Questions for the Record for Chairwoman Edith Ramirez

Hearing before the Senate Committee on the Judiciary
Subcommittee on Antitrust, Competition Policy and Consumer Rights
"S. 2102, The 'Standard Merger and Acquisition
Reviews Through Equal Rules Act of 2015'"
October 7, 2015

Questions from Senator Lee

1. If the FTC's administrative process hasn't been used to block a merger in roughly twenty years, how exactly will the special expertise of the FTC be lost if the SMARTER Act becomes law, as you suggested it would be at the hearing? How, if at all, would the SMARTER Act impair the FTC's ability to block anticompetitive mergers?

The Federal Trade Commission's administrative adjudicative function is a fundamental institutional attribute that for over a century has played a significant role in the development of antitrust law, including merger law, to the benefit of consumers. Importantly, the Commission's expertise is likely to be particularly beneficial in complex and difficult cases where economic learning and research may have developed more quickly than judicial doctrine.

The FTC has used its administrative process to challenge a number of anticompetitive consummated mergers in the past 20 years, including: ProMedica Health System's acquisition of St. Luke's Hospital (affirmed by the Sixth Circuit);[1] Polypore's acquisition of Microporous (affirmed by the Eleventh Circuit);[2] Evanston Northwestern Healthcare's acquisition of Highland Park Hospital (appeal dismissed);[3] and Chicago Bridge & Iron's acquisition of assets from Pitt-Des Moines, Inc. (affirmed by the Fifth Circuit).[4] In each of these cases, the Commission issued a detailed decision that helped develop key aspects of merger doctrine, including the standard for entry analysis, the issue of potential competition, and the appropriate way to assess market power in hospital markets. Commission decisions describing the agency's approach to merger review and advancing and refining merger analysis through the adjudicative process benefit both consumers and the business community.

Admittedly, the FTC has not recently used its administrative process to block an unconsummated merger. That is due largely to the reality that litigated challenges in unconsummated merger cases are rare overall. Like at the FTC, very few of the matters involving unconsummated transactions challenged by the Department of Justice have gone to trial. In the vast majority of cases, it is possible to negotiate a solution that allows the procompetitive benefits of a transaction to go forward while addressing competitive concerns.

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[1] *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).
[2] *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012).
[3] Opinion of the Commission, *Evanston Nw. Healthcare Corp.*, No. 9315, (F.T.C. Aug. 6, 2007), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2008/04/080428commopinionon remedy.pdf.
[4] *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008).

However, in the instances where litigation is necessary to block an unconsummated anticompetitive transaction, I believe the Commission should continue to exercise the adjudicative role that Congress very deliberately assigned the agency at its inception. The current system has worked well for over one hundred years, and all indications are that it will continue to do so. In my view, the proposed legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement.

2. Please explain the argument justifying the FTC's ability to block a merger through a preliminary injunction rather than through the merits-based standard used by the DOJ?

- **Please explain how this is an equitable process for those companies whose mergers are blocked by the FTC rather than the DOJ?**

As a threshold matter, the FTC does not block mergers with preliminary injunctions. A preliminary injunction temporarily preserves the status quo pending an administrative trial. When it seeks a preliminary injunction, the FTC is required to show a likelihood of success on the merits and that the equities favor the granting of an injunction. In evaluating the Commission's likelihood of success on the merits, the same substantive legal standards apply – Section 7 of the Clayton Act – regardless of which agency is bringing the challenge. The FTC, like DOJ, must make a strong evidentiary and legal showing that the proposed transaction would likely be anticompetitive. As the federal district court in *FTC v. Sysco* recently emphasized, the Commission must have "rigorous proof" to obtain a preliminary injunction.[5] That district courts take their role in evaluating Commission preliminary injunction requests very seriously and apply a merits-based standard is demonstrated by the rulings issued in Commission wins and losses alike.[6]

Furthermore, the fact that the FTC first seeks a preliminary injunction and then proceeds to a trial in an effort to secure permanent relief—an approach that any litigant, including the DOJ, can take—does not render its process unfair. Indeed, as detailed at greater length in the Commission's written testimony, there is no evidence that the Commission's procedures prejudice the parties before it. Notably, both agencies have comparable records when it comes to overall merger enforcement actions, including challenged mergers and mergers that result in settlements or abandoned or restructured transactions.[7]

3. In your view, would the outcome of the Sysco/US Foods case have been different if it had involved a bench trial on the merits rather than a trial awarding the FTC a preliminary injunction? Would the Court of Appeals Decision in *Whole Foods* have been different had it been a full merits proceeding?

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[5] *FTC v. Sysco Corp.*, --- F. Supp. 3d ---, 2015 WL 3958568, at *9 (D.D.C. June 23, 2015).
[6] *Id.*; *see also FTC v. Steris Corp.*, --- F. Supp. 3d ---, 2015 WL 5657294, at *23 (N.D. Ohio September 24, 2015); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069, 1095 (N.D. Ill. 2012).
[7] *See, e.g.*, FED. TRADE COMM'N & DEPT. OF JUSTICE ANTITRUST DIV., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2014 9, 12-13 (2015), *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino.s.c.18a-hart-scott-rodino-antitrust-improvements-act-1976/150813hsr_report.pdf.

Although it is difficult to speculate about counterfactual scenarios, because of the extensive records before the federal district court in *FTC v. Sysco Corp.* and before the federal court of appeals in *FTC v. Whole Foods Market, Inc.*, I believe it is unlikely that the result would have been different in either case following a permanent injunction trial.

In *Sysco*, the district court judge remarked that the proceedings were "extraordinary," with the litigants exchanging millions of documents, deposing dozens of witnesses, and securing over a hundred sworn declarations.[8] All aspects of the Clayton Act merger analysis were fully briefed by both sides, and each side had an opportunity to present substantial live testimony during the eight-day trial. The district court then issued a lengthy decision weighing the evidence on every relevant point. In the end, the court found that the FTC had met its burden of showing a "reasonable probability" that the merger of the nation's two largest broadline foodservice distributors would harm competition and that "the evidence offered by Defendants to rebut the FTC's showing of likely harm was unavailing."[9] Given this record, it seems unlikely that the judge would have reached a different conclusion had he been ruling on a motion for a permanent injunction.

Whole Foods also involved copious documents, numerous declarations and depositions, detailed expert reports, trial testimony, and thorough briefing. Accordingly, I believe the court of appeals likely would have reached a similar decision if it had been reviewing the denial of a permanent injunction rather than a preliminary injunction.

4. Why hasn't the FTC implemented the AMC recommendation to seek a permanent injunction in court?

Congress created the FTC for the very purpose of having it serve as a complement to antitrust enforcement by DOJ. In doing so, Congress granted the FTC certain unique authority, the centerpiece of which is the Commission's adjudicative function. The Commission continues to believe there is considerable value to its administrative process, as I have described above and in more detail in the Commission's written testimony. As a result, the Commission has continued to perform its enforcement role using the authority we were granted and thus chosen not to moot that function by seeking a permanent injunction in federal court when challenging an unconsummated merger.

5. When the FTC argues for a preliminary injunction has it ever argued before a court that it indeed has a different standard than the DOJ? If so, please identify the various FTC court filings in which it has done so.

Based on staff's review of relevant briefs filed in preliminary injunction cases since 2000, we have not identified any case in which the FTC argued that its standard was different from the DOJ standard for obtaining a preliminary injunction. In fact, in a brief filed this past March, the FTC highlighted how its standard is *similar* to the DOJ's. *See* Memorandum in Support of Plaintiff Federal Trade Commission's Motion for Temporary Restraining Order and Preliminary Injunction at 8, *FTC v. Sysco Corp.*, 2015 WL 3958568 (No. 1:15-cv-00256-APM) (describing

[8] *FTC v. Sysco Corp.*, 2015 WL 3958568, at *2.
[9] *FTC v. Sysco Corp.*, 2015 WL 3958568, at *61.

the FTC standard for "likelihood of success on the merits" as the same as that for DOJ in analogous circumstances).

Question from Senator Hatch

1. **How often does the Commission disagree with the staff recommendation in a merger review case? Is it a common occurrence, or is it unusual? If you can, please give me a percentage.**

In each merger matter, as well as in anticompetitive conduct cases, the Commission receives multiple recommendations from FTC staff. At a minimum, it receives separate recommendations from staffs of the Bureau of Competition ("BC") and the Bureau of Economics ("BE"), as well as from the directors of BC and BE. The Office of General Counsel may also weigh in – either with a formal memorandum or more informally. Those recommendations are typically aligned, but in a small percentage of cases, there may be differing views. Thus, when there is not a staff consensus, the majority of the Commission will agree with some staff, but disagree with other staff. It may also be the case that one or more Commissioners dissent. In that circumstance, there may or may not be agreement with some or all of the staff. Given the many different possibilities, we do not track the percentage of times the Commission or an individual Commissioner agrees or disagrees with any particular staff recommendation.