that it should really defer to the FTC and allow—just have enough to say that there is enough of a basis to allow the FTC to go into Part 3. They started the Part 3 hearing process at the same time that they went into court.

The combination of all of that was intended to and did influence the parties' decision not to fight. The parties issued a statement after the fact that said we had to give up—oh, and, by the way, the other thing they did is that—all for good measure, is that Tom Rosch, Commissioner Rosch was to serve as the Administrative Law Judge in the proceeding that tried the merger case.

The whole—it was a smart use of the toolkit that the FTC had. It was definitely intended to help them to win this merger case, which they wanted to do. No one, I think, begrudges the FTC that it used that toolkit. That is what you want an agency to do. The problem is that it was perceived at the time, not only by the parties but by other folks, as basically an example of how the FTC could get the results it wanted, in this case it would be good to have the parties abandon the transaction by using its unique processes and procedures, which are different from the DOJ.

The reason, I think, that the legislation is appropriate is because you should not expect the FTC to itself not exercise and use all of the tools in its toolkit. Congress should decide whether it is appropriate to have two different procedures, and if it is not, then it should legislate.

Chairman LEE. It is going to use those tools, and the fact that it has the tools at all and can use them and occasionally does use them has an impact on the parties and the way they—

Ms. GARZA. It has an impact, and I will not go on too long, but at some point think about how you advise a client when they are deciding whether to enter into a transaction and how to allocate risk or when they are before an agency—I will not do it now because it would take too long, but the way that you describe what the situation is at DOJ that they face is very different from what they will face at the FTC when you are a lawyer telling them that. Believe me, it sounds different, and I know that it impacts decisions on whether or not to go into a transaction in the first place and how far the parties will stick to a transaction and whether or not they abandon it and whether or not they concede to provisions and consent decrees that they would prefer not to, but they cannot take the risk of waiting 2 years potentially in order to close their merger.

Chairman LEE. Thank you. Mr. Clanton, you described how for FTC cases the preliminary injunction is the de facto merits hearing because mergers do not survive in FTC cases beyond the PI stage. Is this hearing, this type of hearing, the hearing at the preliminary injunction stage, is it less robust than the type of review that you would have in a consolidated hearing, the type of hearing that you would typically have in a case involving the DOJ?

Mr. CLANTON. I think it is less robust, but I will say and I would acknowledge that in some cases the court has given very extensive scrutiny to what should be the primary issue, which is likelihood of success. I think that did happen in the *Sysco* case. I think the Commission briefs pretty deliberately focused on that standard as the thing that the court should look to as the primary factor.

You do have decisions where there has been a fairly robust consideration of the legal issues, and, again, you would expect that from the standpoint of, you know, how the matter has been investigated, the long time that has been involved in that.

I would also point to other decisions—and Ms. Garza mentioned that as well—where this—the PI standard, the lower PI—well, there are two issues: a lower PI standard, number one; and number two, the fact that the hearing is on a PI and not on the merits. Fundamentally, I think that is wrong as a matter of fairness in terms of a reasonable opportunity for a defendant to get a determination on whether this transaction is lawful or not.

One thing I would mention is if you go back—and there has been various statements over the years, but the Commission sent a letter to Chairman Conyers in 2008, unanimously, expressly endorsing a lower standard and citing the *Whole Foods* case and others that set forth a standard that does not specifically or primarily put emphasis on the likelihood of success.

You know, you have got inconsistencies, significant inconsistencies over time in terms of how the Commission has interpreted and advocated the scope of their authority to seek a PI.

Chairman LEE. Thank you. Mr. Lipsky, does the Pitofsky rule obviate the need for legislation here, obviate the need for legislation removing the FTC's option of pursuing administrative litigation with respect to proposed mergers?

Mr. LIPSKY. No. I think the Pitofsky rule should be codified precisely because it has proven to be so changeable over the years with the policy statement having survived more or less in its 1995

form, but the Commission going back on adoption of this Rule 3.26, which actually tries to implement that and it has been interpreted largely as embodying the Pitofsky rule. It is exactly, as David Clanton just mentioned, the tendency of the Commission, depending on its membership, depending on, you know, the themes of the times, to shift interpretations of its authority, which, of course, is natural and probably unavoidable to a great extent. I think that is the strongest type of reason for asking Congress to fix it according to its own judgment and to make sure that this provision will be enforced as written.

Chairman LEE. Thank you. Mr. Jacobson, what is the best argument you can give me for subjecting certain industries and, therefore, certain types of proposed mergers to one set of standards and processes and another industry and another set of proposed mergers to a different set of standards and procedures based on what we could call “the coin flip” of which agency happens to review their transactions?

Mr. JACOBSON. As you will see—

Chairman LEE. Push the red button, if you will.

Mr. JACOBSON. Sorry. As you will see from the AMC report, I wish it was a coin flip, but it is a little more complicated than that. Why should there be a different substantive standard? I do not think there is, and I want to make clear I am not opposing that part of the legislation. I think some clarity on that cannot be unduly harmful given all of the ink that has been spilled on whether the standard should be the same or different.

Chairman LEE. Right, but you are not opposing the part of the bill that proposed a different standard.

Mr. JACOBSON. Right.

Chairman LEE. What about the procedures?

Mr. JACOBSON. I think as U.S. consumers we are fortunate that the FTC has the option to pursue Part 3 administrative litigation when it—

Chairman LEE. Why not give that to the DOJ?

Mr. JACOBSON. DOJ absolutely has that option. It is a current policy for DOJ to consolidate the preliminary injunction and merits trial. It is not written in a statute such as the SMARTER Act.

Chairman LEE. They do not have administrative proceedings though.

Mr. JACOBSON. No, they do not, and that was—I mean, we are getting into, you know, do we really want two antitrust agencies? For the reasons stated in my separate statement for the Antitrust Modernization Commission, I believe that plurality of antitrust enforcement is critical to the administration of the antitrust laws.

Yes, the DOJ is not an administrative agency. The FTC is an administrative agency. That has been true since 1914.

I do want to correct what I think may be a misunderstanding on what the Pitofsky rule is. The Pitofsky rule was not that we will never commence a Part 3. The Pitofsky rule, which is codified and is cited in my statement, has a five-factor test to determine whether administrative cases will proceed. Really it boils down to was the district court off the deep end. I do think when the district court goes off the deep end—and there are instances like that—the taking of Part 3 is good for American consumers.

Chairman LEE. What if the Pitofsky rule disappeared? What if they dropped it? What if they abandoned it? Would that affect your analysis?

Mr. JACOBSON. I do not think they will, but it would put them in the same sort of discretionary bucket that the DOJ is on whether to do a permanent at the same time as a preliminary injunction. As a matter of policy, I firmly support the Pitofsky rule, and I would be very disappointed if it were to be changed. I think the Inova situation was an outlier, as I say in my statement, that this was attributable in part to the very strong personality of an excellent Federal Trade Commissioner, Republican Commissioner, Tom Rosch.

Chairman LEE. Right, Okay. The fact that it is an outlier does not do anything for me. I mean, the fact that it is an outlier still exists, and the fact that it is an outlier, the fact that those outliers can arise as a result of the fact that we have got two different systems, that matters, doesn't it?

Mr. JACOBSON. I think it matters in a way that we should support not oppose. I think—

Chairman LEE. Okay. You would not disagree with Ms. Garza's conclusion that this undoubtedly affects parties, it affects the behavior of parties to—

Mr. JACOBSON. I completely disagree with that. It has absolutely not been my experience. When you are trying to get a deal through the agency, you are focused on, "Am I going to get a preliminary injunction or not?" You are not focused on the later possibility of a permanent injunction trial with DOJ or a Part 3 with the FTC. It absolutely plays no role in the analysis.

Chairman LEE. I want to give Ms. Garza a chance to respond to that point, but before I do that, I want to make sure I understand your answer to my question. My most fundamental question is: What is the—the policy justification for subjecting one industry to one set of procedures and another to another set of procedures, how do we justify that? You seem to be saying that the FTC's—the procedures available to the FTC are good, are better.

Mr. JACOBSON. No; they are different. I think the fact that they are different is a plus for the American consumer.

Chairman LEE. If it is a plus, why not make the same—why not create a universe in which we either have two FTCs or we somehow give DOJ the ability to conduct administrative proceedings, administration litigation?

Mr. JACOBSON. I would oppose that because of my strong belief in the plurality of antitrust enforcement, particularly—

Chairman LEE. Right, but that is my idea of having two FTCs. Let us have another one called the "Federal Antitrust Bureau." Let us just pretend DOJ does not exist here for a second. We have two separate ones. Would you give that other entity these same procedures? Because your idea behind the plurality of antitrust enforcement agencies, that is the—you do not want to put all your eggs in one basket. Isn't that—

Mr. JACOBSON. Yes, and you want—you know, sometimes there is a liberal Democrat who appoints a very interventionist Assistant Attorney General. When we have the Federal Trade Commission,

we have no more than three from one party. We have a bipartisan agency. I strongly support that.

Would I prefer two FTCs, two different FTCs, as opposed to today's system? No. I think the system we have today with the DOJ and the FTC, they have both done remarkable things over a long period of time. I think it has worked fantastically well, and I would not tinker with it.

Chairman LEE. I want to make clear that I am not saying that I am opposed to differences in every circumstance. What I am saying is that here the reason for opposition to this legislation does not seem to make sense to me, and I am struggling with the ability to understand why that opposition exists.

Ms. Garza, why don't we hear from you and have you respond to Mr. Jacobson's assessment that it does not affect the behavior—the differences in the two procedures does not affect the behavior of the parties.

Ms. GARZA. I have two points. It does if you are a buyer. Okay? If you are buying a business, if you are the acquirer, and the issue is, well, after—I could go through the investigation, and then I can go to court, and then I can win on a preliminary injunction. Then the agency, if it thinks the court was off the deep end or just simply disagrees with the court's decision, can commence an administrative proceeding that ties me up even after I close with the object of undoing my transaction. How could that not affect the acquirer? It does not make any sense to me, and it is not what I have experienced over 34 years of practice.

The other thing I would say, to my ears, to say that the reason that you need to preserve the right to go into Part 3 proceedings after an injunction has been denied is because the court may have gone off the deep end or because the court may have gotten it wrong is the problem. To me, to my ears, that is the problem. That is saying basically if the FTC does not like what happened in court, it can go around that and it can use its administrative proceeding, which is to me why businesses perceive it as being unfair. I do not mean to say that I think that the FTC is unfair. I do not mean to impugn any of the work that Chairwoman Ramirez and everyone does. That is absolutely seen as a fairness issue, because we have a system where you have to go to court, you make your best case, you win or you lose, you have your appeal. What they are asking for, what they are saying is, "I do not really like that. I prefer to go through my administrative proceeding with my ALJ, which will then be appealed to the Commission that voted out the complaint." I am telling you, that sounds unfair to the business person that is before the Federal Trade Commission.

Chairman LEE. Yes, among other things, it seemed to create the very real possibility of a much more protracted process. How much longer on average might this process take if the transaction went to the FTC rather than to the DOJ?

Ms. GARZA. Some of my colleagues have done more of the statistical analysis, but the difference is, if I am at the DOJ and I have gone my 6-, 7-, 8-, maybe longer number of months of investigation, then I go to my—to the hearing, the consolidated hearing, which could take 3 or 4 more months, and then you get your decision, you appeal it or not. If you are at the Federal Trade Commission, you

have more or less the same—you have that 6-, 7-, 8-month investigation. Then you go to the preliminary injunction hearing, which might be 2, 2½, 3 months. Then, again, there is the risk that, depending on how that hearing goes and if you lose—if the FTC loses the hearing, then it goes into Part 3. Your deal has closed, but it remains at risk for the duration of the Part 3 proceeding.

Chairman LEE. Mr. Clanton, will the FTC be able—would the FTC still be able to develop effective merger policy through its own proceedings if the SMARTER Act becomes law? If Congress were to pass it, will the FTC still be able to develop effective merger policy?

Mr. CLANTON. Yes, and that is what they are doing today. You know, the cases that Chairwoman Ramirez cited in her statement talking about the development of the law are administrative cases that are not covered by the SMARTER Act. You know, that to me is part of the telling point about the lack of impact that this is going to have on the Commission's ability to develop law administratively. There are just a lot of decisions out there, merger and non-merger, where the Commission is developing law through the administrative process. That will continue. This is not going to harm that.

Chairman LEE. Mr. Lipsky, in your testimony you note that quote, "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." Can you elaborate on that a little bit for us?

Mr. LIPSKY. Whenever a company is considering a major transaction, it is sometimes a life-changing event for the company or in any event is a very significant matter that can involve the expenditure of hundreds of millions or billions or many billions of dollars, can transform their lines of business, can alter their competitive strategy. This is the kind of decision that is often considered very, very carefully. You hire financial advisers, you hire an investment banker, you hire all kinds of specialists, consultants, to support what the management and the board of directors of the company are ultimately going to decide. A part of that—and sometimes an important part of that—will be the antitrust advice, and generally you are advising on two risks. One we refer to as "completion risk." What is the risk that we will be able to do this transaction more or less as envisioned at the end of the day? The other major risk is timing risk. Interest rates, market prices, especially nowadays, change very substantially in short periods of time. An economically and competitively wise decision on day one can be a very poor decision 6 months, 8 months, 10 months, a year later.

That is why I emphasize that we need to consider the fact that when you are talking about transactions that are generally held up by the legal apparatus, by the Hart-Scott-Rodino Act and so forth, the delay and expense is a particularly punishing risk for companies that are in the position of trying to do a transaction.

I think—I thought I heard, considering all of the witnesses today, including Chairwoman Ramirez, I thought I heard kind of a consensus that if you are going to have an administrative litigation phase before the FTC, it is definitely going to be slower, and I

think partly for that reason more expensive and sometimes substantially slow. That is why the 9-year proceeding in the *Coke-Dr Pepper* case and the 6-year proceeding in the *Donnelley-Meredith/Burda* case did have such an impact and made such an impression on the bar, because if there was any serious risk of having a delay of that character because of the possibility of FTC administrative litigation, there are many, many transactions that either would not be considered or would not be seriously proposed.

Chairman LEE. Particularly taking into account the timing risk.

Mr. LIPSKY. Absolutely.

Chairman LEE. Mr. Jacobson, anything you want to respond to that we have just heard?

Mr. JACOBSON. The completion—

Chairman LEE. Push your button, if you will.

Mr. JACOBSON. Sorry. This is my first time. The completion risk and the timing risk are identical. Remember, the deal can close if the preliminary injunction has been denied. The advice that is given is: Is this deal going to go through? Do I have to agree to a consent? That is all focused on the preliminary injunction stage. That is the completion risk.

The timing risk, you know, once the PI is denied, the deal can close. Is—does that have an impact on the acquirer's plans for integration? It has not been my experience—in fact, I would argue the opposite, that if there is an administrative proceeding, the company is going to proceed more quickly to integrate the merged companies, in part because that makes divestiture more difficult. That is one of the reasons the Hart-Scott-Rodino Act was passed, to allow review before scrambling of the egg.

I agree there is a completion risk and a timing risk in every deal. I just do not think it would be impacted by the statute at all.

Chairman LEE. Notwithstanding the fact that there is an additional procedure that may take place that may—

Mr. JACOBSON. After closing.

Chairman LEE. Okay. I want to thank all of you for being here today. This has been very enlightening, very helpful, and your testimony before the Committee is greatly appreciated.

Senator Klobuchar was required to be in another Committee hearing and wanted to be here at the end, but had to go to that Committee. Regardless, we will keep the record open for 1 week in case we have anything else to supplement the record.

Thank you very much. We will be adjourned.

[Whereupon, at 11:51 a.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]



## APPENDIX

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PREPARED STATEMENT OF  
DAVID A. CLANTON  
SENIOR COUNSEL, BAKER & MCKENZIE LLP

BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY,  
AND CONSUMER RIGHTS  
SENATE COMMITTEE ON THE JUDICIARY

HEARING ON  
S. 2102, THE "STANDARD MERGER AND ACQUISITION REVIEWS  
THROUGH EQUAL RULES ACT OF 2015"

WASHINGTON, DC  
OCTOBER 7, 2015

**Prepared Statement of  
David A. Clanton**

Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on S. 2102, 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 (AMC).<sup>1</sup> 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 explained below, the legislation will not harm the Commission’s merger enforcement program, and it will not prevent the agency from continuing to influence the development of antitrust law through administrative litigation.

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.

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<sup>1</sup> ANTITRUST MODERNIZATION COMM’N, REPORT AND RECOMMENDATIONS 14, 138-150 (2007). (recommendations 24-26)

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-regarded horizontal 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.”<sup>2</sup>

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<sup>2</sup> See, e.g., *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 882 (D.C. Cir. 2008) (Tatel, J., concurring). The FTC endorsed this lower, deferential standard in a 2008 letter to the House Judiciary Committee. See FTC Letter to Chairman John Conyers, Dec. 23, 2008.

Whatever this standard means, and it is hard to equate it with a likelihood of success (however weak the likelihood might be),<sup>3</sup> 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. As the ABA Antitrust Section noted in comments filed in 2014 supporting the same preliminary injunction test for both agencies:

[the FTC’s] low standard makes it too easy for the FTC to deliver what for all practical purposes is a death blow to a merger. It is also particularly hard to justify given that, by the time the FTC goes to court to challenge a merger notified under the Hart-Scott-Rodino Act, the FTC typically already will have investigated the merger for several months, and in some cases for a year or more.”<sup>4</sup>

The lengthy, in-depth investigations that precede every litigated HSR merger case explain why DOJ is ready and willing to proceed immediately to a trial on the merits and seek a 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.<sup>5</sup> Passage of the HSR Act changed all that and gave both agencies the time and the tools to conduct thorough market investigations before parties to reportable transactions could consummate their deals. Put simply, in such circumstances the rationale for the “serious questions” test or, more generally, a lower standard for the FTC no longer exists.

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<sup>3</sup> The ambiguity of what is meant by the “serious questions” standard is amplified by the court’s decision in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67-68 (D.D.C. 2009), which held that it was not for the court to decide which party’s market evidence was more persuasive in determining whether the Commission’s *prima facie* case could be rebutted.

<sup>4</sup> American Bar Association Section of Antitrust Law, Comments on Proposed Legislation: The Standard Merger and Acquisitions Review through Equal Rules Act of 2014, at 3 (June 20, 2014) (hereafter “ABA Antitrust Section Comments”).

<sup>5</sup> See *FTC v. Dean Foods, Co.*, 384 U.S. 597 (1966).

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 typically be resolved in favor of the government.<sup>6</sup> 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).<sup>7</sup>

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 in the federal courts. Without FTC concurrence, federal judges are powerless to issue permanent injunctions. As the AMC correctly observed, there is no "obstacle to the FTC's adoption of the DOJ's approach" regarding consolidation of preliminary and permanent injunctive relief in federal court.<sup>8</sup> Indeed, the Commission already seeks permanent injunctions in the vast majority of its consumer protection cases, in part because that is the only way it can get effective

<sup>6</sup> 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). See also ABA Antitrust Section Comments, at 4 n.8 (and cases cited therein).

<sup>7</sup> *Antitrust Division Manual*, Fifth Edition, at page IV-20 (last updated April 2015).

<sup>8</sup> AMC Report at 140.

monetary redress. The agency has also sought permanent relief from time-to-time in antitrust cases, including consummated mergers.<sup>9</sup>

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*<sup>10</sup> and *H&R Block*<sup>11</sup> – that were litigated to conclusion in permanent injunction hearings with a recent FTC merger case – *FTC v. Sysco Corp.*, No. 1:15-CV-00256, 2015 U.S. Dist. LEXIS 83482 (D.D.C. June 23, 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 decisions. In the *Sysco* case, the FTC filed its administrative complaint on February 19 of this year and set a hearing date to begin on July 21, approximately 5 months later. As in virtually all FTC cases involving reportable transactions, the Commission initiated a parallel federal court proceeding seeking a preliminary injunction to block the transaction pending completion of the administrative proceeding. On June 23, the court issued a decision blocking the proposed merger pending completion of the FTC proceeding. Shortly thereafter the merger parties announced they were terminating the transaction.

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<sup>9</sup> See, e.g., *FTC v. Cardinal Health, Inc.*, No. 1:15-CV-03031 (S.D.N.Y. April 23, 2015) (stipulated injunction, including disgorgement, in monopolization case)

<sup>10</sup> *U.S. v. Oracle Corp.*, 331 F.Supp.2d 1098 (N.D. Cal. 2004).

<sup>11</sup> *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 was completed in approximately 4 months, or just a little shorter than the time required to complete the DOJ permanent injunction cases. The key difference is that, had the parties not abandoned their merger plans, the FTC's administrative hearing would have just been starting a month later. 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 litigated 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, like the *Sysco* outcome, 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. It will also remain true for consummated transactions outside the scope of the SMARTER Act where the Commission can continue to use administrative litigation to develop antitrust merger law. In two recent cases, *ProMedica*<sup>12</sup> and *Polypore*<sup>13</sup> 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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<sup>12</sup> *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).

<sup>13</sup> *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).

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. In the past 20 years there has not been a single transaction where the FTC sought a preliminary injunction 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 preliminary injunction case.

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.

To summarize, the pending legislation corrects an inequitable disparity between the FTC's and DOJ's merger litigation procedures. First, it would retire the "serious questions" test and replace it with the same preliminary injunction standard that governs DOJ merger cases. That would ensure that the test applied to the FTC properly focuses on the likelihood of success as the most important factor a court should consider in determining whether to grant interim relief. Second, by requiring the FTC to bring all of its non-consummated merger challenges in federal court – covering both preliminary and permanent relief – the legislation would ensure that merger defendants will be afforded a reasonable opportunity to get a full hearing on the merits, regardless of which agency reviews their merger.

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

BEFORE THE SUBCOMMITTEE ON ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS  
SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

S. 2102  
THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015"

WASHINGTON, D.C.  
OCTOBER 7, 2015

**Statement of  
Deborah A. Garza<sup>1</sup>**

**Hearing on  
S. 2102  
The “Standard Merger and Acquisition Reviews  
Through Equal Rules Act of 2015”**

Chairman Lee, Ranking Member Klobuchar and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. From May 2003 through May 2007, I served as Chair of the Antitrust Modernization Commission (“AMC”), which was established by Congress “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.”<sup>2</sup> The AMC’s Report and Recommendations to the President and Congress included three recommendations relevant to this hearing, each of which enjoyed bipartisan commissioner support. One of these recommendations specifically called 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

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<sup>1</sup> I am currently a partner at Covington & Burling, where I co-chair the firm’s global competition law practice. For the past several years I have also served as an officer of the American Bar Association (ABA) Section of Antitrust Law, 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. The views expressed in my Statement are my own and not those of the ABA or any other organization.

<sup>2</sup> Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11053, 116. Stat. 1856 (2002).

“HSR Act”).<sup>3</sup> It is a great honor and pleasure for me to be here today to testify in support of the SMARTER Act. Eight years is a long time, but I have never lost faith that the good government vision of the AMC recommendations would prevail.

The premise of the SMARTER Act is simple: A merger should not be treated differently depending on which antitrust enforcement agency – DOJ or the FTC – happens to review it. Regulatory outcomes 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.<sup>4</sup>

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.

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<sup>3</sup> See Recommendation 25 of the Report and Recommendations of the Antitrust Modernization Commission (April 2007) (Hereinafter referred to as “AMC Report”).

<sup>4</sup> 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<sup>5</sup> 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.<sup>6</sup> 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.

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<sup>5</sup> 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.

<sup>6</sup> See 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC).

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 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.<sup>7</sup>

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. 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.

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<sup>7</sup> 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.

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 Prince William Health System, Inc.<sup>8</sup> 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.<sup>9</sup> 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 promised to issue his initial decision shortly after the hearing concluded, and the Commission said it would decide any appeal of the initial decision within 90 days thereafter. While this fast-track procedure was packaged as a way to shorten the period during which 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."<sup>10</sup> In his testimony on the SMARTER Act, Mr. Lipsky provides

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<sup>8</sup> Neither I nor my firm was involved in any way in that transaction.

<sup>9</sup> Commencing an administrative proceeding at around the same time it sues for a preliminary injunction is essentially standard FTC practice today.

<sup>10</sup> 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](http://newsroom.inova.org/article_display.cfm?article_id=5135).

additional case examples of the length of time involved in an FTC HSR challenge involving an administrative hearing.

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 for the FTC, it was understood at the time that the FTC would litigate internally only in the rare case. 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.

While I appreciate the FTC's return to its prior policy, I also appreciate that the policy could just as easily change again, unless Congress speaks.

***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 has been 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.”<sup>11</sup>

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.”<sup>12</sup> 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 relevant interrelated recommendations and findings. The first recommendation 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

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<sup>11</sup> 15 U.S.C. § 53(b).

<sup>12</sup> *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).

the merging parties.”<sup>13</sup> The FTC pretty clearly rejected that advice. I would suggest that the agency saw no particular advantage in disarming itself.

The second recommendation 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 Commissioners did not join this recommendation.<sup>14</sup> Commissioner Burchfield explained that he would preserve the option of subsequent administrative proceedings for situations in which the preliminary and permanent injunction phases were not consolidated. He also considered that such legislation would be practically meaningless so long as the FTC could reinstate administrative proceedings against a consummated merger.

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). We expressed the view that “follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts.”

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 House 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.

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<sup>13</sup> AMC Report Recommendation 24. Only AMC Commissioners Cannon (R) and Yarowsky (D) did not join in this recommendation.

<sup>14</sup> Burchfield (R), Kempf (R), Jacobson (D) and Garza (R) did not join.

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 (Commissioner 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.<sup>15</sup>

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.”<sup>16</sup> 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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The SMARTER Act would accomplish the full intent of these AMC recommendations.

The Act ensures that transactions would be treated the same without regard to which federal

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<sup>15</sup> 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.

<sup>16</sup> AMC Report at 2.

antitrust enforcement agency reviewed them and addresses the concern of many that the process rules will be stacked against them in a way that effectively prevent 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 of the SMARTER Act and thank this Subcommittee for the attention it has paid to the AMC recommendations.

PREPARED STATEMENT OF

**JONATHAN M. JACOBSON**

Partner, Wilson Sonsini Goodrich & Rosati, PC  
Former Commissioner, Antitrust Modernization Commission

Before the United States Senate  
Committee on the Judiciary  
Subcommittee on Antitrust, Competition Policy & Consumer Rights

Concerning

S. 2102: the Standard Merger & Acquisition Review  
Through Equal Rules Act of 2015

Washington, DC

October 7, 2015

STATEMENT OF JONATHAN M. JACOBSON

*Before the*

**U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights  
S. 2102 , the ‘Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015’  
October 7, 2015<sup>1</sup>**

Chairman Lee, Ranking Member Klobuchar, and distinguished members of the Subcommittee:

Thank you for inviting me to testify on the important issues raised by the proposed legislation under review by this Subcommittee, namely the Standard Merger and Acquisition Reviews Through Equal Rules Act or “SMARTER Act.”

My testimony focuses on two aspects of the proposed legislation: the proposal to strip the FTC of jurisdiction to conduct administrative proceedings in merger or joint venture cases; and the proposal to clarify that the Federal Trade Commission and the Department of Justice must meet the same substantive standards to obtain a preliminary injunction against a proposed merger when enforcing Clayton Act § 7, 15 U.S.C. § 18.

I make my observations on these proposals as a practitioner of antitrust law who has followed the FTC’s activities closely for almost 40 years and has assisted multiple clients in navigating merger reviews – as well as representing the respondent in the trial of Coca-Cola/Dr Pepper before Judge Gesell and then at the FTC in Part III after the deal was abandoned.<sup>2</sup> I also

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<sup>1</sup> All the views expressed here are my own, and not those of Wilson Sonsini Goodrich & Rosati or any of our clients. I would like to thank my colleagues Daniel P. Weick and Elyse Dorsey for their invaluable assistance with the preparation of this statement.

<sup>2</sup> *FTC v. Coca-Cola Co.*, 641 F. Supp. 1128 (D.D.C. 1986), *vacated as moot*, 829 F.2d 191 (D.C.Cir.1987); *Coca-Cola Co.*, 119 F.T.C. 724 (1995) (consent order after trial, during appeal).

served on the Antitrust Modernization Commission (“AMC”), whose REPORT AND RECOMMENDATIONS recommended these proposals – over my dissent in part.

***Eliminating Administrative Adjudication.*** The proposal to eliminate the FTC’s ability to conduct administrative proceedings in pre-consummation merger challenges is harmful to the sound administration of the antitrust laws.

The proposed legislation accomplishes its objective by amending FTC Act § 5(b), 15 U.S.C. § 45(b), to exclude “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)” from the grant of authority to the FTC to conduct administrative proceedings “except in cases where the Commission approves an agreement with the parties to the transaction that contains a consent order.” S. 2102 § 3(1). The amendments to Clayton Act Section 11, as currently drafted, *id.* § 2(3), reinforce this exclusion.

I begin by noting that, to the extent that the legislation is intended to implement the AMC’s recommendation, it is drafted too broadly. The AMC recommended that Congress implement legislation “to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.” AMC Report at 140. Its proposal “would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects.” *Id.* at 141. But the proposed legislation could be construed as prohibiting a challenge to the “consummation” of any merger in administrative proceedings, even a post-merger challenge, notwithstanding the term “proposed.” If enacted at all, I strongly recommend clarifying that the exclusion would only apply 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)

*where the merger, acquisition, joint venture, or similar transaction has not yet been consummated*<sup>3</sup> for avoidance of doubt. There is no justification for eliminating administrative litigation in post-consummation challenges, for those are not undertaken with the time sensitivity attendant on a challenge to a merger occurring prior to the closing of the transaction. See AMC Report at 141.

Moreover, the FTC's recent experiences in post-consummation merger challenges – *Chicago Bridge & Iron*, *Evanston Northwestern Healthcare*, and *Polypore* – are matters where the Commission's work was highly regarded by the bar and upheld, if appealed, by the relevant courts of appeals.<sup>3</sup> The *Evanston* case is especially noteworthy. After a long string of losses in sound hospital merger cases – brought both by DOJ and the Commission – the FTC pursued *Evanston* to use its expertise to analyze whether the reasoning the courts had used to bless these mergers was sound. Republican Chairman Deborah Majoras' opinion demonstrated that, in fact, the *Evanston* merger (like many of those that preceded it) had led to higher costs for health care and had harmed consumers. Following *Evanston*, the courts have looked much more carefully at hospital mergers – and some have been blocked, saving consumers millions of dollars – based at least in part on the FTC's *Evanston* analysis.

Moving to my substantive disagreement with the bill, I continue to adhere to the dissenting statement Deborah Garza and I issued finding that the proposed “statutory change is both unnecessary and potentially harmful.” AMC Report at 140. My reasons follow.

First, statutory change is unnecessary. In the real world, the FTC has no material procedural advantage over the DOJ in merger challenges. The FTC's track record in these

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<sup>3</sup> See *Chicago Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *Polypore Intern., Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012); *Evanston Northwestern Healthcare*, 144 F.T.C. 1 (2007).

cases is similar to DOJ's, and the potential for an administrative proceeding has had no practical effect.<sup>4</sup> In negotiating with the FTC, the focus is on the preliminary injunction risk, not the prospect of a later Part III if an injunction is denied. In representing merging parties, I have often found that who the staff lawyers are may make a big difference in both timing and getting the deal through at all – and there are considerable variances in the various merger “shops” at the DOJ just as there are at the FTC. In sharp contrast, which agency gets the deal makes little actual difference: the key is the particular staff assigned.

Second, and relatedly, the use of Part III after a preliminary injunction has been denied is rare.<sup>5</sup> Although used sporadically in the distant past, there have been no such cases filed since 1995. The last time such a proceeding occurred was the early 1990s, where the FTC adjudicated (and ultimately dismissed) an administrative complaint against R.R. Donnelley & Sons Co.'s

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<sup>4</sup> According to their Hart-Scott-Rodino Annual Reports, the FTC and DOJ rarely litigate for injunctive relief, but when they do their outcomes are comparable, with the FTC faring a bit worse at the district court level. See U.S. FED. TRADE COMM'N & DEP'T OF JUSTICE, ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, <https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports>. Between 2000 and 2014, the FTC reported litigating for preliminary injunctions in eleven merger enforcement matters, winning four and losing seven at the district court level; the Commission then appealed and prevailed in the circuit courts on three of its losses. DOJ, meanwhile, reported litigated five injunctions, winning three (two permanent and one preliminary) and losing two (both permanent) during the same time period. The FTC thus prevailed in 64% of challenges, DOJ in 60%. DOJ also prevailed in a consummated merger case in district court in the *Bazaarvoice* matter, including that case would put DOJ's win percentage at 67%.

<sup>5</sup> The *Inova/Prince William* transaction was not one where Part III was commenced after the denial of a preliminary injunction but, rather, simultaneously with the filing of the preliminary injunction complaint in district court. The parties attributed their abandonment of the transaction in part to the expedited Part III procedure put in place by then-Commissioner Rosch. The case is certainly an outlier, with the Commission's actions motivated in substantial part by a procedural experiment to expedite Part III matters by having a Commissioner (Rosch) sit as the presiding judge as well. The procedure is not one the FTC deploys today, and there is no reason to expect to see it again.

acquisition of Pan Associates, L.P. and Meredith Corp.<sup>6</sup> It appears that the motivation for further proceedings there, at least in part, was the fact that the district court's conclusions were "adopted nearly verbatim from proposed findings submitted by [the merging parties]" and that the district court opinion indicated its review was impacted by "the rushed circumstances" of the preliminary injunction proceedings. 120 F.T.C. at 139.

In 1995, while the *R.R. Donnelley* case was concluding, the FTC adopted a policy limiting the circumstances in which it would pursue follow-on administrative litigation after a preliminary injunction against a merger had been denied.<sup>7</sup> The FTC now decides whether to pursue such administrative litigation based on "(i) the factual findings and legal conclusions of the district court or any appellate court, (ii) any new evidence developed during the course of the preliminary injunction proceeding, (iii) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation, (iv) an overall assessment of the costs and benefits of further proceedings, and (v) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge." 60 Fed. Reg. at 39,743. As I mentioned, the FTC has not pursued follow-on administrative litigation after denial of a preliminary injunction since the statement issued, despite having had opportunities to do so.<sup>8</sup>

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<sup>6</sup> See *R.R. Donnelley & Sons & Co.*, 120 F.T.C. 36, 137 (1995). See also *R.R. Donnelley & Sons Co. v. FTC*, 931 F.2d 430 (7th Cir. 1991) (refusing to review decision to conduct administrative proceedings); *FTC v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cas. ¶ 69,239, 1990 WL 193674, 1990 U.S. Dist. LEXIS 11361 (D.D.C. Aug. 27, 1990) (denying preliminary injunction).

<sup>7</sup> See FTC, Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995).

<sup>8</sup> See, e.g., FTC Press Release, FTC Closes Its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), available at <https://www.ftc.gov/news-events/press-releases/2005/06/ftc-closes-its-investigation-arch-coals-acquisition-triton-coal>.

Given that the FTC has acknowledged as a matter of policy that follow-on administrative litigation should not be automatic or routine, and that it in fact has not pursued this sort of litigation in almost 25 years, I believe the proposal to eliminate completely the possibility of follow-on administrative litigation is unnecessary.

Third, the case-by-case analysis adopted by the FTC is the appropriate approach. While it is certainly true that “follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual circumstances,” that does not mean it is never appropriate. *See* AMC Report at 140. Part III administrative litigation – both for anticompetitive conduct matters and mergers – is core to the FTC’s basic mission. Prior to 1976 (when Hart-Scott-Rodino was passed), administrative litigation of FTC merger matters was the only type of FTC merger review, and retaining discretion to pursue administrative litigation where appropriate is consistent with the FTC’s assignment to develop and apply expertise on competition law issues in an administrative context.<sup>9</sup> If the FTC finds it appropriate to develop the law through follow-on administrative proceedings where it could, for example, perform a more rigorous analysis of new economic theories and evidence than a generalist district court might be able to perform, it should have discretion to do so. That is precisely what Congress intended when creating the FTC 101 years ago.

Fourth, if enacted, the bill would not eliminate the possibility of continued proceedings by the FTC even after a preliminary injunction is denied. Although DOJ policy is to consolidate both the preliminary and permanent injunctive relief requests into a single proceeding, it is not

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<sup>9</sup> FTC, Federal Trade Commission Strategic Plan Fiscal Years 2000 – 2005, at 2 (2000) (“Congress created the Commission as a bipartisan tribunal that could develop a body of administrative law enabling businesses to better understand the line between vigorous competition and unlawful restraint of trade.”), *available at* [https://www.ftc.gov/sites/default/files/documents/reports\\_annual/strategic-plan/spfy00fy05.pdf](https://www.ftc.gov/sites/default/files/documents/reports_annual/strategic-plan/spfy00fy05.pdf).

required to do so. If DOJ cannot agree with the merging parties on schedule, or for any other reason, DOJ remains completely free to seek a permanent injunction in a later proceeding if the preliminary injunction is denied. So would the FTC under the bill. The only difference is that the FTC would have to proceed in court, not in an administrative proceeding. So the only real consequence is that, in proceeding after a preliminary injunction has been denied, the matter would be decided by a generalist judge rather than five committed experts in the field. That makes no sense to me, and seems to conflict with the basic purpose of the FTC Act.

Fifth, the theoretical possibility of follow-on administrative litigation does not meaningfully harm merging parties. As I have noted, the FTC has not pursued such litigation for many years, and even if it did, any time-sensitivity would be eliminated by the fact that, in the absence of a preliminary injunction, the parties are free to close the transaction while the FTC proceedings continue. While that may create a risk of later expense if the merger is found to violate the Clayton Act, that risk exists in any event given that the DOJ, one or more state attorneys general, and/or one or more private plaintiffs could sue to unwind the merger post-consummation.<sup>10</sup> That is simply one of the many risks of entering a transaction raising significant antitrust concerns. The post-consummation context can certainly be accounted for in consideration of remedies,<sup>11</sup> and Congress should not set up a framework where the FTC must abandon an already initiated merger challenge and then institute (or ask DOJ to institute) separate post-consummation proceedings to unwind the transaction.

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<sup>10</sup> *United States v. E.I. duPont de Nemours & Co.*, 353 U.S. 586 (1957).

<sup>11</sup> *See Evanston Northwestern Healthcare Corp.*, 144 F.T.C. 1, 377 (2007) (rejecting divestiture remedy for post-consummation challenge because “[t]he potentially high costs inherent in the separation of hospitals that have functioned as a merged entity for seven years instead warrant a remedy that restores the lost competition through injunctive relief.”). *See also Messner v. Northshore Univ. HealthSystem*, 669 F.3d 802, 809 (7th Cir. 2012) (describing FTC proceedings).

Sixth, the breadth of the proposed statutory language may well have unintended negative consequences, especially in light of the proposed application of revised section 5 of the FTC Act to joint ventures. Say, for example, as in the *Polygram* case,<sup>12</sup> parties propose a joint venture to create new product but at the same time agree not compete against each other on existing products. The proposed statute would force the FTC to rush to seek a preliminary injunction in district court, rather than proceeding as it normally would in a Sherman Act § 1 case by challenging the agreement not to compete on existing products in an administrative proceeding without any challenge to joint venture's new product. Especially in novel contexts such as this, the proposed statute would hamper the orderly development of the law through the FTC's accumulated expertise.

For all these reasons, stripping the FTC of the ability to conduct administrative litigation for pre-consummation merger challenges would do very little to assist merging parties while imposing substantial limitations on the FTC's ability to pursue its mission in appropriate cases. I therefore would respectfully urge the Senate to reject this aspect of the proposed legislation.

***Preliminary Injunction Standards.*** In contrast, I do not oppose the proposal to conform the statutory preliminary injunction standards for the FTC to those applicable to the DOJ. I understand the proposed Act to accomplish this by amending Clayton Act § 11, 15 U.S.C. § 21, to require the FTC to enforce Clayton Act § 7 "in the same manner as the Attorney General in accordance with section 15 [of the Clayton Act]" and carving out from the FTC Act's preliminary injunction provisions (FTC Act § 13(b), 15 U.S.C. § 53(b)) any request to prevent "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)." S. 2102 §§ 2(3) & 3(3). This would

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<sup>12</sup> *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005).

require the FTC to seek a preliminary injunction in a pre-consummation merger challenge under the standards of Clayton Act § 15, 15 U.S.C. § 25.

It is certainly the case that ink has been spilled over the question of whether the current Section 13(b) standard imposes a lower burden on the FTC than the DOJ, especially following the discussion in the *Whole Foods* decision.<sup>13</sup> See, e.g., AMC, REPORT & RECOMMENDATIONS 142 (2007) (“AMC Report”) (observing that “[t]he agencies face nominally different standards governing whether a federal district court will issue a preliminary injunction” but noting “the magnitude of the difference between the two standards is not clear”). In my own view, any ambiguity in the standards is reflective of the broader ambiguity in legal standards for preliminary injunctions against mergers challenged by either agency; as a leading treatise observes, district courts have used a variety of formulations to describe both the DOJ and the FTC’s burden in seeking a preliminary injunction. See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 413-16 (7th ed. 2012).

In my experience, whatever theoretical difference might exist between the FTC and DOJ standards has no practical significance. District courts still exercise a fair amount of discretion in determining whether preliminary injunctive relief is justified, and in practice a district judge is highly likely to issue an injunction against a merger she views as probably unlawful and highly unlikely to issue an injunction against a merger if she thinks it is probably lawful. This is the reason why two of my colleagues on the AMC and I joined the recommendation to align the standards for preliminary injunctive relief for the two agencies in pre-consummation merger matters with the caveat that “the standard today is the same and . . . such legislation is not truly necessary.” AMC Report at 141. I nevertheless still believe that “clarification can do no harm

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<sup>13</sup> *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008).

and may be beneficial by removing possible doubts.” For that reason, I do not oppose this aspect of the proposed legislation.

I would note, however, that the text of the proposal creates an ambiguity similar to the one discussed above concerning post-consummation challenges. If the text adopted requires the FTC to “enforce compliance with [Clayton Act § 7] in the same manner as the Attorney General in accordance with section 15 [of the Clayton Act]” and does not clarify other enforcement mechanisms, that could again be read to strip the FTC of any authority to conduct administrative proceedings in merger matters. In this context, to the extent this provision is intended solely as part of the harmonization of preliminary injunction standards applicable to DOJ and FTC pre-consummation merger challenges, I would suggest changing the text to read “shall seek injunctive relief to enforce compliance with that section *under the same standards as applicable in cases brought by*” rather than “shall enforce compliance with that section in the same manner as” in order to avoid any ambiguity.

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I would like to close by once again thanking the Subcommittee and its distinguished members for inviting me to testify on these important issues for the proper administration of federal antitrust law in the merger context. I am happy to answer any questions you may have.

UNITED STATES SENATE  
COMMITTEE ON THE JUDICIARY  
SUBCOMMITTEE ON  
ANTITRUST, COMPETITION POLICY AND CONSUMER RIGHTS  
SENATOR MICHAEL S. LEE, CHAIRMAN

Testimony of

Abbott B. Lipsky, Jr.

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

TESTIMONY ON

S. 2102, THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH  
EQUAL RULES ACT OF 2015"

October 7, 2015

Mr. Chairman and Members of the Subcommittee, thank you for your invitation to testify regarding S. 2102, 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. I also currently serve as Co-Chair of the International Competition Policy Working Group of the U.S. Chamber of Commerce. To reemphasize, however, I am presenting these views on my own behalf, not on behalf of any of these or any other organizations.

Much of my professional experience has involved the antitrust aspects of mergers, acquisitions and joint ventures. 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 F. Baxter. These Guidelines revolutionized the Antitrust Division's approach to enforcement of Section 7 of the Clayton Act by explicitly incorporating a variety of fundamental economic concepts, criteria and techniques into every step of the merger enforcement process. While there have been several noteworthy modifications to the 1982 Merger Guidelines – specifically in 1984, 1992, 1997 and 2010 – 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 in 1991.

I have experience in both U.S. district court and administrative litigation, and 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 the House Judiciary Committee Subcommittee on Regulatory Reform, Commercial and Antitrust Law in the previous Congress (April 3, 2014), and again before the same House Subcommittee on June 16 of this year. 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. One path runs through the Antitrust Division, with the assessment depending on the potential for a disposition resulting from federal court litigation, while the other runs through the

Federal Trade Commission, which can lead to a variety of potential procedures involving both administrative litigation, court litigation, or various combinations of each.

Because the so-called "clearance" process – the method by which the Antitrust Division of the Department of Justice and the Federal Trade Commission 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 therefore none of the procedural pathways can ever be ruled out. While the fundamental legal standard in Section 7 is the same for both agencies and for the courts, 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 authority to adjudicate the legality of a transaction: to block a transaction it must persuade a federal district court to issue an order prohibiting or conditioning the transaction and maintain that order through any proceedings in the appellate courts. The Antitrust Division's authority to seek such an order is provided in 15 USC §25.

The procedural options in an FTC merger challenge are more numerous and complex 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 when the FTC challenges a transaction, it will seek a preliminary injunction under 15 USC §53(b) in a federal district court, 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 the FTC is unsuccessful in its request for a preliminary injunction the Commission may appeal. But regardless of the ultimate outcome in court, the Commission has the option of continuing the challenge through administrative litigation. For most structural transactions this administrative litigation option is the alternative that presents the greatest potential for continuing 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 to pursue its case in administrative litigation before an administrative law judge (ALJ). The parties sought dismissal of the complaint based on issue preclusion, arguing that the judicial rulings on the Commission's complaint foreclosed further proceedings on that complaint in administrative litigation. This was rejected by the Commission's ALJ on the grounds that the eight-month investigation under the Hart-Scott-Rodino Act followed by the six-day preliminary injunction hearing in court did not provide a sufficient basis to assess the competitive effects of the transaction.

The parties sought review by the full Commission of the ALJ's rejection of their issue-preclusion argument. The Commission refused even to consider the parties' appeal, since according to the Commission its rules of procedure did not allow interlocutory appeal of the ALJ ruling. The parties then sought review of the Commission action 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 (7<sup>th</sup> 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 D.C. *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 U.S. Court of Appeals for the D.C. Circuit declaring the matter moot and remanding with instructions to the district court to vacate the injunction.

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.

The costs, delays and uncertainties 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 the then-Chairman of the FTC, Robert Pitofsky.<sup>1</sup> On its face the Statement appears to say little of substance. A Commission release that accompanied publication of the Statement offered a spirited defense 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.

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, however, that reversed the rule and its unspoken presumption (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.<sup>2</sup> However, the FTC very recently took steps that would seem to at least partially restore the original understanding of the Pitofsky Rule.<sup>3</sup> Like

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

<sup>2</sup> 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).

<sup>3</sup> 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).

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 – or at least the possibility of further administrative litigation – where 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 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 standards for grant of preliminary relief. 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 become 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 on the merits, 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, uncertainty and inconvenience of proceedings may cause the parties to abandon the transaction. If it turns out that the transaction was erroneously enjoined, the consumer suffers. Even if the transaction ultimately goes through, the consumer foregoes some or possibly all of its competitive benefits, 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.<sup>4</sup>

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.

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

**Prepared Statement of  
The Federal Trade Commission**

**Before the  
United States Senate  
Committee on the Judiciary  
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

**S. 2102, The “Standard Merger and Acquisition Reviews Through Equal  
Rules Act of 2015”**

**Washington, DC  
October 7, 2015**

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission regarding the FTC's work to promote competition on behalf of consumers, the value of our process for challenging anticompetitive mergers, and our concerns with S. 2102.<sup>1</sup> Our principal concern is that the proposed legislation would eliminate the Commission's adjudicative function in certain merger cases.<sup>2</sup> As explained below, that proposed legislative step is unwarranted and would remove a key tool the Commission has used successfully for many decades to promote competition and advance consumer welfare.

Congress created the Commission in 1914 as an independent, bipartisan agency to augment then-existing antitrust enforcement efforts. Congress gave the FTC unique tools to carry out this special charge. These include expert research authority and broad information-gathering power to identify and study threats to consumer welfare and the competitive process. That authority is enhanced by the FTC's ability to consider and decide cases as an expert tribunal, subject to review by a federal court of appeals.<sup>3</sup> As Justice Sutherland wrote for the Supreme Court in *Humphrey's Executor v. United States*, this combination of functions allows the agency to "exercise the trained judgment of a body of experts" when "dealing with these special questions concerning industry that comes from experience,"<sup>4</sup> as Congress intended.

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<sup>1</sup> This written statement presents the views of the Federal Trade Commission. My oral statements and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner. Commissioner Ohlhausen voted against the issuance of this testimony. She presented her views on the SMARTER Act in a recent speech, which is available at <https://www.ftc.gov/public-statements/2015/09/smarter-section-5>.

<sup>2</sup> This adjudicative function is sometimes referred to as "Part 3," which denotes the relevant procedural rules in the Code of Federal Regulations.

<sup>3</sup> Over 30 independent or executive branch agencies, including the FTC, engage in administrative adjudication and follow procedures prescribed by the Administrative Procedure Act (5 U.S.C. §§ 551-706).

<sup>4</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. Rep. No. 63-597, at 10-11 (1914)).

For the past century, the FTC has worked to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints. Throughout its history, the FTC has tackled the complex competition issues of the day, guiding antitrust policy from the horse and buggy era to our modern interconnected, global economy. The Commission's administrative authority has been an important part of those efforts. As the Commission enters its second century, it does so as a firm champion of our national policy of fair and vigorous competition.

This testimony begins by highlighting the FTC's efforts to preserve competition in crucial sectors of the economy and describing the way the FTC's administrative process has supplemented that effort and benefitted consumers. We then explain our concerns with the proposed legislation.

#### **I. FTC Merger Enforcement Preserves Competition**

As we know, competitive markets are the foundation of our economy. Effective antitrust enforcement helps ensure that those markets function well and benefit both consumers and businesses alike. As the Supreme Court recently reaffirmed in upholding the Commission's decision in *North Carolina State Board of Dental Examiners v. FTC*, "[f]ederal antitrust law is a central safeguard for the Nation's free market structures."<sup>5</sup> The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers. One of the Commission's most important responsibilities is to prevent mergers that may substantially lessen competition in violation of Section 7 of the Clayton Act.

The vast majority of proposed mergers do not raise competitive concerns. In each of the past five fiscal years (FY 2010-FY 2014), as the economy has recovered from the recession, there have been an average of about 1,400 transactions reported under the pre-merger filing

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<sup>5</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) ("*N.C. Dental*").

requirements of the Hart-Scott-Rodino Act. Following an initial review by the FTC or the Department of Justice's Antitrust Division (DOJ), with which the FTC shares primary jurisdiction for enforcing the nation's antitrust laws, over 96% of transactions have been allowed to proceed without further inquiry or investigation.

Of the proposed mergers that warrant additional agency investigation to determine whether they violate Section 7, the FTC has challenged, on average, 21 that were likely to harm competition in each of the past five fiscal years. Most of these transactions were allowed to proceed with negotiated divestitures or were abandoned based on the concerns raised by the FTC during the investigation. In a few instances each year, a settlement cannot be reached and the Commission files suit in federal court when it is necessary to prevent a transaction from proceeding pending an administrative trial. Similarly, most DOJ merger enforcement actions result in settlements, abandonment, or restructured deals, with few litigated cases.

FTC merger enforcement has preserved competitive market conditions in vital sectors of the economy, such as health care, technology, consumer goods and services, and energy, preventing price increases and spurring innovation. With the high cost of health care a serious concern for most Americans, the Commission has been particularly active in seeking to preserve and promote competition in healthcare markets.<sup>6</sup> Healthcare consolidation can undermine efforts to control these costs.<sup>7</sup> For this reason, the FTC devotes significant resources to addressing mergers that threaten to raise prices or undermine cost-containment efforts in a variety of

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<sup>6</sup> A description of, and links to, the FTC's various healthcare-related activities can be found at <http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

<sup>7</sup> Recent research shows that health care providers with significant market power may be able to negotiate higher than competitive payment rates, often without offsetting improvements in quality. *See, e.g.*, Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, The Synthesis Project, Robert Wood Johnson Found. (2012), available at <http://www.rwjf.org/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html>.

healthcare markets, including general acute care hospitals,<sup>8</sup> surgery centers,<sup>9</sup> psychiatric hospitals,<sup>10</sup> dialysis clinics,<sup>11</sup> medical devices,<sup>12</sup> and pharmaceuticals.<sup>13</sup>

For example, the Commission carefully reviews mergers between pharmaceutical manufacturers to prevent firms from acquiring market power that would allow them to raise prices on crucial medications. In FY 2013-14, the Commission took action in 13 pharmaceutical mergers, ordering divestitures to preserve competition in the sale of 44 pharmaceutical products used to treat a variety of conditions, such as hypertension, diabetes, and cancer, as well as widely-used generic medications such as oral contraceptives and antibiotics.

The Commission has also taken action to prevent anticompetitive healthcare provider transactions, as illustrated by two recent appellate wins. In the first, the Sixth Circuit upheld the Commission's decision requiring ProMedica Health System to divest its rival, St. Luke's Hospital, because the merger would have given ProMedica the leverage to demand higher rates from health plans.<sup>14</sup> The court concluded that the size and competitive significance of ProMedica, combined with St. Luke's location in the affluent southwestern Toledo suburbs with its high proportion of commercially-insured patients, would have made ProMedica virtually

<sup>8</sup> See, e.g., *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

<sup>9</sup> See, e.g., Decision & Order, *In re H.I.G. Bayside Debt*, No. C-4494 (F.T.C. Dec. 22, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0183-c-4494/hig-bayside-debt-et-al>; Order Dismissing Complaint, *In re Reading Health Sys.*, No. 9353 (F.T.C. Dec. 7, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210155/reading-health-system-surgical-institute-reading-matter>.

<sup>10</sup> See, e.g., Agreement Containing Consent Orders, *In re Allan B. Miller*, No. C-4372 (F.T.C. Oct. 5, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210157/universal-health-services-alan-b-miller>.

<sup>11</sup> See, e.g., Agreement Containing Consent Orders, *In re Fresenius Med. Care AG*, No. C-4348 (F.T.C. Feb. 28, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1110170/fresenius-medical-care-ag-co-kgaa-matter>.

<sup>12</sup> See, e.g., Decision and Order, *In re Medtronic, Inc.*, No. C-4503 (F.T.C. Jan. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0187/medtronic-inc-covidien-plc-matter>.

<sup>13</sup> See, e.g., Decision and Order, *In re Impax Labs., Inc.*, No. C-4511 (F.T.C. Apr. 22, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/151-0011-c-4511/impax-laboratories-inc-et-al-matter>; Decision and Order, *In re Novartis AG*, No. C-4510 (F.T.C. Apr. 7, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0141-c-4510-c-4498/novartis-ag-matter-glaxosmithkline>.

<sup>14</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

indispensable to health plans post-merger, resulting in higher prices and less incentive to innovate. The court described the Commission's opinion finding the merger anticompetitive as "comprehensive, carefully reasoned, and supported by substantial evidence in the record."<sup>15</sup>

The FTC achieved another significant victory when the Ninth Circuit affirmed a district court decision that the acquisition by a dominant health care system with a large physician practice group of Idaho's largest independent multi-specialty physician practice group violated the Clayton Act and the Idaho Competition Act.<sup>16</sup> The Ninth Circuit agreed with the trial court's determination that the transaction would have given the combined entity the power to demand higher rates in the market for adult primary care services in Nampa, Idaho, the state's second-largest city. The court did not find St. Luke's quality-based efficiencies defense adequate to rebut a prima facie case that the merger was anticompetitive.

The Commission has also sought to prevent mergers in other critical sectors of the economy. In February, following an extensive investigation, the FTC filed an administrative complaint to block the merger of the two largest foodservice distributors in the country, Sysco Corporation and US Foods, Inc.<sup>17</sup> The \$231 billion foodservice industry supplies food and related products to restaurants, government agencies, school and workplace cafeterias, hotels and resorts, and hospitals.<sup>18</sup> To prevent the companies from consummating the merger and integrating their operations pending a full administrative trial, the FTC, joined by the Attorneys General of 11 states and the District of the Columbia, sought a preliminary injunction in district

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<sup>15</sup> *Id.* at 573.

<sup>16</sup> *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke's Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

<sup>17</sup> *Complaint, In re Sysco Corp.*, No. 9364 (F.T.C. Feb. 19, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf>.

<sup>18</sup> *FTC v. Sysco Corp.*, --- F. Supp. 3d ---, No. 1:15-cv-00256 (APM), 2015 WL 3958568, at \*9 (D.D.C. June 23, 2015).

court.<sup>19</sup> In late June, following an eight-day hearing, Judge Mehta of the U.S. District Court for the District of Columbia ruled that the FTC had established it was likely to succeed in proving that the proposed acquisition would violate Section 7 of the Clayton Act.<sup>20</sup> Sysco announced shortly thereafter that it would abandon the proposed merger in light of the district court's ruling.

## **II. The FTC's Administrative Process Has Advanced Consumers' Interests**

One of the key components of FTC antitrust enforcement has been the role of the FTC's administrative process in challenging harmful mergers and advancing consumers' interests through fact-driven application of antitrust principles. It has proven particularly valuable in complex cases such as hospital mergers and reverse payment patent settlements, where the Commission has used the combination of its research and law enforcement authority to develop a coordinated, well-considered approach to challenging anticompetitive conduct and advancing antitrust law.

The FTC's administrative process has played an especially important role in its hospital merger enforcement efforts. During the 1980s and early 1990s, the FTC and DOJ successfully challenged a number of hospital mergers,<sup>21</sup> but following several consecutive losses between 1994 and 2000, in which we disagreed with the courts' conclusions about market behavior, the FTC reassessed its approach. In 2002, it launched a Hospital Mergers Retrospective Project to review consummated hospital mergers to better understand their competitive impact.

The information gathered from this project, complemented by a series of workshops, led the FTC to revamp its approach to litigating hospital cases by allowing us to present a more accurate picture of a hospital merger's potential competitive impact. It also led the Commission

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<sup>19</sup> The following states joined the suit: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia.

<sup>20</sup> *Sysco*, 2015 WL 3958568, at \*61.

<sup>21</sup> *See, e.g., FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, *aff'd*, 898 F.2d 1278 (7th Cir. 1990).

to challenge one of the mergers it studied, Evanston Northwestern Healthcare's consummated acquisition of Highland Park Hospital in the northern suburbs of Chicago.<sup>22</sup> On an extensive record following an administrative trial, the FTC concluded in that case that the merger resulted in significantly higher insurance rates for employers and patients. The Commission's *Evanston* decision laid the groundwork for a series of successful FTC challenges against other anticompetitive hospital mergers that threatened higher prices and lower quality care, including the *ProMedica* case discussed above.<sup>23</sup>

In 2011, the Commission also used its adjudicative process to challenge Polypore's consummated acquisition of Microporous, two leading providers of components for batteries.<sup>24</sup> Following an administrative trial, the Commission ruled that the transaction was anticompetitive because it led to decreased competition and higher prices in four battery product markets.<sup>25</sup> The Commission required Polypore to divest Microporous to an FTC-approved buyer. In considering the case, the Commission addressed novel issues regarding whether the parties should be deemed current or potential competitors. The Eleventh Circuit affirmed the Commission's decision.<sup>26</sup>

<sup>22</sup> Complaint, *In re Evanston Nw. Healthcare Corp.*, No. 9315 (F.T.C. Feb. 10, 2004), available at <https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210emhcomplaint.pdf>.

<sup>23</sup> See, e.g., *ProMedica Health Sys.*, 749 F.3d at 573; *FTC v. St. Luke's Health Sys., Ltd.*, No. 1:13-CV-00116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1095 (transaction abandoned following grant of preliminary injunction); Opinion of the Commission, *In re Evanston Nw. Healthcare Corp.*, No. 9315, (F.T.C. Aug. 6, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>. Additionally, hospitals have abandoned a number of mergers after the FTC threatened a challenge. See, e.g., Press Release, Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare That it Will Abandon its Plan to Acquire Mercy Hot Springs (June 27, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/06/statement-ftc-competition-director-richard-feinstein-todays>; Order Dismissing Complaint, *In re Reading Health Sys.*, No. 9353 (F.T.C. Dec. 7, 2012), available at <http://www.ftc.gov/os/adjpro/d9353/121207readingsirempt.pdf>; Order Dismissing Complaint, *In re Inova Health Sys. Found.*, No. 9326 (F.T.C. June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismisscmpt.pdf>.

<sup>24</sup> Polypore's acquisition of Microporous was non-reportable under the HSR rules.

<sup>25</sup> Opinion of the Commission, *In re Polypore Int'l, Inc.*, Docket No. 9327 (F.T.C. Dec. 13, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf>.

<sup>26</sup> *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012).

The Commission's administrative decisions in non-merger antitrust cases further demonstrate the value of the Commission's adjudicative process. The Commission's longstanding efforts to stop anticompetitive reverse-payment patent settlements, culminating with the Commission's victory before the Supreme Court in *FTC v. Actavis*,<sup>27</sup> serves as another important example.

Since the late 1990s, the Commission has engaged in a bipartisan effort to protect consumers against the anticompetitive consequences of reverse-payment patent settlements. As with hospital mergers, the Commission deployed all of its unique tools to achieve that goal. Using its authority under Section 6(b) of the FTC Act to gather information about the effects of reverse-payment arrangements, the Commission issued a report analyzing the impact of these arrangements on pharmaceutical prices.<sup>28</sup> It also sought and obtained critical legislative improvements, including provisions requiring drug companies to file pharmaceutical patent agreements with the FTC that have allowed the FTC to track the scope of the problem and identify troubling agreements.<sup>29</sup>

In 2003, the Commission issued an administrative decision in this area in *In re Schering-Plough Corp.*, finding that a reverse-payment arrangement between branded pharmaceutical company Schering-Plough and two generic manufacturers violated the antitrust laws by improperly delaying generic competition.<sup>30</sup> In 2005, the Eleventh Circuit reversed the Commission's administrative ruling, establishing what became known as the "scope of the patent

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<sup>27</sup> *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

<sup>28</sup> Fed. Trade Comm'n, *Generic Entry Prior to Patent Expiration* (2002), available at <https://www.ftc.gov/reports/generic-drug-entry-prior-patent-expiration-ftc-study>.

<sup>29</sup> Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, § 1112, 117 Stat. 2066 at 2461-62.

<sup>30</sup> Opinion of the Commission, *In re Schering-Plough Corp.*, Docket No. 9297 (F.T.C. Dec. 18, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/12/031218commissionopinion.pdf>.

test,” which in effect insulated reverse-payment agreements from antitrust challenge.<sup>31</sup> Although other appellate courts adopted the same restrictive analysis,<sup>32</sup> the Commission continued to challenge anticompetitive reverse-payment arrangements and to release additional empirical analyses documenting the significant anticompetitive effects of such arrangements.<sup>33</sup>

Ultimately, in 2013, the Supreme Court in *Actavis v. FTC* rejected the scope-of-the-patent test and ruled that these reverse-payment patent settlements are subject to antitrust scrutiny under the rule of reason, the same analysis the Commission had adopted in its *Schering-Plough* opinion a decade earlier.

The Supreme Court’s ruling in *Actavis* vindicated nearly twenty years of Commission work to combat unlawful reverse payments, benefiting consumers, businesses, and taxpayers, all of whom paid inflated prices as a result of this illegal tactic delaying generic entry.<sup>34</sup>

The Commission continues to be active in this area. Earlier this year, the Commission reached a landmark \$1.2 billion settlement with Cephalon, Inc. and its now-parent, Teva Pharmaceuticals, ending a long-running enforcement action charging that Cephalon paid four generic competitors to abandon their challenges to its Provigil patent and stay off the market for six years, in violation of the antitrust laws. The settlement ensures that at least \$1.2 billion is available to compensate Provigil purchasers who overpaid for Provigil as a result of Cephalon’s conduct. The settlement is the largest equitable monetary award in the FTC’s history. Additionally, as part of the settlement, Teva, the world’s largest generic company, agreed to a

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<sup>31</sup> *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065-66 (11th Cir. 2005).

<sup>32</sup> *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 213 (2d Cir. 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008).

<sup>33</sup> See, e.g., Fed. Trade Comm’n, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions: A Federal Trade Commission Staff Study* (2010), available at <https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff>.

<sup>34</sup> *Id.*

prohibition on the type of anticompetitive patent settlements the Commission alleged that Cephalon had used to artificially inflate the price of Provigil.

Yet another example of the way the Commission has used its administrative process to shape antitrust law for the benefit of consumers is in the area of state action. State action has been a Commission focus for many decades, beginning with early challenges to taxicab regulations in the 1970s and continuing today. In 2003, for instance, the Commission issued a staff report identifying areas in which the state action doctrine had expanded beyond the original principles articulated by the Supreme Court in *Parker v. Brown*.<sup>35</sup> These efforts laid the groundwork for the FTC's Supreme Court victory earlier this year in *N.C. Dental*.<sup>36</sup> The Court agreed with the Commission's administrative decision that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."<sup>37</sup> This decision is particularly important because occupational licensing requirements govern a substantial and growing segment of the U.S. economy.

Over the last two decades, reviewing courts have affirmed 10 out of 13 Commission administrative competition decisions.<sup>38</sup> That number rises to 11 wins out of 13 cases once one takes into account that the Commission's 2003 ruling in *Schering-Plough*, reversed by the Eleventh Circuit in 2005,<sup>39</sup> was ultimately vindicated with the Supreme Court's 2013 decision in *Actavis*.<sup>40</sup> This appellate record is even more impressive given that many of those opinions have

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<sup>35</sup> Fed. Trade Comm'n, Report of the State Action Task Force (Sept. 2003), available at <https://www.ftc.gov/reports/report-state-action-task-force-recommendations-clarify-reaffirm-original-purposes-state>.

<sup>36</sup> *N.C. Dental*, 135 S. Ct. at 1109.

<sup>37</sup> *Id.* at 1114.

<sup>38</sup> The Commission's orders were overturned in *Rambus, Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008), *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073–76 (11th Cir. 2005), and *California Dental Association v. FTC*, 224 F.3d 942, 957–58 (9th Cir. 2000).

<sup>39</sup> *Schering-Plough*, 402 F.3d at 1073–76.

<sup>40</sup> *Actavis*, 133 S. Ct. at 2223 (discussed above).

involved novel questions of law on which the Commission is given no deference,<sup>41</sup> and that respondents have the ability to choose the most favorable appellate forums.<sup>42</sup>

### **III. The Proposed Legislative Changes Are Unnecessary and Could Have Adverse Effects for Consumers**

As we understand it, the proposed legislation aims to remove certain aspects of the FTC's adjudicative function. In our view, these legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement. Although the Commission's process for challenging potentially harmful transactions does include an administrative hearing, there is no evidence that the Commission's procedures prejudice the parties. Accordingly, there is no need to alter the FTC's administrative process.

As an initial matter, in 2009, the Commission revised its rules governing administrative litigation to streamline the administrative process in response to concerns that process was too protracted.<sup>43</sup> The revised rules represent a comprehensive and significant revision of the Commission's adjudicatory process that expedite the prehearing, hearing, and appeal phases, streamline discovery and motion practice, and ensure that the Commission applies its substantive expertise earlier in the process. These rules include tight deadlines for the Commission to rule on the merits of a case.<sup>44</sup> The result is an administrative process that is comparable to federal court timelines.

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<sup>41</sup> See, e.g., *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008) ("We review de novo all legal questions pertaining to Commission orders.").

<sup>42</sup> The FTC Act authorizes respondents to appeal Commission orders to any regional court of appeals where the challenged method of competition was used or where the respondent would otherwise be subject to personal jurisdiction. 15 U.S.C. § 45(c) (2012).

<sup>43</sup> Press Release, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), available at <http://www.ftc.gov/opa/2009/04/part3.shtm>. In August 2011, the Commission made additional changes relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. Press Release, FTC Modifies Part 3 of Agency's Rules of Practice (Aug. 12, 2011), available at <http://www.ftc.gov/opa/2011/08/part3.shtm>.

<sup>44</sup> *Id.*

Second, while the preliminary injunction standard prescribed for the FTC under Section 13(b) of the FTC Act is worded differently than the one that applies to DOJ, the FTC, like DOJ, is required to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive in order to obtain a preliminary injunction. As Assistant Attorney General William Baer has stated, “any effort to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.”<sup>45</sup>

Indeed, federal district courts closely scrutinize cases brought by both agencies. For example, in *Sysco* the court ruled that Section 13(b) “demands rigorous proof to block a proposed merger or acquisition.”<sup>46</sup> In that matter, the district court engaged in a detailed examination of the foodservice distribution industry, the parties’ proposed product and geographic market definitions, market shares and concentration, existing and potential competitors, the likely effects of the proposed transaction on pricing and other dimensions of competition, and the claimed efficiencies from the transaction.<sup>47</sup> For this reason, preliminary injunction cases typically involve several-day hearings with extensive prior briefing, live witnesses, and expert testimony. Notably, there is no evidence to suggest that there is a difference in outcomes as between the FTC and the DOJ despite the differently-worded preliminary injunction standard.

Furthermore, in March 2015, the Commission reaffirmed that, in cases where it fails to obtain a preliminary injunction in federal court, it will carefully consider whether to press

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<sup>45</sup> William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Responses to Written Questions of Senator Michael S. Lee 6 (April 2013), available at <http://www.judiciary.senate.gov/imo/media/doc/041613QFRs-Baer.pdf>.

<sup>46</sup> *Sysco Corp.*, 2015 WL 3958568, at \*9.

<sup>47</sup> *Id.* at \*3. Courts in other FTC preliminary injunction cases have engaged in a similarly thorough analysis. See, e.g., *FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998).

forward with administrative litigation.<sup>48</sup> Significantly, in the last 20 years, the Commission has not proceeded administratively following a loss at the preliminary injunction stage.<sup>49</sup> For example, in 2011 the Commission ended its administrative litigation involving LabCorp's acquisition of Westcliff Medical Labs after carefully considering the factors outlined in a 1995 Commission Policy Statement.<sup>50</sup> Comparable matters in the future would be subject to similar Commission scrutiny.

Consequently, in our view, the proposed modifications of the Commission's adjudicative function are unnecessary. If anything, such changes could very well negatively impact the Commission and undermine its beneficial role in promoting competition. The FTC plays an essential role in protecting consumers from anticompetitive mergers. By seeking to alter the Commission's adjudicative function, the proposed legislation risks eroding a fundamental institutional attribute of the FTC. This quasi-judicial role is a defining characteristic of the agency – authority Congress very deliberately granted to the FTC when the agency was created to serve as a complement to enforcement by DOJ. The current system has worked well for over one hundred years, and all indications are that it will continue to do so to the benefit of competition and consumers.

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<sup>48</sup> Revisions to Rules of Practice, 80 Fed. Reg. 15157, 15158 (Mar. 23, 2015) (discussing rule changes that allow respondents to request an automatic suspension of Part 3 litigation if a court denies a preliminary injunction and emergency appellate relief is not granted to the Commission).

<sup>49</sup> Like any other litigant, the FTC has the right to seek appellate review after a district court denies preliminary relief. The agency may continue to pursue the administrative case during that period, although in recent cases, the FTC has stayed the administrative litigation during the appeal. In *Phoebe Putney*, for example, the Commission stayed the administrative proceeding after losing its request for a preliminary injunction in the federal district court and only resumed the administrative proceeding after its successful appeal in the Supreme Court. *In re Phoebe Putney*, Order Granting Complaint Counsel's Motion to Lift Stay, No. 9348 (F.T.C. March 14, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130314phoebeordermotion.pdf>.

<sup>50</sup> See Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Lab. Corp. of Am.*, No. 9345 (F.T.C. Apr. 21, 2011) (citing Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39, 741 (Aug. 3, 1995), available at [https://www.ftc.gov/system/files/documents/public\\_statements/568671/110422labcorpcommstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf)). The Policy Statement explains how, after a court has denied preliminary injunctive relief to the Commission, the Commission determines whether administrative litigation should be continued.

**IV. Conclusion**

Thank you for the opportunity to appear before you and share the Commission's concerns about proposed legislation that would fundamentally alter a critical aspect of the agency's institutional role and risks impeding its ability to protect American consumers and the public interest.

**Statement of Senator Patrick Leahy (D-Vt.),  
Ranking Member, Senate Judiciary Committee,  
Subcommittee Hearing on “S.2102, The ‘Standard Merger and Acquisition Reviews  
Through Equal Rules Act of 2015’”  
October 7, 2015**

The antitrust laws protect hardworking Americans by ensuring that our markets are characterized by vibrant competition. This competition results in lower prices and more choices for consumers. Over 100 years ago, Congress created the Federal Trade Commission (FTC) as an independent agency with statutory enforcement powers to protect consumers from anticompetitive actions. At a time of increasing consolidation in many different industries, the agency serves a vital function that we must preserve and protect.

Today’s hearing will examine S.2102, The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, also known as the SMARTER Act. I have serious concerns about the impact of this proposed legislation on the independent antitrust enforcement authority of the FTC. The legislation being discussed today would fundamentally change the FTC’s authority to protect consumers against harmful mergers before they are completed. Such steps deserve our careful attention and review.

The first change made by the SMARTER Act would alter the standard used by courts when the FTC seeks a preliminary injunction against a transaction before completion. Although the words used to articulate the injunction standard for the FTC are different than those for the Department of Justice, FTC Chairwoman Edith Ramirez and Assistant Attorney General for Antitrust William Baer have both testified to this subcommittee that there is no practical difference between the injunction standards, and that there is no problem to be fixed. Proponents of the SMARTER Act have a heavy burden to rebut these views from our Nation’s leading antitrust enforcers. I am deeply concerned that a change in statutory language would call into question decades of precedent, causing confusion and unpredictability. Moreover, a change could send an unintended signal to federal courts that Congress intends the standard for the FTC to obtain an injunction to be *lowered*, and am therefore skeptical of such a proposal.

The second change made by the SMARTER Act would prohibit the FTC from using its administrative adjudication authority to challenge merger transactions before they are consummated. The FTC’s independent adjudication function is a core component of the Commission’s statutory structure, and reflects its nature as an expert agency. Removing this authority in the context of unconsummated mergers undermines the Commission’s ability to protect consumers *before* harm has occurred. Again, the proponents of the legislation face a heavy burden to justify such a significant structural change.

The Judiciary Committee’s oversight of the FTC’s antitrust enforcement efforts is vital. Part of that oversight function is to ensure that our antitrust authorities have the tools they need to protect competition in the complex markets of today. Our laws should be updated as needed, but changes should be undertaken carefully and only in response to demonstrated problems that lead to consumer harm. I look forward to reviewing the testimony of the witnesses today.

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SENATE COMMITTEE ON THE JUDICIARY HEARING ON S. 2102  
 THE "STANDARD MERGER AND ACQUISITION REVIEWS  
 THROUGH EQUAL RULES ACT OF 2015"  
 QUESTIONS FOR THE RECORD

Responses from David Clanton

A. Questions from Senator Orrin G. Hatch

1. **Chairwoman Ramirez and others claim that Part III proceedings add significant value to FTC merger review and that eliminating Part III in merger cases would be a mistake. Do Chairwoman Ramirez and others *overstate* the value of Part III proceedings? Do they *understate* the drawbacks that attend FTC's ability to threaten Part III proceedings? Please give me your thoughts.**

Response:

I agree that FTC Part III proceedings add value and the Commission has contributed to the development of antitrust law in both merger and non-merger cases. In my prepared testimony, I cited to a couple of recent cases where the Commission successfully challenged consummated transactions – *ProMedica Health Systems* and *Polypore International*. The SMARTER Act would not prevent the FTC from continuing to use Part III proceedings in such cases.

However, for unconsummated transactions, notably HSR reportable transactions, these cases never get past the preliminary injunction ("PI") stage. If the FTC loses, they generally do not continue to litigate the case in a Part III proceeding, at least in recent years and since the Commission reinstated the so-called Pitofsky Rule earlier this year. If the FTC wins, the merging parties invariably either abandon the transaction or agree to some type of remedy (primarily divestiture remedies). I indicated in my statement that no case had continued through Part III following a PI in the past 20 years, regardless of which side prevailed in the PI proceeding. In fact, I am not aware of any case since enactment of the HSR Act where a Part III proceeding was completed after the Commission successfully obtained a PI.

The practical effect of the Commission's refusal to seek permanent relief in federal court in these cases, is that FTC merger cases are decided in a preliminary injunction hearing while DOJ cases are typically decided on the merits. The Commission has well-established authority to seek permanent injunctions under Section 13(b) in both consumer protection and antitrust cases, including merger cases.

In short, the FTC is not developing law through Part III proceedings in the context of proposed mergers. Accordingly, the legislation would not adversely affect the agency's development of merger law through administrative litigation.

2. **Do you believe that withdrawing the FTC's ability to pursue Part III proceedings in merger review cases would hinder the FTC's ability to perform its mission of protecting consumer welfare? Why or why not?**

Response:

As explained above, removing the FTC's ability to pursue Part III proceedings involving unconsummated acquisitions and mergers would not impair the agency's enforcement efforts.

3. **You served as Commissioner and as Acting Chairman of the FTC. During your time as Commissioner, did you see instances where the threat of Part III proceedings gave the FTC added leverage in merger review cases? Do you believe this added leverage is justified, given that DOJ has no ability to threaten internal administrative proceedings?**

Response:

I believe the bifurcation of the PI and merits hearings in FTC merger cases has given the FTC additional leverage, whether in settlement negotiations or otherwise. Of course, it is difficult, if not impossible, to know what motivates merger parties to settle or decide not to proceed with a transaction in the first instance, but the fact that Part III proceedings are never completed after companies lose a PI is powerful evidence that the lengthy litigation process at the FTC is not working. Although the Commission has taken steps to shorten Part III litigation in merger cases, the sequential combination of a lengthy investigation, followed by a PI hearing, followed by a Part III trial on the merits is still too long for losing parties to put a merger on hold until the merits phase is completed.

Given the extensive factual and economic evidence that is developed by both the FTC and DOJ prior to any judicial or administrative merger proceeding, the FTC (like DOJ) should be prepared to try their cases on the merits when challenging an unconsummated acquisition or merger.

4. **Do you believe that the FTC and DOJ do in fact face different standards for obtaining a preliminary injunction in a merger review case? How do those different standards affect how the agencies approach merger cases? How do the different standards affect parties' decisions about whether to merge?**

Response:

Yes, I believe the agencies do face different standards, with the primary difference being the threshold showing of probable success that the agencies must establish to warrant issuance of a PI. Although Section 13(b) speaks in terms of "likelihood of success," many courts, particularly in the D.C. Circuit, have in the words of the FTC itself adopted a more "deferential" test that can 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.” *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (citations omitted).

This vague standard provides no useful guidance as to what is meant by “likelihood of success” and it invites varying and inconsistent interpretations. By contrast, the Second Circuit in *U.S. v. Siemens Corporation*, 621 F.2d 499, 505-06 (2d Cir. 1980) rejected a similar version of the “serious questions” test in a DOJ merger case.

As to how the different standards affect the agencies’ approach in merger cases, both agencies necessarily must prepare as if the case is a trial on the merits, which only underscores why the FTC should have no objection to consolidating the preliminary and permanent injunction hearing in federal court.

5. **Again, you served as Commissioner and as Acting Chairman of the FTC. From your experience, can you tell me how often the Commission disagrees with the staff recommendation in a merger review case? Is it a common occurrence, or is it unusual? Are there any lessons we should draw from how frequently or not the Commission agrees with the staff recommendation in a merger case?**

Response:

In my experience at the FTC, there was frequent robust debate at Commission meetings on staff recommendations to challenge mergers. In the vast majority of cases, the Commissioners supported the staff recommendations, but the debate often resulted in modifications to case theories or other strategic issues. My sense is that the Commission today also approves most staff recommendations, but it is clear from public statements of Commissioners that there is an equally robust debate on all types of issues, including merger policy. Moreover, the economic learning and case development on merger enforcement issues has advanced considerably over the past 30 plus years at both the FTC and DOJ. If anything, the FTC and DOJ are in a much better position today to pursue a trial on the merits in federal court than they were at the dawn of the HSR era. That experience provides an additional reason why the Commission should bring its unconsummated merger cases exclusively in federal court, particularly where Part III trials are not a viable option.

B. Questions from Senator Amy Klobuchar

1. **In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?**

Response:

In my experience, merging parties are very interested in the litigation process and agency-specific procedures, particularly where a transaction raises potentially significant antitrust issues and settlement prospects are unclear. In such circumstances, the parties understand that in FTC cases they get only one shot and that is in a preliminary injunction (“PI”)

hearing, not a trial on the merits, because the combined judicial and Part III administrative proceedings take too long. Naturally, that doesn't happen very often and a company's decision to proceed (or not) with a transaction or its willingness to accept certain settlement terms is often based on a variety of factors, including business reasons unrelated to agency enforcement risks. I have had a few cases where the parties backed off transactions that were either being reviewed by the FTC or were likely to be reviewed by the agency, but I cannot say with confidence whether the reasons were based on issues addressed by this legislation, business considerations or some combination thereof. I do know that the overall length of the regulatory review, including possible litigation, was a factor under consideration by the parties.

The fact that parties to an unconsummated transaction never litigate a merger in a Part III administrative proceeding, if they lose at the PI stage, simply confirms that merits trials are not a viable option in such circumstances. As I noted in my statement, the PI hearing becomes the de facto merits hearing. That is reason enough, in my view, to equalize the litigation procedures between the FTC and DOJ for proposed transactions.

2. **As I understand your concern, you believe that some courts, in assessing the likelihood of success element for a preliminary injunction, have interpreted 15 U.S.C. 53(b) to require the FTC only to raise “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination,” and you believe that standard is lower than what is required under the traditional common law test for a preliminary injunction. It appears that some courts have adopted similar language in applying the common law test for a preliminary injunction, at least where the balance of harm favors the plaintiff. For example, the Second Circuit requires a plaintiff to raise “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.” *Citigroup Global v. VCG Special Opport*, 598 F.3d 30, 35 (2d Cir. 2010).**
- (a) **How is the standard under 15 U.S.C. 53(b) different than the test articulated by the Second Circuit?**

Response:

Although the Second Circuit has applied a variation of the “serious questions” standard in certain preliminary injunction cases, it explicitly rejected this standard in a merger case brought by the DOJ. In *U.S. v. Siemens Corporation*, 621 F. 2d 499 (2d Cir. 1980), the court stated that “[t]he proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor.”

The *Siemens* court went on to observe that irreparable harm should be presumed if the government establishes a “reasonable probability” of success, but it emphasized that “[*l*]o warrant that presumption ... the Government must do far

*more than merely raise sufficiently serious questions with respect to the merits to make them fair ground for litigation. A preliminary injunction remains a drastic form of relief.” Id. at 505-06 (emphasis added).*

Thus, the *Siemens* decision clearly places primary emphasis on the importance of showing a “likelihood of success” and characterizes the “serious questions” test as a lower standard.

- (b) **The one clear difference between the test described in 15 U.S.C. 53(b) and the test generally articulated under common law is that the 53(b) standard does not require proof of irreparable harm. Under the common law preliminary injunction test, how often would the Department of Justice be unable to show irreparable harm when challenging an unconsummated merger? Please identify the conditions under which the Department of Justice could not make a showing of irreparable harm.**

Response:

While courts in DOJ cases adhere to the traditional four-part test for granting preliminary injunctions, they have modified that test to ease the government’s burden on elements relating to irreparable injury, balancing the equities and the public interest – but only if a likelihood of success can first be established. For example, as noted above, in *Siemens* the court held that irreparable injury may be presumed in DOJ cases if the government can show a reasonable probability of success. Other courts have taken a similar approach in DOJ merger cases, *see, e.g., United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989).

The most important difference between the FTC and DOJ is the threshold showing of success that each agency must make to justify the grant of preliminary relief. That difference is highlighted in *Siemens* where the court contrasted the “serious questions” test with a reasonable probability of success. Judge Brown’s opinion in *Whole Foods* illustrates just how elastic the “serious questions” standard has become:

Section 53(b) preliminary injunctions are meant to be readily available to preserve the status quo while the FTC develops its ultimate case, and it is quite conceivable that the FTC might need to seek such relief before it has settled on the scope of the product or geographic markets implicated by a merger. For example, the FTC may have alternate theories of the merger’s anticompetitive harm, depending on inconsistent market definitions. While on the merits, the FTC would have to proceed with only one of those theories, at this preliminary phase it just has to raise substantial doubts about a transaction. One may have such doubts without knowing exactly what arguments will eventually prevail. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1031, 1036 (D.C. Cir. 2008)

- (c) **Although the Federal Trade Commission may have a lower burden to obtain a preliminary injunction than a private party, is there any court decision that has said the Federal Trade Commission has a lower burden to obtain a preliminary injunction than the Department of Justice?**

Response:

In addition to *Siemens* (which compares the tests but does not refer to the FTC), other cases have emphasized the unique, deferential standard under Section 13(b). In *FTC v. CCC Holdings Inc.*, 605 F.Supp.2d 26, 77 n.11 (D.D.C. 2009), the court had this to say:

Defendants take issue with the FTC's interpretation of the "serious, substantial" question standard set forth in *Heinz* and *Whole Foods*, asserting: "[Y]ou can talk about substantial questions, doubtful questions, whatever.... [W]hat those cases say [is that] it simply means nothing other than likelihood of success on the merits." Parker, Tr. (2/17 p.m.) at 41:24-42:3 (Mitchell). *While Defendants' statement is literally true, precedents irrefutably teach that in this context "likelihood of success on the merits" has a less substantial meaning than in other preliminary injunction cases. Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law. The analysis of likelihood of success "measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed" in proving that the effect of a merger "may be to substantially lessen competition or tend to create a monopoly." (citation omitted) (emphasis added).

Moreover, following the *Whole Foods* decision in 2008, the Commission defended what it called the "deferential" standard applied in that case in a letter to then-House Judiciary Committee Chairman John Conyers and Ranking Member Lamar Smith. In that letter the FTC expressly contrasted the merger enforcement responsibilities of the FTC and DOJ. A copy is attached.

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BEIJING BRUSSELS LONDON LOS ANGELES  
 NEW YORK SAN FRANCISCO SEOUL  
 SHANGHAI SILICON VALLEY WASHINGTON

**Deborah A. Garza**

Covington & Burling LLP  
 One CityCenter  
 850 Tenth Street, NW  
 Washington, DC 20001-4956  
 T +1 202 662 5146  
 dgarza@cov.com

October 30, 2015

Senator Charles E. Grassley  
 Chairman  
 United States Senate  
 Committee on the Judiciary  
 Washington, DC 20510-6275

Re: S.102, Standard Merger and Acquisition  
 Reviews Through Equal Rules Acts of 2015

Dear Senator Grassley:

Thank you for the opportunity to comment on the proposed Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015. As you know, the proposed legislation essentially implements recommendations of the Antitrust Modernization Commission (AMC) to eliminate differences in the way that the Justice Department ("DOJ") and the Federal Trade Commission ("FTC") handle merger challenges. I appreciate the opportunity to further explain the rationale for the AMC recommendations in response to follow-up questions from members of the Senate Committee on the Judiciary.

**Questions from Senator Orrin G. Hatch**

1. *Chairwoman Ramirez and others claim that Part III proceedings add significant value to FTC merger review and that eliminating Part III in merger cases would be a mistake. Do Chairwoman Ramirez and others overstate the value of Part III proceedings? Do they understate the drawbacks that attend FTC's ability to threaten Part III proceedings? Please give me your thoughts. Brenda: Please put all the Qs in complete italics.*

**Response:**

Chairwoman Ramirez' remarks do not identify any unique value to using Part III with respect to mergers subject to the Hart-Scott-Rodino (HSR) Act. Every example of a merger-related Part III proceeding cited by Chairwoman Ramirez involved a *consummated* transaction that was *not* subject to the HSR Act and thus would *not* be affected by the SMARTER Act. The FTC could continue to use Part III in such cases. The value that Chairwoman Ramirez describes would thus be preserved. That is a significant point.

The fact is, we actually do not see HSR merger challenges actually going through a Part III proceeding — largely because merging parties give up after losing on a preliminary injunction (PI), rather than trying to hold their deal together through lengthy Part III

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proceedings. That it is why I believe the primary value of the FTC's Part III tool in such proceedings is actually the threat of its use — that is, the ability to kill a deal without having to prevail on a trial on the merits. This goes to the core of why the AMC recommended the reform represented by the SMARTER Act.

As the AMC Report explained:

The mere availability of [Part III administrative] proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger. It thus can give the FTC greater leverage in seeking concessions in a consent decree. Although the FTC has not pursued a full administrative trial after denial of a preliminary injunction in at least fifteen years [prior to 2007, when the AMC Report issued], its policy regarding the circumstances in which it would seek administrative litigation following the denial of a preliminary injunction [the "Pitofsky Rule"] does not rule out the possibility that it may pursue this course. Indeed, in 2005, the FTC left an administrative complaint pending against Arch Coal for over eight months after it had failed to obtain a preliminary injunction, and it has acted similarly in the recent past.

AMC Report at 139-40 (citations omitted).<sup>1</sup>

The AMC further concluded that eliminating administrative litigation would **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. Indeed, the FTC's own conduct confirms holding administrative trials after losing an injunction rarely, if ever, adds significant value, as the FTC has not held an administrative trial regarding an HSR Act merger after losing a preliminary injunction motion in recent years.

AMC Report at 140-41 (citations omitted).

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<sup>1</sup> After the AMC issued its Report and Recommendations, the FTC moved to increase the potency of the Part III threat by withdrawing the Pitofsky Rule, which had limiting the circumstances under which the FTC would continue to pursue Part III even after having lost on a PI. Apparently in response to Congress' consideration of the SMARTER Act, the FTC recently re-adopted the Pitofsky Rule. However, the FTC's ability to change its position and the continued flexibility even under the Pitofsky Rule to pursue administrative litigation after losing PI demonstrates the need for legislation.

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2. *Do you believe that withdrawing the FTC's ability to pursue Part III proceedings in merger review cases would hinder the FTC's ability to perform its mission of protecting consumer welfare? Why or why not?*

**Response:**

I agree with the conclusion of the AMC that withdrawing the FTC's ability to pursue administrative litigation in HSR merger cases would **not** hinder the FTC's performance of its mission to protect consumer welfare for the reasons stated in the AMC Report.

3. *Do you believe that the FTC and DOJ do in fact face different standards for obtaining a preliminary injunction in a merger review case? How do those different standards affect how the agencies approach merger cases? How do the different standards affect parties' decisions about whether to merge?*

**Response:**

I believe the FTC and DOJ should **not** face different standards for obtaining a PI in HSR merger cases. That was also the conclusion of the AMC Report. It accordingly does not matter whether someone can argue that in one or more decisions the standard looks similar. The SMARTER Act would remove the uncertainty and preclude the FTC seeking application of a more lenient standard.

In this regard, the AMC Report explained:

There is at least a perception, if not a reality, that the FTC and DOJ face different standards for obtaining a preliminary injunction. . . . [J]ust the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of the dual merger enforcement regime.

. . . .

While the magnitude of the difference between the two standards is not clear, the Commission believes Congress should remove all doubt by ensuring that courts apply the same standard in ruling on a motion for preliminary injunction, whether the injunction is sought by the FTC or the DOJ. . . This change should not hamper the FTC's ability to obtain injunctive relief in appropriate cases; on the contrary, its ability should be identical to that of the DOJ.

AMC Report at 141-42 (citations omitted).

That having been said, while its position may be different today, the FTC has historically advocated in courts and to Congress that its PI standard is different. In a letter to then-Chairman of the House Judiciary Committee, Rep. John Conyers, Jr. in 2008, the FTC stated: "The AMC Report is correct in stating that the procedures and standard in preliminary injunction cases brought under Section 13(b) of the FTC Act are different from the procedures

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and standard applicable to preliminary injunctions in litigation conducted by the [Antitrust] Division [of the U.S. Justice Department.” The FTC explained that this difference was purposeful and reflects the fact that, unlike the Justice Department, which does not decide the cases it prosecutes, the FTC has both prosecutorial and judicial functions. The FTC explained the case law as follows:

Reflecting its recognition of the intentions of Congress . . . , the courts of appeals have fashioned a 13(b) standard that safeguards the public interest in having the Commission instead of the federal district courts judge the merits of the antitrust . . . matters entrusted to it. For example, in *FTC v H.J. Heinz Co.*, 246 F.3d 708, 714-15, 726 (D.C. Cir. 2001), the court held that issuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them ‘fair ground for investigation.’ The D.C. Circuit has just re-affirmed this deferential standard in denying a petition for rehearing en banc . . . in *Whole Foods Market*, 2008 U.S. App. LEXIS 24092.

The relevant debate is not whether the standard is different, but whether it **should be** different. I believe, with the bi-partisan majority of the AMC at the time, that the standard should **not** be different for the limited slice of the FTC’s jurisdiction related to HSR-reported mergers.

**Questions from Senator Klobuchar**

1. *In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?*

**Response:**

Yes, often. With respect to every merger raising a potential competition issue,<sup>2</sup> the parties must agree to allocate regulatory risk. That is, they must agree on how long a buyer, and a seller, must stick with a deal — is it nine months, one year, longer? What are the conditions over which a buyer must close the transaction? Does buyer need to litigate to avoid or remove a court injunction? What if the court allows the transaction to close but the FTC pursues administrative litigation to try to unwind the transaction? What divestitures and other

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<sup>2</sup> As Chairwoman Ramirez explained, only a relatively small percentage of transactions are subject to a full investigation and fewer are challenged. Even where a transaction may raise a potential competitive concern, it is often possible for the FTC or DOJ to conclude that the merger will not unreasonably restrain competition or that it can be restructured to address competitive concerns. Importantly, not every transaction that raises competitive issues is or should be blocked or restructured. Given the predictive and often complex nature of the analysis, it is often a close question whether on balance a transaction would be anticompetitive and reasonable minds can differ on the conclusion.

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concessions must the buyer offer to avoid a challenge and when must it make the offer? In many agreements, a buyer faces a "hell or high water" requirement to do whatever it takes to close a transaction by a certain date.<sup>3</sup> In others, the parties may agree to cap how much a buyer must do. And, a buyer may have to pay a substantial fee to the seller for failing to close on time.

A key element in allocating risk is time. As has been explained in prior testimony by myself and others, it is not possible to hold a deal together indefinitely. Financing is a key issue, for example, as is the seller's ability to retain employees and customers.

The FTC's different process and standard means that it can take significantly longer to get a merger cleared through the FTC than the DOJ. As others have testified, the FTC process can easily take half a year longer than the DOJ. Chairwoman Ramirez frankly acknowledged the existence of a time difference in her testimony, even with steps the FTC has taken to shorten the time involved with administrative litigation.

This time difference makes it less likely that merging parties will get their day in court and enhances the FTC's leverage in extracting concessions from the parties. As explained by the AMC:

The differences in the agencies' policies regarding consolidation of actions for preliminary and permanent relief impose significantly different burdens on the parties in two respects. The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions; [DOJ] therefore must establish that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence. By comparison, the FTC must meet the burden required for obtaining a preliminary injunction, which is generally regarded as lower. Because the grant of any injunction (whether preliminary or permanent) almost always kills the deal, this difference could materially affect the parties' prospects for completing their transaction. Second, the decision of the district court in a consolidated DOJ proceeding is final (barring an appeal); if the DOJ loses, the parties can be certain that the challenge is finished. In contrast, if the FTC fails to obtain a preliminary injunction, it may pursue relief in a potentially lengthy and costly internal administrative hearing.

The mere availability of such proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a merger challenge. It thus can give the FTC greater leverage in seeking concessions in a consent decree.

AMC Report at 139.

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<sup>3</sup> The date is typically keyed to financing and other factors relating to the seller's ability to maintain its business.

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I have personally handled several matters over the years in which the time and uncertainty associated with FTC merger review caused parties not to proceed with mergers or compromised on concessions in order to be able close a transaction on a timely basis.

2. *As I understand your concern, you believe that some courts, in assessing the likelihood of success element for a preliminary injunction, have interpreted 15 U.S.C. 53(b) to require the FTC only to raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination," and you believe that standard is lower than what is required under the traditional common law test for a preliminary injunction. It appears that some courts have adopted similar language in applying the common law test for a preliminary injunction, at least where the balance of harm favors the plaintiff. For example, the Second Circuit requires a plaintiff to raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Citigroup Global v. VCG Special Opport, 598 F.3d 30, 35 (2d Cir. 2010).*

**Response:**

To be clear, my concern relates to the effect of differences between the two enforcement agencies' practices, policies and standards taken as a whole, not solely to differences in the preliminary injunction standard. That is why the AMC described its three-part recommendation for reform as "interrelated": (1) the FTC should seek both preliminary and permanent injunctive relief in HSR merger cases, in a consolidated proceeding where practicable; (2) the FTC should not pursue administrative litigation in HSR merger cases, and (3) Congress should ensure that the same standard for the grant of preliminary injunction applies to both the FTC and the DOJ.

Frankly, I believe a court would have little if any reason to apply a different PI standard in FTC HSR merger cases if the first two recommendations were adopted. This conclusion is consistent with the FTC's letter to Rep. Conyers discussed above in response to a question from Sen. Hatch. In the Conyers letter, the FTC acknowledged that it benefits from a different standard and justified that advantage based on the fact that the FTC, rather than the district court, would try the merits of the case. The FTC at least then believed that the court should defer to the FTC's judgment by enjoining a transaction based not on a judgment of likely outcome on the merits (as would apply in a DOJ merger case), but on whether the FTC had "raised questions" sufficiently serious to make them "fair ground for further investigation."

I take the gist of your questions regarding the Second Circuit's standard for PIs under the Rule 65 of the Federal Rules Procedure to be, in essence, "So, what standard would apply equally to DOJ and the FTC under the SMARTER Act?" The precise answer to that question depends on the law in each circuit. But it is important to bear in mind that the SMARTER Act does not purport to dictate a standard. It merely says that whatever standard the courts apply under the Federal Rules, it should be the same for the DOJ and the FTC.

- *How is the standard under 15 U.S.C. 53(b) different than the test articulated by the Second Circuit?*

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**Response:**

Courts have interpreted 15 U.S.C. 53(b) in different ways, but it is fair to rely on the characterization of the D.C. Circuit approach provided by the FTC in the Conyers letter. Excerpting from the full quote provided above: “[I]ssuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them ‘fair ground for investigation.’”

I understand there is a Circuit split as to the propriety of a sliding scale PI test that requires a lesser showing on likely success on the merits where there is very significant likelihood of irreparable harm. It is possible the Supreme Court will clarify the question issue in the future and establish a uniform federal standard.

The Second Circuit confirmed its use of a sliding scale test in *Citigroup Global Markets, Inc. v VGC Special Opportunities Master Fund Limited* under which a plaintiff must show irreparable harm and either likelihood of success on the merits or “sufficiently serious questions going to the merits to make them a fair ground for litigation *and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.*” (Emphasis added.) The Court explained that this approach allows a court to grant a PI where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits, but the costs of not granting the injunction outweigh the benefits. Moreover, “[b]ecause the moving party must not only show that there are ‘serious questions’ going to the merits, but must additionally establish that ‘the balance of hardships tips *decidedly* in its favor, its overall burden is no lighter than the one it bears under the ‘likelihood of success’ standard.” (Internal citation omitted; emphasis in original.)

It is not clear from *Citigroup* how the Second Circuit sliding scale approach would apply to a government motion for a PI in an HSR merger case. As Mr. Clanton has explained, in *US v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980), the Second Circuit stated that the proper test for determining whether to grant a preliminary injunction in an antitrust action initiated by the government is “whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tip in its favor.” The Second Circuit further held that irreparable harm would be presumed where the Government has established a “reasonable probability” of success on the merits. But, to warrant that presumption, the Government “must do far more than merely raise sufficiently serious questions with respect to the merits to make them fair ground for litigation,” noting that a PI “remains a drastic form of relief.”

- *The one clear difference between the test described in 15 U.S.C. 53(b) and the test generally articulated under common law is that the 53(b) standard does not require proof of irreparable harm. Under the common law preliminary injunction test, how often would the Department of Justice be unable to show irreparable harm when challenging an unconsummated merger? Please identify the conditions under which the Department of Justice could not make a showing of irreparable harm.*

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**Response:**

Under *Siemens*, irreparable harm would be presumed where DOJ established a probability of success in the merits. *See also U.S. v Ivaco, Inc.*, 704 F.Supp. 1409, 1429 (W.D. Mich. 1989); *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (dicta). This makes sense given a general understanding that it is difficult to “unscramble the eggs” once a merger has been consummated, but appreciating that it should take more than raising serious questions as fair ground for further investigation to prevent the parties from closing their transaction.

It is not possible to say in abstract “how often” DOJ would be unable to show irreparable harm in an HSR merge case or to anticipate conditions under which it could not make the requisite showing. I can imagine a court allowing a merger to close under an order to hold acquired assets separate to preserve the Government’s ability to obtain an adequate remedy, particularly if a trial on the merits can proceed on a timely basis.

- *Although the Federal Trade Commission may have a lower burden to obtain a preliminary injunction than a private party, is there any court decision that has said the Federal Trade Commission has a lower burden to obtain a preliminary injunction than the Department of Justice?*

**Response:**

I am not aware of a court decision addressing whether different standards apply to the DOJ and the FTC per se. That is not surprising, because the issue would never come before the court that way. As Mr. Clanton has explained, however, in interpreting 53(b), courts have contrasted that standard to a standard of likelihood of success on the merits and found that the 53(b) standard demands less. *See FTC v. CCC Holdings Inc.*, 605 F.Supp.2d 26, 77 n. 11 (D.D.C. 2009). In addition, as explained above, the FTC itself has described the standard as different. (See discussion of Conyers letter.)

Thank you for affording me the opportunity to respond to these questions.

Sincerely,

  
Deborah A. Garza



Wilson Sonsini Goodrich & Rosati  
PROFESSIONAL CORPORATION

**Senate Judiciary Committee  
Subcommittee on Antitrust, Competition Policy and Consumer Rights  
Hearing on “S. 2102: the Standard Merger & Acquisition Review Through Equal  
Rules Act of 2015”  
October 7, 2015**

**Senator Klobuchar’s Question for the Record for Jonathan Jacobson**

- 1. In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?**

The simple answer to the question is “no. Never.” But let me elaborate. In my 39 years of practice, the firms in which I have been a partner have sheperded many dozens of mergers through the agencies. In each one, the planning process has included a prediction as to which agency would be cleared to evaluate the transaction. In *none* has there been *any* consideration of abandoning or revising the transaction because of the possibility that, after prevailing in an FTC-brought preliminary injunction proceeding, the Commission might later unwind the merger through an administrative proceeding. The potential for such an outcome occasionally appears as a single sub-bullet point in a long PowerPoint, but *never* affects planning or evaluation of the transaction’s prospects. The concerns instead are: whether the deal in fact poses a competition problem; whether a second request will be issued; which staff lawyers (e.g., Mergers 2 at the FTC or Lit 3 at DOJ) will handle the matter; whether a preliminary injunction will be granted; and the potential remedies if the merger does not go through unscathed.

As I mentioned in my written statement, I was involved many years ago in matter – *Coca-Cola/Dr Pepper* – that involved both a preliminary injunction and a later Part 3 proceeding. *See* Statement of Jonathan M. Jacobson, Oct. 7, 2015, at 2 & n.1. In that case, the district court *granted* the preliminary injunction, after which Dr Pepper exercised its rights to terminate the transaction and was sold to another buyer. The court of appeals properly vacated the district court decision as moot. Nevertheless, the FTC brought a Part 3 proceeding. Staff and the administrative law judge agreed to dismissal on the ground that continued proceedings were no longer in the public interest. The Commission, however, reinstated the proceeding on a 2-1 vote. The matter proceeded to trial and to a decision by the full Commission, after which Coca-Cola appealed to the D.C. Circuit. While the appeal was pending, the Commission issued its 1995 revised policy on administrative litigation following denial of a preliminary injunction and settled with Coca-Cola around the same time.

I mention this history for two reasons. First, the process involved in *Coca-Cola/Dr Pepper* would *not be affected* by the proposed SMARTER Act because the proceedings there did not involve a “proposed” merger – but instead a merger that had been abandoned. The bill would not inhibit the use of Part 3 where the merger had been enjoined and abandoned; it applies only to those mergers that have *not* been enjoined and that therefore may continue to pose a threat of consumer harm. This makes no sense at all. Second, and more importantly, *Coca-Cola/Dr Pepper* was a catalyst in the commission’s reassessment of the use of Part 3 in merger cases, resulting in the procedures we have today. Those procedures require a careful evaluation by the Commission of the value of a follow-on administrative proceeding. And the upshot is that there has not been a single merger since then challenged in Part 3 after a preliminary injunction has been denied.

In short, in the wake of *Coca-Cola/Dr Pepper* and the revised Commission policy, **there is no problem** – much less one that requires an act of Congress to address.

For these reasons, and the reasons set forth in my oral and written testimony, I urge the committee to *reject* that part of the proposed SMARTER Act that would prevent the Commission from conducting administrative proceedings following denial of a preliminary injunction.

Jonathan Jacobson

**Questions for the Record**  
**Senator Orrin G. Hatch**  
**Senate Judiciary Committee**  
**Subcommittee on Antitrust, Competition Policy, and Consumer Rights**  
**Hearing: “S. 2012, The ‘Standard Merger and Acquisition Reviews Through Equal Rules**  
**(SMARTER) Act of 2015’”**  
**Wednesday, October 7, 2015**

**Question for Abbot B. Lipsky, Partner, Latham & Watkins LLP**

1. Do you believe that the FTC and DOJ do in fact face different standards for obtaining a preliminary injunction in a merger review case? How do those different standards affect how the agencies approach merger cases? How do the different standards affect parties’ decisions about whether to merge?

Yes, I believe that recent cases such as *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), and *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009), create a substantial argument that the FTC enjoys a more lenient preliminary injunction standard under 15 U.S.C. §53(b) than the standard applicable to Department of Justice requests for preliminary injunction under 15 U.S.C. §25. This creates a temptation for the FTC to block transactions where it finds merely colorable evidence that a merger will be anticompetitive (arguably sufficient to win a preliminary injunction under the standard articulated by the cited cases), even in situations where the Commission would not succeed in proving a case at trial on the merits.

The current divergence in preliminary injunction standards leads parties to inject an additional level of caution into their consideration of transactions above and beyond that which would be appropriate if the application of the more traditional standard applied to the Justice Department could be expected. That additional degree of caution should not be underestimated: the expense, management distraction, compelled disclosure of sensitive information, often-unfavorable publicity and other disruptions inherent in any intense antitrust litigation matter – disruptions that become especially pronounced if litigation occurs over an extended time, as it frequently does – weigh very heavily against considering a potentially controversial merger from the perspective of any responsible and well-advised business manager. Based on my professional experience in advising parties with regard to transactions that potentially raise antitrust questions, this additional note of caution deters procompetitive or competitively neutral transactions to an appreciable degree.

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**Senate Committee on the Judiciary**  
**Subcommittee on Antitrust, Competition Policy and Consumer Rights**  
**“S. 2102 , The ‘Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015’”**

**Questions for the Record: Senator Amy Klobuchar**

1) *Questions for Ms. Garza, Mr. Lipsky, Mr. Clanton, and Mr. Jacobson*

- In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?

Yes. When the Dr Pepper Company announced that it was terminating its agreement to be acquired by The Coca-Cola Company, its then-owner (private equity firm Forstmann, Little & Company) specifically attributed that termination to the prospect of continuing administrative litigation with the Federal Trade Commission that would otherwise have resulted – precisely the type of proceeding that would be addressed by the SMARTER Act (specifically by the provision that would require the Commission to seek a permanent injunction under Section 13(b) rather than by proceeding through its own Part III administrative litigation for unconsummated transactions such as the then-proposed Coca-Cola Co./Dr. Pepper Co. transaction). As quoted in the Los Angeles Times when the announcement was made,

“We have no other choice but to request (that) the agreement be terminated given the prospect of years of litigation with the Federal Trade Commission and the resulting potentially adverse effect on the operations and employees of Dr Pepper,” Theodore J. Forstmann, general partner of Forstmann, Little, said in the statement.

Jube Shiver Jr., *Dr Pepper Halts Plan to Merge With Coca-Cola: Companies Say Prospect of Lengthy FTC Proceedings Caused Deal’s Cancellation*, Aug. 6, 1986,

[http://articles.latimes.com/1986-08-06/business/fi-1607\\_1\\_dr-pepper](http://articles.latimes.com/1986-08-06/business/fi-1607_1_dr-pepper).

The Federal Trade Commission continued administrative prosecution of its complaint against the abandoned transaction even following the determination by the U.S. Court of Appeals for the D.C. Circuit that the matter was moot, due in part to the termination of the agreement with Coca-Cola Company by Forstmann, Little and to the

sale of Dr Pepper Company by Forstmann, Little to Hicks & Haas, another investment firm. *FTC v. Coca-Cola Co.*, 829 F.2d 191 (D.C. Cir. 1987).<sup>1</sup> The Commission's administrative litigation led to a final FTC decision finding the transaction unlawful under Section 7 of the Clayton Act and Section 5 of the FTC Act, and ordering relief. *Coca-Cola Co.*, 117 F.T.C. 795 (1994). The parties ultimately settled the matter while it was pending administrative review before the D.C. Circuit, prior to full merits briefing. It took nearly nine years for the entire process to unfold.<sup>2</sup>

The foregoing can be verified readily on the basis of public-record information. In my opinion the prospect of continuing FTC administrative litigation following issuance of a preliminary injunction in this specific case had a discouraging effect on consideration of subsequent transactions by a number of firms that I have advised over the years. While companies seldom disclose that they have considered a specific transaction and then decided not to pursue it due to antitrust considerations, the public-record facts of the Coca-Cola Co./Dr Pepper Co. matter provide a sobering reminder to any well-counseled management that transactions that may raise non-trivial antitrust issues can result in "years of litigation with the Federal Trade Commission and the resulting potentially adverse effect" on business. It is therefore my opinion that this history forms an integral part of the legal and practical background that well-counseled businesses consider when evaluating the potential risks of any such transaction.

As discussed in my testimony and at the Subcommittee hearing, the Commission's adoption in 1995 of the Policy Statement regarding Administrative Litigation Following the Denial of a Preliminary Injunction and Rule 3.26 (16 C.F.R. § 3.26) – even though it expressed no firm commitment by the Commission – was widely understood (due to the roughly contemporaneous conclusion of the R.R.

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<sup>1</sup> The short opinion *per curiam* explains the Court's decisions (1) to dismiss the appeal as moot and (2) to remand to the district court with instructions to vacate the preliminary injunction.

<sup>2</sup> For complete clarity I point out that my personal involvement in this matter began when I joined the Coca-Cola Company Law Department in July 1992, after the administrative litigation had been under way for about six years. After supervising the remaining administrative aspects and Court of Appeals phases of the matter, I also had primary responsibility on the Coca-Cola side for the negotiation of the settlement that was ultimately worked out with the Commission.

Donnelley/Meredith Burda and Coca-Cola/Dr Pepper matters) as signaling Commission reluctance to pursue Part III litigation with regard to transactions that had been subject to preliminary injunction proceedings under Section 13(b). It is my understanding that for thirteen years after issuance of the Policy Statement there was no Part III administrative litigation following disposition of a Section 13(b) preliminary injunction in a case involving an unconsummated merger. As time wore on, this might have reduced any chilling effect that would otherwise have resulted from awareness of those earlier proceedings within the antitrust bar and the business community.

In 2008, however, pursuit of administrative litigation following the Commission's loss on motion for preliminary injunction against the Whole Foods Market, Inc./Wild Oats Markets, Inc. acquisition, and changes to the Commission's Rules of Practice for Part III litigation, including Rule 3.26, gave a powerful signal that the "Pitofsky Rule" was unlikely to be followed from that time forward.<sup>3</sup> Since that time the prospect of continuing FTC administrative litigation has been as important as it had been just prior to the issuance of the Policy Statement in 1995, in light of the R.R. Donnelley/Meredith Burda and Coca-Cola/Dr Pepper cases. Although I recognize that the Commission very recently took action apparently intended to restore Rule 3.26 to its status in the 1995-2008 period,<sup>4</sup> in my opinion this is and will be perceived as a discretionary Commission action that can be reversed at any future time, similar to the Commission's previous changes in course on the issue in 1995 and again in 2008. Thus the prospect of Part III litigation will continue to be an important deterrent to the consideration of transactions that may raise antitrust issues – even if such transactions may ultimately be found lawful under prevailing substantive antitrust standards – until the persistent threat of continuing FTC Part III proceedings is more definitely settled by statute.

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<sup>3</sup> See, e.g., Neal R. Stoll & Shepard Goldfein, *Random Events in Merger Notices: 'Cleared to DOJ' vs. 'Cleared to FTC'*, 240 N.Y.L.J. (Dec. 16, 2008) ("Don't expect the commission to continue to adhere to the sentiments expressed in the 1995 Policy Statement . . ." (quoting extensively from FTC Proposed Amendment to 16 CFR Parts 3 & 4, 73 Fed. Reg. 58,832, 58,837 (Oct. 7, 2008) (quotation omitted))).

<sup>4</sup> Debbie Feinstein, FTC, *Changes to Commission Rule 3.26 re: Part 3 Proceedings Following Federal Court Denial of a Preliminary Injunction* (Mar. 16, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings>.

2) *Questions for Ms. Garza, Mr. Lipsky, and Mr. Clanton*

As I understand your concern, you believe that some courts, in assessing the likelihood of success element for a preliminary injunction, have interpreted 15 U.S.C. § 53(b) to require the FTC only to raise “questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination,” and you believe that standard is lower than what is required under the traditional common law test for a preliminary injunction. It appears that some courts have adopted similar language in applying the common law test for a preliminary injunction, at least where the balance of harm favors the plaintiff. For example, the Second Circuit requires a plaintiff to raise “sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.” *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quotation and citation omitted).

- How is the standard under 15 U.S.C. § 53(b) different than the test articulated by the Second Circuit?

Despite apparent similarities between the precise verbal formulation of the “common-law” preliminary injunction standard and the § 13(b) preliminary injunction standard, the use of this specific Second Circuit opinion as a basis for comparison of the two standards is subject to a variety of difficulties. *Citigroup Global* is not an antitrust case, but litigation between two private parties, as distinct from litigation brought against private parties in the name of an agency of the United States, as government merger challenges are.

The Second Circuit recognizes this distinction and has specifically addressed the importance of maintaining emphasis on proof by the government of a “reasonable likelihood of success on the merits,” which it regards as a higher standard than the “serious questions” formulation:

Because the Government in seeking to enjoin a merger under § 7 represents the public's interest in a competitive marketplace, the standards governing the granting of preliminary relief in private litigation are inappropriate. Thus, once the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed. To warrant that presumption, however, the Government must do far more than merely raise sufficiently serious questions with respect to the merits to make them a fair ground for litigation. A preliminary injunction remains a drastic form of relief.

*United States v. Siemens Corp.*, 621 F.2d 499, 506 (2d Cir. 1980) (citations omitted).

- The one clear difference between the test described in 15 U.S.C. § 53(b) and the test generally articulated under common law is that the 53(b) standard does not require proof of irreparable harm. Under the common law preliminary injunction test, how often would the Department of Justice be unable to show irreparable harm when challenging an unconsummated merger? Please identify the conditions under which the Department of Justice could not make a showing of irreparable harm.

Absent unusual specific circumstances, the Department of Justice shows irreparable harm from a transaction whenever it establishes a substantial probability of success on the merits. This is because a consummated merger is usually very costly to “undo” – the most basic assumption underlying both the preliminary injunction authority granted to the FTC in Section 13(b) in 1973 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. But this element is not and should not be deemed satisfied by a showing of colorable evidentiary support for a case on the merits – the “serious questions” standard. As the Justice Department’s litigation record shows, it is highly unlikely to fail in its showing of irreparable harm in cases where it proves substantial probability of success on the merits.

- Although the Federal Trade Commission may have a lower burden to obtain a preliminary injunction than a private party, is there any court decision that has said the Federal Trade Commission has a lower burden to obtain a preliminary injunction than the Department of Justice?

Among the recent cases most frequently mentioned in this connection are *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), and *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). Although it is possible to contend that such cases do not say *in haec verba* that the FTC has a lower preliminary injunction standard than the Department of Justice, as mentioned in my written testimony at page 10, it is clear that other highly respected experts construe these cases as authority for the existence of a lower standard for FTC. I cited specifically the earlier testimony of former FTC Chairman Timothy Muris, who has been directly involved in FTC merger litigation – as FTC Chairman and as a legal representative and advisor to private parties in litigation with the FTC – over an extended period of time, and who has concluded:

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.

*Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers—Part II: Hearing Before the Subcomm. on Consumer Protection, Product Safety & Insurance of the S. Comm. on Commerce, Science & Transportation, 111th*

Cong. 57 (2010) (statement of Timothy J. Muris, Foundation Professor, George Mason Univ. Sch. of Law, and of counsel, O'Melveny & Myers LLP).

Questions for the Record for Chairwoman Edith Ramirez

Hearing before the Senate Committee on the Judiciary  
 Subcommittee on Antitrust, Competition Policy and Consumer Rights  
 "S. 2102, The 'Standard Merger and Acquisition  
 Reviews Through Equal Rules Act of 2015'"  
 October 7, 2015

Questions from Senator Lee

1. **If the FTC's administrative process hasn't been used to block a merger in roughly twenty years, how exactly will the special expertise of the FTC be lost if the SMARTER Act becomes law, as you suggested it would be at the hearing? How, if at all, would the SMARTER Act impair the FTC's ability to block anticompetitive mergers?**

The Federal Trade Commission's administrative adjudicative function is a fundamental institutional attribute that for over a century has played a significant role in the development of antitrust law, including merger law, to the benefit of consumers. Importantly, the Commission's expertise is likely to be particularly beneficial in complex and difficult cases where economic learning and research may have developed more quickly than judicial doctrine.

The FTC has used its administrative process to challenge a number of anticompetitive consummated mergers in the past 20 years, including: ProMedica Health System's acquisition of St. Luke's Hospital (affirmed by the Sixth Circuit);<sup>1</sup> Polypore's acquisition of Microporous (affirmed by the Eleventh Circuit);<sup>2</sup> Evanston Northwestern Healthcare's acquisition of Highland Park Hospital (appeal dismissed);<sup>3</sup> and Chicago Bridge & Iron's acquisition of assets from Pitt-Des Moines, Inc. (affirmed by the Fifth Circuit).<sup>4</sup> In each of these cases, the Commission issued a detailed decision that helped develop key aspects of merger doctrine, including the standard for entry analysis, the issue of potential competition, and the appropriate way to assess market power in hospital markets. Commission decisions describing the agency's approach to merger review and advancing and refining merger analysis through the adjudicative process benefit both consumers and the business community.

Admittedly, the FTC has not recently used its administrative process to block an unconsummated merger. That is due largely to the reality that litigated challenges in unconsummated merger cases are rare overall. Like at the FTC, very few of the matters involving unconsummated transactions challenged by the Department of Justice have gone to trial. In the vast majority of cases, it is possible to negotiate a solution that allows the procompetitive benefits of a transaction to go forward while addressing competitive concerns.

<sup>1</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

<sup>2</sup> *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012).

<sup>3</sup> Opinion of the Commission, *Evanston Nw. Healthcare Corp.*, No. 9315, (F.T.C. Aug. 6, 2007), available at <https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopiniononremedy.pdf>.

<sup>4</sup> *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008).

However, in the instances where litigation is necessary to block an unconsummated anticompetitive transaction, I believe the Commission should continue to exercise the adjudicative role that Congress very deliberately assigned the agency at its inception. The current system has worked well for over one hundred years, and all indications are that it will continue to do so. In my view, the proposed legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement.

**2. Please explain the argument justifying the FTC’s ability to block a merger through a preliminary injunction rather than through the merits-based standard used by the DOJ?**

- **Please explain how this is an equitable process for those companies whose mergers are blocked by the FTC rather than the DOJ?**

As a threshold matter, the FTC does not block mergers with preliminary injunctions. A preliminary injunction temporarily preserves the status quo pending an administrative trial. When it seeks a preliminary injunction, the FTC is required to show a likelihood of success on the merits and that the equities favor the granting of an injunction. In evaluating the Commission’s likelihood of success on the merits, the same substantive legal standards apply – Section 7 of the Clayton Act – regardless of which agency is bringing the challenge. The FTC, like DOJ, must make a strong evidentiary and legal showing that the proposed transaction would likely be anticompetitive. As the federal district court in *FTC v. Sysco* recently emphasized, the Commission must have “rigorous proof” to obtain a preliminary injunction.<sup>5</sup> That district courts take their role in evaluating Commission preliminary injunction requests very seriously and apply a merits-based standard is demonstrated by the rulings issued in Commission wins and losses alike.<sup>6</sup>

Furthermore, the fact that the FTC first seeks a preliminary injunction and then proceeds to a trial in an effort to secure permanent relief—an approach that any litigant, including the DOJ, can take—does not render its process unfair. Indeed, as detailed at greater length in the Commission’s written testimony, there is no evidence that the Commission’s procedures prejudice the parties before it. Notably, both agencies have comparable records when it comes to overall merger enforcement actions, including challenged mergers and mergers that result in settlements or abandoned or restructured transactions.<sup>7</sup>

**3. In your view, would the outcome of the Sysco/US Foods case have been different if it had involved a bench trial on the merits rather than a trial awarding the FTC a preliminary injunction? Would the Court of Appeals Decision in *Whole Foods* have been different had it been a full merits proceeding?**

<sup>5</sup> *FTC v. Sysco Corp.*, --- F. Supp. 3d ---, 2015 WL 3958568, at \*9 (D.D.C. June 23, 2015).

<sup>6</sup> *Id.*; see also *FTC v. Steris Corp.*, --- F. Supp. 3d ---, 2015 WL 5657294, at \*23 (N.D. Ohio September 24, 2015); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012).

<sup>7</sup> See, e.g., FED. TRADE COMM’N & DEPT. OF JUSTICE ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2014 9, 12-13 (2015), available at [https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino-s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr\\_report.pdf](https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino-s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr_report.pdf).

Although it is difficult to speculate about counterfactual scenarios, because of the extensive records before the federal district court in *FTC v. Sysco Corp.* and before the federal court of appeals in *FTC v. Whole Foods Market, Inc.*, I believe it is unlikely that the result would have been different in either case following a permanent injunction trial.

In *Sysco*, the district court judge remarked that the proceedings were “extraordinary,” with the litigants exchanging millions of documents, deposing dozens of witnesses, and securing over a hundred sworn declarations.<sup>8</sup> All aspects of the Clayton Act merger analysis were fully briefed by both sides, and each side had an opportunity to present substantial live testimony during the eight-day trial. The district court then issued a lengthy decision weighing the evidence on every relevant point. In the end, the court found that the FTC had met its burden of showing a “reasonable probability” that the merger of the nation’s two largest broadline foodservice distributors would harm competition and that “the evidence offered by Defendants to rebut the FTC’s showing of likely harm was unavailing.”<sup>9</sup> Given this record, it seems unlikely that the judge would have reached a different conclusion had he been ruling on a motion for a permanent injunction.

*Whole Foods* also involved copious documents, numerous declarations and depositions, detailed expert reports, trial testimony, and thorough briefing. Accordingly, I believe the court of appeals likely would have reached a similar decision if it had been reviewing the denial of a permanent injunction rather than a preliminary injunction.

**4. Why hasn’t the FTC implemented the AMC recommendation to seek a permanent injunction in court?**

Congress created the FTC for the very purpose of having it serve as a complement to antitrust enforcement by DOJ. In doing so, Congress granted the FTC certain unique authority, the centerpiece of which is the Commission’s adjudicative function. The Commission continues to believe there is considerable value to its administrative process, as I have described above and in more detail in the Commission’s written testimony. As a result, the Commission has continued to perform its enforcement role using the authority we were granted and thus chosen not to moot that function by seeking a permanent injunction in federal court when challenging an unconsummated merger.

**5. When the FTC argues for a preliminary injunction has it ever argued before a court that it indeed has a different standard than the DOJ? If so, please identify the various FTC court filings in which it has done so.**

Based on staff’s review of relevant briefs filed in preliminary injunction cases since 2000, we have not identified any case in which the FTC argued that its standard was different from the DOJ standard for obtaining a preliminary injunction. In fact, in a brief filed this past March, the FTC highlighted how its standard is *similar* to the DOJ’s. See Memorandum in Support of Plaintiff Federal Trade Commission’s Motion for Temporary Restraining Order and Preliminary Injunction at 8, *FTC v. Sysco Corp.*, 2015 WL 3958568 (No. 1:15-cv-00256-APM) (describing

<sup>8</sup> *FTC v. Sysco Corp.*, 2015 WL 3958568, at \*2.

<sup>9</sup> *FTC v. Sysco Corp.*, 2015 WL 3958568, at \*61.

the FTC standard for “likelihood of success on the merits” as the same as that for DOJ in analogous circumstances).

**Question from Senator Hatch**

- 1. How often does the Commission disagree with the staff recommendation in a merger review case? Is it a common occurrence, or is it unusual? If you can, please give me a percentage.**

In each merger matter, as well as in anticompetitive conduct cases, the Commission receives multiple recommendations from FTC staff. At a minimum, it receives separate recommendations from staffs of the Bureau of Competition (“BC”) and the Bureau of Economics (“BE”), as well as from the directors of BC and BE. The Office of General Counsel may also weigh in – either with a formal memorandum or more informally. Those recommendations are typically aligned, but in a small percentage of cases, there may be differing views. Thus, when there is not a staff consensus, the majority of the Commission will agree with some staff, but disagree with other staff. It may also be the case that one or more Commissioners dissent. In that circumstance, there may or may not be agreement with some or all of the staff. Given the many different possibilities, we do not track the percentage of times the Commission or an individual Commissioner agrees or disagrees with any particular staff recommendation.



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

December 23, 2008

The Honorable John Conyers, Jr.  
Chairman  
Committee on the Judiciary  
United States House of Representatives  
Washington, D.C. 20515-6216

Dear Chairman Conyers:

Thank you for your letter of December 18, 2008, asking for the Commission's views on the different ways in which the Federal Trade Commission and the Department of Justice enforce Section 7 of the Clayton Act, which prohibits mergers or acquisitions that tend to create a monopoly or substantially lessen competition. 15 U.S.C. § 18. We take very seriously all correspondence from members of Congress, but have paid special heed to your letter because it concerns the very nature of the Federal Trade Commission (FTC) as it has existed for nearly a century.

You note in your letter that the Antitrust Modernization Commission (AMC) has recommended that the procedures and substantive legal standards of the FTC and the Justice Department's Antitrust Division (the Division) be harmonized by having the FTC adopt the Division's procedures and standards in cases arising under the Hart-Scott-Rodino Act (HSR), 15 U.S.C. § 18a. The AMC's recommendations in this respect were not unanimous. Several Commissioners dissented.<sup>1</sup> The AMC Report is correct in stating that the procedures and standard in preliminary injunction cases brought under Section 13(b) of the FTC Act are different from the procedures and standard applicable to preliminary injunctions in litigation conducted by the Division. This difference exists by design, and the way the FTC has functioned has served the public interest well.

However, there is no difference in the ultimate determination of whether an acquisition is illegal under the Clayton Act. The standard is the same whether the Department of Justice brings the action in federal court or whether there is administrative litigation before the FTC: each

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<sup>1</sup> For example, Vice-Chair (and former General Counsel of the Judiciary Committee) Yarowsky and Commissioner Cannon dissented from the recommendation that the Commission adopt a policy to challenge HSR mergers only in federal court. Similarly, Vice-Chair Yarowsky and Commissioners Burchfield and Cannon dissented from the recommendation that the same standards for granting a preliminary injunction apply to actions brought by the Antitrust Division and the FTC.

The Honorable John Conyers, Jr. – Page 2

agency must establish by a preponderance of the evidence that the acquisition may substantially lessen competition.

The Antitrust Division is an arm of the Justice Department, which of course is an Executive Branch agency. Like a number of other Justice Department divisions, its function is primarily prosecutorial in nature. As such, the Division does not decide the antitrust cases it prosecutes. Those cases are prosecuted in, and decided by, the federal district courts, generally in permanent injunction proceedings. Those courts are not specialized antitrust courts. To the contrary, they are generalist courts, which handle hundreds of other cases, criminal and civil, in which the few antitrust cases tried are, except in actions for permanent injunctions, frequently decided by juries rather than the courts themselves.

By contrast, as you know, the FTC is not an Executive Branch agency like the Justice Department or its various divisions. It was instead created by the Congress as an independent agency. To be sure, its members are appointed by the President and the President selects the Chairman from among the sitting Commissioners. But the President's appointments are subject to confirmation by the Senate, and no more than three of the five Presidential appointees may be members of the same political party. Moreover, the FTC's activities are subject to oversight by various congressional committees, which have rigorously exercised their oversight responsibilities. Also, the FTC, unlike the federal district courts, was conceived by the Congress as a specialized agency, expert in the consumer protection and antitrust matters entrusted to it. Finally, unlike the Division or any other arm of the Justice Department, the FTC was not supposed to be strictly and solely a prosecutorial agency. Instead the Congress gave it *both* prosecutorial and judicial functions.

These differences between the FTC and the Division are not the result of Congressional inadvertence or of any arrogation of powers by the FTC. They are the result of thoughtful deliberation by the Congress and President, which created the agency in 1914. Representative Covington, who authored the original bill, emphasized that, because the agency would have specialized expertise and experience, it should have both prosecutorial and judicial functions. He declared in pertinent part:

[T]he function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair and, if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature. . . . The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature.

Congressional Record, Sept. 10, 1914, at 14931-33.

This conception of the FTC is reflected in Section 5 of its organic statute. It empowers the FTC to issue a complaint when it has "reason to believe" that an unfair method of competition or an unfair or deceptive act or practice has occurred and that the complaint would

The Honorable John Conyers, Jr. – Page 3

be “in the public interest,” and then, after a “hearing,” to make “findings as to the facts” and to issue a “cease and desist” order against any such violation. Notably, the federal district courts are not given any jurisdiction or power to review FTC adjudicative decisions, and the power to review those decisions is given exclusively to the federal appellate courts. 15 U.S.C. § 45.

Accordingly, the federal courts have repeatedly described the FTC as an agency that is independent, possesses “experience” and “expertise” in “the problems to be met,” and has “judicial” or “quasi-judicial” functions. See *Humphrey's Executor v. United States*, 295 U.S. 602, 624-25, 631 (1935); see also *Hosp. Corp. of Am. v. FTC*, 807 F.2d, 1381, 1386 (7th Cir. 1986) (“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 determination of antitrust questions. It sought the assistance of an administrative body in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act . . .”) (Posner, J.); *FTC v. Whole Foods Market, Inc.*, 2008 U.S. App. LEXIS 24092, at \*33 (Tatel, J., quoting Judge Posner).

Thus, from its very inception the Commission has had the authority, and the mandate, to initiate administrative proceedings whenever it found reason to believe that a law it enforces is being violated and at the conclusion of such proceedings to issue final cease and desist or divestiture orders upon finding actual law violations.

In 1973 Congress determined that the public interest would best be served by allowing the Commission to obtain temporary and preliminary injunctions from the federal district courts in aid of adjudicative proceedings to be conducted before the FTC. At that time, Congress enacted Section 13(b) to strengthen the FTC’s adjudicatory capability by, among other things, empowering the FTC to seek preliminary injunctive relief from the federal district courts pending plenary trials at the Commission. 15 U.S.C. § 53 (b). Often times, it is hard to remedy an anticompetitive merger once the parties have completed the transaction. In enacting that legislation, Congress made it clear that the federal district courts should not usurp the FTC’s adjudicatory function in such cases. Thus, the legislative history declared that “[t]he intent is to maintain the statutory or ‘public interest’ standard which is now applicable, and not to impose the traditional ‘equity’ standard of irreparable damage, probability of success on the merits, and the balance of hardships favors the petitioner. . . [T]hat standard is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measures the propriety and need for injunctive relief.” H. R. Rep. No. 624, 93rd Cong., 1st Sess. 31 (1971).

Reflecting its recognition of the intentions of Congress as expressed in these statutes and their legislative history, the courts of appeals have fashioned a 13(b) standard that safeguards the public interest in having the Commission instead of the federal district courts judge the merits of the antitrust and consumer protection matters entrusted to it. For example, in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15, 726 (D.C. Cir. 2001), the court held that issuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them a “fair ground for

The Honorable John Conyers, Jr. – Page 4

investigation.”<sup>2</sup> The D.C. Circuit has just re-affirmed this deferential standard in denying a petition for rehearing en banc and issuing only slightly revised panel decisions in *Whole Foods Market*, 2008 U.S. App. LEXIS 24092.

In short, if the Commission were simply a prosecutor like the Antitrust Division, instead of exercising dual prosecutorial and judicial functions, that would not only reverse the Congressional intent that has prevailed for nearly a century; it would also differentiate the Commission in this respect from numerous other federal independent agencies. Under the Administrative Procedure Act (APA), many such agencies possess the dual functions which Congress has intended the FTC to exercise. The FTC was intended to apply specialized antitrust expertise to important competition issues. It serves the public interest in maintaining competitive markets by providing this expertise.<sup>3</sup>

One of the most critical advantages, and a cornerstone characteristic of administrative agencies, is expertise. The Congress and the Executive have long recognized that the ability of agencies to devote continuous time, supervision, and expertise to complex problems calling for specialized knowledge is a critical advantage and an important reason for the creation of administrative agencies. With its expertise and unique institutional tools, the Commission was created to be – and continues to function as – a forum for expert adjudication.

This is not to say that the Commission cannot better perform its adjudicatory function. In fact, that is exactly what the Commission is trying to accomplish by amending the rules of practice applicable to the FTC’s adjudicatory (Part 3) proceedings. However, there is arguably at least as strong a case for legislation that would vest in the FTC exclusive jurisdiction over all HSR merger matters prosecuted by the federal government (or that would require the Division to prosecute its HSR merger case in plenary trials conducted at the FTC) as there is for legislation requiring the FTC, like the Division, to conduct its HSR merger litigation exclusively in the federal district courts. *See* 1989 Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission at 108-118.

Finally, we emphasize that the FTC will *not* ignore the rulings and jurisprudence of the federal courts. To the contrary, the Commission’s 1995 Statement, where the FTC declared that it will not automatically proceed to administrative litigation when a preliminary injunction has been denied, and instead will consider the five factors outlined in the Statement, proceeding on a

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<sup>2</sup> Other appellate courts have embraced this standard as well. *See FTC v. University Health Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (*per curiam*).

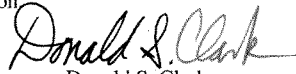
<sup>3</sup> In its current composition, the Commission has unparalleled antitrust expertise and experience. All four of the current Commissioners have extensive antitrust expertise and experience. Combined, the current Commissioners have nearly a century of antitrust experience (and one has served as the Director of the FTC’s Bureau of Consumer Protection).

The Honorable John Conyers, Jr. – Page 5

case-by-case basis, will remain operative.<sup>4</sup> 1995 Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741, 39743 (1995). And, of course, all of the FTC's decisions in plenary trials are subject to review by the federal appellate courts, including the Supreme Court. Accordingly, in applying the Sherman and Clayton Acts, the FTC will continue to adhere to the jurisprudence of those courts.

Thank you for giving us this opportunity to comment on these important issues. We are at your disposal to testify about them at a hearing or to discuss them more informally with you and your staff.

By direction of the Commission



Donald S. Clark  
Secretary

cc: The Honorable Lamar S. Smith  
United States House of Representatives  
Washington, D.C. 20515

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<sup>4</sup> The five factors are: (1) the factual findings and conclusions of law of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger injunction policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.



800 10th Street, NW  
Two CityCenter, Suite 400  
Washington, DC 20001-4956  
(202) 638-1100 Phone  
www.aha.org

**Statement  
of the  
American Hospital Association  
before the  
Subcommittee on Regulatory Reform, Commercial and Antitrust Law  
of the  
Judiciary Committee  
of the  
U.S. House of Representatives**

Hearing on the  
“Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015”

**October 7, 2015**

On behalf of nearly 5,000 member hospitals, health systems and other health care organizations, and our 43,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to submit this statement to the Judiciary Committee’s Subcommittee on Regulatory Reform, Commercial and Antitrust Law in support of H.R. 2745, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, also known as the SMARTER Act.

H.R. 2745 is a bill that has been narrowly crafted to accomplish one important outcome: to ensure that all proposed transactions face the same enforcement process and standard of review regardless of whether the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ) reviews the transaction. It codifies key recommendations of the bipartisan Antitrust Modernization Commission created in 2002.<sup>1</sup> In particular, H.R. 2745 amends the Clayton Act, 15 U.S.C. §§ 12-27, and the FTC Act, 15 U.S.C. §§ 41-58, to eliminate the FTC’s ability to bring administrative proceedings to challenge a proposed transaction under Section 7 of the Clayton Act, 15 U.S.C. § 18, and to require both the FTC and the DOJ to meet the same preliminary injunction standard when moving for a preliminary injunction in federal court.

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<sup>1</sup> See [http://govinfo.library.unt.edu/amc/report\\_recommendation/toc.htm](http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm).



Both the FTC and DOJ are charged with enforcing Section 7 of the Clayton Act, which prohibits transactions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”<sup>2</sup> However, the two agencies follow different enforcement processes and are subject to different standards of review. While the DOJ litigates transactions in a full hearing on the merits in federal court before an impartial judge, the FTC’s practice is to pursue a preliminary injunction in federal court while at the same time commencing internal administrative proceedings in which the agency has a decided advantage. Moreover, a federal judge applies a different, and arguably more deferential, standard of review to a request for a preliminary injunction from the FTC, as compared to the same request from the DOJ. Therefore, parties whose proposed transaction is reviewed by the FTC can reasonably expect a more burdensome enforcement process, a higher likelihood of abandoning the transaction, and the potential for a different substantive outcome.

The disparate treatment of proposed transactions depending upon whether the FTC or DOJ challenges the transaction under Section 7 of the Clayton Act demands a clear and targeted congressional response. The AHA urges Congress to pass H.R. 2745 for two reasons:

1. The bill harmonizes the FTC’s authority to review and challenge proposed transactions with that exercised by the DOJ, while preserving the FTC’s ability to pursue administrative litigation to enforce laws and regulations exclusively within its purview.
2. In so doing, the bill removes a deterrent to hospital integration and realignment, which is essential for success in the changing health care landscape.

#### **H.R. 2745 HARMONIZES THE FTC’S AND THE DOJ’S AUTHORITY TO REVIEW AND CHALLENGE PROPOSED TRANSACTIONS**

Although the FTC and DOJ have concurrent jurisdiction to enforce Section 7 of the Clayton Act, the FTC and DOJ have developed a “clearance” process over time by which review of certain proposed transactions is allocated either to the FTC or DOJ. There is no difference in the size or structure of the transactions allocated to each agency. The only relevant difference between the transactions reviewed by the FTC, as opposed to the DOJ, is the sector of the economy in which the parties to the transaction operate. Nevertheless, there are significant differences between the enforcement processes followed by and the standards of review applicable to the two agencies.

If the DOJ reviews a transaction and chooses to enforce Section 7 of the Clayton Act, it often agrees with transacting parties to consolidate proceedings for preliminary and permanent injunctive relief under Rule 65(a)(2) of the Federal Rules of Civil Procedure.<sup>3</sup> As a result, the DOJ and the transacting parties benefit from a streamlined process to a full hearing on the merits within a matter of months. Congress did not specify a specific standard of review for DOJ requests for a preliminary injunction to enforce Section 7 of the Clayton Act. As a result, federal courts typically apply a modified version of the traditional four-factor test for preliminary

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<sup>2</sup> 15 U.S.C. § 18.

<sup>3</sup> See Fed. R. Civ. P. 65(a)(2).

injunctions, which, among other things, requires a showing of the DOJ's likelihood of success on the merits. However, since, in practice, the DOJ often agrees to consolidate the preliminary and permanent injunction phases of its enforcement actions, the DOJ in almost all cases must prove a violation of Section 7 of the Clayton Act, rather than simple likelihood of success on the merits, to block a proposed transaction.

Alternatively, if the FTC reviews a transaction and chooses to enforce Section 7 of the Clayton Act, it files a motion for a preliminary injunction in federal court while simultaneously initiating internal administrative proceedings. Moreover, because these proceedings are not consolidated, the FTC can proceed with administrative litigation regardless of the outcome of the preliminary injunction hearing. In the past, the FTC has suggested that "the norm should be that the [administrative litigation] can proceed even if a court denies preliminary relief."<sup>4</sup>

This two-step process, as compared to the DOJ's more streamlined process, costs transacting parties both time and money. For example, there was an approximately three-month lag between the DOJ's issuance of a complaint to American Airlines and US Airways challenging their proposed transaction and the date scheduled for a consolidated hearing on the merits in federal district court, with a ruling expected shortly thereafter.<sup>5</sup> The transacting parties could then have appealed an opinion in the DOJ's favor to a United States Court of Appeals. In contrast, an administrative law judge took an additional nine months to rule on the consummated transaction between ProMedica Health System and St. Luke's Hospital after a federal judge granted the FTC's request for a preliminary injunction. ProMedica Health System and St. Luke's Hospital then appealed the administrative law judge's decision to the full Commission, which took an additional three months to uphold the administrative law judge's decision.<sup>6</sup> Only then, one year after a federal judge granted the FTC's request for a preliminary injunction, could the transacting parties appeal the Commission's decision to a United States Court of Appeals.

Congress did specify a "public interest" standard of review for FTC requests for a preliminary injunction to enforce Section 7 of the Clayton Act.<sup>7</sup> This standard requires a court to grant the FTC's request for a preliminary injunction "[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."<sup>8</sup> Most practitioners agree there is a perception that the standard is deferential to the FTC. Therefore, transacting parties assume a judge will grant the FTC's request for a preliminary injunction, and the FTC will further litigate the proposed transaction in internal administrative proceedings which inure to its benefit.

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<sup>4</sup> Rules of Practice, 73 Fed. Reg. 58,832, 58, 837 (Oct. 7, 2008) (proposed rules).

<sup>5</sup> See <http://www.justice.gov/atr/case/us-et-al-v-us-airways-group-inc-and-amr-corporation>.

<sup>6</sup> See <https://www.ftc.gov/enforcement/cases-proceedings/101-0167/promedica-health-system-inc-corporation-matter>.

<sup>7</sup> See Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

<sup>8</sup> *Id.*

The cumulative effect of the FTC's two-step enforcement process, as compared to the more streamlined DOJ enforcement process, as well as the arguably more lenient standard of review applicable to FTC motions for a preliminary injunction to enforce Section 7 of the Clayton Act, is to deter some lawful and procompetitive transactions. Transacting parties facing a challenge by the FTC bear the additional cost in time and money of simultaneously litigating a motion for a preliminary injunction before a federal judge applying an arguably more lenient standard, while also preparing to litigate the merits of the proposed transaction before a FTC administrative law judge. There also is the uncertainty of whether the FTC will pursue administrative litigation, regardless of the outcome of the preliminary injunction hearing. Given that time is of the essence in almost every transaction, transacting parties faced with a FTC enforcement action under Section 7 of the Clayton Act often choose to abandon their otherwise lawful and procompetitive transactions rather than assume the uncertainty and cost of protracted litigation. Alternatively, transacting parties whose proposed transaction is reviewed by the DOJ do not face the decision whether to abandon their transaction under the same set of conditions.

The FTC has acknowledged on multiple occasions that its two-step enforcement process can cause delay and uncertainty for transacting parties. In 2009, the FTC instituted comprehensive changes in its procedural rules purportedly to expedite administrative proceedings, but as demonstrated by the ProMedica Health System-St. Luke's Hospital transaction, the FTC administrative proceedings remain cumbersome and lengthy in contrast with DOJ's consolidated hearing on the merits.<sup>9</sup> More recently, the FTC revised its Rules of Practice to reinstate a pre-2009 practice of staying administrative litigation pending the outcome of a preliminary injunction hearing. The FTC also reaffirmed a 1995 policy statement that limited the agency's ability to pursue administrative litigation following the denial of a request for a preliminary injunction, unless the FTC determines that doing so would be in the public interest.<sup>10</sup> But discretionary and often temporary changes to the FTC's rules and policies are no substitute for permanent correction of the problem.

While these revisions to its Rules of Practice are a step in the right direction, they do not: 1) shorten the time frame for administrative proceedings in enforcement actions under Section 7 of the Clayton Act; 2) remove all uncertainty as to whether the FTC will pursue administrative litigation following the denial of a request for a preliminary injunction; 3) ensure all proposed transactions receive a full hearing on the merits in federal court; or 4) address the different standards of review applicable to FTC and DOJ requests for a preliminary injunction. H.R. 2745 accomplishes these objectives without encroaching on the FTC's ability to enforce laws and regulations exclusively within its purview in internal administrative proceedings. Additionally, the FTC would have the same ability as the DOJ to appeal a loss in federal court to a United States Court of Appeals if the transaction raised a significant legal issue, as the FTC did in *FTC v. Phoebe Putney Health System, Inc.*<sup>11</sup> As a result, all transacting parties, no matter in which

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<sup>9</sup> See Rules of Practice, 74 Fed. Reg. 20,205 (May 1, 2009) (to be codified at 16 C.F.R. pt. 3-4).

<sup>10</sup> See Revisions to Rules of Practice, 80 Fed. Reg. 15,157 (Mar. 23, 2015) (to be codified at 16 C.F.R. pt. 2-4).

<sup>11</sup> 133 S. Ct. 1003 (2013).

field they operate, will face the same enforcement process and standard of review in federal court regardless of whether the FTC or DOJ reviews their proposed transaction.

At least one FTC Commissioner has recently stated that she supports “legislative efforts at making the merger review process as similar as possible across the two antitrust agencies.”<sup>12</sup> Specifically, Commissioner Olhausen would support any legislation, including H.R. 2745, “that ensured that courts apply the same PI [Preliminary Injunction] standard to actions brought by the FTC and DOJ” and that made the FTC’s recent revisions to its Rules of Practice “more permanent and restrictive.”<sup>13</sup> According to Commissioner Olhausen, even with these changes, such a bill “will [not] significantly impact the good work the Commission does in the antitrust area.”<sup>14</sup>

### **H.R. 2745 ELIMINATES A DETERRENT TO HOSPITAL INTEGRATION AND REALIGNMENT**

Hospitals, in particular, have been adversely impacted by the different process and standard of review applicable to FTC enforcement actions under Section 7 of the Clayton Act. As a result of the “clearance” process that has developed over time, the FTC reviews all transactions involving hospitals, and, thus, every hospital transaction challenged by the FTC is subject to the FTC’s unfair and punitive two-step enforcement process, as well as the arguably more lenient standard of review that applies to FTC requests for a preliminary injunction.

The additional time and financial burden of litigating a hospital transaction first at the preliminary injunction hearing and then in internal administrative proceedings has deterred many hospitals from pursuing potentially lawful and procompetitive transactions. For example, Inova Health System Foundation,<sup>15</sup> OSF Healthcare System,<sup>16</sup> and Reading Health System<sup>17</sup> have all abandoned proposed transactions that are potentially lawful and procompetitive rather than face a lengthy and expensive administrative litigation with the FTC.

This phenomenon will only get worse as greater integration and alignment become even more essential for hospitals to be successful in the changing health care landscape. Both public and private forces are fueling the drive toward an efficient and effective continuum of care that delivers care to communities in innovative ways and in new, more cost-effective and convenient

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<sup>12</sup> Maureen K. Olhausen, Comm’r, Fed. Trade Comm’n, *A SMARTER Section 5*, Remarks before the U.S. Chamber of Commerce, at 18 (Sept. 25, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/804511/150925smartersection5.pdf](https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf).

<sup>13</sup> *Id.* at 15-17.

<sup>14</sup> *Id.* at 18.

<sup>15</sup> See <http://www.law360.com/articles/58795/facing-ftc-challenge-hospitals-drop-merger-plans>.

<sup>16</sup> See <http://www.law360.com/articles/329680/ill-health-systems-ditch-merger-plans-after-ftc-antitrust-suit>.

<sup>17</sup> See <http://www.law360.com/articles/395215/pa-hospital-merger-killed-after-ftc-broaches-challenge>.

settings. For example, there are significant financial penalties levied on hospitals that are unable to coordinate care and uncertain rewards for hospitals that accept financial risk to keep their communities healthy. Moreover, there are new technologies and care delivery models to which hospitals must adapt if they are to remain viable. The need to become more efficient and obtain access to capital to meet these challenges is leading to more integration and alignment among hospitals.

The FTC's continued use of its two-step enforcement process presents a roadblock to this drive for more efficient hospital integration and alignment. Transacting parties will continue to abandon potentially lawful and procompetitive transactions rather than bear the cost in time and money of moving proposed transactions through a preliminary injunction hearing and then internal administrative proceedings that inure to the FTC's benefit. H.R. 2745 removes these obstacles by forcing the FTC to avail itself of the same enforcement process and standard of review applicable to DOJ enforcement actions. As a result, the FTC will be required to face a full hearing on the merits in federal court before an impartial judge in every enforcement action against a proposed hospital transaction.

#### **CONCLUSION**

The AHA supports enforcement of the antitrust laws; however, all transacting parties, including hospitals, should face the same enforcement process and standard of review regardless of whether the FTC or DOJ reviews the proposed transaction. The agencies' authority to enforce Section 7 of the Clayton Act is uniform, and the processes followed by and the standards of review applicable to each agency's enforcement actions should be as well. H.R. 2745 accomplishes this goal and ensures both the FTC and DOJ will rely exclusively on the federal court system to determine the competitiveness of a transaction, ensuring transacting parties, including hospitals, receive a full hearing on the merits.

CHAMBER OF COMMERCE  
OF THE  
UNITED STATES OF AMERICA

R. BRUCE JOSTEN  
EXECUTIVE VICE PRESIDENT  
GOVERNMENT AFFAIRS

1615 H STREET, N.W.  
WASHINGTON, D.C. 20062-2000  
202/463-5310

October 6, 2015

The Honorable Michael Lee  
Chairman  
Subcommittee on Antitrust, Competition  
Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

The Honorable Amy Klobuchar  
Ranking Member  
Subcommittee on Antitrust, Competition  
Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly supports S. 2102, the "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015."

This legislation is long overdue. As a matter of basic fairness, a proposed merger undergoing antitrust review should be subject to the same government review process regardless of whether the review is conducted by the Department of Justice (DOJ) or the Federal Trade Commission (FTC). The SMARTER Act addresses this concern and is based on the bi-partisan Antitrust Modernization Commission (AMC) recommendations to Congress that state:

Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.

Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.

Under current law, the standard for a court to grant the DOJ a preliminary injunction is different than the standard written in law for the FTC. However, in practice, the Assistant Attorney General for Antitrust and Chair of the Federal Trade Commission have over the years

consistently downplayed this difference in testimony before Congress. The SMARTER Act would ensure that regardless of which agency reviews a proposed transaction, the standard by which a court grants a preliminary injunction is in fact the same.

The SMARTER Act also would require the FTC to go to court to challenge proposed mergers on the merits, in the same manner as the DOJ. There is nothing in the law that determines whether the DOJ or FTC reviews a merger, therefore merging parties should not be subject to two different processes that have the potential to generate different outcomes. The FTC should, like the DOJ, go to court, and mergers should be challenged on the merits before a judge.

The SMARTER Act would not make it any easier for mergers to be cleared as the legislation would not alter the merit review standard in the law. Instead, the SMARTER Act would create efficiencies and guarantee fairness by ensuring proposed merger transactions are reviewed under the same process regardless of whether the transaction happens to be reviewed by the DOJ or FTC. For this reason, the Chamber strongly supports passage of the SMARTER Act.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten". The signature is written in a cursive, flowing style.

R. Bruce Josten

cc: Members of the Committee on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights



October 6, 2015

The Honorable Mike Lee, Chairman  
The Honorable Amy Klobuchar, Ranking Member  
Subcommittee on Antitrust, Competition Policy and Consumer Rights  
Committee on the Judiciary  
United States Senate  
Washington, DC 20510

Dear Chairman Lee and Ranking Member Klobuchar:

Consumers Union, the policy and advocacy arm of Consumer Reports, urges the Committee not to approve S. 2102, 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.

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 a century ago. 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 could also set a precedent 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 technical 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, there are indications that there has 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.<sup>1</sup> 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 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

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<sup>1</sup> 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.

cited are from an earlier era – one from the mid-1980s, one from the early 1990s.<sup>2</sup> Without getting into the specifics of those two 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 not approving S. 2102.

Respectfully,



George P. Slover  
Senior Policy Counsel  
Consumers Union

cc: Members, Subcommittee on Antitrust, Competition Policy and Consumer Rights

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<sup>2</sup> 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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No. 202

## How Dodd-Frank Harms Main Street

Ill-Considered Financial Reform Law Thwarts Americans' Access to Financial System

By Iain Murray\*

The financial crisis of 2007-2008 was a drastic shock to the American economy. The regulatory response of 2009-2010 was just as powerful a shock to the financial system. Enshrined in the Wall Street Reform and Consumer Protection Act, popularly known as Dodd-Frank after its main Senate and House sponsors—then-Sen. Christopher Dodd (D-Conn.) and then-Rep. Barney Frank (D-Mass.)—the reforms were intended to protect Main Street and consumers from financial predation by Wall Street. Instead, it has meant reduced access to credit for small businesses and fewer choices for consumers, while doing little to punish the main culprits in the financial crisis.

Dodd-Frank grew out of a 2009 Treasury Department task force proposal, “A New Foundation: Rebuilding Financial Supervision and Regulation,” which had two distinct goals:

- 1) Prevent bank failures from endangering the economy (the task force’s original focus); and
- 2) Set up a new federal regulator, an idea first proposed in 2007 by then-Harvard professor Elizabeth Warren.<sup>1</sup>

The latter led to the creation of the Consumer Financial Protection Bureau (CFPB) under Dodd-Frank. Sen. Dodd and Rep. Frank worked closely with the administration to help turn the proposal into law. In December, 2009, Rep. Frank introduced the bill that became the Dodd-Frank Act, which contained most of the original White House proposal.

The bill was an odd contraption from the start. Warren had had argued for her agency as a means to protect consumer financial product safety, bringing the benefits of what she termed “a well-functioning market” to financial consumers. In an article in the progressive journal *Democracy*, “Unsafe at Any Rate” (a nod to Ralph Nader’s *Unsafe at Any Speed*), she wrote:

It is impossible to buy a toaster that has a one-in-five chance of bursting into flames and burning down your house. But it is possible to refinance an existing home with a mortgage that has the same one-in-five chance of putting the family out on the street—and the mortgage won’t even carry a disclosure of that fact to the homeowner.<sup>2</sup>

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\* Iain Murray is Vice President for Strategy at the Competitive Enterprise Institute. A version of this essay originally appeared in *The Washington Examiner*.

But as George Mason University law professor Todd Zywicki points out, Warren's comparison is inapt.

Loans are not toasters... The default and foreclosure crisis was caused by misaligned incentives, anti-deficiency laws, and erratic monetary policy. These causes are all safety and soundness issues and not consumer protection issues. ...

Essentially, safety and soundness relates to banks engaging in risky or responsible lending, while consumer protection deals with fraud, deception, and unfair practices in the marketplace.<sup>3</sup>

The Dodd-Frank Act was sold to the American people as promoting financial soundness and stability by reining in Wall Street and the big banks, rather than to prevent fraud. When its supporters mentioned fraud, it was in passing. Then-House Speaker Nancy Pelosi said: "No longer again will recklessness on Wall Street cause joblessness on Main Street. No longer will the risky behavior of the few threaten the financial stability of our families, our businesses, and our economy as a whole."<sup>4</sup>

Other items from the wish list of the left were added to the bill as it made its way through Congress. Sen. Richard Durbin (D-Ill.) added an amendment that imposed a cap on the "interchange fees" banks and debit card networks charge to merchants whose customers use the cards.<sup>5</sup> The House-Senate conference added the "Volcker Rule," named after former Federal Reserve chairman Paul Volcker, to prohibit banks from trading financial instruments with their own money, despite the proposal not even being voted on during the bill's passage.<sup>6</sup> The final law even included a provision requiring companies to disclose their use of "conflict minerals" that might have originated from the war zone in the Democratic Republic of Congo, in an effort to cut off funding to warlords there.<sup>7</sup>

The bill passed at every stage largely along party line votes, at a time when Democrats controlled both chambers of Congress (the two Republican Senators from Maine voted for the bill). Sen. Dodd even suggested that the lack of bipartisan involvement was a good thing, arguing that to compromise would be a "huge mistake" given the urgency of the problems the bill sought to address.<sup>8</sup> The final act, signed into law in July 2010, weighed in at 848 pages and over 360,000 words. It is unlikely that many of those who voted for (or against) the bill actually read it.

**Federal Power Grab.** Much of Dodd-Frank is a broad enabling act granting power to executive agency bureaucrats to write specific regulations. "Laws classically provide people with rules. Dodd-Frank is not directed at people," Yale law professor Jonathan Macey told *The Economist*. "It is an outline directed at bureaucrats and it instructs them to make still more regulations and to create more bureaucracies."<sup>9</sup>

This delegation of rulemaking has created great uncertainty for the financial industry. While Dodd-Frank provides an outline, the final rule is usually far more detailed, leaving firms to guess what new restrictions may be put in place. For example, the text of the Volcker Rule in the statute ran to 11 pages. The agencies responsible for the rule produced a draft rule for

comment of almost 300 pages, containing almost 1,500 questions for the industry. The final rule ran to 71 pages, plus over 800 pages of responses to comments and other clarifications, with the process taking over two years.

By 2013, three years after Dodd-Frank's passage, the law firm Davis Polk calculated that over 15 million words of rules required by Dodd-Frank had been written, enough to fill 28 volumes the length of *War and Peace*.<sup>10</sup> At that rate, when Dodd-Frank's required rules are finally complete, over 35,000 pages and over 38 million words will have been added to the financial industry rule book.

To make matters worse, only 58 percent of Dodd-Frank's required rules had been completed almost four years after its passage. Davis Polk tallied up 395 rules the Act mandated the administration to draw up, each with a deadline for finalization. At the end of 2014, only 176—over a third—of 277 deadlines had been met.<sup>11</sup>

Dodd-Frank does more than just require rules. It also empowers agencies to create new ones as they see fit. For example, the CFPB's recently proposed rule to regulate prepaid debit cards is entirely a creation of the Board.<sup>12</sup> The rule runs to 800 pages of prescriptions as to how the cards, an increasingly popular method of payment, may be issued and handled. There are long and short form information sheets that need to be presented to the recipient depending on the circumstances, each describing a variety of fees that might be incurred if the card is used in certain ways. Dodd-Frank also empowered the CFPB to regulate such diverse financial products as auto loans, debt collection, electronic payments, mortgages, overdrafts, payday lending, and overseas remittances. It is planning or has already issued rules in all of these areas.

Dodd-Frank's impact on the financial industry is clearly massive and burdensome. Some might say, "Good. They deserved it!" But who really bears these burdens? Not so much Wall Street as Main Street. The first two titles of the law are critical to understand why.

Title I created the Financial Stability Oversight Council (FSOC), a regulator with the power to designate a firm with over \$50 billion in assets as a Systemically Important Financial Institution (SIFI) that could endanger the entire financial system if it were to get in trouble.

Title II creates an Orderly Liquidation Authority (OLA), supposedly the means by which a SIFI can be wound down without the need for a taxpayer bailout. At face value, this would seem to be an improvement on the Too Big to Fail (TBTF) phenomenon that led to the crisis and bailouts, but that is not how the law has worked in practice.

SIFI status is clearly valuable, and therefore represents a reward to big banks. Before the crisis, big banks benefited from investors' and depositors' confidence that the government would bail them out because of their size and therefore represented lower risk. Banks with over \$100 billion in assets were normally able to raise capital much more cheaply than their competitors. In practice, SIFI status has entrenched this advantage, and even extended it to more big banks because of the lower formal threshold of \$50 billion. As a result, banks with

more than \$100 billion in assets, like Bank of New York Mellon, have been able to enjoy the advantages of easier money.

Dodd-Frank proponents have argued that the OLA offers a way to liquidate insolvent banks in an orderly fashion. Yet liquidation is only one of a range of options for dealing with a SIFI in trouble, and is likely a last result. Federal Deposit Insurance Corporation (FDIC) Chairman Martin Gruenberg has stated that his preferred solution is to create a “bridge” company, with the government placing the existing company in receivership and transferring its assets to a new company set up by the FDIC, which would presumably include most of the senior staff of the old company as well.<sup>13</sup> This system replaces the transparency of the regular bankruptcy process with a shadowy regime that empowers regulators and interested stakeholders, including other SIFIs.

**“That’s Where the Money Is.”** While the costs of this operation will not be paid for by the Treasury, the rest of us will still pay for this process. Here is how.

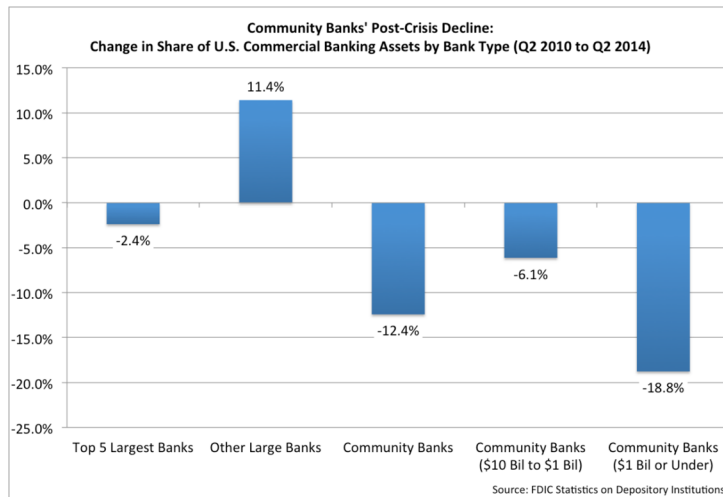
The FSOC’s SIFI designation authority is not restricted to big banks, but encompasses any large financial institution, including large insurance companies. AIG, GE Capital, Prudential, and MetLife have been designated SIFIs (MetLife is challenging its designation in court). Insurers—with the exception of AIG, whose London office had diversified into credit default swaps on subprime loans—had nothing to do with the crisis. In fact, their business model is predicated on accurately assessing payout risk (AIG was an outlier for having deviated from this model). They have proved exceptionally stable over the years, with lifespans far exceeding most banks. They are not particularly interconnected with other financial firms, and are at very low risk of presenting a systemic risk to the financial system.

Why then is the FSOC designating them as SIFIs? As Willie Sutton put it, “because that’s where the money is.” The Orderly Liquidation Fund, established by Dodd-Frank to pay for activities authorized under the OLA and run by the FDIC, is capitalized by fees levied on SIFIs. Insurers have large amounts of low-risk assets that make for an attractive pool of money. So in the event of an orderly liquidation, anyone with an insurance policy will pay for the process. An April 2013 study by the consultancy Oliver Wyman found that the OLA would raise consumers’ aggregate life insurance premiums from \$3 billion to \$8 billion a year, with the bulk affecting retirees, who will see their incomes drop.<sup>14</sup>

**Unintended Consequences.** The regulations imposed by SIFI designation also create perverse incentives for insurers, as it signals that the FDIC will not allow the institution to fail. That could increase insurance firms’ willingness to tolerate risk, thus making them less stable—and making their SIFI designation a self-fulfilling prophecy.

It is, however, small and community banks—Main Street banks—that are suffering the most from Dodd-Frank. Large banks can absorb the costs of burdensome new regulations. They have large compliance departments, and can meet new challenges by making them larger. Smaller banks, however, only have a few compliance staffers. With millions of new words of regulation to deal with, they face a crushing new work load. “Big banks have armies of lobbyists, lawyers, consultants, and compliance staffers, without denting the banks’

profitability,” says Jim Purcell, Chairman and CEO of State National Bank in Big Spring, Texas. “Community banks, by contrast, lack those resources, and every extra dollar of compliance costs is one less dollar to spend on customer service, one more dollar of cost that ultimately must be passed through to customers.”<sup>15</sup>



Source: Lux and Greene, 2015

Small banks facing these new pressures have three options:

- 1) Increase their compliance departments and pass the costs on to their customers.
- 2) Close.<sup>16</sup>
- 3) Merge with other banks to be able to afford a large compliance department.

Two thousand community banks and credit unions have closed or merged since 2010. A recent Harvard study found that the rate of decline in community banks as a proportion of the U.S. banking system has doubled since 2010, and that “particularly troubling is community banks’ declining market share in several key lending markets, their decline in small business lending volume, and the disproportionate losses being realized by particularly small community banks.”<sup>17</sup>

**Finance Not for the People.** Even those Main Street banks that are surviving are facing problems and reducing services. A February 2015 Mercatus Center study found that many such banks have stopped offering home mortgages, home equity lines of credit, overdraft protection, or credit cards.<sup>18</sup> Thanks to the CFPB’s qualified mortgage rule, community bankers can no longer based their loan decisions on what they know about the applicant and instead have to qualify applicants based around a host of consumer “protections” that have caused banks to withdraw from the market altogether. As a result, customers have found

their banking choices severely restricted. “Every dollar spent on regulatory compliance means as many as 10 fewer dollars available for creditworthy borrowers,” James Hamby, president and CEO of Vision Bank in Ada, Oklahoma, told the House Oversight Committee in 2012. “Less credit in turn means businesses can’t grow and create new jobs. As a result, local economies suffer, and the national economy suffers along with them.”<sup>19</sup>

Other restrictions introduced by Dodd-Frank have compounded the problem. The Durbin Amendment’s caps on the “swipe fees” charged to merchants for use of debit card payment networks have significantly increased the cost of providing debit cards to customers. While the Durbin Amendment exempted credit cards and small banks, large, SIFI-designated banks—including Bank of America, JP Morgan Chase, and Wells Fargo—issue a huge share of payment cards in the U.S.

Merchants, particularly large retailers, lobbied for this change for years, bristling at the reduced profit they faced when customers chose the convenience of a card compared to cash or check (the Federal Reserve’s check clearing system is free of charge). Their fees were reduced from 44 cents to 24 cents per swipe on average, resulting in \$7.3 billion windfall to merchants. Retail industry groups claim the savings were passed on to consumers. However, David Evans of the University of Chicago Law School and colleagues estimate that only about half of the savings reached consumers, while all of the reduced profits faced by the banks were passed through to their customers in the form of higher fees, resulting in a net present cost to the economy of around \$25 billion.<sup>20</sup>

The effect on bank customers has been subtle but visible. The number of free checking accounts decreased considerably, with the number of banks offering free checking halving after the passage of the Durbin Amendment (one of the few bright spots for small banks was their ability to increase free checking because of their exemption from the cap). The average minimum monthly holding requirement for no-fee banking tripled from \$250 to \$750. Average monthly fees doubled.<sup>21</sup>

The most pernicious effect of these fee increases is that the banking system became too expensive for about a million people—largely from the poorest sectors of society—who have turned to alternative financial services, including prepaid debit cards (subject to the 800-page rule mentioned above), payday lenders, and check cashing shops.<sup>22</sup>

It is not just the poor in America who have suffered from Dodd-Frank. In Africa, Dodd Frank’s conflict minerals provision has badly hurt the economy of eastern Congo, where it has “brought about a de facto embargo on the minerals mined in the region, including tin, tungsten and the tantalum that is essential for making cellphones,” according to freelance reporter David Aronson. As early as 2011, he called the law a “catastrophe” in *The New York Times* because it cut off the region’s sole supply of income that could lift people above subsistence level.<sup>23</sup>

The U.S. Court of Appeals for the District of Columbia Circuit struck down large parts of the provision in April 2014 as unconstitutional restrictions on speech and going beyond the remit of the Securities Exchange Commission. Yet, its effects are still being felt. The

Congolese government shut down most of the mines and has begun certifying minerals as “conflict-free,” but as *The Washington Post* reported last December, its progress has been “glacial.”<sup>24</sup>

**Constitutionally Dubious.** Dodd-Frank’s conflict minerals provision may not be the last one to be struck down as unconstitutional. The CFPB’s very design raises significant constitutional questions. The American system is based on checks and balances, with power dispersed among the executive, legislature, and courts. Executive agencies, including independent ones, operate with the consent of Congress and the courts, but the CFPB is largely free from these constraints.

Congress exercises no “power of the purse” over the CFPB, because the agency’s budget comes from the Federal Reserve, amounting to approximately \$600 million that Congress cannot touch or regulate.<sup>25</sup> The president cannot remove the CFPB director—an executive branch official—except under limited circumstances, such as malfeasance. And judicial review of the CFPB’s actions is limited, because Dodd-Frank requires courts to give extra deference to the CFPB’s legal interpretations.

The roles of the Federal Stability Oversight Council and Orderly Liquidation Authority are equally problematic. The OLA gives the Treasury Secretary the power to liquidate any financial company as long as the FDIC and the Fed are in agreement, and enables the FSOC to suspend bankruptcy laws, as described above. This puts investors and shareholders in jeopardy based on the whim of bureaucrats.

These problems form the basis of a lawsuit challenging the constitutionality of the CFPB and FSOC brought by the Competitive Enterprise Institute, the 60 Plus Association, the State National Bank of Big Spring, and 12 state attorneys general concerned about the safety of their states’ pension investments. (The lawsuit was dismissed for lack of standing in 2013, but it is currently in the appeals process.)

Meanwhile, the CFPB has issued a study condemning mandatory arbitration clauses that enable financial firms to extend credit to consumers that would otherwise pose too great a risk.<sup>26</sup> Relying on a discredited study by the Center for Responsible Lending that alleged racial discrimination in automobile financing,<sup>27</sup> the CFPB has also asserted the power to regulate nonbank lenders.<sup>28</sup>

The Bureau is also preparing a rule regulating payday lenders—with little evidence they cause real harm worthy of regulation.<sup>29</sup> In fact, the majority of studies about the effects of payday lending show no evidence that they trap borrowers in a harmful cycle of debt.<sup>30</sup> Kennesaw State University Statistics Professor Jennifer Priestley cites “a growing body of literature which shows that payday loans may not only fail to harm borrowers, but may actually contribute to an improvement in borrower welfare.”<sup>31</sup> The CFPB has ignored these studies and issued its own studies justifying its rulemaking.<sup>32</sup>

**Conclusion.** Many of the rules issued under Dodd-Frank have harmed some of the poorest Americans, who have seen their insurance made more expensive, their banking choices

reduced, and their bank fees increased. Many have been forced out of the banking system altogether, only to face the alternatives, such as prepaid debit cards and payday loans, more difficult to access. When legal choices are restricted, people turn to illegal ones. Loans sharks and racketeers could soon make a comeback, thanks to Dodd-Frank's "consumer protection" provisions.

None of this is to deny the good intentions of the bill's authors and the staff of the CFPB, but as C.S. Lewis put it in *God in the Dock*:

Of all tyrannies, a tyranny sincerely exercised for the good of its victims may be the most oppressive. It would be better to live under robber barons than under omnipotent moral busybodies. The robber baron's cruelty may sometimes sleep, his cupidity may at some point be satiated; but those who torment us for our own good will torment us without end for they do so with the approval of their own conscience.<sup>33</sup>

In the meantime, the bankers of Wall Street can sleep easy knowing that they can raise capital more cheaply thanks to their SIFI designation, and regulators know that a good, high-paying job awaits them in compliance departments there.

## Notes

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<sup>2</sup> Elizabeth Warren, "Unsafe at Any Rate," *Democracy: A Journal of Ideas*, Issue 5, Summer 2007, <http://www.democracyjournal.org/5/6528.php?page=all>.

<sup>3</sup> Stefanie Haeffele-Balch and Todd Zywicki, "Loans are not Toasters: The Problems with a Consumer Financial Protection Agency," *Mercatus on Policy* No. 60, Mercatus Center, October 2009, <http://mercatus.org/publication/loans-are-not-toasters-problems-consumer-financial-protection-agency>.

<sup>4</sup> Nancy Pelosi, speech in House of Representatives, June 30 2010, <http://www.democraticleader.gov/newsroom/pelosi-voting-yes-will-pass-toughest-set-wall-street-reform-generations/>.

<sup>5</sup> §1075 of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010. This amends the Electronic Funds Transfer Act, 15 U.S.C. 1693 et seq., adding a new Section 920.

<sup>6</sup> § 619 (12 U.S.C. § 1851) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

<sup>7</sup> §1502 (15 U.S.C. §78m(p)) of the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.

<sup>8</sup> Binyamin Appelbaum and Brady Dennis, "Legislation by Senator Dodd would overhaul banking regulators," *Washington Post*, November 11 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/11/09/AR2009110901935.html>.

<sup>9</sup> "Too big not to fail," *The Economist*, February 18 2012, <http://www.economist.com/node/21547784>.

<sup>10</sup> Davis Polk, Dodd Frank Progress Report, July 15 2013, <http://www.davispolk.com/Dodd-Frank-Rulemaking-Progress-Report/>.

<sup>11</sup> Davis Polk, Dodd Frank Progress Report, First Quarter 2015. Ibid.

<sup>12</sup> Consumer Financial Protection Board, "CFPB Proposes Strong Federal Protections for Prepaid Products," news release, November 13 2014, <http://www.consumerfinance.gov/newsroom/cfpb-proposes-strong-federal-protections-for-prepaid-products/>.

<sup>13</sup> Remarks by Martin J. Gruenberg Acting Chairman, FDIC to the Federal Reserve Bank of Chicago Bank Structure Conference; Chicago, IL, May 10, 2012, <https://www.fdic.gov/news/news/speeches/archives/2012/spmay1012.html>.

<sup>14</sup> Oliver Wyman, "The Consumer Impact of Higher Capital Requirements on Insurance Products," PowerPoint presentation, April 10 2013, <http://responsibleregulation.com/wp-content/uploads/2013/05/Pricing-impact-study-Oliver-Wyman-April-10-2013.pdf>.

- <sup>15</sup> Testimony of Jim R. Purcell, Chairman and C.E.O. of The State National Bank of Big Spring, U.S. House of Representatives, Committee on Financial Services, Subcommittee on Oversight and Investigations, "The Adverse Consequences Of the Dodd-Frank Act On Community Bank Customers and Borrowers," July 19, 2012, <http://financialservices.house.gov/uploadedfiles/hhrg-112-ba09-wstate-jpurcell-20120719.pdf>.
- <sup>16</sup> The otherwise healthy Shelter Financial Bank of Columbia, Missouri, did so in 2013. Mackenzie Bruce, "Shelter Financial Bank sets March closing date," *The Missourian*, February 28 2013, [http://www.columbiamissourian.com/news/shelter-financial-bank-sets-march-closing-date/article\\_f466b12d-051d-5ff2-b128-cdf770743937.html](http://www.columbiamissourian.com/news/shelter-financial-bank-sets-march-closing-date/article_f466b12d-051d-5ff2-b128-cdf770743937.html).
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- <sup>21</sup> Todd J. Zywicki, Geoffrey A. Manne, and Julian Morris, "Price Controls on Payment Card Interchange Fees: The U.S. Experience," George Mason Law & Economics Research Paper No. 14-18, June 4, 2014, [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2446080##](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2446080##).
- <sup>22</sup> *Ibid.*
- <sup>23</sup> David Aronson, "How Congress Devastated Congo," *New York Times*, August 7 2011, [http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?\\_r=0](http://www.nytimes.com/2011/08/08/opinion/how-congress-devastated-congo.html?_r=0).
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## Liquid Capital Was the First Killer App

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Fighting Poverty Means Broadening the Capital Base

Iain Murray

### Economics

The sharing economy is older than smartphone apps. The modern financial system may be the first example to have evolved. Rather than sharing capital assets such as cars or spare bedrooms, people shared their liquid capital — they lent money to each other that they didn't need to use right away. But recent regulations threaten to kill off the original killer app.

Historically, access to capital had been limited to those who already possessed it in the form of assets or savings. With the dawn of the modern financial system, the invention of credit meant that those who had capital could share it with those who didn't. Loans allowed both to benefit.

The classic Jimmy Stewart savings-and-loan model was based on the idea that people pooling their savings and lending out to others to buy houses would increase the capital base, making everyone involved wealthier. A bank manger could even look at a business plan drawn up by someone with no collateral and choose to make a loan based on the plan's attractiveness. As the financial system evolved, other forms of access to capital developed. It is probably not as widely known as it should be that Sergey Brin founded Google by maxing out his credit cards.

Lending entails risk to the original providers of capital, and access to capital does not guarantee success. But all else being equal, the greater the accessible capital base, the wealthier those who have access to it will become.

Since the most recent financial crisis, many traditional forms of credit have dried up. Despite near-zero interest rates in much of the developed world, Banks are no longer making as many of the speculative loans that started so many businesses in the last century. new regulations from regulators like the Consumer Financial Protection Bureau (CFPB) (and similar bodies in other countries) have severely restricted the issuance of new mortgages and credit cards. Access to capital is harder to obtain.

Three forms of deregulation would improve matters:

- A more liberal approach to the chartering of new banks. Studies have shown that new banks are more likely to lend to small businesses and startups. In the United States, Congress should place firm time limits on regulators for the approval of new banks and it should end outdated regulations that separate banks and holding companies, allowing retailers like Walmart to open banks (Walmart's British counterpart Tesco runs a

- successful bank in the United Kingdom).
- Greater accountability for financial regulators such as the CFPB. The CFPB is insulated from accountability by a number of structural problems, which need to be addressed. Greater accountability will make the agency less likely to be captured by an ideological aversion to lending. Similar arguments apply to the international financial regulatory framework, which operates at two degrees of separation from public accountability, and which has led to regulatory harmonization that may be self-defeating.
- An end to the zero-interest-rate policy of central banks such as the Federal Reserve, which has led to a malinvestment in already existing large firms via the stock market rather than saving via bank deposits, which can in turn be used to provide access to capital via loans. In addition, capital requirements have led to banks unnecessarily holding on to funds that could be used for investment.

Each of these policies could make it easier to lend and borrow. Taken together, these three approaches form a deregulatory manifesto for greater access to capital.

The market, however, has already found new ways to share capital between investors and those who require it. In particular, two new forms of access to capital have developed in recent years:

- Crowdfunding: This form of financing allows those with good ideas or talents to find multiple backers willing to help them flourish. Various online platforms have developed different models of funding. Patreon, for example, allows patronage of an individual by many small-dollar donors. Indiegogo specializes in helping investors back a project in return for tiered rewards (the greater the donation, the bigger the reward). Kickstarter specializes in letting people fund projects through a preorder model, where those who fund a product's development are the first to receive it, usually at a discounted price, when it comes to market. A fourth model, equity crowdfunding, allows companies to offer real equity investments with the benefits of ownership. This model has been restricted by securities law in countries like the United States, but recent deregulation has led to the beginnings of a market (for more information, see John Berlau, "A Declaration of Crowdfunding Independence," from the Competitive Enterprise Institute).
- Peer-to-Peer Lending: Another innovative form of financing includes companies such as Prosper and Lending Club that match investors with people who want to start a business, take out a loan for home repair, or pay off debts, to give just a few examples. Individuals borrow funds at an interest rate appropriate for their risk. In the United States, these services are again significantly restricted by securities law, which has impeded the development of the market (other countries, like the United Kingdom, are less restrictive). Deregulation of securities law to facilitate peer-to-peer lending could significantly increase the size of this market and disintermediate banks, thereby mitigating the effects of the regulatory restrictions described earlier.

The use of cryptocurrencies and the blockchain can further develop both approaches, obviating some of the regulatory inefficiencies. Moreover, with an ongoing debate among libertarians over the morality or otherwise of fractional-reserve banking, these innovations

could well square that particular circle.

Regulators should allow these markets to develop naturally, just as the banking system evolved over time, rather than taking a precautionary approach. Doing so would increase the number of people able to access capital, thereby alleviating poverty significantly. Jimmy Stewart would no doubt approve.

## The Poor Need Affordable Energy

**F** [fee.org/articles/the-poor-need-affordable-energy/](http://fee.org/articles/the-poor-need-affordable-energy/)

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Iain Murray

Affordable energy is fundamental to what economist Deirdre McCloskey calls the "[Great Faci](#)" of the explosion of human welfare. It remains central to the reduction of absolute poverty. Yet, some Western governments are working to *increase* energy costs, purportedly to combat global warming.

What they are really combating is prosperity.

This is perverse and regressive. In America and Europe, energy takes up a much larger share of poor households' budgets compared to other income brackets. For instance, a household with an annual income between \$10,000 and \$25,000 spends well over 10 percent of its budget on energy, according to the [Bureau of Labor Statistics](#). And a January 2014 [study](#) for the American Coalition for Clean Coal Electricity found that "households earning \$50,000 or less spend more on energy than on food, spend twice as much on energy as on health care, and spend more than twice as much on energy as on clothing." (For more on this issue, see "[Fossil Fuels Are a Blessing to Humanity](#).")

Increasing the cost of energy also harms people's health. That's because energy use is so fundamental to modern life that it can take precedence over other household expenses — including health care. The National Energy Assistance Directors' Association [found](#) that an increase in energy costs led 30 percent of poor households to reduce purchases of food, 40 percent to go without medical care, and 33 percent to not fill a prescription.

The term "fuel poverty" describes households in cold climates that are not able to keep their home warm at an affordable cost. The primary causes of fuel poverty are low income, poor insulation, and high energy prices. Eight percent of households in Belgium, France, Spain, Italy, and the United Kingdom suffer from some form of fuel poverty, according to the European Union's European Fuel Poverty and Energy Efficiency consortium project. In the UK, where there is much more data owing to an official designation of fuel poverty, a household is defined as fuel poor if it has to spend 10 percent of its income on essential energy services; 20 percent of households meet this definition.

Despite this, Western governments are pursuing policies to increase energy prices. President Obama said during his first election campaign that electricity rates from coal would "necessarily skyrocket" under his policies; this may finally come to pass under his EPA's proposed Clean Power Plan. In Western Europe, energy costs have increased due to a

combination of renewable energy subsidies and mandates, bans or moratoria on hydraulic fracturing (“fracking”), hostility to nuclear energy, and Russia’s control of natural gas supplies for much of the continent’s eastern half.

Despite the president’s policies, US energy markets have shown that innovation beats regulation every time. Even though huge swaths of American energy resources are locked up under untouchable federal lands, energy production has boomed over the past decade, thanks to the development of horizontal drilling and improved hydraulic fracturing techniques. These technological advances have led to lower electricity prices from natural gas. And subsurface property rights have benefited both urban and rural households through royalty payments for energy production on their land.

Moreover, as gas became more affordable, it led to a *reduction* in greenhouse gas emissions. Indeed, thanks to energy innovation, America met the emissions targets set for it in the Kyoto Protocol, without any need for burdensome laws and regulation — or for the Kyoto Protocol itself. Whatever you think of the need for carbon emissions reduction, energy innovation is achieving that goal.

This is all to the good, but more energy innovation is possible. The key is greater liberalization. America should free up federal lands to energy development, rather than pickle them in regulatory aspic. Europe could enjoy its own energy boom by approving hydraulic fracturing.

Reducing artificially high energy costs is the first step in tackling fuel poverty. In America, the market is alleviating the burden of energy costs on poor households, even as the government goes the wrong way. That shows us the way forward for tackling the much greater problem in the developing world.

## Minimum wage, maximum damage

[washingtonexaminer.com/minimum-wage-maximum-damage/article/2555135](http://www.washingtonexaminer.com/minimum-wage-maximum-damage/article/2555135)

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There are few policies more popular than increasing the federal minimum wage. In a 2013 Gallup poll, 76 percent of respondents approved of the idea. It seems to make economic and moral sense on an intuitive level. President Obama reflected this sentiment in his Oct. 11 weekly radio address, saying, "We believe that in America, nobody who works full time should ever have to raise a family in poverty. ... America deserves a raise right now."

Yet most economists oppose the concept of a minimum wage at all, and data back them up. In fact, the minimum wage harms those it is intended to help.

The federal minimum is now \$7.25 an hour, but it is higher in some states and municipalities. There is a movement, headed by the president, to raise this to \$10.10 an hour, with the ostensible goal of reducing poverty and inequality. Some states and cities are on board. California will raise its minimum to \$10 on Jan. 1, 2016, and San Diego will raise it to \$10.50 on the same date, with another dollar on top of that a year later. SeaTac, Washington, the area around Seattle-Tacoma International Airport, has already raised its minimum to \$15 an hour with unhappy consequences, as we shall see.

Most economists agree that the minimum wage cannot achieve its aim. Harvard economist Greg Mankiw's "Ten things economists believe" is a list of statements that members of the economics profession finds uncontroversial. Here is one of the statements: "A minimum wage increases unemployment among young and unskilled workers." This proposition is supported by 79 percent of economists.

James M. Buchanan, Nobel Prize winner for economics in 1986, put it thus:

"Just as no physicist would claim that 'water runs uphill,' no self-respecting economist would claim that increases in the minimum wage increase employment. Such a claim, if seriously advanced, becomes equivalent to a denial that there is even minimal scientific content in economics, and that, in consequence, economists can do nothing but write as advocates for ideological interests."

The overwhelming majority of empirical studies into the effects of the minimum wage find that it erodes employment. In 2007, David Neumark of the University of California-Irvine and William Wascher of the Federal Reserve surveyed over 100 minimum wage studies published since the early 1990s. They discovered that over two-thirds of them found negative effects on employment, while only about an eighth found positive effects. Worse, those studies that focused on the low-skilled people including youths found particularly bad damage done.

Wascher and Irvine also looked at the quality of the studies. They found 33 studies that were robust to most criticisms, of which 28 found negative employment effects. (Notably, much of

the evidence for positive employment effects in the larger sample came from the United Kingdom rather than the United States, and that those studies may have failed to account for complicating factors during the 1980s, when the UK had sector-specific minimum wages. But the more recent evidence from the UK's introduction of a national minimum wage in 1997 mirrors the American evidence.)

The federal minimum wage was raised in 2007, and again in a couple of steps until 2009. There has been recent research into the effects of that increase. One study, by Aspen Gorry of the University of California-Santa Cruz, focuses on the effect on youth unemployment. He found that minimum wages effect unemployment, especially youth unemployment, "because they interact with a worker's ability to gain job experience." While the minimum wage increase pushed the general unemployment rate 0.8 of a percentage point higher over the study period (compounding the misery of the economic downturn), the unemployment rate for 15- to 24-year-olds surged by almost 3 percentage points.

Gorry also looked at youth unemployment in France, where the minimum wage is about \$12 per hour, considerably more than America's, and where the youth unemployment rate has hovered around 24 percent, double the U.S. rate. Gorry finds that the different minimum wage levels account for nearly the entire difference between France's and America's youth jobless rates. That means France could find jobs for about half its unemployed youngsters by reducing its minimum wage to American levels.

Such a preponderance of evidence is reflected in official studies. When the Congressional Budget Office earlier this year reviewed the probable effects of a minimum wage increase to \$10.10 an hour, it took into account the findings of over 60 studies on the issue. The CBO report suggested that the increase would help lift 900,000 families above the poverty line, as the president touted, but at the cost of killing the jobs of half a million other people.

The minimum wage transfers resources not from the rich to the poor, but among the poor. Some of America's least well-off workers would get a raise, but many more others would see their hours cut, or lose their jobs entirely. Obama's radio address concluded, "America should forever be a place where your hard work is rewarded." But those whose jobs are destroyed by a minimum wage increase have neither hard work nor reward.

So why is the minimum wage so popular? The answer is that there are economic effects that are seen and others that are not seen, as the great French economist Frederic Bastiat noted. As he explained, any new economic policy "gives birth not only to an effect, but to a series of effects. Of these effects, the first only is immediate; it manifests itself simultaneously with its cause — it is seen. The others unfold in succession — they are not seen." In the case of the minimum wage, what is seen is the increase in many workers' pay packets. What is not seen is workers losing their jobs.

The public may not attribute those job losses to a minimum wage increase, blaming instead other factors such as increasing automation, a company's contraction, or an employer's greed. Yet the underlying reason is the same in all these cases: A corporation invests in a machine

because it is less expensive than paying workers the higher minimum wage, the company contracts because it cannot afford to keep the same number of workers with the same wage budget, and the employer, far from being greedy, sees the new wage cutting into his bottom line and he chooses to do other things rather than pay a marginally effective worker more than he thinks he is worth.

Yet job losses are just the beginning of the unseen effects. There are other workers, particularly inexperienced young ones, who will not be hired in the first place because the cost of their wages is too high. As Gorry found, jobs that never come into being prevent potential workers from gaining experience. Young would-be workers are denied the chance to gain basic job skills. Instead, they set off down the road to long-term unemployment. This is what is happening in France.

Those who lose their jobs or never get them are not the only ones to suffer. Even those workers who keep their jobs and are paid a higher wage and are "lifted out of poverty" often fail to account for these changes.

One unintended consequence is that taxes on wage earners go up. A higher minimum wage can make employers less inclined to offer non-wage benefits such as generous leave policies or insurance, as well as on-the-job perks such as free meals and parking. Non-cash perks such as parking and food are not taxed. But when these non-wage benefits are converted to wages, they become subject to income and sales taxes. So not only do workers have to pay for perks that used to be free, they get taxed for them, too.

SeaTac provides an informative example. There, Northwest Asian Weekly reporter Assunta Ng asked hotel workers who had received the wage increase whether they were happy with it:

"Are you happy with the \$15 wage?" I asked the full-time cleaning lady.

"It sounds good, but it's not good," the woman said.

"Why?" I asked.

"I lost my 401(k), health insurance, paid holiday, and vacation," she responded. "No more free food."

The hotel used to feed her. Now, she has to bring her own food. Also, no overtime, she said. She used to work extra hours and received overtime pay.

What else? I asked.

"I have to pay for parking," she said.

Another interviewee, a waitress, claimed that she had seen a decrease in her tips. When the minimum wage was \$7, her tips increased that to more than \$15 an hour, but the differential was now less. She now has to bring her own food and pay for parking, both of which used to be provided by her employer at no cost to her.

Annual or holiday bonuses can also suffer. There is an interesting natural experiment that illustrates this in the Westfield Valley Fair mall in California. Half the mall is in San Jose, while the other half is in Santa Clara. When San Jose raised its minimum wage to \$10 in 2012, Santa Clara's remained at \$8. The mall has two competing pretzel shops, one in each jurisdiction. When San Jose instituted its raise, the pretzel shop there, Wetzel's Pretzels, was unable to raise its prices because of the competition across the mall, and the owner was reluctant to cut staff as that would have affected customer service. Instead, she took the hit in the form of lower profits.

The lower profits hurt workers, too. The store owner's policy was to share 15 percent of profits in the form of an annual bonus. Reduced profits led to smaller bonuses. This is not the sort of thing that an aggregation of statistics picks up.

Consumers don't escape the malign effects of increased minimum wages, either. Prices often increase when business face a shortfall in profits. Businesses that use large numbers of minimum wage workers, such as the fast food industry, tend to raise their prices the most. A 2008 study by Daniel Aaronson and Eric French of the Chicago Fed and James MacDonald of the U.S. Department of Agriculture found that fast-food restaurants pass through 100 percent of the wage increase to their customers in higher prices. Another study by Sara Lemos of the Institute for the Study of Labor found that a 10 percent increase in the minimum wage led to a 4 percent increase in food prices and an overall increase in prices of just over half a percentage point.

That may sound small, but consider where the effects fall hardest. Workers earning minimum wage are more likely to patronize fast food restaurants than anyone else, and food in general forms a much bigger part of their budgets. A significant part of the minimum wage increase is, literally, eaten up by higher food prices. The effect is all the more significant for those who work at those restaurants and may no longer have access to complimentary shift meals.

Obama claims that a minimum wage increase means those who get it "have more money to spend at local businesses, which grows the economy for everyone." But, per Bastiat, that is only in the short run, providing the immediate "seen" effect. In the medium and long run, price increases cancel out the minimum wage hike's stimulative effect, and the gains are reversed. Aaronson and French, in another study, find the long-term effect on the economy of a minimum wage increase to be virtually nil, as the unseen effects take over.

Most of the winners from a minimum wage increase are large businesses, which can afford to take on extra payroll. The mom-and-pop store down the road might not be able to follow suit. If, as sometimes happens, it is forced to close, customers are driven to the big retailer. Big companies often lobby for increases in the minimum wage. Walmart publicly favored the 2009 federal increase to \$7.25 per hour. While it has not supported current proposals for a \$9 or \$10.10 hourly minimum wage, it is not opposing them, either.

The benefit to big companies is apparent even when a minimum wage hike does not increase their payroll costs. Costco, which pays all of its employees well above minimum wage, would not be directly affected by most proposed minimum wage increases, but its smaller competitors would. A combination of increased payroll and reduced hours or fewer employees hits small competitors. This means higher prices and fewer employees to serve customers, which drives more customers to Costco and other bigger companies.

There is evidence that high minimum wage laws also increase crime because they condemn some people to chronic unemployment. Some turn to economic crime, dealing drugs, or fencing stolen goods to make ends meet, while others turn to crimes of idleness, such as vandalism and assault. A study by Andrew Beauchamp and Stacey Chan based on National Longitudinal Survey of Youth data from 1997 to 2010 finds that, in states that increased their minimum wages during that time, "crimes increase among minimum wage-bound workers and most strongly among teenagers, and that these increases occur among both monetary and non-monetary crimes. ... [A]ffected 14-16 year-olds are 8.4 percentage points more likely to commit crimes, and 17-19 year-olds increase crime by 3.4 to 4.1 percentage points."

Increased crime takes a toll on perpetrators as well as victims because they acquire criminal records, which blight their chances of getting a job in the future.

Breaking out of poverty is difficult for many people, and the evidence is that a minimum wage adds to the difficulty. Workers are fired, hours are cut, jobs are not created, non-wage perks, including insurance, free parking, free meals, and vacation days evaporate, annual bonuses shrink, prices rise, (squeezing minimum wage earners themselves), big businesses gain an artificial competitive advantage over their smaller competitors, and crime rates rise. It is a bleak litany.

Raising the minimum wage remains popular because only the visible effects are usually considered. Fortunately, the public may be willing to consider the unseen effects when they are pointed out. Following the March release of the CBO study, Bloomberg News asked people if they supported a minimum wage increase to \$10.10 an hour. With that simple proposition, 69 percent were in favor and 28 percent opposed. Bloomberg then asked, "A recent report by the Congressional Budget Office says that raising the minimum wage to \$10.10 over the next three years would increase the incomes of 16.5 million Americans while eliminating 500,000 jobs. Does that trade-off seem acceptable or unacceptable to you?" When put that way, 34 percent were in favor and 57 percent found it unacceptable.

It is time for politicians to learn what the public is so quick to perceive.

*Iain Murray is a vice president at the Competitive Enterprise Institute in Washington, D.C.*

*Ryan Young is a fellow at CEI.*



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## Federal Labor Agencies Ambush American Economy

How the Department of Labor and National Labor Relations Board Support Big Labor, Not the American Worker

By *Trey Kovacs*\*

As it enters its final stretch, the Obama administration has launched an unprecedented campaign to reward the president's union allies, using the regulatory process. The Department of Labor (DOL) and National Labor Relations Board (NLRB) are seeking to impose costly regulations that threaten to seriously disrupt workplaces around the nation and the greater economy. The real goal of these burdensome regulatory proposals is to make it easier for unions to organize workplaces. Job creation and worker freedom are at risk.

"I owe those unions," said President Obama in the book that helped launch his first campaign for president. "When their leaders call, I do my best to call them back right away."<sup>1</sup> Democrats, in general, owe organized labor, which consistently funds their campaigns. Thirteen of the top 25 all-time campaign contributors<sup>2</sup> are labor unions, with all 13 of those unions giving at least 93 percent political dollars to Democrats.<sup>3</sup>

This is happening in a time when some 6.5 million workers are seeking full-time employment but can only find part-time work and workplace participation rate is at a 38-year low of 62.6 percent.<sup>4</sup> Current agency overreach is partially responsible for the inability of the economy to recover.<sup>5</sup>

A major reason for the administration's pro-union regulatory push is its inability to get pro-union legislation through Congress. The misnamed Employee Free Choice Act (EFCA) would have effectively done away with secret ballots in union organizing elections by allowing unions to organize workplaces through a procedure known as card check, whereby union organizers collect signatures out in the open—thus exposing workers to pressure and intimidation.

Under current law, card check organizing requires the business owner's permission. EFCA would have ended that requirement, allowing unions to proceed with card check once they get a majority of employees to sign cards. Of course, this increases unions' incentives to pressure employees into signing, for as long as it takes to get to a majority. EFCA failed on a cloture vote.<sup>6</sup> EFCA's defeat was a major loss for organized labor, but union chiefs have not given up on gaining favorable policy changes, and they expect the Obama administration to deliver.

\* *Trey Kovacs is a policy analyst at the Competitive Enterprise Institute.*

Unions need new members not only to bolster membership, which has been falling for years, but to extend the life of pension plans, many of which are critically underfunded, with new union dues.<sup>7</sup> Given the critical status of many union pension plans and the administration's close ties to organized labor, the Department of Labor and National Labor Relations Board can be expected to aggressively persist in their pro-union regulatory push.

Congress can minimize the federal labor agencies' regulatory onslaught by withholding funding for activities that are harmful to a peaceful and productive workplace. Congress may not be able to override a Presidential veto or control specific agency actions, but Congress has sole authority to fund the government. Congress should seriously consider such an approach regarding the following policies coming out of NLRB and DOL.

**Department of Labor's Proposed Overtime Rule.** On June 30, 2015, the Department of Labor submitted a Notice of Proposed Rulemaking to significantly modify the exemptions in the Fair Labor Standards Act's overtime rules.<sup>8</sup> Under current rules, the FLSA requires overtime pay (time and a half pay) to all hourly employees who work over 40 hours per week. Salaried employees who perform executive, administrative, professional, and outside sales activities and who make more than \$23,660 are exempt from overtime pay requirements.<sup>9</sup> Employers must track all hours worked by employees who fall within the overtime thresholds or risk penalty.

The DOL's proposed rule will dramatically alter who is eligible for overtime pay. Proposed requirements would extend mandatory overtime payments to salaried employees who earn \$50,440 annually or less, from the current \$23,660. It would even cover workers who perform mainly professional or managerial tasks. The change would force employers to adjust work schedules and reclassify workers, among other potential changes. Employer compliance obligations could increase due to employing more hourly and non-overtime exempt employees whose hours must be tracked to calculate overtime pay.

The Obama administration estimates that the proposed rule will affect the wages of nearly 5 million employees.<sup>10</sup> Secretary of Labor Thomas Perez estimates the overtime pay regulation could add as much as \$1.3 billion to workers pay in just the first year.<sup>11</sup> On its face that sounds substantial, but spread out throughout the economy, that averages out to a wage increase of only \$260 a year per worker.<sup>12</sup>

The administration's union allies have hailed the proposed regulation. "The minimum wage they can't do," said Bill Samuel, director of legislative affairs at the AFL-CIO. "This is probably the most significant step they can take to raise wages for millions of workers."<sup>13</sup> Yet, public reaction has been overwhelmingly negative. The rule may raise wages for some, but many employers have to shift some workers into part-time work or hire fewer of them.<sup>14</sup> Employers are pessimistic the rule will achieve its purported benefits. For instance, Don Fox, CEO of Firehouse Subs, is known for doing the right thing by his employees. He extended health care coverage to all his employees a year before it was required. But the overtime rule could prove too much for him, as it might force him to convert some salaried employees to hourly wage workers or forbid salaried employees from working more than 40

a week. “What’s a real shame is that I’m in a position of having to penalize someone because they’re doing something they judge is best for their career,” he said.<sup>15</sup>

Others who have analyzed the rule also reject the assertion that workers will receive a huge pay hike. Attorney Doug Hass, who represents private sector employers in a wide range of issues, notes, the DOL’s estimation that workers will receive a pay hike is entirely dependent on the “assumption that employers will increase pay in response to the regulation or, at worst keep it the same ... perhaps while spreading some of the additional overtime pay around to other workers.”<sup>16</sup> Yet, the overtime mandate only applies to hours, not pay. Unlike increases in the minimum wage, the government cannot force employers to pay employees more via the overtime rule because employers can take steps to keep labor costs at relatively the same level, either by hiring fewer employees or cutting back hours.

One likely scenario is that employers will alter labor costs by lowering employee base pay, because the primary mechanism to defray costs is to reduce wages. A survey of the economic research shows that a majority of employers would lower base pay to control labor costs when faced with a narrowing of overtime exemptions.<sup>17</sup> U.S Bureau of Labor Statistics economist Anthony Barkume finds cutting wages would make up for 80 percent of overtime costs.<sup>18</sup>

Employers could also hire more part-time and low wage workers, limit workers’ hours to under 40 a week to avoid overtime costs, or reduce fringe benefits and cut bonuses in order to raise base salaries above the new threshold of \$54,440.<sup>19</sup>

Another option available to employers is to reclassify and change work duties of employees, thereby turning salaried, junior management workers into hourly employees.<sup>20</sup> Employers then would closely monitor and cap their employees’ work hours. This amounts to a regulatory ban on aspiration for many ambitious employees.

***Farewell flexible hours.*** Capping hours, reclassifying workers and employing more hourly workers will greatly restrict employers from offering flexible schedules, a benefit many professional employees value and have come accustomed to.

Former salaried workers will have to adjust to life as hourly workers with less flexible work schedules because employers must track hours worked whereas they previously did not—such as for example, when checking work-related email on a mobile device. Junior managers who are not reclassified as hourly workers and eligible for overtime will lose out on common perks offered today like telecommuting and compensation days.<sup>21</sup>

Some workers impacted by the rule will likely be forced into a rigid eight-hour workday where the employer demands them to report to the work site. This eliminates employees’ ability to take time off to pick up a child from school or run errands at convenient times. Making strict schedules the norm could mean a large portion of the 16 to 25 million workers who telecommute at least once a month could lose this benefit.<sup>22</sup>

Another unintended consequence of the rule is that salaried employees who are reclassified as hourly workers will lose pay if they take off unscheduled work. For instance, an hourly worker who has to leave work to attend to an emergency while on the clock will lose pay for the time away from the office.

A recent survey shows that workers rank flexibility as a major priority, just below compensation.<sup>23</sup> Another survey, focusing on millennial workers, found that two-thirds of millennials would like to shift their work hours and 64 percent would like to occasionally work from home.<sup>24</sup> By forcing employers to monitor workers' hours and pay overtime to a wider range of workers, such flexible work arrangements will be reduced. Productivity will suffer, as research shows that flexible work schedules leads to greater productivity.<sup>25</sup> Even the White House Council of Economic Advisors reports that "by increasing productivity and job satisfaction, work flexibility is good for our economy at large."<sup>26</sup>

While it is a nice sound bite for the Obama administration that its overtime regulation will give millions of workers a raise, in truth, a more likely result is that pay will remain consistent but flexible schedules and junior management positions will vanish.

**NLRB Ambush Election Rule.** On April 14, 2015, the National Labor Relations Board implemented a new regulation for union representation elections that threatens workers' freedom of association and privacy, while hindering employers' protected speech on unionization prior to an election.<sup>27</sup> Under the new rule, the time frame between the filing of a petition and the date on which an election is conducted is reduced to as little as 14 days. The short time frame gives employees little time to educate themselves on the pros and cons of unionizing, and undermines employers' ability to respond to unionization campaigns.

The NLRB rule as constructed intends to limit the debate needed for workers to evaluate the benefits of union membership. The only message workers are likely to hear is from the union, which has been organizing for months in advance, often without the employer's knowledge. Naturally, unions tout the potential benefits of unionization, not any of the downsides. With a short time to respond before a representation election, employers will have a much harder time getting their message out.

Unions win more elections when workers have less time to contemplate whether to join a union. From 2004 to 2014, unions won only 60 percent of elections conducted in 36 to 42 days but won more than 86 percent of elections conducted in less than 21 days.<sup>28</sup> Since the rule has been in place, the median time for union elections has dropped from 38 days to 23 days.<sup>29</sup> At NLRB Regional Office 28 in Phoenix, the average has dropped to 18 days, with some elections conducted in as few as 13, 14, and 16 days. The NLRB New Jersey office even conducted one election in just nine days.<sup>30</sup> Unions have taken advantage of this shorter time frame. There was a 32 percent increase in union petitions during the first month the rule has been in effect,<sup>31</sup> with 280 petitions filed between April 14 and May 14, 2015.<sup>32</sup>

The ambush election rule also poses a serious threat to worker privacy. It compels employers to provide employees' contact information to union organizers, including personal cell phone numbers, email addresses and work schedules, without any opportunity for workers who do not want their personal data released to opt out. Releasing employee

personal information would almost certainly expose workers to harassment, intimidation, and much higher risk of identity theft.<sup>33</sup> In fact, the NLRB General Counsel's guidance memo on the ambush election rule acknowledges the adverse impacts that could arise from distributing workers' private information: "selling the list to telemarketers, (2) providing it to a political campaign, or (3) using the list to harass, coerce, or rob employees."<sup>34</sup>

**NLRB Aims At Redefining Joint Employer Standard.** The Obama administration is seeking to redefine the concept of joint employment to give unions bigger corporate targets that are easier to organize. Rather than organize one franchise at a time, the National Labor Relations Board is trying to give unions the ability to drag the parent corporation to the bargaining table. The change would disrupt many kinds of beneficial business arrangements in addition to franchise businesses, including temp and staffing agencies and contractors.

It is much easier for unions to organize one large employer than hundreds or thousands of small businesses. Thus, making large franchise brands, like McDonald's, joint employers with their independently operated franchises gives unions the ability to unleash the union organizing strategy known as a corporate campaign—a coordinated effort comprising legal, political, and public relations attacks to wear down a company's resistance to unionization by threatening to sully its reputation with its suppliers, shareholders, and customers.

A group of NLRB cases involving three different businesses could radically redefine the current joint employer standard, which defines when an employee is considered jointly employed by two businesses and when a business is responsible for the labor practices of another business.<sup>35</sup> The potential transformation of the joint employer standard threatens the franchise model that has helped so many Americans start their own businesses. Currently, two businesses are deemed joint employers when they both exercise substantial, direct and immediate control over hiring, firing, disciplining, supervising, and directing workers.<sup>36</sup>

Now the NLRB is proposing to expand the definition of "joint employer" to include indirect control, unexercised potential control, and a fuzzy notion of "economic and industrial realities."<sup>37</sup> The broader joint employer standard would make many franchisors, contractors and staffing agencies liable for franchisees with the mindset of making these employers more easily organized.

The new standard would make determining whether an employee is jointly employed highly speculative and specific to the situation, especially under the NLRB's proposed economic realities standard, which takes into account a business' involvement in a wide array of criteria—including sales data, inventory and labor costs, projections of labor needs, employee work schedules, setting wages and wage reviews, the application and screening process, and even productivity—that give the NLRB a lot of wiggle room.<sup>38</sup>

**Threat to franchising.** Franchising helps drive job creation and economic growth. Franchise businesses have created jobs faster than other businesses from 2007 to 2014,<sup>39</sup> and have accounted for over 10 percent of new jobs created in 2013 and 2014.<sup>40</sup> Franchise operations make up 3 percent of U.S. Gross Domestic Product and \$890 billion of economic output.<sup>41</sup>

Limiting franchising opportunities will diminish economic growth and harm economic opportunity for millions of Americans. Franchisees under the current joint employer standard can rely on the corporate franchisor for marketing, tested business methods, and use of its brand, but the franchisee operates the business and is liable for its day-to-day business practices, including hiring, work conditions, and employee supervision.<sup>42</sup> This allows individuals to start businesses in sectors that would otherwise require significant resources to address large scale marketing and regulatory costs. Small business spend 36 percent more for regulatory compliance than larger businesses, and franchises allow entrepreneurs to start businesses with limited out-of-pocket investment and reduced risk.<sup>43</sup>

*Threat to contracting and outsourcing.* Outsourcing of certain job functions is also under threat by the proposed change in the joint employer standard. At this writing, the NLRB is expected to rule in favor of the Teamsters against Browning-Ferris Industries (BFI), which operates a recycling plant in California that employs 60 individuals directly and contracts with Leadpoint, a temporary staffing agency, to fill 240 composter and sorting positions at the plant.<sup>44</sup>

In 2013, Teamsters Local 350 petitioned to be certified as the union representative of both BFI and Leadpoint employees, arguing that both BFI and Leadpoint jointly employed the workers. A NLRB Regional Office, relying on precedent, ruled that Leadpoint was the sole employer of the plant's composters and sorters. The Teamsters appealed. The case, now before the national NLRB, is expected to be decided in the coming weeks.<sup>45</sup>

The new proposed joint employer standard would make organizing much easier for unions. For example, three-fourths, or 180, of 240 Leadpoint workers support the Teamsters and vote to unionize. Under the new proposed joint employer standard, the Teamsters would not even need one vote from the employees directly employed by BFI to win representation over both workforces.

If unions are granted the privilege to organize two employers as one, or one business is forced to live by another business' collective bargaining agreement, companies like BFI or others that utilize temporary staff or outsource certain functions are likely to bring many jobs back in-house and scale back the hiring of subcontractors and temporary staff. This is a bad sign, given that the temporary workforce has been a bright spot for U.S. job growth—reaching an all-time high of over 2 percent of the total private-sector workforce in 2014 and employing 3.15 million workers per week.<sup>46</sup>

If the NLRB make final the new expanded definition of joint employer it will substantially and adversely impact American businesses—franchisers, contractors, suppliers, and temporary employment arrangements. Though, of course, the real goal of redefining the joint employer standard is to ease union organizing campaigns.

Ultimately, the potential changes in the joint employer standard would advantage a small group of special interests while endangering 770,000 franchise businesses and countless firms that use outsourcing which adds up to 8.5 million employees and temporary staff. American business today relies on independent operators or franchisees. This system is

threatened by making the larger firm liable for the employment practices of entities it may not be able to control. The result will be fewer new businesses being created.

**Conclusion.** Organized labor is receiving the payback for its hefty political contributions to Democratic politicians. Major rules and decisions coming out of the Department of Labor and National Labor Relations Board would stack the deck in favor of union organizing. Having failed to make card check standard organizing by enactment of the misnamed Employee Free Choice Act, union leaders expect favorable policy changes from the Obama administration—which in turn is trying to delivery. Unions need organizing made easier to bolster sagging membership numbers and collect more union dues to prop up severely underfunded pensions.

The NLRB and DOL are charged with protecting and advancing the opportunity of workers. However, under the Obama administration, the agencies have failed to live up to those expectations. Congress, invested with the power of the purse, should use that power to end the assault on workers and the economy.

## Notes

<sup>1</sup> Barack Obama, *The Audacity of Hope: Thoughts on Reclaiming the American Dream* (New York: Crown, 2006).

<sup>2</sup> Union supporters argue that union political contributions overwhelmingly support Democrats because that is what the union membership desires. However, a 2012 Gallup poll found 35 percent of union members supported Mitt Romney and 57 percent said they would vote for Barack Obama, Frank Newport, “Majority of Union Members Favor Obama; a Third Back Romney,” Gallup, June 11, 2012, [http://www.gallup.com/poll/155138/Majority-Union-Members-Favor-Obama-Third-Back-Romney.aspx?utm\\_source=tagrss&utm\\_medium=rss&utm\\_campaign=syndication](http://www.gallup.com/poll/155138/Majority-Union-Members-Favor-Obama-Third-Back-Romney.aspx?utm_source=tagrss&utm_medium=rss&utm_campaign=syndication).

<sup>3</sup> Center for Responsive Politics, “Top Organization Contributors,” accessed August 5, 2015, <http://www.opensecrets.org/orgs/list.php>.

<sup>4</sup> Josh Boak and Christopher S. Rugaber, “Job Market’s New Normal: Smaller Workforce, Sluggish Pay,” *Associated Press*, July 4, 2015, [http://hosted.ap.org/dynamic/stories/U/US\\_ECONOMY\\_THE\\_NEW\\_JOB\\_MARKET?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2015-07-04-10-24-16](http://hosted.ap.org/dynamic/stories/U/US_ECONOMY_THE_NEW_JOB_MARKET?SITE=AP&SECTION=HOME&TEMPLATE=DEFAULT&CTIME=2015-07-04-10-24-16).

<sup>5</sup> Wayne Crews, *Ten Thousand Commandments 2015*, Competitive Enterprise Institute, May 8, 2015, <https://cei.org/10kc2015>.

<sup>6</sup> Sam Stein, “Specter Will Vote against Employee Free Choice Act,” *Huffington Post*, April 24, 2009, [http://www.huffingtonpost.com/2009/03/24/specter-to-oppose-cloture\\_n\\_178571.html](http://www.huffingtonpost.com/2009/03/24/specter-to-oppose-cloture_n_178571.html).

<sup>7</sup> Diana Furchtgott-Roth, *Unions vs. Private Plans: How Secure Are Union Members’ Retirements?* Hudson Institute, 2008, <http://www.hudson.org/content/researchattachments/attachment/882/unionvsprivatepensionplans.pdf>. The situation has not changed much since the publication of this study.

<sup>8</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 29 CFR Part 541 (2015), <http://www.dol.gov/whd/overtime/NPRM2015/OT-NPRM.pdf>.

<sup>9</sup> Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Computer and Outside Sales Employees, 29 CFR Part 541, final, (2004). <http://www.ecfr.gov/cgi-bin/text-idx?c=ecfr&sid=48d6ee3b99d3b3a97b1bf189e1757786&rgn=div5&view=text&node=29:3.1.1.1.23&pidno=29>.

<sup>10</sup> “Fact Sheet: Middle Class Economics Rewarding Hard Work by Restoring Overtime Pay,” The White House, June 30, 2015, <https://www.whitehouse.gov/the-press-office/2015/06/30/fact-sheet-middle-class-economics-rewarding-hard-work-restoring-overtime>.

<sup>11</sup> The DOL proposal asserts this increase occurs because, “The proposed rule will also transfer income to affected EAP [Executive, Administrative, Professional, white collar exempt] workers working in excess of 40

hours per week through payment of overtime to workers earning between the current and proposed salary levels.” Christine Mai-Duc, “Obama’s new overtime rules: How they’s work and who they’d affect,” *Los Angeles Times*, June 30, 2015, <http://www.latimes.com/business/la-fi-obama-overtime-rules-explainer-20150630-htmstory.html>.

<sup>12</sup> See note, 16.

<sup>13</sup> Marianne Levine, “Barack Obama poised to hike wages for millions,” Politico, June 8, 2015, [http://www.politico.com/story/2015/06/barack-obama-overtime-salary-levels-white-house-118688.html?hp=t1\\_r](http://www.politico.com/story/2015/06/barack-obama-overtime-salary-levels-white-house-118688.html?hp=t1_r).

<sup>14</sup> Melanie Trottman and Eric Morath, “Labor Department Expected to Make Millions More Eligible for Overtime,” *The Wall Street Journal*, June 29, 2015, <http://www.wsj.com/articles/labor-department-expected-to-make-millions-more-eligible-for-overtime-1435626461>.

<sup>15</sup> Lydia DePillis, “As labor advocates hail Obama’s overtime plan, employers brace selves,” *Washington Post*, June 30, 2015, [http://www.washingtonpost.com/business/economy/as-labor-advocates-hail-obamas-overtime-plan-employers-brace-selves/2015/06/30/f0291bea-1f43-11e5-bf41-c23f5d3face1\\_story.html](http://www.washingtonpost.com/business/economy/as-labor-advocates-hail-obamas-overtime-plan-employers-brace-selves/2015/06/30/f0291bea-1f43-11e5-bf41-c23f5d3face1_story.html).

<sup>16</sup> Doug Hass, “The DOL’s Surprising Conclusion about Employers in the New FLSA Regulations,” *Wage & Hour Insights*, July 8, 2015, <http://www.wagehourinsights.com/dol-news/the-dols-surprising-conclusion-about-employers-in-the-new-flsa-regulations/>.

<sup>17</sup> James Sherk, “Salaried Overtime Requirements: Employers Will Offset Them with Lower Pay,” Heritage Foundation, July 2, 2015, <http://www.heritage.org/research/reports/2015/07/salaried-overtime-requirements-employers-will-offset-them-with-lower-pay>.

<sup>18</sup> Anthony Barkume, “The Structure of Labor Costs with Overtime Work in US Jobs,” *Industrial and Labor Relations Review*, Vol. 64, No. 1 (October 2010).

<sup>19</sup> Oxford Economics, “Rethinking Overtime: How Increasing Overtime Exemption Thresholds Will Affect the Retail and Restaurant Industries,” 2015, prepared for the National Retail Federation, [https://nrf.com/sites/default/files/Documents/Rethinking\\_Overtime.pdf](https://nrf.com/sites/default/files/Documents/Rethinking_Overtime.pdf).

<sup>20</sup> Christian Schappel, “Why DOL’s new OT rules may not increase pay,” HRmorning.com, July 10, 2015, <http://www.hrmorning.com/dol-new-ot-rules-may-not-increase-pay/>.

<sup>21</sup> Diana Furchgott-Roth, “Obama deals a blow to parents, women and millennials in new overtime rules,” MarketWatch.com, June 26, 2015, <http://www.marketwatch.com/story/the-many-unintended-consequences-of-obamas-new-overtime-rules-2015-06-26>.

<sup>22</sup> Data retrieved on August 10, 2015 from <http://globalworkplaceanalytics.com/telecommuting-statistics>.

<sup>23</sup> Survey conducted by Harris Poll on behalf of EY, “A global study on work-life challenges across generations,” 2015, [http://www.ey.com/Publication/vwLUAssets/EY-global-generations-a-global-study-on-work-life-challenges-across-generations/\\$FILE/EY-global-generations-a-global-study-on-work-life-challenges-across-generations.pdf](http://www.ey.com/Publication/vwLUAssets/EY-global-generations-a-global-study-on-work-life-challenges-across-generations/$FILE/EY-global-generations-a-global-study-on-work-life-challenges-across-generations.pdf).

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<sup>26</sup> Cecilia Rouse, “The Economics of Workplace Flexibility,” Council of Economic Advisers, March 31, 2010, <http://www.whitehouse.gov/blog/2010/03/31/economics-workplace-flexibility>.

<sup>27</sup> National Labor Relations Board, Representation—Case Procedures, Final, 80 *Federal Register* 19199, <https://www.federalregister.gov/articles/2015/04/10/2015-08159/representation-case-procedures>.

<sup>28</sup> Trey Kovacs, “New Rule Empowers Union ‘Ambush Elections,’” *Investor’s Business Daily*, April 2, 2015, <https://cei.org/content/new-rule-empowers-union-ambush-elections>.

<sup>29</sup> Christine Holst, “The Aftermath of ‘Ambush’ Elections – Union Petitions Increase, Median Time to Election Decreases During First Month of Controversial Rule,” *National Law Review*, June 9, 2015, <http://www.natlawreview.com/article/aftermath-ambush-elections-union-petitions-increase-median-time-to-election-decrease>.

<sup>30</sup> Timothy M. McConville, “Region 28’s Average Election Time Now 18 Days: Ambush at the NLRB,” *National Law Review*, June 24, 2015, <http://www.natlawreview.com/article/region-28-s-average-election-time-now-18-days-ambush-nlrb>.

<sup>31</sup> Ibid.

<sup>32</sup> Bill Berger, "New NLRB Election Rules Accelerate Union Action," *JD Supra Business Advisor*, June 6, 2015, <http://www.jdsupra.com/legalnews/new-nlr-election-rules-accelerate-83582/>.

<sup>33</sup> William Messenger, Testimony to the U.S. House of Representatives Committee on Education and Workforce, "Culture of Union Favoritism: The Return of the NLRB's Ambush Election Rule," March 2, 2014. [http://edworkforce.house.gov/uploadedfiles/william\\_l\\_messenger\\_testimony.pdf](http://edworkforce.house.gov/uploadedfiles/william_l_messenger_testimony.pdf).

<sup>34</sup> Guidance Memorandum on Representation Case Procedure Changes Effective April 14, 2015, NLRB MEMORANDUM GC 15-06, <https://www.scribd.com/doc/271654351/GC-15-06-Guidance-Memorandum-on-Representation-Case-Procedure-Changes-Effective-April-14-2015-PDF-10>.

<sup>35</sup> National Labor Relations Board, NLRB Office of the General Counsel Issues Consolidated Complaints against McDonald's Franchisees and their Franchisor McDonald's, USA, LLC as Joint Employers (2014), <http://www.nlr.gov/news-outreach/news-story/nlr-office-general-counsel-issues-consolidated-complaints-against-cnn-america-inc-and-team-video-services-llc>, 361 NLRB No. 47 (2014), <http://apps.nlr.gov/link/document.aspx/09031d45818bc15c>. Notice and Invitation to File Briefs, *Browning-Ferris Industries of California, Inc. and FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350, International Brotherhood of Teamsters*, Case 32-RC-109684 (2014), [http://www.constangy.net/nr\\_images/officially-invited.pdf](http://www.constangy.net/nr_images/officially-invited.pdf).

<sup>36</sup> Decision and Order by Members Zimmerman, Hunter and Dennis, *Laerco Transportation and Warehouse; California Transportation Labor, Inc.; American Management Carriers, Inc.; Cal-American Transport, Inc. and International Longshoremen's and Warehousemen's Union, Petitioner*; Case 21-RC-17087 (1984), [http://www.constangy.net/nr\\_images/laerco.pdf](http://www.constangy.net/nr_images/laerco.pdf). And Decision and Order by Chairman Dotson and Members Hunter and Dennis, *TLI, Incorporated and Crown Zellerbach Corporation and General Teamsters Local Union No. 326 a/w International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, Case 4-CA-13033 (1984), <http://labor-relations-board.vlex.com/vid/tli-inc-43772301>.

<sup>37</sup> Amicus Brief of the General Counsel, *Browning-Ferris Industries of California, Inc. & FPR-II, LCC v. Sanitary Truck Drivers and Helpers local 350*, Case 32-RC-109684 (2014), page 2, <http://www.laborrelationsupdate.com/files/2014/07/GCs-Amicus-Brief-Browning-Ferris.pdf>.

<sup>38</sup> "The NLRB's Designs to Re-Define Joint Employer," *National Law Review*, August 10, 2015, <http://www.natlawreview.com/article/nlr-s-designs-to-re-define-joint-employer-national-labor-relations-board>.

<sup>39</sup> International Franchise Association, "Franchise Businesses Projected to Grow Faster than the Rest of the Economy in 2014," 2014, <http://franchiseeconomy.com/franchise-businesses-projected-to-grow-faster-than-the-rest-of-the-economy-in-2014/>

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<sup>42</sup> "Changes to the Joint Employer Standard," Coalition for a Democratic Workplace, 2015, <http://myprivateballot.com/wp-content/uploads/2015/01/Fact-Sheet-Joint-Employer-Update-1-15.pdf>.

<sup>43</sup> "Opportunity at Risk: A New Joint-Employer Standard and the Threat to Small Business," U.S. Chamber of Commerce, 2015,

[http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final\\_0.pdf](http://www.workforcefreedom.com/sites/default/files/Joint%20Employer%20Standard%20Final_0.pdf).

<sup>44</sup> Aloysius Hogan "The NLRB Joint-Employer Cases: An Attack on American Business," *Issue Analysis* 2015 No. 2, Competitive Enterprise Institute, June 2015, <https://cei.org/sites/default/files/Aloysius%20Hogan%20-%20The%20NLRB%20Joint-Employer%20Cases%20-%20206-4-15.pdf>.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.