Questions for the Record
Senator Orrin G. Hatch
Senate Judiciary Committee
Subcommittee on Antitrust, Competition Policy, and Consumer Rights
Hearing: "S. 2012, The 'Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015'"
Wednesday, October 7, 2015

Question for Abbot B. Lipsky, Partner, Latham & Watkins LLP

1. 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?

Yes, I believe that recent cases such as *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), and *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). create a substantial argument that the FTC enjoys a more lenient preliminary injunction standard under 15 U.S.C. §53(b) than the standard applicable to Department of Justice requests for preliminary injunction under 15 U.S.C. §25. This creates a temptation for the FTC to block transactions where it finds merely colorable evidence that a merger will be anticompetitive (arguably sufficient to win a preliminary injunction under the standard articulated by the cited cases), even in situations where the Commission would not succeed in proving a case at trial on the merits.

The current divergence in preliminary injunction standards leads parties to inject an additional level of caution into their consideration of transactions above and beyond that which would be appropriate if the application of the more traditional standard applied to the Justice Department could be expected. That additional degree of caution should not be underestimated: the expense, management distraction, compelled disclosure of sensitive information, often-unfavorable publicity and other disruptions inherent in any intense antitrust litigation matter – disruptions that become especially pronounced if litigation occurs over an extended time, as it frequently does – weigh very heavily against considering a potentially controversial merger from the perspective of any responsible and well-advised business manager. Based on my professional experience in advising parties with regard to transactions that potentially raise antitrust questions, this additional note of caution deters procompetitive or competitively neutral transactions to an appreciable degree.

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

Questions for the Record: Senator Amy Klobuchar

1) *Questions for Ms. Garza, Mr. Lipsky, Mr. Clanton, and Mr. Jacobson*

- 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?

Yes. When the Dr Pepper Company announced that it was terminating its agreement to be acquired by The Coca-Cola Company, its then-owner (private equity firm Forstmann, Little & Company) specifically attributed that termination to the prospect of continuing administrative litigation with the Federal Trade Commission that would otherwise have resulted – precisely the type of proceeding that would be addressed by the SMARTER Act (specifically by the provision that would require the Commission to seek a permanent injunction under Section 13(b) rather than by proceeding through its own Part III administrative litigation for unconsummated transactions such as the then-proposed Coca-Cola Co./Dr. Pepper Co. transaction). As quoted in the Los Angeles Times when the announcement was made,

> "We have no other choice but to request (that) the agreement be terminated given the prospect of years of litigation with the Federal Trade Commission and the resulting potentially adverse effect on the operations and employees of Dr Pepper," Theodore J. Forstmann, general partner of Forstmann, Little, said in the statement.

Jube Shiver Jr., *Dr Pepper Halts Plan to Merge With Coca-Cola: Companies Say Prospect of Lengthy FTC Proceedings Caused Deal's Cancellation*, Aug. 6, 1986, http://articles.latimes.com/1986-08-06/business/fi-1607_1_dr-pepper.

The Federal Trade Commission continued administrative prosecution of its complaint against the abandoned transaction even following the determination by the U.S. Court of Appeals for the D.C. Circuit that the matter was moot, due in part to the termination of the agreement with Coca-Cola Company by Forstmann, Little and to the

sale of Dr Pepper Company by Forstmann, Little to Hicks & Haas, another investment firm. *FTC v. Coca-Cola Co.*, 829 F.2d 191 (D.C. Cir. 1987).[1] The Commission's administrative litigation led to a final FTC decision finding the transaction unlawful under Section 7 of the Clayton Act and Section 5 of the FTC Act, and ordering relief. *Coca-Cola Co.*, 117 F.T.C. 795 (1994). The parties ultimately settled the matter while it was pending administrative review before the D.C. Circuit, prior to full merits briefing. It took nearly nine years for the entire process to unfold.[2]

The foregoing can be verified readily on the basis of public-record information. In my opinion the prospect of continuing FTC administrative litigation following issuance of a preliminary injunction in this specific case had a discouraging effect on consideration of subsequent transactions by a number of firms that I have advised over the years. While companies seldom disclose that they have considered a specific transaction and then decided not to pursue it due to antitrust considerations, the public-record facts of the Coca-Cola Co./Dr Pepper Co. matter provide a sobering reminder to any well-counseled management that transactions that may raise non-trivial antitrust issues can result in "years of litigation with the Federal Trade Commission and the resulting potentially adverse effect" on business. It is therefore my opinion that this history forms an integral part of the legal and practical background that well-counseled businesses consider when evaluating the potential risks of any such transaction.

As discussed in my testimony and at the Subcommittee hearing, the Commission's adoption in 1995 of the Policy Statement regarding Administrative Litigation Following the Denial of a Preliminary Injunction and Rule 3.26 (16 C.F.R. § 3.26) – even though it expressed no firm commitment by the Commission – was widely understood (due to the roughly contemporaneous conclusion of the R.R.

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[1] The short opinion *per curiam* explains the Court's decisions (1) to dismiss the appeal as moot and (2) to remand to the district court with instructions to vacate the preliminary injunction.

[2] For complete clarity I point out that my personal involvement in this matter began when I joined the Coca-Cola Company Law Department in July 1992, after the administrative litigation had been under way for about six years. After supervising the remaining administrative aspects and Court of Appeals phases of the matter, I also had primary responsibility on the Coca-Cola side for the negotiation of the settlement that was ultimately worked out with the Commission.

Donnelley/Meredith Burda and Coca-Cola/Dr Pepper matters) as signaling Commission reluctance to pursue Part III litigation with regard to transactions that had been subject to preliminary injunction proceedings under Section 13(b). It is my understanding that for thirteen years after issuance of the Policy Statement there was no Part III administrative litigation following disposition of a Section 13(b) preliminary injunction in a case involving an unconsummated merger. As time wore on, this might have reduced any chilling effect that would otherwise have resulted from awareness of those earlier proceedings within the antitrust bar and the business community.

In 2008, however, pursuit of administrative litigation following the Commission's loss on motion for preliminary injunction against the Whole Foods Market, Inc./Wild Oats Markets, Inc. acquisition, and changes to the Commission's Rules of Practice for Part III litigation, including Rule 3.26, gave a powerful signal that the "Pitofsky Rule" was unlikely to be followed from that time forward.[3] Since that time the prospect of continuing FTC administrative litigation has been as important as it had been just prior to the issuance of the Policy Statement in 1995, in light of the R.R. Donnelley/Meredith Burda and Coca-Cola/Dr Pepper cases. Although I recognize that the Commission very recently took action apparently intended to restore Rule 3.26 to its status in the 1995-2008 period,[4] in my opinion this is and will be perceived as a discretionary Commission action that can be reversed at any future time, similar to the Commission's previous changes in course on the issue in 1995 and again in 2008. Thus the prospect of Part III litigation will continue to be an important deterrent to the consideration of transactions that may raise antitrust issues – even if such transactions may ultimately be found lawful under prevailing substantive antitrust standards – until the persistent threat of continuing FTC Part III proceedings is more definitely settled by statute.

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[3] *See, e.g.*, Neal R. Stoll & Shepard Goldfein, *Random Events in Merger Notices: 'Cleared to DOJ' vs. 'Cleared to FTC'*, 240 N.Y.L.J. (Dec. 16, 2008) ("Don't expect the commission to continue to adhere to the sentiments expressed in the 1995 Policy Statement . . . ." (quoting extensively from FTC Proposed Amendment to 16 CFR Parts 3 & 4, 73 Fed. Reg. 58,832, 58,837 (Oct. 7, 2008) (quotation omitted))).

[4] Debbie Feinstein, FTC, *Changes to Commission Rule 3.26 re: Part 3 Proceedings Following Federal Court Denial of a Preliminary Injunction* (Mar. 16, 2015), https://www.ftc.gov/news-events/blogs/competition-matters/2015/03/changes-commission-rule-326-re-part-3-proceedings.

2) *Questions for Ms. Garza, Mr. Lipsky, and Mr. Clanton*

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 Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (quotation and citation omitted).

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

Despite apparent similarities between the precise verbal formulation of the "common-law" preliminary injunction standard and the § 13(b) preliminary injunction standard, the use of this specific Second Circuit opinion as a basis for comparison of the two standards is subject to a variety of difficulties. *Citigroup Global* is not an antitrust case, but litigation between two private parties, as distinct from litigation brought against private parties in the name of an agency of the United States, as government merger challenges are.

The Second Circuit recognizes this distinction and has specifically addressed the importance of maintaining emphasis on proof by the government of a "reasonable likelihood of success on the merits," which it regards as a higher standard than the "serious questions" formulation:

> Because the Government in seeking to enjoin a merger under § 7 represents the public's interest in a competitive marketplace, the standards governing the granting of preliminary relief in private litigation are inappropriate. Thus, once the Government demonstrates a reasonable probability that § 7 has been violated, irreparable harm to the public should be presumed. To warrant that presumption, however, the Government must do far more than merely raise sufficiently serious questions with respect to the merits to make them a fair ground for litigation. A preliminary injunction remains a drastic form of relief.

United States v. Siemens Corp., 621 F.2d 499, 506 (2d Cir. 1980) (citations omitted).

- 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.

Absent unusual specific circumstances, the Department of Justice shows irreparable harm from a transaction whenever it establishes a substantial probability of success on the merits. This is because a consummated merger is usually very costly to "undo" – the most basic assumption underlying both the preliminary injunction authority granted to the FTC in Section 13(b) in 1973 and the Hart-Scott-Rodino Antitrust Improvements Act of 1976. But this element is not and should not be deemed satisfied by a showing of colorable evidentiary support for a case on the merits – the "serious questions" standardAs the Justice Department's litigation record shows, it is highly unlikely to fail in its showing of irreparable harm in cases where it proves substantial probability of success on the merits.

- 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?

Among the recent cases most frequently mentioned in this connection are *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), and *FTC v. CCC Holdings Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009). Although it is possible to contend that such cases do not say *in haec verba* that the FTC has a lower preliminary injunction standard than the Department of Justice, as mentioned in my written testimony at page 10, it is clear that other highly respected experts construe these cases as authority for the existence of a lower standard for FTC. I cited specifically the earlier testimony of former FTC Chairman Timothy Muris, who has been directly involved in FTC merger litigation – as FTC Chairman and as a legal representative and advisor to private parties in litigation with the FTC – over an extended period of time, and who has concluded:

> Unfortunately, a few recent court decisions provide the FTC with a lower preliminary injunction standard than the standard for the DOJ. Because of this lower standard, it is now possible for the FTC to obtain a preliminary injunction to block a merger with evidence that would be insufficient for the DOJ to obtain the injunction.

Financial Services and Products: The Role of the Federal Trade Commission in Protecting Consumers–Part II: Hearing Before the Subcomm. on Consumer Protection, Product Safety & Insurance of the S. Comm. on Commerce, Science & Transportation, 111th

Cong. 57 (2010) (statement of Timothy J. Muris, Foundation Professor, George Mason Univ. Sch. of Law, and of counsel, O'Melveny & Myers LLP).