Statement of Senator Patrick Leahy (D-Vt.),
Ranking Member, Senate Judiciary Committee,
Subcommittee Hearing on "S.2102, The 'Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015'"
October 7, 2015

The antitrust laws protect hardworking Americans by ensuring that our markets are characterized by vibrant competition. This competition results in lower prices and more choices for consumers. Over 100 years ago, Congress created the Federal Trade Commission (FTC) as an independent agency with statutory enforcement powers to protect consumers from anticompetitive actions. At a time of increasing consolidation in many different industries, the agency serves a vital function that we must preserve and protect.

Today's hearing will examine S.2102, The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, also known as the SMARTER Act. I have serious concerns about the impact of this proposed legislation on the independent antitrust enforcement authority of the FTC. The legislation being discussed today would fundamentally change the FTC's authority to protect consumers against harmful mergers before they are completed. Such steps deserve our careful attention and review.

The first change made by the SMARTER Act would alter the standard used by courts when the FTC seeks a preliminary injunction against a transaction before completion. Although the words used to articulate the injunction standard for the FTC are different than those for the Department of Justice, FTC Chairwoman Edith Ramirez and Assistant Attorney General for Antitrust William Baer have both testified to this subcommittee that there is no practical difference between the injunction standards, and that there is no problem to be fixed. Proponents of the SMARTER Act have a heavy burden to rebut these views from our Nation's leading antitrust enforcers. I am deeply concerned that a change in statutory language would call into question decades of precedent, causing confusion and unpredictability. Moreover, a change could send an unintended signal to federal courts that Congress intends the standard for the FTC to obtain an injunction to be *lowered*, and am therefore skeptical of such a proposal.

The second change made by the SMARTER Act would prohibit the FTC from using its administrative adjudication authority to challenge merger transactions before they are consummated. The FTC's independent adjudication function is a core component of the Commission's statutory structure, and reflects its nature as an expert agency. Removing this authority in the context of unconsummated mergers undermines the Commission's ability to protect consumers *before* harm has occurred. Again, the proponents of the legislation face a heavy burden to justify such a significant structural change.

The Judiciary Committee's oversight of the FTC's antitrust enforcement efforts is vital. Part of that oversight function is to ensure that our antitrust authorities have the tools they need to protect competition in the complex markets of today. Our laws should be updated as needed, but changes should be undertaken carefully and only in response to demonstrated problems that lead to consumer harm. I look forward to reviewing the testimony of the witnesses today.

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