PREPARED STATEMENT OF

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on

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Through Equal Rules Act of 2014"

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The proposed bill (the "SMARTER Act") springs from the premise that it is currently easier for the Federal Trade Commission (FTC) to stop a merger (or extract a settlement) than it is for the Department of Justice (DOJ). The proponents assert that the standard for a preliminary injunction is lower for the FTC than for the DOJ. They further assert that when the FTC wins a preliminary injunction, it can subject the merging parties to an administrative trial, and that the extra cost and time involved (compared to a DOJ court proceeding) may make parties more willing to settle or drop the transaction altogether. These differences raise concerns because, to the extent they exist, they subject merging parties to disparate treatment depending upon whether their case is assigned to the FTC or the DOJ. Since the agencies divide cases based on which agency has the most expertise in a particular industry, a proposed merger may be more likely to be stopped or curtailed if it's in an "FTC industry" rather than a "DOJ industry," even if there is no difference in competitive merits.

The proposed bill seeks to end this disparity through two principal changes. First, it would make the preliminary injunction standard in Section 13(b) of the FTC Act – the standard that many courts say is less demanding – inapplicable to mergers. Second, it would deprive the FTC of the ability to challenge mergers under Section 5 of the FTC Act, which would mean that the agency could not adjudicate their legality in administrative proceedings, the linchpin of the agency process.

In this statement, I provide a preliminary assessment of both changes. My analysis indicates that there is a substantial case for the first change – equalizing the preliminary injunction standards. It also points out, however, that the change may not be needed in practice and may have significant costs. The second change – eliminating the FTC's ability to use administrative proceedings in merger cases – is more problematic. This may be an opening

wedge in an attack on dual enforcement, a system that Congress created, that it has maintained for a hundred years, and that has generally worked well, providing some competition, so to speak, in federal antitrust enforcement. From this perspective, the elimination of the FTC's administrative power in the merger area would be disturbing and likely to harm consumers.

Preliminary Injunction Standards

Requiring the FTC and DOJ to satisfy the same preliminary injunction standard has considerable appeal. Why should a merger be more likely to be subject to a preliminary injunction simply because it is in an industry that the FTC knows better than DOJ? Why should differences in the industry expertise of the two agencies play a role in which mergers are likely to be preliminarily enjoined?

These questions assume, however, that the agencies actually face different standards. That is not clear. Bill Baer, who has held high positions at both agencies, testified recently that, in practice, the agencies face the same preliminary injunction standard. Although the words used in many decisions, particularly recent decisions in the D.C. Circuit, suggest that the test is easier for the FTC, in fact, in Baer's view, both agencies have to supply essentially the same evidence – and rigorous analysis – to obtain a preliminary injunction. There is substantial support for that view. While I have not reviewed the underlying records of individual cases, it is my impression from reading many decisions that, whatever the stated standard, judges normally demand of both agencies proof that a merger is "likely" to harm competition. If that is generally true, there is little reason to alter Section 13(b). The proposed bill would address a problem that largely does not exist.

Of course, if the stated standards are actually identical in practice, why not make their language identical? Is there any reason to preserve two different formulations of the standard for a preliminary injunction – one for each agency – if the difference does not matter in practice? This, too, is a substantial argument. But there are two reasons why preserving the existing standard for the FTC may be justified. The first is a concern with unintended consequences. The FTC uses Section 13(b) for many aspects of its enforcement program, not just mergers, and if mergers are explicitly excluded from 13(b), courts may take that as a signal that the FTC also needs to meet a tougher standard in its other cases. That need not occur – and might be avoided through firm language and legislative history – but it is an issue that needs to be addressed.

The second reason to maintain the existing Section 13(b) standard is more important. When the FTC obtains a preliminary injunction, it adjudicates the legality of the proposed merger through administrative proceedings. While those proceedings are generally more time consuming than a consolidated hearing before a district court on whether to issue both a preliminary injunction and a permanent injunction, administrative proceedings allow the FTC to bring to bear its considerable expertise. This was one of the major reasons Congress created the FTC. It wanted an independent agency to develop expertise in competition policy through sustained attention to the issue and through studies, reports and a vigorous enforcement program, and then apply that expertise to particular practices and transactions. Congress thought such administrative expertise would produce better results than assigning antitrust cases exclusively to generalist judges, who may have little antitrust expertise and who may face these cases only once in a lifetime.

To be sure, not every proposed merger requires the kind of detailed, expert review that administrative adjudication can provide. Many mergers may be sufficiently routine or

commonplace that they can be effectively evaluated in a consolidated court proceeding. But that is not true for every proposed transaction. If an industry is changing rapidly or neither agency has developed much expertise in it, there is reason to expose a merger in that industry to an administrative proceeding before determining whether it should be stopped. And in such a case, it may well be difficult to show, prior to such a proceeding, that the merger was "likely" to harm competition. In such a case, in other words, both the FTC's current preliminary injunction standard and its administrative adjudication would be desirable.

This analysis suggests that eliminating the FTC's existing preliminary injunction standard would have significant costs in some cases. Those costs would have to be balanced against the benefits of equalizing the standard for both agencies.

Administrative Adjudication

Eliminating the FTC's power to determine the legality of a merger through the administrative process described in Section 5 would strike at a vital reason for the creation of the FTC. It would not of course deprive the agency of the power to use administrative adjudication to combat other anticompetitive practices, but once that power were removed in one area, where would it stop? The proposed bill therefore raises the question of dual enforcement, a system that Congress originated and maintained for a century. While that system has drawbacks, it also has substantial benefits, including the value that an independent agency can create when it uses its expertise and sustained deliberation to solve a difficult competition problem.

That value was illustrated by the Commission's efforts in the last decade to reinvigorate hospital merger enforcement. Both agencies had been defeated in a series of hospital merger challenges. Ultimately, the FTC used economic studies and detailed analyses to challenge a

consummated hospital merger in administrative adjudication, finding in an extensive and thoughtful opinion that the merger had been anticompetitive. This effort resulted in a change in the direction of hospital merger enforcement, and several succeeding mergers were successfully challenged in the courts. Had the FTC been unable to use administrative adjudication – had it been forced to go to yet another generalist judge – this result may not have occurred.

The proposed bill's most serious problem, in short, is its elimination of the FTC's power to use administrative adjudication, even to challenge consummated mergers in an area where the courts have been hostile to enforcement. Congress should be reluctant to deprive consumers of the benefits of this power.