

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

HEARING ON

**THE “STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES
(SMARTER) ACT OF 2014”**

**WASHINGTON, D.C.
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Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. In May 2007, I testified before the Judiciary Committee’s Antitrust Task Force as former Chair of the Antitrust Modernization Commission (“AMC”) regarding the AMC’s Report and Recommendations. Three of those recommendations—all of which have bipartisan support—are relevant to this hearing. One of them called specifically for legislation like the SMARTER Act to equalize the merger enforcement authority of the U.S. Federal Trade Commission (“FTC”) and U.S. Department of Justice (“DOJ”) by prohibiting the FTC from pursuing administrative litigation against transactions notified under the Hart-Scott-Rodino Act.¹ So, it is a great pleasure for me to be here today to testify in support of the SMARTER Act. Seven years is a while, but I never lost faith that the wisdom of the AMC recommendations would prevail.

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

¹ See Recommendation 25 of the Report and Recommendations of the Antitrust Modernization Commission (April 2007) (Hereinafter referred to as “AMC Report”).

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.²

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

How the Problem Arises

The problem arises because, while the FTC and DOJ have essentially identical authority to enforce the Clayton Act³ against mergers they believe to be anticompetitive, the processes they use and the judicial standards they face are very different. 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.

² AMC Report at 138-39.

³ 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 both active in the defense, healthcare and other spaces, even sometimes trading back and forth transactions involving certain industries and even certain companies.

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.⁴ But their practices with respect to seeking permanent injunctions differ 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 full hearing on the merits, with DOJ having to prove its case based on a preponderance of the evidence.

In contrast, the FTC has never 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.

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

⁴ See 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC).

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.⁵

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

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. as an example.⁶ In that matter, the FTC commenced its own administrative proceedings at around the same time that it sued to get a preliminary injunction in federal district court, clearly signaling that the administrative litigation would proceed regardless of what the district court might do. For good measure, the FTC appointed then-Commissioner Rosch as the administrative law judge. He imposed a “fast track” schedule under which the administrative hearing would begin within about two months after the court was expected to rule. He also promised to issue his initial decision soon after the hearing concluded, and the Commission said it would decide any appeal of the initial decision within 90 days. While this fast-track procedure was packaged as a way to shorten how long the parties would have to wait for their full day in court, its only apparent certain effect was to encourage

⁵ 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.

⁶ Neither I nor my firm was involved in any way in that transaction.

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.”⁷

It should also be noted that in at least some courts the standard applied in deciding whether to issue a preliminary injunction is less burdensome for the FTC than for DOJ. The FTC must meet a public interest standard under Section 13(b) of the FTC Act. 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.”⁸ Courts have applied a variety of formulations in describing the burden and what the FTC must do to satisfy it, including that the FTC merely have raised questions “so serious, substantial, difficult and doubtful as to make them fair ground for further investigation.”⁹ In contrast, because Section 15 of the Clayton Act, under which DOJ proceeds, does not specify a standard, 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.” Without regard to how the different standards might apply to a particular case, the AMC concluded (and I agreed) that it would be better to eliminate uncertainty by making it clear that the same standard applies to both the FTC and DOJ.

⁷ 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.

⁸ 15 U.S.C. § 53(b).

⁹ *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).

AMC Recommendations

As I stated at the outset, the AMC offered three sets of interrelated recommendations and findings. The first was that the FTC “should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act [“HSR”] merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties.”¹⁰ The FTC pretty clearly rejected that advice. I would suggest that the agency saw no particular advantage in disarming itself.

The second was for Congress to amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR merger cases. Four of the 12 AMC Commissioners did not join this recommendation.¹¹ Commissioner Burchfield explained that he declined to join in part because the legislation would be practically meaningless so long as the FTC could circumvent the law by instituting administrative proceedings as soon as the merger closed after the denial of a preliminary injunction. Commissioners Jacobson and I explained that we declined to join based on the FTC’s then-policy and practice of not routinely pursuing follow-on administrative litigation where a preliminary injunction had been denied. As we have seen, however, that policy and practice changed very soon after the AMC issued its report. Speaking only for myself (and not for Mr. Jacobson), had I looked into my crystal ball and seen Inova and other developments, I would have joined in the recommendation of my more prescient colleagues.

¹⁰ AMC Report Recommendation 24. Only AMC Commissioners Cannon (R) and Yarowsky (D) did not join in this recommendation.

¹¹ 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 (Burchfield) on the ground that the case law is clear that the traditional equities test applies except where Congress has expressly said otherwise; in his view, legislating as recommended by the AMC would be as likely to confuse and to clarify.

It appears to me that the SMARTER Act accomplishes the full gist of these AMC recommendations. For that reason, I am pleased to testify in support and to thank this Subcommittee for the attention it has paid to the AMC recommendations.