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HEARING ON THE STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2014

HEARING

BEFORE THE

SUBCOMMITTEE ON
REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

ONE HUNDRED THIRTEENTH CONGRESS

SECOND SESSION

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CONTENTS

APRIL 3, 2014

Page

OPENING STATEMENTS

The Honorable Spencer Bachus, a Representative in Congress from the State of Alabama, and Chairman, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 1
The Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 9
The Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 10

WITNESSES

Deborah A. Garza, Partner, Covington & Burling LLP
Oral Testimony 12
Prepared Statement 15
Abbott B. Lipsky, Jr., Partner, Latham & Watkins LLP
Oral Testimony 23
Prepared Statement 25
Richard G. Parker, Partner, O'Melveny & Myers LLP
Oral Testimony 30
Prepared Statement 32
John B. Kirkwood, Professor of Law, Associate Dean for Strategic Planning and Mission, Seattle University School of Law
Oral Testimony 40
Prepared Statement 42

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 61
Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 62
Letter from Albert A. Foer, President, the American Antitrust Institute (AAI), submitted by the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Tennessee, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 64
Letter from the Edith Ramirez, Chairwoman, Federal Trade Commission, submitted by the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary 68
Letter from George S. Cary, Partner, Cleary Gottlieb Steen & Hamilton LLP, former Deputy Director, Bureau of Competition, Federal Trade Commission, submitted by the Honorable George Holding, a Representative in Congress from the State of North Carolina, and Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law 70

Page

Response to Questions for the Record from Deborah A. Garza, Partner, Covington & Burling LLP 72
Response to Questions for the Record from Abbott B. Lipsky, Jr., Partner, Latham & Watkins LLP 76
Response to Questions for the Record from Richard G. Parker, Partner, O'Melveny & Myers LLP 78
Response to Questions for the Record from John B. Kirkwood, Professor of Law, Associate Dean for Strategic Planning and Mission, Seattle University School of Law 81

HEARING ON THE STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2014

THURSDAY, APRIL 3, 2014

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON REGULATORY REFORM,
COMMERCIAL AND ANTITRUST LAW
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to call, at 1:06 p.m., in room 2237, Rayburn Office Building, the Honorable Spencer Bachus, (Chairman of the Subcommittee) presiding.

Present: Representatives Bachus, Marino, Holding, Collins, Johnson, Conyers, and Jeffries.

Staff Present: (Majority), Anthony Grossi, Counsel; Ashley Lewis, Clerk; (Minority) Slade Bond (Counsel); and Rosalind Jackson, Professional Staff Member.

Mr. BACHUS. Good afternoon. The Subcommittee on Regulatory Reform, Commercial and Antitrust Law hearing will come to order.

Without objection, the Chair is authorized to declare recesses of the Committee at any time.

How many of you all have testified before a congressional Committee? Okay. What we do, Professor, we have our opening statements of Members. Then we go to your statements, and then we have questions for all of you, and I will introduce each of you all at the appropriate time.

I recognize myself for an opening statement.

Let me welcome everyone to today's hearing, which is on the discussion draft of legislation. We thank our distinguished panel of witnesses because their testimony on the language in this draft will help to inform our further discussions on Federal antitrust enforcement procedures.

Antitrust enforcement plays an important function in the fair and efficient operation of our market economy. Two Federal agencies enforce our nation's antitrust law, the Department of Justice and the Federal Trade Commission. When a company wishes to merge with or purchase another company, it notifies both antitrust enforcement agencies of the proposed transaction. The agencies then confer and determine which will review the transaction to ensure that antitrust laws are not violated.

There are no fixed rules to determine which agency will conduct the review. If the reviewing agency determines that the proposed transaction violates antitrust law, the agency files a lawsuit in district court to seek an injunction against the transaction. Generally speaking, if the court grants the injunction, the parties abandon the transaction. If the court denies the injunction, the parties may consummate the transaction shortly thereafter.

Although the FTC may pursue further internal administrative proceedings for a merger under its review, the Antitrust Modernization Act of 2002 created a special commission to conduct a review of the antitrust laws and the manner in which DoJ and FTC enforce these laws.

In 2007, this commission published a comprehensive report that included recommendations for potential reforms to existing antitrust enforcement practices. Two of these recommendations were focused on the procedures that agencies follow when they seek to prevent the consummation of a proposed transaction. The report found that courts apply different standards to preliminary injunction requests from DoJ and FTC.

The preliminary injunction standard applied to the FTC is drawn directly from the Federal Trade Commission Act, while the standard applied to the Department of Justice is the government case law standard of the relevant court of appeals. The Antitrust Modernization Commission also highlighted that the FTC has the ability to pursue administrative litigation following a court's denial of its preliminary injunction request, while DoJ cannot conduct administrative litigation. The Antitrust Modernization Commission recommended that Congress enact legislation that would harmonize the preliminary injunction standard at both the FTC and DoJ and provide that the agencies have identical authority to prevent a proposed transaction that is monopolistic or substantially lessens competition.

Today's hearing will examine the discussion draft of legislation called the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014, or SMARTER Act, that draws from these recommendations.

There is much today from our witnesses to discuss. I look forward to the start of testimony.

[Discussion Draft of H.R. _____, the "Strandard Merger and Acquisition Reviews Through Equal Rules Act of 2014" follows:]

[DISCUSSION DRAFT]

113TH CONGRESS
2D SESSION

H. R. _____

To amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as Attorney General exercises such authority.

IN THE HOUSE OF REPRESENTATIVES

M__. _____ (for ____ and ____) introduced the following bill; which was referred to the Committee on _____

A BILL

To amend the Clayton Act and the Federal Trade Commission Act to provide that the Federal Trade Commission shall exercise authority with respect to mergers only under the Clayton Act and only in the same procedural manner as Attorney General exercises such authority.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014".

1 **SEC. 2. AMENDMENTS TO THE CLAYTON ACT.**

2 The Clayton Act (15 U.S.C. 12 et seq.) is amended—

3 (1) in section 4F—

4 (A) in the heading by inserting "OR THE

5 FEDERAL TRADE COMMISSION" after "UNITED

6 STATES",

7 (B) in subsection (a)—

8 (i) by inserting "(or the Federal

9 Trade Commission with respect to a viola-

10 tion of section 7)" after "United States",

11 and

12 (ii) and inserting "(or it)" after "he"

13 each place it appears, and

14 (C) in subsection (b) by inserting "(or the

15 Federal Trade Commission with respect to a

16 violation of section 7)" after "United States",

17 (2) in section 5—

18 (A) in subsection (a) by inserting "(includ-

19 ing a proceeding brought by the Federal Trade

20 Commission with respect to a violation of sec-

21 tion 7)" after "United States",

22 (B) in subsection (b) by inserting "(includ-

23 ing the Federal Trade Commission with respect

24 to a violation of section 7)" after "United

25 States" each place it appears,

(C) in subsection (c) by inserting "(including the Federal Trade Commission with respect to a violation of section 7)" after "United States" each place it appears,

(D) in subsection (d) by inserting "(including the Federal Trade Commission with respect to a violation of section 7)" after "United States" each place it appears,

(E) in subsection (e)(1) by inserting "(including the Federal Trade Commission with respect to a violation of section 7)" after "United States",

(F) in subsection (f)(4) by inserting "(including the Federal Trade Commission with respect to a violation of section 7)" after "United States",

(G) in subsection (g)—

(i) by inserting "(including the Federal Trade Commission with respect to a violation of section 7)" after "United States",

(ii) by inserting "(or the Federal Trade Commission)" after "General", and

1 (iii) by inserting "(or any officer or
2 employee of the Federal Trade Commis-
3 sion)" after "Justice",
4 (II) in subsection (i) by inserting "(includ-
5 ing the Federal Trade Commission with respect
6 to a violation of section 7)" after "United
7 States".
8 (3) in section 11(a) by inserting "(excluding en-
9 forcing compliance with section 7)" after "com-
10 merce",
11 (4) in section 13 by inserting "(including the
12 Federal Trade Commission with respect to a viola-
13 tion of section 7)" after "United States" the 1st
14 place it appears, and
15 (5) in section 15 by inserting "and the duty of
16 the Federal Trade Commission with respect to a vio-
17 lation of section 7," after "General,".
18 **SEC. 3. AMENDMENTS TO THE FEDERAL TRADE COMMIS-**
19 **SION ACT.**
20 The Federal Trade Commission Act (15 U.S.C. 41)
21 is amended—
22 (1) in section 5(b)—
23 (A) by inserting "(excluding an unfair
24 method of competition that would result from
25 the consummation of a merger, acquisition,

joint venture, or similar transaction)" after "unfair method of competition", and

(B) by inserting "(excluding any activity in preparation for a merger, acquisition, joint venture, or similar transaction which if consummated, may result in any unfair method of competition)" after "method of competition" the 2d and 3d places it appears,

(2) in the 4th undesignated paragraph of section 9 by inserting "or the Commission with respect to any activity in preparation for a merger, acquisition, joint venture, or similar transaction which if consummated, may result in any unfair method of competition," after "commission,", and

(3) in section 13(b)(1) by inserting "(excluding section 7 of the Clayton Act and section 5(a)(1) with respect to an unfair method of competition that would result from the consummation of a merger, acquisition, joint venture, or similar transaction)" after "Commission".

SEC. 4. EFFECTIVE DATE; APPLICATION OF AMENDMENTS.

(a) EFFECTIVE DATE.—Except as provided in subsection (b), this Act and the amendments made by this Act shall take effect on the date of the enactment of this Act.

1 (b) APPLICATION OF AMENDMENTS.—The amend-
2 ments made by this Act shall not apply to any of the fol-
3 lowing that occurs before the date of enactment of this
4 Act::
5 (1) A violation of section 7 of the Clayton Act
6 (15 U.S.C. 18).
7 (2) A transaction with respect to which there is
8 compliance with section 7A of the Clayton Act (15
9 U.S.C. 18a).
10 (3) A merger, acquisition, joint venture, or
11 similar transaction that is consummated.

Mr. BACHUS. At this time, I recognize the Ranking Member, Mr. Hank Johnson of Georgia, for his opening statement.

Mr. JOHNSON. Thank you, Mr. Chairman.

Today's hearing is——

Mr. BACHUS. Let me say this, and probably you may comment on this, too. Of course, I think we are all mindful of what happened at Fort Hood today, and some of us discussed our time in the Army, and it is obviously a sad day for our country, and our thoughts and prayers are with our soldiers and their families.

Mr. Johnson?

Mr. JOHNSON. Thank you. I stand with you in that regard.

Today's hearing is an important opportunity to consider the Federal Trade Commission's role in developing and enforcing antitrust law. When Congress first established the Federal Trade Commission in 1914, it sought to safeguard consumers against anticompetitive behavior by breathing new life into antitrust enforcement. Unlike its predecessor, the Commerce Department's Bureau of Corporations, Congress specifically empowered the Commission with adjudicative authority to enforce, clarify, and develop antitrust law. And unlike generalist courts of that era, the Commission also had the mission to study and enunciate the law as an expert tribunal through its research and information-gathering authority.

A century later, the Commission continues to advance antitrust law. Under the process for administrative litigation, also known as Part 3 litigation, the Commission may seek permanent injunctions in its own administrative court in addition to its ability to seek preliminary injunctions in Federal district courts. This additional authority is a unique mechanism that takes advantage of the Commission's longstanding expertise to develop some of the most complex issues in antitrust law. It is critical to the Commission's mission to promote competition and consumer welfare.

Today, the Subcommittee will consider the Standard Merger and Acquisition Reviews Through Equal Rules, or the SMARTER, Act. This bill would create a uniform standard for preliminary injunctions and eliminate the Commission's century-old authority to adjudicate the permanent injunctions of mergers, acquisitions, joint ventures, or similar transactions.

The stated goal of the SMARTER Act to create a uniform process for merger review between the Federal Trade Commission and the Department of Justice is not without appeal. I consider myself a man of strong and unrelenting support for the third co-equal branch of government, the Federal Judiciary. I understand the objective of reserving power for the Federal courts instead of agencies and creating symmetry in antitrust enforcement. I also understand the concerns associated with administrative litigation.

But I would point out that these concerns are hardly new and have existed for decades without serious proof of actual harm or unfairness. The American Bar Association expressed concerns with the FTC's twin role as prosecutor and judge in a landmark report 25 years ago but ultimately concluded that the benefits of this enforcement regime outweighed these concerns.

Likewise, when the ABA revisited this question 7 years ago, it continued its support of administrative litigation with an important

exception in those rare cases of the FTC pursuing administrative litigation after a Federal court denies a preliminary injunction.

But the prospect of completely eliminating the FTC's adjudicative authority, a practice that has expertly guided our nation's antitrust laws for a century, raises serious concerns. I cannot stand by and support legislation that would dismantle government and a century of progress under the guise of symmetrical enforcement. Although I welcome today's hearing, I sincerely hope that we can find an evenhanded solution that does not throw the baby out with the bath water. After all, if we can all agree that anticompetitive mergers pose serious threats to consumers and to the marketplace, the overriding goal of this legislation should be to preserve competition.

I thank the Chair for holding this hearing and I yield back.

Mr. BACHUS. I thank the gentleman from Georgia.

At this time, I recognize the Ranking Member of the full Committee, Mr. Conyers from Michigan, for his opening statement.

Mr. CONYERS. Thank you, Chairman Bachus. I will not take up the 4 or 5 minutes, but I did want you to know that there are some reservations that I will be considering as we proceed on this very important hearing.

What I think we are trying to do is to make the Federal Trade Commission adhere to the same merger enforcement procedures as the Justice Department's Antitrust Division. Now, there are some logical appeals that reach out to me, and there are some serious concerns about potential detrimental effects that may occur.

You see, by making the FTC like DoJ, this proposal would weaken the FTC's independence, which contravenes Congress' original intent in establishing the Federal Trade Commission in the first place. And so I need you to work with me on that, and I invite any comments, particularly from the witnesses, and I will be holding these discussions with the Chairman and my colleagues on this very important Committee.

Now, a concern. Eliminating the FTC's ability to conduct administrative adjudication could harm the FTC's ability to protect consumers. Administrative adjudication by which the agency and the merging parties litigate their case in front of an administrative law judge allows for a less formal adjudication process before a panel of experts, in contrast to litigation before a judge, a generalist judge, in a Federal court.

Moreover, the administrative process allows the testing of novel theories and the development of expertise in new industries in a way that a generalist court is less well suited to handle.

So the smarter approach is with some caution, and I will be listening carefully to what is said.

Our preeminent goal here should be to strengthen, not weaken, antitrust enforcement in order to protect consumers, which is why FTC Chairwoman Ramirez wrote to this Subcommittee raising concerns about the bill under discussion, pointing out that it would have far-reaching, immediate effects and could fundamentally alter the nature and function of the FTC, as well as the potential for significant and unintended consequences.

So it is with great pleasure that I join in welcoming all of our distinguished witnesses and look forward to this hearing, and I ask unanimous consent to put the remainder of my remarks in the

record, including the letter to the Chairman and the Ranking Member by the chairwoman of the FTC, and I yield back the balance of my time.

Mr. BACHUS. Let me say this; and, of course, I only speak as the Subcommittee Chair. But I think that we are all concerned about monopolistic transactions that create monopolistic entities or that are monopolistic or that substantially lessen competition, and that is really why we are having this hearing, to see whether these proposals, how narrowly they are drawn and whether or not they will have any effect on that. We obviously are concerned about cartels. You read about some of those in existence in other countries and in the history of this country.

So I think we are all cautious about anything that would create more opportunities for that type of transaction, and I think that will be something on which our witnesses will build a record and can address some of those concerns.

Without objection, other Members' opening statements will be made a part of the record.

We have a very distinguished panel today, and I will first begin by introducing all our witnesses.

Ms. Garza is Co-Chair of Covington & Burling's Antitrust and Competition Law Practice Group. Ms. Garza has been involved in some of the largest antitrust matters in the last 30 years, including the merger of Exxon and Mobil, the U.S. Government's suit against Microsoft, the USFL's suit against the NFL, and many other litigation and regulatory matters on behalf of Fortune 500 companies.

Before her time at Covington, Ms. Garza served as Acting Assistant Attorney General in charge of the Antitrust Division at the Department of Justice. She also served as Deputy Assistant Attorney General for Regulatory Affairs, Special Assistant, Chief of Staff, and Counselor to the Assistant Attorney General in charge of the antitrust Division.

In 2004, she was supported by President George W. Bush to chair the Antitrust Modernization Commission, or AMC, a bipartisan blue-ribbon panel created by Congress to study and report to the President and Congress on the state of antitrust enforcement in the United States. The Commission's report has been widely praised for providing a valuable framework for policy discussions going forward.

Ms. Garza received her Bachelor's degree from Northern Illinois University and her J.D. from the University of Chicago.

We welcome you, Ms. Garza.

Mr. Lipsky is a partner in the Washington, D.C. office of Latham & Watkins. He is internationally recognized for his work on both U.S. and non-U.S. competition law and policy, and has handled antitrust matters throughout the world. Before Lathan & Watkins, Mr. Lipsky served as Chief Antitrust lawyer for the Coca-Cola Company from 1992 to 2002. He has been closely associated with efforts to streamline antitrust enforcement around the world, advocating a reduction of compliance burdens and the harmonization of fundamental objectives of antitrust law.

From 1981 through 1983, Mr. Lipsky served as Deputy Assistant Attorney General under William F. Baxter, who sparked profound antitrust law changes while serving as President Reagan's chief

antitrust official. In that position, Mr. Lipsky supervised Supreme Court litigation in a series of ground-breaking antitrust cases and played a fundamental role in developing DoJ's merger guidelines.

Mr. Lipsky received his Bachelor's degree from Amherst College, his Master's from Stanford University, and his J.D. from Stanford Law School.

We welcome you, Mr. Lipsky.

Mr. Parker is in the Washington, D.C. office of O'Melveny and Myers and the chair of the firm's antitrust and competition practice. He has extensive experience in antitrust matters both before the enforcement agencies and in the courts. Mr. Parker has been recognized as a leading antitrust lawyer by many publications, including Chambers USA, which noted that he is acknowledged by all corners of the market as a tremendous antitrust lawyer who can both litigate and handle deals.

Prior to O'Melveny and Myers or his tenure there, Mr. Parker spent 3 years at the Federal Trade Commission as Director for the Bureau of Competition and received the Distinguished Service Award from the chairman of the FTC upon his departure.

Mr. Parker received his Bachelor's degree summa cum laude from the University of California at Davis and his J.D. from the University of California at Los Angeles or, I guess, UCLA.

We welcome you.

Our final witness, Professor Kirkwood, is Professor of Law and Associate Dean for Strategic Planning and Mission at Seattle University School of Law. He is also a Senior Fellow of the American Antitrust Institute. Following his graduation from law school, Professor Kirkwood directed antitrust policy offices in the Premerger Notification Program at the FTC. He managed antitrust cases and investigations at the FTC Seattle office and presently consults on antitrust matters. He has received the Outstanding Faculty Award and the Dean's Medal from Seattle University.

Professor Kirkwood received his Bachelor's degree magna cum laude from Yale University, his Master's in Public Policy cum laude from the Kennedy School of Harvard University, and his J.D. cum laude from Harvard Law School.

So you are an Ivy League man, right? So, we welcome you, Professor.

And we welcome all our witnesses.

Each of the witnesses' written testimony will be entered into the record in its entirety.

I ask that each of the witnesses summarize his or her testimony in the 5 minutes allotted. I will say this, we will turn on a light, but if you go 6 minutes, 6-and-a-half minutes, at least in this Subcommittee, nobody is going to stop you because we are more interested in you making a coherent statement than we are in yellow and red lights.

So we will start, Ms. Garza, with your testimony.

TESTIMONY OF DEBORAH A. GARZA, PARTNER, COVINGTON & BURLING LLP

Ms. GARZA. So, you want me to turn the mic on, and you would like a coherent statement.

Mr. BACHUS. Coherent. Really, if it is 7 or 8 minutes, I don't mind.

Ms. GARZA. You keep making it longer, and I was going for 2 or 3, but we will do it.

So, Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you very much for the opportunity to appear before you today to provide views on the proposed SMARTER Act.

In May 2007, Representative Conyers, I remember that you were there. You might remember me. In May 2007, I testified before the Judiciary Committee's Antitrust Task Force as former Chair of the Antitrust Modernization Commission regarding the AMC's report and recommendations. Three of those recommendations actually read on the types of issues that you are considering here today. Each of the three recommendations were bipartisan.

I want to make the point that in my view, this is not a partisan issue, not a DoJ versus FTC issue, not really even an enforcement, pro-enforcement versus anti-enforcement, issue. It really is, I think, in our view at the time with the AMC, a good government issue, and I do think it is important for you to be considering it now even though it has taken 7 years. I have been very patient. It is important to consider it now because we do have an issue, frankly, around the world with due process. Right now we have an issue with other jurisdictions and the way that they are enforcing their antitrust laws.

So I think it is important, at the same time that the U.S. Government is out talking to other jurisdictions about the way that they enforce their antitrust laws, that we at least take the time to examine our own processes to make sure that they are fair and equal and perceived as being fair and equal. So I thank you for taking this opportunity to make a review of the way that the FTC and the DoJ handle HSR mergers.

One of the recommendations of the AMC called specifically for legislation like the SMARTER Act—that is a great name, by the way—to equalize merger enforcement authority of the U.S. Federal Trade Commission and the U.S. Justice Department under the Hart-Scott-Rodino Act. I will say that the AMC's recommendation was narrowly and specifically focused on the issue of mergers that are notified under the Hart-Scott-Rodino Act.

The premise of SMARTER and the recommendation by the AMC was quite simple. A merger should not be treated differently depending on which antitrust enforcement agency happens to review it. Regulatory outcome should not be determined by the flip of an agency merger coin, wise legislation needed or appropriate the AMC thought at the time and I think now. It is appropriate precisely to maintain consensus about a strong antitrust enforcement regime. A perception of unequal or unfair treatment I think undermines that consensus.

As the AMC explained at the time, parties to a merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DoJ reviews their merger. A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly.

I won't repeat much more of what is in my testimony, but I will add to you that it is very easy for companies to understand that certain of their transactions will have to be reviewed by the government, and it is easy for them to understand that they will eventually, if necessary, get their day in court. It is much more difficult for them to understand that how they will be treated and how their transaction will fare may depend on whether the Federal Trade Commission looks at their transaction or the Justice Department. And it is very hard to explain to a company that is before the FTC why it is that they won't get that same day in court, necessarily.

As other people will testify, and as we indicated in the AMC report and, Chairman Bachus, you mentioned, it can be very difficult to hold a transaction together for the length of time that it takes to go through a full proceeding, from a preliminary injunction action in court all the way through to an administrative hearing, review by the Commission, and then finally review by a court.

So the idea, I think, is not to prevent either agency from being able to fully consider a transaction. It is really to make sure that every company feels that it has its day in court. We didn't see it at the time, and I don't see it now, as disadvantaging or handicapping the Federal Trade Commission. The Justice Department wins cases and wins case challenges to HSR mergers. The FTC just won a challenge in a merger out in Idaho. The agencies do win cases when they have the evidence to support their cases. So this is not about tilting the deck to make sure that mergers that shouldn't go through, go through. It is simply about making the process fair and equal and understandable.

Thank you.

[The prepared statement of Ms. Garza follows:]

PREPARED STATEMENT
OF DEBORAH A. GARZA
FORMER CHAIR, ANTITRUST MODERNIZATION COMMISSION
PARTNER, COVINGTON & BURLING LLP

BEFORE THE UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON THE JUDICIARY
SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

HEARING ON

THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES (SMARTER) ACT OF 2014"

WASHINGTON, D.C.
APRIL 3, 2014

Statement of
Deborah A. Garza

Hearing on
The "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2014"

Chairman Bachus, Ranking Member Johnson, and Members of the Subcommittee, thank you for the opportunity to appear before you today in support of the proposed SMARTER Act. In May 2007, I testified before the Judiciary Committee's Antitrust Task Force as former Chair of the Antitrust Modernization Commission ("AMC") regarding the AMC's Report and Recommendations. Three of those recommendations—all of which have bipartisan support—are relevant to this hearing. One of them called specifically for legislation like the SMARTER Act to equalize the merger enforcement authority of the U.S. Federal Trade Commission ("FTC") and U.S. Department of Justice ("DOJ") by prohibiting the FTC from pursuing administrative litigation against transactions notified under the Hart-Scott-Rodino Act.[1] So, it is a great pleasure for me to be here today to testify in support of the SMARTER Act. Seven years is a while, but I never lost faith that the wisdom of the AMC recommendations would prevail.

The premise of SMARTER is simple: A merger should not be treated differently depending on which antitrust enforcement agency happens to review it. Regulatory outcome should not be determined by a flip of the merger agency coin.

[1] *See* Recommendation 25 of the Report and Recommendations of the Antitrust Modernization Commission (April 2007) (Hereinafter referred to as "AMC Report").

Why is this Legislation Needed?

This legislation is needed because it is important to maintain consensus about the value of a strong antitrust enforcement regime. A perception of unequal or unfair treatment undermines that consensus.

As the AMC explained:

> Parties to a merger should receive comparable treatment and face similar burdens regardless of whether the FTC or the DOJ reviews their merger. A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More important, it creates the impression that the ultimate decision as to whether a merger may proceed depends in substantial part on which agency reviews the transaction. In particular, the divergence may permit the FTC to exert greater leverage in obtaining the parties' assent to a consent decree.[2]

As will be explained below, the need for corrective legislation is even more evident today than when the AMC issued its findings and recommendations in 2007.

How the Problem Arises

The problem arises because, while the FTC and DOJ have essentially identical authority to enforce the Clayton Act[3] against mergers they believe to be anticompetitive, the processes they use and the judicial standards they face are very different. Because of its institutional structure as an administrative agency, the FTC has a potentially enormous advantage vis-à-vis DOJ and leverage over the parties with respect to the mergers it chooses to challenge. Indeed, under current law, one could argue that the FTC is in a "heads we win, tails you lose" position.

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[2] AMC Report at 138-39.

[3] 15 U.S.C. § 12. DOJ has sole jurisdiction with respect to banks, railroads, airlines and certain telecommunications firms. But the agencies otherwise share jurisdiction and are both active in the defense, healthcare and other spaces, even sometimes trading back and forth transactions involving certain industries and even certain companies.

As a result, merging parties are justifiably concerned that their fates may be different depending on whether it is the FTC or DOJ that reviews their merger.

Each of the FTC and DOJ are authorized to seek both preliminary and permanent federal court injunctions blocking a merger.[4] But their practices with respect to seeking permanent injunctions differ importantly.

For its part, DOJ typically agrees with merging parties to consolidate proceedings for preliminary and permanent relief under Rule 65(a)(2) of the Federal Rules of Civil Procedure (assuming they can agree to a reasonable schedule). This ensures the parties a full hearing on the merits, with DOJ having to prove its case based on a preponderance of the evidence.

In contrast, the FTC has never agreed to a consolidated proceeding and, indeed, has affirmatively resisted it. Despite the FTC's legal ability to seek permanent relief from the district court, it prefers to seek a preliminary injunction only, to preserve the status quo while it proceeds with its administrative litigation.

This approach has great strategic significance. First, the standard for obtaining a preliminary injunction in government merger challenges is lower than the standard for obtaining a permanent injunction. That is, it is easier to get.

Second, as a practical matter, the grant of a preliminary injunction is typically sufficient to end the matter. In nearly every case, the parties will abandon their transaction rather than incur the heavy cost and uncertainty of trying to hold the merger together through further proceedings—which is why merging parties typically seek to consolidate proceedings for preliminary and permanent relief under Rule 65(a)(2). Time is of the essence. As one witness

[4] *See* 15 U.S.C. § 25 (DOJ); 15 U.S.C. § 53(b) (FTC).

testified before the AMC, "it is a rare seller whose business can withstand the destabilizing effect of a year or more of uncertainty" after the issuance of a preliminary injunction.[5]

Third, even if the court *denies* the FTC its preliminary injunction and the parties close their merger, the FTC can still continue to pursue an administrative challenge with an eye to undoing or restructuring the transaction – as it often does. This is the "heads I win, tails you lose" aspect of the situation today. It is very difficult for the parties to get to the point of a full hearing in court given the effect of time on transactions, even with the FTC's recently expedited administrative procedures.

To appreciate what happens, I encourage the Subcommittee members to study the FTC's challenge in 2008 to the proposed acquisition by Inova Health Systems Foundation of Prince William Health System, Inc. as an example.[6] In that matter, the FTC commenced its own administrative proceedings at around the same time that it sued to get a preliminary injunction in federal district court, clearly signaling that the administrative litigation would proceed regardless of what the district court might do. For good measure, the FTC appointed then-Commissioner Rosch as the administrative law judge. He imposed a "fast track" schedule under which the administrative hearing would begin within about two months after the court was expected to rule. He also promised to issue his initial decision soon after the hearing concluded, and the Commission said it would decide any appeal of the initial decision within 90 days. While this fast-track procedure was packaged as a way to shorten how long the parties would have to wait for their full day in court, its only apparent certain effect was to encourage

[5] Testimony of Michael Sohn before the Antitrust Modernization Commission, Federal Enforcement Institutions Hearing, at 11 (Nov. 3, 2005). In fact, by the time a preliminary injunction issues, a merger will already likely have been under investigation and in litigation for more than a year.
[6] Neither I nor my firm was involved in any way in that transaction.

the court to issue a preliminary injunction and the parties to terminate their merger agreement. In a press release, the parties attributed their decision to abandon the deal to "the unusual process changes by the [FTC that] threatened to prolong the completion of the merger by as much as two years, which both health systems believe is not in the best interest of the communities they serve."[7]

It should also be noted that in at least some courts the standard applied in deciding whether to issue a preliminary injunction is less burdensome for the FTC than for DOJ. The FTC must meet a public interest standard under Section 13(b) of the FTC Act. An injunction shall be granted "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of success, such action would be in the public interest."[8] Courts have applied a variety of formulations in describing the burden and what the FTC must do to satisfy it, including that the FTC merely have raised questions "so serious, substantial, difficult and doubtful as to make them fair ground for further investigation."[9] In contrast, because Section 15 of the Clayton Act, under which DOJ proceeds, does not specify a standard, courts generally apply a traditional equities test requiring DOJ to show a reasonable likelihood of success on the merits—not merely that there is "fair ground for further investigation." Without regard to how significant the different standards might if applied to a particular case, the AMC concluded (and I agreed) that it would be better to eliminate uncertainty by making it clear that the same standard applies to both the FTC and DOJ.

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[7] Press Release, Inova Health System, Statement from Inova Health System and Prince William Health System About the Proposed Merger (June 6, 2008), available at http://newsroom.inova.org/article_display.cfm?article_id=5135.
[8] 15 U.S.C. § 53(b).
[9] FTC v H.J. Heinz Co., 246 F.3d 708, 714-15 (D.C. Cir. 2001). *See also* FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028, 1034-35 (D.C. Cir. 2008).

AMC Recommendations

As I stated at the outset, the AMC offered three sets of interrelated recommendations and findings. The first was that the FTC "should adopt a policy that when it seeks injunctive relief in Hart-Scott-Rodino Act ["HSR"] merger cases in federal court, it will seek both preliminary and permanent injunctive relief, and will seek to consolidate those proceedings so long as it is able to reach agreement on an appropriate scheduling order with the merging parties."[10] The FTC pretty clearly rejected that advice. I would suggest that the agency saw no particular advantage in disarming itself.

The second was for Congress to amend Section 13(b) of the FTC Act to prohibit the FTC from pursuing administrative litigation in HSR merger cases. Four of the 12 AMC Commissioners did not join this recommendation.[11] Commissioner Burchfield explained that he declined to join in part because the legislation would be practically meaningless so long as the FTC could circumvent the law by instituting administrative proceedings as soon as the merger closed after the denial of a preliminary injunction. Commissioners Jacobson and I explained that we declined to join based on the FTC's then-policy and practice of not routinely pursuing follow-on administrative litigation where a preliminary injunction had been denied. As we have seen, however, that policy and practice changed very soon after the AMC issued its report. Speaking only for myself (and not for Mr. Jacobson), had I looked into my crystal ball and seen Inova and other developments, I would have joined in the recommendation of my more prescient colleagues.

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[10] AMC Report Recommendation 24. Only AMC Commissioners Cannon (R) and Yarowsky (D) did not join in this recommendation.
[11] Burchfield (R), Kempf (R), Jacobson (D) and Garza (R) did not join.

Third, the AMC recommended that Congress act to ensure that the same standard for a grant of a preliminary injunction applies to both the FTC and DOJ. Only one AMC Commissioner declined to join this recommendation (Burchfield) on the ground that the case law is clear that the traditional equities test applies except where Congress has expressly said otherwise; in his view, legislating as recommended by the AMC would be as likely to confuse and to clarify.

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It appears to me that the SMARTER Act accomplishes the full gist of these AMC recommendations. For that reason, I am pleased to testify in support and to thank this Subcommittee for the attention it has paid to the AMC recommendations.

Mr. BACHUS. Thank you very much.
Mr. Lipsky?

TESTIMONY OF ABBOTT B. LIPSKY, JR., PARTNER, LATHAM & WATKINS LLP

Mr. LIPSKY. I also want to express my thanks to the Chairman and the Ranking Member and all the Members of the Subcommittee who have taken time out of their busy schedule to appear today, and also thank you for your strong statements in support of free markets and antitrust laws as a way to preserve free markets and keep the American economy growing and going.

I am going to be summarizing my statement very briefly and focusing more on the question of administrative litigation as opposed to the injunction standard, which I understand my colleague, Rich Parker, is going to address in some considerable detail.

The first point I want to make is that the basic thrust of the bill in removing administrative litigation at the FTC as an option for cases where the FTC has failed to win an injunction in court is pretty much what the situation is today. When President Clinton appointed Professor Bob Pitofsky, an extremely distinguished antitrust scholar and practitioner, to be chairman of the FTC back in the 1990's, one of the very first things he did was to have the FTC issue a statement and establish as policy that, in general, the Commission would always reconsider whether administrative litigation was appropriate to carry forward if the Commission lost the merger case in court. And in practice, the way that has worked out is exactly the way that the FTC merger cases would work out under this bill, because as far as I am aware, no case in which the FTC had lost an injunction suit was carried forward in administrative litigation. I was able to find two cases where the Commission, having lost a couple of cases in court, the Refining case, Western Refining, and a couple of other cases, declined to carry forward an administrative litigation.

I believe that Chairman Pitofsky was right in persuading the Commission to adopt that policy because the Commission had I think justly been criticized for conducting very extensive litigation, administrative litigation, following court losses under circumstances where it was very difficult to argue that the public interest had been served.

In the one case, even though the Commission had won in court and the target of the acquisition had been sold to other interests and had been disposed of in other ways, the Commission continued that litigation for 9 years. Eventually that litigation was settled under Chairman Pitofsky, who settled I think on relatively lenient terms, and justly so.

And the other case, and perhaps the leading example is the R.R. Donnelley case, where the Commission lost its case in court, persisted in administrative litigation for 5 years, only to conclude that the transaction, the merger was lawful. So essentially, that administrative litigation had continued to really no good effect.

I think that the Committee is right, even those who expressed some reservation about this approach. They are right to be concerned about the unique tools available to the Commission and the unique role that the Commission has in forwarding antitrust doc-

trine. But I don't think the ability to conduct administrative litigation in a merger case where the Commission was unsuccessful in court has much to do with preserving that uniqueness.

The FTC has many unique elements that Congress put into the original legislation and enacted since, the so-called 6(b) authority to conduct industry investigations, which is now being used to examine the whole issue of patent controls. The Commission under Chairman Ramirez was extremely constructive in bringing harmony to the whole idea of how the antitrust laws apply to horizontal restraints, which culminated in the so-called Three Tenors decision and which has been followed in a number of other circuits. It was a very valuable contribution to a very uncertain area of the law.

I don't think that this one modest reform to prevent the kinds of delay and expense that occurred in the cases that I alluded to earlier will at all harm or diminish the Commission's ability to do good and to advance antitrust law.

Finally, I see that I am heading to the end of my time, but I wanted to ask you to consider one other dimension which is addressed in the last paragraph of my testimony. The last time I appeared before this Committee it was actually a hearing Chaired by Mr. Johnson, who conducted a very interesting proceeding on the subject of how the new Chinese anti-monopoly law was influencing American business, and a number of concerns were expressed. I think there was some cautious optimism, but there was also concern that the Chinese antitrust law might be enforced in a way that would obstruct American business or be uncertain or unduly burdensome.

Today we have a situation where Chinese anti-monopoly law approval for mergers is usually the slowest boat in the merger notification convoy. In 1976, the U.S. was the very first country to have mandatory premerger notification. We now have over 80 jurisdictions around the world. They all look to the United States as a model for how to enforce antitrust law. And given that the burden and expense and complexity of complying with the antitrust laws in 100 jurisdictions around the world is so much greater than it was formerly, I think it behooves us to exercise leadership.

The United States should exercise leadership and make sure that its processes are rational and as efficient as possible, and everything we do in the antitrust sphere is echoed in those other 100 jurisdictions, and that is why we should constantly reconsider whether we should really be required to conduct these kinds of proceedings. That is why I favor the thrust of the bill.

Thank you very much.

[The prepared statement of Mr. Lipsky follows:]

PREPARED STATEMENT OF

ABBOTT B. LIPSKY, JR.
Partner, Latham & Watkins LLP

on

The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"

Before the

House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

House Judiciary Committee

Washington, D.C.
April 3, 2014

PREPARED STATEMENT OF

ABBOTT B. LIPSKY, JR.

Mr. Chairman and Honorable Members of the Subcommittee, my name is Abbott B. Lipsky, Jr. and I am a partner in the Washington, D.C. office of Latham & Watkins LLP. I am very grateful for your invitation to testify today on the discussion draft of the SMARTER Act, a bill that, if enacted, would equalize the enforcement tools applied by the two federal antitrust agencies to mergers and other structural transactions. This testimony provides my own views as an individual with thirty-eight years' experience as an antitrust lawyer. In presenting this testimony I am not representing any party.

I have been involved in a variety of cases involving antitrust challenges to mergers and other structural transactions from diverse perspectives – as a staff attorney and then as Deputy Assistant Attorney General in the Antitrust Division, as the chief global antitrust counsel at the Coca-Cola Company, and as a private practitioner representing parties engaged in structural transactions. I have represented parties in structural transaction matters before both federal agencies and before the courts (as well as before numerous antitrust enforcement agencies in a wide variety of jurisdictions around the world), and I have had the opportunity to confront in real time the situations and issues that would be addressed by the SMARTER Act. I support the two main thrusts of the SMARTER Act – to clarify that traditional injunction standards apply regardless of which federal antitrust agency challenges a structural transaction in court, and to provide equivalent procedures for each agency in cases involving structural transactions. This testimony focuses on the latter aspect.

Following President Clinton's designation of Prof. Robert Pitofsky as Chairman of the FTC, the Commission clarified its policy of reassessing the public interest in pursuing administrative litigation in structural transaction cases when the federal courts had denied a

Commission request for injunction.[1] The issuance of this Statement was perceived in part as a response to criticism of the Commission's previous use of administrative litigation in such circumstances. In one case the Commission had pressed its merger challenge through years of administrative litigation following rejection of its application for a court injunction, only to conclude ultimately that the proposed merger was indeed lawful.[2] Although the Policy Statement was not by any means an ironclad promise to avoid administrative litigation in similar cases, I am not aware of any administrative case pursued subsequently by the Commission in the circumstances addressed by the 1995 Statement. I am aware of at least two cases in which the policy was explicitly followed, and there may be more.[3]

Legislation that largely embodies the approach taken by the FTC following issuance of the 1995 Policy Statement is warranted in light of this experience. Existing law gives the FTC extraordinary flexibility to determine how and when it will pursue administrative litigation challenging structural transactions. The cost and duration of administrative litigation – especially when added on top of the already costly and time-consuming legal processes involved in the resolution of a suit for injunction – can easily discourage stakeholders from considering lawful and procompetitive transactions on the margin. There are structural transaction cases that persisted in administrative litigation for as long as nine years (including some time pending before a federal appeals court).[4] The possibility of lengthy and costly administrative litigation for transactions that are cleared to the FTC for investigation complicates the stakeholders' legal assessment of structural transactions. This is because there is no reliable basis to determine whether a transaction will be reviewed or challenged by the FTC as distinct from the Department

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[1] Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995).

[2] R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995).

[3] FTC Press Release, FTC Closes its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), available at http://www.ftc.gov/news-events/press-releases/2005/06/ftc-closes-its-investigation-arch-coals-acquisition-triton-coal (visited March 31, 2014); FTC Press Release, FTC Ends Administrative Litigation in Western Refining Case (October 3, 2007), available at http://www.ftc.gov/news-events/press-releases/2007/10/ftc-ends-administrative-litigation-western-refining-case (visited April 1, 2014).

[4] FTC Press Release, Coca-Cola Company (May 18, 1995) (noting settlement and indicating parties' intent to dismiss pending appeal), available at http://www.ftc.gov/news-events/press-releases/1995/05/coca-cola-company (visited April 1, 2014).

of Justice. And even for cases that clear to the FTC, there can be no assurance that victory in court would assure that the Commission would not proceed with administrative litigation.

It has been said that administrative litigation offers the opportunity to create a more complete record and to develop and apply more specialized expertise for structural transaction cases than is available through court litigation. While these are plausible assertions, the historical record does not confirm that FTC administrative litigation has produced superior policy innovations or greater quality in decision making for structural transaction cases, relative to Department of Justice enforcement and judicial decision making.

This is not to detract from the FTC's proper role in developing merger expertise and in contributing to antitrust enforcement and policy innovations in this and other fields. The FTC has contributed to a variety of such innovations in the recent past, but these have occurred primarily in the fields of microeconomic analysis and the issuance of substantive and other guidelines. Recently the FTC has made contributions to merger enforcement policy in close partnership with the Department of Justice.[5] Even when the two agencies were openly feuding about a number of issues – clearance of specific transactions, Hatch-Waxman settlements, substantive standards for competitive assessment of unilateral conduct – the agencies' close cooperation on merger enforcement policy has been consistent. Such cooperation is a desirable and appropriate facet of our dual federal enforcement structure, and merger enforcement is the leading example of cooperation between the two federal agencies.

FTC innovation has not been confined to administrative litigation, but has included a diverse variety of non-litigation activities, such as holding workshops and seminars on targeted subjects of interest. Recently the Commission has exercised its unique authority to investigate a competitive policy issue of broad significance (patent assertion entities) under its unique 6(b)

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[5] The most recent versions of the Horizontal Merger Guidelines (August 19, 2010) and the Commentary on the Horizontal Merger Guidelines (March 2006) were issued jointly by the FTC and the Antitrust Division, as were the Antitrust Guidelines for Collaborations Among Competitors (April 2000), governing many forms of joint venture that, like mergers, may also be challenged under Clayton Act Section 7, 15 U.S.C. §18. Some documents relevant to assessment of structural transactions have been issued separately, such as the Policy Guide to Merger Remedies (Antitrust Division, June 2011), and Negotiating Merger Remedies, Statement of the FTC Bureau of Competition (January 2012).

provision. Through these and other similar activities the FTC also enlists the help of leading lawyers as well as academics and consultants in microeconomics, industrial organization, econometrics, and other fields that have long supported policy development for antitrust enforcement. Many innovations probably originate in fresh appointments to the Commission and to its various staff components including the Bureau of Competition, the Office of the General Counsel, the Bureau of Economics. I give credit to past FTC initiatives in a variety of enforcement areas, but I do not think that legislation to reduce material procedural differences in enforcement methods between the two federal agencies with specific regard to structural transaction will tend to undermine the Commission's capacity to make future innovations in the field of enforcement policy regarding structural transactions (or otherwise).

The need to ensure that U.S. antitrust enforcement procedures are accurate and efficient is now greater than at any time in our history. The U.S. serves as a model for antitrust enforcement around the world. Since the Hart-Scott-Rodino Act of 1976 imposed mandatory premerger notification on significant transactions affecting U.S. commerce, scores of other jurisdictions around the world have adopted similar mandatory premerger notification schemes. Maintaining vigorous economic growth and innovation requires increased attention to the design and implementation of antitrust procedures to assure maximum objectivity, accuracy and efficiency of antitrust enforcement around the world. Every competition regime should engage in frequent reassessment of the necessity of the burdens it imposes, whatever antitrust policy objectives it claims to serve. The U.S. – the jurisdiction with the world's strongest record of antitrust enforcement – should exercise leadership in demonstrating its willingness to adjust its procedures to obtain maximum appropriate impact at minimum cost. Legislation to accomplish the two main objectives of this legislation would be a welcome demonstration of such leadership.

I would be pleased to answer questions and to provide any further support that the Subcommittee may request.

Mr. BACHUS. Thank you, Mr. Lipsky.

Mr. Parker?

TESTIMONY OF RICHARD G. PARKER, PARTNER, O'MELVENY & MYERS LLP

Mr. PARKER. Mr. Chairman, Mr. Ranking Member, thank you.

Is it on?

Mr. BACHUS. I am not sure. Is it working?

Mr. PARKER. I want to thank you for the opportunity to express my views to the Committee. I have personally tried merger cases in Federal court both for the FTC and against the FTC, won some, lost some.

And so I bring—I don't think mine is working. All right. I will just talk with it right here. Can you hear me better? All right. Thank you.

As I have said, I have tried these for both sides, and I hope I can bring some practical advice here and suggestions to the Committee.

I have heard the comments of particularly Mr. Johnson and Mr. Conyers talking about the importance of administrative litigation, and I believe you touched it also, Mr. Chairman, and I totally agree with that. I agree that administrative litigation is a very good way to deal with monopolization issues, with conduct issues, for the simple reason that you have an expert agency and you can get six or 7 weeks for a trial to really build a record and look at something.

I am in Federal court every day, and if I said to the Federal judges I am in front of "I need six or 7 weeks to try this case," they would say "Mr. Parker, you have one," because they are doing immigration cases and criminal cases and everything else. So that is very important.

My point here is that I do not believe the administrative process works in a narrow area in Hart-Scott-Rodino merger review. I don't believe that it is practical, and let me just take you through two examples.

I was privileged to represent the airlines in the DoJ versus U.S. Airways-American Airlines case. I was the lead counsel for the defense there, okay? And so we were sued in the middle of August. We went to the DoJ and said we really don't need a preliminary injunction. We will agree to that, but we want an early trial date. We got a trial date in November, 4 months. The trial would have been over before Christmas, and the judge, Judge Colleen Kollar-Kotelly—who is an outstanding judge, by the way—committed to rule by the middle of January. We would have had our day in court as the airlines, and a ruling, within 5 months. That works. Now, this case settled a week or two before trial, so we never got to trial, but that is a procedure that works.

Now, I was also in a case called *FTC v. CCC/Mitchell*, and that was one that we went to court on, and I will tell you painfully that I lost that case, but I am over it, I am over it. And here is the situation. We got sued sometime in November. It was a preliminary injunction. But we couldn't collapse that with a permanent injunction because the permanent injunction was going to be held administratively. So we went to court only on a preliminary injunction in Jan-

uary, and we tried that case for about 2 weeks, and the judge ruled in March, and we lost.

Well, okay, let's go to the administrative proceeding. It would have taken us 8 or 9 or 10 months to get a ruling, and then to go to the Court of Appeals for another year. We had financers, we had banks, we had investment bankers you can't hold together. That is the problem. So our only day in court was that preliminary injunction day. That was it. That was the whole deal. Up or down, that is it.

The other problem was that the district judge—and she is an outstanding district judge, Rosemary Collyer. She is superb. They have a lot of good judges in this town. But she interpreted the Whole Foods decision reasonably as setting forth a lower standard for the FTC.

So in the airlines case, we would have gotten a full-blown trial under Section 7 and done it in 6 months, and here the only day we had in court, the only day, was under a preliminary injunction standard that is more reduced from the standard equitable test that we learned in law school.

All I am suggesting is—and the FTC, this is not going to affect the FTC's role. I know these people, and they are very good trial lawyers. They can go to court, and they can stand up against the best of them, and they do not need any special rule in the preliminary injunction, and they ought to do the exact same thing that the Department of Justice does, and I will tell you, they will win most of their cases, painfully, because I am on the other side. But that is what I believe. So I think this is an intelligent procedure.

My other point is this. You try to explain to a chief executive officer why, if he had a DoJ-regulated industry, he would have a better time in court than an FTC case, and you will get—you could imagine how hard it is to explain that, and we just have to eliminate that because it serves no purpose. It only creates unfairness, and it does not affect the mission of the FTC one iota because they can stand up in Federal court as well as the DoJ can and will win most of their cases.

I would be happy at the appropriate time to entertain any questions you might have.

[The prepared statement of Mr. Parker follows:]

TESTIMONY OF RICHARD G. PARKER

BEFORE THE COMMITTEE ON THE JUDICIARY

SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

UNITED STATES HOUSE OF REPRESENTATIVES

WASHINGTON, D.C.

HEARING ON H.R.__, THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2014"

APRIL 3, 2014

Thank you for inviting me to testify today. I am a partner at O'Melveny & Myers LLP, where I lead the Antitrust and Competition Law Group. I have practiced in the antitrust area for more than 25 years, handling litigation against the government and private parties, criminal and civil investigations, including merger investigations and litigation. I served at the Federal Trade Commission ("FTC") from 1998 to 2001 as Senior Deputy Director and then Director of the Bureau of Competition. During my tenure, I tried merger cases for the FTC. I have also tried merger cases against the FTC in private practice.

I strongly believe in the agency's mission in enforcing both competition and consumer protection laws. The FTC has very strong litigation capabilities. Agency lawyers perform very well in court and the United States benefits significantly from the FTC's enforcement efforts. I am not here to criticize the role of the Commission or its enforcement agenda, both of which I strongly support. I testify for the much more narrow purpose of suggesting that the FTC be held to the same standard in merger injunctions in federal court as the Antitrust Division of the Department of Justice ("DOJ"). I believe that this is good competition policy, and more broadly, good public policy.

The proposed Act, "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014," appears to remedy the disparity between the DOJ standard and the FTC standard to enjoin pending mergers and to that extent is sound policy. I feel that way for several reasons.

1. The FTC is an outstanding litigation agency and can perform in court very effectively under this standard. The FTC needs no special rule or advantage in court.

2. The FTC and DOJ each cover different industries. For example, the FTC addresses issues in the oil and gas industry and the DOJ does the same in the airline industry. The division of industries between the agencies generally is a reflection of historical experience and in some cases can be somewhat arbitrary. It is fundamentally unfair and serves no legitimate enforcement objective for an

> "FTC industry" to have a more difficult time in court than a "DOJ industry." As would be expected, and as I know from experience representing clients, that is a very hard point to explain, much less defend, to an executive whose company happens to be an FTC industry for merger review purposes.

The FTC and the DOJ both are charged with enforcing Section 7 of the Clayton Act, which prohibits mergers in which "the effect of such acquisition may be substantially to lessen competition, or tend to create a monopoly." 15 U.S.C. § 18. To obtain a preliminary injunction in federal district court, the DOJ must show "a reasonable likelihood of success on the merits" and that the equities balance in favor of the government. *See* 15 U.S.C. § 25, DOJ preliminary relief authority; *see, e.g.*, United States v. Siemens Corp., 621 F.2d 499, 505-06 (2d Cir. 1980), United States v. Gillette Co., 828 F. Supp. 78, 80-81 (D.D.C. 1993). In most cases, the parties stipulate to combine the preliminary injunction with the permanent into a single trial. Thus, the court is asked to decide the case on the merits.

The FTC seeks preliminary relief to stop a merger pending an administrative trial before an FTC Administrative Judge with the right to appeal to the Commission and ultimately the courts. As a result, the preliminary and permanent injunctions cannot be combined. Thus, the FTC seeks preliminary relief under Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which requires a federal court to determine whether "weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest." Requiring the FTC to show a likelihood of success at trial is both logical and fair, but some recent court decisions have found that the FTC meets this standard merely if it can show that a transaction raises questions so "serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation" by the FTC. This diverges from an assessment of the "likelihood of success" that the DOJ must prove in order to obtain preliminary relief.

The general test for preliminary injunctions is based in longstanding principles of equity and requires a showing of:

(1) likelihood of success on the merits;

(2) irreparable harm;

(3) a balancing of harms; and

(4) the public interest.

In DOJ actions, as compared to private litigation, some federal courts apply a modified version of this traditional preliminary injunction test, and do not require that a government agency show irreparable harm once the agency shows a likelihood of success. Harm is presumed once the government shows that it is likely to prove a violation of the law. Additionally, the balancing of harms and the public interest generally are combined into one factor, the balancing of the equities. Thus, under this formulation, in DOJ cases in which preliminary relief is sought, the likelihood of success takes on increased significance. As indicated, in most cases, the DOJ and the parties agree to an expedited trial on the merits, combining the preliminary and permanent injunction into a single proceeding.

As indicated, the FTC typically does not try permanent injunctions in federal court but does so internally in administrative proceedings. Only the preliminary injunction is in federal court and the standard applied there is of great importance. Unfortunately, in FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008) ("Whole Foods") the D.C. Circuit appears to have set an unduly relaxed standard for FTC preliminary injunctions. Before Whole Foods, district courts had required at least a minimal showing of probability of success. None had allowed the FTC to obtain a preliminary injunction by simply "raising issues" for further consideration. Earlier FTC preliminary injunction victories were the result of trials ranging from

five days to six weeks. Those cases generated lengthy opinions laying out in detail the FTC's likelihood of success at trial. *See, e.g.*, FTC v. Staples, Inc., 970 F. Supp. 1066 (D.D.C. 1997); FTC v. Cardinal Health, 12 F. Supp. 2d 34 (D.D.C. 1998); FTC v. Swedish Match, 131 F. Supp. 2d 151 (D.D.C. 2000).

In Whole Foods, Judge Brown, stated "To be consistent with the § 53(b) standard, this decision [the district court's decision] must have rested on a conviction the FTC entirely failed to show a likelihood of success." 548 F.3d. at 1035. This turns the preliminary injunction standard on its head, requiring not that the FTC show likelihood of success, but that the parties prove that the FTC could not succeed on the merits. Judge Tatel in a concurring opinion writes, "Critically, the district court's task is not 'to determine whether the antitrust laws have been or are about to be violated. That adjudicatory function is vested in the FTC in the first instance.'" *Id.* at 1042 (Tatel, J., concurring) (quoting FTC v. H. J. Heinz Co. et al., 246 F.3d 708, at 714-15 (D.C. Cir. 2001)). Judge Tatel then quotes Judge Posner in stating that "One of the main reasons for creating the Federal Trade Commission and giving it concurrent jurisdiction to enforce the Clayton Act was that Congress distrusted judicial determination of antitrust questions." *Id.* (quoting Hosp. Corp. of Am. v. FTC, 807 F.2d 1381, 1386 (7th Cir. 1986)).

But the legislative history does not suggest judicial distrust or essentially abdication to the FTC was the motivation for enactment of 13(b), it suggests the opposite. Nor does the legislative language or history suggest that the FTC would not need to show a meaningful likelihood of success. Section 13(b) was not a part of the original FTC Act, but was passed in 1973 as part of the Trans-Alaska Pipeline Authorization Act. The Conference Report's discussion of Section 13(b) states in part that the amendment "is not in any way intended to impose a totally new standard of proof different from that which is now required of the

Commission," and that "[t]he inclusion of this new language is to define the duty of the courts to exercise independent judgment on the propriety of issuance of a temporary restraining order or a preliminary injunction." H.R. Rep. No. 93-624, at 31 (1973) reprinted in 1973 U.S.C.C.A.N. 2417, 2533. The Conference Report also made clear that the amendment did not impose the traditional equity standard of private litigation that required irreparable injury be proven, but it did not suggest that the likelihood of success requirement be lessened. In FTC v. Weyerhauser Co., 665 F.2d 1072 (D.C. Cir. 1981) the court, in considering the Conference Report, stated that "the case law [referenced in the Conference Report] lightened the agency's burden by eliminating the need to show irreparable harm." *Id.* at 1082. The court also, however, noted that the Conference Report emphasized the importance placed on the court's exercise of independent judgment, noting that "Independent judgment is not exercised when a court responds automatically to the agency's threshold showing." *Id.*

A federal district court in the District of Columbia found that Whole Foods mandated a lower standard for the FTC to obtain injunctive relief. FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009) ("CCC Holdings"). The court in CCC Holdings held (i) that the parties defeated the FTC's unilateral effects theory and (ii) that the coordinated effects case could go either way – i.e. the FTC had not proven a likelihood of success. Yet, the court granted the injunction. The court there held that "'likelihood of success on the merits' has a less substantial meaning than in other preliminary injunction cases." *Id.* at 36, n. 11. Granting the injunction, the court wrote, "The Defendants' arguments may ultimately win the day when a more robust collection of economic data is lain before the FTC. On this preliminary, record, however, the Court must conclude that the FTC has raised questions that are so 'serious, substantial, difficult and doubtful' that they are 'fair ground for thorough investigation, study, deliberation and

determination by the FTC.'" *Id.* at 67. That is a far cry from likelihood of success. In essence, the opinion states that a tie goes to the government, and that is a fundamentally different and lower standard than what the DOJ must meet in seeking preliminary relief.

Whole Foods as applied in CCC Holdings is of immense practical import. Mergers, as a practical matter, are hard to hold together pending government review and trial. The DOJ, by consolidating the preliminary and permanent injunction into a single proceeding, can generally get a case to trial relatively quickly. In the recent U.S. Airways and American Airlines merger, trial was set little more than three months from filing, with a decision expected in less than six months.

When the FTC obtains preliminary relief in federal court, the merger is effectively over. In virtually every case in which the FTC has prevailed in obtaining a preliminary injunction in federal court, the parties have abandoned the transaction. Why? The answer is timing. Under FTC Rules of Practice, the parties in CCC Holdings would not have received a Commission decision for some eight months after the preliminary injunction was entered. Court of Appeals review can easily consume another year or more. The parties already had spent more than four months litigating the preliminary injunction. And in most cases, the timeline under the FTC Rules of Practice would be longer, with administrative proceedings taking at least another 12 months.[1] Not surprisingly, the parties in CCC Holdings abandoned the merger.

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[1] In 2008, the FTC adopted interim final rules amending Parts 3 and 4 of the agency's Rules of Practice to help streamline the timeline for administrative proceedings. However, with these changes the timeline for a proposed merger under Part 3 administrative review still would involve approximately 12 months following second request merger review and federal district court proceedings, thus requiring a proposed merger to hold together for an estimated 18-24 months. Under the revised FTC rules, the evidentiary hearing must be held within five months from the date of the complaint; the administrative hearing is limited to 30 trial days; final proposed findings within 40 days after trial; initial decision within 70 days after final proposed findings; briefing before the Commission 45 days after initial decision. *See* Rules of Practice for Federal Trade Commission, 74 Fed. Reg. 20,205 (May 1, 2009) (to be codified at 16 C.F.R. pts. 3–4), and 74 Fed. Reg. 1804 (January 13, 2009).

In sum, parties whose merger is before the FTC are at a significant disadvantage to those who happen to draw the DOJ. There is no sufficient policy reason to support that result. I respectfully suggest that mergers reportable under the Hart-Scott-Rodino Improvements Act of 1976 be adjudicated by either agency in federal court under the same rules and standards.

# # #

Mr. BACHUS. Thank you.
Professor Kirkwood?

TESTIMONY OF JOHN B. KIRKWOOD, PROFESSOR OF LAW, ASSOCIATE DEAN FOR STRATEGIC PLANNING AND MISSION, SEATTLE UNIVERSITY SCHOOL OF LAW

Mr. KIRKWOOD. Thank you very much, Mr. Chairman and Ranking Member, and the other Members of the Subcommittee, for inviting me here.

This draft bill proposes to equalize the powers of the FTC and the DoJ in merger challenges through two principal methods. The first is to equalize the standards for granting a preliminary injunction. As my co-members of this group of testifiers have indicated, there is a substantial case, in general, for having the same preliminary injunction standard. The agencies divide which merger cases they look at based on industry expertise, and there is no justification for giving the FTC an easier ability to challenge mergers in industries where the FTC has expertise rather than where the Justice Department has expertise. So as a general matter, equalizing the preliminary injunction standards does make a lot of sense.

I see a couple of possible objections. One is that the existing preliminary injunction standard is in 13(b) of the FTC Act, and that also governs the Commission's authority to obtain preliminary injunction in other FTC cases. And by changing the standard for mergers, you wouldn't want to change the standard for other cases. Now, maybe that can be handled by very careful drafting, by precise and clear legislative history, but it is an issue that the Commission will raise and needs to be considered.

The other objection is more substantial. In some merger cases, there may be a need for a relaxed preliminary injunction standard and administrative litigation. In a non-routine merger case, in a case where, say, the FTC doesn't have a great deal of expertise in a particular industry or where the industry is changing rapidly and so a more sustained look is necessary to determine whether or not the merger will create market power or lessen competition, there may well be a reason to give the FTC the opportunity to look in more depth to give it a more relaxed standard and the ability to use sustained administrative litigation. Maybe.

Now, it may be difficult to separate those cases out from the standard kinds of cases that Rich litigates. So it may be that this is simply a cost of equalizing the standards, but it is a potential cost of certain cases that wouldn't be heard.

The second method the discussion draft uses is to completely eliminate administrative adjudication in merger cases. The strongest justification is the one that Tad gave you, that if the FTC has lost in court, both at the district court level and at the appellate court level, what sense does it make to allow them to engage in administrative litigation too? It may not make any sense. In fact, since the 1995 policy statement, my understanding is the FTC has never taken a case through administrative litigation after it lost in the Federal courts, and Tad is nodding.

But there is the kind of case I mentioned, the non-routine merger case where the FTC hasn't lost. And more important, there are consummated mergers where the FTC isn't seeking a preliminary in-

junction at all but is seeking to undo a transaction that has already occurred, and there, there may be benefit for administrative litigation.

The FTC showed this benefit in the hospital merger area. That is perhaps the strongest example of the constructive pro-consumer use of administrative litigation. Both agencies, Justice and FTC, had been unsuccessful in a series of hospital merger challenges. They lost something like six in a row. And the FTC decided to take a careful look at both the economic studies and health care analysis of this area and determined that there was a consummated merger near Chicago that had resulted in higher prices. They challenged that merger in administrative litigation and, in an extensive and thoughtful opinion, held it to be anticompetitive.

The result of that effort was to make it easier in future cases to challenge them in court. If the FTC had been unable to do that kind of administrative litigation, that result might not have occurred, and the ability to keep health care costs down might have been lost.

So there is real value in administrative litigation, at least in some contexts. And, as Mr. Johnson and Mr. Conyers have already mentioned, if you take the FTC's administrative litigation power away, you are taking a step toward ending dual enforcement.

Thank you.

[The prepared statement of Mr. Kirkwood follows:]

PREPARED STATEMENT OF

JOHN B. KIRKWOOD

Professor of Law and

Associate Dean for Strategic Planning and Mission

Seattle University School of Law

on

The "Standard Merger and Acquisition Reviews

Through Equal Rules Act of 2014"

Before the

House Judiciary Committee

Subcommittee on

Regulatory Reform, Commercial and Antitrust Law

Washington, D.C.

April 3, 2014

The proposed bill (the "SMARTER Act") springs from the premise that it is currently easier for the Federal Trade Commission (FTC) to stop a merger (or extract a settlement) than it is for the Department of Justice (DOJ). The proponents assert that the standard for a preliminary injunction is lower for the FTC than for the DOJ. They further assert that when the FTC wins a preliminary injunction, it can subject the merging parties to an administrative trial, and that the extra cost and time involved (compared to a DOJ court proceeding) may make parties more willing to settle or drop the transaction altogether. These differences raise concerns because, to the extent they exist, they subject merging parties to disparate treatment depending upon whether their case is assigned to the FTC or the DOJ. Since the agencies divide cases based on which agency has the most expertise in a particular industry, a proposed merger may be more likely to be stopped or curtailed if it's in an "FTC industry" rather than a "DOJ industry," even if there is no difference in competitive merits.

The proposed bill seeks to end this disparity through two principal changes. First, it would make the preliminary injunction standard in Section 13(b) of the FTC Act – the standard that many courts say is less demanding – inapplicable to mergers. Second, it would deprive the FTC of the ability to challenge mergers under Section 5 of the FTC Act, which would mean that the agency could not adjudicate their legality in administrative proceedings, the linchpin of the agency process.

In this statement, I provide a preliminary assessment of both changes. My analysis indicates that there is a substantial case for the first change – equalizing the preliminary injunction standards. It also points out, however, that the change may not be needed in practice and may have significant costs. The second change – eliminating the FTC's ability to use administrative proceedings in merger cases – is more problematic. This may be an opening

wedge in an attack on dual enforcement, a system that Congress created, that it has maintained for a hundred years, and that has generally worked well, providing some competition, so to speak, in federal antitrust enforcement. From this perspective, the elimination of the FTC's administrative power in the merger area would be disturbing and likely to harm consumers.

Preliminary Injunction Standards

Requiring the FTC and DOJ to satisfy the same preliminary injunction standard has considerable appeal. Why should a merger be more likely to be subject to a preliminary injunction simply because it is in an industry that the FTC knows better than DOJ? Why should differences in the industry expertise of the two agencies play a role in which mergers are likely to be preliminarily enjoined?

These questions assume, however, that the agencies actually face different standards. That is not clear. Bill Baer, who has held high positions at both agencies, testified recently that, in practice, the agencies face the same preliminary injunction standard. Although the words used in many decisions, particularly recent decisions in the D.C. Circuit, suggest that the test is easier for the FTC, in fact, in Baer's view, both agencies have to supply essentially the same evidence – and rigorous analysis – to obtain a preliminary injunction. There is substantial support for that view. While I have not reviewed the underlying records of individual cases, it is my impression from reading many decisions that, whatever the stated standard, judges normally demand of both agencies proof that a merger is "likely" to harm competition. If that is generally true, there is little reason to alter Section 13(b). The proposed bill would address a problem that largely does not exist.

Of course, if the stated standards are actually identical in practice, why not make their language identical? Is there any reason to preserve two different formulations of the standard for a preliminary injunction – one for each agency – if the difference does not matter in practice? This, too, is a substantial argument. But there are two reasons why preserving the existing standard for the FTC may be justified. The first is a concern with unintended consequences. The FTC uses Section 13(b) for many aspects of its enforcement program, not just mergers, and if mergers are explicitly excluded from 13(b), courts may take that as a signal that the FTC also needs to meet a tougher standard in its other cases. That need not occur – and might be avoided through firm language and legislative history – but it is an issue that needs to be addressed.

The second reason to maintain the existing Section 13(b) standard is more important. When the FTC obtains a preliminary injunction, it adjudicates the legality of the proposed merger through administrative proceedings. While those proceedings are generally more time consuming than a consolidated hearing before a district court on whether to issue both a preliminary injunction and a permanent injunction, administrative proceedings allow the FTC to bring to bear its considerable expertise. This was one of the major reasons Congress created the FTC. It wanted an independent agency to develop expertise in competition policy through sustained attention to the issue and through studies, reports and a vigorous enforcement program, and then apply that expertise to particular practices and transactions. Congress thought such administrative expertise would produce better results than assigning antitrust cases exclusively to generalist judges, who may have little antitrust expertise and who may face these cases only once in a lifetime.

To be sure, not every proposed merger requires the kind of detailed, expert review that administrative adjudication can provide. Many mergers may be sufficiently routine or

commonplace that they can be effectively evaluated in a consolidated court proceeding. But that is not true for every proposed transaction. If an industry is changing rapidly or neither agency has developed much expertise in it, there is reason to expose a merger in that industry to an administrative proceeding before determining whether it should be stopped. And in such a case, it may well be difficult to show, prior to such a proceeding, that the merger was "likely" to harm competition. In such a case, in other words, both the FTC's current preliminary injunction standard and its administrative adjudication would be desirable.

This analysis suggests that eliminating the FTC's existing preliminary injunction standard would have significant costs in some cases. Those costs would have to be balanced against the benefits of equalizing the standard for both agencies.

Administrative Adjudication

Eliminating the FTC's power to determine the legality of a merger through the administrative process described in Section 5 would strike at a vital reason for the creation of the FTC. It would not of course deprive the agency of the power to use administrative adjudication to combat other anticompetitive practices, but once that power were removed in one area, where would it stop? The proposed bill therefore raises the question of dual enforcement, a system that Congress originated and maintained for a century. While that system has drawbacks, it also has substantial benefits, including the value that an independent agency can create when it uses its expertise and sustained deliberation to solve a difficult competition problem.

That value was illustrated by the Commission's efforts in the last decade to reinvigorate hospital merger enforcement. Both agencies had been defeated in a series of hospital merger challenges. Ultimately, the FTC used economic studies and detailed analyses to challenge a

consummated hospital merger in administrative adjudication, finding in an extensive and thoughtful opinion that the merger had been anticompetitive. This effort resulted in a change in the direction of hospital merger enforcement, and several succeeding mergers were successfully challenged in the courts. Had the FTC been unable to use administrative adjudication – had it been forced to go to yet another generalist judge – this result may not have occurred.

The proposed bill's most serious problem, in short, is its elimination of the FTC's power to use administrative adjudication, even to challenge consummated mergers in an area where the courts have been hostile to enforcement. Congress should be reluctant to deprive consumers of the benefits of this power.

Mr. BACHUS. I appreciate all the testimony. Obviously, we have three witnesses that make a strong case in favor of the law, and I think, Professor, you don't believe that it would be a good change, or you believe it would have some good, some bad. Is that correct?

Mr. KIRKWOOD. I think it is correct that, at least as a general matter, equalizing the preliminary injunction standards does make sense, the first part of the legislation, but that part can be handled simply by adjusting the preliminary injunction standard in Section 13(b), equalizing it to the standard the Justice Department has to meet. I raised a couple of possible objections to that, but on balance, it is probably a good idea.

Mr. BACHUS. The legislation?

Mr. KIRKWOOD. The second part of the legislation, the part that would remove from the Commission's Section 5 authority its ability to challenge mergers through the administrative process, that is much more questionable.

Mr. BACHUS. Thank you.

You know, I was sitting here listening to testimony, and I have to sort of go—I represented railroads. When you go to my office, you see trains all over my office. And some of what Mr. Lipsky and Mr. Parker were saying recalled to me the history of the Rock Island Railroad, which was really the biggest disaster of the 20th century and railroading where some 12,000 miles of rail was abandoned, and many businesses that depended on that railroad went out of business, and it was all unavoidable. It was the result of 10 years, from 1964 to 1974, of administrative proceedings, which finally approved in 1974 the proposal that was made in 1964. But by that time, the Union Pacific Railroad had made other plans and they didn't go forward with the merger. So for another 6 years you had derailments, you had interruptions in services, and finally in 1980 several thousand employees lost their jobs and we lost some important competition in the rail industry, and it was as a result of administrative decisions.

I sort of come with that. People have actually said that that weakened the entire industry across the country. It discouraged mergers, abandonments of unproductive rail lines, and led to really somewhat of a deterioration in rail all over the country, which then resulted in New York Central-Pennsylvania merger to try to stave off that. But by then it was too late and we really had a disaster in railroads until we moved to really more unregulating parts of the railroad industry. Today it has finally recovered.

I almost think about the idea of double jeopardy. Of course, we apply that in criminal cases. But you go to court, you have your day in court. In civil cases, that is the Seventh Amendment. And then you have to start all over again. Somehow, that just doesn't seem to square with your ideas of taking your case to court, having your day in court, and litigating for some months at a time, highly skilled people on both sides, capable judges, and then having to start all over.

You mentioned the American Airlines. I think had that drug on for two or 3 years, with American Airlines in the shape they were in, I am not sure that it would have survived. I think you would have had kind of a repeat of what you saw with the Rock Island or some of these other mergers. People just finally give up, because

that airline was—it would have strengthened both of them, and ultimately, I think, it will increase competition. That is the usual.

But I do want to say in closing I think you have all expressed—and let me say this. There is no one on this Committee that does not appreciate the need for strong antitrust enforcement and the need to guard against monopolies, cartels, or behavior that lessens competition. But often, in disapproving transactions, you actually reduce competition. That may not sound natural, but it often does.

And in looking at this legislation, I would say to my colleagues, the former Chairman and Ranking Member of the Subcommittee, that I have great respect for both of you, but I think maybe you are construing this in your opening statements that there is a much broader sweep to this bill. I think it is not nearly as comprehensive in making changes as you think it is.

So, with that, I will yield to the Ranking Member.

Mr. JOHNSON. Thank you, Mr. Chairman.

Mr. BACHUS. I usually have questions. That is probably the first time I hadn't. But I think all my questions were answered by the testimony.

Mr. JOHNSON. Thank you.

Ms. Garza, in a 1989 report on the role of the Federal Trade Commission, the American Bar Association's Antitrust Law Section recognized that merger enforcement was probably the FTC's most important antitrust role. Do you agree with that ABA assessment?

Ms. GARZA. I don't know if it is the most important. It certainly is one of the important roles that the Federal Trade Commission has today, to review mergers. I think the Federal Trade Commission has a number of important roles. They have a uniquely important role in looking at antitrust and helping to develop antitrust policy in other ways. They have a uniquely important role, as Tad Lipsky explained, and I think Rich Parker, with respect to conduct cases, to take a deeper look, and to do it through their administrative hearing process. They have a very important role to play in the way they use their 6(b) authority to look at industries and look at issues like patent assertion entities and really bring some light to issues.

So I think it has a lot of important roles. Some of them are unique. Those are the ones that are unique, and those are the ones that I think their administrative proceedings and their special hearing tools can help with. On the merger side, obviously, they share that with the Justice Department. It is also important. My testimony and the AMC report wasn't based on any understanding that that was an unimportant part of what their agenda is.

Mr. JOHNSON. You would agree, though, that it is a——

Ms. GARZA. It is important.

Mr. JOHNSON. It is an important——

Ms. GARZA. I agree it is important.

Mr. BACHUS. George, for a minute, would you step back in for a second? I want to recognize two of our former staff members that are in the audience that I think have given a great deal of service to the country and to this Committee that are here, George Slover, who is our former parliamentarian, and Will Moschella. Would you raise your hand a little? Who have also given us technical assist-

ance on this because of their expertise in dealing with these matters before.

I meant to introduce you when I introduced the panel, but I wanted to acknowledge your years of service and your continued importance to this Committee. So, thank you.

It is very important that we have resources of stored knowledge and experience, and we appreciate both of you all making yourselves available to the Committee from time to time.

So, with that, I will come back to you without a loss of time.

Mr. JOHNSON. Thank you, thank you.

Mr. BACHUS. And I will even let you mention the Koch brothers.

Mr. JOHNSON. Well, since I am talking to Mr. Lipsky, I was not going to ask him about the Koch brothers, but he did talk about free markets, which is something that the Koch brothers stand for, which many of us do also. But the question is, what is the extent of government involvement in those free markets?

But I would ask you, Mr. Lipsky, do you agree that merger enforcement is probably the FTC's most important antitrust role? And before you answer, if you could maybe give me a yes or no.

Mr. LIPSKY. No.

Mr. JOHNSON. You do not.

Mr. LIPSKY. Because I would adopt Deb Garza's answer to that question, that it is an extremely important function. But I mentioned, for example, the development of the policy toward horizontal restraint, which had been a huge puzzle that had flummoxed antitrust lawyers and judges and the agencies themselves for decades, and I think through their case selection and the way they articulated the legal standard in this Three Tenors case that I mentioned—I think the technical name of the case is In re Polygram Holdings—but they did a tremendous service to antitrust in clarifying the law and making it easier to comply.

So I can't agree that merger enforcement is the most important. I think it is very important, but it is not the most important.

Mr. JOHNSON. Okay. Do you agree also, Mr. Parker? Because I have a follow-up. I know that you all know it is coming, but I am going to run out of time, so don't filibuster me.

Mr. PARKER. The answer is yes, sir, I totally agree with you.

Mr. JOHNSON. All right. And Professor Kirkwood?

Mr. KIRKWOOD. I am not sure it is the most important. It is clearly major.

Mr. JOHNSON. Okay.

Mr. KIRKWOOD. Clearly a major responsibility, but they have done substantial other things.

Mr. JOHNSON. Do you, Professor Kirkwood, agree that this bill would create a slippery slope to ending joint enforcement of antitrust law by both FTC and DoJ because it eliminates FTC authority to adjudicate permanent injunctions of mergers, acquisitions, and the like?

Mr. KIRKWOOD. It would take a step down the slippery slope, yes, because it——

Mr. JOHNSON. Okay.

Mr. Parker, yes or no?

Mr. PARKER. No.

Mr. JOHNSON. Okay, it does not take us down.

Mr. PARKER. If I thought that this was going to eliminate dual enforcement, I would not be in favor of the legislation. This is very narrow in one area where I think the FTC can play its role.

Mr. JOHNSON. I got you, I got you, in the Hart-Scott-Rodino cases.

Mr. PARKER. Yes.

Mr. JOHNSON. It is a narrow area, as you see it?

Mr. PARKER. It is an important area. For the FTC, it is a very important area. When I was there, it was the merger wave, and it most certainly was the most important area, but it can be performed very well in Federal court, in my opinion. That is what I said.

Mr. JOHNSON. Okay. What do you think about the second objection that Professor Kirkwood enunciated, say, a merger in an area that the FTC may not have the kind of expertise to meet a higher standard and may need a lesser standard just to take the opportunity to study and marinate, if you will, on the ramifications of the merger? You don't see that as a legitimate objection?

Mr. PARKER. No, sir. I believe the FTC can handle any merger on the face of the earth.

Mr. JOHNSON. Okay. And, Mr. Lipsky, being the free market proponent, I would assume that you would agree with Mr. Parker. And also, Ms. Garza, you yourself probably agree with Mr. Parker as well.

Ms. GARZA. I do, sir.

Mr. LIPSKY. Absolutely.

Mr. BACHUS. Okay. Thank you.

I think maybe just for clarification, you said merger enforcement. Of course, you are talking about enforcing the monopolistic or antitrust provisions, which may in some cases be approving mergers. It may be in other cases to deny. But merger enforcement doesn't always mean stopping mergers.

Mr. JOHNSON. Well, but if you don't stop it before it happens, then you lose the ability to stop it.

Mr. BACHUS. At this time, Mr. Marino is recognized for 5 minutes, the gentleman from Pennsylvania, or Mr. Holding, whoever wants to go first.

Mr. MARINO. Good afternoon, folks. Thanks for being here. Let's get right to the point.

I have a special place in my heart for the Department of Justice. I worked there as a United States Attorney and a prosecutor in my state before that. So I have the utmost confidence in DoJ. By the same token, I have the utmost confidence in the people at the Federal Trade Commission, all extremely cream-of-the-crop individuals I refer to them as.

But, Professor Kirkwood, if you would be so kind to explain to me why you think, given our judicial system the way it is, civil and criminal, why someone should have a second bite at the apple if they don't like the way the first ruling went.

Mr. KIRKWOOD. I think that if the FTC loses in district court and loses on appeal as well, it would be a rare case, if ever, where they should get a second bite. So I think I agree with where you are coming from. In fact, as we discussed here, since the FTC's policy

statement in 1995, they have never taken a merger case to administrative litigation after losing in Federal court.

Mr. MARINO. Okay. I am going to use your slippery slope argument, then, to counter that. What if? You say, well, you will have the beginning of a slippery slope, and what is next? It doesn't mean that the FTC would not in the future take that case to another level. And why have the two standards?

Mr. KIRKWOOD. I think I am much more in sync with where you are coming from. There are possible objections. But in general, there should be a single standard, and you can make that change without eliminating the FTC's administrative adjudication power. You can simply say that when either agency seeks a preliminary injunction, they have to show a reasonable likelihood of success.

Mr. MARINO. Right.

Mr. KIRKWOOD. That could be handled.

If you are worried that the FTC might sometime attempt to take a second bite at the apple, you could prohibit that without removing the FTC's power to do administrative adjudication in mergers. There are consummated mergers, and there might be these kind that Rich and Tad have just denied. There might be these novel ones where the FTC needs to look more carefully.

Mr. MARINO. What does the administrative procedure through the FTC have over the traditional judicial system?

Mr. KIRKWOOD. That goes to the reason that the Congress created a bipartisan administrative body that is committed to developing competition law and develops expertise in it, as opposed to a district court judge who, on the one hand, may be excellent at antitrust but, on the other hand, may not have seen it before.

So the FTC's administrative role makes more sense in the more challenging kinds of cases.

Mr. MARINO. Well, then why wouldn't you—I am sorry. Go ahead, sir.

Mr. KIRKWOOD. As in the hospital merger case, as in the pay-for-delay settlement cases.

Mr. MARINO. Then why don't we—let's get back to the traditional judicial system with Federal judges. Why do we not, then, divide Federal judges up? Why don't we have judges that just hear criminal cases? And let's even go a step or two further than that. Why do we not have judges that hear capital murder cases as opposed to judges that hear sexual abuse cases or pornography cases? And let's flip over to the civil side of the issues as well. There could be a myriad of areas where we could put judges into specialties. But that is my concern, a specialty, because having knowledge of other judicial concepts I think is critically important no matter what judge or panel of judges are making a decision.

Just let me jump to one more thing, Professor. How do you justify, then, what appears to be the inordinate time it takes for the FTC to resolve a case? As a prosecutor, I have to agree with Mr. Parker. In Federal court, I knew that if I were going to ask the judge for a continuance or extra time, I had better say the rosaries before I do that because it is going to be extremely difficult to get that. Doesn't that hurt competition? And, in effect, if it hurts competition, it hurts the consumer?

Mr. KIRKWOOD. The FTC has long been worried about the time that it takes for administrative litigation, so you are absolutely right to be concerned. Even with the stepped-up procedures, it still takes a year. So that is a concern. If you equalize the preliminary injunction standards, there would be fewer of the cases that would go to the FTC so that you would have that problem less. To go all the way to eliminate administrative adjudication creates other costs.

Mr. MARINO. I see my time has expired, so I yield back.

Mr. BACHUS. Thank you.

Mr. John Conyers, the Ranking Member of the full Committee, is recognized.

Mr. CONYERS. Thank you, Mr. Chairman. I enjoy the discussion that is going on after the statements.

I begin by asking Attorney Parker, did the Congress, in your view, create the Federal Trade Commission as an independent agency? And if your answer is they did so because they wanted to get more expertise, wouldn't this draft proposal called SMARTER end up eliminating the administrative adjudication provision?

Mr. PARKER. That was—yes, sir, that was a principal reason in forming the FTC. But, no, the FTC would—the answer to the second part of your question is no, because the Commission would bring its experience to bear in the investigation of the merger and in the decision whether or not to challenge it.

All I am saying is that the FTC can do its function there, and I am saying for very practical reasons, given the need for speed in merger matters, they ought to have it adjudicated in a Federal court. But the investigation and the decision, the FTC can bring its full experience and expertise to bear on that, and they do.

Mr. CONYERS. Could I ask the same of you, Attorney Lipsky?

Mr. LIPSKY. I basically adopt Rich Parker's answer. Remember, the FTC has some very considerable resources to bring to bear on its knowledge and expertise. We mentioned the 6(b) authority. It has a huge—well, it has a substantial staff of very talented academic economists, I think most of them with Ph.D.'s who write research papers related to their work, who are very serious about advancing the frontiers of antitrust analysis, and those are very dedicated and smart and committed people, and that is, I think, part of what gives Mr. Parker the confidence to express what he has expressed, and I join him in that answer.

Mr. CONYERS. Attorney Garza, do you have a different view?

Ms. GARZA. I don't have a different view. I have the same view. I would only add that the FTC has been very important in developing merger policy, along with the Justice Department.

The only thing I would add is that the number of mergers, most mergers, the vast majority, 90-some percent, never get challenged. A small amount actually get investigated. The ones that we are talking about here are a very small number of cases that either agency feels the need to challenge. But it is in those cases, I think, only where we are saying that the FTC and the DoJ, when they do move to challenge a transaction, should do so on the same basis.

Mr. CONYERS. Professor Kirkwood, your views?

Mr. KIRKWOOD. I think that administrative adjudication is sometimes valuable. In the vast bulk of merger cases—Mr. Parker

thinks it is all merger cases. I am not sure it is all of them, but in the vast bulk of merger cases, the FTC uses expertise to decide whether to challenge and how to litigate, and that is sufficient, ought to be on the same preliminary injunction standard. But there are some times, as in the hospital merger case, where that extra expertise is reflected not only in the development of the investigation but in the decision to go forward and in the opinion the FTC writes, and that is valuable.

Mr. CONYERS. Is it the view of the four of you that it is important that the Federal Trade Commission retain its ability to use administrative adjudication for merger challenges?

Mr. PARKER. I would say it is important for them to keep their administrative ability for everything but merger challenges would be my position, sir.

Mr. CONYERS. All right.

Okay, Mr. Lipsky.

Ms. Garza?

Ms. GARZA. I would agree with that. I would just note that the Antitrust Modernization Commission recommendation, just for the record, did not ask Congress to preclude the use of administrative proceedings for consummated transactions.

Mr. CONYERS. Professor Kirkwood?

Mr. KIRKWOOD. Yes. I disagree for the reason I just mentioned, that it shouldn't be completely eliminated. As Ms. Garza just mentioned, in consummated transactions, it is particularly appropriate.

Mr. CONYERS. Thank you, Mr. Chairman. I yield back any time that may be remaining.

Mr. BACHUS. Thank you, Mr. Conyers.

At this time, Mr. George Holding, the gentleman from North Carolina, is recognized.

Mr. HOLDING. Thank you, Mr. Chairman.

Since we have such a wealth of practical antitrust litigation experience, I want to switch gears a little bit and look ahead and explore some related issues. These questions are for all of you, and we will kind of go in seriatim.

In your general experience in the merger review process, have you ever run across where the FTC or DoJ has used that process to extract or impose any extraneous concessions that aren't necessarily part of the antitrust or other concerns in the merger?

Ms. GARZA. I can tell you that when I was at the Justice Department, we religiously avoided that. I have never had a contrary experience at the Federal Trade Commission. I will note that in the U.S. Airways-American Airline case, the Justice Department did state that in their relief, they got some relief that helped to address broader issues preexisting in the industry, and that did somewhat surprise me, but I don't know if I would use the word "extort" or "extract" or whatever the words you used. But I do think in that case, that indicated that there may have been some notion of getting relief that you might not have been able to get from a court of law.

Mr. HOLDING. Sure.

Mr. Lipsky?

Mr. LIPSKY. I think I can say I haven't run across that phenomenon in my personal experience. The closest is there were some

cable television merger cases some years ago where I believe it was the Federal Trade Commission articulated in a somewhat similar fashion to what Ms. Garza has referred to in the airlines case that there should be some independent consideration to media diversity or the diversity of editorial voices to play a role in the assessment of that merger. But I was not personally involved in that case, so I can't claim that.

Mr. HOLDING. Sure. But would any of you all say that it is a problem for either DoJ or FTC to use this opportunity of review to extract some other concessions? Perhaps there is some behavior of the company that they haven't liked in the past. They haven't been able to dissuade them from engaging in this behavior through other means, other court process. You have a merger review here. You have them as kind of a supplicant, you know, you are going to approve this merger or not. Would it be appropriate to extract that?

Mr. PARKER. My view is that when I was at the FTC I told the staff you get what you need to solve the competitive problem of the merger, and if you don't you go to court, and you don't ask for anything else. I think that is the appropriate policy.

Mr. HOLDING. Anyone want to disagree with that?

Mr. KIRKWOOD. I would not.

Mr. HOLDING. Do you think it would be a problem to make clear in this statute as we are trying to do some good government legislation here and clarify this standard, so in addition to make clear in this statute that agencies in reviewing a merger may not impose such extraneous conditions unrelated to the merger itself, go ahead and codify what you all are saying would be a good practice, or is a practice?

Mr. PARKER. That, I believe, is the practice, and I don't see any harm in codifying that. No, sir.

Mr. HOLDING. All right. Mr. Chairman, I yield back.

Mr. BACHUS. Thank you.

I do want to note that Anant Raut is in the audience, and I appreciate your attendance, a former staffer on the Democratic side.

Mr. Jeffries, 5 minutes.

Mr. JEFFRIES. Thank you, Mr. Chair.

Let me thank the witnesses for your appearance and your testimony here today.

I want to start with Mr. Parker. It is my understanding that you spend a significant amount of time working at the FTC; is that correct?

Mr. PARKER. I was there for approximately 3 years. At one point I was head of the Bureau of Competition.

Mr. JEFFRIES. And I think you mentioned in your testimony that the agency greatly benefits the United States in terms of its enforcement efforts; is that right?

Mr. PARKER. As a citizen and as an alum, I am very proud of the work the FTC does. I think it is very good for the United States, absolutely.

Mr. JEFFRIES. And so you would agree that it continues to play a very important role, a substantial role in terms of our anticompetitive efforts in the United States, which also is good for the country?

Mr. PARKER. Yes, sir.

Mr. JEFFRIES. Now, as I understand it, in terms of the legislation that has been placed before us, there are largely two arguments as it relates to limiting the administrative litigation ability of the FTC. The first is that somehow it is unfair for the FTC to get a second bite of the apple. Is that your perspective?

Mr. PARKER. Yes. My perspective is really one of fairness, that if the FTC gets a second bite of the apple, it kills the deal, and that the parties to the deal have really not had a fair opportunity to present it because of the low preliminary injunction standard. And the idea you are going to be vindicated, then, in an administrative trial is impractical because the banks will walk away and your deal will fall apart.

Mr. JEFFRIES. Now, theoretically it certainly seems like that has some merit. But in practice, am I correct that this administrative litigation ability actually has been rarely used by the FTC?

Mr. PARKER. When I was there—I am sounding like an old guy talking about the good old days—we would slug it out in Federal court, and in the event of a loss, we would not pursue administrative litigation. I understand that policy has changed, and I disagree with that policy. But when I was there under Chairman Pitofsky, we went to court, we slugged it out. If we lost, that is it.

Mr. JEFFRIES. But over the last few years, I believe it has not been used in terms of the merger context; correct?

Mr. PARKER. It has been threatened to be used. It has been—but the problem is that they will say, okay, we are going to Part 3, and the parties will say, well, I am dead. I mean, there is no deal, so there is never any Part 3. Why? Because the deal went away. So my position is all about fairness.

Mr. JEFFRIES. Understood, and I appreciate that.

Ms. Garza, it is my understanding that the second criticism that has been put forth of the process in order to justify support for this bill has been the notion that the FTC essentially is superseding the court system through this administrative process. Is that a criticism that you share?

Ms. GARZA. I don't know that that is the way I would put it. I think the way that I would describe the problem is to ask you to take a look at the Inova Hospital transaction and what happened there, because that was an example of where I think the FTC switched its policy, the policy that had been put in place by Chairman Pitofsky around 1995, and it illustrates what happens and what the FTC is doing. In that case, I think Professor Kirkwood had said there had been numerous losses in hospital merger cases by both the DoJ and the FTC. So the FTC, in order to help to ensure that it would prevail in the Inova case, did some remarkable things. One of the things it did was it signaled to the court that it filed an administrative proceeding about the same time that it went into court for the preliminary injunction, signaling that no matter what you do, court, we will have an administrative hearing. No matter what the court does, the parties, we will be in an administrative hearing, and then persuaded the——

Mr. JEFFRIES. Ms. Garza, I don't want to cut you off, but my time is limited, so let me just follow up on that point that you are raising.

Ms. GARZA. Okay.

Mr. JEFFRIES. Isn't it also the case, however, that the FTC's administrative process, when that is concluded, is appealable to the Federal Court of Appeals?

Ms. GARZA. It is, but it could be one or 2 years later. So we will never get to that point is the problem. To say what other people have said, the deal won't hold together. So it is an easy or cheap way of killing a deal, through process rather than on the merits.

Mr. JEFFRIES. Okay. I certainly understand that argument. It is a fair argument. But I also just want to make sure it is clear on the record that in terms of going outside the Article 3 jurisdiction, essentially, even if the FTC pursues its administrative process, aside from the practical considerations, it is not extra-judicial, that at the end of the day Article 3 Federal courts or the Court of Appeals has an opportunity to consider it.

Mr. PARKER. That is correct.

Ms. GARZA. Right.

Mr. JEFFRIES. Thank you.

Mr. BACHUS. All right. Thank you, the gentleman from New York.

At this time, we will go to the gentleman from Georgia, Mr. Doug Collins.

Mr. COLLINS. Thank you, Mr. Chairman.

Ms. Garza, you refer to the AMC report statement, the existence of two different preliminary injunction standards may undermine public confidence in antitrust enforcement measures. Could you expand on that point a little bit?

Ms. GARZA. Well, the concern is that the Antitrust Modernization Commission thought it was really very important to a vigorous antitrust enforcement regime that there be broad consensus, that even if you might disagree with decisions, particular decisions, that everybody believes it is a reasonable system, it is a fair system, it is an understandable system.

So our concern was anything that appeared to be hard to explain, where it looked unequal, where it looked as though process was being stacked against you, where it looked like you as a practical matter would not get your day in court, that can't help but to undermine consensus and the need for strong antitrust enforcement. If you have a lot of that, then you have your constituents coming to you and saying antitrust enforcement is unfair, merger enforcement is too stringent. It may not be an issue of merger enforcement or merger enforcement standards, but it is an issue of process, and it is an issue of parties not feeling that they have been unfairly treated and allowed to have a true day in court. So that is why we think the process is really important to making sure that you can go forward with a strong enforcement program.

Mr. COLLINS. It is amazing to me that the word "process" that you used seems to be the key element in a lot of things that we do up here, especially when it comes to regulatory issues and rule reform, that the process is the biggest thing. Many people complain about the end result, but the problem is the process. The problem is what most people end up seeing.

Do you think the SMARTER Act will make obtaining antitrust approval easier or more difficult, or merely more transparent and predictable? Which do you think it would do?

Ms. Garza, or anybody who wants to take it up would be fine.

Ms. GARZA. I really don't think it will affect the merits. What it does is it takes a little bit of the thumb off the scale, but I don't think it will inhibit the FTC's ability, as Mr. Parker has been explaining, inhibit their ability to stop mergers that should be stopped, to obtain relief where they should obtain it. So the idea here is not to change the merits or to change the numbers of transactions that on the merits get through or not. The whole idea is simply to make the process more transparent and clear and perceived as being fair.

Mr. COLLINS. Mr. Parker, do you agree with that, since you were brought up?

Mr. PARKER. I believe it will make it more fair. That will be the change. Yes, sir.

Mr. COLLINS. Okay, good.

Mr. Lipsky, have you personally encountered an FTC administrative litigation that has persisted in spite of a contrary judicial ruling?

Mr. LIPSKY. Personally I have not, no.

Mr. COLLINS. Okay.

Anybody?

[No response.]

Mr. COLLINS. Okay, okay.

Mr. Parker, do you believe that the FTC can effectively perform its antitrust enforcement responsibilities under a preliminary injunction standard that will be applied following the enactment of the SMARTER Act?

Mr. PARKER. Yes, I certainly do. These people used to work for me. They are very good. They can function in Federal court with the best of them. Yes, sir.

Mr. COLLINS. Does anybody else want to comment on that from your perspective?

Mr. KIRKWOOD. One issue that has been surfaced by the comments just made here is whether equalizing the standards would make any difference. If it wouldn't make any difference, even though the FTC has a lower stated standard, the outcomes would all be the same, so there is less need for this legislation. It doesn't mean I oppose that aspect of it, but it is an interesting issue whether any mergers have been stopped that wouldn't be stopped if you equalized the standards.

Mr. COLLINS. Okay. So I think the questions that are coming here and looking at the process, Ms. Garza, do you think the DoJ is any less effective at antitrust enforcement than the FTC because of its inability to use administrative litigation? Ms. Garza?

Ms. GARZA. No, no.

Mr. COLLINS. I think this is an interesting topic, and I think especially when you—and I love what you said, Ms. Garza, about process. This goes back to a process issue, and I think many times the perception of process, whether the end result is one way or the other, the perception of process, I know at least from my part of Georgia, perception is reality. If you want to argue people's perceptions, then you are going to have a lot of problems. You have to educate on the process, and I think this is what is good about that.

Mr. Chairman, with that, I yield back.

Mr. BACHUS. Thank you.

I think this will conclude our hearing at this time. I really appreciate the witnesses' testimony.

Each of your written statements will be entered into the record in their entirety.

With that, this concludes today's hearing.

Ms. GARZA. Thank you.

Mr. BACHUS. Without objection, all Members will have 5 legislative days to submit additional written questions for the witnesses or additional materials for the record.

This hearing is adjourned.

[Whereupon, at 2:32 p.m., the Subcommittee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Prepared Statement of the Honorable Henry C. "Hank" Johnson, Jr., a Representative in Congress from the State of Georgia, and Ranking Member, Subcommittee on Regulatory Reform, Commercial and Antitrust Law

Thank you, Mr. Chairman.

Today's hearing is an important opportunity to consider the Federal Trade Commission's role in developing and enforcing antitrust law.

When Congress first established the Federal Trade Commission in 1914, it sought to safeguard consumers against anti-competitive behavior by breathing new life into antitrust enforcement. Unlike its predecessor—the Commerce Department's Bureau of Corporations—Congress specifically empowered the Commission with adjudicative authority to enforce, clarify, and develop antitrust law. And unlike generalist courts of that era, the Commission also had the mission to study and enunciate the law as an expert tribunal through its research and information-gathering authority.

A century later, the Commission continues to advance antitrust law. Under the process for administrative litigation—also known as Part 3 litigation—the Commission may seek permanent injunctions in its own administrative court in addition to its ability to seek preliminary injunctions in federal district court. This additional authority is a unique mechanism that takes advantage of the Commission's long-standing expertise to develop some of the most complex issues in antitrust law. It is critical to the Commission's mission to promote competition and consumer welfare.

Today, this Subcommittee will consider the "Standard Merger and Acquisition Reviews Through Equal Rules," or SMARTER Act. This bill would create a uniform standard for preliminary injunctions and eliminate the Commission's century-old authority to adjudicate the permanent injunctions of mergers, acquisitions, joint ventures, or similar transactions.

The stated goal of the SMARTER Act—to create a uniform process for merger review between the Federal Trade Commission and Department of Justice—is not without appeal.

I consider myself a man of the law and strong supporter of the third, co-equal branch of government, the federal judiciary. I understand the objective of reserving power for the federal courts instead of agencies, and creating symmetry in antitrust enforcement.

I also understand the concerns associated with administrative litigation. But I would point out that these concerns are hardly new and have existed for decades without serious proof of actual harm or unfairness.

The American Bar Association expressed concerns with the FTC's "twin role as prosecutor and judge" in a landmark report twenty-five years ago, but ultimately concluded that the benefits of this enforcement regime outweighed these concerns. Likewise, when the ABA revisited this question seven years ago, it continued its support of administrative litigation with an important exception: In the rare case of the FTC pursuing administrative litigation after a federal court denies a preliminary injunction.

I am comfortable with creating parity in the standard for preliminary injunctions, or perhaps tinkering with Part 3 litigation in a pragmatic, even-handed way that does not undermine competition or consumer protection.

But the prospect of completely eliminating the FTC's adjudicative authority—a practice that has expertly guided our nation's antitrust laws for a century—raises serious concerns.

I cannot stand by and support legislation that would dismantle government and a century of progress under the guise of symmetrical enforcement.

Although I welcome today's hearing, I sincerely hope that we can work to find an even-handed solution that does not throw the baby out with the bath water. After all, if we can all agree that anti-competitive mergers pose serious threats to consumers and the marketplace, the overriding goal of this legislation should be to preserve competition.

I thank the Chair for holding this hearing and yield back.

Prepared Statement of the Honorable John Conyers, Jr., a Representative in Congress from the State of Michigan, and Ranking Member, Committee on the Judiciary

The draft bill that we consider today—the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014" or SMARTER Act—would make the Federal Trade Commission adhere to the same merger enforcement procedures as the Justice Department's Antitrust Division.

While certain aspects of this proposal have a logical appeal, I have several serious concerns as well.

Most importantly, by making the FTC like the DoJ, this proposal would weaken the FTC's independence, which contravenes Congress's original intent in establishing the FTC.

Without question, Congress established the Commission to be an *independent* administrative agency for good reasons.

In particular, Congress was dissatisfied with the failure of the Sherman Antitrust Act of 1890 to stop the merger wave and corporate abuses that occurred over the course of the 24 years following its enactment

It should be noted that Congress created the FTC in 1914 notwithstanding the fact that the Justice Department's antitrust enforcement authority had already been in existence and fully functional at that time.

So, the FTC was established by Congress to function as a body of experts that could develop antitrust law and policy comparatively free from political influence, and particularly executive branch interference.

To effectuate these purposes, Congress gave the FTC broad investigative and reporting powers as well as the authority to use an administrative adjudication process to enforce the antitrust laws rather than try cases before a federal judge.

Unfortunately, the SMARTER Act, by eliminating distinctions between the FTC and the DoJ in merger enforcement procedures, threatens to undermine Congress's original intent in creating the Commission.

Particularly problematic in this regard is the bill's provision eliminating in merger cases the administrative adjudication process under section 5(b) of the FTC Act.

This provision fundamentally changes the character of the FTC in the merger context, transforming it from an independent administrative agency into just another enforcement agency like the Antitrust Division of the Justice Department.

Additionally, eliminating the FTC's ability to conduct administrative adjudication would harm the FTC's ability to protect consumers.

Administrative adjudication, by which the agency and the merging parties litigate their case in front of an agency administrative law judge, allows for a less formal adjudication process before a panel of experts, in contrast to litigation before a generalist judge in a federal court. Moreover, the administrative process allows the testing of novel theories and the development of expertise in new industries in a way that a generalist court is less well-suited to handle.

Moreover, although the legislation purportedly is limited to merger enforcement, certain provisions appear to curtail the FTC's administrative litigation authority *beyond* merger cases, which could jeopardize the FTC's independence.

In particular, the SMARTER Act would exclude from the FTC's authority to use administrative adjudications not just for a merger or acquisition, but also for a "joint venture" or "similar transaction."

Moreover, it would exclude from the FTC's authority to administratively issue cease-and-desist orders "any activity *in preparation* for a merger, acquisition, joint venture, or similar transaction" that may result in an unfair method of competition.

The clear import of this provision, which reaches conduct beyond mergers and acquisitions, would be to further curtail the FTC's administrative authority in the future.

Finally, our preeminent goal here should be to *strengthen, not weaken,* antitrust enforcement in order to protect consumers, which is why FTC Chairwoman Edith Ramirez wrote to this Subcommittee raising concern about the SMARTER Act.

As Chairwoman Ramirez pointed out, the bill would have "far-reaching immediate effects" and "fundamentally alter the nature and function of the FTC, as well as the potential for significant unintended consequences."

Therefore, any effort to lessen the FTC's independence and thereby weaken its ability to vigorously enforce antitrust laws must be viewed with great skepticism.

Unfortunately, antitrust scrutiny of mergers has been woefully deficient over the past 30 years, although there has been some modest improvement recently.

The very fact that many industries are now dominated by just a handful of very large firms attests to this failure of aggressive scrutiny.

Fewer and more dominant firms within an industry forces consumers to pay higher prices and to accept suboptimal products or services.

As I noted at the outset, the SMARTER Act has some logical appeal. I do not foreclose working with my colleagues on a narrower proposal that does not touch administrative adjudication. As currently drafted, however, I cannot support this measure.

April 9, 2014

The Honorable Spencer T. Bachus, III
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

The Honorable Henry C. Johnson, Jr.
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington, D.C. 20515

RE: The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"

Dear Chairman Bachus and Ranking Member Johnson:

The American Antitrust Institute ("AAI") respectfully requests that this letter become part of the record of your Subcommittee's April 3, 2014, hearing on the draft "Standard Merger and Acquisition Reviews through Equal Rules Act of 2014" (the "SMARTER Act"). AAI generally shares the concerns expressed at the hearing by John Kirkwood, a longtime Senior Fellow and distinguished member of AAI's Advisory Board, and the concerns set forth in FTC Chairwoman Ramirez's April 2, 2014, letter to the Subcommittee, particularly with regard to the proposed elimination of the FTC's authority to engage in administrative adjudication of mergers and unspecified other transactions. AAI believes the Subcommittee's initiative raises important questions of merger law and policy that warrant careful study over the months (or years) ahead, and it is premature to move in the direction of drafting any specific proposed legislation until that study is concluded. AAI's more specific perspectives on the issues presented by the proposed SMARTER Act are as follows:

1. AAI agrees that it is anomalous that there are different articulations of the standard for obtaining a preliminary injunction against a proposed merger depending on which enforcement agency is bringing the case to court: mergers challenged by DOJ can be preliminarily enjoined only if DOJ meets the traditional equity test including a showing of a substantial likelihood that the merger will violate Section 7; mergers challenged by the FTC can be preliminarily enjoined upon what some courts have held to be a more lenient public interest test under Section 13(b) of the FTC Act. But is this difference a real difference? AAI shares the skepticism of many observers that this difference matters in any material sense since courts generally require both agencies to make strong

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showings of probable anticompetitive effect before a preliminary injunction is entered, this notwithstanding that Section 7 of the Clayton Act bars acquisitions whose effect "*may be* substantially to lessen competition."[1]

Assuming this difference does matter, however, SMARTER Act supporters prematurely jump to the conclusion that the correct solution to this "unfairness" is to subject FTC challenges to the tougher standard applicable to DOJ. Why is it not better from a public policy standpoint to address the anomaly by extending the benefit of the Section 13(b) standard to DOJ challenges? A deferential standard for both agencies is warranted by the expertise and sophistication of the merger review process at both agencies, as well as by the "incipiency doctrine," which requires both agencies to "arrest in its incipiency . . . the substantial lessening of competition" from an acquisition.[2] In any event, AAI suggests that the right choice between these two options depends on whether, in the current environment, the problem to be solved – if there is one – is over-enforcement by FTC or under-enforcement by DOJ. More on that question below.

2. A clearly more material difference between the two agencies' merger enforcement regimes is that DOJ merger challenges must be tried before "generalist" judges in district courts while FTC merger challenges can be tried within the FTC's own administrative adjudication process. Although this difference has been part of the merger enforcement landscape for 100 years, SMARTER Act supporters cite one lone example of an alleged abuse of the Commission's administrative option – two decades ago – as support for abolishing it.[3] The cited concern is that, even when the FTC loses a motion for a preliminary injunction in court and the merger is then consummated, the FTC can subject the merger to a "second bite at the apple" – an administrative adjudication seeking to unwind it. But that concern was addressed in a 1995 Commission Policy Statement and an associated addition to the Commission's Rules of Practice.[4] There is no apparent ongoing problem to be addressed; and, even if there is such a problem, the obvious solution would be legislation limited to precluding an administrative challenge in the aftermath of denial of a preliminary injunction rather than the far more drastic elimination of the administrative adjudication process for merger challenges altogether.

3. In any event, prudence compels caution in any tinkering with a system of dual enforcement including administrative adjudication that emerged out of robust debate in the course of the 1912 Presidential election campaign and that Congress adopted two years later in the face of grave concern over the fate of antitrust enforcement generally when left exclusively in the hands of

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[1] 15 U.S.C. § 18 (emphasis added).

[2] United States v. E.I. DuPont de Nemours & Co., 353 U.S. 586, 589 (1957).

[3] R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995). Deborah Garza, in her testimony supporting the SMARTER Act, offered a rendition of what happened in a 2008 FTC challenge of a hospital merger in which the parties abandoned their proposed transaction before a court ruling on the FTC's preliminary injunction motion as a further basis for the proposed legislation. See Garza Statement at 4-5. AAI finds that episode to be of no relevance to the issue at hand.

[4] Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995); 16 C.F.R. § 3.26 (2009). The rule adopted in the immediate aftermath of that policy statement and now set forth in 16 C.F.R. § 3.26 invites respondent, in the wake of a court's denial of a preliminary injunction, to move for dismissal of the associated administrative proceeding or for a new Commission determination of whether continued litigation is in the public interest.

generalist judges.[5] That concern persists, as exemplified in a recent decision by a federal district court in the district of Minnesota that found no antitrust violation when the owner of the only drug that treats an acute condition of premature infants acquired its only rival drug and thereupon raised prices by more than 1400%.[6] The system of dual enforcement is not broken. AAI has criticized merger enforcement and non-enforcement decisions of both agencies, but there is no doubt that both agencies have contributed importantly to the evolution of merger law and policy over many years. AAI fears the inevitable disruption and likely diminution of overall enforcement in this field that would accompany any legislative "fix" of the sort proposed by SMARTER Act supporters in the short term.

4. That said, however, AAI would welcome a broad in-depth study of the current dual enforcement system and related aspects of the current merger enforcement landscape with a view to developing consensus judgments regarding thoughtful reforms over the years ahead. Such a study should begin with a probing examination of the question identified hereinabove as to whether the existing enforcement apparatus results in either over-enforcement or under-enforcement of Section 7 strictures on merger activity. This is a question that should be explored not only with respect to U.S. enforcement processes but also with an eye on what has become a global enforcement system with many participants on other continents. AAI readily acknowledges its own strong inclination that there is significant under-enforcement, a function of many factors that include steadily increasing concentration in critical parts of the economy as a result of steadily increasing merger activity; inadequate funding of the enforcement agencies; and merger law standards that have become more complex than necessary or desirable, thereby steadily escalating both investigation and litigation costs. Surely, however, an objective nonpartisan study of this question should precede any legislation that would change existing institutional structures.

5. If and when it becomes timely to explore institutional restructuring, AAI believes that eliminating FTC administrative adjudication would almost surely be counterproductive. We would thereby (a) lose the considerable benefits of expert agency policy evolution, the original Wilson/Brandeis vision giving rise to the FTC's creation a hundred years ago and more important than ever for sound evolution of merger policy in the 21st Century; and (b) exacerbate any inefficiency of dual enforcement generally since we would then have two enforcement agencies applying the same merger law standards and procedures to different companies in different industries in cases brought exclusively to generalist courts. A more logical course would be channeling all merger enforcement to the FTC and its expert administrative processes. Among the benefits would be enabling DOJ to shift more resources into its highly acclaimed criminal cartel enforcement activity (thereby likely to add even more to the already billions of dollars in fines it brings into the U.S. treasury year after year).

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[5] As the Commission observed in its above-referenced 1995 Statement of Policy, the FTC "was created in part because Congress believed that a special administrative agency would serve the public interest by helping to resolve complex antitrust questions. Congress intended that the Commission would play a 'leading role in enforcing the Clayton Act, which was passed at the same time as the statute creating the Commission' [quoting Hospital Corp. of America v. FTC, 807 F.2d 1381, 1388 (7th Cir. 1986)]. . . . Especially because the Supreme Court has addressed substantive issues of merger law only rarely in recent decades, and because antitrust law during that time has evolved in response to economic learning, the Commission's opinions have been an important vehicle to provide guidance to the business community on how to analyze complex merger issues." 60 Fed. Reg. 39,741 at 39,742.

[6] FTC v. Lundbeck, Inc., 2010 WL 3810015 (D. Minn. 2010).

6. Notwithstanding all of the above, AAI believes that there is one aspect of institutional reform in the merger enforcement field that is now timely for Congressional consideration: inadequacies in both judicial and public vetting of merger settlements. The now-pending Tunney Act proceeding with regard to DOJ's U.S. Airways/American Airlines settlement highlights the problem. As AAI argued in an amicus brief filed in that proceeding last week, meaningful review under the Tunney Act process is undermined in particular by the common practice of allowing consummation of the merger at issue as soon as the proposed consent decree is filed and thus obviously before public comments are received or the presiding judge has even seen the proposed settlement terms. This same practice is common with respect to FTC merger settlements: the mergers that are settled are allowed to close as soon as the proffered consent orders are published and before any comments are received under the agency's administrative review process. AAI would welcome your Subcommittee's review of this problem and consideration of potential fixes for it.

Our thanks for your consideration of our perspectives.

Sincerely,

Albert A. Foer
President
American Antitrust Institute

OFFICE OF THE
CHAIRWOMAN

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

April 2, 2014

The Honorable Spencer T. Bachus III
Chairman
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington D.C. 20515

The Honorable Henry C. Johnson, Jr.
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
House Committee on the Judiciary
U.S. House of Representatives
Washington D.C. 20515

Dear Chairman Bachus and Ranking Member Johnson,

I write in connection with the hearing your subcommittee will hold on April 3, 2014, to consider a discussion draft of legislation that would eliminate the Federal Trade Commission's authority to conduct administrative hearings and sit as an administrative tribunal in cases involving mergers and certain other transactions. I have serious concerns about both the far-reaching immediate effects of the draft bill, which would fundamentally alter the nature and function of the FTC, as well as the potential for significant unintended consequences.

Congress created the Commission in 1914 as a bipartisan expert agency that would augment existing antitrust enforcement authority by taking a considered and long-term approach to developing antitrust law and safeguarding competition. In doing so, Congress expressly recognized that American consumers would benefit from an expert agency with the means to develop competition law and policy over time. To that end, Congress gave the FTC unique tools to carry out this special charge. These include expert research authority, broad information-gathering power, and, of particular significance here, an adjudicative function in which the FTC considers and decides cases as an expert tribunal, subject to review by a federal court of appeals.

This quasi-judicial role is a defining characteristic of the FTC and is critical to our ability to fulfill our mission to promote competition and advance consumer welfare. It allows the Commission to conduct thorough hearings to develop both the facts and the law in a broad variety of antitrust matters. Our adjudicative function has been particularly valuable in complex areas such as hospital mergers, where the Commission has used the combination of its information-gathering power and case-specific law enforcement authority to develop a coordinated, well-considered approach to challenging anticompetitive conduct, one that has now been endorsed by the federal courts.

In the nearly one hundred years that the Commission has performed this role, it has fully realized the benefits Congress originally foresaw in 1914 when it created the FTC. I am especially proud of the Commission's record in using its administrative litigation process to identify, prevent, and remedy anticompetitive mergers. In sum, I believe there is no basis for fundamentally altering this critical aspect of the Commission's institutional role, which has served American consumers and the public interest well over the course of the last century.

Thank you for considering my views on this matter. I respectfully request that this letter be made part of the hearing record.

Sincerely,

Edith Ramirez
Chairwoman

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Questions for the Record from
Congressman Holding
for the Hearing on "H.R. ___, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"
April 3, 2014

Questions for Mr. Cary

1. In your general experience in government or private practice, has the merger review process ever been used to extract or impose extraneous concessions or conditions for potential antitrust or other concerns - unrelated to the merger under review?

I cannot say that this practice has not ever happened, but it is rare. I would estimate that this might occur a few times a decade.

2. Following on, in your view, is it inappropriate to use Section 7 merger review authority to seek extraneous remedies, either under Section 5 of FTC Act, or Sections 1 or 2 of Sherman Act, that don't arise from, or are not a part of, the deal terms or documents of the transaction before the government for review?

As a general proposition, I would agree that it is inappropriate to use Section 7 merger review authority to seek extraneous remedies. The ability to hold up a major transaction through extraneous demands puts the merging parties in a very difficult position, having to trade off their procedural rights in the unrelated matter against the business demands of closing the transaction or the extremely high costs (many millions of dollars) and time

required to substantially comply with a Request for Additional Information in order to start the clock on the merger review so as to force the agency's hand.

3. Would it be a problem to make clear in this statute, as this is good government legislation, that the agencies in reviewing a merger may not impose such extraneous conditions, unrelated to the effects of the merger?

While completely agreeing that using the merger review process to secure extraneous remedies is inappropriate, I am reluctant to add to the statute in this regard. The problem is that, how closely related the "extraneous" matter is to the merger, is often unclear. If there is an ongoing issue of potentially exclusionary activity, such concerns could be exacerbated if the party increases its market share and therefore market power through a merger which subjects even more of the market to the exclusionary activity. On the other hand, if the market is less than competitive to begin with, thereby raising concerns about the merger, it may in fact relieve those concerns to eliminate other exclusionary activity, such that the merger can go forward, realizing efficiencies, without threatening competition.

Sorting these issues out is often not straightforward. Adding a statutory provision could unduly chill the Agency's efforts to resolve a merger short of litigation and in a way that allows an otherwise procompetitive merger to go forward. Given that this issue rarely arises, statutory amendment is not necessary.

Given that reasonable people can differ as to the degree of relationship between the merger and the so-called "extraneous" matter, the better approach is for the Congress to use its oversight function to admonish the Agency not to abuse its authority in this regard, and to scrutinize its judgment as to whether the degree of relationship between a merger and other exclusionary activity is sufficient to warrant using the powerful procedural tools of the merger process.

George S. Cary
Partner
Cleary Gottlieb Steen & Hamilton LLP

Former Deputy Director
Bureau of Competition
Federal Trade Commission

Questions for the Record from
Congressman Holding
for the Hearing on "H.R. ___, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"
April 3, 2014

Questions for Ms. Garza

1. In your general experience in government or private practice, has the merger review process ever been used to extract or impose extraneous concessions or conditions for potential antitrust or other concerns - unrelated to the merger under review?

Response:

In my general experience in both the public and private sectors, neither the U.S. Justice Department Antitrust Division (DOJ) nor the U.S. Federal Trade Commission (FTC) have used the Hart-Scott-Rodino Act merger review process to extract or impose concessions or conditions not specifically intended to competitive concerns raised by the merger.

The FTC has considered addressing data privacy concerns through the HSR merger review process, but rejected that approach as being inconsistent with the law. An example is Google's acquisition of DoubleClick in 2007. By a vote of 4 to 1, the FTC voted to close an eight month long investigation of that transaction without any objection. In its closing statement, the FTC stated that interested parties had raised concerns about the transaction's potential impact on consumer privacy. However, the FTC concluded that the concerns were not unique to Google-DoubleClick. Importantly, the FTC explained:

> 'as the sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition,' the FTC lacks the legal authority to block the transaction on grounds, or require conditions to this transaction, that do not relate to antitrust.

http://www.ftc.gov/system/files/documents/public_statements/418081/071220googledc-commstmt.pdf.

In my experience, the principle reflected in the quoted language has continued to guide the enforcement policy and actions of both the FTC and DOJ.

I note that the FTC did impose conditions relating to the licensing of standards essential patents (SEPs) in a decree resolving merger-related concerns associated with the acquisition by Robert Bosch GmbH of SPX Service Solutions in November 2012. *See In the Matter of Robert Bosch GmbH* (Nov. 2012). The FTC alleged that the proposed merger would give Bosch a monopoly in the sale of air conditioning recycling, recovery

and recharge (ACRRR) devices in the United States and obtained a commitment by Bosch to sell its ACRRR device business as a condition of closing the merger. The FTC also alleged in the same complaint that, prior to its agreement with Bosch, SPX violated RAND (reasonable and nondiscriminatory) licensing obligations with respect to certain key SEPs by seeking injunctions against willing licensees. To avoid an enforcement action under Section 5 of the FTC Act (which prohibits unfair methods of competition), Bosch agreed to abandon SPX's claims for injunctive relief. Although the merger and SEP allegations were alleged and settled in the same complaint and consent decree, publicly available information does not indicate that the FTC conditioned its approval of the merger on Bosch's agreement to also settle the SEP claims. It appears that Bosch chose to resolve what otherwise would have been an ongoing, stand-alone enforcement action at the same time that it resolved the merger challenge.

As I observed in my testimony, in contrast to the federal enforcement agencies, various state Attorneys General have from time to time extracted concessions from merging parties to address non-antitrust concerns (for example, job losses and environmental concerns). It appears that the parties agreed to these requests in order to prevent delay that would result from litigation with the state or states.

2. Following on, in your view, is it inappropriate to use Section 7 merger review authority to seek extraneous remedies, either under Section 5 of FTC Act, or Sections 1 or 2 of Sherman Act, that don't arise from, or are not a part of, the deal terms or documents of the transaction before the government for review?

Response:

I agree with the FTC's statement in Google/DoubleClick (quoted above) that it is inappropriate to seek to challenge a merger, or to impose conditions on it, on grounds unrelated to competition concerns arising out of and reasonably likely to result from the transaction.

That having been said, it is possible that in the course of investigating a merger, an antitrust enforcement agency will discover other conduct it believes violates the law or, even if it does not violate the law, would impede competitive response to a post-merger reduction in output and/or price increase. For example, the enforcement agency might uncover evidence of a price-fixing conspiracy or other conduct that unreasonably violates U.S. antitrust law. In that event, the enforcement agency must be free to pursue whatever investigation and prosecution it deems appropriate independent of its review of the merger.

In addition, such conduct could be relevant to the agency's assessment of the merger. For example, one question in assessing a merger's likely competitive effect is whether it would unreasonably facilitate successful coordinated interaction. Evidence of existing or prior price-fixing might suggest that the industry is susceptible to collusion and weigh in favor of challenging the merger and/or of imposing conditions designed to prevent such collusion in the future. As further example, certain types of pre-existing

agreements may limit the ability of actual or potential competitors to respond to a post-merger price increase (consider agreements not to compete or exclusive dealing or distribution agreements).

It is completely appropriate to consider the effect of such an agreement in assessing the merger's likely competitive effect. The merging parties might agree to terminate or modify such an agreement or agreements or agree that they will not enforce them in order to remove impediments to competition that would deter or counteract a post-merger price increase. This kind of concession or condition is appropriate and should not be viewed as being unrelated to the merger.

3. Would it be a problem to make clear in this statute, as this is good government legislation, that the agencies in reviewing a merger may not impose such extraneous conditions, unrelated to the effects of the merger?

Response:

I do not believe a revision is needed, given existing case law and the lack of evidence of abuse by the enforcement agencies. However, it should be possible to craft language affirming that relief should be related to the likely competitive effects of the merger alone. Such language should be carefully written to avoid the possibility of unreasonably limiting the agencies' ability to resolve merger-related concerns short of absolutely prohibiting transactions from proceeding.

Questions from Mr. Conyers

4. In Professor Kirkwood believes there may be value in permitting the FTC to pursue administrative litigation even after it loses a preliminary injunction proceeding in court when a transaction involves a rapidly changing industry or is in an industry that neither DOJ or FTC have developed much expertise in.

What is your response?

Response:

There might be some value in some cases of litigating a merger challenge even after a preliminary injunction is denied (and this is the case for either DOJ or the FTC). However, there are also costs. As I and other witnesses explained at the hearing, it can be impossible for parties to hold a deal together for as long as it would take for a full trial and appeal. At the time a complaint is filed, DOJ or the FTC will already have investigated the transaction for up to a year or even more and the agency often seeks, and the courts will typically allow for, additional discovery prior to the preliminary injunction hearing. This kind of time already stresses the parties' ability to hold a deal together. Buyers may not be able to tolerate the further delay, uncertainty and risk of having to unwind a deal post-closing following many more months of litigation. This is why for

many years DOJ tended to collapse the preliminary and permanent injunction hearing into one and the FTC chose not to pursue an administrative proceeding as a general rule. That system worked well. The system, in my view, broke, when the FTC determined to improve its record of stopping mergers by exploiting procedures unique to its status as an administrative agency. While that was the FTCs prerogative and consistent with the law, there is a substantial question whether it is good merger policy for the U.S.

It is not clear to me that a distinction can be made for transactions in a rapidly evolving industry or an industry as to which the enforcement agency lacks experience. Merger analysis is inherently highly fact intensive, and every merger review involves marshalling the facts and assessing them against certain largely agreed principles and parameters.

5. Why did the AMC not recommend combining the DOJ and the FTC outright, at least with respect to their merger enforcement functions?

Response:

Because DOJ is a part of the executive branch and the FTC is an independent agency, it is not possible literally to combine them. Rather, Congress would have to provide exclusive antitrust merger review authority to one agency or the other. A majority (if not all) AMC commissioners agreed that if we were starting with a blank slate, we would recommend there be a single federal antitrust merger enforcement agency. However, there was no consensus on the AMC or in comments or testimony submitted to the AMC on which agency should have sole merger enforcement authority, DOJ or the FTC. That choice largely depends on whether enforcement authority is best vested in an executive branch agency (with one ultimate agency decision-maker and traditional court review) or an independent agency (requiring the majority vote of a politically diverse commission and involving administrative procedures). In addition, because the AMC was not dealing with a blank slate, some commissioners were concerned about the effect on the FTC of removing merger enforcement authority and, in general, we did not believe that any recommendation the AMC might make could ever actually be implemented due to the political sensitivities of removing merger enforcement authority from either agency.

Questions for the Record from
Congressman Holding
for the Hearing on "H.R. ___, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"
April 3, 2014

Questions for Mr. Lipsky

1. In your general experience in government or private practice, has the merger review process ever been used to extract or impose extraneous concessions or conditions for potential antitrust or other concerns - unrelated to the merger under review?

   The possibility that relief imposed by antitrust agencies in merger review has been influenced by extraneous considerations – either antitrust concerns unrelated to the transaction, or non-antitrust concerns – is suggested by a number of cases over the years. Fortunately this is relatively rare in the U.S., but the possibility has arisen. When the FTC imposed conditions on the combination of Time Warner Inc. and Turner Broadcasting System, Inc. in 1996, for example, the totality of the circumstances – including concerns expressed publicly by FTC officials regarding multiplicity of ownership in media industries – suggested that an independent First Amendment concern may have been reflected in the Commission's construction of antitrust law. More recently, conditions imposed on transactions in IP-intensive sectors have given rise to suggestions that federal agency merger review has begun to incorporate intellectual-property policy considerations that are tangential or even extraneous to the antitrust issues posed by the specific transaction under review.

   This issue of a possible role for extraneous considerations in merger review is attracted more frequently in jurisdictions outside the U.S., especially in jurisdictions that incorporate non-antitrust factors – such as national economic development, market integration or increasing the ownership stakes of previously disadvantaged persons -- within the substantive standards of competition law applicable to mergers.

2. Following on, in your view, is it inappropriate to use Section 7 merger review authority to seek extraneous remedies, either under Section 5 of FTC Act, or Sections 1 or 2 of Sherman Act, that don't arise from, or are not a part of, the deal terms or documents of the transaction before the government for review?

   The disadvantages of allowing antitrust agencies to seek extraneous remedies in the course of merger review, as indicated in the question, vastly outweigh any asserted advantages, and I therefore oppose the practice. The current system for merger review pursuant to Section 7 of the Clayton Act and the HSR Act gives significant procedural advantages to the government enforcement agencies, primarily in the form of a mandate for investigation that lacks an effective practical constraint. Were the federal agencies empowered to apply their merger review authority to implement remedies with regard to

extraneous issues, those advantages would be transferred to other spheres of antitrust enforcement. This is likely to result in substantial negative effects on the clarity and objectivity of antitrust enforcement, and would also insulate agency action on such issues from timely judicial review. Such judicial review is an essential safeguard in encouraging prudent exercise of enforcement authority by the agencies, and any action that compromises that review would unbalance the current law-enforcement system and could undermine the judiciary's key role in antitrust enforcement and lead to substantial negative effects on the economy.

3. Would it be a problem to make clear in this statute, as this is good government legislation, that the agencies in reviewing a merger may not impose such extraneous conditions, unrelated to the effects of the merger?

No. I support the concept outlined in the question.

Questions for the Record from
Congressman Holding
for the Hearing on "H.R. ___, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"
April 3, 2014

Questions for Mr. Parker

1. In your general experience in government or private practice, has the merger review process ever been used to extract or impose extraneous concessions or conditions for potential antitrust or other concerns - unrelated to the merger under review?

   When I was at the Federal Trade Commission it was neither my practice nor the policy of the agency to extract or impose extraneous conditions or concessions unrelated to the merger under review. In private practice in the mergers in which I have been involved on behalf of clients, I have not seen extraneous concessions or conditions imposed unrelated to the merger under review.

2. Following on, in your view, is it inappropriate to use Section 7 merger review authority to seek extraneous remedies, either under Section 5 of FTC Act, or Sections 1 or 2 of Sherman Act, that don't arise from, or are not a part of, the deal terms or documents of the transaction before the government for review?

   It is not appropriate to use Hart-Scott-Rodino merger review authority to impose extraneous remedies unrelated to potential competitive concerns raised by a proposed merger transaction.

3. Would it be a problem to make clear in this statute, as this is good government legislation, that the agencies in reviewing a merger may not impose such extraneous conditions, unrelated to the effects of the merger?

   I am hopeful that the SMARTER Act will be narrowly crafted legislation to address a very specific and different issue. Respectfully, I suggest that the Committee not add language unrelated to the legislation's primary purpose.

Questions from Mr. Conyers

4. In Professor Kirkwood believes that, although in most cases the preliminary injunction standards applicable to the FTC and the DOJ are substantially similar in application, therefore militating in favor of standardizing them statutorily, there may be some reason to maintain the existing section 13(b) standard for the FTC. In particular, he cites administrative expertise that would produce better results rather than assigning cases exclusively to generalist judges and situations where an industry is rapidly changing and neither agency has much expertise.

What is your response?

In the FTC's investigation and its decision on whether to seek to enjoin a merger, the Commission can and does bring its full expertise to bear. The review process before a complaint is filed generally takes at least six months and often more. During this time, the FTC has access to a tremendous amount of documents and data from the merging parties, as well their executives and other employees. The agency may obtain information from third parties and typically does so. The FTC has tremendously talented lawyers and economists, they can and do use their expertise to develop their case and go to court. Thus, FTC expertise is brought to bear on the merger even though ultimately tried in federal court.

Why did Congress create the FTC as an independent agency? By choosing to standardize the merger enforcement process under those applicable to DOJ, doesn't the SMARTER Act undermine Congress's intent in making the FTC independent?

Congress created the FTC in 1914 as independent agency, in part to address concerns about the power of the large trusts by creating an expert agency. Section 13(b) was not part of the original FTC Act, but enacted as part of the Trans-Atlantic Pipeline Authorization Act in 1973. At the time the legislation was enacted, the FTC had no statutory authority to seek injunctive relief based on merger review. In the statute itself, Congress chose to use the words "likelihood of success" and not "serious substantial" questions. The Joint Committee report also noted that the purpose of the new language was "to define the duty of the courts to exercise independent judgment." The current and lower preliminary injunction standard being applied by certain courts under 13(b), specifically the D.C. Circuit in its decision in FTC v. Whole Foods Mkt., Inc., 548 F.3d 1028 (D.C. Cir. 2008), and as followed and interpreted by a decision of the U.S. District Court for the District of Columbia in FTC v. CCC Holdings Inc., 605 F. Supp. 2d 26 (D.D.C. 2009), is relatively recent. I believe requiring the FTC to follow the same standard as the DOJ to obtain a preliminary injunction in a Hart-Scott-Rodino merger case does not undermine the agency's independence or deprive the courts of the FTC's expertise, as interpreted by some courts recently. I also believe it is good government to have mergers reviewed and challenged by the Federal Trade Commission or the Department of Justice decided by a federal court under the same standard.

To be clear, I do not believe the FTC should be precluded from using its administrative proceedings for consummated transactions nor for non-merger matters.

To the extent that there are material differences in the preliminary injunction standards applicable to the FTC and the DOJ in HSR merger cases, why should the standard applicable to DOJ, as opposed to the standard articulated in FTC Act section 13(b), be the applicable standard to both agencies?

I believe that the standard that the DOJ is held to in HSR merger cases is the same standard that Congress intended for the FTC to be held to under 13(b) when the Commission seeks to block a Hart-Scott-Rodino merger at the preliminary injunction stage. When I was at the FTC that was the standard I assumed we had to meet and we were able in almost all cases to meet it.

Questions for the Record from
Congressman Holding
for the Hearing on "H.R. ___, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"
April 3, 2014

Questions for Professor Kirkwood

1. In your general experience in government or private practice, has the merger review process ever been used to extract or impose extraneous concessions or conditions for potential antitrust or other concerns - unrelated to the merger under review?

   No, not in my experience.

2. Following on, in your view, is it inappropriate to use Section 7 merger review authority to seek extraneous remedies, either under Section 5 of FTC Act, or Sections 1 or 2 of Sherman Act, that don't arise from, or are not a part of, the deal terms or documents of the transaction before the government for review?

   Yes, it is inappropriate.

3. Would it be a problem to make clear in this statute, as this is good government legislation, that the agencies in reviewing a merger may not impose such extraneous conditions, unrelated to the effects of the merger?

   No, it would not be a problem, assuming the provision was precisely drafted.

Questions from Mr. Conyers

4. Ms. Garza expresses concern that the FTC "has a potentially enormous advantage vis-a-vis DOJ and leverage over the parties with respect to the mergers it challenges" because of its institutional structure as an administrative agency.

   What is your response?

   As I indicated in my testimony, the preliminary injunction standards for the two agencies should be equalized. If they are, then the FTC is no more likely to obtain a preliminary injunction than the DOJ. Under these circumstances, the FTC's administrative powers would not give it an undesirable advantage over the DOJ.

   Suppose the FTC seeks to block a proposed merger and loses. In that case, it would not ordinarily subject the merger to administrative litigation.

Indeed, in the past twenty years, it has never done so. In such cases, its administrative powers would not give it a significant advantage over the DOJ.

Suppose, on the other hand, the FTC seeks to block a merger and wins a preliminary injunction. Then, administrative adjudication would follow, and the prospect of such litigation might well cause the parties to abandon their deal, something that would not happen in a DOJ case, where both a permanent injunction and a preliminary injunction are tried at the same time. But that result would not normally be undesirable. For if a district court grants a preliminary injunction, and that decision is sustained on appeal, two federal courts would have determined that the merger is reasonably likely to reduce competition. When the parties lose twice in federal court, there is little reason to be concerned if they drop their proposed merger.

In short, if the FTC is no more likely to obtain a preliminary injunction than the DOJ (because the standards for the two agencies have been equalized), the FTC's administrative powers would rarely, if ever, give it an undesirable advantage over the DOJ.

5. Mr. Lipsky asserts that the "cost and duration of administrative litigation – especially when added on top of the already costly and time-consuming legal processes involved in the resolution of a suit for injunction – can easily discourage stakeholders from considering lawful and procompetitive transactions on the margin." For this reason, he believes that the FTC should not be allowed to use administrative litigation in merger cases.

   What is your response?

   The FTC's ability to challenge a merger through administrative litigation should not be eliminated, for the reasons I mentioned in my testimony.

   This power is unlikely to deter a significant number of procompetitive mergers because, as I noted in my response to the prior question, if the federal courts determine that the merger is likely to be procompetitive, and deny the FTC's request for a preliminary injunction, the FTC is extremely unlikely to subject the transaction to administrative litigation.

   In the case of *consummated* mergers, the FTC does use administrative adjudication, but the prospect of such litigation has obviously not deterred the merger. Moreover, as the Evanston hospital merger case showed, the FTC's ability to adjudicate the legality of such a merger through the administrative process can be very valuable for consumers and the economy.

6. The SMARTER Act will, among other things, impose the Tunney Act requirement that a court make a public interest determination before entering a consent judgment.

   Do you believe the Tunney Act has worked as intended? If not, how can it be improved?

   This is a substantial issue, but I have not studied it and cannot comment.

7. Are you concerned that the SMARTER Act's carve-out from the section 5(b) administrative adjudication process may reach transactions other than mergers and acquisitions? For example, it appears to reach non-merger conduct such as pre-merger activity, joint ventures, and other undefined "similar transactions."

   This is also a concern. While it could be mitigated by careful drafting, the better approach is to preserve the FTC's ability to employ administrative adjudication in all cases.