

The SMARTER Act and Its Impact on Federal Merger Enforcement

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Executive Summary

Federal lawmakers are currently considering legislation intended to eliminate differences in the procedures used by the Federal Trade Commission (FTC) and the Department of Justice Antitrust Division in challenging unconsummated acquisitions and mergers. The effort addresses concerns that parties to a proposed merger or acquisition currently face different preliminary injunction standards in court challenges, as well as different processes, depending upon which federal antitrust agency reviews the transaction.

Versions of the proposed “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015” or “SMARTER Act” are moving through the House of Representatives and the Senate. If enacted, the measure would radically change the FTC’s methods for challenging proposed combinations. The proposal has support from businesses and practitioners. However, a majority of the Commission members are asking Congress to refrain from making the changes, contending that the concerns are overstated and that the agency has protections in place that prevent feared abuses. At a time when Congress is slow to pass legislation, the ultimate fate of the measure is far from certain. However, the proposal already could be impacting the FTC’s enforcement decisions.

The so-called SMARTER Act has two main objectives: (1) equalize the standards for the two federal antitrust agencies for obtaining a preliminary injunction against a proposed merger or acquisition; and (2) eliminate the FTC’s ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. This paper will consider the current framework for federal merger enforcement, the proposed changes, and the response of the FTC. It will also look at a possible alternative. Further, enforcement efforts will be considered to provide context for the current scheme and the proposed changes.

The Current Merger Enforcement Regime

The FTC and the Department of Justice Antitrust Division share enforcement responsibility for mergers and acquisitions. The two agencies allocate responsibility for reviewing each proposed transaction under a clearance process based primarily on past experience and expertise. While one agency might focus on a particular industry, there is usually no guarantee which agency will review a transaction. The agencies often negotiate to determine which agency will review a transaction. This is true in some particularly important sectors of the economy, such as health care. Thus, it is quite possible that merging parties will not know which agency will be reviewing their transaction, and consequently, which standards and processes will apply in the event of a challenge.

Differing standards for injunctive relief

Section 7 of the Clayton Act, 15 U.S.C. §18, generally prohibits mergers whose effect may be substantially to lessen competition. Any “person, firm, corporation, or association” can seek injunctive relief against a merger or acquisition pursuant to Section 16 of the Clayton Act, 15 U.S.C. §26. The Clayton Act also includes a provision authorizing the Department of Justice to seek an injunction to block a proposed merger or acquisition. Under Section 15 of the Clayton Act, 15 U.S.C. §25, the Justice Department can seek to enjoin a transaction on the grounds that the acquisition would substantially lessen competition. However, the provision does not define the standard of review for the Justice Department’s preliminary injunction motion. Consequently, a traditional equitable standard applies. This means that the Justice Department must make a showing of a substantial likelihood that the transaction violates Section 7 of the Clayton Act.

On the other hand, a different injunction standard applies for the FTC. Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), authorizes the agency to bring a federal court action, seeking injunctive relief against a violation of any law that the agency enforces, “pending the issuance of a complaint by the Commission and until such complaint is dismissed by the Commission or set aside by the court on review, or until the order of the Commission made thereon has become final...”

Under this provision, a preliminary injunction may be granted “[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...” This “public interest” standard is considered to be a more lenient standard than the test imposed on the Justice Department in seeking preliminary injunctive relief.

In *FTC v. Owens-Illinois, Inc.*, 681 F. Supp. 27, 1988-1 Trade Cases ¶67,899 (D.D.C. 1988) *vacated as moot*, 850 F.2d 694 (D.C. Cir. 1988), the federal district court in Washington, D.C. explained the distinction. The statutory “public interest” standard applies in FTC challenges rather than the traditional four-part test for preliminary injunctive relief requiring proof of “irreparable harm.” In that matter, the court concluded that the public interest did not justify the extraordinary remedy

of a preliminary injunction to prevent the proposed merger of the second- and third-largest domestic glass container producers in the United States.

In the most recent decision denying an FTC request for a preliminary injunction to block the combination of the world’s second and third largest sterilization companies, *FTC v. Steris Corp.*, 2015-2 Trade Cases ¶79,303 (N.D. Ohio Sept. 24, 2015), the federal district court in Cleveland also discussed the standard faced by the FTC. Citing *FTC v. Promedica*, 2011-1 Trade Cases ¶77,395 (N.D. Ohio Mar. 29, 2011), which quoted *FTC v. Butterworth Health Corp.*, 946 F.Supp. 1285, 1996-2 Trade Cases ¶71,571 (W.D. Mich. 1996), *aff’d* 121 F.3d 708, 1997-2 Trade Cases ¶71,863 (6th Cir. 1997), the court said that in order to show a likelihood of success under Section 13(b), the FTC must “raise questions going to the merits so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance, and ultimately by the Court of Appeals.”

It has been argued that, while the wording of the standard is different, the standard that has been applied for obtaining a preliminary injunction in a merger challenge is the same for the FTC and the Justice Department. Caselaw on the precise application of the FTC standard is not settled. However, the U.S. Court of Appeals in Washington, D.C. held that “the FTC need not show any irreparable harm” in *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1028, 2008-2 Trade Cases ¶76,233 (D.C. Cir. 2008).

As for the Justice Department standard, the federal district court in *U.S. v. Gillette Co.*, 828 F. Supp. 78, 1993-1 Trade Cases ¶70,210 (D.D.C. 1993), citing *Owens-Illinois*, identified the hurdle facing the Justice Department in its effort to block a merger in the U.S. “premium fountain pen” market. Noting that the case was not brought by the FTC pursuant to 15 U.S.C. §53(b), the court applied the circuit’s fundamental four-part preliminary injunction standard. Under the test, the court balanced: (1) the likelihood of the plaintiff’s success on the merits; (2) the threat of irreparable injury to the plaintiff in the absence of an injunction; (3) the possibility of substantial harm to other interested parties from a grant of injunctive relief; and (4) the interests of the public. The court denied the motion for preliminary injunction. Shortly thereafter, the suit was dismissed.

Administrative vs. court proceedings

In addition to facing different standards for preliminary injunctions, the FTC and the Justice Department have different processes for challenging proposed mergers and acquisitions. While the Justice Department's ability to challenge mergers is limited to court proceedings, the FTC has the authority to pursue administrative proceedings and to seek a cease and desist order or divestiture relief under Section 5 of the FTC Act, 15 U.S.C. §45, and Section 11 of the Clayton Act, 15 U.S.C. §21, when it is unable to reach a negotiated settlement.

A preliminary injunction, or even the mere threat of a preliminary injunction, often leads parties to a proposed deal to abandon their transaction. However, the outcome of the government's preliminary injunction motion does not necessarily determine the fate of the case.

Justice Department approach

It has been the practice of the Justice Department to dismiss merger challenges after the denial of injunctive relief. This is true for both preliminary injunction and permanent injunction proceedings.

Often the Justice Department and merging parties agree to forego the preliminary injunction phase of the case and proceed directly to a trial on the merits in order to obtain permanent injunctive relief under Rule 65(a) (2) of the Federal Rules of Civil Procedure. The Justice Department followed this approach in its challenge to H&R Block, Inc.'s acquisition of digital do-it-yourself tax preparation products provider TaxACT. In *U.S. v. H&R Block, Inc.*, 833 F.Supp.2d 36, 2011-2 Trade Cases ¶77,678 (D.D.C. 2011), the federal district court in Washington, D.C. permanently enjoined the acquisition at the Justice Department's request.

A trial on the merits in the Justice Department's latest contested merger challenge is scheduled for November 2015. The government is seeking to block the acquisition of General Electric's appliance business by rival AB Electrolux (*U.S. v. AB Electrolux*, D.D.C., Case No. 1:15-cv-01039-EGS, complaint filed July 1, 2015).

FTC process

The FTC also has authority to seek permanent injunctive relief in federal court. However, it has not utilized this approach. It also has not followed the Justice Department's practice of consolidating preliminary and permanent injunction proceedings. This raises concerns from merging parties because it has been suggested that

a decision in an FTC case seeking preliminary injunctive relief can take as long as a decision on a permanent injunction in a Justice Department action.

Rather than remain in court, the FTC approach is to seek preliminary injunctive relief to maintain the status quo while the agency proceeds with administrative proceedings, sometimes called Part 3 litigation, to challenge the merits of a proposed transaction. The FTC has the ability to pursue administrative proceedings, even if the agency is denied a preliminary injunction in federal court. While the agency has not pursued

The FTC's "public interest" standard is considered to be a more lenient standard than the test imposed on the Justice Department in seeking preliminary injunctive relief.

administrative litigation after the denial of a preliminary injunction in more than two decades (see Appendix for a list of preliminary injunction rulings since 1995), the SMARTER Act aims to take away this authority from the FTC. Uncertainty for merging parties about whether the FTC will abandon its objections to a transaction following the denial of a preliminary injunction or pursue administrative action is among the major concerns that the Act is intended to address.

Administrative litigation after denial of a preliminary injunction

It is the policy of the FTC to take a close look at pursuing administrative litigation to challenge a merger following the denial of a preliminary injunction in federal district court. In June 1995, the FTC issued a policy statement regarding administrative merger litigation following the denial of a preliminary injunction (Trade Regulation Reporter ¶13,242). In this statement, sometimes called the "Pitofsky rule" after the agency's then chairman—Robert Pitofsky—the Commission takes the position that it will decide on a case-by-case

basis whether pursuing administrative litigation after such a denial would be in the public interest. In making its decision whether to proceed administratively, the FTC will consider: (1) the factual findings and legal conclusions of the district court or any appellate court; (2) any new evidence developed during the course of the preliminary injunction proceeding; (3) whether the transaction raises important issues of fact, law, or merger policy that need resolution in administrative litigation; (4) an overall assessment of the costs and benefits of further proceedings; and (5) any other matter that bears on whether it would be in the public interest to proceed with the merger challenge.

The statement was announced around the same time the Commission was grappling with a long-running challenge to R.R. Donnelley & Sons Co.'s acquisition of rival printing services company Meredith/Burda Company L.P. In 1990, the FTC pursued administrative litigation against R.R. Donnelley after the agency was denied a preliminary injunction by the federal district court in Washington, D.C. (*FTC v. R.R. Donnelley & Sons Co.*, 1990-2 Trade Cases ¶69,239 (D.D.C. August 27, 1990)). Although an administrative law judge ordered divestitures (because the acquisition had been consummated), the Commission ultimately dismissed the complaint—more than five years after the transaction was announced—on the ground that the relevant market was not properly defined (*In the Matter of R.R. Donnelley & Sons Co.*, 120 F.T.C. 36, Trade Regulation Reporter ¶23,876). This matter is often cited as an example of the FTC's abuse of administrative proceedings following a preliminary injunction denial.

As noted earlier, the Commission has not pursued administrative litigation after a denial of preliminary injunctive relief in two decades. However, the decision not to proceed has not always been unanimous. In 2007, two commissioners—Commissioners Pamela Jones Harbour and J. Thomas Rosch—dissented from a decision not to pursue a gasoline refinery merger following a denial of the FTC's motion for a preliminary injunction in *FTC v. Foster*, 2007-1 Trade Cases ¶75,725 (D.N.M. May 29, 2007). The dissenters pointed to “significant factual and legal errors” in the district court's opinion (*In the Matter of Paul L. Foster*, Trade Regulation Reporter ¶16,054).

While there were questions whether the FTC had moved away from the policy statement with changes to its Rules of Practice in 2009, support for the policy statement was reaffirmed in a March 13, 2015, agency

announcement. Changes to Rule 3.26 of the Commission's Rules of Practice, 16 C.F.R. 3.26, reinstated the practice of an automatic withdrawal from, or stay of, the administrative litigation if the merging parties file a qualifying motion in the pending Part 3 case. The change is thus a return to the automatic mechanisms in the pre-2009 rules. It has been suggested that the agency's adherence to the policy statement might have been in response to the proposed legislation. Also, the Commission's ability to change the policy remains a concern of bill supporters.

In any event, the Commission currently appears to be following its pledge made in 1995. The FTC recently cited the statement when it decided to dismiss its administrative proceeding against Steris Corp. after a decision denying an FTC request for a preliminary injunction to block the company's acquisition of rival Synergy Health plc (*FTC v. Steris Corp.*, 2015-2 Trade Cases ¶79,303 (N.D. Ohio Sept. 24, 2015); Trade Regulation Reporter ¶17,404).

The FTC's decision to abandon the challenge to the Steris/Synergy deal raises the question of whether the pending bills might be influencing Commission enforcement decisions. The case raised questions about the “actual potential entrant” doctrine. The case concerned the issue of Section 7 liability where a potential entrant (Synergy) merges with a firm already competing in the market (Steris) and the effect lessens future competition. The defendants challenged the doctrine, arguing that it was disfavored. Although the district court assumed the validity of this doctrine, administrative litigation might have provided the FTC with an opportunity to resolve this issue.

The FTC is not shying away from challenging proposed acquisitions, however. On November 6, 2015, the agency *announced* that it was moving to block a hospital combination in West Virginia. The FTC issued an administrative complaint and authorized its staff to seek a temporary restraining order and a preliminary injunction in federal court to prevent Cabell Huntington Hospital from acquiring St. Mary's Medical Center, and to maintain the status quo pending the administrative proceeding.

Stays of administrative litigation

It is the practice of the FTC to stay administrative proceedings at the request of the merging parties after a preliminary injunction is denied so that the agency

can consider how to proceed. The FTC may resume proceedings after a successful appeal. The FTC has had varying success in appealing preliminary injunction orders in merger cases. One notable success story was the FTC's *Phoebe Putney* case, which also demonstrates the agency's approach to stays of administrative litigation following the denial of a preliminary injunction. In that matter, the FTC failed to obtain a preliminary injunction to block a hospital authority's acquisition of Palmyra Park Hospital, Inc. from HCA Inc. in Georgia in 2011 (*FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp. 2d 1356, 2011-1 Trade Cases ¶77,508 (M.D. Ga. 2011)). The Commission stayed the administrative proceedings. After the FTC's success before the U.S. Supreme Court (*FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 2013-1 Trade Cases ¶78,269 (2013)), the Commission resumed the administrative proceedings.

The Proposed Smarter Act

As previously noted, the proposed SMARTER Act is intended to eliminate the enumerated disparities between the procedures used by the FTC and the Department of Justice in challenging proposed acquisitions and mergers notified under the Hart-Scott-Rodino (HSR) Act, 15 U.S.C. Sec. 18a. It does not impact FTC challenges to consummated mergers or other antitrust violations. The legislation would ensure that courts employ the same standard for the FTC and Justice Department in seeking a preliminary injunction against a pending acquisition or merger. It also would remove the FTC's ability to pursue administrative litigation following judicial denial of a preliminary injunction request in a merger case. In effect, it would attempt to standardize the processes used by the two agencies to obtain injunctive relief in federal district court against a proposed merger or acquisition.

Antitrust Modernization Report

The proposed changes arose from the Antitrust Modernization Commission's 2007 report and recommendations for improvements to the antitrust laws. Among the goals of the bi-partisan Antitrust Modernization Commission or AMC was the implementation of changes that would make merger review fairer and more straightforward.

"Parties to a proposed merger should receive comparable treatment and face similar burdens regardless of whether the FTC or DOJ reviews their merger,"

according to the Antitrust Modernization Report. "A divergence undermines the public's trust that the antitrust agencies will review transactions efficiently and fairly. More importantly, 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."

House Bill

In the current Congress, a House version of the measure (*H.R. 2745*) was introduced by Rep. Blake Farenthold (R.-Tex.) on June 12, 2015. It was approved by the House Judiciary Committee with a vote of 18-10 on September 30, 2015. The vote was along party lines with

"Businesses seeking to merge deserve consistent treatment without regard to which agency decides to review the merger."
—Senator Orrin Hatch

the exception of one Democrat—Rep. Scott Peters of California—voting in favor of reporting the bill. H.R. 2745 is similar to a measure, also sponsored by Rep. Farenthold, that was introduced in the 113th Congress but failed to gain traction.

On June 16, 2015, the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law held a hearing on the proposed SMARTER Act. In *opening remarks*, Committee Chairman Bob Goodlatte (R.-Va.) called the SMARTER Act "a common-sense, straightforward measure that implements reforms advanced by the bi-partisan members of the AMC." He added that the measure was "an important step to achieving this Committee's goal of assuring our nation's antitrust laws are enforced in a manner that is fair, consistent and predictable." Goodlatte suggested that it was "unfair for some parties to be subject to administrative litigation while others avoid this prospect merely as a result of the identity of the reviewing antitrust enforcement agency."

Senate Bill

Companion legislation in the Senate ([S. 2102](#)) was introduced by Senators Mike Lee (R-Utah), Chuck Grassley (R-Iowa), and Orrin Hatch (R-Utah) on September 30, 2015. The Senate Judiciary Committee's antitrust subcommittee held a hearing on the proposal on October 7. At the hearing, Senate lawmakers heard the testimony of the FTC, delivered by Chairwoman Edith Ramirez. The FTC's testimony and the views of a dissenting commissioner are discussed below.

In [announcing](#) the Senate proposal, Antitrust Subcommittee Chairman Mike Lee said that "parties to a merger should not face different sets of rules when preparing to undergo a merger review process depending on the happenstance of whether the Antitrust Division of the DOJ or the FTC reviews their merger." He added: "whether a merger proceeds should depend on whether it is pro-competitive or anti-competitive, not on which agency reviews the transaction."

"There is no good reason for the Federal Trade Commission and the Department of Justice to apply different standards in enforcing our nation's antitrust laws," Sen. Hatch said. "Businesses seeking to merge deserve consistent treatment without regard to which agency decides to review the merger."

Changes to the preliminary injunction standard

One of the goals of the SMARTER Act is to align the standards for the two federal antitrust agencies when seeking a preliminary injunction of a proposed transaction in court. The SMARTER Act would amend Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), to exclude the FTC from seeking a preliminary injunction in a case brought under Section 7 of the Clayton Act, 15 U.S.C. § 18. Currently, Section 13(b) permits the FTC to seek injunctive relief under the more lenient "public interest" test. To ensure that the FTC has authority to challenge proposed mergers, the proposal would amend Section 15 of the Clayton Act, 15 U.S.C. § 25, which grants the Justice Department the authority to seek to enjoin a proposed merger, to provide that the Clayton Act duties and authorities under this provision extend to the FTC. Because Section 15 does not specify the standard of review for the government's preliminary injunction motion, a traditional equitable standard would apply for both agencies.

Restrictions on administrative proceedings

The SMARTER Act also seeks to eliminate the FTC's ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. To effectuate the change, Section 5 of the FTC Act, 15 U.S.C. § 45, which allows the FTC to initiate an administrative proceeding to evaluate an "unfair method of competition," would be amended to exclude the initiation of a proceeding on the basis of a merger review.

Section 5(b)'s first sentence would read as follows:

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition (*excluding the consummation of a proposed merger, acquisition, joint venture, or similar transaction that is subject to section 7 of the Clayton Act (15 U.S.C. 18), except in cases where the Commission approves an agreement with the parties to the transaction that contains a consent order*) or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. (Emphasis on amendment text added.)

In addition, the measure would amend Section 11 of the Clayton Act, 15 U.S.C. § 21, which authorizes the enforcement of compliance with certain sections of the Clayton Act by federal agencies including the FTC, to add a new paragraph (m) to exclude the FTC's enforcement of Section 7. However, the proposal would ensure that, if the FTC reaches a proposed consent order with the parties to the transaction with respect to a violation of section 7, the Commission would enforce compliance in accordance with Section 11. Among other provisions intended to harmonize proceedings, the FTC, like the Department of Justice, would be required to notify state attorneys general of actions that the state could bring, under an amendment to Section 4F of the Clayton Act, 15 U.S.C. § 15f.

The FTC Responses

FTC testimony

In *testimony* before the Senate Judiciary Committee's antitrust subcommittee on October 7, 2015, FTC Chairwoman Edith Ramirez questioned the wisdom of the SMARTER Act. She called the legislation "unnecessary," saying it risks "undermining the beneficial role the Commission plays in merger enforcement."

Ramirez said that the agency's main concern was with provisions in the legislation that remove certain aspects of the FTC's adjudicative function. Further, she noted that the legislative efforts to harmonize the preliminary injunction standards imposed on the FTC and the Department of Justice were not needed because the courts already impose the same standard in practice.

According to the Commission's testimony, the FTC's administrative process in challenging harmful mergers and advancing consumers' interests through fact-driven application of antitrust principles has been one of the key components of the agency's antitrust enforcement efforts. At the hearing, Ramirez touted the agency's administrative record, noting that the vast majority of administrative competition decisions have been affirmed by federal appellate courts.

The Commission's procedures do not prejudice the parties, Ramirez added. The testimony noted the FTC's efforts to streamline its rules governing administrative litigation. "The result is an administrative process that is comparable to federal court timelines," according to the testimony.

"By seeking to alter the Commission's adjudicative function, the proposed legislation risks eroding a fundamental institutional attribute of the FTC," the testimony stated. "This quasi-judicial role is a defining characteristic of the agency—authority Congress very deliberately granted to the FTC when the agency was created to serve as a complement to enforcement by DOJ. The current system has worked well for over one hundred years, and all indications are that it will continue to do so to the benefit of competition and consumers." The testimony cited a number of matters that did not involve challenges to unconsummated mergers.

Despite the difference in language between the preliminary injunction standard under Section 13(b) of the FTC Act and the general standard for a preliminary injunction that applies to the Justice Department, Ramirez contended that there is no evidence to suggest

that there is a difference in outcomes. Noting that there is no practical difference between what each agency must show in order to win a preliminary injunction, Ramirez suggested that attempts to harmonize the language are unnecessary and potentially harmful.

The chairwoman expressed concern that if the language is changed, courts might not understand the purpose of the change and might "impose a higher standard" on the FTC. The statutory change might otherwise "create confusion" or lead to "needless litigation over what the standard is."

"In our view, these legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement," the testimony stated.

"By seeking to alter the Commission's adjudicative function, the proposed legislation risks eroding a fundamental institutional attribute of the FTC."
—FTC Testimony

"Although the Commission's process for challenging potentially harmful transactions does include an administrative hearing, there is no evidence that the Commission's procedures prejudice the parties. Accordingly, there is no need to alter the FTC's administrative process."

The Commission vote approving the testimony and its inclusion in the formal record was three-to-one, with Commissioner Maureen K. Ohlhausen voting against the issuance of the testimony. Commissioner Ohlhausen's views were presented in a September 25, 2015, speech to the U.S. Chamber of Commerce.

Commissioner Ohlhausen's views

In her *speech*, entitled "A SMARTER Section 5," Commissioner Ohlhausen offered her support for harmonization of standards for seeking a preliminary injunction by the FTC and Department of Justice against a planned merger. Ohlhausen said that she generally supported

legislative efforts at making the merger review process as similar as possible across the two antitrust agencies. Regarding proposed changes to the agency's administrative procedures, she cautioned against making the FTC subordinate to the Justice Department in challenging unconsummated mergers or otherwise impinging on the independence of the FTC.

"Under the SMARTER Act, it appears the Commission could continue to challenge consummated mergers that it has reason to believe are anticompetitive," Ohlhausen noted. "Even in unconsummated mergers, the Commission could still appeal a [preliminary injunction] loss to the circuit court of appeals, if the transaction raised a significant legal issue worth pursuing, as recently happened in the *Phoebe Putney* matter."

Ohlhausen also pointed out that Part 3 proceedings had been utilized much more frequently in conduct matters, which would not be affected by the SMARTER Act. Noting that the FTC has not pursued Part 3 litigation following a denial of a preliminary injunction in a merger case in more than 20 years, the commissioner suggested that the "Commission would not be losing a frequently used tool."

Former Commissioner Wright's views

Before departing the Commission, then-Commissioner Joshua D. Wright weighed in on the proposal. In a February 21, 2015, [speech](#), entitled "Judging Antitrust," at the Inaugural Global Antitrust Institute Moot Court Competition in Washington, D.C., Wright expressed his hope that the SMARTER Act would be approved by Congress.

"The SMARTER Act solves a practical problem of potentially disparate preliminary injunction standards between the FTC and DOJ," he said. "Furthermore, it addresses due process concerns associated with litigation and the Part 3 administrative adjudication process." Wright suggested that the legislation "would remove from the FTC's structural design the due process concerns raised by its ability to get two bites at the apple and the incomplete separation of the agency's prosecutorial role from its adjudicative role." He added that "the FTC would still be able to pursue conduct cases and challenges to consummated mergers in Part 3, areas where it has shown stronger performance than in the narrow unconsummated-merger arena."

An Alternative Proposal

The FTC is not alone in questioning the proposed legislation. Albert Foer, Senior Fellow at the American Antitrust Institute, [testified](#) before the House Judiciary Committee's Subcommittee on Regulatory Reform, Commercial and Antitrust Law on June 16, 2015, regarding the proposed SMARTER Act. Foer agreed that there was no need for the differently-articulated preliminary injunction standards. However, he suggested that courts "generally require both agencies to make a strong showing of probable anticompetitive effect before a preliminary injunction is issued."

Assuming a single theoretical standard for injunctive relief was necessary, Foer suggested an alternative approach. He would recommend that the FTC's purportedly more-lenient standard for seeking injunctive relief be applied in Department of Justice merger challenges. Attorneys representing merger parties likely would certainly resist this change and would advocate for the application of the traditional injunction standard for both federal antitrust agencies.

Foer also warned of a "slippery slope." He expressed concern that "if Congress takes away the FTC's administrative adjudication for mergers, it could be starting down one of those slippery slopes where brakes are likely to fail."

Conclusion

The SMARTER Act is intended to provide businesses that face a merger challenge with consistent treatment, whether the opposition to the transaction comes from the FTC or the Department of Justice. If passed, the proposal would: (1) impose the same standard for obtaining a preliminary injunction against a proposed merger or acquisition—the current standard faced by the Department of Justice—on both federal antitrust agencies; and (2) eliminate the FTC's ability to pursue administrative adjudication to challenge a proposed transaction when it seeks a preliminary injunction in court. The few amendments to the Clayton Act and FTC Act in the text of the bills belie the impact that the measure would have on future merger enforcement actions when the FTC and the parties are unable to reach a settlement. There also remains the threat that

a slippery slope might lead to further restrictions on the FTC's ability to pursue Part 3 litigation outside of HSR Act merger cases.

Despite the complaints about the unfairness of the differing standards and processes, these concerns do not seem to be dissuading businesses from merging. The merger boom continues. However, strong arguments have been made that the differing standards and processes create uncertainty and hamper productivity. For instance, the American Hospital Association, in offering its support for the measure, *said*: "The cumulative effect of the FTC's two-step enforcement process, as compared to the more streamlined DOJ enforcement process, as well as the arguably more lenient standard of review applicable to FTC motions for a preliminary injunction to enforce Section 7 of the Clayton Act, is to deter some lawful and procompetitive transactions."

In the near term, it is unlikely that parties to a proposed merger will be entering into an agreement with the FTC to proceed directly to a trial on the merits of the pending transaction as they might with the Justice Department. In addition, practitioners will still need to counsel clients about the possibility of an administrative trial challenging a proposed deal after a court battle over preliminary injunctive relief.

The passage of new laws, particularly in the antitrust area, is a rare event these days. The Republican-sponsored proposals appear to have at least some support from Democrats. Perhaps, amending the bill to focus on its less controversial goal—changing the wording of the preliminary injunction standard—could lead to greater bi-partisan support for the measure. Even Chairwoman

Ramirez conceded the agency's main concern was preserving the Commission's ability to pursue administrative litigation. Of course, a change in the wording

"The SMARTER Act would remove from the FTC's structural design the due process concerns raised by its ability to get two bites at the apple . . ."

*—Former FTC Commissioner
Joshua D. Wright*

of the standard would likely lead deal proponents to argue that the FTC's recent successes on preliminary injunction motions lack persuasive authority under a traditional equity standard.

Even if the measure does not pass in this Congress, it will most like appear in the next. Moreover, the FTC will continue to feel pressure from federal lawmakers to streamline processes and remove uncertainty for businesses. This could impact, and potentially already has impacted, the Commission's decisions in the merger enforcement area.

Appendix

Federal District Court Decisions on FTC Motions for Preliminary Injunctions in Merger Challenges (1995 - 2015)

FTC v Steris Corp., 2015-2 Trade Cases ¶79,303 (N.D. Ohio September 24, 2015)

FTC v. Sysco Corp., 2015-1 Trade Cases ¶79,221 (D.D.C. June 23, 2015)

FTC v. OSF Healthcare Sys., 852 F. Supp. 2d 1069, 2012-1 Trade Cases ¶77,850 (N.D. Ill. 2012)

FTC v. Promedica Health System, Inc. 2011-1 Trade Cases ¶77,395 (N.D. Ohio Mar. 29, 2011)

FTC v. Laboratory Corporation of America (C.D. Cal. 2011) 2011-1 Trade Cases ¶77,348

FTC v. CCC Holdings, Inc., 605 F. Supp. 2d 26, 2009-1 Trade Cases ¶76,544 (D.D.C. 2009)

FTC v. Foster, 2007-1 Trade Cases ¶75,725 (D.N.M. May 29, 2007)

FTC v. Whole Foods Market, Inc., 502 F. Supp. 2d 1, 2007-2 Trade Cases ¶75,831 (D.D.C. 2007); *rev'd* 548 F.3d 1028, 2008-2 Trade Cases ¶76,233 (D.C. Cir. 2008)

FTC v. Equitable Resources, Inc., 2007-1 Trade Cases ¶75,702 (W.D. Pa. May 14, 2007); 2007-1 Trade Cases ¶75,716 (W.D. Pa. May 21, 2007, on motion for injunction pending appeal)

FTC v. Arch Coal, Inc., 329 F. Supp. 2d 109, 2004-2 Trade Cases ¶74,513 (D.D.C. 2004)

FTC v. Swedish Match, 131 F. Supp. 2d 151, 2000-2 Trade Cases ¶73,122 (D.D.C. 2000)

FTC v. v. H.J. Heinz Co., 116 F. Supp. 2d 190, 2000-2 Trade Cases ¶73,066 (D.D.C. 2000); *rev'd* 246 F.3d 708, 2001-1 Trade Cases ¶73,243 (D.C. Cir. 2001)

FTC v. Tenet Healthcare Corp. 17 F. Supp. 2d 937, 1998-2 Trade Cases ¶72,227 (E.D. Mo. 1998); *rev'd* 186 F.3d 1045, 1999-2 Trade Cases ¶72,578 (8th Cir. 1999)

FTC v. Cardinal Health, Inc., 12 F. Supp. 2d 34, 1998-2 Trade Cases ¶72,226 (D.D.C. 1998)

FTC v. Staples, Inc., 970 F. Supp. 1066, 1997-2 Trade Cases ¶71,867 (D.D.C. 1997)

FTC v. Butterworth Health Corp. 946 F. Supp. 1285, 1996-2 Trade Cases ¶71,571 (W.D. Mich. 1996); *aff'd* 121 F.3d 708, 1997-2 Trade Cases ¶71,863 (6th Cir. 1997)

FTC v. Freeman Hospital, 911 F. Supp. 1213, 1995-1 Trade Cases ¶71,037 (W.D. Mo. 1995); *aff'd* 69 F.3d 260, 1995-2 Trade Cases ¶71,167 (8th Cir. 1995)

[NOTE: District court orders denying motions for preliminary injunctions appear in bold.]

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