

# STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2017

NOVEMBER 15, 2017.—Committed to the Committee of the Whole House on the  
State of the Union and ordered to be printed

Mr. GOODLATTE, from the Committee on the Judiciary,  
submitted the following

## R E P O R T

together with

## DISSENTING VIEWS

[To accompany H.R. 659]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 659) to amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as the Attorney General exercises such authority, having considered the same, report favorably thereon without amendment and recommend that the bill do pass.

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## Purpose and Summary

H.R. 659, the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017,” or the “SMARTER Act,” harmonizes the standards applied to the Department of Justice (DOJ) and the Federal Trade Commission (FTC) when each agency seeks a preliminary injunction to a proposed merger or acquisition. Additionally, the SMARTER Act amends the Clayton Act to provide the FTC with the same authority DOJ already possesses to seek an injunction against a proposed merger, and, in doing so, removes the ability of the FTC to pursue internal administrative litigation following a court’s denial of an FTC preliminary injunction request. The SMARTER Act would preserve each agency’s authority to challenge monopolistic transactions or ones that would substantially lessen competition and not affect the judicial remedies available to address such transactions.

## Background and Need for the Legislation

### A. BRIEF OVERVIEW OF ANTITRUST ENFORCEMENT BY DOJ AND THE FTC OF PROPOSED MERGERS AND ACQUISITIONS

Two federal agencies, the Antitrust Division of DOJ and the FTC, share responsibility for government enforcement of the federal antitrust laws.<sup>1</sup> The position of Assistant Attorney General for Antitrust was created in 1903, and the Antitrust Division became a separate operating unit within DOJ thirty years later.<sup>2</sup> In 1914, Congress passed the Federal Trade Commission Act (the FTC Act),<sup>3</sup> which created the FTC and conferred to the independent agency antitrust enforcement authority that would, in part, supplement DOJ’s antitrust enforcement authority.

Section 7 of the Clayton Act (Section 7) prohibits mergers and acquisitions that would “substantially lessen competition” or “tend to create a monopoly.”<sup>4</sup> The Antitrust Division and the FTC have essentially identical authority to enforce Section 7. The manner in which they review and enforce their Section 7 authority largely is prescribed by the Hart-Scott-Rodino Antitrust Improvements Act (the HSR Act).<sup>5</sup> Under the HSR Act, each of the antitrust enforcement agencies is notified in advance of a proposed transaction and afforded a period of time to review the effects of such a transaction.<sup>6</sup> Only one agency takes responsibility for the review of a proposed transaction.<sup>7</sup> For the vast majority of transactions, the

<sup>1</sup> ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS, at 129 (Apr. 2007), [http://govinfo.library.unt.edu/amc/report\\_recommendation/amc\\_final\\_report.pdf](http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf) [hereinafter, the “AMC Report”].

<sup>2</sup> *Id.*

<sup>3</sup> 15 U.S.C. §§ 41–58 (1914).

<sup>4</sup> 15 U.S.C. § 18 (2013).

<sup>5</sup> 15 U.S.C. § 18a (2013), as amended.

<sup>6</sup> As a practical matter, virtually every transaction includes a period of time between the execution of the initial transaction documents that outline the intent of parties to enter into a deal and the manner in which they intend to consummate the deal, and the “closing” of the transaction when the deal is consummated. Depending on the size and complexity of the transaction, that period of time could be anywhere between a matter of weeks to over a year.

<sup>7</sup> AMC Report, at 132 (explaining that there is not a governing document or policy that determines which agency reviews each proposed transaction; however, there are some historical practices that can influence which agency reviews the transaction. For example, DOJ typically re-

antitrust enforcement agencies will grant an early termination of the statutory waiting period or simply allow the waiting period to expire without taking any formal action, both of which have the effect of allowing the transaction to proceed to consummation.

When the antitrust enforcement agencies conclude that the consummation of a proposed transaction would violate Section 7, the agencies pursue an injunction of the transaction in federal court. Generally speaking, if the court grants the injunction, the parties abandon the merger; if the court denies the injunction, the parties consummate the transaction shortly thereafter.

#### B. DISPARATE PRELIMINARY INJUNCTION STANDARDS

The FTC and DOJ confront different standards when seeking a preliminary injunction of a proposed transaction in court. When reviewing the FTC's request for a preliminary injunction, courts apply the standard explicitly set forth in Section 13(b) of the FTC Act, which states that "[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, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond."<sup>8</sup> By comparison, Section 15 of the Clayton Act, pursuant to which DOJ seeks injunctions, does not specify a standard of review for courts when they determine whether to grant preliminary injunctive relief. Consequently, DOJ must meet the traditional preliminary injunction standard as applied by the presiding circuit court, which generally requires "a reasonable likelihood of success on the merits" and "the balance of equities" favoring DOJ.<sup>9</sup>

It is difficult to quantify the degree to which the disparate preliminary injunction standards yield different results. At a minimum, there is a perception that a disparate preliminary injunction standard exists.<sup>10</sup> Some commentators go so far as to suggest that the FTC may even be subject to a more lenient standard than DOJ.<sup>11</sup>

#### C. DISPARATE PROCESSES TO PREVENT A PROPOSED TRANSACTION

Generally, DOJ agrees with the transaction parties to combine the proceedings for both a preliminary injunction and permanent injunction before the district court.<sup>12</sup> In contrast, the FTC's practice is to seek only a preliminary injunction, despite the fact that they have the authority to consolidate the proceedings in the same fashion as DOJ. In fact, the FTC has affirmatively fought against

views telecommunications transactions and the FTC typically reviews health care transactions. These historical practices, however, are not hard and fast rules and are not always followed.  
<sup>8</sup> 15 U.S.C. § 53(b) (2013).

<sup>9</sup> See, e.g., *United States v. Siemens Corp.*, 621 F.2d 499, 505–06 (2d Cir. 1980) (citations omitted). Although courts generally also require a showing of irreparable injury or substantial harm to the public to grant a preliminary injunction, many courts have held that irreparable harm to the public should be presumed once the government establishes a reasonable probability of success. See, e.g., *id.* at 506. See also the American Bar Association, Section of Antitrust Law, Public Comments Submitted to the Antitrust Modernization Commission Regarding Differential Merger Enforcement Standards, at 3 (Oct. 28, 2005).

<sup>10</sup> AMC Report, at 141.

<sup>11</sup> AMC Report, at 142. *But see* AMC Report at 142 n.90 statement of William Blumenthal (stating that the perception continually changes, and that it is not invariably the case that people would rather be before DOJ).

<sup>12</sup> AMC Report, at 138.

efforts to consolidate the preliminary injunction and permanent injunction proceedings.<sup>13</sup>

One of the primary reasons behind the FTC's practice to pursue only a preliminary injunction is it preserves the FTC's ability to pursue administrative litigation following the denial of a preliminary injunction request. When the FTC seeks to prevent the consummation of a proposed transaction, it will file simultaneously an administrative complaint that initiates the administrative litigation process and, because the administrative complaint does not by itself prevent the consummation of the transaction, a preliminary injunction request in Federal court. Ostensibly, the preliminary injunction is to preclude the parties from closing the transaction while the administrative litigation is pending. Absent such a request, the parties to the transaction theoretically could consummate the transaction and continue with their administrative litigation at the FTC. If the parties lose their case, they would face the prospect of having their transaction unwound. In contrast, the DOJ does not have the authority to conduct administrative litigation.

#### D. THE ANTITRUST MODERNIZATION COMMISSION AND ITS RECOMMENDATIONS

In early 2003, the bi-partisan Antitrust Modernization Commission (AMC) was formed pursuant to the Antitrust Modernization Act.<sup>14</sup> The AMC was charged with examining the antitrust laws, soliciting the opinions of experts on the operation of such laws, and publishing a report with the AMC's recommendations for any improvement to the antitrust laws. On April 2, 2007, the AMC issued a 540-page report that detailed the issues it examined and provided a number of recommendations for legislative, administrative, and judicial action.

Included in the AMC report was an examination of the issues attendant to the existing disparities in the preliminary injunction standards applied to DOJ and the FTC, and the disparate processes available to DOJ and the FTC when each agency seeks to prevent a proposed transaction. As stated within the AMC 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.<sup>15</sup>

The AMC report further explains that even the perception of a difference between the standards applied to, and processes used by, the agencies could impact how parties interact with the agencies. For example, the FTC may be perceived as having greater leverage

<sup>13</sup> See Pl. FTC's Mem. in Opp'n to Defs.' Mot. Seeking Consolidation of Prelim. & Permanent Injns., *FTC v. Arch Coal, Inc.*, Case No. 1:04-CV-00534, at 3, 4 (Apr. 22, 2004) (arguing against consolidation).

<sup>14</sup> Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, § 11054(h), 116 Stat. 1856, 1857.

<sup>15</sup> AMC Report, at 138-9. The importance of removing any potential divergence is underscored by the fact that it often is mere chance or, the "flip of a coin," that determines which agency reviews the proposed transaction.

when negotiating a consensual consent decree with the proposed transaction parties.<sup>16</sup> Again, “just the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of a dual merger enforcement regime.”<sup>17</sup>

#### E. RECENT FTC ACTIONS

On March 13, 2015, the FTC announced that it was re-adopting a rule created in 1995, often referred to as the “Pitofsky Rule” after the FTC Chairman at the time.<sup>18</sup> In brief, the Pitofsky Rule provides that if the FTC is unsuccessful in obtaining a preliminary injunction against a proposed transaction in Federal court, it will not automatically proceed to continue to block the transaction through administrative litigation. Rather, the FTC will review each matter on a case-by-case basis and determine whether proceeding to administrative litigation is warranted. Additionally, the Pitofsky Rule provides for the automatic stay of the pending administrative litigation following the denial of the preliminary injunction request in Federal court.

In 2009, the FTC repealed the component of the Pitofsky Rule that provided for the automatic stay of the administrative litigation.<sup>19</sup> The latest FTC action reinstates the automatic stay component of the Pitofsky Rule. To be clear, the FTC still retains the ability to continue administrative litigation following the denial of a preliminary injunction request, and, the Pitofsky Rule may be repealed in whole, or in part, by a Commission vote. Notably, the Pitofsky Rule predates the AMC Report.

#### F. THE SMARTER ACT

The SMARTER Act incorporates a number of the recommendations made by the AMC, and provides the antitrust enforcement agencies with consistent authority and processes when seeking to prevent a proposed transaction. Specifically, the SMARTER Act confers to the FTC the same authority that DOJ presently possesses under the Clayton Act. In doing so, the SMARTER Act also requires the FTC to petition the district court to seek an injunction of a proposed transaction rather than using an internal administrative process. The FTC will retain administrative litigation capabilities in other contexts. As the AMC report highlights:

Elimination of administrative litigation in HSR Act merger cases will not deprive the FTC of an important enforcement option. Although administrative litigation may provide a valuable avenue to develop antitrust law in general, it appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases. Whatever the value, it is

<sup>16</sup> AMC Report, at 142.

<sup>17</sup> *Id.*

<sup>18</sup> FTC, *Commission Approves Revisions to Its Rules of Practice* (Mar. 13, 2015), <https://www.ftc.gov/newsevents/press-releases/2015/03/commission-approves-revisions-its-rules-practice>; Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39,741 (1995).

<sup>19</sup> Debbie Feinstein, *Changes to Commission Rule 3.26 re: Part 3 Proceedings Following Federal Court Denial of a Preliminary Injunction*, FTC (Mar. 16, 2015), <https://www.ftc.gov/newsevents/blogs/competitionmatters/2015/03/changes-commission-rule-326-re-part-3-proceedings>.

significantly outweighed by the costs it imposes on merging parties in uncertainty and litigation costs.<sup>20</sup>

Accordingly, under the SMARTER Act, both DOJ and the FTC remain able to pursue both preliminary and permanent injunctions, and the standards applied by courts to both agencies will be identical. Consequently, while there will continue to be a dual antitrust enforcement regime, the standards and processes applied to parties who undergo a transaction review will be harmonized.

### **Hearings**

H.R. 659 is identical to H.R. 2745, which was introduced during the 114th Congress. On June 16, 2015, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted a hearing on H.R. 2745. The witnesses at the hearing were: Deborah Garza, Esq., Partner, Covington & Burling LLP, former Chairwoman of the Antitrust Modernization Commission, and former Acting Assistant Attorney General of the Department of Justice; David Clanton, Esq., Senior Counsel, Baker & McKenzie LLP, former Commissioner, and former acting Chairman of the Federal Trade Commission; Abbott (Tad) B. Lipsky, Jr., Esq., Partner, Latham & Watkins LLP, former Deputy Assistant to the Assistant Attorney General of the Department of Justice; and, Albert A. Foer, Esq., founder and former president of the American Antitrust Institute.

Three of the four witnesses testified in support of the same preliminary injunction standard being applied to both antitrust enforcement agencies. Additionally, these same three witnesses testified in support of removing the FTC's ability to pursue administrative litigation solely in the context of merger reviews. These witnesses testified that such a change would promote transparency, fairness, and predictability to the merger review process as well as allow the United States to continue its leadership role in global antitrust enforcement policy. The Minority witness testified that he believed there was not significant cause to amend the law.

During the 113th Congress, the Subcommittee on Regulatory Reform, Commercial and Antitrust Law conducted a hearing on a discussion draft of the SMARTER Act. The testimony provided at this hearing similarly supported harmonizing the preliminary injunction standard and removing the FTC's ability to pursue administrative litigation solely in the context of merger reviews.

### **Committee Consideration**

On April 5, 2017, the Committee met in open session and ordered the bill, H.R. 659, favorably reported, without amendment, by a vote of 16–10, a quorum being present.

### **Committee Votes**

In compliance with clause 3(b) of rule XIII of the Rules of the House of Representatives, the Committee advises that the following rollcall votes occurred during the Committee's consideration of H.R. 659:

1. Motion to report H.R. 2745 favorably to the House of Representatives. Agreed to by a vote of 16 ayes to 10 nays.

<sup>20</sup> AMC Report, at 141 (citations omitted).

**ROLLCALL NO. 1**

	<b>Ayes</b>	<b>Nays</b>	<b>Present</b>
Mr. Goodlatte (VA), Chairman .....	X	.....	.....
Mr. Sensenbrenner, Jr. (WI) .....	X	.....	.....
Mr. Smith (TX) .....	X	.....	.....
Mr. Chabot (OH) .....	.....	.....	.....
Mr. Issa (CA) .....	X	.....	.....
Mr. King (IA) .....	X	.....	.....
Mr. Franks (AZ) .....	.....	.....	.....
Mr. Gohmert (TX) .....	.....	.....	.....
Mr. Jordan (OH) .....	X	.....	.....
Mr. Poe (TX) .....	X	.....	.....
Mr. Chaffetz (UT) .....	X	.....	.....
Mr. Marino (PA) .....	X	.....	.....
Mr. Gowdy (SC) .....	.....	.....	.....
Mr. Labrador (ID) .....	.....	.....	.....
Mr. Farenthold (TX) .....	X	.....	.....
Mr. Collins (GA) .....	.....	.....	.....
Mr. DeSantis (FL) .....	X	.....	.....
Mr. Buck (CO) .....	X	.....	.....
Mr. Ratcliffe (TX) .....	X	.....	.....
Ms. Roby (AL) .....	X	.....	.....
Mr. Gaetz (FL) .....	X	.....	.....
Mr. Johnson (LA) .....	.....	.....	.....
Mr. Biggs (AZ) .....	X	.....	.....
Mr. Conyers, Jr. (MI), Ranking Member .....	.....	X	.....
Mr. Nadler (NY) .....	.....	X	.....
Ms. Lofgren (CA) .....	.....	X	.....
Ms. Jackson Lee (TX) .....	.....	.....	.....
Mr. Cohen (TN) .....	.....	X	.....
Mr. Johnson (GA) .....	.....	.....	.....
Mr. Deutch (FL) .....	.....	X	.....
Mr. Gutierrez (IL) .....	.....	.....	.....
Ms. Bass (CA) .....	.....	.....	.....
Mr. Richmond (LA) .....	.....	.....	.....
Mr. Jeffries (NY) .....	.....	.....	.....
Mr. Cicilline (RI) .....	.....	X	.....
Mr. Swalwell (CA) .....	.....	.....	.....
Mr. Lieu (CA) .....	.....	X	.....
Mr. Raskin (MD) .....	.....	X	.....
Ms. Jayapal (WA) .....	.....	X	.....
Mr. Schneider (IL) .....	.....	X	.....
<b>Total</b> .....	<b>16</b>	<b>10</b>	.....

**Committee Oversight Findings**

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee advises that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

### **New Budget Authority and Tax Expenditures**

Clause 3(c)(2) of rule XIII of the Rules of the House of Representatives is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

### **Congressional Budget Office Cost Estimate**

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 659, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,  
CONGRESSIONAL BUDGET OFFICE,  
*Washington, DC, May 2, 2017.*

Hon. BOB GOODLATTE, CHAIRMAN,  
*Committee on the Judiciary,*  
*House of Representatives, Washington, DC.*

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 659, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Stephen Rabent, who can be reached at 226-2860.

Sincerely,

KEITH HALL.

Enclosure

cc: Honorable John Conyers Jr.  
Ranking Member

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### **H.R. 659—Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017**

As ordered reported by the House Committee on the Judiciary on  
April 5, 2017

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H.R. 659 would amend federal laws governing mergers and acquisitions to align procedures followed by the Federal Trade Commission (FTC) with those followed by the Department of Justice (DOJ). Under current law, both the FTC and DOJ enforce federal antitrust laws, though in some instances, the manner in which the two agencies exercise that authority is different. H.R. 659 would amend the Clayton Act and the Federal Trade Commission Act to align certain procedures followed by the FTC when it reviews and litigates a proposed merger or acquisition with procedures followed by DOJ. Among other changes, the bill would require the FTC to resolve certain contested mergers or acquisitions through a federal court instead of an administrative proceeding. The bill also would harmonize the standard that the FTC must meet before a federal court can issue a preliminary injunction against a proposed transaction with the standard that DOJ is required to use.



Based on an analysis of information from the FTC on the agency's current procedures for handling contested mergers and acquisitions, CBO estimates that the increased workloads of the FTC and the federal courts under the bill would cost less than \$500,000 over the 2018–2022 period because only a small number of cases are not settled or are abandoned and because the FTC already follows procedures similar to those required in H.R.659; such spending would be subject to the availability of appropriated funds.

Enacting H.R. 659 would not affect direct spending or revenues; therefore, pay-as-you-go procedures do not apply. CBO estimates that enacting H.R. 659 would not increase net direct spending or on-budget deficits in any of the four consecutive 10-year periods beginning in 2028.

H.R. 659 contains no intergovernmental or private-sector mandates as defined in the Unfunded Mandates Reform Act and would not affect the budgets of state, local, or tribal governments.

The CBO staff contact for this estimate is Stephen Rabent. The estimate was approved by H. Samuel Papenfuss, Deputy Assistant Director for Budget Analysis.

### **Duplication of Federal Programs**

No provision of H.R. 659 establishes or reauthorizes a program of the Federal government known to be duplicative of another Federal program, a program that was included in any report from GAO to Congress pursuant to section 21 of Public Law 111—139, or a program related to a program identified in the most recent Catalog of Federal Domestic Assistance.

### **Disclosure of Directed Rule Makings**

The Committee estimates that H.R. 659 specifically directs to be completed no specific rule makings within the meaning of 5 U.S.C. § 551.

### **Performance Goals and Objectives**

The Committee states that pursuant to clause 3(c)(4) of rule XIII of the Rules of the House of Representatives, H.R. 659 amends the Clayton Act and the Federal Trade Commission Act to provide the Federal Trade Commission with the same authority as the Department of Justice with respect to mergers under the Clayton Act.

### **Advisory on Earmarks**

In accordance with clause 9 of rule XXI of the Rules of the House of Representatives, H.R. 659 does not contain any congressional earmarks, limited tax benefits, or limited tariff benefits as defined in clause 9(e), 9(f) or 9(g) of Rule XXI.

### **Section-by-Section Analysis**

The following discussion describes the bill as reported by the Committee.

#### *Section 1. Short Title.*

Sets forth the short title of the legislation as the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017.”

*Section 2. Amendments to the Clayton Act.*

Sec. 2(1): Section 4F of the Clayton Act provides that the Attorney General must notify state attorneys general of any antitrust action in which the Attorney General believes the state could bring an action based on substantially similar facts and share related files with such state attorneys general. The SMARTER Act amends this section to subject the FTC to these same requirements.

Sec. 2(2)(A): Section 5(a) of the Clayton Act provides that, in cases brought by the United States that result in final judgments against a defendant, those judgments can be used as *prima facie* evidence (*i.e.*, unless rebutted, sufficient to prove the allegation) of antitrust violations under substantially similar facts brought by other parties. The SMARTER Act amends this section to clarify that actions brought by the United States include actions brought by the FTC under Section 7.

Section 2(2)(B): Section 5(i) of the Clayton Act suspends the statute of limitations for private and state rights of action based on the conduct in question during a United States' proceeding and for one year thereafter, except that claims brought under section 4 or 4C of the Clayton Act only may be brought during the United States' proceeding or within four years after the cause of action accrued. The SMARTER Act amends this section to clarify that the statute of limitations is also tolled for actions brought by the FTC under Section 7.

Section 2(3): Section 11 of the Clayton Act authorizes the enforcement of compliance with certain sections of the Clayton Act by Federal agencies with specific expertise and provides for procedures for such enforcement. For example, section 11 authorizes the Federal Reserve Board to enforce compliance of these sections of the Clayton Act against banks, banking associations, and trust companies. Section 11 also provides the FTC with the authority to prosecute violations of the Clayton Act through the FTC administrative litigation process. The SMARTER Act amends the Clayton Act to exclude the FTC's enforcement of Section 7 from these separate procedures, which ensures that the FTC's Section 7 enforcement procedures will be identical to the procedures applicable to the Attorney General. Additionally, the SMARTER Act includes clarifying language that the FTC may still enter into Section 7 consent decrees with parties to the proposed transaction.

Section 2(4): Section 13 of the Clayton Act allows the United States to issue subpoenas that will be effective in any judicial district. The SMARTER Act amends this section to clarify that the term United States includes the FTC when it is prosecuting Section 7 cases.

Section 2(5): Section 15 of the Clayton Act provides that it is the duty of the United States district attorneys, under the direction of the Attorney General, to institute antitrust lawsuits whereby they may seek temporary restraining orders or other remedies against the offensive conduct. The SMARTER Act amends this section to extend the duty to initiate lawsuits to the FTC.

*Section 3. Amendments to the FTC Act.*

Section 3(1): Section 5 of the FTC Act allows the FTC to initiate an administrative proceeding to evaluate an "unfair method of competition," which could include a proposed merger. The SMARTER

Act amends this section to preclude the FTC from initiating an administrative proceeding against a proposed transaction.

Section 3(2): Section 9 of the FTC Act, in the paragraph to be amended, provides jurisdiction to the Federal courts to issue writs of mandamus that command compliance with the FTC Act. The process for obtaining such a writ of mandamus requires the FTC to request the Attorney General to submit an application to the courts for the writ. The SMARTER Act amends this section to allow the FTC to submit independently an application to the courts for such a writ for merger review cases in which the FTC finds that the activity in question constitutes an “unfair method of competition.”

Section 3(3): Section 13(b) of the FTC Act provides authority to the FTC to seek a preliminary injunction for a violation of the FTC Act. The SMARTER Act amends this section specifically to exclude the FTC from seeking a preliminary injunction in a case brought under Section 7 because the FTC now has this authority separately under the Clayton Act.

Section 3(4): Section 20(c)(1) of the FTC Act provides authority to the FTC to issue subpoenas and take depositions. The SMARTER Act amends this section to clarify that the FTC also has this authority when prosecuting Section 7 cases.

*Section 4. Effective Date; Application of Amendments.*

Subsection 4(a): Provides that the effective date of the SMARTER Act will be the day that it is signed into law.

Subsection 4(b): Provides that the SMARTER Act will not apply to violations of Section 7 that occurred prior to the enactment of the SMARTER Act, transactions that are in compliance with Section 7A of the Clayton Act (*i.e.*, transactions for which the parties have filed a Hart-Scott-Rodino merger review notice), and consummated mergers.

**Changes in Existing Law Made by the Bill, as Reported**

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, and existing law in which no change is proposed is shown in roman):

**CLAYTON ACT**

\* \* \* \* \*

**[ACTIONS BY ATTORNEY GENERAL OF THE UNITED STATES]**

**[SEC. 4F. (a)** Whenever the Attorney General of the United States has brought an action under the antitrust laws, and he has reason to believe that any State attorney general would be entitled to bring an action under this Act based substantially on the same alleged violation of the antitrust laws, he shall promptly give written notification thereof to such State attorney general.

**[(b)** To assist a State attorney general in evaluating the notice or in bringing any action under this Act, the Attorney General of

the United States shall, upon request by such State attorney general, make available to him, to the extent permitted by law, any investigative files or other materials which are or may be relevant or material to the actual or potential cause of action under this Act.】

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

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

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

\* \* \* \* \*

SEC. 5. (a) A final judgment or decree heretofore or hereafter rendered in any civil or criminal proceeding brought by or on behalf of the United States under the antitrust laws (*including a proceeding brought by the Federal Trade Commission with respect to a violation of section 7*) to the effect that a defendant has violated said laws shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto: *Provided*, That this section shall not apply to consent judgments or decrees entered before any testimony has been taken. Nothing contained in this section shall be construed to impose any limitation on the application of collateral estoppel, except that, in any action or proceeding brought under the antitrust laws, collateral estoppel effect shall not be given to any finding made by the Federal Trade Commission under the antitrust laws or under section 5 of the Federal Trade Commission Act which could give rise to a claim for relief under the antitrust laws.

(b) Any proposal for a consent judgment submitted by the United States for entry in any civil proceeding brought by or on behalf of the United States under the antitrust laws shall be filed with the district court before which such proceeding is pending and published by the United States in the Federal Register at least 60 days prior to the effective date of such judgment. Any written comments relating to such proposal and any responses by the United States thereto, shall also be filed with such district court and published by the United States in the Federal Register within such sixty-day period. Copies of such proposal and any other materials and documents which the United States considered determinative in formu-

lating such proposal, shall also be made available to the public at the district court and in such other districts as the court may subsequently direct. Simultaneously with the filing of such proposal, unless otherwise instructed by the court, the United States shall file with the district court, publish in the Federal Register, and thereafter furnish to any person upon request, a competitive impact statement which shall recite—

- (1) the nature and purpose of the proceeding;
  - (2) a description of the practices or events giving rise to the alleged violation of the antitrust laws;
  - (3) an explanation of the proposal for a consent judgment, including an explanation of any unusual circumstances giving rise to such proposal or any provision contained therein, relief to be obtained thereby, and the anticipated effects on competition of such relief;
  - (4) the remedies available to potential private plaintiffs damaged by the alleged violation in the event that such proposal for the consent judgment is entered in such proceeding;
  - (5) a description of the procedures available for modification of such proposal; and
  - (6) a description and evaluation of alternatives to such proposal actually considered by the United States.
- (c) the United States shall also cause to be published, commencing at least 60 days prior to the effective date of the judgment described in subsection (b) of this section, for 7 days over a period of 2 weeks in newspapers of general circulation of the district in which the case has been filed, in the District of Columbia, and in such other districts as the court may direct—
- (i) a summary of the terms of the proposal for the consent judgment,
  - (ii) a summary of the competitive impact statement filed under subsection (b),
  - (iii) and a list of the materials and documents under subsection (b) which the United States shall make available for purposes of meaningful public comment, and the place where such materials and documents are available for public inspection.
- (d) during the 60-day period as specified in subsection (b) of this section, and such additional time as the United States may request and the court may grant, the United States shall receive and consider any written comments relating to the proposal for the consent judgment submitted under subsection (b). the Attorney General or his designee shall establish procedures to carry out the provisions of this subsection, but such 60-day time period shall not be shortened except by order of the district court upon a showing that (1) extraordinary circumstances require such shortening and (2) such shortening is not adverse to the public interest. At the close of the period during which such comments may be received, the United States shall file with the district court and cause to be published in the Federal Register a response to such comments. Upon application by the United States, the district court may, for good cause (based on a finding that the expense of publication in the Federal Register exceeds the public interest benefits to be gained from such publication), authorize an alternative method of public dissemina-

tion of the public comments received and the response to those comments.

(e)(1) Before entering any consent judgment proposed by the United States under this section, the court shall determine that entry of such judgment is in the public interest. For the purpose of such determination, the court shall consider—

(A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and

(B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

(2) Nothing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene.

(f) In making its determination under subsection (e), the court may—

(1) take testimony of Government officials or experts or such other expert witnesses, upon motion of any party or participant or upon its own motion, as the court may deem appropriate;

(2) appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain the views, evaluations, or advice of any individual, group or agency of government with respect to any aspects of the proposed judgment or the effect of such judgment, in such manner as the court deems appropriate;

(3) authorize full or limited participation in proceedings before the court by interested persons or agencies, including appearance *amicus curiae*, intervention as a party pursuant to the Federal Rules of Civil Procedure, examination of witnesses or documentary materials, or participation in any other manner and extent which serves the public interest as the court may deem appropriate.

(4) review any comments including any objections filed with the United States under subsection (d) concerning the proposed judgment and the responses of the United States to such comments and objections; and

(5) take such other action in the public interest as the court may deem appropriate.

(g) Not later than 10 days following the date of the filing of any proposal for a consent judgment under subsection (b), each defendant shall file with the district court a description of any and all written or oral communications by or on behalf of such defendant, including any and all written or oral communications on behalf of such defendant by any officer, director, employee, or agent of such defendant, or other person, with any officer or employee of the United States concerning or relevant to such proposal, except that

any such communications made by counsel of record alone with the Attorney General or the employees of the Department of Justice alone shall be excluded from the requirements of this subsection. Prior to the entry of any consent judgment pursuant to the antitrust laws, each defendant shall certify to the district court that the requirements of this subsection have been complied with and that such filing is a true and complete description of such communications known to the defendant or which the defendant reasonably should have known.

(h) Proceedings before the district court under subsections (e) and (f) of this section, and the competitive impact statement filed under subsection (b) of this section, shall not be admissible against any defendant in any action or proceeding brought by any other party against such defendant under the antitrust laws or by the United States under section 4A of this Act nor constitute a basis for the introduction of the consent judgment as prima facie evidence against such defendant in any such action or proceeding.

(i) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws (*including a proceeding instituted by the Federal Trade Commission with respect to a violation of section 7*), but not including an action under section 4A, the running of the statute of limitations in respect of every private or State right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however*, That whenever the running of the statute of limitations in respect of a cause of action arising under section 4 or 4C is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.

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SEC. 11. (a) That authority to enforce compliance with sections 2, 3, 7, and 8 of this Act by the persons respectively subject thereto is hereby vested in the Surface Transportation Board where applicable to common carriers subject to jurisdiction under subtitle IV of title 49, United States Code; in the Federal Communications Commission where applicable to common carriers engaged in wire or radio communication or radio transmission of energy; in the Secretary of Transportation where applicable to air carriers and foreign air carriers subject to the Federal Aviation Act of 1958; in the Federal Reserve Board where applicable to banks, banking associations, and trust companies; and in the Federal Trade Commission where applicable to all other character of commerce to be exercised as follows:

(b) Whenever the Commission, Board, or Secretary vested with jurisdiction thereof shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of this Act, it shall issue and serve upon such person and the Attorney General a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission, Board, or Secretary requiring

such person to cease and desist from the violation of the law so charged in said complaint. The Attorney General shall have the right to intervene and appear in said proceeding and any person may make application, and upon good cause shown may be allowed by the Commission, Board, or Secretary, to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission, Board, or Secretary. If upon such hearing the Commission, Board, or Secretary, as the case may be, shall be of the opinion that any of the provisions of said sections have been or are being violated, it shall make a report in writing, in which it shall state its findings as to the facts, and shall issue and cause to be served on such person an order requiring such person to cease and desist from such violations, and divest itself of the stock, or other share capital, or assets, held or rid itself of the directors chosen contrary to the provisions of sections 7 and 8 of this Act, if any there be, in the manner and within the time fixed by said order. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission, Board, or Secretary may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission, Board, or Secretary may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission, Board, or Secretary conditions of fact or of law have so changed as to require such action or if the public interest shall so require: *Provided, however,* That the said person may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section.

(c) Any person required by such order of the commission, board, or Secretary to cease and desist from any such violation may obtain a review of such order in the court of appeals of the United States for any circuit within which such violation occurred or within which such person resides or carries on business, by filing in the court, within sixty days after the date of the service of such order, a written petition praying that the order of the commission, board, or Secretary be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the commission, board, or Secretary, and thereupon the commission, board, or Secretary shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the commission, board, or Secretary until the filing of the record, and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the commission, board, or Secretary, and enforce-



ing the same to the extent that such order is affirmed, and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors *pendente lite*. The findings of the commission, board, or Secretary as to the facts, if supported by substantial evidence, shall be conclusive. To the extent that the order of the commission, board, or Secretary is affirmed, the court shall issue its own order commanding obedience to the terms of such order of the commission, board, or Secretary. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, board, or Secretary, the court may order such additional evidence to be taken before the commission, board, or Secretary, and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission, board, or Secretary may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of title 28 of the United States Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals to affirm, enforce, modify, or set aside orders of the commission, board, or Secretary shall be exclusive.

(e) No order of the commission, board, or Secretary or judgment of the court to enforce the same shall in anywise relieve or absolve any person from any liability under the antitrust laws.

(f) Complaints, orders, and other processes of the commission, board, or Secretary under this section may be served by anyone duly authorized by the commission, board, or Secretary, either (1) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (2) by leaving a copy thereof at the residence or the principal office or place of business of such person; or (3) by mailing by registered or certified mail a copy thereof addressed to such person at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered or certified mail as aforesaid shall be proof of the service of the same.

(g) Any order issued under subsection (b) shall become final—

(1) upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the commission, board, or Secretary may thereafter modify or set aside its order to the extent provided in the last sentence of subsection (b); or

(2) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the commission, board, or Sec-

retary has been affirmed, or the petition for review has been dismissed by the court of appeals, and no petition for certiorari has been duly filed; or

(3) upon the denial of a petition for certiorari, if the order of the commission, board, or Secretary has been affirmed or the petition for review has been dismissed by the court of appeals; or

(4) upon the expiration of thirty days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the order of the commission, board, or Secretary be affirmed or the petition for review be dismissed.

(h) If the Supreme Court directs that the order of the commission, board, or Secretary be modified or set aside, the order of the commission, board, or Secretary rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the mandate, in which event the order of the commission, board, or Secretary shall become final when so corrected.

(i) If the order of the commission, board, or Secretary is modified or set aside by the court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission, board, or Secretary rendered in accordance with the mandate of the court of appeals shall become final on the expiration of thirty days from the time such order of the commission, board, or Secretary was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the commission, board, or Secretary shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the court of appeals to the commission, board, or Secretary for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the commission, board, or Secretary rendered upon such rehearing shall become final in the same manner as though no prior order of the commission, board, or Secretary had been rendered.

(k) As used in this section the term "mandate", in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Any person who violates any order issued by the commission, board, or Secretary under subsection (b) after such order has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$5,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the United States. Each separate violation of any such order shall be a separate offense, except that in the case of a violation through continuing failure or neglect to obey a final order of the commission, board, or Secretary each

day of continuance of such failure or neglect shall be deemed a separate offense.

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

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

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SEC. 13. That in any suit, action, or proceeding brought by or on behalf of the United States *(including a suit, action, or proceeding brought by the Federal Trade Commission with respect to a violation of section 7)* subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: *Provided*, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

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SEC. 15. That the several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this Act, and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, *and the duty of the Federal Trade Commission with respect to a violation of section 7*, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition, and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises. Whenever it shall appear to the court before which any such proceeding may be pending that the ends of justice require that other parties should be brought before the court, the court may cause them to be summoned, whether they reside in the district in which the court is held or not, and subpoenas to that end may be served in any district by the marshal thereof.

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## FEDERAL TRADE COMMISSION ACT

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SEC. 5. (a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and

loan institutions described in section 18(f)(3), Federal credit unions described in section 18(f)(4), common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended, except as provided in section 406(b) of said Act, from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a), the term “unfair or deceptive acts or practices” includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition (*excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18), except in cases where the Commission approves an agreement with the parties to the transaction that contains a consent order*) or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by

the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the opinion that the method of competition or the act or practice in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate circuit court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph (2) not later than 120 days after the date of the filing of such request.

(c) Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the circuit court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined

therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code.

(d) Upon the filing of the record with it the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive.

(e) No order of the Commission or judgment of court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the Antitrust Acts.

(f) Complaints, orders, and other processes of the Commission under this section may be served by anyone duly authorized by the Commission, either (a) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or the president, secretary, or other executive officer or a director of the corporation to be served; or (b) by leaving a copy thereof at the residence or the principal office or place of business of such person, partnership, or corporation; or (c) by mailing a copy thereof by registered mail or by certified mail addressed to such person, partnership, or corporation at his or its residence or principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post office receipt for said complaint, order, or other process mailed by registered mail or certified mail as aforesaid shall be proof of the service of the same.

(g) An order of the Commission to cease and desist shall become final—

(1) Upon the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time; but the Commission may thereafter modify or set

aside its order to the extent provided in the last sentence of subsection (b).

(2) Except as to any order provision subject to paragraph (4), upon the sixtieth day after such order is served, if a petition for review has been duly filed; except that any such order may be stayed, in whole or in part and subject to such conditions as may be appropriate, by—

(A) the Commission;

(B) an appropriate court of appeals of the United States, if (i) a petition for review of such order is pending in such court, and (ii) an application for such a stay was previously submitted to the Commission and the Commission, within the 30-day period beginning on the date the application was received by the Commission, either denied the application or did not grant or deny the application; or

(C) the Supreme Court, if an applicable petition for certiorari is pending.

(3) For purposes of subsection (m)(1)(B) and of section 19(a)(2), if a petition for review of the order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(4) In the case of an order provision requiring a person, partnership, or corporation to divest itself of stock, other share capital, or assets, if a petition for review of such order of the Commission has been filed—

(A) upon the expiration of the time allowed for filing a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals and no petition for certiorari has been duly filed;

(B) upon the denial of a petition for certiorari, if the order of the Commission has been affirmed or the petition for review has been dismissed by the court of appeals; or

(C) upon the expiration of 30 days from the date of issuance of a mandate of the Supreme Court directing that the order of the Commission be affirmed or the petition for review be dismissed.

(h) If the Supreme Court directs that the order of the Commission be modified or set aside, the order of the Commission rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of thirty days from the time it was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected to accord with the man-

date, in which event the order of the Commission shall become final when so corrected.

(i) If the order of the Commission is modified or set aside by the circuit court of appeals, and if (1) the time allowed for filing a petition for certiorari has expired and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered in accordance with the mandate of the circuit court of appeals shall become final on the expiration of thirty days from the time such order of the Commission was rendered, unless within such thirty days either party has instituted proceedings to have such order corrected so that it will accord with the mandate, in which event the order of the Commission shall become final when so corrected.

(j) If the Supreme Court orders a rehearing; or if the case is remanded by the circuit court of appeals to the Commission for a rehearing, and if (1) the time allowed for filing a petition for certiorari has expired, and no such petition has been duly filed, or (2) the petition for certiorari has been denied, or (3) the decision of the court has been affirmed by the Supreme Court, then the order of the Commission rendered upon such rehearing shall become final in the same manner as though no prior order of the Commission had been rendered.

(k) As used in this section the term “mandate”, in case a mandate has been recalled prior to the expiration of thirty days from the date of issuance thereof, means the final mandate.

(l) Any person, partnership, or corporation who violates an order of the Commission after it has become final, and while such order is in effect, shall forfeit and pay to the United States a civil penalty of not more than \$10,000 for each violation, which shall accrue to the United States and may be recovered in a civil action brought by the Attorney General of the United States. Each separate violation of such an order shall be a separate offense, except that in the case of a violation through continuing failure to obey or neglect to obey a final order of the Commission, each day of continuance of such failure or neglect shall be deemed a separate offense. In such actions, the United States district courts are empowered to grant mandatory injunctions and such other and further equitable relief as they deem appropriate in the enforcement of such final orders of the Commission.

(m)(1)(A) The Commission may commence a civil action to recover a civil penalty in a district court of the United States against any person, partnership, or corporation which violates any rule under this Act respecting unfair or deceptive acts or practices (other than an interpretive rule or a rule violation of which the Commission has provided is not an unfair or deceptive act or practice in violation of subsection (a)(1)) with actual knowledge or knowledge fairly implied on the basis of objective circumstances that such act is unfair or deceptive and is prohibited by such rule. In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(B) If the Commission determines in a proceeding under subsection (b) that any act or practice is unfair or deceptive, and issues a final cease and desist order, other than a consent order,



with respect to such act or practice, then the Commission may commence a civil action to obtain a civil penalty in a district court of the United States against any person, partnership, or corporation which engages in such act or practice—

(1) after such cease and desist order becomes final (whether or not such person, partnership, or corporation was subject to such cease and desist order), and

(2) with actual knowledge that such act or practice is unfair or deceptive and is unlawful under subsection (a)(1) of this section.

In such action, such person, partnership, or corporation shall be liable for a civil penalty of not more than \$10,000 for each violation.

(C)(1) In the case of a violation through continuing failure to comply with a rule or with section 5(a)(1), each day of continuance of such failure shall be treated as a separate violation, for purposes of subparagraphs (A) and (B). In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require.

(2) If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the defendant in a civil penalty action under paragraph (1)(B) the issues of fact in such action against such defendant shall be tried de novo. Upon request of any party to such an action against such defendant, the court shall also review the determination of law made by the Commission in the proceeding under subsection (b) that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice in violation of subsection (a).

(3) The Commission may compromise or settle any action for a civil penalty if such compromise or settlement is accompanied by a public statement of its reasons and is approved by the court.

(n) The Commission shall have no authority under this section or section 18 to declare unlawful an act or practice on the grounds that such act or practice is unfair unless the act or practice causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition. In determining whether an act or practice is unfair, the Commission may consider established public policies as evidence to be considered with all other evidence. Such public policy considerations may not serve as a primary basis for such determination.

\* \* \* \* \*

SEC. 9. That for the purposes of this Act the commission, or its duly authorized agent or agents, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any documentary evidence of any corporation being investigated or proceeded against; and the commission shall have power to require by subpoena the attendance and testimony of witnesses and the production of all such documentary evidence relating to any matter under investigation. Any member of the commission may sign subpoenas, and members and examiners of the commission may administer oaths and affirmations, examine witnesses, and receive evidence.

Such attendance of witnesses, and the production of such documentary evidence, may be required from any place in the United States, at any designated place of hearing. And in case of disobedience to a subpoena the commission may invoke the aid of any court of the United States in requiring the attendance and testimony of witnesses and the production of documentary evidence.

Any of the district courts of the United States within the jurisdiction of which such inquiry is carried on may, in case of contumacy or refusal to obey a subpoena issued to any corporation or other person, issue an order requiring such corporation or other person to appear before the commission, or to produce documentary evidence if so ordered, or to give evidence touching the matter in question; and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Upon the application of the Attorney General of the United States, at the request of the commission, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.

*Upon the application of the commission with respect to any activity related to the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18) that may result in any unfair method of competition, the district courts of the United States shall have jurisdiction to issue writs of mandamus commanding any person or corporation to comply with the provisions of this Act or any order of the commission made in pursuance thereof.*

The commission may order testimony to be taken by deposition in any proceeding or investigation pending under this Act at any stage of such proceeding or investigation. Such depositions may be taken before any person designated by the commission and having power to administer oaths. Such testimony shall be reduced to writing by the person taking the deposition, or under his direction, and shall then be subscribed by the deponent. Any person may be compelled to appear and depose and to produce documentary evidence in the same manner as witnesses may be compelled to appear and testify and produce documentary evidence before the commission as hereinbefore provided.

Witnesses summoned before the commission shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

\* \* \* \* \*

SEC. 13. (a) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is engaged in, or is about to engage in, the dissemination or the causing of the dissemination of any advertisement in violation of section 12, and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the court on review, or the order of the Commission to cease and desist

made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the causing of the dissemination of such advertisement. Upon proper showing a temporary injunction or restraining order shall be granted without bond. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(b) Whenever the Commission has reason to believe—

(1) that any person, partnership, or corporation is violating, or is about to violate, any provision of law enforced by the Federal Trade Commission (*excluding section 7 of the Clayton Act (15 U.S.C. 18) and section 5(a)(1) with respect to the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18)*), and

(2) that the enjoining thereof pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final, would be in the interest of the public—

the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States to enjoin any such act or practice. Upon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest, and after notice to the defendant, a temporary restraining order or a preliminary injunction may be granted without bond: *Provided, however*, That if a complaint is not filed within such period (not exceeding 20 days) as may be specified by the court after issuance of the temporary restraining order or preliminary injunction, the order or injunction shall be dissolved by the court and be of no further force and effect: *Provided further*, That in proper cases the Commission may seek, and after proper proof, the court may issue, a permanent injunction. Any suit may be brought where such person, partnership, or corporation resides or transacts business, or wherever venue is proper under section 1391 of title 28, United States Code. In addition, the court may, if the court determines that the interests of justice require that any other person, partnership, or corporation should be a party in such suit, cause such other person, partnership, or corporation to be added as a party without regard to whether venue is otherwise proper in the district in which the suit is brought. In any suit under this section, process may be served on any person, partnership, or corporation wherever it may be found.

(c) Any process of the Commission under this section may be served by any person duly authorized by the Commission—

(1) by delivering a copy of such process to the person to be served, to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served;

(2) by leaving a copy of such process at the residence or the principal office or place of business of such person, partnership, or corporation; or

(3) by mailing a copy of such process by registered mail or certified mail addressed to such person, partnership, or corporation at his, or her, or its residence, principal office, or principal place or business.

The verified return by the person serving such process setting forth the manner of such service shall be proof of the same.

(d) Whenever it appears to the satisfaction of the court in the case of a newspaper, magazine, periodical, or other publication, published at regular intervals—

(1) that restraining the dissemination of a false advertisement in any particular issue of such publication would delay the delivery of such issue after the regular time therefor, and

(2) that such delay would be due to the method by which the manufacture and distribution of such publication is customarily conducted by the publisher in accordance with sound business practice, and not to any method or device adopted for the evasion of this section or to prevent or delay the issuance of an injunction or restraining order with respect to such false advertisement or any other advertisement,

the court shall exclude such issue from the operation of the restraining order or injunction.

\* \* \* \* \*

SEC. 20. (a) For purposes of this section:

(1) The terms “civil investigative demand” and “demand” mean any demand issued by the Commission under subsection (c)(1).

(2) The term “Commission investigation” means any inquiry conducted by a Commission investigator for the purpose of ascertaining whether any person is or has been engaged in any unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)) or in any antitrust violations.

(3) The term “Commission investigator” means any attorney or investigator employed by the Commission who is charged with the duty of enforcing or carrying into effect any provisions relating to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)) or any provisions relating to antitrust violations.

(4) The term “custodian” means the custodian or any deputy custodian designated under section 21(b)(2)(A).

(5) The term “documentary material” includes the original or any copy of any book, record, report, memorandum, paper, communication, tabulation, chart, or other document.

(6) The term “person” means any natural person, partnership, corporation, association, or other legal entity, including any person acting under color or authority of State law.

(7) The term “violation” means any act or omission constituting an unfair or deceptive act or practice in or affecting commerce (within the meaning of section 5(a)(1)) or any antitrust violation.

(8) The term “antitrust violation” means—

(A) any unfair method of competition (within the meaning of section 5(a)(1));

(B) any violation of the Clayton Act or of any other Federal statute that prohibits, or makes available to the Commission a civil remedy with respect to, any restraint upon or monopolization of interstate or foreign trade or commerce;

(C) with respect to the International Antitrust Enforcement Assistance Act of 1994, any violation of any of the foreign antitrust laws (as defined in section 12 of such Act) with respect to which a request is made under section 3 of such Act; or

(D) any activity in preparation for a merger, acquisition, joint venture, or similar transaction, which if consummated, may result in any such unfair method of competition or in any such violation.

(b) For the purpose of investigations performed pursuant to this section with respect to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), all actions of the Commission taken under section 6 and section 9 shall be conducted pursuant to subsection (c).

(c)(1) Whenever the Commission has reason to believe that any person may be in possession, custody, or control of any documentary material or tangible things, or may have any information, relevant to unfair or deceptive acts or practices in or affecting commerce (within the meaning of section 5(a)(1)), or to antitrust violations, the Commission may, before the institution of any proceedings under this Act, *or under section 7 of the Clayton Act (15 U.S.C. 18), where applicable*, issue in writing, and cause to be served upon such person, a civil investigative demand requiring such person to produce such documentary material for inspection and copying or reproduction, to submit such tangible things, to file written reports or answers to questions, to give oral testimony concerning documentary material or other information, or to furnish any combination of such material, answers, or testimony.

(2) Each civil investigative demand shall state the nature of the conduct constituting the alleged violation which is under investigation and the provision of law applicable to such violation.

(3) Each civil investigative demand for the production of documentary material shall—

(A) describe each class of documentary material to be produced under the demand with such definiteness and certainty as to permit such material to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction; and

(C) identify the custodian to whom such material shall be made available.

(4) Each civil investigative demand for the submission of tangible things shall—

(A) describe each class of tangible things to be submitted under the demand with such definiteness and certainty as to permit such things to be fairly identified;

(B) prescribe a return date or dates which will provide a reasonable period of time within which the things so demanded may be assembled and submitted; and

(C) identify the custodian to whom such things shall be submitted.

(5) Each civil investigative demand for written reports or answers to questions shall—

(A) propound with definiteness and certainty the reports to be produced or the questions to be answered;

(B) prescribe a date or dates at which time written reports or answers to questions shall be submitted; and

(C) identify the custodian to whom such reports or answers shall be submitted.

(6) Each civil investigative demand for the giving of oral testimony shall—

(A) prescribe a date, time, and place at which oral testimony shall be commenced; and

(B) identify a Commission investigator who shall conduct the investigation and the custodian to whom the transcript of such investigation shall be submitted.

(7)(A) Any civil investigative demand may be served by any Commission investigator at any place within the territorial jurisdiction of any court of the United States.

(B) Any such demand or any enforcement petition filed under this section may be served upon any person who is not found within the territorial jurisdiction of any court of the United States, in such manner as the Federal Rules of Civil Procedure prescribe for service in a foreign nation.

(C) To the extent that the courts of the United States have authority to assert jurisdiction over such person consistent with due process, the United States District Court for the District of Columbia shall have the same jurisdiction to take any action respecting compliance with this section by such person that such district court would have if such person were personally within the jurisdiction of such district court.

(8) Service of any civil investigative demand or any enforcement petition filed under this section may be made upon a partnership, corporation, association, or other legal entity by—

(A) delivering a duly executed copy of such demand or petition to any partner, executive officer, managing agent, or general agent of such partnership, corporation, association, or other legal entity, or to any agent of such partnership, corporation, association, or other legal entity authorized by appointment or by law to receive service of process on behalf of such partnership, corporation, association, or other legal entity;

(B) delivering a duly executed copy of such demand or petition to the principal office or place of business of the partnership, corporation, association, or other legal entity to be served;  
or

(C) depositing a duly executed copy in the United States mails, by registered or certified mail, return receipt requested, duly addressed to such partnership, corporation, association, or other legal entity at its principal office or place of business.

(9) Service of any civil investigative demand or of any enforcement petition filed under this section may be made upon any natural person by—

(A) delivering a duly executed copy of such demand or petition to the person to be served; or

(B) depositing a duly executed copy in the United States mails by registered or certified mail, return receipt requested, duly addressed to such person at his residence or principal office or place of business.

(10) A verified return by the individual serving any civil investigative demand or any enforcement petition filed under this section setting forth the manner of such service shall be proof of such service. In the case of service by registered or certified mail, such return shall be accompanied by the return post office receipt of delivery of such demand or enforcement petition.

(11) The production of documentary material in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the documentary material required by the demand and in the possession, custody, or control of the person to whom the demand is directed has been produced and made available to the custodian.

(12) The submission of tangible things in response to a civil investigative demand shall be made under a sworn certificate, in such form as the demand designates, by the person to whom the demand is directed or, if not a natural person, by any person having knowledge of the facts and circumstances relating to such production, to the effect that all of the tangible things required by the demand and in the possession, custody, or control of the person to whom the demand is directed have been submitted to the custodian.

(13) Each reporting requirement or question in a civil investigative demand shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for the objection shall be stated in lieu of an answer, and it shall be submitted under a sworn certificate, in such form as the demand designates, by the person, if a natural person, to whom the demand is directed or, if not a natural person, by any person responsible for answering each reporting requirement or question, to the effect that all information required by the demand and in the possession, custody, control, or knowledge of the person to whom the demand is directed has been submitted.

(14)(A) Any Commission investigator before whom oral testimony is to be taken shall put the witness on oath or affirmation and shall personally, or by any individual acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically and transcribed. After the testimony is fully transcribed, the Commission investigator before

whom the testimony is taken shall promptly transmit a copy of the transcript of the testimony to the custodian.

(B) Any Commission investigator before whom oral testimony is to be taken shall exclude from the place where the testimony is to be taken all other persons except the person giving the testimony, his attorney, the officer before whom the testimony is to be taken, and any stenographer taking such testimony.

(C) The oral testimony of any person taken pursuant to a civil investigative demand shall be taken in the judicial district of the United States in which such person resides, is found, or transacts business, or in such other place as may be agreed upon by the Commission investigator before whom the oral testimony of such person is to be taken and such person.

(D)(i) Any person compelled to appear under a civil investigative demand for oral testimony pursuant to this section may be accompanied, represented, and advised by an attorney. The attorney may advise such person, in confidence, either upon the request of such person or upon the initiative of the attorney, with respect to any question asked of such person.

(ii) Such person or attorney may object on the record to any question, in whole or in part, and shall briefly state for the record the reason for the objection. An objection may properly be made, received, and entered upon the record when it is claimed that such person is entitled to refuse to answer the question on grounds of any constitutional or other legal right or privilege, including the privilege against self-incrimination. Such person shall not otherwise object to or refuse to answer any question, and shall not himself or through his attorney otherwise interrupt the oral examination. If such person refuses to answer any question, the Commission may petition the district court of the United States pursuant to this section for an order compelling such person to answer such question.

(iii) If such person refuses to answer any question on grounds of the privilege against self-incrimination, the testimony of such person may be compelled in accordance with the provisions of section 6004 of title 18, United States Code.

(E)(i) After the testimony of any witness is fully transcribed, the Commission investigator shall afford the witness (who may be accompanied by an attorney) a reasonable opportunity to examine the transcript. The transcript shall be read to or by the witness, unless such examination and reading are waived by the witness. Any changes in form or substance which the witness desires to make shall be entered and identified upon the transcript by the Commission investigator with a statement of the reasons given by the witness for making such changes. The transcript shall then be signed by the witness, unless the witness in writing waives the signing, is ill, cannot be found, or refuses to sign.

(ii) If the transcript is not signed by the witness during the 30-day period following the date upon which the witness is first afforded a reasonable opportunity to examine it, the Commission investigator shall sign the transcript and state on the record the fact of the waiver, illness, absence of the witness, or the refusal to sign, together with any reasons given for the failure to sign.

(F) The Commission investigator shall certify on the transcript that the witness was duly sworn by him and that the transcript is



a true record of the testimony given by the witness, and the Commission investigator shall promptly deliver the transcript or send it by registered or certified mail to the custodian.

(G) The Commission investigator shall furnish a copy of the transcript (upon payment of reasonable charges for the transcript) to the witness only, except that the Commission may for good cause limit such witness to inspection of the official transcript of his testimony.

(H) Any witness appearing for the taking of oral testimony pursuant to a civil investigative demand shall be entitled to the same fees and mileage which are paid to witnesses in the district courts of the United States.

(d) Materials received as a result of a civil investigative demand shall be subject to the procedures established in section 21.

(e) Whenever any person fails to comply with any civil investigative demand duly served upon him under this section, or whenever satisfactory copying or reproduction of material requested pursuant to the demand cannot be accomplished and such person refuses to surrender such material, the Commission, through such officers or attorneys as it may designate, may file, in the district court of the United States for any judicial district in which such person resides, is found, or transacts business, and serve upon such person, a petition for an order of such court for the enforcement of this section. All process of any court to which application may be made as provided in this subsection may be served in any judicial district.

(f)(1) Not later than 20 days after the service of any civil investigative demand upon any person under subsection (c), or at any time before the return date specified in the demand, whichever period is shorter, or within such period exceeding 20 days after service or in excess of such return date as may be prescribed in writing, subsequent to service, by any Commission investigator named in the demand, such person may file with the Commission a petition for an order by the Commission modifying or setting aside the demand.

(2) The time permitted for compliance with the demand in whole or in part, as deemed proper and ordered by the Commission, shall not run during the pendency of such petition at the Commission, except that such person shall comply with any portions of the demand not sought to be modified or set aside. Such petition shall specify each ground upon which the petitioner relies in seeking such relief, and may be based upon any failure of the demand to comply with the provisions of this section, or upon any constitutional or other legal right or privilege of such person.

(g) At any time during which any custodian is in custody or control of any documentary material, tangible things, reports, answers to questions, or transcripts of oral testimony given by any person in compliance with any civil investigative demand, such person may file, in the district court of the United States for the judicial district within which the office of such custodian is situated, and serve upon such custodian, a petition for an order of such court requiring the performance by such custodian of any duty imposed upon him by this section or section 21.

(h) Whenever any petition is filed in any district court of the United States under this section, such court shall have jurisdiction to hear and determine the matter so presented, and to enter such

order or orders as may be required to carry into effect the provisions of this section. Any final order so entered shall be subject to appeal pursuant to section 1291 of title 28, United States Code. Any disobedience of any final order entered under this section by any court shall be punished as a contempt of such court.

(i) Notwithstanding any other provision of law, the Commission shall have no authority to issue a subpoena or make a demand for information, under authority of this Act or any other provision of law, unless such subpoena or demand for information is signed by a Commissioner acting pursuant to a Commission resolution. The Commission shall not delegate the power conferred by this section to sign subpoenas or demands for information to any other person.

(j) The provisions of this section shall not—

(1) apply to any proceeding under section 5(b), any proceeding under section 11(b) of the Clayton Act (15 U.S.C. 21(b)), or any adjudicative proceeding under any other provision of law; or

(2) apply to or affect the jurisdiction, duties, or powers of any agency of the Federal Government, other than the Commission.

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### Dissenting Views

To Accompany H.R. 659, the “Standard Merger and Acquisition Through Equal Rules Act of 2017” or “SMARTER Act”

H.R. 659, the “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2017” or “SMARTER Act,” undermines the independence of the Federal Trade Commission (FTC) in direct contravention of Congress’ original intent in establishing this agency more than 100 years ago. Although Congress created the FTC as an independent and bipartisan antitrust enforcement and policy agency, H.R. 659 undoes this goal by eliminating the FTC’s ability to use procedures pursuant to the Federal Trade Commission Act (FTC Act)<sup>1</sup> to enforce antitrust law in merger cases, and, in particular, its ability to use administrative adjudication. Moreover, while this bill purports to implement recommendations of the Anti-trust Modernization Commission (AMC), it goes far beyond the AMC’s recommendations by curtailing the FTC’s ability to address consummated mergers and non-merger activity. Finally, in seeking to harmonize the preliminary injunction standard for proposed mergers, H.R. 659 either addresses a non-existent problem or may, in fact, impose a less consumer-friendly standard.

H.R. 659 is not a modest measure. Rather, it represents a seismic change to the status quo by altering the FTC’s fundamental nature as an independent administrative agency charged with enforcing antitrust laws and developing antitrust policy while being relatively shielded from political, and particularly Executive Branch, interference. Such loss of independence and distinctiveness threatens the FTC’s role in creating antitrust policy in a stable, long-term manner without being subject to the changing political ideologies from one Presidential administration to the next. The

<sup>1</sup> Federal Trade Commission Act of 1914, Pub. L. No. 63–203, 38 Stat. 717 (1914), codified at 15 U.S.C. §§ 41–58 (2017).

elimination of distinctions between the FTC and the Department of Justice (DOJ) in merger enforcement potentially opens the door to the elimination of the FTC's antitrust enforcement role by chipping away at the various differences that justify its separate existence.

We share the views expressed by former FTC Chair Edith Ramirez, who served during the Obama Administration, regarding a Senate bill substantively identical to H.R. 659. She warned that the measure “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.”<sup>2</sup> In addition, the American Antitrust Institute, a consumer-oriented antitrust organization, strongly opposes H.R. 659, particularly with respect to its elimination of the FTC's ability to use administrative adjudication in merger cases.<sup>3</sup> Consumers Union, the policy and advocacy arm of Consumer Reports, echoes these concerns, observing that that “we do not believe the case has been made . . . that there is a material problem here that warrants making alterations to the FTC's fundamental enforcement structure.”<sup>4</sup>

For these reasons and those described below, we respectfully urge our colleagues to oppose H.R. 659.

## DESCRIPTION AND BACKGROUND

### DESCRIPTION

H.R. 659 eliminates the ability of the FTC to use the procedures of the FTC Act in merger enforcement cases and with respect to certain types of non-merger activity. In its stead, the bill requires the FTC to use the procedures available to the DOJ under the Clayton Antitrust Act (Clayton Act) in such circumstances.<sup>5</sup> The following is a description of the most relevant provisions of the bill.

Section 2 of the bill amends the Clayton Act to bring the FTC's merger enforcement authority under the Act. Under current law,

<sup>2</sup>*The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on S. 2102 Before the Subcomm. on Antitrust, Competition Policy & Consumer Rights of the S. Comm. on the Judiciary*, 114th Cong. 47 (2015) (statement of Edith Ramirez, Chairwoman, Federal Trade Commission), <https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Ramirez%20Testimony.pdf> [hereinafter Senate Hearing]. Former FTC Chairwoman Ramirez expressed similar concerns with an earlier, but substantially similar, draft of the SMARTER Act, which she said would have “far-reaching immediate effects” and the “potential for significant unintended consequences.” Letter from Edith Ramirez, Chair, Federal Trade Comm'n, to Spencer Bachus (R-AL), Chair, & Henry C. Johnson, Jr. (D-GA), Ranking Member, Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary (Apr. 2, 2014) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter Ramirez Letter].

<sup>3</sup>See, e.g., Letter from Albert A. Foer, President, American Antitrust Institute, to Spencer Bachus (R-AL), Chair, & Henry C. Johnson, Jr. (D-GA), Ranking Member, Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary (Apr. 9, 2014) (on file with H. Comm. on the Judiciary Democratic staff) [hereinafter “Foer Letter”]; *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on H.R. 2745 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 47 (2015), [http://judiciary.house.gov/\\_cache/files/9f77f8c3-6b40-4b22-b337-51ddbda9b6/114-32-95119.pdf](http://judiciary.house.gov/_cache/files/9f77f8c3-6b40-4b22-b337-51ddbda9b6/114-32-95119.pdf) (statement of Bert Foer, senior fellow, American Antitrust Institute).

<sup>4</sup>Letter from George P. Slover, Senior Policy Counsel, Consumers Union, to Bob Goodlatte (R-VA), Chair, H. Comm. on the Judiciary, *et al.* (Apr. 4, 2017) (on file with H. Comm. on the Judiciary Democratic staff). We also note that the Obama Administration strongly opposed a substantively identical bill in the 114th Congress, stating that the legislation “would eliminate the [FTC's] ability to use critical administrative and procedural tools to promote competition and protect consumers.” Exec. Office of the President, Office of Mgm't & Budget, Statement of Administration Policy on H.R. 2745—Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, Mar. 21, 2016, *available at* <http://www.presidency.ucsb.edu/ws/index.php?pid=117357>.

<sup>5</sup>Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (1914), codified at 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2017).

the DOJ's Antitrust Division and the FTC's Bureau of Competition enforce the Nation's antitrust laws jointly. Nevertheless, while the DOJ enforces the antitrust laws through civil actions under the Clayton Act and Sherman Act, the FTC enforces the antitrust laws through section 5 of the FTC Act, which prohibits unfair methods of competition. As amended, H.R. 659 would align the procedural requirements applicable to the DOJ and FTC for merger enforcement under the Clayton Act.

Section 3 of the bill makes several amendments to the FTC Act that effectively eliminate the FTC's authority to act pursuant to the Act's provisions. Of particular concern, section 3(1) of the bill amends section 5(b) of the FTC Act, which provides the FTC with the authority to institute administrative proceedings against a person, partnership, or corporation whenever the FTC determines that such a party has been or is using "any unfair method of competition," among other things. If the FTC determines after a notice and hearing that the target of the complaint has engaged in the "unfair method of competition" and prepares a report to that effect, the FTC may issue a cease and desist order. A party may appeal an FTC decision to a federal court of appeals.

Section 3(1) of the bill would exclude from the definition of "unfair method of competition" any "unfair method of competition that would result from the consummation of a merger, acquisition, joint venture, or similar transaction." Notably, section 3(1) excludes mergers from the FTC's administrative process as well as pre-merger activity, acquisitions, joint ventures, or other similar transactions from the definition of "method of competition" as used in the portion of section 5(b) of the FTC Act giving the FTC the authority to issue reports and cease-and-desist orders. The inclusion of pre-merger activity suggests that the bill's elimination of the FTC's administrative authority extends beyond mergers to include arguably non-merger anticompetitive conduct.

Section 3(3) of the bill amends section 13(b) of the FTC Act, which provides the FTC with the authority to bring suit in a federal district court to enjoin any conduct that violates any provision of law enforced by the FTC and also articulates the standard for granting a preliminary injunction. This standard requires a showing that, "weighing the equities and considering the [FTC's] likelihood of ultimate success, such action would be in the public interest." It further provides that if the FTC does not file a complaint within a time period specified by the court not to exceed 20 days, the preliminary injunction is dissolved. Section 3(3) of the bill excludes from section 13(b) any actions that violate section 7 of the Clayton Act and section 5(a)(1) of the FTC Act—which declares, in part, that unfair methods of competition are unlawful—with respect to an unfair method of competition that would result from the consummation of a merger, acquisition, joint venture, or similar transaction.

#### BACKGROUND

In 1914, Congress passed the FTC Act,<sup>6</sup> which created the FTC, because of its belief that the Sherman Antitrust Act of 1890<sup>7</sup> failed

<sup>6</sup>Federal Trade Commission Act of 1914, Pub. L. No. 63–203, 38 Stat. 717 (1914) (codified at 15 U.S.C. §§ 41–58 (2017)).

<sup>7</sup>Sherman Antitrust Act of 1890, 26 Stat. 209 (1890) (codified at 15 U.S.C. §§ 1–7 (2017)).

to stop the merger wave and corporate abuses.<sup>8</sup> In addition to establishing the FTC, the FTC Act made unlawful, *inter alia*, “unfair methods of competition.”<sup>9</sup> Given Congress’s view that the Sherman Act, and enforcement of that Act by the DOJ, was insufficient, it created the FTC to encourage development of antitrust policy by antitrust experts through an *independent* administrative agency that would share enforcement authority with the DOJ<sup>10</sup> and have the exclusive authority to enforce the FTC Act.<sup>11</sup> Additionally, Congress gave the FTC broad investigative and reporting powers and authorized its Commissioners to use an administrative adjudication process to enforce the antitrust laws rather than try cases before a generalist federal judge, though the FTC’s decisions may be appealed to a federal court of appeals.<sup>12</sup> Congressional advocates for the creation of the FTC disclaimed any intent to amend the Sherman Act or to undermine DOJ’s enforcement role.<sup>13</sup> Rather, they sought to enhance existing antitrust law and enforcement, and in particular, to establish “a new agency that would prosecute if the [DOJ] faltered, enforcing a flexible new standard where the Sherman Act might not.”<sup>14</sup>

Since the establishment of the FTC, Congress has historically granted the agency broad authority to prohibit unfair methods of competition. In fact, every time the Supreme Court has restricted the FTC’s authority through statutory interpretation, Congress has responded by amending the FTC Act to expand its authority.<sup>15</sup>

In the exceedingly rare instances where the government and the merging parties do not reach a consent agreement at the moment the government has filed suit to block a merger, the government may seek a temporary restraining order and a preliminary injunction to stop consummation of the merger while the government pursues its complaint. Nominally, FTC and DOJ are subject to different standards for the grant of preliminary injunctions. While the dominant view is that in practice both standards essentially are the same, there are some who believe that the FTC standard is more favorable to the enforcement agency.<sup>16</sup>

<sup>8</sup> Marc Winerman, *The Origins of the FTC: Concentration, Cooperation, Control, and Competition*, 71 ANTITRUST L. J. 74 (2003), <http://www.ftc.gov/sites/default/files/attachments/federal-trade-commission-history/origins.pdf>.

<sup>9</sup> 15 U.S.C. § 45(a) (2017); Marc Winerman, *A Brief History of the Federal Trade Commission: Federal Trade Commission 90th Anniversary Symposium*, 6 (Sept. 22, 2004), [http://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv\\_program.pdf](http://www.ftc.gov/sites/default/files/attachments/ftc-90-symposium/90thanniv_program.pdf) [hereinafter *FTC History*].

<sup>10</sup> An “independent” agency is one that has some measure of independence from the President. The principal evidence of such independence is that the President cannot remove the head of such an agency without cause. Independent agencies are often styled “commissions” or “boards.” STEPHEN G. BREYER, *et al.*, ADMINISTRATIVE LAW AND REGULATORY POLICY, at 100 (4th ed. 1999).

<sup>11</sup> While the FTC has no authority to enforce the Sherman Act, the Supreme Court has held that any conduct that violates section 1 of the Sherman Act would also violate section 5(a) of the FTC Act. *Federal Trade Comm’n v. California Dental Ass’n*, 526 U.S. 756, 763 n.3 (1999) (“The FTC Act’s prohibition of unfair competition and deceptive acts or practices . . . overlaps the scope of § 1 of the Sherman Act.”).

<sup>12</sup> 15 U.S.C. § 45(b) (2017).

<sup>13</sup> *Id.*

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

<sup>15</sup> *FTC History*, *supra* note 9, at 7–9 (outlining instances in the 1920’s and 1930’s in which Congress expanded the FTC’s authority in response to restrictive Supreme Court decisions, and also highlighting further expansions of the FTC’s authority by Congress in the 1950’s and 1970’s).

<sup>16</sup> See, e.g., ANTITRUST MODERNIZATION COMMISSION, REPORT AND RECOMMENDATIONS 142 (2007) [hereinafter *AMC Report*] (“[A]gencies face nominally different standards governing

## CONCERNS WITH H.R. 659

I. H.R. 659 UNDERMINES THE FTC'S INDEPENDENCE AND MISSION  
TO PROMOTE COMPETITION

H.R. 659 fundamentally changes the FTC's more than century-old organizational structure and lessens the agency's independence. By eliminating the agency's authority to pursue administrative litigation in merger cases and other circumstances, the bill undermines the FTC's independence and turns it into another executive enforcement agency in large merger cases. This fundamental change violates Congress's purpose in establishing the FTC in the first place.

Congress created the FTC as an independent agency, i.e., one with a considerable measure of independence from the President. Congress's intent in doing so was not only to supplement the DOJ's enforcement activity where it may be lacking, but to also develop antitrust policy with a body of antitrust experts not subject to swings in political ideology that the DOJ, as an arm of the Executive Branch, may experience.<sup>17</sup>

This explains why the bill's elimination of the FTC's authority to use administrative adjudication in merger enforcement matters is particularly concerning. Such authority is essential to the FTC's ability to promote competition and challenge anticompetitive conduct,<sup>18</sup> a view shared by both Republican and Democratic FTC Chairs. For example, FTC Chair Edith Ramirez, who served during the Obama Administration, observed that "Congress created the Commission in 1914 as an independent, bipartisan agency to augment then-existing antitrust enforcement efforts" because Congress recognized that "American consumers would benefit from an expert agency with the means to develop competition law and policy over time," Chair Ramirez added.<sup>19</sup> She explained:

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.<sup>20</sup>

whether a federal district court will issue a preliminary injunction," but "the magnitude of the difference between the two standards is not clear.").

<sup>17</sup>*Id.* at 129 (noting that Congress "also believed that an administrative agency—conducting administrative adjudication of antitrust cases, and vested with broad information-gather powers—would be a better vehicle for developing more flexible standards of antitrust law than were the courts.").

<sup>18</sup>Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?* 12 J. COMPETITION L. & ECON. 623, 624 (2016) [hereinafter *Administrative Litigation*], <https://academic.oup.com/jcle/article/12/4/623/2547756/ADMINISTRATIVE-LITIGATION-AT-THE-FTCEFFECTIVE>.

<sup>19</sup>Senate Hearing, *supra* note 2, at 2 (statement of Edith Ramirez, Chair, Federal Trade Commission).

<sup>20</sup>Senate Hearing, *supra* note 2, at 14 (statement of Edith Ramirez, Chairwoman, Federal Trade Commission).

The current Acting FTC Chair, Maureen Ohlhausen, likewise supports the use of administrative litigation as a “unique asset in enforcing our antitrust laws.”<sup>21</sup> In the past decade, she notes, the FTC has relied on administrative litigation to promote competition in healthcare markets, the pharmaceutical industry, and in occupational licensing, as well as other areas.<sup>22</sup> As Chair Ohlhausen observed earlier this year, the agency has an exemplary record when using this authority reflected by the fact that it has won six of the seven cases appealed to the Supreme Court in the past 30 years, and five of these were brought through administrative litigation.<sup>23</sup> Congress has trusted the FTC with this authority because the FTC “is well placed to resolve difficult questions of competition and consumer-protection law.”<sup>24</sup> Committee reports from both houses of Congress during the establishment of the FTC bolster this view.<sup>25</sup> By weakening the FTC’s independence, H.R. 659 undermines these benefits for American consumers.

Beyond the specific changes proposed by H.R. 659, we are wary of any measure to alter, and possibly diminish, the FTC’s authority. Opponents of the FTC’s enforcement activities have engaged in a longstanding campaign to undermine the agency, both because of its role as an antitrust enforcer and also because of its work in the consumer protection arena. Any proposal to alter the FTC’s authority, and particularly one that would eliminate its distinctiveness from the DOJ, should be viewed with skepticism.<sup>26</sup> Although H.R. 659 is ostensibly limited to HSR merger cases, eliminating distinctions between the DOJ and the FTC may later be used to justify ultimately eliminating the FTC as an antitrust enforcement and policymaking agency.

In discussing the value of administrative adjudication, Bert Foer, the former President of the American Antitrust Institute (AAI), stated in a letter to the Committee:

[P]rudence compels caution in any tinkering with a system of dual enforcement including administrative adjudication that emerged out of robust debate in the course of the 1912 Presidential election campaign and that Congress adopted two years later in the face of grave concern over the fate of antitrust enforcement generally when left exclusively in the hands of generalist judges. . . . AAI believes that eliminating FTC administrative adjudication would almost surely be counterproductive. We would thereby (a) lose the considerable benefits of expert agency policy evolution, the original Wilson/Brandeis vision giving rise to the FTC’s creation a hundred years ago and more important than ever for sound evolution of merger policy in the

<sup>21</sup>Maureen K. Ohlhausen, Acting Chair, Federal Trade Comm’n, Address at Global Competition Review 6th Annual Antitrust Law Leaders Forum 10 (Feb. 3, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1070123/gcr\\_the-ftc\\_path\\_ahead.pdf](https://www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftc_path_ahead.pdf);

<sup>22</sup>*Administrative Litigation*, *supra* note 18, at 624.

<sup>23</sup>Maureen K. Ohlhausen, Acting Chair, Federal Trade Comm’n, Address at Global Competition Review 6th Annual Antitrust Law Leaders Forum 10 (Feb. 3, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1070123/gcr\\_the-ftc\\_path-ahead.pdf](https://www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftc_path-ahead.pdf);

<sup>24</sup>*Administrative Litigation*, *supra* note 18, at 623.

<sup>25</sup>*Humphrey’s Ex’r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. Rep. No. 63–597, at 10–11 (1914)).

<sup>26</sup>See, e.g., U.S. CHAMBER OF COMMERCE, *Unfair Methods of Competition Under Section 5 of the FTC Act: Does the U.S. Need Rules “Above and Beyond Antitrust”?*, GCP: THE ANTITRUST CHRONICLE (Sept. 2009), [http://www.uschamber.com/sites/default/files/reports/0909antrust\\_0.pdf](http://www.uschamber.com/sites/default/files/reports/0909antrust_0.pdf).

21st Century; and (b) exacerbate any inefficiency of dual enforcement generally since we would then have two enforcement agencies applying the same merger law standards and procedures to different companies in different industries in cases brought exclusively to generalist courts. A more logical course would be channeling all merger enforcement to the FTC and its expert administrative processes.<sup>27</sup>

Similarly, at a 2014 hearing before the Subcommittee on Regulatory Reform, Commercial, and Antitrust Law examining draft legislation substantially similar to H.R. 659, Professor John Kirkwood of the Seattle University School of Law expressed great concern about the removal of the FTC's administrative adjudication authority because the purpose of having this authority was to allow the FTC to develop antitrust law in a less partisan, more expert way than generalist courts or the DOJ under the control of one political party may be able to do.<sup>28</sup> Professor Kirkwood's concerns were twofold: (1) removing the FTC's administrative adjudication authority in merger cases might lead to a "slippery slope" whereby such authority would eventually be removed in other areas of antitrust enforcement;<sup>29</sup> and (2) administrative adjudication supports the FTC's congressionally-mandated mission of developing administrative expertise through sustained attention, information-gathering, and vigorous enforcement.<sup>30</sup> Professor Kirkwood highlighted administrative adjudication's particular importance in those cases when an industry is changing rapidly or when an agency has not developed much expertise in it.<sup>31</sup>

Similarly, Jonathan Jacobson, a former commissioner of the Antitrust Modernization Commission, echoed many of these concerns in his 2015 testimony:

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. 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.<sup>32</sup>

<sup>27</sup> Foer Letter, *supra* note 3, at ¶¶ 3, 5.

<sup>28</sup> *Hearing on the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014 Before the S. Comm. On Regulatory Reform, Commercial and Antitrust Law*, 113th Cong. 13 (2014) (statement of John B. Kirkwood, Professor of Law & Associate Dean for Strategic Planning and Mission, Seattle University School of Law), [http://judiciary.house.gov/\\_cache/files/4b07b175-6ca6-400e-b218-2e42b3ffa0d0/113-83-87424.pdf](http://judiciary.house.gov/_cache/files/4b07b175-6ca6-400e-b218-2e42b3ffa0d0/113-83-87424.pdf) [hereinafter Kirkwood Statement].

<sup>29</sup> *Id.* at 5.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> Senate Hearing, *supra* note 2, at 7 (statement of Jonathan Jacobson, former commissioner of the Antitrust Modernization Commission), <https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Jacobson%20Testimony.pdf>.



Concurring in these views, Ranking Member John Conyers, Jr. (D-MI) observed that rather than strengthening Commission's authority, H.R. 659 "does the opposite."<sup>33</sup>

## II. H.R. 659 DOES NOT COMPORT WITH THE ANTITRUST MODERNIZATION COMMISSION RECOMMENDATIONS

Although H.R. 659 supporters claim that the bill simply implements the recommendations of the bipartisan Antitrust Modernization Commission (AMC), the measure, in fact, exceeds what the AMC contemplated. Congress created the AMC in 2002 to examine whether antitrust laws, policies, and procedures should be amended in light of changes to the economy, and in 2007, it issued a 449-page report outlining 80 recommendations for revisions to antitrust law and policy. Only two of these 80 recommendations—advocating the elimination of FTC's administrative adjudication authority for merger cases and the adoption of a uniform preliminary injunction standard—are relevant to consideration of the SMARTER Act.

The scope of these two AMC recommendations, however, is narrower than what is proposed in H.R. 659. With respect to administrative litigation, the AMC recommended that Congress eliminate the FTC's authority to pursue administrative litigation in large merger cases and that it should ensure the same standard that DOJ is subject to when seeking a preliminary injunction in such cases.<sup>34</sup> H.R. 659, however, differs in several respects. First, rather than limiting its provisions to these two recommendations, the bill would make the FTC functionally equivalent to the DOJ in large merger cases, which, arguably, is a step towards eliminating the dual enforcement regime, an option the AMC specifically rejected.<sup>35</sup> Second, the bill's carve-out for the FTC's administrative adjudication authority would reach beyond merger cases to also include "joint ventures" and "similar transactions" as well as pre-merger activity, meaning that the loss of the FTC administrative adjudication authority would extend beyond the scope of section 7 of the Clayton Act to potentially include non-merger activity. Finally, the FTC's loss of administrative litigation authority could reach already-consummated mergers, which is well beyond the AMC recommendation. As Mr. Jacobson noted in his testimony in opposition to the SMARTER Act, "to the extent that the legislation is intended to implement the AMC's recommendation, it is drafted too broadly." He explained:

The AMC recommended that Congress implement legislation "to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases." 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, anti-competitive effects." But the proposed legislation could be

<sup>33</sup> Unofficial Tr. of the Markup of: H.R. 659, the "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2017" by the H. Comm. on the Judiciary, 115th Cong. 8 (2017), <https://judiciary.house.gov/wp-content/uploads/2017/04/4.5.17-markup-transcript.pdf> [hereinafter Markup Tr.].

<sup>34</sup> AMC Report, *supra* note 16, at 140–41.

<sup>35</sup> *Id.* at 129 (recommending "no comprehensive change to the existing system in which both the FTC and the DOJ enforce the antitrust laws").

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**” 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.<sup>36</sup>

Mr. Jacobson further noted that the FTC’s success in post-consummation merger challenges is held in high regard by the anti-trust bar and has been upheld on appeal.<sup>37</sup>

### III. H.R. 659 ADDRESSES A NON-EXISTENT PROBLEM

H.R. 659 does not address an actual problem. First, there is no evidence of procedural bias in the FTC’s use of administrative litigation. Rather, this system has produced a string of important victories by the Commission before the Supreme Court that reduce anticompetitive conduct. Second, the changes that H.R. 659 contemplates would apply in the exceedingly rare instances where: (1) a transaction is large enough to merit more detailed review; (2) after the review, the reviewing agency determines that it would challenge the transaction through litigation; (3) the parties do not agree to any settlement, including divestitures and other commitments; and (4) the parties choose to continue with their transaction despite the filing of a complaint by the reviewing agency rather than abandoning the transaction. Instances where the FTC would seek a preliminary injunction and use its administrative process are rare, and instances when the FTC seeks to use its administrative process after losing a preliminary injunction proceeding in court are even rarer.

#### A. THERE IS NO EVIDENCE OF PROCEDURAL BIAS IN THE FTC’S ENFORCEMENT RECORD

Although proponents of H.R. 659 argue that differing processes and standards in merger enforcement by the FTC and DOJ causes “unnecessary uncertainty,”<sup>38</sup> even supporters of the bill acknowledge that claims of due-process deficiencies or procedural bias are misplaced. In 2016, Acting FTC Chair Ohlhausen, who supports the bill, concluded that procedural concerns with administrative litigation are “misplaced.”<sup>39</sup> In “the most comprehensive study to

<sup>36</sup> Senate Hearing, *supra* note 2, at 3–4 (emphasis in original) (internal citations omitted) (statement of Jonathan Jacobson, former commissioner of the Antitrust Modernization Commission), <https://www.judiciary.senate.gov/imo/media/doc/10-07-15%20Jacobson%20Testimony.pdf>.

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

<sup>38</sup> Markup Tr. at 5 (statement of Representative Bob Goodlatte (R-VA), Chair, H. Comm. on the Judiciary).

<sup>39</sup> Maureen K. Ohlhausen, Acting Chairwoman, Federal Trade Comm’n, Address at Global Competition Review 6th Annual Antitrust Law Leaders Forum 9, 10 (Feb. 3, 2017), [https://www.ftc.gov/system/files/documents/public\\_statements/1070123/gcr\\_the-ftp\\_path-ahead.pdf](https://www.ftc.gov/system/files/documents/public_statements/1070123/gcr_the-ftp_path-ahead.pdf); *Administrative Litigation*, *supra* note 18.

date” of the FTC’s administrative litigation authority, she noted that despite criticism, “administrative adjudication is a useful tool for advancing competition policy.”<sup>40</sup> This study, which reviewed every available case since 1977 that produced decision through administrative litigation, expressly rejected the assertion that the Commission’s process is biased or unfair,<sup>41</sup> referring to claims about the shortcomings of the FTC’s administrative litigation process as “mostly anecdotal or theoretical.”<sup>42</sup>

Acting FTC Chairwoman Ohlhausen’s study also refuted the proposition that the FTC “always wins.” In 145 administrative cases over the past four decades, the “Commission does not always rule for complaint counsel,” she notes.<sup>43</sup> Indeed, it dismisses nearly a third of cases it has previously authorized.<sup>44</sup> Importantly, this data also indicate that the FTC has become more selective regarding the cases it administratively litigates, bringing fewer of these cases over time.<sup>45</sup> This trend evidences “improved case selection, likely in response to changes in antitrust law that demanded more economic rigor.”<sup>46</sup>

In response to the claim that H.R. 659 would reduce costs and uncertainty by promoting uniformity in merger reviews, it should be noted that FTC and DOJ already analyze mergers in exactly the same way, following the same substantive policy in conducting pre-merger reviews (i.e., the joint Merger Guidelines). Mr. Jacobson underscored this similarity, arguing that in his experience the outcome of a merger has never turned on the perceived differences in merger enforcement addressed by H.R. 659:

In my 39 years of practice, the firms in which I have been a partner have shepherded 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.<sup>47</sup>

Additionally, the FTC’s internal procedures already make it highly unlikely that the agency would ever seek such a “second bite at the apple.”<sup>48</sup> In 2015, the FTC set forth new procedures for the ad-

<sup>40</sup> *Administrative Litigation*, *supra* note 18, at 656.

<sup>41</sup> *Id.* at 645.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.* at 657.

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

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> Senate Hearing, *supra* note 2 (response to questions for the record from Jonathan Jacobson, former commissioner, Antitrust Modernization Commission) (emphasis in original), <https://www.judiciary.senate.gov/imo/media/doc/Jacobson%20Responses%20to%20Klobuchar.pdf>.

<sup>48</sup> H.R. 659’s proponents may cite the FTC’s actions in the Whole Foods-Wild Oats merger as an example of the agency’s problematic use of administrative proceedings after losing a preliminary injunction matter in court. In that case, however, the U.S. Court of Appeals for the D.C. Circuit ultimately vindicated the FTC’s pursuit of administrative litigation after losing the preliminary injunction proceeding in court when the appeals court reversed the district court’s de-

ministrative adjudication process following a federal court's denial of a preliminary injunction under section 13(b) of the FTC Act.<sup>49</sup> Under the revised rule, parties have two options to end administrative adjudication following a preliminary injunction.<sup>50</sup> First, a party may move to have an administrative adjudication withdrawn, which will automatically occur within two days of the filing unless there is an objection by the complaint counsel.<sup>51</sup> Previously, administrative cases were only withdrawn from adjudication pursuant to the Commission's direction.<sup>52</sup> Second, a party may file a motion to dismiss the administrative complaint on the basis that "the public interest does not warrant further litigation," which results in an automatic stay of the proceeding for seven days until Commission rules on the motion.<sup>53</sup> Formerly, absent the Commission's direction, filing a motion to dismiss did not result in an automatic stay of the proceeding.<sup>54</sup> Deborah Feinstein, the Director of the FTC's Bureau of Competition noted that this change creates "a new and improved process that aims to be quicker, more predictable, and more transparent."<sup>55</sup>

The FTC's revision to Rule 3.26 does not, however, displace the Commission's longstanding policies of determining whether to forego administrative adjudication solely because a federal court does not grant a preliminary injunction.<sup>56</sup> In 1995, the FTC clarified that this determination is made on a case-by-case basis, guided by five factors to determine whether continuing administrative adjudication is in the public interest as follows:

- (1) the factual findings and legal conclusions of the district court or any appellate court;
- (2) any new evidence developed during the preliminary injunction proceeding;
- (3) whether the transaction raises important issues of fact, law, or merger 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.<sup>57</sup>

nial of the FTC's request for a preliminary injunction. *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008). Additionally, as both the AMC and AAI have pointed out, the FTC's own internal practice and procedures make the "second bite" scenario unlikely. AMC Report, *supra* note 16, at 141; Foer Letter, *supra* note 3.

<sup>49</sup> 15 U.S.C. § 53(b) (2017); FED. TRADE COMMISSION, *Commission Approves Revisions to Its Rules of Practice* (Mar. 13, 2015), <https://www.ftc.gov/news-events/press-releases/2015/03/commission-approves-revisions-its-rules-practice>.

<sup>50</sup> A party may also utilize this process following the denial of the Commission's motion for relief pending appeal by a federal court of appeals. 16 C.F.R. § 3.26(b)(2) (2017).

<sup>51</sup> 16 C.F.R. § 3.26(c) (2017) ("The Secretary shall issue an order withdrawing the matter from adjudication 2 days after such a motion is filed, except that, if complaint counsel file an objection asserting that the conditions of paragraph (b) of this section have not been met, the Commission shall decide the motion within 10 days after the objection is filed.")

<sup>52</sup> 16 C.F.R. § 3.26(c) (2017) ("The matter will not be withdrawn from adjudication unless the Commission so directs.")

<sup>53</sup> 16 C.F.R. § 3.26(d)(2), (4) (2017).

<sup>54</sup> 16 C.F.R. § 3.26(d) (2017) ("The filing of a motion to dismiss shall not stay the proceeding unless the Commission so directs.")

<sup>55</sup> Deborah Feinstein, *Changes to Commission Rule 3.26 Re: Part 3 Proceedings following Federal Court Denial of a Preliminary Injunction*, FED. TRADE COMMISSION (Mar. 16, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings>.

<sup>56</sup> Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39742 (Aug. 3, 1995), <https://www.ftc.gov/sites/default/files/attachments/merger-review/950803administrativelitigation.pdf>.

<sup>57</sup> *Id.*

While there may be rare instances where there may be a “second bite” scenario, Mr. Jacobson notes that the FTC has refrained from using this authority since 1995, but that its use has historically served the public interest.<sup>58</sup>

B. THERE IS NO EFFECTIVE DIFFERENCE BETWEEN THE ANTITRUST AGENCIES’ PRELIMINARY INJUNCTION STANDARDS

To the extent that H.R. 659 seeks to harmonize the preliminary injunction standards applicable in DOJ merger cases<sup>59</sup> and FTC merger cases,<sup>60</sup> doing so does not appear to solve a real problem. The dominant opinion among courts, academics, and the antitrust bar is that the standards, while nominally different, are the same in practice.<sup>61</sup> Former FTC Chair Ramirez and former Assistant Attorney General for Antitrust William Baer have underscored this point, arguing that regardless of which agency seeks a preliminary injunction in merger cases, both are required “to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive.”<sup>62</sup> Far from providing differential treatment, federal district courts “closely scrutinize cases brought by both agencies,”<sup>63</sup> with one court recently observing that the FTC’s preliminary injunction standard “demands rigorous proof to block a proposed merger or acquisition.”<sup>64</sup>

Assuming there is a substantive difference between the injunction standards, however, attempting to unify them raises the concern that the bill simply seeks to undermine the FTC’s independence and distinctiveness, contrary to Congress’s intent in creating an independent antitrust enforcement agency in the first place. Instead, Congress should default to a standard that is deferential to agency expertise, as Mr. Foer of AAI suggests:

SMARTER Act supporters prematurely jump to the conclusion that the correct solution to this “unfairness” is to subject FTC challenges to the tougher standard applicable to DOJ. Why is it not better from a public policy standpoint to address the anomaly by extending the benefit of the Section 13(b) standard to DOJ challenges? A deferen-

<sup>58</sup>Senate Hearing, *supra* note 2, at 2 (response to questions for the record from Jonathan Jacobson, former commissioner of the Antitrust Modernization Commission) (“[T]here has not been a single merger since then challenged in Part 3 after a preliminary injunction has been denied.”), <https://www.judiciary.senate.gov/imo/media/doc/Jacobson%20Responses%20to%20Klobuchar.pdf>.

<sup>59</sup>When DOJ seeks a preliminary injunction, it acts pursuant to section 15 of the Clayton Act, which provides, in part, that a court hearing a case under the Act “may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises.” 15 U.S.C. § 25 (2017). Section 15, however, does not specify a standard for determining when to grant a preliminary injunction. Therefore, a modified version of the general test for preliminary injunctions applies. The test is usually articulated as requiring that the government show a reasonable likelihood of success on the merits and that the balance of equities tips in its favor. *U.S. v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980).

<sup>60</sup>FTC Act section 13(b) requires a court to grant a preliminary injunction to the FTC upon “a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.” 15 U.S.C. § 53(b) (2017). Courts have interpreted this standard to mean that the FTC must raise questions that are “so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation.” *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714–15 (D.C. Cir. 2001).

<sup>61</sup>*See, e.g.*, AMC Report, *supra* note 16, at 141 (noting the view of Commissioners Garza, Jacobson, and Kempf that the standard is the same and that such legislation is not truly necessary).

<sup>62</sup>Senate Hearing, *supra* note 2, at 13 (statement of Edith Ramirez, Chairwoman, Federal Trade Commission).

<sup>63</sup>*Id.*

<sup>64</sup>*Fed. Trade Comm’n v. Sysco Corp.*, 113 F. Supp. 3d 1, 23 (D.D.C. 2015).

tial standard for both agencies is warranted by the expertise and sophistication of the merger review process at both agencies.<sup>65</sup>

Similarly, Professor Kirkwood testified that equalizing the FTC and DOJ preliminary injunction standards was not necessary because both standards function the same way as a practical matter.<sup>66</sup> He was, however, concerned that changing the preliminary injunction standard applicable to the FTC in merger cases could have unintended consequences, such as causing courts to apply the non-FTC standard in non-merger cases as well. He also noted that the FTC Act standard, to the extent that it really was substantively more favorable to the government than the one applicable to the DOJ, was designed to allow the FTC to use its administrative proceedings.<sup>67</sup>

## CONCLUSION

For over a century, the FTC, as an independent agency, has strengthened the enforcement of antitrust laws to protect American consumers. Congress intended the agency to be a vigorous enforcer of the law and to develop antitrust policy in a bipartisan and expert manner while being comparatively insulated from the changing political and economic priorities that occur with each new presidential administration. A hallmark of this independence is the FTC's ability to pursue administrative adjudication, including in merger enforcement cases. By prohibiting the agency from exercising this authority in merger cases, H.R. 659 ultimately strikes at the very heart of the rationale for the FTC's existence and directly contravenes Congress' intent in establishing the FTC more than 100 years ago. Whatever speculative benefits for business in terms of purported reduced costs and uncertainty, undermining the FTC's independence and distinctiveness is simply too high a price to pay.

We are additionally concerned that H.R. 659 goes well-beyond the recommendations of the AMC. In particular, the elimination of administrative adjudication authority would also apply to certain non-merger conduct, including joint ventures and pre-merger activity, as well as consummated transaction.

Finally, the bill's uniform preliminary injunction standard for merger cases appears to be a solution in search of a problem. Nonetheless, to the extent that there is a material difference and to the extent that the FTC Act standard is, in fact, more favorable to enforcement authorities, as the bill's proponents contend, H.R. 659 chooses the less consumer-protective standard.

<sup>65</sup> *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on H.R. 2745 Before the Subcomm. on Regulatory Reform, Commercial & Antitrust Law of the H. Comm. on the Judiciary*, 114th Cong. 47 (2015), [http://judiciary.house.gov/\\_cache/files/9f77f8c3-6b40-4b22-b337-51ddbedab9b6/114-32-95119.pdf](http://judiciary.house.gov/_cache/files/9f77f8c3-6b40-4b22-b337-51ddbedab9b6/114-32-95119.pdf).

<sup>66</sup> *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014: Hearing on H.R. 5402 Before the H. Comm. on the Judiciary*, 113th Cong. 3 (2014), [http://www.appliedantitrust.com/14\\_merger\\_litigation/legislation/smarter\\_act/kirkwood-testimony.pdf](http://www.appliedantitrust.com/14_merger_litigation/legislation/smarter_act/kirkwood-testimony.pdf).

<sup>67</sup> *Id.* at 4–5.

For the foregoing reasons, we dissent and urge our colleagues to oppose H.R. 659.

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