Wilson Sonsini Goodrich & Rosati
PROFESSIONAL CORPORATION

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

Senator Klobuchar's Question for the Record for Jonathan Jacobson

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?**

The simple answer to the question is "no. Never." But let me elaborate. In my 39 years of practice, the firms in which I have been a partner have sheparded many dozens of mergers through the agencies. In each one, the planning process has included a prediction as to which agency would be cleared to evaluate the transaction. In *none* has there been *any* consideration of abandoning or revising the transaction because of the possibility that, after prevailing in an FTC-brought preliminary injunction proceeding, the Commission might later unwind the merger through an administrative proceeding. The potential for such an outcome occasionally appears as a single sub-bullet point in a long PowerPoint, but *never* affects planning or evaluation of the transaction's prospects. The concerns instead are: whether the deal in fact poses a competition problem; whether a second request will be issued; which staff lawyers (e.g., Mergers 2 at the FTC or Lit 3 at DOJ) will handle the matter; whether a preliminary injunction will be granted; and the potential remedies if the merger does not go through unscathed.

As I mentioned in my written statement, I was involved many years ago in matter – *Coca-Cola/Dr Pepper* – that involved both a preliminary injunction and a later Part 3 proceeding. *See* Statement of Jonathan M. Jacobson, Oct. 7, 2015, at 2 & n.1. In that case, the district court *granted* the preliminary injunction, after which Dr Pepper exercised its rights to terminate the transaction and was sold to another buyer. The court of appeals properly vacated the district court decision as moot. Nevertheless, the FTC brought a Part 3 proceeding. Staff and the administrative law judge agreed to dismissal on the ground that continued proceedings were no longer in the public interest. The Commission, however, reinstated the proceeding on a 2-1 vote. The matter proceeded to trial and to a decision by the full Commission, after which Coca-Cola appealed to the D.C. Circuit. While the appeal was pending, the Commission issued its 1995 revised policy on administrative litigation following denial of a preliminary injunction and settled with Coca-Cola around the same time.

I mention this history for two reasons. First, the process involved in *Coca-Cola/Dr Pepper* would *not be affected* by the proposed SMARTER Act because the proceedings there did not involve a "proposed" merger – but instead a merger that had been abandoned. The bill would not inhibit the use of Part 3 where the merger had been enjoined and abandoned; it applies only to those mergers that have *not* been enjoined and that therefore may continue to pose a threat of consumer harm. This makes no sense at all. Second, and more importantly, *Coca-Cola/Dr Pepper* was a catalyst in the commission's reassessment of the use of Part 3 in merger cases, resulting in the procedures we have today. Those procedures require a careful evaluation by the Commission of the value of a follow-on administrative proceeding. And the upshot is that there has not been a single merger since then challenged in Part 3 after a preliminary injunction has been denied.

In short, in the wake of *Coca-Cola/Dr Pepper* and the revised Commission policy, **there is no problem** – much less one that requires an act of Congress to address.

For these reasons, and the reasons set forth in my oral and written testimony, I urge the committee to *reject* that part of the proposed SMARTER Act that would prevent the Commission from conducting administrative proceedings following denial of a preliminary injunction.

Jonathan Jacobson