The American Antitrust Institute

April 9, 2014

The Honorable Spencer T. Bachus, III
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Henry C. Johnson, Jr.
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"

Dear Chairman Bachus and Ranking Member Johnson:

The American Antitrust Institute ("AAI") respectfully requests that this letter become part of the record of your Subcommittee's April 3, 2014, hearing on the draft "Standard Merger and Acquisition Reviews through Equal Rules Act of 2014" (the "SMARTER Act"). AAI generally shares the concerns expressed at the hearing by John Kirkwood, a longtime Senior Fellow and distinguished member of AAI's Advisory Board, and the concerns set forth in FTC Chairwoman Ramirez's April 2, 2014, letter to the Subcommittee, particularly with regard to the proposed elimination of the FTC's authority to engage in administrative adjudication of mergers and unspecified other transactions. AAI believes the Subcommittee's initiative raises important questions of merger law and policy that warrant careful study over the months (or years) ahead, and it is premature to move in the direction of drafting any specific proposed legislation until that study is concluded. AAI's more specific perspectives on the issues presented by the proposed SMARTER Act are as follows:

1. AAI agrees that it is anomalous that there are different articulations of the standard for obtaining a preliminary injunction against a proposed merger depending on which enforcement agency is bringing the case to court: mergers challenged by DOJ can be preliminarily enjoined only if DOJ meets the traditional equity test including a showing of a substantial likelihood that the merger will violate Section 7; mergers challenged by the FTC can be preliminarily enjoined upon what some courts have held to be a more lenient public interest test under Section 13(b) of the FTC Act. But is this difference a real difference? AAI shares the skepticism of many observers that this difference matters in any material sense since courts generally require both agencies to make strong

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showings of probable anticompetitive effect before a preliminary injunction is entered, this notwithstanding that Section 7 of the Clayton Act bars acquisitions whose effect "*may be* substantially to lessen competition."[1]

Assuming this difference does matter, however, 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 deferential standard for both agencies is warranted by the expertise and sophistication of the merger review process at both agencies, as well as by the "incipiency doctrine," which requires both agencies to "arrest in its incipiency . . . the substantial lessening of competition" from an acquisition.[2] In any event, AAI suggests that the right choice between these two options depends on whether, in the current environment, the problem to be solved – if there is one – is over-enforcement by FTC or under-enforcement by DOJ. More on that question below.

2. A clearly more material difference between the two agencies' merger enforcement regimes is that DOJ merger challenges must be tried before "generalist" judges in district courts while FTC merger challenges can be tried within the FTC's own administrative adjudication process. Although this difference has been part of the merger enforcement landscape for 100 years, SMARTER Act supporters cite one lone example of an alleged abuse of the Commission's administrative option – two decades ago – as support for abolishing it.[3] The cited concern is that, even when the FTC loses a motion for a preliminary injunction in court and the merger is then consummated, the FTC can subject the merger to a "second bite at the apple" – an administrative adjudication seeking to unwind it. But that concern was addressed in a 1995 Commission Policy Statement and an associated addition to the Commission's Rules of Practice.[4] There is no apparent ongoing problem to be addressed; and, even if there is such a problem, the obvious solution would be legislation limited to precluding an administrative challenge in the aftermath of denial of a preliminary injunction rather than the far more drastic elimination of the administrative adjudication process for merger challenges altogether.

3. In any event, prudence 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

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[1] 15 U.S.C. § 18 (emphasis added).

[2] United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 589 (1957).

[3] R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995). Deborah Garza, in her testimony supporting the SMARTER Act, offered a rendition of what happened in a 2008 FTC challenge of a hospital merger in which the parties abandoned their proposed transaction before a court ruling on the FTC's preliminary injunction motion as a further basis for the proposed legislation. See Garza Statement at 4-5. AAI finds that episode to be of no relevance to the issue at hand.

[4] Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995); 16 C.F.R. § 3.26 (2009). The rule adopted in the immediate aftermath of that policy statement and now set forth in 16 C.F.R. § 3.26 invites respondent, in the wake of a court's denial of a preliminary injunction, to move for dismissal of the associated administrative proceeding or for a new Commission determination of whether continued litigation is in the public interest.

generalist judges.[5] That concern persists, as exemplified in a recent decision by a federal district court in the district of Minnesota that found no antitrust violation when the owner of the only drug that treats an acute condition of premature infants acquired its only rival drug and thereupon raised prices by more than 1400%.[6] The system of dual enforcement is not broken. AAI has criticized merger enforcement and non-enforcement decisions of both agencies, but there is no doubt that both agencies have contributed importantly to the evolution of merger law and policy over many years. AAI fears the inevitable disruption and likely diminution of overall enforcement in this field that would accompany any legislative "fix" of the sort proposed by SMARTER Act supporters in the short term.

4. That said, however, AAI would welcome a broad in-depth study of the current dual enforcement system and related aspects of the current merger enforcement landscape with a view to developing consensus judgments regarding thoughtful reforms over the years ahead. Such a study should begin with a probing examination of the question identified hereinabove as to whether the existing enforcement apparatus results in either over-enforcement or under-enforcement of Section 7 strictures on merger activity. This is a question that should be explored not only with respect to U.S. enforcement processes but also with an eye on what has become a global enforcement system with many participants on other continents. AAI readily acknowledges its own strong inclination that there is significant under-enforcement, a function of many factors that include steadily increasing concentration in critical parts of the economy as a result of steadily increasing merger activity; inadequate funding of the enforcement agencies; and merger law standards that have become more complex than necessary or desirable, thereby steadily escalating both investigation and litigation costs. Surely, however, an objective nonpartisan study of this question should precede any legislation that would change existing institutional structures.

5. If and when it becomes timely to explore institutional restructuring, 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 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. Among the benefits would be enabling DOJ to shift more resources into its highly acclaimed criminal cartel enforcement activity (thereby likely to add even more to the already billions of dollars in fines it brings into the U.S. treasury year after year).

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[5] As the Commission observed in its above-referenced 1995 Statement of Policy, the FTC "was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions. Congress intended that the Commission would play a 'leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission' [quoting Hospital Corp. of America v. FTC, 807 F.2d 1381, 1388 (7th Cir. 1986)]. . . . Especially because the Supreme Court has addressed substantive issues of merger law only rarely in recent decades, and because antitrust law during that time has evolved in response to economic learning, the Commission's opinions have been an important vehicle to provide guidance to the business community on how to analyze complex merger issues." 60 Fed. Reg. 39,741 at 39,742.

[6] FTC v. Lundbeck, Inc., 2010 WL 3810015 (D. Minn. 2010).

6. Notwithstanding all of the above, AAI believes that there is one aspect of institutional reform in the merger enforcement field that is now timely for Congressional consideration: inadequacies in both judicial and public vetting of merger settlements. The now-pending Tunney Act proceeding with regard to DOJ's U.S. Airways/American Airlines settlement highlights the problem. As AAI argued in an amicus brief filed in that proceeding last week, meaningful review under the Tunney Act process is undermined in particular by the common practice of allowing consummation of the merger at issue as soon as the proposed consent decree is filed and thus obviously before public comments are received or the presiding judge has even seen the proposed settlement terms. This same practice is common with respect to FTC merger settlements: the mergers that are settled are allowed to close as soon as the proffered consent orders are published and before any comments are received under the agency's administrative review process. AAI would welcome your Subcommittee's review of this problem and consideration of potential fixes for it.

Our thanks for your consideration of our perspectives.

Sincerely,

Albert A. Foer
President
American Antitrust Institute