

1 S. 2102, THE STANDARD MERGER AND ACQUISITION REVIEWS
2 THROUGH EQUAL RULES ACT OF 2015

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4 WEDNESDAY, OCTOBER 7, 2015

5 United States Senate,
6 Subcommittee on Antitrust, Competition Policy, and
7 Consumer Rights,
8 Committee on the Judiciary,
9 Washington, D.C.

10 The Subcommittee met, pursuant to notice, at 10:10
11 a.m., in room SD-226, Dirksen Senate Office Building, Hon.
12 Mike Lee, Chairman of the Subcommittee, presiding.

13 Present: Senators Lee, Tillis, Hatch, Klobuchar, and
14 Blumenthal.

15 OPENING STATEMENT OF HON. MIKE LEE, A U.S. SENATOR
16 FROM THE STATE OF UTAH

17 Chairman Lee. Welcome. Senator Klobuchar, the Ranking
18 Democrat, has been held up in another meeting. She may be
19 joining us in a little while, but we are going to go ahead
20 and proceed without her in the meantime.

21 Today's hearing focuses on the Standard Merger and
22 Acquisition Reviews through Equal Rules Act, or the SMARTER
23 Act. The SMARTER Act contains a series of important reforms
24 that are designed to address existing disparities in the
25 standards applied to and processes used by the two antitrust

1 enforcement agencies--the Department of Justice and the
2 Federal Trade Commission--when they seek to prevent the
3 consummation of a proposed transaction.

4 These disparities were examined by the bipartisan
5 Antitrust Modernization Commission, which was formed
6 pursuant to the Antitrust Modernization Act and charged with
7 conducting comprehensive examination of the antitrust laws
8 and existing enforcement practices.

9 In the Commission's view, "Parties to a proposed merger
10 should receive comparable treatment and face similar burdens
11 regardless of whether the FTC or DOJ reviews their merger.
12 A divergence undermines the public's trust that the
13 antitrust agencies will review transactions efficiently and
14 fairly. More important, it creates the impression that the
15 ultimate decision as to whether a merger may proceed depends
16 in substantial part on which agency reviews the
17 transaction."

18 Accordingly, the Commission recommended and the SMARTER
19 Act implements two principal reforms. The first ensures
20 that, regardless of which agency reviews a proposed
21 transaction, the standard by which a court grants a
22 preliminary injunction is the same. The second requires the
23 Federal Trade Commission to go to court, just like the
24 Department of Justice, when it seeks an injunction of a
25 proposed transaction, rather than using its internal

1 administrative process to review the merits.

2 These reforms are necessary to ensure that the
3 antitrust laws are applied in a manner that is consistent
4 and fair to all parties. I look forward to our discussion.

5 So we will proceed now with our first witness.
6 Chairwoman Ramirez, will you please stand and be sworn? Do
7 you affirm that the testimony you are about to give before
8 the Committee will be the truth, the whole truth, and
9 nothing but the truth, so help you God?

10 Ms. Ramirez. I do.

11 Chairman Lee. Thank you.

12 Chairwoman Edith Ramirez was sworn in as Commissioner
13 of the Federal Trade Commission in April 2010 and became
14 Chairwoman of the FTC in March 2013. At the FTC Chairwoman
15 Ramirez has focused on promoting competition and innovation
16 in the technology and health care sectors, protecting
17 consumers from deceptive and unfair practices, and
18 safeguarding consumer privacy.

19 Before joining the FTC, Chairwoman Ramirez was a
20 partner in the Los Angeles office of Quinn Emanuel Urquhart
21 & Sullivan, where she litigated complex business disputes,
22 including intellectual property, antitrust, unfair
23 competition, and advertising matters. She is a graduate of
24 Harvard Law School, where she was an editor of the Harvard
25 Law Review, and also a graduate of Harvard College.

1 Chairwoman Ramirez, thank you for joining us, and we
2 look forward to your testimony.

1 STATEMENT OF THE HONORABLE EDITH RAMIREZ,
2 CHAIRWOMAN, FEDERAL TRADE COMMISSION, WASHINGTON,
3 D.C.

4 Ms. Ramirez. Thank you, Chairman Lee and members of
5 the Subcommittee, for inviting me to testify. I appreciate
6 the opportunity to discuss the Federal Trade Commission's
7 efforts to promote competition, the value of the
8 Commission's merger enforcement process, and my concerns
9 with the proposed legislation.

10 In my view, the bill is unnecessary and would remove
11 authority that the Commission has used successfully for over
12 100 years to promote competition and advance consumer
13 welfare.

14 As we all know, competition is the core of our economy.
15 Robust competition leads to lower prices, higher-quality
16 goods, and innovation. The FTC seeks to promote competition
17 through a careful and thorough fact-intensive approach to
18 law enforcement.

19 One of the Commission's most important responsibilities
20 is preventing mergers that may substantially lessen
21 competition in violation of Section 7 of the Clayton Act.

22 Although most mergers do not raise competitive
23 concerns, we seek to identify and, where necessary,
24 challenge anticompetitive transactions. Those efforts have
25 preserved competition in vital sectors of the economy,

1 including health care, technology, consumer goods and
2 services, and energy, among others.

3 Between fiscal year 2010 and 2014, the FTC challenged
4 approximately 21 mergers per year. Most of those proceeded
5 with negotiated divestitures, but in one or two cases each
6 year, the Commission filed suit in Federal court to block
7 the merger pending an administrative trial. These numbers
8 are similar to those of the Department of Justice during the
9 same time period.

10 The FTC's administrative process has played an
11 important role in challenging harmful mergers and advancing
12 consumers' interests. As Congress intended, the
13 Commission's administrative role has proven especially
14 valuable for developing antitrust law in complex cases where
15 the FTC has been able to apply its competition expertise.

16 The Commission's efforts to prevent anticompetitive
17 consolidation among health care providers is an important
18 example. After losing a number of hospital merger cases,
19 the FTC used its information gathering and research
20 capabilities to improve its approach to litigating hospital
21 cases. The Commission's 2007 administrative decision in the
22 Evanston case laid the groundwork for a string of successful
23 FTC challenges against other anticompetitive hospital
24 mergers and has likely deterred still more that similarly
25 threatened higher prices and lower-quality care.

1 The Commission has brought its expertise to bear
2 through the administrative process in other merger cases as
3 well as in non-merger matters involving significant areas of
4 antitrust law. These include pay-for-delay settlements
5 between branded and generic pharmaceutical companies and the
6 scope of the state action doctrine.

7 Importantly, FTC administrative decisions are subject
8 to judicial review, and courts have affirmed Commission
9 administrative decisions at a very high rate. This includes
10 wins in 10 out of 13 Commission administrative competition
11 decisions over the last two decades. This number rises to a
12 11 once we factor in the Commission's 2003 ruling in
13 Schering-Plough, which was reversed by the Eleventh Circuit,
14 was ultimately vindicated by the Supreme Court's 2013
15 decision in the Actavis case.

16 I believe the proposed legislation risks undermining
17 the Commission's beneficial administrative role in merger
18 enforcement. Although the FTC's process for challenging
19 mergers includes an administrative hearing, there is no
20 evidence that the Commission's procedures prejudice the
21 parties involved. In 2009, for instance, the FTC modified
22 its rules to streamline the administrative process in
23 response to concerns the process was too long. This
24 included expediting the pretrial hearing and appeal phases
25 as well as imposing tight deadlines for the Commission to

1 rule on the merits of a case. As a result, the length of
2 FTC administrative litigation is comparable to that in
3 Federal court.

4 Additionally, although the preliminary injunction
5 standard in the FTC Act is worded differently than the one
6 that applies to the Department of Justice, in my view there
7 is no practical difference between what each agency must
8 show to obtain a preliminary injunction. Both agencies must
9 make a robust evidentiary and legal showing that a
10 transaction is likely to substantially lessen competition.

11 In the Commission's two most recent PI actions--one a
12 win and another a loss--both courts made clear that they
13 were assessing the FTC's likelihood of success on the merits
14 as well as balancing the equities, just as occurs in a DOJ
15 case.

16 Furthermore, this past March, the Commission reaffirmed
17 its policy that when a Federal court denies a request for
18 preliminary injunction, it will carefully consider whether
19 to press forward with administrative litigation. Notably,
20 over the last 20 years, the Commission has not proceeded
21 administratively following a loss at the preliminary
22 injunction stage. In short, there is no evidence that the
23 FTC's administrative process prejudices parties. In my view
24 the bill's proposed modifications to the Commission's
25 adjudicative authority are unnecessary and unwarranted.

1 Indeed, by eliminating the ability of the FTC to use
2 its administrative process in certain merger cases, the
3 proposed legislation would alter a fundamental feature of
4 the FTC's institutional design, one that Congress very
5 deliberately granted the agency more than 100 years ago.
6 Such a change risks eroding the FTC's effectiveness in
7 ensuring a competitive marketplace to the detriment of
8 consumers. For these reasons, I have serious concerns about
9 the bill.

10 Thank you, and I am happy to respond to any questions
11 you may have.

12 [The prepared statement of Ms. Ramirez follows:]

1 Chairman Lee. Thank you very much, Chairwoman Ramirez.

2 The Department of Justice's approach to blocking a
3 merger is pretty straightforward. The Department of Justice
4 seeks a preliminary injunction in Federal district court,
5 and it then agrees with the parties to the transaction to
6 combine these proceedings with respect to both the
7 preliminary injunction and a permanent injunction.

8 The parties then litigate before a Federal district
9 judge, the same Federal district judge, both the merits of
10 the case and the preliminary injunction. So this is one
11 proceeding in front of one judge.

12 But, by contrast, the FTC's practice is to seek only a
13 preliminary injunction in Federal court, and if the FTC
14 first prevails in Federal court on its motion for a
15 preliminary injunction, any trial on whether the transaction
16 would be unwound would occur not in front of the same
17 district judge that handled the PI, but in an entirely
18 separate proceeding and at a later date.

19 And so, accordingly, the parties that end up before the
20 FTC are, in effect, forced to litigate twice--the
21 preliminary injunction in Federal court and then the merits
22 in the FTC's administrative process.

23 Now, all this occurs simply because of the fact that
24 the agency that is reviewing the transaction is the FTC
25 rather than the Department of Justice.

1 So help me understand, Chairwoman Ramirez, is there a
2 good reason for subjecting certain parties or certain
3 industries to one process and other parties to another more
4 onerous process? In other words, is there anything unique
5 about the jurisdiction of the FTC and the types of
6 industries or companies that are subject to the FTC's
7 jurisdiction that makes your process uniquely suited to
8 those types of transactions?

9 Ms. Ramirez. This was a decision that Congress made
10 when it created the Federal Trade Commission back in 1914.
11 It very deliberately authorized the FTC to have an
12 administrative process. It wanted to have an expert
13 bipartisan body that would have the ability to exercise its
14 competition expertise in this arena. So that was a very
15 deliberate decision made by Congress.

16 Let me also say that, first of all, I want to explain
17 that certain--when the Department of Justice elects to
18 combine its preliminary injunction phase along with the
19 ultimate merits of the case, that is a decision that is
20 made--an election that is made by the Department of Justice
21 and the parties. In litigation, typically one goes through
22 a preliminary injunction phase and then proceeds to
23 ultimately litigate on the merits. So that is just a choice
24 that is made during the course of litigation by DOJ and the
25 parties again.

1 I believe that the process at the FTC, while certainly
2 different and including an administrative process, is both
3 fair, I think that it works quite well, I think it works to
4 the advantage of consumers. And my concern with eliminating
5 this authority is that it risks undermining the
6 effectiveness of the FTC, which has played a very important
7 and beneficial role in preserving competition.

8 Chairman Lee. But you have got the authority to do
9 that. I mean, the FTC seeks permanent injunctions in many
10 other contexts, including some consummated mergers. So it
11 does not lack the authority to do so. It does not lack the
12 authority to seek a permanent injunction. So why doesn't
13 the FTC simply consolidate the PI with the permanent
14 injunction proceedings in the same manner that DOJ does?

15 Ms. Ramirez. Again, this is part of the Federal Trade
16 Commission's DNA. We were designed to have this
17 administrative function, and that is an authority that I
18 think the agency ought to use. And it uses it I think quite
19 ably as evidenced by the track record that we have.

20 I believe that the procedures, again, while different,
21 they are comparable, but they are fair. I do not believe
22 that the processes, the differing processes result in any
23 different outcome for parties. They are different, but in
24 my mind, they are both fair, they work well, and I think
25 altering that authority risks eroding a very important

1 component of why it was that the FTC was created by
2 Congress.

3 Chairman Lee. Sure. And I understand that. I
4 understand this has been in place for over a century and
5 that Congress made a choice when it gave the FTC this
6 authority. But, of course, it is our job as a Congress to
7 review these things from time to time and to figure out
8 whether it still makes sense. I am not sure that there--I
9 am not aware of any indication that Congress at the time was
10 contemplating this particular dynamic, this particular
11 disparity that we have now seen develop in this area of the
12 law. And we will follow up more on that in a minute, but my
13 time has expired.

14 We will go now to Senator Klobuchar.

15 Senator Klobuchar. Well, thank you very much, Mr.
16 Chairman. I apologize for being late. I had a steering
17 committee meeting, and it went over a little bit. And I
18 know we like to start these things on time. I welcome the
19 Chairwoman. Chairwoman Ramirez, thank you so much for being
20 here, and congratulations. She won a consumer award last
21 night. I happened to be there, so congratulations for that.

22 Just to summarize, I think two of the arguments, while
23 this is modest legislation, I think proposed for good
24 reasons, from one side, in terms of the costs of doing this
25 just to summarize because it is a complex subject, I think

1 the first would be that just losing the benefits of the FTC
2 applying its expertise in administrative litigation, in rare
3 cases a court may deny a preliminary injunction because
4 economic learning and research may develop faster than the
5 legal doctrine. I suppose the argument would be that the
6 FTC would eliminate--would not be allowed to pursue this
7 possibility of administrative litigation or using its
8 expertise; the second argument being sort of the risk of
9 unintended consequences, that by passing this change, would
10 we raise the standard for obtaining a preliminary injunction
11 for both agencies, or despite that stated attempt, the
12 courts apply the SMARTER Act provisions to unconsummated
13 mergers or other conduct. Would that be fair to summarize
14 the issues that you raise?

15 Ms. Ramirez. That is a fair summary, yes. Thank you.

16 Senator Klobuchar. Okay. So just a question about
17 whether eliminating this ability to use administrative
18 litigation in challenging these unconsummated mergers. So
19 the argument would be that it would undermine the antitrust
20 enforcement and, thus, harm consumers. Is that right?

21 Ms. Ramirez. Yes.

22 Senator Klobuchar. Okay. And some have said that the
23 SMARTER Act represents modest changes to merger enforcement,
24 sort of codifying some of the current project. And so help
25 me understand why the agency believes the SMARTER Act would

1 undermine the ability to promote competition and protect
2 consumers.

3 Ms. Ramirez. Let me back up a bit and also just say
4 that--highlight, as I think is evidenced by both my oral
5 testimony here this morning as well as the written testimony
6 that we submitted, is that this is authority that we use in
7 limited circumstances.

8 Senator Klobuchar. Right.

9 Ms. Ramirez. So, in my view, the process does work
10 well when it is used, but it risks, again, eroding our
11 ability to use authority that Congress gave us and that I
12 believe we have used quite ably over the course of our
13 history, including--

14 Senator Klobuchar. And you have a right to be proud of
15 that work, so thank you.

16 Ms. Ramirez. So in addition to that, I also do not
17 believe that there is any evidence that parties are
18 prejudiced by the fact that our process includes an
19 administrative component to it. If you look at the data, I
20 believe that it suggests--and you look at how many cases are
21 litigated as compared to the Department of Justice, if you
22 look at how many cases are settled or abandoned when before
23 the FTC as compared to the Department of Justice, I think
24 you see that the numbers are quite comparable. In my mind,
25 that suggests that the FTC exercises no greater leverage

1 over parties. Otherwise, I think you would see a disparity
2 in those numbers. So, in my mind, there is no evidence that
3 this type of a change is necessary or warranted.

4 I also am concerned about unintended consequences.
5 Whenever you have a change, a major institutional change of
6 this nature, I believe that you risk creating uncertainty.
7 And we can anticipate what some of those questions might be,
8 but then, in addition, there are also ones that sitting here
9 today I probably will not be able to anticipate, but that
10 will play out when parties inevitably end up litigating over
11 what these changes signify.

12 Senator Klobuchar. Do you think there could be a
13 situation in the future where the case law has not kept up
14 with economic thinking or is too restrictive and the FTC
15 actually brings a preliminary injunction to protect
16 consumers from a transaction?

17 Ms. Ramirez. I do. I think that we as an agency have
18 used our decisions to develop important areas of law. I
19 think the reverse payment patent settlement cases are
20 certainly one where, back in 2003, the Commission issued a
21 decision that ultimately was vindicated by the Supreme Court
22 in 2013. So I do believe that the development of antitrust
23 doctrine is a very important aspect of what the Commission
24 does.

25 Senator Klobuchar. Very good. Well, thank you very

1 much. And I also wanted--Mr. Chairman, with your
2 permission, Senator Leahy, our Ranking Member on the
3 Judiciary Committee, asked that we put on the record that he
4 was unable to attend today because of another commitment,
5 but he has a statement for the record, Mr. Chairman.

6 Chairman Lee. Thank you very much, Senator Klobuchar.

7 We have now been joined by Senator Hatch, who I want to
8 thank for his cosponsorship of the SMARTER Act, and we now
9 recognize you, Senator Hatch.

10 Senator Hatch. Well, thank you, Senator Lee. We
11 appreciate you and your leadership on this matter.

12 Let me just ask this question to you, Chairwoman
13 Ramirez. I would like to read you a quote from the
14 Antitrust Modernization Commission report:

15 "Parties to a proposed merger should receive comparable
16 treatment and face similar burdens regardless of whether the
17 FTC or the DOJ reviews their merger. A divergence
18 undermines the public's trust that the antitrust agencies
19 will review transactions efficiently and fairly. More
20 important, it creates the impression that the ultimate
21 decision as to whether a merger may proceed depends in
22 substantial part on which agency reviews the transaction."

23 If you would, tell me why you think the Antitrust
24 Modernization Commission--this is a bipartisan Commission
25 composed of experts who have spent years investigating ways

1 to improve our Nation's antitrust laws--was wrong.

2 Ms. Ramirez. Senator, I want to just emphasize that
3 the authority that we use when we exercise our authority to
4 go into court, challenge a transaction, and then proceed
5 administratively is authority that is used in very limited
6 circumstances. Most of the transactions that we review are
7 procompetitive and do not raise anticompetitive concerns.
8 And so we really are talking about a very small number of
9 transactions that ultimately are litigated.

10 As to those, I believe that, notwithstanding the
11 differences in procedure, parties do receive fair treatment
12 and that our merger enforcement process works well. I do
13 not believe that parties are prejudiced. I do not believe
14 that they face a substantially greater burden. I do not
15 believe that there is a difference in outcome depending on
16 which agency a party is before. So, in my mind, the
17 proposed legislation is neither necessary, it is not
18 warranted.

19 In addition, I feel that making such a change to the
20 contrary would risk hurting consumers, right undermining the
21 ability of the Federal Trade Commission to preserve
22 competition in implement areas, like health care, which has
23 been a top priority for the agency over decades, among other
24 sectors of the economy. And I believe also that the
25 proposed measure, whenever you have this type of reform and

1 change, I believe that it risks a number of unintended
2 consequences and creates, frankly, more uncertainty.

3 As a litigator of 20 years and currently a law
4 enforcer, I can tell you that I do not believe it is going
5 to be a wise use of taxpayer money and limited FTC resources
6 to be litigating over the precise contours of the proposed
7 reforms.

8 Senator Hatch. Well, you point in your testimony to a
9 number of instances in which you say that Part 3 proceedings
10 in merger cases yielded positive results for consumers.
11 Now, it is one thing to say look at Part 3, it has produced
12 all these great results. But it is another thing to say
13 that Part 3 was necessary to achieve those results. Can you
14 give me examples of instances in which Part 3 proceedings in
15 merger cases yielded benefits to consumers that could not
16 have been achieved throughout standard Section 7 district
17 court litigation?

18 Ms. Ramirez. Senator, the authority that was given to
19 the FTC was a very deliberate authority that was given by
20 Congress. Congress elected in 1914, when it created the
21 agency, to augment the then-existing antitrust authority
22 that the Department of Justice had. I think that was a very
23 deliberate decision. I think it has played out well.

24 Admittedly, it is authority that we have used in the
25 unconsummated merger context rarely. That to me also

1 suggests yet another reason why I believe this particular
2 set of changes are unnecessary. But I think if you look at
3 a number of merger cases, including the Evanston case, the
4 Polypore case, the ProMedica case, we have addressed complex
5 issues of antitrust law, and we have been affirmed by the
6 appellate courts. And I think these have been important
7 developments that have benefited consumers over the long
8 term.

9 Senator Hatch. Okay. If the Commission cannot
10 convince a court that blocking a merger is in the public
11 interest, why does it make sense to allow the Commission to
12 continue trying to stop a merger through its own internal
13 administrative processes? And if an independent adjudicator
14 rejects the Commission's arguments, why should the
15 Commission be able to continue prosecuting a case internally
16 as both judge and jury?

17 Ms. Ramirez. So let me untangle your question,
18 Senator, if I may.

19 Senator Hatch. Sure.

20 Ms. Ramirez. I want to make clear that the FTC can go
21 into court to seek a preliminary injunction. Now, if the
22 FTC loses that request for preliminary injunction, at that
23 point in time the Commission--we have a policy where we will
24 examine whether it would be appropriate for us to continue
25 in our administrative process. It has been a very long time

1 since the Commission has elected to do that, and I assure
2 you that in instances when that happens, the Commission will
3 examine whether it is appropriate. It may not be
4 appropriate, and at that point the matter would then be
5 dismissed from the Part 3 process. So that is something
6 that just does not happen as a matter of course. It is a
7 very serious issue. And the court will examine it and look
8 at it very, very carefully.

9 Senator Hatch. Well, thank you.

10 Thank you, Mr. Chairman. My time is up.

11 Chairman Lee. Thank you, Senator Hatch.

12 I want to note for the record that we will include
13 Senator Leahy's statement for the record, without objection.

14 [The prepared statement of Senator Leahy follows:]

15 / COMMITTEE INSERT

1 Chairman Lee. Senator Blumenthal.

2 Senator Blumenthal. Thanks, Mr. Chairman. And thank
3 you for being here, Chairwoman Ramirez, and for your
4 extraordinary and distinguished service as a litigator and
5 now as the Chairperson of the FTC.

6 I think in my humble opinion, with the greatest respect
7 to the proponents of this legislation, the best thing about
8 this proposal is its title, and I admire the creativity and
9 ingenuity of its proponents because it seems to me that it
10 is truly a solution in search of a problem. There is no
11 real problem here. And I want to just follow up on the
12 point that you were just making because the Chairman of the
13 Subcommittee has raised the specter of two separate trials
14 or fact proceedings before two different judges imposing an
15 inordinate burden on the parties. How often does that
16 happen?

17 Ms. Ramirez. It happens very rarely. The last time
18 that it happened, it has been more than two decades since
19 that has happened.

20 Senator Blumenthal. Two decades ago.

21 Ms. Ramirez. Yes.

22 Senator Blumenthal. So there has been no instance in
23 the last two decades where, in fact, two different district
24 court judges held factual hearings requiring the parties to
25 come forward and present their cases.

1 Ms. Ramirez. It has been more than two decades since
2 the Commission has lost a preliminary injunction and then
3 proceeded administratively, correct.

4 Senator Blumenthal. Because of the policy that you
5 just mentioned, if you lose a preliminary injunction
6 proceeding, it is a pretty good indication as to what the
7 merits of the case are.

8 Ms. Ramirez. That is right.

9 Senator Blumenthal. And let me ask you, in your
10 experience--and you are a pretty experienced antitrust
11 litigator--does this difference in procedure involved in
12 Department of Justice versus FTC actions result in different
13 outcomes?

14 Ms. Ramirez. In my view, it does not.

15 Senator Blumenthal. And that is because both agencies
16 apply the same law. Is that correct?

17 Ms. Ramirez. Absolutely.

18 Senator Blumenthal. And do the different procedures
19 result in different costs or burdens on the parties?

20 Ms. Ramirez. The FTC procedure may be a longer
21 procedure because typically it is a two-step process whereby
22 we would first go into Federal court and then proceed
23 administratively. But I will note that parties could
24 stipulate to a PI and then proceed immediately to a Part 3
25 process. And given reforms that we undertook in 2009 to

1 streamline our administrative process, I believe the time
2 frame would be comparable to that in Federal court.

3 Senator Blumenthal. But if a merger fails to withstand
4 the scrutiny of a preliminary injunction proceeding, it may
5 also be an indication to the parties that they need to
6 reconsider a merger. Correct?

7 Ms. Ramirez. Yes.

8 Senator Blumenthal. And so is it not a fact that a lot
9 of mergers are abandoned after an unsuccessful defense in a
10 preliminary injunction proceeding?

11 Ms. Ramirez. Yes, that is so.

12 Senator Blumenthal. So in the long run, actually it
13 may save the parties some money and a lot of travail and
14 inconvenience and, in fact, internal costs to know right
15 away as a result of a preliminary injunction proceeding that
16 they are not going to succeed.

17 Ms. Ramirez. It could very well.

18 Senator Blumenthal. Let me just say I regard this
19 legislation simply as an attempt to tinker with the current
20 procedure without there being a real demonstrated need for
21 it. In fact, it could have the effect of preventing or
22 undermining effective antitrust scrutiny, which I think is
23 all the more important today than ever before. The trend
24 toward consolidation in various industries--airline,
25 telecom, pharmaceutical, health care--in my view is bad for

1 consumers, and I would ask, with the Chairman's permission
2 to enter into the record a very cogent article written on
3 July 8th by Greg Ip in the Wall Street Journal entitled,
4 "Why Corporate America Could Use More Competition."

5 Chairman Lee. Without objection.

6 [The article follows:]

7 / SUBCOMMITTEE INSERT

1 Senator Blumenthal. And as well, a letter written by
2 the Consumers Union on the subject of this legislation,
3 which states very well the reasons that we ought to approach
4 with a lot of skepticism this kind of legislation. It is
5 October 6, 2015, written by the Consumer Union to the
6 Chairman and Ranking Member of this Subcommittee.

7 Chairman Lee. Thank you, Senator Blumenthal. That
8 will be received into the record.

9 [The letter follows:]

10 / SUBCOMMITTEE INSERT

1 Chairman Lee. Senator Tillis.

2 Senator Tillis. Thank you, Mr. Chair. Thank you for
3 being here, Ms. Ramirez.

4 I think I am the only non-attorney on the panel today,
5 so I am not going to ask you a lot of legal questions. I am
6 going to ask you a few practical questions.

7 How on Earth could we assume that the present policy is
8 really a time saver or money saver for businesses that are
9 going through this? I mean, it just defies logic,
10 particularly, let us say that you are not successful with
11 getting the injunction, the merger moves on, and then the
12 administrative processes continue. Why would anybody think
13 that when you consider the merger is moving on, you are
14 going through the administrative process, how on Earth could
15 this in any way be a positive thing for the business moving
16 forward with a merger? I mean, why can't--and let me ask
17 you another question as we are going along with that. That
18 is probably rhetorical. It just does not make sense. But,
19 again, I am viewing it from a business perspective.

20 The Antitrust Commission report seemed to suggest that
21 some of the changes that are proposed by the SMARTER Act may
22 have merit. And, by the way, I am sure this is the first
23 time in Congress that we have ever used a title like
24 "smarter" to represent maybe an underlying bill that people
25 would be opposed to. But can you give me some assessment--I

1 assume you have read the Commission report and why you would
2 disagree with the Commission's report on certain things that
3 seem to link two provisions of the SMARTER Act?

4 Ms. Ramirez. Let me address your first question, and I
5 want to clarify that I am not taking the position that the
6 two-step process that is typically used by the Federal Trade
7 Commission is a time saver. What I am saying is that I do
8 not believe that our process prejudices parties, I do not
9 believe that it enhances the leverage that the FTC exercises
10 over parties in connection with merger challenges. I am
11 saying also saying that the process does not have an impact
12 on outcomes, and that it is ultimately comparable to what
13 transpires when the Department of Justice is looking at
14 transactions.

15 And then with regard to your second question, I will
16 just make two points. One is just the overarching process
17 that I believe is a fair one and an appropriate one. And,
18 again, I will emphasize that this was--

19 Senator Tillis. That does not really get to my
20 question, though. I know that you have consistently
21 responded with your belief that the current process is fair
22 and open. What I am getting to specifically are some of the
23 recommendations of the Commission report and why, rather
24 than defending your position by saying you think it is fair
25 and open, discuss why the proposed changes, some of which

1 map to some of the SMARTER provisions do not make sense. In
2 other words, let us get into a specific reason why the
3 proposed changes represent a problem. And to go back to
4 your line of responses, explain to me why the changes would
5 make it an unfair and inconsistent process.

6 Ms. Ramirez. The key concern expressed by the
7 Commission was an issue about the preliminary injunction
8 standard that is used by the Federal Trade Commission in
9 contrast to the Department of Justice. I have to say that
10 if one looks at how the courts have applied those standards,
11 the standards are, in fact, stated differently. But the way
12 that the courts have applied them, they apply them in the
13 same way. Both the Federal Trade Commission and the
14 Department of Justice have to make a rigorous evidentiary
15 and legal showing that the proposed transaction is likely to
16 substantially lessen competition, and it is only when that
17 showing has been made will a court grant a preliminary
18 injunction.

19 So that central concern of the Commission is one that I
20 believe when one actually examines what transpires in the
21 courts, I do not believe that that is justified.

22 Senator Tillis. Mr. Chair, I was running late to this
23 Committee because I was in a Senate Armed Services Committee
24 hearing. I repeatedly say in Senate Armed Services that I
25 never want our men and women in uniform to go into a fair

1 fight. In other words, I always want them to be better
2 equipped and better trained. In this particular case, it
3 seems to me that the devices that we have, that the
4 Government has available to it now almost make it certain
5 that businesses go under this with an unfair fight and an
6 unfair advantage. And for that reason, I support the
7 SMARTER Act, and I look forward to seeing it move through
8 the Committee.

9 Thank you, Mr. Chair.

10 Chairman Lee. Thank you, Senator Tillis.

11 Most merger cases tend to settle after the grant of a
12 preliminary injunction. Doesn't this counsel in favor of
13 having a bench trial on the merits at the same time?
14 Wouldn't that suggest that we ought to have that? In other
15 words, if the answer is no because the parties sometimes
16 prevail in later litigation on the merits, isn't this an
17 even stronger reason to ensure that the preliminary
18 injunction and merits are litigated at the same time? So
19 some of the same arguments you are using--one of the
20 arguments you are using here is that, you know, you have not
21 used this authority in 20 years, it rarely arises, and so
22 why worry about it. Well, I do worry about it because of
23 the fact that if in practical effect most of the time you
24 have one bite at the apple anyway, and in your case, in the
25 case of something that under the jurisdiction of the FTC, if

1 the bite at the apple tends to be at the preliminary
2 injunction phase, then why not have the more fulsome type of
3 review that you have when you have a whole review on the
4 merits? Why not have that all at once?

5 I am sympathetic to the view in this and in every other
6 area of the law that we do not want to adopt things that are
7 solutions in search of problems. But I think the same
8 criticism can be made of the existing provision of law. If
9 the existing provision of law is itself a solution in search
10 of a problem, then why not make the two standards the same?
11 Why not put people through the same process?

12 Ms. Ramirez. Mr. Chairman, I would argue that the
13 parties can under our current system--what they can do is
14 that they can stipulate to a preliminary injunction, which
15 is something that we seek in order for us to enable to
16 obtain meaningful relief at the conclusion of a merits
17 trial. So the parties could very easily stipulate to not
18 consummate the particular merger or to robust--to hold
19 separate, and then proceed to a merits trial, and there you
20 would then be before the Commission, and you would go
21 through the merits trial before a Commission and then
22 obviate a step before a Federal court.

23 So that is a process, if parties so choose, that is
24 available to them. So I would argue that that is another
25 route that one can take, and one need not alter the existing

1 system in order to allow for that, to address the concerns
2 that you have expressed.

3 Chairman Lee. And yet that does not happen in this
4 context, at least not with the same regularity that it
5 happens--

6 Ms. Ramirez. Well, parties actually--no, that--

7 Chairman Lee. --when a matter is before the DOJ.

8 Ms. Ramirez. Apologies for interrupting you, but it
9 actually does occur on occasion.

10 Chairman Lee. With the same regularity--

11 Ms. Ramirez. On occasion. These are--we are speaking
12 about already a very small number of matters. The Ardagh
13 case, that was a situation where there was a stipulation,
14 and then it proceeded to merits, merits trial. Ultimately
15 that was resolved via settlement. But, again, we are
16 speaking just as an initial matter about a very small
17 universe of cases, and so the numbers are not large.

18 Chairman Lee. Now, I want to make sure I understand
19 your position correctly. Do you believe there is no
20 difference between the preliminary injunction standard
21 prescribed for the FTC under Section 13(b) of the FTC Act
22 and the one that applies to the DOJ?

23 Ms. Ramirez. There is no question that the standards
24 are worded differently. There is different language that is
25 used under the authority that we exercise. But in my--

1 Chairman Lee. But, in effect, though--

2 Ms. Ramirez. But in my view, in effect, you know,
3 courts--I believe district courts take their role very
4 seriously. They absolutely understand the importance of
5 this preliminary injunction phase. I think we see that
6 evidenced by the two most recent matters in which we have
7 sought a preliminary injunction: the Sysco matter, in which
8 we prevailed and did get a grant of an injunction. The
9 court wrote this incredibly detailed 140-page opinion. It
10 was thorough, careful. Courts undertake this role very
11 seriously, and I believe that they end up applying the same
12 standard that ends up applying when the Department of
13 Justice seeks the preliminary injunction.

14 Chairman Lee. So if they are, in effect, the same, if
15 they have the same practical effect, why not have them also
16 be the same?

17 Ms. Ramirez. So, ultimately, in the abstract, I have
18 no issue with harmonizing the preliminary injunction
19 standards. My fear and my concern, again, and I say this
20 with 20 years of litigation experience and in my experience
21 of several years as a law enforcer with the Commission, my
22 fear is that a change in the standard--given that right now
23 it is the same standard as the Department of Justice, my
24 fear is that courts would then not understand the purpose of
25 the change and perhaps end up imposing either a higher

1 standard or simply would create uncertainty as to what
2 exactly the new standard ought to be. So I think that
3 creates uncertainty, but in theory, harmonization of the
4 standards I do not see as a problem. I believe they are
5 already de facto similar standards effectively.

6 Chairman Lee. Okay. I think I understand your
7 position there. I struggle with it just the same because if
8 I am understanding you correctly, you are saying we have got
9 two different standards, but they are interpreted the same
10 way by courts. If we make the standards as they are written
11 into the law literally the same, then the courts might make
12 them different. I do struggle with that.

13 Ms. Ramirez. Senator, my point is simply that I do not
14 believe there is a need to make a change here. My worry is
15 that with any change, attorneys who zealously advocate for
16 their clients and parties who, you know, look for any
17 argument that they want to make, I just fear needless
18 litigation over issues about what the standard might mean if
19 there is a change, given that in my mind it is being applied
20 appropriately today. So why make a change?

21 Furthermore, I also, of course--you know, this
22 particular bill goes far beyond that and then addresses,
23 again, the adjudicative authority that we have. And so my
24 concerns extend beyond simply harmonization of the PI
25 standard.

1 Chairman Lee. What would you say responding to my
2 concern that the courts, as a matter of--canons of statutory
3 construction tell judges that they are not supposed to
4 assume that differences in legislative language are
5 irrelevant. They are not supposed to just lightly ignore
6 surplus or minor differences. I mean, I think I could--if
7 what you are worried about is consistency in the application
8 of the law, I could make a corresponding argument to yours
9 that would say the greater risk is that at some point courts
10 are going to realize, hey, these are not the same standard,
11 there must be a difference, and that could change that way.

12 We, of course, do not have control over what the courts
13 do, but we do have control over what the law says. And if
14 what you are telling me is that the law ought to provide for
15 the same substantive standard, the same standard in effect,
16 I do struggle with the idea that we should not change the
17 law to make sure that the law actually says the same thing
18 in these two areas.

19 Do you want to respond to that?

20 Ms. Ramirez. Senator, let me just take issue with the
21 way that you have constructed your comment. The courts are
22 not comparing the FTC standard as compared to the Department
23 of Justice standard. And let me also just state that the
24 standard that is applied, of course, with the Department of
25 Justice is just the traditional preliminary injunction

1 standard that is in the common law, that is articulated by
2 courts. But they are not comparing the language that is in
3 the FTC Act as compared to that traditional standard. So I
4 think there is a--your point about statutory construction I
5 do not believe is apposite to the way courts approach this
6 issue.

7 If you look, again, I would urge the members of the
8 Committee to look closely at the way that the courts in the
9 Sysco matter, the decision in June, and also the recent
10 decision in the Steris case, see how those courts apply the
11 standard and compare that to the way courts have applied the
12 standard in Department of Justice cases, you will see that
13 there is still--there is that same requirement that the FTC
14 establish a likelihood of success on the merits. And,
15 again, in my mind, the way the standards are articulated end
16 up no differently, and outcomes in my mind are also not
17 determinative, depending on who it is that you are in front
18 of.

19 Chairman Lee. So harm could come from additional
20 efforts at statutory clarity.

21 Ms. Ramirez. I am sorry?

22 Chairman Lee. If we attempt to clarify the standard,
23 harm could come from that. That is your concern.

24 Ms. Ramirez. That is a worry. But more fundamentally,
25 my concerns go beyond the issue of harmonization of the PI

1 standard. My major concern about this proposed legislation
2 is about the--is with regard to the effort to eliminate the
3 administrative process. That is the fundamental concern.

4 Chairman Lee. Got it. Thank you.

5 Senator Klobuchar?

6 Senator Klobuchar. Thank you very much. I just had
7 one side question about pharmaceuticals. As you know,
8 Turing Pharmaceuticals announced a 5,000-percent price
9 increase on Daraprim, a drug used to prevent malaria and
10 treat toxoplasmosis. Yesterday, I sent a letter to the FTC
11 asking you to investigate whether Turing was restricting
12 supply, and we are well aware of the price increase, but
13 this is about whether or not they are restricting supply to
14 prevent generics from getting on the market and to delay
15 generic competition.

16 On Monday, the New York Times also covered price
17 increases by Valeant Pharmaceuticals. What role do you see
18 antitrust laws in general, without maybe commenting on the
19 specific situation as you look into it, what role does the
20 FTC and antitrust laws have to play in this clearly emerging
21 problematic area?

22 Ms. Ramirez. Senator, as I think you are well aware,
23 this is a top priority for us to monitor the pharmaceutical
24 industry. It is an area that we have been active in for
25 decades. We share the concern when we see significant price

1 hikes. We will be looking--we look closely when we do see
2 price hikes. As a general matter, price hikes alone may not
3 necessarily mean that there is anticompetitive conduct. But
4 if there is, we certainly will be taking appropriate action
5 should we find there has been a violation of the antitrust
6 laws.

7 Senator Klobuchar. Do you think we are going to need a
8 different legislative solution rather than antitrust laws if
9 this kind of behavior is allowed and these patients are just
10 at the mercy of people increasing prices if, in fact, there
11 is not per se an antitrust violation?

12 Ms. Ramirez. Well, I think that is an issue that
13 certainly your Committee and other Members of Congress
14 should examine. In the meantime, we are certainly going to
15 do our job and ensure that the antitrust laws are
16 appropriately enforced and that we do what we can to protect
17 consumers.

18 Senator Klobuchar. Okay. Thank you very much.

19 Chairman Lee. Thank you very much, Chairwoman Ramirez.
20 We will give our next panel a few minutes to get situated,
21 and then we will resume.

22 Ms. Ramirez. Thank you.

23 Chairman Lee. Thank you very much.

24 [Pause.]

1 Chairman Lee. Okay. Can I get this panel of witnesses
2 to now stand and be sworn? Do you affirm that the testimony
3 you are about to give before the Committee will be the
4 truth, the whole truth, and nothing but the truth, so help
5 you God?

6 Ms. Garza. I do.

7 Mr. Clanton. I do.

8 Mr. Lipsky. I do.

9 Mr. Jacobson. I do.

10 Chairman Lee. Thank you. Okay. I will introduce all
11 of the witnesses together, and then we will come back to you
12 for your opening statements.

13 Ms. Deborah Garza is the co-chair of Covington &
14 Burling's Antitrust and Competition Law Practice Group.
15 With more than 30 years of experience in both the private
16 and public sectors, Ms. Garza has been involved in some of
17 the largest antitrust matters in the last 30 years,
18 including the merger of Exxon and Mobil, the U.S.
19 Government's suit against Microsoft, the USFL suit against
20 the NFL, and many other litigation and regulatory matters on
21 behalf of Fortune 500 companies. Before joining Covington,
22 Ms. Garza served as Acting Assistant Attorney General in
23 charge of the Antitrust Division at the Department of
24 Justice. She was also appointed by President George W. Bush
25 to chair the Antitrust Modernization Commission, the

1 bipartisan blue ribbon panel created by Congress to study
2 and report to the President and Congress on the state of
3 antitrust enforcement in the United States. Ms. Garza
4 received her bachelor's degree from Northern Illinois
5 University and her J.D. from the University of Chicago--
6 which happens to be Senator Klobuchar's alma mater.

7 Mr. David Clanton is senior counsel at Baker &
8 McKenzie, where he also serves as head of the firm's Global
9 and North American Antitrust Practice Groups. Mr. Clanton
10 has over 30 years of experience representing clients in
11 high-profile and complex antitrust matters. Prior to
12 joining Baker & McKenzie, Mr. Clanton served as a
13 Commissioner and as Acting Chairman of the Federal Trade
14 Commission. Mr. Clanton received his bachelor's degree from
15 Andrews University and his J.D. from Wayne Law School, where
16 he served on the Law Review.

17 Mr. Tad Lipsky is a partner in the Washington, D.C.,
18 office of Latham & Watkins. He is recognized
19 internationally for his work on both U.S. and global
20 antitrust law and policy and has handled antitrust matters
21 throughout the world. Before Latham & Watkins, Mr. Lipsky
22 served as chief antitrust lawyer for The Coca-Cola Company
23 for 10 years. Mr. Lipsky also served as Deputy Assistant
24 Attorney General under William F. Baxter. Mr. Lipsky
25 received his B.A. from Amherst College, his M.A. from

1 Stanford, and his J.D. from Stanford.

2 Mr. Jonathan Jacobson is a partner in the New York
3 office of Wilson Sonsini Goodrich & Rosati. He has
4 significant merger experience, including trials in cases
5 brought by the Justice Department and Federal Trade
6 Commission, as well as numerous fully cleared transactions
7 and consent decrees. He currently serves as Vice Chair of
8 the ABA's Section of Antitrust Law, having previously served
9 as an officer, councilmember, and in several other Antitrust
10 Section positions, including editorial chair of antitrust
11 law developments. Prior to joining Wilson Sonsini, Jonathan
12 was a partner at Akin Gump Strauss Hauer & Feld's New York
13 office, where he co-chaired the firm's National Antitrust
14 Practice. He served as a Commissioner on the Antitrust
15 Modernization Commercial.

16 All the witnesses' written statements will be entered
17 into the record in their entirety. I ask that each witness
18 summarize her or his testimony in 5 minutes or less. Thank
19 you for being here.

20 Ms. Garza, the floor is yours.

1 STATEMENT OF DEBORAH GARZA, FORMER CHAIR,
2 ANTITRUST MODERNIZATION COMMISSION, AND PARTNER,
3 COVINGTON & BURLING LLP, WASHINGTON, D.C.

4 Ms. Garza. Chairman Lee, Ranking Member Klobuchar and
5 fellow Chicago alum, and staff and members of the
6 Subcommittee, thank you for the opportunity to appear before
7 you today in support of the proposed SMARTER Act. I would
8 like to join my voice to those of the folks who commented in
9 the prior panel about how great the title is. I also think
10 it is a great title.

11 As you mentioned, from May 2003 through May 2007, I
12 served as Chair of the bipartisan Antitrust Modernization
13 Commission, which was created by Congress to review and
14 report on the state of U.S. antitrust law enforcement. The
15 AMC Report included three recommendations that are relevant
16 to this hearing.

17 The first was that when the FTC seeks injunctive relief
18 in HSR Act merger cases in Federal court, it should seek
19 both preliminary relief and permanent injunctive relief, and
20 it should seek to consolidate those proceedings so long as
21 it is able to do so by reaching an agreement with an
22 appropriate scheduling order with the parties.

23 Two, Congress should amend Section 13(b) of the FTC Act
24 to prohibit the FTC from pursuing administrative litigation
25 in HSR merger cases.

1 And, three, Congress should ensure that the same
2 standard for granting a preliminary injunction in a merger
3 case should apply to both the FTC and the DOJ.

4 The SMARTER Act essentially adopts those
5 recommendations, and it is a great honor and pleasure to be
6 here today to testify in support of the Act. Although it
7 has been 8 years since the AMC made its recommendation, I
8 have never lost faith that the good-government vision of
9 those recommendations would someday prevail. I will note
10 that there are a lot more recommendations in the report,
11 should you ever want to consider any of those as well.

12 The premise of the SMARTER Act is simple: A merger
13 should not be treated differently depending on which
14 antitrust enforcement agency--the DOJ or the FTC--happens to
15 review it. Regulatory outcomes should not be determined by
16 a flip of the merger agency coin.

17 I know there is a question that a number of the
18 Senators have about how exactly the differences could
19 potentially affect outcomes, and I look forward to talking
20 about that in the Q&A.

21 I think the legislation is needed because it is
22 important to maintain consensus about the value of a strong
23 antitrust enforcement regime. A perception of unequal or
24 unfair treatment undermines that consensus.

25 When the AMC was considering what issues to study and

1 examine and report on, we decided to include this issue in a
2 very large group of issues we were considering precisely
3 because we did hear from people that they did perceive, and
4 I think for good reason, that there were significant
5 differences between the ways that the two agencies looked at
6 pre-notified mergers that needed to be addressed.

7 I would like to close--I will not repeat my favorite
8 part of the AMC--well, maybe I will. I guess I will. It
9 has been said three or four times, but I like it so much I
10 will say, as the AMC explained, parties to a merger should
11 receive comparable treatment and face similar burdens
12 regardless of whether the FTC or the DOJ reviews their
13 merger. A divergence undermines the public's trust that the
14 antitrust agencies will review transactions efficiently and
15 fairly. More important, it creates the impression that the
16 ultimate decision as to whether a merger may proceed depends
17 in substantial part on which agency reviews the transaction.
18 That is bad for antitrust enforcement.

19 I would like to close by making three points clear
20 about the AMC's recommendations and the SMARTER Act:

21 One, they are not anti-FTC. I think the FTC has done a
22 terrific job. I admire Chairman Ramirez and all of her
23 staff at the FTC.

24 The AMC recommendations and the SMARTER Act are not
25 anti-enforcement. This is not about tying the FTC's hands

1 or doing anything to inhibit merger enforcement.

2 The recommendations in the SMARTER Act I do not think
3 should be perceived as partisan. Five of six Commissioners
4 appointed by Democrats agree to the first recommendation,
5 including Mr. Jacobson. Five of six Commissioners appointed
6 by Democrats agree to the second recommendation. Mr.
7 Jacobson was a dissenter. All six Commissioners appointed
8 by Democrats agree to the third recommendation. So while we
9 may have differences on what is the best way to proceed--and
10 there are some complex questions here--I hope that will not
11 be treated as a political issue but, rather, as a good-
12 government issue.

13 [The prepared statement of Ms. Garza follows:]

1 Chairman Lee. Thank you very much, Ms. Garza. And I
2 figure better late than never as far as the delay between
3 the issuance of the report--I love the conviction with which
4 you have described the report and quoted it. For a minute
5 there, I thought you were going to break into song in
6 describing--

7 Ms. Garza. You would not want me to break into song.

8 [Laughter.]

9 Chairman Lee. Senator Klobuchar and I had a hearing a
10 few months ago where we had a bunch of songwriters, and one
11 of them was a country music songwriter. Senator Klobuchar
12 observed that everything the man said sounded as if it were
13 a country music song.

14 Senator Klobuchar. We have high standards.

15 Chairman Lee. High standards here, yes.

16 Mr. Clanton?

1 STATEMENT OF DAVID A. CLANTON, SENIOR COUNSEL,
2 BAKER & MCKENZIE LLP, WASHINGTON, D.C.

3 Mr. Clanton. Chairman Lee, Senator Klobuchar, thanks
4 for inviting me.

5 What I would like to do to follow up on what Ms. Garza
6 mentioned is to focus on the administrative--the changes to
7 the administrative process, primarily, and come back and
8 talk about the injunction standards. But it is important to
9 take a step back and look at the fact that this legislation
10 is primarily focused on HSR reportable transactions. That
11 was the whole thrust of the AMC recommendation.

12 And the reason for that is, unlike any other area that
13 the antitrust exchanges enforce, this area is one, this
14 statute is one that was designed really to have the agencies
15 work together to create a system whereby the agencies would
16 have opportunity to review transactions, get the information
17 they need to conduct a thorough investigation, and hold up
18 the deal until the agencies had a chance to do this. And I
19 can tell you from personal experience--and all of us can do
20 that--that that investigative process takes a long time. It
21 takes many months in most cases.

22 Frequent reference has been made to the Sysco case,
23 which was fairly recent, where the Commission did win a
24 preliminary injunction. The investigation there from before
25 the parties went to court was over a year, slightly over a

1 year. And then after that, you had a preliminary injunction
2 hearing that lasted about 4 months, and after that, the
3 parties abandoned the transaction before the matter went
4 back to an administrative hearing. And this is really where
5 the specific issue comes into play in terms of what happens.

6 So at the end of that lengthy process, whether it is 6
7 months, 8 months, 10 months, or a year, the agency and the
8 parties are ready to go to trial, and they are ready to go
9 to trial on the merits, not just a preliminary injunction.
10 And, frankly, that is what you see happening at the
11 Department of Justice.

12 Typically, in recent years DOJ has agreed, the parties
13 have agreed to consolidate the proceeding and have a trial
14 on the merits, which gives the parties an opportunity to
15 defend and requires the Government to prove by a
16 preponderance of evidence that the transaction violations
17 Section 7 of the Clayton Act.

18 By contrast, on the FTC side, the process works this
19 way: The agency goes to seek a preliminary injunction. The
20 parties defend that. The evidence that is put in in that
21 preliminary injunction is pretty much the same evidence
22 because, again, there has been a very extensive
23 investigation. It is the same evidence that would go into a
24 trial on the merits. There might be fewer witnesses than
25 would be in an administrative hearing or in a consolidated

1 hearing. But, by and large, the investigation has been
2 completed by that time.

3 And so the question then is how do you--you know, what
4 is the reasonable process for litigating those issues and
5 how do you get to a point where you have a decision that is
6 on the merits or having a reasonable opportunity. And to
7 just use the Sysco case as an example, since it is current--
8 and I refer to it in my statement. So it took a year for
9 the investigation. It took 4 months for the preliminary
10 injunction hearing. And then if the parties had not
11 abandoned the transaction and the case had gone through an
12 administrative process, that would have taken--from the time
13 of that decision, taken another 8 months: a month until the
14 hearing date started and then another 7 months under the
15 Commission rules for a final decision.

16 And I think it is important to keep in mind that not
17 only is it bifurcated, but if you look at the Commission
18 process--and the Commission has done a good job in trying to
19 speed up its rules and process, and I will give them credit
20 on that. But, nevertheless, it is a two-stage. You have
21 got an administrative law judge that has a hearing, which
22 would be analogous to a district court hearing on the
23 merits. And then after that, he issues or she issues a
24 decision. Then there is an appeal to the full Commission.
25 The full Commission reviews and issues its decision as a

1 mini-internal appellate court.

2 So when you add all those elements together, it is a
3 long time, and it is a lot longer. And I gave as two
4 examples cases that DOJ went through and handled in a
5 consolidated fashion, you know, a few years ago. And one of
6 those lasted 5 months, the other lasted 6 months, for the
7 entire trial on the merits.

8 So what we are talking about, using that just as a
9 reference point with the Sysco case, the Sysco case, if it
10 had been tried--and it was not. But if it had been tried
11 administratively, it would have taken twice as long from the
12 point at the end of the investigation until you get a final
13 decision. And that does not even take into account
14 appellate court of appeals decisions if either party wants
15 to appeal.

16 So when you add all that up, it is not surprising that
17 the Sysco parties decided to abandon, because at the end of
18 all that would have been 2 years or 2 years plus before you
19 would have gotten a final decision on the merits.

20 So, you know, I think it is important to kind of
21 understand how that process works and what the implications
22 are, and I might say that in the last 20 years, there was
23 reference made that the Commission has not continued a
24 proceeding where they lost the preliminary injunction in 20
25 years. There has not been an administrative hearing where

1 they won in 20 years. So there has been no administrative
2 decisions articulating the law in the last 20 years either
3 way, whether the Commission wins or loses.

4 So that suggests to me that changing this law and
5 having everything handled at the court level is not going to
6 impact at all on the Commission's administrative process,
7 and the cases that have been cited with respect to that are--
8 -the cases that Chairwoman Ramirez cited, and the Commission
9 has a good track in many of those. She cited Evanston, she
10 cited Polypore, ProMedica. Those are all consummated. They
11 would not have been covered--they are not covered by this
12 legislation. So the Commission still has an opportunity to
13 articulate its views in those matters.

14 I am over my time. Thank you.

15 [The prepared statement of Mr. Clanton follows:]

1 Chairman Lee. Thank you.

2 Mr. Lipsky.

1 STATEMENT OF ABBOTT B. LIPSKY, JR., PARTNER,
2 LATHAM & WATKINS LLP, WASHINGTON, D.C.

3 Mr. Lipsky. Thank you, Mr. Chairman and Senator
4 Klobuchar. I am very grateful for the opportunity to
5 testify.

6 I very much enjoyed that very substantive exchange with
7 Chairwoman Ramirez. A very interesting conversation. And
8 having come after two other excellent witnesses, I guess I
9 am in the position where everything that needs to be said
10 probably has been said, but just not by me. So I am going
11 to try to limit myself to supplemental points.

12 I did want to state that I am here as somebody who
13 totally supports the idea of a competitive market and sound
14 enforcement of antitrust as a means of maintaining a
15 competitive market to maximize American productivity and
16 innovation. So I totally support the antitrust mission.
17 And I support this legislation because I believe it will
18 improve in the conduct of that mission.

19 It has been mentioned that it has been 20 years since
20 there was an administrative litigation involving a case
21 where there was a preliminary injunction loss. But I want
22 to point out that was because of sound activity at the
23 Commission itself. As I have described at some length in my
24 testimony, there was a 9-year litigation involving a post-
25 transaction hearing involving the Coca-Cola attempt to

1 acquire Dr Pepper. There was a 6-year litigation when R.R.
2 Donnelley tried to acquire Meredith/Burda.

3 The consensus professional learning from those two
4 experiences was that those hearings were a waste of public
5 resources, and the Commission, under the democratically
6 appointed Chairman Bob Pitofsky, to his great credit,
7 implemented the 1995 policy statement and adopted 16 CFR
8 3.26, which, although it did not say this in so many words,
9 was widely understood in the profession as essentially
10 implementing what came to be called the "Pitofsky rule,"
11 namely, that administrative litigation would not be used in
12 those circumstances. And that piece prevailed until the
13 amendment of the rule in 2008, I believe it was. 16 CFR
14 3.26 was actually repealed, although it was recently
15 reinstated, I believe at least partially in consciousness of
16 the possibility of this legislation going forward.

17 So what we are asking for fundamentally in this
18 legislation is that the sound administration that began with
19 Chairman Pitofsky and proceeded until 2008, that that
20 essentially be codified. And as other witnesses have
21 described, we do not think that will have any significant
22 impact on the Commission's antitrust mission.

23 The other thing that I think has not been emphasized
24 that I would like to hear emphasized in consideration of
25 this legislation is that merger activity is one type of

1 competitive conduct where speed and efficiency in
2 decisionmaking is particularly critical. In a situation
3 where an agency begins an investigation over something that
4 has occurred in the past, whether it is a price-fixing
5 cartel, the formation of a trade association or the
6 activities of some other body, the record is, as the
7 investigation reveals and discovers it, and the agency can--
8 and, of course, it is always good to have efficient and
9 speedy procedures. But in a merger and acquisition
10 situation, everybody is waiting for the decision in order
11 for their business history to be written.

12 It is only fairly recently that the Commission has been
13 given some very substantial powers to prevent transactions
14 from occurring. Remember, 13(b) was passed in 1973, and at
15 that time the only ability of the Commission to go in and
16 stop a prospective merger would be to invoke the--go to a
17 Federal appellate court and invoke the All Writs Act and
18 seek an injunction under what was a terribly punishing
19 standard. The Commission has to establish that divestiture
20 following consummation of the transaction would be--I think
21 the phrase is "nearly impossible," which is much more than
22 likelihood of success on the merits and balance of the
23 equities.

24 And then shortly thereafter, we got the Hart-Scott-
25 Rodino Act, which basically blows the whistle on any

1 substantial acquisition until the agency has a full
2 opportunity to investigate and opine on the legality of the
3 merger.

4 And so with those two extremely powerful tools in their
5 toolkit, the Commission has a very adequate means of
6 investigating and then going to court and using that
7 permanent injunction standard in 13(b)--permanent injunction
8 authority in 13(b), as, Mr. Chairman, I think you very
9 effectively suggested they might try to do.

10 Thank you very much.

11 [The prepared statement of Mr. Lipsky follows:]

1 Chairman Lee. Thank you.

2 Mr. Jacobson.

1 STATEMENT OF JONATHAN M. JACOBSON, PARTNER, WILSON
2 SONSINI GOODRICH & ROSATI, PC, NEW YORK, NEW YORK,
3 AND FORMER COMMISSIONER, ANTITRUST MODERNIZATION
4 COMMISSION

5 Mr. Jacobson. Chairman Lee, thank you very much for
6 having me here today. I oppose that part of this bill that
7 would eliminate Part 3 administrative adjudication in HSR
8 cases.

9 I want to start by answering a question that you posed
10 earlier today, and that is, why should there be a second
11 shot by the FTC? And here is the reason: Sometimes courts
12 get it really, really wrong, and I think our experience with
13 the hospital merger cases in the 1990s shows that quite
14 convincingly.

15 So what do you do when the courts are getting it
16 really, really wrong? Well, the Justice Department has only
17 one avenue, which is to appeal. But the FTC is an
18 administrative agency, and like the IRS' ability to non-
19 acquiesce in court decisions, the FTC here has comparable
20 authority to take the case into a Part 3 and get an
21 administrative adjudication, which will later be reviewed by
22 a court of appeals, but on a basis where a record can be
23 established. There may be new theories. There may be new
24 ways of looking at the evidence that a busy district judge
25 who, you know, has many other matters pending just is not

1 going to have the time to address appropriately. So I would
2 suggest that the Part 3 process that has been in place for
3 so long is a necessary and very important part of the basic
4 administrative mission of the Federal Trade Commission.

5 One of the basic premises of the bill is that the
6 availability of these proceedings makes it harder to get an
7 FTC deal through and concluded than one cleared to DOJ, and
8 that has just not been my experience. My experience to the
9 contrary is that the idea that one agency has an advantage
10 over the other is a myth.

11 The potential to commence a Part 3 proceeding can be
12 used in negotiations. I have never heard it, but it is
13 certainly theoretically possible. But what really matters
14 when you are trying to get your deal through is what staff
15 has been assigned to your deal. It is not just, you know,
16 the clearance process, which is something the AMC
17 recommended Congress address, and I would strongly urge you,
18 Senator Lee, to take a look at that series of
19 recommendations. But in terms of what really matters in
20 getting the deals through, it is the staff, and the staffs
21 at the DOJ are different. There are different merger shops
22 at the DOJ. The staffs at the FTC are different. So there
23 is no advantage in getting the deal through, which is really
24 what the companies really care about. And the fact of a
25 potential Part 3, which has not happened in over 20 years,

1 just does not play a role in the negotiations in the real
2 world.

3 The FTC's case-by-case approach is the appropriate
4 approach. There has been no occasion to use this authority
5 for a long period of time. But where it is--and I mentioned
6 the hospital type of cases--that is something where
7 consumers are going to benefit from a careful review by the
8 agency, subject to appellate review by the court of appeals
9 of the defendant's choice.

10 A lot has been said about the inconvenience to the
11 parties. It is important to recognize that if the
12 preliminary injunction has been denied, the deal can close.
13 The stockholders get their money. The bankers get their
14 fees, which is, you know, very important to them, certainly.
15 There is additional legal expense, but there is no delay.
16 And the legal expense is not different than you face in any
17 merger context. A merger can always be challenged post-
18 consummation. It can be challenged by the DOJ. There is no
19 statute of limitations applicable to post-consummation
20 challenges by the DOJ. It can be challenged within 4 years
21 by private parties or by any of the various State attorneys
22 general. This is an inherent risk that you get in every
23 case, and the fact of the Part 3 proceedings really does not
24 exacerbate it at all.

25 And, finally, I would refer you to my written

1 statement. There are some language issues in terms of the
2 draft of the legislation, so if it does go forward, I would
3 urge you to look at the proposed changes in my written
4 remarks.

5 Thank you.

6 [The prepared statement of Mr. Jacobson follows:]

1 Chairman Lee. Thank you very much.

2 I would like to start with Ms. Garza. The FTC's
3 administrative process, as we have established today, has
4 been used rarely, if at all, in roughly 20 years to block an
5 unconsummated merger. So tell me what your opinion about--
6 what is the best case you can make about what, if any, value
7 there is to the FTC of that unused proceeding, you know,
8 separate and apart from any value of the FTC's
9 administrative processes more generally. I am talking about
10 in this context.

11 Ms. Garza. I think the FTC does perceive a value in
12 it, and I think to see how that works, you might consider
13 the context of the hospital mergers that we have been
14 talking about. There was a long period of time in which
15 both the Justice Department and the Federal Trade Commission
16 had poor success in convincing courts to block mergers, and
17 this is an example, by the way, of where both the DOJ and
18 the FTC do happen to look at mergers in the same industry in
19 hospital cases. So there had been a series of losses.

20 So as people have said in their testimony, their
21 written testimony and a bit today, the FTC focused on how to
22 change that, which is fine, which is what you would want an
23 agency to do. And one of the ways was to--was the Evanston
24 case, which is a post-consummation proceeding at which they
25 used to develop the evidence and to show how a hospital

1 merger could be anticompetitive so they had that to use.

2 Then you come to the Inova merger in Northern Virginia,
3 where, in part with the leadership of Commissioner Tom
4 Rosch, the FTC made a concerted effort to turn their track
5 record around. And what they did there was in part they had
6 basically withdrawn, as Tad said, as Mr. Lipsky said,
7 withdrawn the Pitofsky rule, so they said no longer are--we
8 are not bound anymore by our policy of not pursuing
9 administrative hearings if we lose a preliminary injunction.

10 They amended their rules for administrative hearings to
11 make it somewhat more efficient and streamlined and quicker.
12 And then they went into the court and tried to convince the
13 court to give--I would say to apply a less severe or less
14 difficult standard to the issuance of a preliminary
15 injunction by telling the court that it should really defer
16 to the FTC and allow--just have enough to say that there is
17 enough of a basis to allow the FTC to go into Part 3. And
18 they started the Part 3 hearing process at the same time
19 that they went into court.

20 The combination of all of that was intended to and did
21 influence the parties' decision not to fight. The parties
22 issued a statement after the fact that said we had to give
23 up--oh, and, by the way, the other thing they did is that--
24 all for good measure, is that Tom Rosch, Commissioner Rosch
25 was to serve as the administrative law judge in the

1 proceeding that tried the merger case.

2 So the whole--it was a smart use of the toolkit that
3 the FTC had. It was definitely intended to help them to win
4 this merger case, which they wanted to do. And no one, I
5 think, begrudges the FTC that it used that toolkit. That is
6 what you want an agency to do. But the problem is that it
7 was perceived at the time, not only by the parties but by
8 other folks, as basically an example of how the FTC could
9 get the results it wanted, in this case it would be good to
10 have the parties abandon the transaction by using its unique
11 processes and procedures, which are different from the DOJ.

12 So the reason, I think, that the legislation is
13 appropriate is because you should not expect the FTC to
14 itself not exercise and use all of the tools in its toolkit.
15 Congress should decide whether it is appropriate to have two
16 different procedures, and if it is not, then it should
17 legislate.

18 Chairman Lee. It is going to use those tools, and the
19 fact that it has the tools at all and can use them and
20 occasionally does use them has an impact on the parties and
21 the way they--

22 Ms. Garza. It has an impact, and I will not go on too
23 long, but at some point think about how you advise a client
24 when they are deciding whether to enter into a transaction
25 and how to allocate risk or when they are before an agency--

1 I will not do it now because it would take too long, but the
2 way that you describe what the situation is at DOJ that they
3 face is very different from what they will face at the FTC
4 when you are a lawyer telling them that. And, believe me,
5 it sounds different, and I know that it impacts decisions on
6 whether or not to go into a transaction in the first place
7 and how far the parties will stick to a transaction and
8 whether or not they abandon it and whether or not they
9 concede to provisions and consent decrees that they would
10 prefer not to, but they cannot take the risk of waiting 2
11 years potentially in order to close their merger.

12 Chairman Lee. Thank you.

13 Mr. Clanton, you described how for FTC cases the
14 preliminary injunction is the de facto merits hearing
15 because mergers do not survive in FTC cases beyond the P I
16 stage. Is this hearing, this type of hearing, the hearing
17 at the preliminary injunction stage, is it less robust than
18 the type of review that you would have in a consolidated
19 hearing, the type of hearing that you would typically have
20 in a case involving the DOJ?

21 Mr. Clanton. I think it is less robust, but I will say
22 and I would acknowledge that in some cases the court has
23 given very extensive scrutiny to what should be the primary
24 issue, which is likelihood of success. I think that did
25 happen in the Sysco case. I think the Commission briefs

1 pretty deliberately focused on that standard as the thing
2 that the court should look to as the primary factor.

3 So you do have decisions where there has been a fairly
4 robust consideration of the legal issues, and, again, you
5 would expect that from the standpoint of, you know, how the
6 matter has been investigated, the long time that has been
7 involved in that.

8 But I would also point to other decisions--and Ms.
9 Garza mentioned that as well--where the PI standard, the
10 lower PI--well, there are two issues: a lower PI standard,
11 number one; and number two, the fact that the hearing is on
12 a PI and not on the merits. And, fundamentally, I think
13 that is wrong as a matter of fairness in terms of a
14 reasonable opportunity for a defendant to get a
15 determination on whether this transaction is lawful or not.

16 And one thing I would mention is if you go back--and
17 there has been various statements over the years, but the
18 Commission sent a letter to Chairman Conyers in 2008,
19 unanimously, expressly endorsing a lower standard and citing
20 the Whole Foods case and others that set forth a standard
21 that does not specifically or primarily put emphasis on the
22 likelihood of success.

23 So, you know, you have got inconsistencies, significant
24 inconsistencies over time in terms of how the Commission has
25 interpreted and advocated the scope of their authority to

1 seek a PI.

2 Chairman Lee. Thank you.

3 Mr. Lipsky, does the Pitofsky rule obviate the need for
4 legislation here, obviate the need for legislation removing
5 the FTC's option of pursuing administrative litigation with
6 respect to proposed mergers?

7 Mr. Lipsky. No. I think the Pitofsky rule should be
8 codified precisely because it has proven to be so changeable
9 over the years with the policy statement having survived
10 more or less in its 1995 form, but the Commission going back
11 on adoption of this rule 3.26, which actually tries to
12 implement that and it has been interpreted largely as
13 embodying the Pitofsky rule. So it is exactly, as David
14 Clanton just mentioned, the tendency of the Commission,
15 depending on its membership, depending on, you know, the
16 themes of the times, to shift interpretations of its
17 authority, which, of course, is natural and probably
18 unavoidable to a great extent. I think that is the
19 strongest type of reason for asking Congress to fix it
20 according to its own judgment and to make sure that this
21 provision will be enforced as written.

22 Chairman Lee. Thank you.

23 Mr. Jacobson, what is the best argument you can give me
24 for subjecting certain industries and, therefore, certain
25 types of proposed mergers to one set of standards and

1 processes and another industry and another set of proposed
2 mergers to a different set of standards and procedures based
3 on what we could call "the coin flip" of which agency
4 happens to review their transactions?

5 Mr. Jacobson. Well, as you will see--

6 Chairman Lee. Push the red button, if you will.

7 Mr. Jacobson. Sorry. As you will see from the AMC
8 report, I wish it was a coin flip, but it is a little more
9 complicated than that. So why should there be a different
10 substantive standard? I do not think there is, and I want
11 to make clear I am not opposing that part of the
12 legislation. I think some clarity on that cannot be unduly
13 harmful given all of the ink that has been spilled on
14 whether the standard should be the same or different.

15 Chairman Lee. Right, but you are not opposing the part
16 of the bill that proposed a different standard.

17 Mr. Jacobson. Right.

18 Chairman Lee. But what about the procedures?

19 Mr. Jacobson. I think as U.S. consumers we are
20 fortunate that the FTC has the option to pursue Part 3
21 administrative litigation when it--

22 Chairman Lee. So why not give that to the DOJ?

23 Mr. Jacobson. DOJ absolutely has that option. It is a
24 current policy for DOJ to consolidate the preliminary
25 injunction and merits trial. But it is not written in a

1 statute such as the SMARTER Act.

2 Chairman Lee. They do not have administrative
3 proceedings though.

4 Mr. Jacobson. No, they do not, and that was--I mean,
5 we are getting into, you know, do we really want two
6 antitrust agencies? For the reasons stated in my separate
7 statement for the Antitrust Modernization Commission, I
8 believe that plurality of antitrust enforcement is critical
9 to the administration of the antitrust laws.

10 But, yes, the DOJ is not an administrative agency. The
11 FTC is an administrative agency. That has been true since
12 1914.

13 I do want to correct what I think may be a
14 misunderstanding on what the Pitofsky rule is. The Pitofsky
15 rule was not that we will never commence a Part 3. The
16 Pitofsky rule, which is codified and is cited in my
17 statement, has a five-factor test to determine whether
18 administrative cases will proceed. And really it boils down
19 to was the district court off the deep end. And I do think
20 when the district court goes off the deep end--and there are
21 instances like that--the taking of Part 3 is good for
22 American consumers.

23 Chairman Lee. What if the Pitofsky rule disappeared?
24 What if they dropped it? What if they abandoned it? Would
25 that affect your analysis?

1 Mr. Jacobson. I do not think they will, but it would
2 put them in the same sort of discretionary bucket that the
3 DOJ is on whether to do a permanent at the same time as a
4 preliminary injunction. As a matter of policy, I firmly
5 support the Pitofsky rule, and I would be very disappointed
6 if it were to be changed. I think the Inova situation was
7 an outlier, as I say in my statement, that this was
8 attributable in part to the very strong personality of an
9 excellent Federal Trade Commissioner, Republican
10 Commissioner, Tom Rosch.

11 Chairman Lee. Right, okay. But the fact that it is an
12 outlier does not do anything for me. I mean, the fact that
13 it is an outlier still exists, and the fact that it is an
14 outlier, the fact that those outliers can arise as a result
15 of the fact that we have got two different systems, that
16 matters, doesn't it?

17 Mr. Jacobson. I think it matters in a way that we
18 should support not oppose. I think--

19 Chairman Lee. Okay. But you would not disagree with
20 Ms. Garza's conclusion that this undoubtedly affects
21 parties, it affects the behavior of parties to--

22 Mr. Jacobson. I completely disagree with that. It has
23 absolutely not been my experience. When you are trying to
24 get a deal through the agency, you are focused on, "Am I
25 going to get a preliminary injunction or not?" You are not

1 focused on the later possibility of a permanent injunction
2 trial with DOJ or a Part 3 with the FTC. It absolutely
3 plays no role in the analysis.

4 Chairman Lee. I want to give Ms. Garza a chance to
5 respond to that point, but before I do that, I want to make
6 sure I understand your answer to my question. My most
7 fundamental question is: What is the--the policy
8 justification for subjecting one industry to one set of
9 procedures and another to another set of procedures, how do
10 we justify that? You seem to be saying that the FTC's--the
11 procedures available to the FTC are good, are better.

12 Mr. Jacobson. No; they are different. And I think the
13 fact that they are different is a plus for the American
14 consumer.

15 Chairman Lee. But if it is a plus, why not make the
16 same--why not create a universe in which we either have two
17 FTCs or we somehow give DOJ the ability to conduct
18 administrative proceedings, administration litigation?

19 Mr. Jacobson. I would oppose that because of my strong
20 belief in the plurality of antitrust enforcement,
21 particularly--

22 Chairman Lee. Right, but that is my idea of having two
23 FTCs. Let us have another one called the "Federal Antitrust
24 Bureau." Let us just pretend DOJ does not exist here for a
25 second. We have two separate ones. Would you give that

1 other entity these same procedures? Because your idea
2 behind the plurality of antitrust enforcement agencies, that
3 is the--you do not want to put all your eggs in one basket.
4 Isn't that--

5 Mr. Jacobson. Well, yes, and you want--you know,
6 sometimes there is a liberal Democrat who appoints a very
7 interventionist Assistant Attorney General. But when we
8 have the Federal Trade Commission, we have no more than
9 three from one party. We have a bipartisan agency. So I
10 strongly support that.

11 Would I prefer two FTCs, two different FTCs, as opposed
12 to today's system? No. I think the system we have today
13 with the DOJ and the FTC, they have both done remarkable
14 things over a long period of time. I think it has worked
15 fantastically well, and I would not tinker with it.

16 Chairman Lee. I want to make clear that I am not
17 saying that I am opposed to differences in every
18 circumstance. But what I am saying is that here the reason
19 for opposition to this legislation does not seem to make
20 sense to me, and I am struggling with the ability to
21 understand why that opposition exists.

22 Ms. Garza, why don't we hear from you and have you
23 respond to Mr. Jacobson's assessment that it does not affect
24 the behavior--the differences in the two procedures does not
25 affect the behavior of the parties.

1 Ms. Garza. I have two points. It does if you are a
2 buyer. Okay? So if you are buying a business, if you are
3 the acquirer, and the issue is, well, after--I could go
4 through the investigation, and then I can go to court, and
5 then I can win on a preliminary injunction. But then the
6 agency, if it thinks the court was off the deep end or just
7 simply disagrees with the court's decision, can commence an
8 administrative proceeding that ties me up even after I close
9 with the object of undoing my transaction. How could that
10 not affect the acquirer? It does not make any sense to me,
11 and it is not what I have experienced over 34 years of
12 practice.

13 The other thing I would say, to my ears, to say that
14 the reason that you need to preserve the right to go into
15 Part 3 proceedings after an injunction has been denied is
16 because the court may have gone off the deep end or because
17 the court may have gotten it wrong is the problem. To me,
18 to my ears, that is the problem. That is saying basically
19 if the FTC does not like what happened in court, it can go
20 around that and it can use its administrative proceeding,
21 which is to me why businesses perceive it as being unfair.
22 I do not mean to say that I think that the FTC is unfair. I
23 do not mean to impugn any of the work that Chairman Ramirez
24 and everyone does. But that is absolutely seen as a
25 fairness issue, because we have a system where you have to

1 go to court, you make your best case, you win or you lose,
2 you have your appeal. And what they are asking for, what
3 they are saying is, "I do not really like that. I prefer to
4 go through my administrative proceeding with my ALJ, which
5 will then be appealed to the Commission that voted out the
6 complaint." I am telling you, that sounds unfair to the
7 business person that is before the Federal Trade Commission.

8 Chairman Lee. Yes, among other things, it seemed to
9 create the very real possibility of a much more protracted
10 process. How much longer on average might this process take
11 if the transaction went to the FTC rather than to the DOJ?

12 Ms. Garza. Some of my colleagues have done more of the
13 statistical analysis, but the difference is, if I am at the
14 DOJ and I have gone my 6, 7, 8, maybe longer number of
15 months of investigation, then I go to the hearing, the
16 consolidated hearing, which could take 3 or 4 more months,
17 and then you get your decision, you appeal it or not. If
18 you are at the Federal Trade Commission, you have more or
19 less the same--you have that 6-, 7-, 8-month investigation.
20 Then you go to the preliminary injunction hearing, which
21 might be 2, 2-1/2, 3 months. And then, again, there is the
22 risk that, depending on how that hearing goes and if you
23 lose--if the FTC loses the hearing, then it goes into Part
24 3. So your deal has closed, but it remains at risk for the
25 duration of the Part 3 proceeding.

1 Chairman Lee. Mr. Clanton, will the FTC be able--would
2 the FTC still be able to develop effective merger policy
3 through its own proceedings if the SMARTER Act becomes law?
4 If Congress were to pass it, will the FTC still be able to
5 develop effective merger policy?

6 Mr. Clanton. Yes, and that is what they are doing
7 today. You know, the cases that Chairwoman Ramirez cited in
8 her statement talking about the development of the law are
9 administrative cases that are not covered by the SMARTER
10 Act. So, you know, that to me is part of the telling point
11 about the lack of impact that this is going to have on the
12 Commission's ability to develop law administratively. There
13 are just a lot of decisions out there, merger and non-
14 merger, where the Commission is developing law through the
15 administrative process. That will continue. This is not
16 going to harm that.

17 Chairman Lee. Mr. Lipsky, in your testimony you note
18 that, "Antitrust practitioners have long perceived that the
19 possibility of continued administrative litigation by the
20 FTC following a court decision constitutes a significant
21 disincentive for parties to invest resources in transaction
22 planning and execution." Can you elaborate on that a little
23 bit for us?

24 Mr. Lipsky. Whenever a company is considering a major
25 transaction, it is sometimes a life-changing event for the

1 company or in any event is a very significant matter that
2 can involve the expenditure of hundreds of millions or
3 billions or many billions of dollars, can transform their
4 lines of business, can alter their competitive strategy.
5 This is the kind of decision that is often considered very,
6 very carefully. You hire financial advisers, you hire an
7 investment banker, you hire all kinds of specialists,
8 consultants, to support what the management and the board of
9 directors of the company are ultimately going to decide.
10 And a part of that--and sometimes an important part of that--
11 --will be the antitrust advice, and generally you are
12 advising on two risks. One we refer to as "completion
13 risk." What is the risk that we will be able to do this
14 transaction more or less as envisioned at the end of the
15 day? But the other major risk is timing risk. Interest
16 rates, market prices, especially nowadays, change very
17 substantially in short periods of time. An economically and
18 competitively wise decision on day one can be a very poor
19 decision 6 months, 8 months, 10 months, a year later.

20 That is why I emphasize that we need to consider the
21 fact that when you are talking about transactions that are
22 generally held up by the legal apparatus, by the Hart-Scott-
23 Rodino Act and so forth, the delay and expense is a
24 particularly punishing risk for companies that are in the
25 position of trying to do a transaction.

1 I thought I heard, considering all of the witnesses
2 today, including Chairwoman Ramirez, I thought I heard kind
3 of a consensus that if you are going to have an
4 administrative litigation phase before the FTC, it is
5 definitely going to be slower, and I think partly for that
6 reason more expensive and sometimes substantially so. And
7 that is why the 9-year proceeding in the Coke-Dr Pepper case
8 and the 6-year proceeding in the Donnelley-Meredith/Burda
9 case did have such an impact and made such an impression on
10 the bar, because if there was any serious risk of having a
11 delay of that character because of the possibility of FTC
12 administrative litigation, there are many, many transactions
13 that either would not be considered or would not be
14 seriously proposed.

15 Chairman Lee. Particularly taking into account the
16 timing risk.

17 Mr. Lipsky. Absolutely.

18 Chairman Lee. Mr. Jacobson, anything you want to
19 respond to that we have just heard?

20 Mr. Jacobson. So the completion--

21 Chairman Lee. Push your button, if you will.

22 Mr. Jacobson. Sorry. This is my first time.

23 The completion risk and the timing risk are identical.
24 Remember, the deal can close if the preliminary injunction
25 has been denied. The advice that is given is: Is this deal

1 going to go through? Do I have to agree to a consent? But
2 that is all focused on the preliminary injunction stage.
3 And so that is the completion risk.

4 And the timing risk, you know, once the PI is denied,
5 the deal can close. Does that have an impact on the
6 acquirer's plans for integration? It has not been my
7 experience--in fact, I would argue the opposite, that if
8 there is an administrative proceeding, the company is going
9 to proceed more quickly to integrate the merged companies,
10 in part because that makes divestiture more difficult. That
11 is one of the reasons the Hart-Scott-Rodino Act was passed,
12 to allow review before scrambling of the egg.

13 So I agree there is a completion risk and a timing risk
14 in every deal. I just do not think it would be impacted by
15 the statute at all.

16 Chairman Lee. Notwithstanding the fact that there is
17 an additional procedure that may take place that may--

18 Mr. Jacobson. After closing.

19 Chairman Lee. Okay. I want to thank all of you for
20 being here today. This has been very enlightening, very
21 helpful, and your testimony before the Committee is greatly
22 appreciated.

23 Senator Klobuchar was required to be in another
24 Committee hearing and wanted to be here at the end, but had
25 to go to that Committee. But, regardless, we will keep the

1 record open for 1 week in case we have anything else to
2 supplement the record.

3 Thank you very much. We will be adjourned.

4 [Whereupon, at 11:51 a.m., the Subcommittee was
5 adjourned.]

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