

1 STATEMENT OF DAVID A. CLANTON, SENIOR COUNSEL,
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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 these.~~ 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:]