The American Antitrust Institute

July 30, 2015

Honorable Bob Goodlatte, Chairman
Committee on the Judiciary
House of Representatives
2138 Rayburn House Office Building
Washington, DC 20515-6216

Re: H.R. 2745, Hearing on June 16, 2015

Dear Chairman Goodlatte:

The following are my responses to your letter dated July 10, 2015, providing questions submitted for the Record from Committee Ranking Member Conyers and Subcommittee Ranking Member Johnson, regarding my testimony at the above hearing.

1. Do you agree that eliminating the Federal Trade Commission's (FTC) adjudicative authority is a step in the direction of neutering the FTC and decreasing its role in consumer protection and antitrust enforcement?

Yes, I agree. The proposed bill aims at eliminating the FTC's adjudicative authority over most, if not all, merger challenges. If the adjudication process is eliminated for this large and important category of the FTC's competition mission, opponents of the FTC will likely be encouraged to argue that all FTC litigation should be carried on in the federal courts, and from there it is but a short step to argue that all antitrust enforcement should be conducted by the U.S. Department of Justice (DOJ).

This is no time to reduce the tools that the government has to stop anticompetitive mergers or introduce uncertainty (and likely litigation) over those tools. As a respected columnist in the Wall Street Journal recently noted, the current merger wave may represent "a decline in competition as market power becomes concentrated in the hands of fewer companies," leading to decreased investment, fewer start-ups, a slowdown in productivity, and perhaps increased inequality. Greg Ip, *Why Corporate America Needs Some More Competition*, Wall St. J., July 9, 2015, A2. He concludes that "finding a way to rejuvenate competition could have widespread benefits." The proposed legislation moves in precisely the opposite direction.

2. Why is it important for the FTC to retain its ability to use administrative adjudication in merger cases?

"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 determinations of antitrust questions. It thought the assistance of an administrative body would be helpful in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act,

which was passed at the same as the statute creating the Commission." *Hospital Corp. of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986) (Posner, J.).

The same is true today. Allowing the FTC to proceed through adjudication takes advantage of the expertise of the Commission, and allows the Commission to shape a record from which it can elucidate important issues. Keep in mind that very few federal judges have much experience with antitrust or mergers, whereas the administrative law judges at the FTC and the FTC Commissioners have very substantial relevant expertise. One need look no further than the FTC's recent adjudicatory success in the Supreme Court involving state action to see the benefits of this process in a non-merger case. *See N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) (affirming FTC's adjudicatory decision holding self-interested dental board liable under antitrust laws). The adjudicatory process offers the same benefits in merger cases. Indeed, since much merger enforcement is grounded on administrative merger guidelines, it is important to allow the FTC the opportunity to elucidate those guidelines by applying them in adjudicatory proceedings.

As former (Republican) FTC Chairman Bill Kovacic has explained:

> An important application of administrative adjudication is to write opinions . . . that suggest better ways to analyze difficult antitrust issues . . . or refine commonly used analytic techniques . . . . Administrative adjudications give the FTC an opportunity to surpass the results attainable through the resolution of suits in the federal district courts and to build analytical templates whose persuasiveness compel emulation by federal judges. FTC opinions of this type include . . . merger policy questions in *Chicago Bridge and Iron* and *Evanston*.[1]

Insofar as the proposed legislation "merely" seeks to eliminate the FTC's ability to use the adjudicatory process for unconsummated mergers subject to the Hart-Scott-Rodino (HSR) Act, the arguments in support do not withstand scrutiny. The ability to use the adjudicatory process to elucidate merger analysis is important in both unconsummated and consummated transactions.[2] Moreover, Hart-Scott-Rodino Act pre-notified transactions are, by definition, large in the first place; and, in fact, the FTC and DOJ together conduct "second requests" for information on only about 3 percent of these transactions. About half of these, 1.5 percent of the total, are either stopped or modified, including the small percentage that go to trial or administrative hearing. Thus, it is a very small fraction of transactions, the largest and most potentially impactful on the economy that we are discussing. Enough time should be devoted to such cases that they are thoroughly analyzed before a final decision is made. There should be no presumption in favor of large firms in concentrated markets who want to merge and they should not be benefitted by a system that is rigged to their advantage by a seemingly technical, procedural change in the law.

It needs to be recognized that moving too quickly generally benefits the transacting parties, because they have the informational advantage and often the resource advantage over the agency enforcers. If the process moves too slowly, on the other hand, it may benefit the agencies because the

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[1] *Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 20; *see Chicao Bridge & Iron Co. v. FTC*, 534 F.3d 410 (5th Cir. 2008); *In re Evanston Nw. Health Care Corp.*, 2007 WL 2286195 (FTC 2007).

[2] *See, e.g., Promedica Health System, Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014) (upholding FTC adjudicatory decision to block merger after preliminary injunction had been granted).

transacting parties often have some practical time constraints on their deal. The FTC's procedure of seeking a preliminary injunction simultaneously with instituting the administrative process represents a fair and appropriate balance. Recent reforms by the Commission indicate that it has already listened to the Antitrust Modernization Commission and taken appropriate actions to streamline its processes.[3] And its stated policy is that it will only take further action after a preliminary injunction has been denied where there are very strong reasons to do so. Only rarely does the FTC go through an administrative hearing after a preliminary injunction has been denied, and there is every reason to expect this to continue to be a rare situation because of the difficulty of fashioning meaningful relief after the "eggs have been scrambled." The FTC's judicious use of its authority is exemplified by the recent *Phoebe Putney* case, in which the federal court refused to enjoin the merger (on state action grounds) and the FTC continued to pursue the matter in administrative proceedings after the Supreme Court reversed on the state-action issue.[4]

While many merger cases can be handled with finality via preliminary injunction hearings in federal courts, it is not necessarily good policy to rush all cases through a process that combines preliminary and permanent injunction hearings, as the DOJ usually agrees to do and the bill would apparently require of the FTC. And if the bill leaves open, as it appears to do, the possibility that the DOJ and the FTC can refuse to combine preliminary and permanent hearings, then there is no assurance that the permanent injunction process will be completed sooner or be more expeditious than an adjudicative hearing.

3. Why is it important to maintain the distinctive enforcement processes between the FTC and the DOJ?

As explained above, it is important to maintain the FTC's distinctive adjudicatory process for competition cases in general, and merger cases in particular. Indeed, if a single agency or process were to be selected for all mergers, there is a good case that it should be the FTC's process of seeking a preliminary injunction in federal court and then pursuing an administrative hearing if necessary.[5] On the other hand, it is not important to maintain the slight and, in practice, unimportant difference in the standards that a federal judge should apply in considering whether to grant a preliminary injunction, depending on whether the movant is the DOJ or the FTC. This has proven to be a difference that does not make a difference. To the extent that the Congress wants to remove the technical difference in standards, it should modify the DOJ standard to conform to the FTC's "public interest" standard and thereby accord the same deference to agency expertise without regard to whether the movant is the FTC or the DOJ.

4. Are you concerned that the SMARTER Act may reach transactions other than proposed Hart-Scott-Rodino Act mergers? Would the bill arguably apply to consummated transactions, or non-merger activity?

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[3] *See* J. Robert Robertson, *Administrative Trials at the Federal Trade Commission in Competition Cases*, 14 Sedona Conf. J. 101, 102 (2013) ("To help resolve the timing problem, the Commission revised its Rules of Practice in 2009 to guarantee a fast proceeding (from complaint to ALJ decision) in every case.").

[4] *FTC v. Phoebe Putney Health System*, 133 S. Ct. 1003 (2013).

[5] As former chairman Kovacic has noted, "[T]he aim in the FTC Act and the Clayton Act was to create concurrent authority, but Congress seems to have expected that the commission would be the leading agency for enforcement outside the criminal realm." *Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 13.

As I read the bill, it is intended to apply only to a "proposed" (i.e., unconsummated) merger, acquisition, joint venture, or "similar" transaction subject to Clayton Act Section 7, but there are others who are concerned that the bill is not so clear on this point. There is no justification whatsoever to eliminate the FTC's adjudicatory authority over consummated transactions. Indeed, the Antitrust Modernization Commission, while recommending that the FTC not be able to pursue administrative litigation when it loses a preliminary injunction motion in an HSR Act case, expressly recommended that the FTC be able to pursue administrative litigation after the consummation of a merger, when it is no longer in the time-sensitive stage of the HSR Act. If the bill goes forward, it is very important to make it crystal clear that consummated transactions may be subjected to the FTC's adjudicatory process.

5. According to the Antitrust Modernization Commission's report, the value of administrative litigation in Hart-Scott-Rodino Act merger cases is "outweighed by the costs it imposes on merging parties in uncertainty and in litigation costs." Would the SMARTER Act create legal certainty or reduce litigation costs, and even if so, how would this promote competition?

   In 2007, the Commission ruled that the acquisition of Highland Park Hospital by Evanston Northwestern Healthcare violated Section 7 of the Clayton Act after an Administrative judge found that the acquisition "resulted in higher prices and substantially lessened competition for acute care inpatient services in parts of Chicago's northwestern suburbs." What is the significance of this case?

If mergers are able to occur faster and with a greater likelihood of success by eliminating the adjudicative process, there would likely be some savings of litigation costs primarily for the merging parties in those relatively few cases that would have gone through the adjudicative process following the denial of a preliminary injunction. On the other hand, the bill would increase uncertainty and litigation expense as the new statute is applied and interpreted by the courts, diverting the FTC's attention and resources at a time when it is hard pressed to keep up with the current merger wave. And it is hard to see how competition is helped by a process that rushes big mergers through a quick injunction process rather than subjecting them to potential additional review by the expert agency.

The *Evanston* case involved a post-consummation challenge to a hospital merger. It is is significant because it "laid the groundwork for future FTC victories in the hospital merger and physician group acquisition areas."[6]

6. Would the Commission have been able to require conduct remedies for the Evanston-Highland Park merger, or have prevented or required remedies for other hospital mergers that have occurred since, without its ability to advance antitrust through administrative litigation?

The Commission's success in *Evanston*, as well its subsequent successes in blocking mergers of hospitals and physician practice groups, can be attributed in significant part to the fact that it was

[6] Lisa Jose Fales & Paul Feinstein, *How to Turn a Losing Streak into Wins: The FTC and Hospital Merger Enforcement*, 29 Antitrust, Fall 2014, 31, 32 ("In addition to ending the FTC's losing streak, *Evanston* is significant because it announced the Commission's thorough rejection of its prior approach to geographic market definition.").

able to use administrative litigation to develop a record and modify its approach to hospital mergers.[7]

7. How would the SMARTER Act affect the Commission's authority over non-profits, which includes merging hospitals?

The bill does not speak specifically to the Commission's authority over non-profits. The Commission's ability to use administrative litigation for mergers involving non-profits, including non-profit hospitals, would be limited by the Act, as for other mergers.

Sincerely,

Albert A. Foer
Founder and Senior Fellow
American Antitrust Institute

cc: Honorable John Conyers, Jr., Ranking Member

[7] *See id.* FTC Competition Bureau Chief Debbie Feinstein has made a similar point. *See Roundtable: The FTC at 100*, 29 Antitrust, Fall 2014, 10, 18 ("[T]hrough retrospective studies and Part III administrative litigation we were able to develop the record that supported our concerns about anticompetitive hospital mergers and led to a long winning streak in the federal courts.").