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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"

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Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on S. 2102, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" ("SMARTER Act").

I support this reasonable legislation, which implements the recommendations of the Antitrust Modernization Commission (AMC).[1] The bill sensibly harmonizes the FTC's procedural rights to challenge proposed mergers and acquisitions with the standards applicable to the DOJ Antitrust Division. As explained below, the legislation will not harm the Commission's merger enforcement program, and it will not prevent the agency from continuing to influence the development of antitrust law through administrative litigation.

As a former FTC Commissioner, I served on the Commission when the HSR Act was enacted into law and during the development of the premerger notification rules. Since leaving the agency, I have been in private practice for more than 30 years, with substantial experience in merger investigations and enforcement actions. My experience also includes serving as a past chair of Baker & McKenzie's global antitrust practice.

At the outset, let me emphasize that I believe in the FTC's mission and the important contribution it makes to merger enforcement. This legislation would not in any way impair the Commission's ability to maintain a vigorous enforcement program. Rather, it would ensure that the same litigation procedures are used by both agencies in non-consummated mergers and acquisitions, which is consistent with the unified structure of the HSR statute.

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[1] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 14, 138-150 (2007).(recommendations 24-26)

The HSR Act was adopted precisely to give the agencies advance notice of significant proposed acquisitions and sufficient time to conduct a thorough investigation before a deal can be consummated. Almost everything about the statute requires close coordination between the FTC and DOJ, including administration of the premerger notification program, issuance of well-regarded horizontal merger guidelines and determination of which agency will review a particular transaction. The vast majority of reportable deals present no antitrust issues and are cleared after a brief review, often in less than 30 days. The one major exception to this coordinated, shared responsibility is when an investigation cannot be resolved and goes to the litigation stage.

The litigation path in FTC and DOJ merger cases differs in two important respects – first, the standards for granting a preliminary injunction and, second, the venue for litigating the merits.

As to preliminary injunction standards, the FTC is governed by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes TROs and preliminary injunctions to be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest. . . ." In addition to eliminating the traditional irreparable injury requirement, a number of courts have interpreted the "likelihood of success" test to be satisfied if the FTC raises questions going to the merits "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[2]

[2] *See, e.g., FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 882 (D.C. Cir. 2008) (Tatel, J., concurring). The FTC endorsed this lower, deferential standard in a 2008 letter to the House Judiciary Committee. *See* FTC Letter to Chairman John Conyers, Dec. 23, 2008.

Whatever this standard means, and it is hard to equate it with a likelihood of success (however weak the likelihood might be),[3] it is based on the faulty premise that an injunction is necessary because there has not yet been "thorough investigation, study, deliberation and determination by the FTC." To the contrary, when FTC and DOJ merger cases get to court, the agencies have already conducted extensive investigations that typically take 6 months or longer. As the ABA Antitrust Section noted in comments filed in 2014 supporting the same preliminary injunction test for both agencies:

> [the FTC's] low standard makes it too easy for the FTC to deliver what for all practical purposes is a death blow to a merger. It is also particularly hard to justify given that, by the time the FTC goes to court to challenge a merger notified under the Hart-Scott-Rodino Act, the FTC typically already will have investigated the merger for several months, and in some cases for a year or more."[4]

The lengthy, in-depth investigations that precede every litigated HSR merger case explain why DOJ is ready and willing to proceed immediately to a trial on the merits and seek a permanent injunction.

It is useful to note that Section 13(b) was enacted in 1973, three years before passage of the HSR Act. Prior to adoption of 13(b), the FTC was severely curtailed in obtaining preliminary injunctive relief and had to rely on the restrictive All-Writs Act, 28 U.S.C. § 53(a), to obtain temporary relief.[5] Passage of the HSR Act changed all that and gave both agencies the time and the tools to conduct thorough market investigations before parties to reportable transactions could consummate their deals. Put simply, in such circumstances the rationale for the "serious questions" test or, more generally, a lower standard for the FTC no longer exists.

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[3] The ambiguity of what is meant by the "serious questions" standard is amplified by the court's decision in *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26, 67-68 (D.D.C. 2009), which held that it was not for the court to decide which party's market evidence was more persuasive in determining whether the Commission's *prima facie* case could be rebutted.

[4] American Bar Association Section of Antitrust Law, Comments on Proposed Legislation: The Standard Merger and Acquisitions Review through Equal Rules Act of 2014, at 3 (June 20, 2014) (hereafter "ABA Antitrust Section Comments").

[5] *See FTC v. Dean Foods, Co.*, 384 U.S. 597 (1966).

While DOJ is governed by traditional equity standards when seeking a preliminary injunction, courts have relaxed the test to the degree that irreparable injury may be presumed if a likelihood of success can be shown and, in such circumstances, the balance of equities will typically be resolved in favor of the government.[6] Still, the Antitrust Division believes the FTC generally carries a lighter burden when seeking preliminary injunctive relief in merger cases. As outlined in the Division's staff manual,

> [t]he courts, in applying the FTC's statutory standard, have given it the liberal interpretation intended by Congress. *See, e.g., FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (Brown, J.) and 883 (Tatel, J.); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714, 727 (D.C. Cir. 2001); and *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1216-17 (11th Cir. 1991); and *FTC v. Exxon Corp*., 636 F.2d 1336, 1343 (D.C. Cir. 1980). In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b).[7]

Yet, there is no indication that the standard applied to DOJ has hampered its merger enforcement efforts and the Division's successful track record in recent years, whether by fully litigating cases or extracting more favorable settlements, is instructive.

Although Section 13(b) expressly authorizes district court judges to grant both preliminary and permanent injunctions, the FTC consistently takes the position that merits trials involving non-consummated mergers should be conducted in administrative proceedings and not in the federal courts. Without FTC concurrence, federal judges are powerless to issue permanent injunctions. As the AMC correctly observed, there is no "obstacle to the FTC's adoption of the DOJ's approach" regarding consolidation of preliminary and permanent injunctive relief in federal court.[8] Indeed, the Commission already seeks permanent injunctions in the vast majority of its consumer protection cases, in part because that is the only way it can get effective

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[6] *See U.S. v. Siemens, Corp.*, 621 F.2d 499 (2d Cir. 1980); *U.S. v. UPM-Kymmene Oyj*, 2003 U.S. Dist. LEXIS 12820 (N.D. Ill. 2003). *See also* ABA Antitrust Section Comments, at 4 n.8 (and cases cited therein).
[7] *Antitrust Division Manual*, Fifth Edition, at page IV-20 (last updated April 2015).
[8] AMC Report at 140.

monetary redress. The agency has also sought permanent relief from time-to-time in antitrust cases, including consummated mergers.[9]

The practical effect of the divergent litigation schemes at the FTC and DOJ is that in virtually all non-consummated merger cases involving the FTC the outcome is determined at the preliminary injunction stage, whereas DOJ cases typically consolidate the preliminary and permanent injunction hearing. In essence, for FTC cases, the preliminary injunction hearing is the *de facto* merits hearing, regardless of who wins. That means merging companies face a tougher hurdle in FTC cases than they do in DOJ cases where a permanent injunction hearing requires the government to prove a Section 7 violation by a preponderance of the evidence.

To illustrate, let me compare the timeline for a couple of DOJ cases – *Oracle*[10] and *H&R Block*[11] – that were litigated to conclusion in permanent injunction hearings with a recent FTC merger case – *FTC v. Sysco Corp.*, No. 1:15-CV-00256, 2015 U.S. Dist. LEXIS 83482 (D.D.C. June 23, 2015). The *Oracle* and *H&R Block* cases took a little over 6 and 5 months, respectively, from filing of the complaint to issuance of the district court decisions. In the *Sysco* case, the FTC filed its administrative complaint on February 19 of this year and set a hearing date to begin on July 21, approximately 5 months later. As in virtually all FTC cases involving reportable transactions, the Commission initiated a parallel federal court proceeding seeking a preliminary injunction to block the transaction pending completion of the administrative proceeding. On June 23, the court issued a decision blocking the proposed merger pending completion of the FTC proceeding. Shortly thereafter the merger parties announced they were terminating the transaction.

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[9] *See, e.g., FTC v. Cardinal Health,Inc.*, No. 1:15-CV-03031 (S.D.N.Y. April 23, 2015) (stipulated injunction, including disgorgement, in monopolization case)
[10] *U.S. v. Oracle Corp*., 331 F.Supp.2d 1098 (N.D. Cal. 2004).
[11] *U.S. v, H&R Block, Inc.,* 833 F.Supp.2d 36 (D.D.C. 2011).

Thus, in the above comparison, the FTC's preliminary injunction case was completed in approximately 4 months, or just a little shorter than the time required to complete the DOJ permanent injunction cases. The key difference is that, had the parties not abandoned their merger plans, the FTC's administrative hearing would have just been starting a month later. Under the Commission's rules, that proceeding (including the trial, ALJ decision and appeals to the full Commission) will take another 7 months before the agency issues its final decision, resulting in litigation (court + agency) that is at least twice as long as a typical DOJ litigated merger case. And, the FTC decision timeline takes into account rules changes that the Commission has adopted in recent years to speed up its administrative cases. It is, therefore, no surprise that, like the *Sysco* outcome, mergers do not survive in FTC cases beyond the preliminary injunction stage, given the lengthy agency investigation, subsequent litigation, and any appellate review.

Some may argue that the Commission's administrative process allows the agency to advance the development of effective merger policy through its own proceedings, as envisioned when the FTC was created. That may be true in other areas of antitrust and consumer protection where the law is less developed or primarily within the province of the agency. It will also remain true for consummated transactions outside the scope of the SMARTER Act where the Commission can continue to use administrative litigation to develop antitrust merger law. In two recent cases, *ProMedica*[12] and *Polypore*[13] the FTC successfully challenged consummated transactions. In those cases the agency issued administrative decisions, which were upheld on appeal, finding that the transactions violated Section 7 of the Clayton Act.

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[12] *ProMedica Health Sys.*, 2012 FTC LEXIS 58 (FTC 2012), *aff'd, ProMedica Health Sys. v. FTC*, 749 F.3d 559 (6th Cir. 2014) (hospital systems).

[13] *Polypore Int'l*, 2010 FTC LEXIS 97 (FTC 2010), *aff'd*, *Polypore Int'l v. FTC,* 686 F.3d 1208 (11th Cir. 2012) (battery separators).

The Commission has made significant contributions in those areas, but a completely different paradigm exists for reportable acquisitions and mergers where, as noted above, the agencies enforce the law under a jointly developed program, including economically based substantive guidelines that are being accepted by the courts and integrated into their decisions. Moreover, the FTC's administrative process in HSR-reportable cases is not contributing to the development of merger law because the cases never get that far. In the past 20 years there has not been a single transaction where the FTC sought a preliminary injunction to block a proposed merger and then completed the related administrative proceeding – not a single one, regardless of whether the Commission won or lost the preliminary injunction case.

I would add one other comment. The bill, while harmonizing the FTC's litigation procedures with those of DOJ for non-consummated mergers and acquisitions, would not subject the Commission to Tunney Act review of merger litigation settlements. I agree with that approach. The Tunney Act procedures are awkward and ill-suited to the settlement of merger cases and should not be extended to the FTC.

To summarize, the pending legislation corrects an inequitable disparity between the FTC's and DOJ's merger litigation procedures. First, it would retire the "serious questions" test and replace it with the same preliminary injunction standard that governs DOJ merger cases. That would ensure that the test applied to the FTC properly focuses on the likelihood of success as the most important factor a court should consider in determining whether to grant interim relief. Second, by requiring the FTC to bring all of its non-consummated merger challenges in federal court – covering both preliminary and permanent relief – the legislation would ensure that merger defendants will be afforded a reasonable opportunity to get a full hearing on the merits, regardless of which agency reviews their merger.