

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

HEARING ON

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

**WASHINGTON, D.C.
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Chairman Lee, Ranking Member Klobuchar and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. From May 2003 through May 2007, I served as Chair of the Antitrust Modernization Commission (“AMC”), which was established by Congress “to examine whether the need exists to modernize the antitrust laws and to identify and study related issues.”² The AMC’s Report and Recommendations to the President and Congress included three recommendations relevant to this hearing, each of which enjoyed bipartisan commissioner support. One of these recommendations specifically called for legislation like the SMARTER Act to equalize the merger enforcement authority of the U.S. Federal Trade Commission (“FTC”) and U.S. Department of Justice (“DOJ”) by prohibiting the FTC from pursuing administrative litigation against transactions notified under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the

¹ I am currently a partner at Covington & Burling, where I co-chair the firm’s global competition law practice. For the past several years I have also served as an officer of the American Bar Association (ABA) Section of Antitrust Law, which actively comments on proposed competition law policies of jurisdictions around the globe; as a non-governmental advisor to the International Competition Network; and as a member of the Executive Committee of the Federalist Society’s Corporations, Securities and Antitrust Practice Group. In addition to serving as Chair of the AMC, it has been my honor to serve three times in the U.S. Justice Department Antitrust Division, most recently as a Deputy Assistant Attorney General and Acting Assistant Attorney General. I have counseled many clients over the past 34 years with respect to transactions reviewed by both the DOJ and the FTC, as well as parties objecting to transactions. The views expressed in my Statement are my own and not those of the ABA or any other organization.

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

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

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

Why is this Legislation Needed?

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

As the AMC explained:

Parties to a merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public’s trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties’ assent to a consent decree.⁴

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

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

⁴ AMC Report at 138-39.

How the Problem Arises

The problem arises because, while the FTC and DOJ have essentially identical authority to enforce the Clayton Act⁵ against mergers they believe to be anticompetitive, the processes they use and the judicial standards they face are very different.

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

Each of the FTC and DOJ are authorized to seek both preliminary and permanent federal court injunctions blocking a merger.⁶ But their practices with respect to seeking permanent injunctions have differed importantly.

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

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

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

In contrast, the FTC has never to my knowledge agreed to a consolidated proceeding and, indeed, has affirmatively resisted it. Despite the FTC's legal ability to seek permanent relief from the district court, it prefers to seek a preliminary injunction only, to preserve the status quo while it proceeds with its administrative litigation.

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

Second, as a practical matter, the grant of a preliminary injunction is typically sufficient to end the matter. In nearly every case, the parties will abandon their transaction rather than incur the heavy cost and uncertainty of trying to hold the merger together through further proceedings—which is why merging parties typically seek to consolidate proceedings for preliminary and permanent relief under Rule 65(a)(2). Time is of the essence. As one witness testified before the AMC, “it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty” after the issuance of a preliminary injunction.⁷

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

⁷ Testimony of Michael Sohn before the Antitrust Modernization Commission, Federal Enforcement Institutions Hearing, at 11 (Nov. 3, 2005). In fact, by the time a preliminary injunction issues, a merger will already likely have been under investigation and in litigation for more than a year.

To appreciate what happens, I encourage the Subcommittee members to study the FTC's challenge in 2008 to the proposed acquisition by Inova Health Systems Foundation of Prince William Health System, Inc.⁸ In that matter, the FTC commenced its own administrative proceedings at around the same time that it sued to get a preliminary injunction in federal district court, clearly signaling that the administrative litigation would proceed regardless of what the district court might do.⁹ For good measure, the FTC appointed then-Commissioner Rosch as the administrative law judge. He imposed a "fast track" schedule under which the administrative hearing would begin within about two months after the court was expected to rule. He promised to issue his initial decision shortly after the hearing concluded, and the Commission said it would decide any appeal of the initial decision within 90 days thereafter. While this fast-track procedure was packaged as a way to shorten the period during which the parties would have to wait for their full day in court, its only apparent certain effect was to encourage the court to issue a preliminary injunction and the parties to terminate their merger agreement. In a press release, the parties attributed their decision to abandon the deal to "the unusual process changes by the [FTC that] threatened to prolong the completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve."¹⁰ In his testimony on the SMARTER Act, Mr. Lipsky provides

⁸ Neither I nor my firm was involved in any way in that transaction.

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

¹⁰ Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available at http://newsroom.inova.org/article_display.cfm?article_id=5135.

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

In 1995, the FTC adopted a policy (dubbed the “Pitofsky Rule” for the then-Chair of the FTC) not to automatically move to administrative hearing following the loss of a preliminary injunction. While the policy left some wiggle room for the FTC, it was understood at the time that the FTC would litigate internally only in the rare case. This policy was perceived by many as a response to unhappiness about the FTC’s prior use of administrative proceedings.

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

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

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

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

The FTC must meet a public interest standard under Section 13(b) of the FTC Act. Under that standard, an injunction shall be granted “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of success, such action would be in the public interest.”¹¹

Courts have applied a variety of formulations in describing the FTC’s burden under this public interest standard, including that the FTC need merely have raised questions “so serious, substantial, difficult and doubtful as to make them fair ground for further investigation.”¹² That means, even after having investigated a case for four, six, or even twelve months (depending on the case), the FTC need only raise serious questions to win a preliminary injunction.

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

AMC Recommendations

As I stated at the outset, the AMC offered three sets of relevant interrelated recommendations and findings. The first recommendation was that the FTC “should adopt a policy that when it seeks injunctive relief in HSR Act merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with

¹¹ 15 U.S.C. § 53(b).

¹² *FTC v H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001). *See also* *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 1034-35 (D.C. Cir. 2008).

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

The second recommendation was for Congress to amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR merger cases. Four of the 12 AMC Commissioners did not join this recommendation.¹⁴ Commissioner Burchfield explained that he would preserve the option of subsequent administrative proceedings for situations in which the preliminary and permanent injunction phases were not consolidated. He also considered that such legislation would be practically meaningless so long as the FTC could reinstate administrative proceedings against a consummated merger.

Commissioners Jacobson and I explained that we declined to join based on the FTC’s then-policy and practice of not routinely pursuing follow-on administrative litigation where a preliminary injunction had been denied (the so-called Pitofsky Rule). We expressed the view that “follow-on administrative litigation following the denial of a preliminary injunction is inappropriate except in highly unusual contexts.”

As discussed above, however, shortly after the AMC issued its recommendation, the FTC dropped the Pitofsky Rule in favor of a procedural approach many perceived was designed to make it more difficult for parties to litigate merger challenges. After introduction of the first House version of the SMARTER Act, the FTC re-instituted the Pitofsky Rule. While I applaud that decision, I now think it is appropriate for Congress to set it in stone.

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

¹⁴ Burchfield (R), Kempf (R), Jacobson (D) and Garza (R) did not join.

Third, the AMC recommended that Congress act to ensure that the same standard for a grant of a preliminary injunction applies to both the FTC and DOJ. Only one AMC Commissioner declined to join this recommendation (Commissioner Burchfield) based on his view that case law was already clear that the traditional equities test applies except where Congress has expressly said otherwise (“this evolving authority suggests that the DOJ and FTC confront the same preliminary injunction standards”). Unfortunately, however, the law has not evolved in the way that Commissioner Burchfield predicted it would.¹⁵

It is important to note the bipartisan nature of the vote on these recommendations, which were closely considered and seriously debated and discussed among the AMC commissioners. The recommendations were in no way intended to be “anti-enforcement.” Indeed, as reflected in its Report, the AMC fully supported use of the antitrust laws to preserve competitive markets, which “drives an economy’s resources to their fullest and most efficient uses, thereby providing a fundamental basis for economic development.”¹⁶ The objective of these three recommendations, rather, was to maintain a consensus about the value of a strong antitrust merger enforcement regime by ensuring both the reality and perception of fair and equal treatment.

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The SMARTER Act would accomplish the full intent of these AMC recommendations.

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

¹⁵ Commissioners Jacobson, Kemp and I joined the recommendation. We also expressed the belief that the standards were the same and that legislation accordingly might not be necessary, but advised we saw value in eliminating any doubt. I personally relied on testimony by officials of both the FTC and DOJ that they did not view the standards to be different. But that was then.

¹⁶ AMC Report at 2.

antitrust enforcement agency reviewed them and addresses the concern of many that the process rules will be stacked against them in a way that effectively prevent them from getting a fair hearing in court. Moreover, the legislation is narrowly crafted to resolve just this issue of mergers. It is not a general challenge to the FTC's use of administrative hearings in other contexts. For these reasons, I am pleased to testify in support of the SMARTER Act and thank this Subcommittee for the attention it has paid to the AMC recommendations.