

**Prepared Statement of  
The Federal Trade Commission**

**Before the  
United States Senate  
Committee on the Judiciary  
Subcommittee on Antitrust, Competition Policy and Consumer Rights**

**S. 2102, The “Standard Merger and Acquisition Reviews Through Equal  
Rules Act of 2015”**

**Washington, DC  
October 7, 2015**

Chairman Lee, Ranking Member Klobuchar, and Members of the Subcommittee, thank you for the opportunity to appear before you today. I am Edith Ramirez, Chairwoman of the Federal Trade Commission, and I am pleased to testify on behalf of the Commission regarding the FTC's work to promote competition on behalf of consumers, the value of our process for challenging anticompetitive mergers, and our concerns with S. 2102.<sup>1</sup> Our principal concern is that the proposed legislation would eliminate the Commission's adjudicative function in certain merger cases.<sup>2</sup> As explained below, that proposed legislative step is unwarranted and would remove a key tool the Commission has used successfully for many decades to promote competition and advance consumer welfare.

Congress created the Commission in 1914 as an independent, bipartisan agency to augment then-existing antitrust enforcement efforts. Congress gave the FTC unique tools to carry out this special charge. These include expert research authority and broad information-gathering power to identify and study threats to consumer welfare and the competitive process. That authority is enhanced by the FTC's ability to consider and decide cases as an expert tribunal, subject to review by a federal court of appeals.<sup>3</sup> As Justice Sutherland wrote for the Supreme Court in *Humphrey's Executor v. United States*, this combination of functions allows the agency to "exercise the trained judgment of a body of experts" when "dealing with these special questions concerning industry that comes from experience,"<sup>4</sup> as Congress intended.

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<sup>1</sup> This written statement presents the views of the Federal Trade Commission. My oral statements and responses to questions are my own and do not necessarily reflect the views of the Commission or of any other Commissioner. Commissioner Ohlhausen voted against the issuance of this testimony. She presented her views on the SMARTER Act in a recent speech, which is available at <https://www.ftc.gov/public-statements/2015/09/smarter-section-5>.

<sup>2</sup> This adjudicative function is sometimes referred to as "Part 3," which denotes the relevant procedural rules in the Code of Federal Regulations.

<sup>3</sup> Over 30 independent or executive branch agencies, including the FTC, engage in administrative adjudication and follow procedures prescribed by the Administrative Procedure Act (5 U.S.C. §§ 551-706).

<sup>4</sup> *Humphrey's Ex'r v. United States*, 295 U.S. 602, 624 (1935) (quoting S. Rep. No. 63-597, at 10-11 (1914)).

For the past century, the FTC has worked to ensure that American markets are open, vibrant, and unencumbered by unreasonable private or public restraints. Throughout its history, the FTC has tackled the complex competition issues of the day, guiding antitrust policy from the horse and buggy era to our modern interconnected, global economy. The Commission's administrative authority has been an important part of those efforts. As the Commission enters its second century, it does so as a firm champion of our national policy of fair and vigorous competition.

This testimony begins by highlighting the FTC's efforts to preserve competition in crucial sectors of the economy and describing the way the FTC's administrative process has supplemented that effort and benefitted consumers. We then explain our concerns with the proposed legislation.

## **I. FTC Merger Enforcement Preserves Competition**

As we know, competitive markets are the foundation of our economy. Effective antitrust enforcement helps ensure that those markets function well and benefit both consumers and businesses alike. As the Supreme Court recently reaffirmed in upholding the Commission's decision in *North Carolina State Board of Dental Examiners v. FTC*, "[f]ederal antitrust law is a central safeguard for the Nation's free market structures."<sup>5</sup> The FTC has jurisdiction over a wide swath of the economy and focuses its enforcement efforts on sectors that most directly affect consumers. One of the Commission's most important responsibilities is to prevent mergers that may substantially lessen competition in violation of Section 7 of the Clayton Act.

The vast majority of proposed mergers do not raise competitive concerns. In each of the past five fiscal years (FY 2010-FY 2014), as the economy has recovered from the recession, there have been an average of about 1,400 transactions reported under the pre-merger filing

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<sup>5</sup> *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) ("*N.C. Dental*").

requirements of the Hart-Scott-Rodino Act. Following an initial review by the FTC or the Department of Justice's Antitrust Division (DOJ), with which the FTC shares primary jurisdiction for enforcing the nation's antitrust laws, over 96% of transactions have been allowed to proceed without further inquiry or investigation.

Of the proposed mergers that warrant additional agency investigation to determine whether they violate Section 7, the FTC has challenged, on average, 21 that were likely to harm competition in each of the past five fiscal years. Most of these transactions were allowed to proceed with negotiated divestitures or were abandoned based on the concerns raised by the FTC during the investigation. In a few instances each year, a settlement cannot be reached and the Commission files suit in federal court when it is necessary to prevent a transaction from proceeding pending an administrative trial. Similarly, most DOJ merger enforcement actions result in settlements, abandonment, or restructured deals, with few litigated cases.

FTC merger enforcement has preserved competitive market conditions in vital sectors of the economy, such as health care, technology, consumer goods and services, and energy, preventing price increases and spurring innovation. With the high cost of health care a serious concern for most Americans, the Commission has been particularly active in seeking to preserve and promote competition in healthcare markets.<sup>6</sup> Healthcare consolidation can undermine efforts to control these costs.<sup>7</sup> For this reason, the FTC devotes significant resources to addressing mergers that threaten to raise prices or undermine cost-containment efforts in a variety of

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<sup>6</sup> A description of, and links to, the FTC's various healthcare-related activities can be found at <http://www.ftc.gov/tips-advice/competition-guidance/industry-guidance/health-care>.

<sup>7</sup> Recent research shows that health care providers with significant market power may be able to negotiate higher than competitive payment rates, often without offsetting improvements in quality. *See, e.g.,* Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, The Synthesis Project, Robert Wood Johnson Found. (2012), *available at* <http://www.rwjf.org/en/research-publications/find-rwjf-research/2012/06/the-impact-of-hospital-consolidation.html>.

healthcare markets, including general acute care hospitals,<sup>8</sup> surgery centers,<sup>9</sup> psychiatric hospitals,<sup>10</sup> dialysis clinics,<sup>11</sup> medical devices,<sup>12</sup> and pharmaceuticals.<sup>13</sup>

For example, the Commission carefully reviews mergers between pharmaceutical manufacturers to prevent firms from acquiring market power that would allow them to raise prices on crucial medications. In FY 2013-14, the Commission took action in 13 pharmaceutical mergers, ordering divestitures to preserve competition in the sale of 44 pharmaceutical products used to treat a variety of conditions, such as hypertension, diabetes, and cancer, as well as widely-used generic medications such as oral contraceptives and antibiotics.

The Commission has also taken action to prevent anticompetitive healthcare provider transactions, as illustrated by two recent appellate wins. In the first, the Sixth Circuit upheld the Commission's decision requiring ProMedica Health System to divest its rival, St. Luke's Hospital, because the merger would have given ProMedica the leverage to demand higher rates from health plans.<sup>14</sup> The court concluded that the size and competitive significance of ProMedica, combined with St. Luke's location in the affluent southwestern Toledo suburbs with its high proportion of commercially-insured patients, would have made ProMedica virtually

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<sup>8</sup> See, e.g., *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014); *FTC v. OSF Healthcare Sys.*, 852 F. Supp. 2d 1069 (N.D. Ill. 2012).

<sup>9</sup> See, e.g., Decision & Order, *In re H.I.G. Bayside Debt*, No. C-4494 (F.T.C. Dec. 22, 2014), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0183-c-4494/hig-bayside-debt-et-al>; Order Dismissing Complaint, *In re Reading Health Sys.*, No. 9353 (F.T.C. Dec. 7, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210155/reading-health-system-surgical-institute-reading-matter>.

<sup>10</sup> See, e.g., Agreement Containing Consent Orders, *In re Allan B. Miller*, No. C-4372 (F.T.C. Oct. 5, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1210157/universal-health-services-alan-b-miller>.

<sup>11</sup> See, e.g., Agreement Containing Consent Orders, *In re Fresenius Med. Care AG*, No. C-4348 (F.T.C. Feb. 28, 2012), available at <https://www.ftc.gov/enforcement/cases-proceedings/1110170/fresenius-medical-care-ag-co-kgaa-matter>.

<sup>12</sup> See, e.g., Decision and Order, *In re Medtronic, Inc.*, No. C-4503 (F.T.C. Jan. 13, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0187/medtronic-inc-coviden-plc-matter>.

<sup>13</sup> See, e.g., Decision and Order, *In re Impax Labs., Inc.*, No. C-4511 (F.T.C. Apr. 22, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/151-0011-c-4511/impax-laboratories-inc-et-al-matter>; Decision and Order, *In re Novartis AG*, No. C-4510 (F.T.C. Apr. 7, 2015), available at <https://www.ftc.gov/enforcement/cases-proceedings/141-0141-c-4510-c-4498/novartis-ag-matter-glaxosmithkline>.

<sup>14</sup> *ProMedica Health Sys., Inc. v. FTC*, 749 F.3d 559 (6th Cir. 2014).

indispensable to health plans post-merger, resulting in higher prices and less incentive to innovate. The court described the Commission’s opinion finding the merger anticompetitive as “comprehensive, carefully reasoned, and supported by substantial evidence in the record.”<sup>15</sup>

The FTC achieved another significant victory when the Ninth Circuit affirmed a district court decision that the acquisition by a dominant health care system with a large physician practice group of Idaho’s largest independent multi-specialty physician practice group violated the Clayton Act and the Idaho Competition Act.<sup>16</sup> The Ninth Circuit agreed with the trial court’s determination that the transaction would have given the combined entity the power to demand higher rates in the market for adult primary care services in Nampa, Idaho, the state’s second-largest city. The court did not find St. Luke’s quality-based efficiencies defense adequate to rebut a prima facie case that the merger was anticompetitive.

The Commission has also sought to prevent mergers in other critical sectors of the economy. In February, following an extensive investigation, the FTC filed an administrative complaint to block the merger of the two largest foodservice distributors in the country, Sysco Corporation and US Foods, Inc.<sup>17</sup> The \$231 billion foodservice industry supplies food and related products to restaurants, government agencies, school and workplace cafeterias, hotels and resorts, and hospitals.<sup>18</sup> To prevent the companies from consummating the merger and integrating their operations pending a full administrative trial, the FTC, joined by the Attorneys General of 11 states and the District of the Columbia, sought a preliminary injunction in district

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<sup>15</sup> *Id.* at 573.

<sup>16</sup> *St. Alphonsus Med. Ctr.-Nampa Inc. v. St. Luke’s Health Sys., Ltd.*, 778 F.3d 775 (9th Cir. 2015).

<sup>17</sup> Complaint, *In re Sysco Corp.*, No. 9364 (F.T.C. Feb. 19, 2015), available at <https://www.ftc.gov/system/files/documents/cases/150219syscopt3cmpt.pdf>.

<sup>18</sup> *FTC v. Sysco Corp.*, --- F. Supp. 3d ----, No. 1:15-cv-00256 (APM), 2015 WL 3958568, at \*9 (D.D.C. June 23, 2015).

court.<sup>19</sup> In late June, following an eight-day hearing, Judge Mehta of the U.S. District Court for the District of Columbia ruled that the FTC had established it was likely to succeed in proving that the proposed acquisition would violate Section 7 of the Clayton Act.<sup>20</sup> Sysco announced shortly thereafter that it would abandon the proposed merger in light of the district court's ruling.

## **II. The FTC's Administrative Process Has Advanced Consumers' Interests**

One of the key components of FTC antitrust enforcement has been the role of the FTC's administrative process in challenging harmful mergers and advancing consumers' interests through fact-driven application of antitrust principles. It has proven particularly valuable in complex cases such as hospital mergers and reverse payment patent settlements, where the Commission has used the combination of its research and law enforcement authority to develop a coordinated, well-considered approach to challenging anticompetitive conduct and advancing antitrust law.

The FTC's administrative process has played an especially important role in its hospital merger enforcement efforts. During the 1980s and early 1990s, the FTC and DOJ successfully challenged a number of hospital mergers,<sup>21</sup> but following several consecutive losses between 1994 and 2000, in which we disagreed with the courts' conclusions about market behavior, the FTC reassessed its approach. In 2002, it launched a Hospital Mergers Retrospective Project to review consummated hospital mergers to better understand their competitive impact.

The information gathered from this project, complemented by a series of workshops, led the FTC to revamp its approach to litigating hospital cases by allowing us to present a more accurate picture of a hospital merger's potential competitive impact. It also led the Commission

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<sup>19</sup> The following states joined the suit: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia.

<sup>20</sup> *Sysco*, 2015 WL 3958568, at \*61.

<sup>21</sup> See, e.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991); *United States v. Rockford Mem'l Corp.*, 717 F. Supp. 1251, aff'd, 898 F.2d 1278 (7th Cir. 1990).

to challenge one of the mergers it studied, Evanston Northwestern Healthcare's consummated acquisition of Highland Park Hospital in the northern suburbs of Chicago.<sup>22</sup> On an extensive record following an administrative trial, the FTC concluded in that case that the merger resulted in significantly higher insurance rates for employers and patients. The Commission's *Evanston* decision laid the groundwork for a series of successful FTC challenges against other anticompetitive hospital mergers that threatened higher prices and lower quality care, including the *ProMedica* case discussed above.<sup>23</sup>

In 2011, the Commission also used its adjudicative process to challenge Polypore's consummated acquisition of Microporous, two leading providers of components for batteries.<sup>24</sup> Following an administrative trial, the Commission ruled that the transaction was anticompetitive because it led to decreased competition and higher prices in four battery product markets.<sup>25</sup> The Commission required Polypore to divest Microporous to an FTC-approved buyer. In considering the case, the Commission addressed novel issues regarding whether the parties should be deemed current or potential competitors. The Eleventh Circuit affirmed the Commission's decision.<sup>26</sup>

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<sup>22</sup> Complaint, *In re Evanston Nw. Healthcare Corp.*, No. 9315 (F.T.C. Feb. 10, 2004), available at <https://www.ftc.gov/sites/default/files/documents/cases/2004/02/040210emhcomplaint.pdf>.

<sup>23</sup> See, e.g., *ProMedica Health Sys.*, 749 F.3d at 573; *FTC v. St. Luke's Health Sys., Ltd.*, No. 1:13-CV-00116-BLW, 2014 WL 407446 (D. Idaho Jan. 24, 2014); *OSF Healthcare Sys.*, 852 F. Supp. 2d at 1095 (transaction abandoned following grant of preliminary injunction); Opinion of the Commission, *In re Evanston Nw. Healthcare Corp.*, No. 9315, (F.T.C. Aug. 6, 2007), available at <http://www.ftc.gov/os/adjpro/d9315/070806opinion.pdf>. Additionally, hospitals have abandoned a number of mergers after the FTC threatened a challenge. See, e.g., Press Release, Statement of FTC Competition Director Richard Feinstein on Today's Announcement by Capella Healthcare That it Will Abandon its Plan to Acquire Mercy Hot Springs (June 27, 2013), available at <http://www.ftc.gov/news-events/press-releases/2013/06/statement-ftc-competition-director-richard-feinstein-todays>; Order Dismissing Complaint, *In re Reading Health Sys.*, No. 9353 (F.T.C. Dec. 7, 2012), available at <http://www.ftc.gov/os/adjpro/d9353/121207readingsircmpt.pdf>; Order Dismissing Complaint, *In re Inova Health Sys. Found.*, No. 9326 (F.T.C. June 17, 2008), available at <http://www.ftc.gov/os/adjpro/d9326/080617orderdismissmpt.pdf>.

<sup>24</sup> Polypore's acquisition of Microporous was non-reportable under the HSR rules.

<sup>25</sup> Opinion of the Commission, *In re Polypore Int'l, Inc.*, Docket No. 9327 (F.T.C. Dec. 13, 2010), available at <http://www.ftc.gov/sites/default/files/documents/cases/2010/12/101213polyporeopinion.pdf>.

<sup>26</sup> *Polypore Int'l, Inc. v. FTC*, 686 F.3d 1208 (11th Cir. 2012).



The Commission’s administrative decisions in non-merger antitrust cases further demonstrate the value of the Commission’s adjudicative process. The Commission’s longstanding efforts to stop anticompetitive reverse-payment patent settlements, culminating with the Commission’s victory before the Supreme Court in *FTC v. Actavis*,<sup>27</sup> serves as another important example.

Since the late 1990s, the Commission has engaged in a bipartisan effort to protect consumers against the anticompetitive consequences of reverse-payment patent settlements. As with hospital mergers, the Commission deployed all of its unique tools to achieve that goal. Using its authority under Section 6(b) of the FTC Act to gather information about the effects of reverse-payment arrangements, the Commission issued a report analyzing the impact of these arrangements on pharmaceutical prices.<sup>28</sup> It also sought and obtained critical legislative improvements, including provisions requiring drug companies to file pharmaceutical patent agreements with the FTC that have allowed the FTC to track the scope of the problem and identify troubling agreements.<sup>29</sup>

In 2003, the Commission issued an administrative decision in this area in *In re Schering-Plough Corp.*, finding that a reverse-payment arrangement between branded pharmaceutical company Schering-Plough and two generic manufacturers violated the antitrust laws by improperly delaying generic competition.<sup>30</sup> In 2005, the Eleventh Circuit reversed the Commission’s administrative ruling, establishing what became known as the “scope of the patent

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<sup>27</sup> *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013).

<sup>28</sup> Fed. Trade Comm’n, *Generic Entry Prior to Patent Expiration* (2002), available at <https://www.ftc.gov/reports/generic-drug-entry-prior-patent-expiration-ftc-study>.

<sup>29</sup> Medicare Prescription Drug Improvement and Modernization Act of 2003, Pub. L. No. 108-173, § 1112, 117 Stat. 2066 at 2461-62.

<sup>30</sup> Opinion of the Commission, *In re Schering-Plough Corp.*, Docket No. 9297 (F.T.C. Dec. 18, 2003), available at <https://www.ftc.gov/sites/default/files/documents/cases/2003/12/031218commissionopinion.pdf>.

test,” which in effect insulated reverse-payment agreements from antitrust challenge.<sup>31</sup> Although other appellate courts adopted the same restrictive analysis,<sup>32</sup> the Commission continued to challenge anticompetitive reverse-payment arrangements and to release additional empirical analyses documenting the significant anticompetitive effects of such arrangements.<sup>33</sup>

Ultimately, in 2013, the Supreme Court in *Actavis v. FTC* rejected the scope-of-the-patent test and ruled that these reverse-payment patent settlements are subject to antitrust scrutiny under the rule of reason, the same analysis the Commission had adopted in its *Schering-Plough* opinion a decade earlier.

The Supreme Court’s ruling in *Actavis* vindicated nearly twenty years of Commission work to combat unlawful reverse payments, benefiting consumers, businesses, and taxpayers, all of whom paid inflated prices as a result of this illegal tactic delaying generic entry.<sup>34</sup>

The Commission continues to be active in this area. Earlier this year, the Commission reached a landmark \$1.2 billion settlement with Cephalon, Inc. and its now-parent, Teva Pharmaceuticals, ending a long-running enforcement action charging that Cephalon paid four generic competitors to abandon their challenges to its Provigil patent and stay off the market for six years, in violation of the antitrust laws. The settlement ensures that at least \$1.2 billion is available to compensate Provigil purchasers who overpaid for Provigil as a result of Cephalon’s conduct. The settlement is the largest equitable monetary award in the FTC’s history. Additionally, as part of the settlement, Teva, the world’s largest generic company, agreed to a

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<sup>31</sup> *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1065-66 (11th Cir. 2005).

<sup>32</sup> *In re Tamoxifen Citrate Antitrust Litig.*, 466 F.3d 187, 213 (2d Cir. 2006); *In re Ciprofloxacin Hydrochloride Antitrust Litig.*, 544 F.3d 1323, 1336 (Fed. Cir. 2008).

<sup>33</sup> See, e.g., Fed. Trade Comm’n, *Pay-for-Delay: How Drug Company Pay-Offs Cost Consumers Billions: A Federal Trade Commission Staff Study* (2010), available at <https://www.ftc.gov/reports/pay-delay-how-drug-company-pay-offs-cost-consumers-billions-federal-trade-commission-staff>.

<sup>34</sup> *Id.*

prohibition on the type of anticompetitive patent settlements the Commission alleged that Cephalon had used to artificially inflate the price of Provigil.

Yet another example of the way the Commission has used its administrative process to shape antitrust law for the benefit of consumers is in the area of state action. State action has been a Commission focus for many decades, beginning with early challenges to taxicab regulations in the 1970s and continuing today. In 2003, for instance, the Commission issued a staff report identifying areas in which the state action doctrine had expanded beyond the original principles articulated by the Supreme Court in *Parker v. Brown*.<sup>35</sup> These efforts laid the groundwork for the FTC's Supreme Court victory earlier this year in *N.C. Dental*.<sup>36</sup> The Court agreed with the Commission's administrative decision that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in order to invoke state-action antitrust immunity."<sup>37</sup> This decision is particularly important because occupational licensing requirements govern a substantial and growing segment of the U.S. economy.

Over the last two decades, reviewing courts have affirmed 10 out of 13 Commission administrative competition decisions.<sup>38</sup> That number rises to 11 wins out of 13 cases once one takes into account that the Commission's 2003 ruling in *Schering-Plough*, reversed by the Eleventh Circuit in 2005,<sup>39</sup> was ultimately vindicated with the Supreme Court's 2013 decision in *Actavis*.<sup>40</sup> This appellate record is even more impressive given that many of those opinions have

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<sup>35</sup> Fed. Trade Comm'n, Report of the State Action Task Force (Sept. 2003), *available at* <https://www.ftc.gov/reports/report-state-action-task-force-recommendations-clarify-reaffirm-original-purposes-state>.

<sup>36</sup> *N.C. Dental*, 135 S. Ct. at 1109.

<sup>37</sup> *Id.* at 1114.

<sup>38</sup> The Commission's orders were overturned in *Rambus, Inc. v. FTC*, 522 F.3d 456, 466–67 (D.C. Cir. 2008), *Schering-Plough Corp. v. FTC*, 402 F.3d 1056, 1073–76 (11th Cir. 2005), and *California Dental Association v. FTC*, 224 F.3d 942, 957–58 (9th Cir. 2000).

<sup>39</sup> *Schering-Plough*, 402 F.3d at 1073–76.

<sup>40</sup> *Actavis*, 133 S. Ct. at 2223 (discussed above).

involved novel questions of law on which the Commission is given no deference,<sup>41</sup> and that respondents have the ability to choose the most favorable appellate forums.<sup>42</sup>

### **III. The Proposed Legislative Changes Are Unnecessary and Could Have Adverse Effects for Consumers**

As we understand it, the proposed legislation aims to remove certain aspects of the FTC's adjudicative function. In our view, these legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement. 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.

As an initial matter, in 2009, the Commission revised its rules governing administrative litigation to streamline the administrative process in response to concerns that process was too protracted.<sup>43</sup> The revised rules represent a comprehensive and significant revision of the Commission's adjudicatory process that expedite the prehearing, hearing, and appeal phases, streamline discovery and motion practice, and ensure that the Commission applies its substantive expertise earlier in the process. These rules include tight deadlines for the Commission to rule on the merits of a case.<sup>44</sup> The result is an administrative process that is comparable to federal court timelines.

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<sup>41</sup> See, e.g., *Chi. Bridge & Iron Co. v. FTC*, 534 F.3d 410, 422 (5th Cir. 2008) ("We review de novo all legal questions pertaining to Commission orders.").

<sup>42</sup> The FTC Act authorizes respondents to appeal Commission orders to any regional court of appeals where the challenged method of competition was used or where the respondent would otherwise be subject to personal jurisdiction. 15 U.S.C. § 45(c) (2012).

<sup>43</sup> Press Release, FTC Issues Final Rules Amending Parts 3 and 4 of the Agency's Rules of Practice (Apr. 27, 2009), available at <http://www.ftc.gov/opa/2009/04/part3.shtm>. In August 2011, the Commission made additional changes relating to discovery, the labeling and admissibility of certain evidence, and deadlines for oral arguments. Press Release, FTC Modifies Part 3 of Agency's Rules of Practice (Aug. 12, 2011), available at <http://www.ftc.gov/opa/2011/08/part3.shtm>.

<sup>44</sup> *Id.*

Second, while the preliminary injunction standard prescribed for the FTC under Section 13(b) of the FTC Act is worded differently than the one that applies to DOJ, the FTC, like DOJ, is required to make a robust evidentiary and legal showing that the transaction would likely be anticompetitive in order to obtain a preliminary injunction. As Assistant Attorney General William Baer has stated, “any effort to seek a federal court injunction against a proposed merger requires the FTC or the division to present a convincing factual and legal basis for competitive concern in order to secure appropriate relief.”<sup>45</sup>

Indeed, federal district courts closely scrutinize cases brought by both agencies. For example, in *Sysco* the court ruled that Section 13(b) “demands rigorous proof to block a proposed merger or acquisition.”<sup>46</sup> In that matter, the district court engaged in a detailed examination of the foodservice distribution industry, the parties’ proposed product and geographic market definitions, market shares and concentration, existing and potential competitors, the likely effects of the proposed transaction on pricing and other dimensions of competition, and the claimed efficiencies from the transaction.<sup>47</sup> For this reason, preliminary injunction cases typically involve several-day hearings with extensive prior briefing, live witnesses, and expert testimony. Notably, there is no evidence to suggest that there is a difference in outcomes as between the FTC and the DOJ despite the differently-worded preliminary injunction standard.

Furthermore, in March 2015, the Commission reaffirmed that, in cases where it fails to obtain a preliminary injunction in federal court, it will carefully consider whether to press

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<sup>45</sup> William J. Baer, Assistant Attorney General, Antitrust Division, U.S. Department of Justice, Responses to Written Questions of Senator Michael S. Lee 6 (April 2013), *available at* <http://www.judiciary.senate.gov/imo/media/doc/041613QFRs-Baer.pdf>.

<sup>46</sup> *Sysco Corp.*, 2015 WL 3958568, at \*9.

<sup>47</sup> *Id.* at \*3. Courts in other FTC preliminary injunction cases have engaged in a similarly thorough analysis. *See, e.g., FTC v. CCC Holdings, Inc.*, 605 F. Supp. 2d 26 (D.D.C. 2009); *FTC v. Arch Coal, Inc.*, 329 F. Supp. 2d 109 (D.D.C. 2004); *FTC v. Swedish Match*, 131 F. Supp. 2d 151 (D.D.C. 2000); *FTC v. Cardinal Health, Inc.*, 12 F. Supp. 2d 34 (D.D.C. 1998).

forward with administrative litigation.<sup>48</sup> Significantly, in the last 20 years, the Commission has not proceeded administratively following a loss at the preliminary injunction stage.<sup>49</sup> For example, in 2011 the Commission ended its administrative litigation involving LabCorp's acquisition of Westcliff Medical Labs after carefully considering the factors outlined in a 1995 Commission Policy Statement.<sup>50</sup> Comparable matters in the future would be subject to similar Commission scrutiny.

Consequently, in our view, the proposed modifications of the Commission's adjudicative function are unnecessary. If anything, such changes could very well negatively impact the Commission and undermine its beneficial role in promoting competition. The FTC plays an essential role in protecting consumers from anticompetitive mergers. By seeking to alter the Commission's adjudicative function, the proposed legislation risks eroding a fundamental institutional attribute of the FTC. 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.

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<sup>48</sup> Revisions to Rules of Practice, 80 Fed. Reg. 15157, 15158 (Mar. 23, 2015) (discussing rule changes that allow respondents to request an automatic suspension of Part 3 litigation if a court denies a preliminary injunction and emergency appellate relief is not granted to the Commission).

<sup>49</sup> Like any other litigant, the FTC has the right to seek appellate review after a district court denies preliminary relief. The agency may continue to pursue the administrative case during that period, although in recent cases, the FTC has stayed the administrative litigation during the appeal. In *Phoebe Putney*, for example, the Commission stayed the administrative proceeding after losing its request for a preliminary injunction in the federal district court and only resumed the administrative proceeding after its successful appeal in the Supreme Court. In *re Phoebe Putney*, Order Granting Complaint Counsel's Motion to Lift Stay, No. 9348 (F.T.C. March 14, 2013), available at <http://www.ftc.gov/sites/default/files/documents/cases/2013/03/130314phoebeordermotion.pdf>.

<sup>50</sup> See Statement of Commissioners Leibowitz, Kovacic, and Ramirez, *In re Lab. Corp. of Am.*, No. 9345 (F.T.C. Apr. 21, 2011) (citing Administrative Litigation Following the Denial of a Preliminary Injunction: Policy Statement, 60 Fed. Reg. 39, 741 (Aug. 3, 1995), available at [https://www.ftc.gov/system/files/documents/public\\_statements/568671/110422labcorpcommstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/568671/110422labcorpcommstmt.pdf)). The Policy Statement explains how, after a court has denied preliminary injunctive relief to the Commission, the Commission determines whether administrative litigation should be continued.

#### **IV. Conclusion**

Thank you for the opportunity to appear before you and share the Commission's concerns about proposed legislation that would fundamentally alter a critical aspect of the agency's institutional role and risks impeding its ability to protect American consumers and the public interest.