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Senator Charles E. Grassley
Chairman
United States Senate
Committee on the Judiciary
Washington, DC 20510-6275

Re: S.102, Standard Merger and Acquisition Reviews Through Equal Rules Acts of 2015

Dear Senator Grassley:

Thank you for the opportunity to comment on the proposed Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015. As you know, the proposed legislation essentially implements recommendations of the Antitrust Modernization Commission (AMC) to eliminate differences in the way that the Justice Department ("DOJ") and the Federal Trade Commission ("FTC") handle merger challenges. I appreciate the opportunity to further explain the rationale for the AMC recommendations in response to follow-up questions from members of the Senate Committee on the Judiciary.

Questions from Senator Orrin G. Hatch

1. *Chairwoman Ramirez and others claim that Part III proceedings add significant value to FTC merger review and that eliminating Part III in merger cases would be a mistake. Do Chairwoman Ramirez and others overstate the value of Part III proceedings? Do they understate the drawbacks that attend FTC's ability to threaten Part III proceedings? Please give me your thoughts. Brenda: Please put all the Qs in complete italics.*

Response:

Chairwoman Ramirez' remarks do not identify any unique value to using Part III with respect to mergers subject to the Hart-Scott-Rodino (HSR) Act. Every example of a merger-related Part III proceeding cited by Chairwoman Ramirez involved a *consummated* transaction that was *not* subject to the HSR Act and thus would *not* be affected by the SMARTER Act. The FTC could continue to use Part III in such cases. The value that Chairwoman Ramirez describes would thus be preserved. That is a significant point.

The fact is, we actually do not see HSR merger challenges actually going through a Part III proceeding — largely because merging parties give up after losing on a preliminary injunction (PI), rather than trying to hold their deal together through lengthy Part III

proceedings. That it is why I believe the primary value of the FTC's Part III tool in such proceedings is actually the threat of its use — that is, the ability to kill a deal without having to prevail on a trial on the merits. This goes to the core of why the AMC recommended the reform represented by the SMARTER Act.

As the AMC Report explained:

> The mere availability of [Part III administrative] proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a challenge to a merger. It thus can give the FTC greater leverage in seeking concessions in a consent decree. Although the FTC has not pursued a full administrative trial after denial of a preliminary injunction in at least fifteen years [prior to 2007, when the AMC Report issued], its policy regarding the circumstances in which it would seek administrative litigation following the denial of a preliminary injunction [the "Pitofsky Rule"] does not rule out the possibility that it may pursue this course. Indeed, in 2005, the FTC left an administrative complaint pending against Arch Coal for over eight months after it had failed to obtain a preliminary injunction, and it has acted similarly in the recent past.

AMC Report at 139-40 (citations omitted).[1]

The AMC further concluded that eliminating administrative litigation would **not** deprive the FTC of an important enforcement option:

> Although administrative litigation may provide a valuable avenue to develop antitrust law in general, it appears unlikely to add significant value beyond that developed in federal court proceedings for injunctive relief in HSR Act merger cases. Whatever the value, it is significantly outweighed by the costs it imposes on merging parties in uncertainty and litigation costs. Indeed, the FTC's own conduct confirms holding administrative trials after losing an injunction rarely, if ever, adds significant value, as the FTC has not held an administrative trial regarding an HSR Act merger after losing a preliminary injunction motion in recent years.

AMC Report at 140-41 (citations omitted).

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[1] After the AMC issued its Report and Recommendations, the FTC moved to increase the potency of the Part III threat by withdrawing the Pitofsky Rule, which had limiting the circumstances under which the FTC would continue to pursue Part III even after having lost on a PI. Apparently in response to Congress' consideration of the SMARTER Act, the FTC recently re-adopted the Pitofsky Rule. However, the FTC's ability to change its position and the continued flexibility even under the Pitofsky Rule to pursue administrative litigation after losing PI demonstrates the need for legislation.

2. *Do you believe that withdrawing the FTC's ability to pursue Part III proceedings in merger review cases would hinder the FTC's ability to perform its mission of protecting consumer welfare? Why or why not?*

Response:

I agree with the conclusion of the AMC that withdrawing the FTC's ability to pursue administrative litigation in HSR merger cases would **not** hinder the FTC's performance of its mission to protect consumer welfare for the reasons stated in the AMC Report.

3. *Do you believe that the FTC and DOJ do in fact face different standards for obtaining a preliminary injunction in a merger review case? How do those different standards affect how the agencies approach merger cases? How do the different standards affect parties' decisions about whether to merge?*

Response:

I believe the FTC and DOJ should **not** face different standards for obtaining a PI in HSR merger cases. That was also the conclusion of the AMC Report. It accordingly does not matter whether someone can argue that in one or more decisions the standard looks similar. The SMARTER Act would remove the uncertainty and preclude the FTC seeking application of a more lenient standard.

In this regard, the AMC Report explained:

> There is at least a perception, if not a reality, that the FTC and DOJ face different standards for obtaining a preliminary injunction. . . . [J]ust the perception that the applicable rules depend on the happenstance of which agency is reviewing the transaction can undermine confidence in the fairness of the dual merger enforcement regime.
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> . . . .
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> While the magnitude of the difference between the two standards is not clear, the Commission believes Congress should remove all doubt by ensuring that courts apply the same standard in ruling on a motion for preliminary injunction, whether the injunction is sought by the FTC or the DOJ. . . This change should not hamper the FTC's ability to obtain injunctive relief in appropriate cases; on the contrary, its ability should be identical to that of the DOJ.

AMC Report at 141-42 (citations omitted).

That having been said, while its position may be different today, the FTC has historically advocated in courts and to Congress that its PI standard is different. In a letter to then-Chairman of the House Judiciary Committee, Rep. John Conyers, Jr. in 2008, the FTC stated: "The AMC Report is correct in stating that the procedures and standard in preliminary injunction cases brought under Section 13(b) of the FTC Act are different from the procedures

and standard applicable to preliminary injunctions in litigation conducted by the [Antitrust] Division [of the U.S. Justice Department." The FTC explained that this difference was purposeful and reflects the fact that, unlike the Justice Department, which does not decide the cases it prosecutes, the FTC has both prosecutorial and judicial functions. The FTC explained the case law as follows:

> Reflecting its recognition of the intentions of Congress . . . , the courts of appeals have fashioned a 13(b) standard that safeguards the public interest in having the Commission instead of the federal district courts judge the merits of the antitrust . . . matters entrusted to it. For example, in *FTC v H.J. Heinz Co.*, 246 F.3d 708, 714-15, 726 (D.C. Cir. 2001), the court held that issuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them 'fair ground for investigation.' The D.C. Circuit has just re-affirmed this deferential standard in denying a petition for rehearing en banc . . . in *Whole Foods Market*, 2008 U.S. App. LEXIS 24092.

The relevant debate is not whether the standard **is** different, but whether it **should be** different. I believe, with the bi-partisan majority of the AMC at the time, that the standard should **not** be different for the limited slice of the FTC's jurisdiction related to HSR-reported mergers.

Questions from Senator Klobuchar

1. *In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?*

Response:

Yes, often. With respect to every merger raising a potential competition issue,[2] the parties must agree to allocate regulatory risk. That is, they must agree on how long a buyer, and a seller, must stick with a deal — is it nine months, one year, longer? What are the conditions over which a buyer must close the transaction? Does buyer need to litigate to avoid or remove a court injunction? What if the court allows the transaction to close but the FTC pursues administrative litigation to try to unwind the transaction? What divestitures and other

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[2] As Chairwoman Ramirez explained, only a relatively small percentage of transactions are subject to a full investigation and fewer are challenged. Even where a transaction may raise a potential competitive concern, it is often possible for the FTC or DOJ to conclude that the merger will not unreasonably restrain competition or that it can be restructured to address competitive concerns. Importantly, not every transaction that raises competitive issues is or should be blocked or restructured. Given the predictive and often complex nature of the analysis, it is often a close question whether on balance a transaction would be anticompetitive and reasonable minds can differ on the conclusion.

concessions must the buyer offer to avoid a challenge and when must it make the offer? In many agreements, a buyer faces a "hell or high water" requirement to do whatever it takes to close a transaction by a certain date.[3] In others, the parties may agree to cap how much a buyer must do. And, a buyer may have to pay a substantial fee to the seller for failing to close on time.

A key element in allocating risk is time. As has been explained in prior testimony by myself and others, it is not possible to hold a deal together indefinitely. Financing is a key issue, for example, as is the seller's ability to retain employees and customers.

The FTC's different process and standard means that it can take significantly longer to get a merger cleared through the FTC then the DOJ. As others have testified, the FTC process can easily take half a year longer than the DOJ. Chairwoman Ramirez frankly acknowledged the existence of a time difference in her testimony, even with steps the FTC has taken to shorten the time involved with administrative litigation.

This time difference makes it less likely that merging parties will get their day in court and enhances the FTC's leverage in extracting concessions from the parties. As explained by the AMC:

> The differences in the agencies' policies regarding consolidation of actions for preliminary and permanent relief impose significantly different burdens on the parties in two respects. The DOJ usually agrees with the merging parties to consolidate proceedings for preliminary and permanent injunctions; [DOJ] therefore must establish that the proposed merger would violate Section 7 of the Clayton Act by a preponderance of the evidence. By comparison, the FTC must meet the burden required for obtaining a preliminary injunction, which is generally regarded as lower. Because the grant of any injunction (whether preliminary or permanent) almost always kills the deal, this difference could materially affect the parties' prospects for completing their transaction. Second, the decision of the district court in a consolidated DOJ proceeding is final (barring an appeal); if the DOJ loses, the parties can be certain that the challenge is finished. In contrast, if the FTC fails to obtain a preliminary injunction, it may pursue relief in a potentially lengthy and costly internal administrative hearing.
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> The mere availability of such proceedings can harm parties by creating uncertainty as to the legal status of their transaction, a risk not faced when the DOJ brings a merger challenge. It thus can give the FTC greater leverage in seeking concessions in a consent decree.

AMC Report at 139.

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[3] The date is typically keyed to financing and other factors relating to the seller's ability to maintain its business.

I have personally handled several matters over the years in which the time and uncertainty associated with FTC merger review caused parties not to proceed with mergers or compromised on concessions in order to be able close a transaction on a timely basis.

2. *As I understand your concern, you believe that some courts, in assessing the likelihood of success element for a preliminary injunction, have interpreted 15 U.S.C. 53(b) to require the FTC only to raise "questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination," and you believe that standard is lower than what is required under the traditional common law test for a preliminary injunction. It appears that some courts have adopted similar language in applying the common law test for a preliminary injunction, at least where the balance of harm favors the plaintiff. For example, the Second Circuit requires a plaintiff to raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Citigroup Global v. VCG Special Opport, 598 F.3d 30, 35 (2d Cir. 2010).*

Response:

To be clear, my concern relates to the effect of differences between the two enforcement agencies' practices, policies and standards taken as a whole, not solely to differences in the preliminary injunction standard. That is why the AMC described its three-part recommendation for reform as "interrelated": (1) the FTC should seek both preliminary and permanent injunctive relief in HSR merger cases, in a consolidated proceeding where practicable; (2) the FTC should not pursue administrative litigation in HSR merger cases, and (3) Congress should ensure that the same standard for the grant of preliminary injunction applies to both the FTC and the DOJ.

Frankly, I believe a court would have little if any reason to apply a different PI standard in FTC HSR merger cases if the first two recommendations were adopted. This conclusion is consistent with the FTC's letter to Rep. Conyers discussed above in response to a question from Sen. Hatch. In the Conyers letter, the FTC acknowledged that it benefits from a different standard and justified that advantage based on the fact that the FTC, rather than the district court, would try the merits of the case. The FTC at least then believed that the court should defer to the FTC's judgment by enjoining a transaction based not on a judgment of likely outcome on the merits (as would apply in a DOJ merger case), but on whether the FTC had "raised questions" sufficiently serious to make them "fair ground for further investigation."

I take the gist of your questions regarding the Second Circuit's standard for PIs under the Rule 65 of the Federal Rules Procedure to be, in essence, "So, what standard would apply equally to DOJ and the FTC under the SMARTER Act?" The precise answer to that question depends on the law in each circuit. But it is important to bear in mind that the SMARTER Act does not purport to dictate a standard. It merely says that whatever standard the courts apply under the Federal Rules, it should be the same for the DOJ and the FTC.

- *How is the standard under 15 U.S.C. 53(b) different than the test articulated by the Second Circuit?*

Response:

Courts have interpreted 15 U.S.C. 53(b) in different ways, but it is fair to rely on the characterization of the D.C. Circuit approach provided by the FTC in the Conyers letter. Excerpting from the full quote provided above: "[I]ssuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them 'fair ground for investigation.'"

I understand there is a Circuit split as to the propriety of a sliding scale PI test that requires a lesser showing on likely success on the merits where there is very significant likelihood of irreparable harm. It is possible the Supreme Court will clarify the question issue in the future and establish a uniform federal standard.

The Second Circuit confirmed its use of a sliding scale test In *Citigroup Global Markets, Inc. v VGC Special Opportunities Master Fund Limited* under which a plaintiff must show irreparable harm and either likelihood of success on the merits or "sufficiently serious questions going to the merits to make them a fair ground for litigation *and a balance of hardships tipping decidedly toward the party requesting the preliminary relief.*" (Emphasis added.) The Court explained that this approach allows a court to grant a PI where it cannot determine with certainty that the moving party is more likely than not to prevail on the merits, but the costs of not granting the injunction outweigh the benefits. Moreover, "[b]ecause the moving party must not only show that there are 'serious questions' going to the merits, but must additionally establish that 'the balance of hardships tips *decidedly* in its favor, its overall burden is no lighter than the one it bears under the 'likelihood of success' standard." (Internal citation omitted; emphasis in original.)

It is not clear from *Citigroup* how the Second Circuit sliding scale approach would apply to a government motion for a PI in an HSR merger case. As Mr. Clanton has explained, in *US v. Siemens Corp.*, 621 F.2d 499 (2d Cir. 1980), the Second Circuit stated that the proper test for determining whether to grant a preliminary injunction in an antitrust action initiated by the government is "whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tip in its favor." The Second Circuit further held that irreparable harm would be presumed where the Government has established a "reasonable probability" of success on the merits. But, to warrant that presumption, the Government "must do far more than merely raise sufficiently serious questions with respect to the merits to make them fair ground for litigation," noting that a PI "remains a drastic form of relief."

- *The one clear difference between the test described in 15 U.S.C. 53(b) and the test generally articulated under common law is that the 53(b) standard does not require proof of irreparable harm. Under the common law preliminary injunction test, how often would the Department of Justice be unable to show irreparable harm when challenging an unconsummated merger? Please identify the conditions under which the Department of Justice could not make a showing of irreparable harm.*

Response:

Under *Siemens*, irreparable harm would be presumed where DOJ established a probability of success in the merits. *See also U.S. v Ivaco, Inc.*, 704 F.Supp. 1409, 1429 (W.D. Mich. 1989); *California v. Am. Stores Co.*, 495 U.S. 271, 295 (1990) (dicta). This makes sense given a general understanding that it is difficult to "unscramble the eggs" once a merger has been consummated, but appreciating that it should take more than raising serious questions as fair ground for further investigation to prevent the parties from closing their transaction.

It is not possible to say in abstract "how often" DOJ would be unable to show irreparable harm in an HSR merge case or to anticipate conditions under which it could not make the requisite showing. I can imagine a court allowing a merger to close under an order to hold acquired assets separate to preserve the Government's ability to obtain an adequate remedy, particularly if a trial on the merits can proceed on a timely basis.

- *Although the Federal Trade Commission may have a lower burden to obtain a preliminary injunction than a private party, is there any court decision that has said the Federal Trade Commission has a lower burden to obtain a preliminary injunction than the Department of Justice?*

Response:

I am not aware of a court decision addressing whether different standards apply to the DOJ and the FTC per se. That is not surprising, because the issue would never come before the court that way. As Mr. Clanton has explained, however, in interpreting 53(b), courts have contrasted that standard to a standard of likelihood of success on the merits and found that the 53(b) standard demands less. *See FTC v. CCC Holdings Inc.*, 605 F.Supp.2d 26, 77 n. 11 (D.D.C. 2009). In addition, as explained above, the FTC itself has described the standard as different. (See discussion of Conyers letter.)

Thank you for affording me the opportunity to respond to these questions.

Sincerely,

Deborah A Garza

Deborah A. Garza