

PREPARED STATEMENT OF

JONATHAN M. JACOBSON

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

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Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy & Consumer Rights

Concerning

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

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Before the

**U.S. Senate Subcommittee on Antitrust, Competition Policy and Consumer Rights
S. 2102 , the ‘Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015’
October 7, 2015¹**

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

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

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

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

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

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

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

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

The proposed legislation accomplishes its objective by amending FTC Act § 5(b), 15 U.S.C. § 45(b), to exclude “the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18)” from the grant of authority to the FTC to conduct administrative proceedings “except in cases where the Commission approves an agreement with the parties to the transaction that contains a consent order.” S. 2102 § 3(1). The amendments to Clayton Act Section 11, as currently drafted, *id.* § 2(3), reinforce this exclusion.

I begin by noting that, to the extent that the legislation is intended to implement the AMC’s recommendation, it is drafted too broadly. The AMC recommended that Congress implement legislation “to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.” AMC Report at 140. Its proposal “would not preclude the FTC from pursuing an administrative complaint after the consummation of a merger, based on evidence that the merger has had actual, as opposed to predicted, anticompetitive effects.” *Id.* at 141. But the proposed legislation could be construed as prohibiting a challenge to the “consummation” of any merger in administrative proceedings, even a post-merger challenge, notwithstanding the term “proposed.” If enacted at all, I strongly recommend clarifying that the exclusion would only apply to “the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Preliminary Injunction Standards. In contrast, I do not oppose the proposal to conform the statutory preliminary injunction standards for the FTC to those applicable to the DOJ. I understand the proposed Act to accomplish this by amending Clayton Act § 11, 15 U.S.C. § 21, to require the FTC to enforce Clayton Act § 7 “in the same manner as the Attorney General in accordance with section 15 [of the Clayton Act]” and carving out from the FTC Act’s preliminary injunction provisions (FTC Act § 13(b), 15 U.S.C. § 53(b)) any request to prevent “the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18).” S. 2102 §§ 2(3) & 3(3). This would

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

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

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

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

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

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

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

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