May 2, 2018

The Honorable Jerry Nadler
Ranking Member
Judiciary Committee
U.S. House of Representatives
2109 Rayburn HOB
Washington, DC 20515

The Honorable David Cicilline
Ranking Member
Subcommittee on Regulatory Reform, Commercial and Antitrust Law
U.S. House of Representatives
2244 Rayburn HOB
Washington, DC 20515

Dear Ranking Member Nadler and Ranking Member Cicilline:

The American Antitrust Institute (AAI)[1] respectfully requests that this letter be entered into the record during the Floor consideration of H.R. 5645, the "Standard Merger and Acquisition Reviews through Equal Rules Act of 2018" (the "SMARTER Act"). AAI has reviewed workload statistics compiled by the U.S. Department of Justice (DOJ) and Federal Trade Commission (FTC) to ascertain whether the *premise* of the SMARTER Act is sound. Our review indicates that the concerns of the bill's sponsors are without foundation. The AAI respectfully submits that under these circumstances, the SMARTER Act would not serve the interests of competition or consumers. This letter summarizes our analysis and findings.

The SMARTER Act proposes "[t]o 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 the Attorney General exercises such authority."[2] The SMARTER Act seeks to eliminate supposedly disparate treatment of mergers handled by the DOJ and FTC by (1) preventing the FTC from ever using its administrative process to adjudicate a proposed merger, and (2) requiring the FTC to meet the DOJ's theoretically more stringent standard for obtaining a preliminary injunction to block a merger in federal court.

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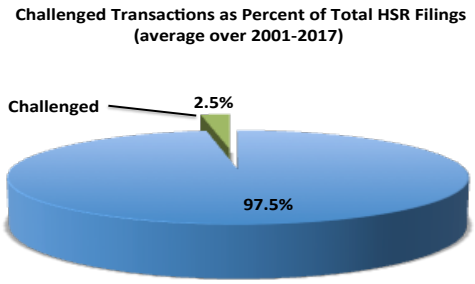
[1] The AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. For more information, see http://www.antitrustinstitute.org.

[2] H.R. 5645, 115th Cong. (2018).

AAI has opposed the SMARTER Act on several grounds. First, the FTC's use of administrative powers should be carefully safeguarded, because it has contributed critically to the effective shaping of U.S. merger policy without detracting from the speed or effectiveness of merger review.[3] Second, any difference in the preliminary injunction standard is more theoretical than real, and if a uniform standard is to be adopted, it should be the FTC's standard, which allows the agency to obtain a preliminary injunction "[u]pon a proper showing that, weighing the equities and considering the Commission's likelihood of ultimate success, such action would be in the public interest."[4] Third, any change in the law may have harmful unintended consequences, including unnecessarily burdening the federal judiciary with new litigation over the meaning and value of the body of legal precedent involving merger cases brought by the FTC in federal court under the existing standard.

The AAI reviewed workload statistics compiled in DOJ and FTC Annual Competition Reports submitted to Congress during the period from 2001-2017.[5] The workload statistics reveal that the SMARTER Act is a proverbial "solution in search of a problem." The chance that any merger will be affected by a supposed divergence between the procedures and standards used by the two agencies is trivial. On average, for the period from 2001-2017, businesses that submitted HSR filings enjoyed a 97.5% chance that their mergers would be approved without being challenged and a 96.7% chance that their deals would be approved without even a Second Request.



[3] A recent, exhaustive study by FTC Commissioner Maureen Ohlhausen debunks claims that Part 3 proceedings are biased against defendants. *See* Maureen K. Ohlhausen, *Administrative Litigation at the FTC: Effective Tool for Developing the Law or Rubber Stamp?*, 12 J. COMPETITION L. & ECON. 623, 652 (2016), https://academic.oup.com/jcle/article/12/4/623/2547756/ADMINISTRATIVE-LITIGATION-AT-THE-FTC-EFFECTIVE (finding that "[t]he merits and the appellate success" of the FTC's Part 3 cases "do not support a narrative that the Commission blindly supports ill-conceived cases because of systemic bias. To the contrary, they show a recent history of solid, well-supported enforcement actions . . . ."); *see also* Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on H.R. 2745 Before the Subcomm. on Regulatory Reform, Commercial and Antitrust Law of the H. Comm. on the Judiciary, 114th Cong. 49-51, (2015) (Statement of Albert A. Foer, Senior Fellow, Am. Antitrust Inst.); *id.* at 68-72 (Response to Questions for the Record from Albert A. Foer, Senior Fellow, Am. Antitrust Inst.).

[4] 15 U.S.C. § 53(b); *see supra* note 3.

[5] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, ANTITRUST DIV., ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, *available at* https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports (reports queried for fiscal years 2001-2017).

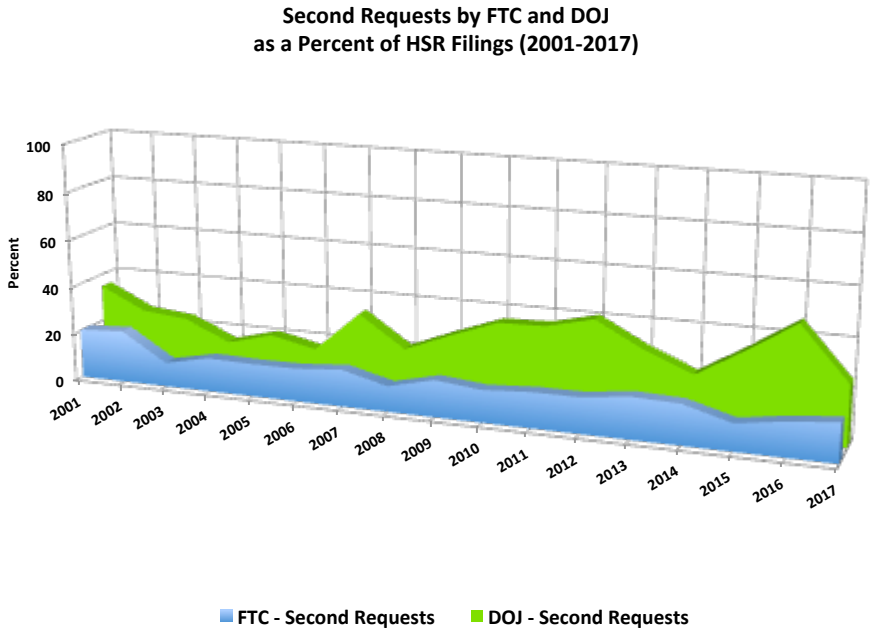
Moreover, the workload data do not support the central argument of the bill's sponsors, namely that firms are unfairly prejudiced when their mergers are reviewed by the FTC rather than DOJ. On the contrary, the workload data demonstrate that firms that have their merger reviewed by the DOJ are *more* likely to have their merger closely scrutinized or challenged than firms whose mergers are reviewed by the FTC.

Fiscal Year 2017 provides a simple example. The DOJ and FTC reported a combined 1,772 Hart-Scott-Rodino filings. Among them, 72 mergers were cleared for investigation to the DOJ and 205 mergers were cleared to the FTC. As shown in the table below, DOJ issued Second Requests in 25% of the merger transactions cleared to it, and challenged 15%, while the FTC issued Second Requests in 16% of the merger transactions cleared to it, and challenged 7%.

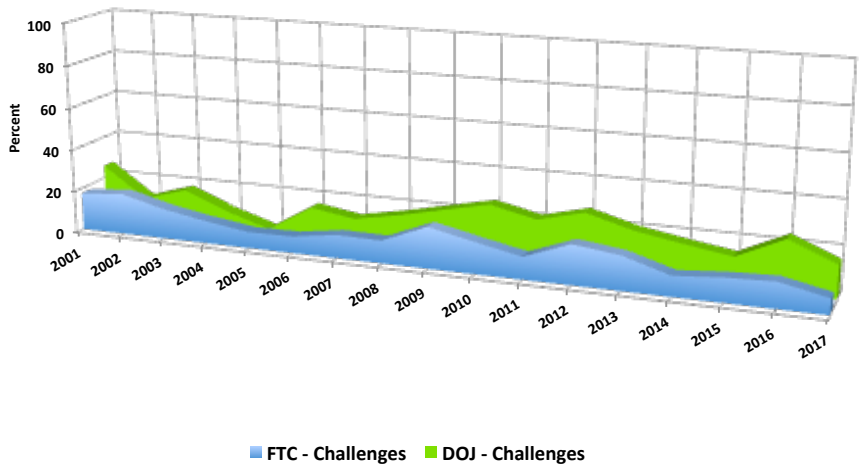
Workload statistics for the period from 2001-2017, presented in the table and charts below, show the same results. On average, the DOJ issued Second Requests in 29% of merger transactions cleared to it, and challenged 18%, while the FTC issued Second Requests in 15% of merger transactions cleared to it, and challenged 13%.

FTC and DOJ Workload Statistics
Show the Premise of the SMARTER Act Is Unfounded

Agency	2017		2001-2017 (average)	
	Second Requests	Challenges	Second Requests	Challenges
	(as percent of transactions cleared to the agency)			
FTC	16%	7%	15%	13%
DOJ	25%	15%	29%	18%



Challenges by FTC and DOJ
as a Percent of HSR Filings (2001-2017)



This means that if a merger was cleared for investigation to the agency with the supposedly unfair advantages over the last 17 years, the merger stood a 94% *better* chance of avoiding a Second Request investigation and a 38% *better* chance of avoiding a challenge.

The enforcement data suggest many things, but one of them is definitely *not* what the SMARTER Act purports to cure: an "unfairness" caused by differences in standards and procedures at the FTC and DOJ. On the contrary, the SMARTER Act would create uncertainty and new litigation to solve a problem that, empirically, does not exist. The AAI respectfully submits that the premise of the SMARTER Act is unfounded, and passing it would be contrary to the interests of competition and consumers.

Thank you for considering the AAI's perspective in this important matter.

Sincerely,

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