SENATE COMMITTEE ON THE JUDICIARY HEARING ON S. 2102
THE "STANDARD MERGER AND ACQUISITION REVIEWS
THROUGH EQUAL RULES ACT OF 2015"

QUESTIONS FOR THE RECORD

Responses from David Clanton

A. Questions from Senator Orrin G. Hatch

1. **Chairwoman Ramirez and others claim that Part III proceedings add significant value to FTC merger review and that eliminating Part III in merger cases would be a mistake. Do Chairwoman Ramirez and others *overstate* the value of Part III proceedings? Do they *understate* the drawbacks that attend FTC's ability to threaten Part III proceedings? Please give me your thoughts.**

   Response:

   I agree that FTC Part III proceedings add value and the Commission has contributed to the development of antitrust law in both merger and non-merger cases. In my prepared testimony, I cited to a couple of recent cases where the Commission successfully challenged consummated transactions – *ProMedica Health Systems* and *Polypore International*. The SMARTER Act would not prevent the FTC from continuing to use Part III proceedings in such cases.

   However, for unconsummated transactions, notably HSR reportable transactions, these cases never get past the preliminary injunction ("PI") stage. If the FTC loses, they generally do not continue to litigate the case in a Part III proceeding, at least in recent years and since the Commission reinstated the so-called Pitofsky Rule earlier this year. If the FTC wins, the merging parties invariably either abandon the transaction or agree to some type of remedy (primarily divestiture remedies). I indicated in my statement that no case had continued through Part III following a PI in the past 20 years, regardless of which side prevailed in the PI proceeding. In fact, I am not aware of any case since enactment of the HSR Act where a Part III proceeding was completed after the Commission successfully obtained a PI.

   The practical effect of the Commission's refusal to seek permanent relief in federal court in these cases, is that FTC merger cases are decided in a preliminary injunction hearing while DOJ cases are typically decided on the merits. The Commission has well-established authority to seek permanent injunctions under Section 13(b) in both consumer protection and antitrust cases, including merger cases.

   In short, the FTC is not developing law through Part III proceedings in the context of proposed mergers. Accordingly, the legislation would not adversely affect the agency's development of merger law through administrative litigation.

2. **Do you believe that withdrawing the FTC's ability to pursue Part III proceedings in merger review cases would hinder the FTC's ability to perform its mission of protecting consumer welfare? Why or why not?**

   Response:

   As explained above, removing the FTC's ability to pursue Part III proceedings involving unconsummated acquisitions and mergers would not impair the agency's enforcement efforts.

3. **You served as Commissioner and as Acting Chairman of the FTC. During your time as Commissioner, did you see instances where the threat of Part III proceedings gave the FTC added leverage in merger review cases? Do you believe this added leverage is justified, given that DOJ has no ability to threaten internal administrative proceedings?**

   Response:

   I believe the bifurcation of the PI and merits hearings in FTC merger cases has given the FTC additional leverage, whether in settlement negotiations or otherwise. Of course, it is difficult, if not impossible, to know what motivates merger parties to settle or decide not to proceed with a transaction in the first instance, but the fact that Part III proceedings are never completed after companies lose a PI is powerful evidence that the lengthy litigation process at the FTC is not working. Although the Commission has taken steps to shorten Part III litigation in merger cases, the sequential combination of a lengthy investigation, followed by a PI hearing, followed by a Part III trial on the merits is still too long for losing parties to put a merger on hold until the merits phase is completed.

   Given the extensive factual and economic evidence that is developed by both the FTC and DOJ prior to any judicial or administrative merger proceeding, the FTC (like DOJ) should be prepared to try their cases on the merits when challenging an unconsummated acquisition or merger.

4. **Do you believe that the FTC and DOJ do in fact face different standards for obtaining a preliminary injunction in a merger review case? How do those different standards affect how the agencies approach merger cases? How do the different standards affect parties' decisions about whether to merge?**

   Response:

   Yes, I believe the agencies do face different standards, with the primary difference being the threshold showing of probable success that the agencies must establish to warrant issuance of a PI. Although Section 13(b) speaks in terms of "likelihood of success," many courts, particularly in the D.C. Circuit, have in the words of the FTC itself adopted a more "deferential" test that can be satisfied if the FTC raises 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." *FTC v. Whole Foods, Inc.*, 548 F.3d 1028, 1042 (D.C. Cir. 2008) (citations omitted).

This vague standard provides no useful guidance as to what is meant by "likelihood of success" and it invites varying and inconsistent interpretations. By contrast, the Second Circuit in *U.S. v. Siemens Corporation*, 621 F.2d 499, 505-06 (2d Cir. 1980) rejected a similar version of the "serious questions" test in a DOJ merger case.

As to how the different standards affect the agencies' approach in merger cases, both agencies necessarily must prepare as if the case is a trial on the merits, which only underscores why the FTC should have no objection to consolidating the preliminary and permanent injunction hearing in federal court.

5. **Again, you served as Commissioner and as Acting Chairman of the FTC. From your experience, can you tell me how often the Commission disagrees with the staff recommendation in a merger review case? Is it a common occurrence, or is it unusual? Are there any lessons we should draw from how frequently or not the Commission agrees with the staff recommendation in a merger case?**

Response:

In my experience at the FTC, there was frequent robust debate at Commission meetings on staff recommendations to challenge mergers. In the vast majority of cases, the Commissioners supported the staff recommendations, but the debate often resulted in modifications to case theories or other strategic issues. My sense is that the Commission today also approves most staff recommendations, but it is clear from public statements of Commissioners that there is an equally robust debate on all types of issues, including merger policy. Moreover, the economic learning and case development on merger enforcement issues has advanced considerably over the past 30 plus years at both the FTC and DOJ. If anything, the FTC and DOJ are in a much better position today to pursue a trial on the merits in federal court than they were at the dawn of the HSR era. That experience provides an additional reason why the Commission should bring its unconsummated merger cases exclusively in federal court, particularly where Part III trials are not a viable option.

B. Questions from Senator Amy Klobuchar

1. **In your opinion, has the outcome of any merger you have been involved in ever turned on the actual or perceived differences that the SMARTER Act would address? If yes, how often?**

Response:

In my experience, merging parties are very interested in the litigation process and agency-specific procedures, particularly where a transaction raises potentially significant antitrust issues and settlement prospects are unclear. In such circumstances, the parties understand that in FTC cases they get only one shot and that is in a preliminary injunction ("PI")

hearing, not a trial on the merits, because the combined judicial and Part III administrative proceedings take too long. Naturally, that doesn't happen very often and a company's decision to proceed (or not) with a transaction or its willingness to accept certain settlement terms is often based on a variety of factors, including business reasons unrelated to agency enforcement risks. I have had a few cases where the parties backed off transactions that were either being reviewed by the FTC or were likely to be reviewed by the agency, but I cannot say with confidence whether the reasons were based on issues addressed by this legislation, business considerations or some combination thereof. I do know that the overall length of the regulatory review, including possible litigation, was a factor under consideration by the parties.

The fact that parties to an unconsummated transaction never litigate a merger in a Part III administrative proceeding, if they lose at the PI stage, simply confirms that merits trials are not a viable option in such circumstances. As I noted in my statement, the PI hearing becomes the de facto merits hearing. That is reason enough, in my view, to equalize the litigation procedures between the FTC and DOJ for proposed transactions.

2. As I understand your concern, you believe that some courts, in assessing the likelihood of success element for a preliminary injunction, have interpreted 15 U.S.C. 53(b) to require the FTC only to 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," and you believe that standard is lower than what is required under the traditional common law test for a preliminary injunction. It appears that some courts have adopted similar language in applying the common law test for a preliminary injunction, at least where the balance of harm favors the plaintiff. For example, the Second Circuit requires a plaintiff to raise "sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief." Citigroup Global v. VCG Special Opport, 598 F.3d 30, 35 (2d Cir. 2010).

(a) How is the standard under 15 U.S.C. 53(b) different than the test articulated by the Second Circuit?

Response:

Although the Second Circuit has applied a variation of the "serious questions" standard in certain preliminary injunction cases, it explicitly rejected this standard in a merger case brought by the DOJ. In *U.S. v. Siemens Corporation*, 621 F. 2d 499 (2d Cir. 1980), the court stated that "[t]he proper test for determining whether preliminary relief should be granted in a Government-initiated antitrust suit is whether the Government has shown a reasonable likelihood of success on the merits and whether the balance of equities tips in its favor."

The *Siemens* court went on to observe that irreparable harm should be presumed if the government establishes a "reasonable probability" of success, but it emphasized that "[*t*]*o warrant that presumption ... the Government must do far*

more than merely raise sufficiently serious questions with respect to the merits to make them fair ground for litigation. A preliminary injunction remains a drastic form of relief." Id. at 505-06 (emphasis added).

Thus, the *Siemens* decision clearly places primary emphasis on the importance of showing a "likelihood of success" and characterizes the "serious questions" test as a lower standard.

(b) The one clear difference between the test described in 15 U.S.C. 53(b) and the test generally articulated under common law is that the 53(b) standard does not require proof of irreparable harm. Under the common law preliminary injunction test, how often would the Department of Justice be unable to show irreparable harm when challenging an unconsummated merger? Please identify the conditions under which the Department of Justice could not make a showing of irreparable harm.

Response:

While courts in DOJ cases adhere to the traditional four-part test for granting preliminary injunctions, they have modified that test to ease the government's burden on elements relating to irreparable injury, balancing the equities and the public interest – but only if a likelihood of success can first be established. For example, as noted above, in *Siemens* the court held that irreparable injury may be presumed in DOJ cases if the government can show a reasonable probability of success. Other courts have taken a similar approach in DOJ merger cases, *see, e.g., United States v. Ivaco, Inc.*, 704 F. Supp. 1409 (W.D. Mich. 1989).

The most important difference between the FTC and DOJ is the threshold showing of success that each agency must make to justify the grant of preliminary relief. That difference is highlighted in *Siemens* where the court contrasted the "serious questions" test with a reasonable probability of success. Judge Brown's opinion in *Whole Foods* illustrates just how elastic the "serious questions" standard has become:

> Section 53(b) preliminary injunctions are meant to be readily available to preserve the status quo while the FTC develops its ultimate case, and it is quite conceivable that the FTC might need to seek such relief before it has settled on the scope of the product or geographic markets implicated by a merger. For example, the FTC may have alternate theories of the merger's anticompetitive harm, depending on inconsistent market definitions. While on the merits, the FTC would have to proceed with only one of those theories, at this preliminary phase it just has to raise substantial doubts about a transaction. One may have such doubts without knowing exactly what arguments will eventually prevail. *FTC v. Whole Foods Mkt., Inc.*, 548 F.3d 1031, 1036 (D.C. Cir. 2008)

(c) Although the Federal Trade Commission may have a lower burden to obtain a preliminary injunction than a private party, is there any court decision that has said the Federal Trade Commission has a lower burden to obtain a preliminary injunction than the Department of Justice?

Response:

In addition to *Siemens* (which compares the tests but does not refer to the FTC), other cases have emphasized the unique, deferential standard under Section 13(b). In *FTC v. CCC Holdings Inc.*, 605 F.Supp.2d 26, 77 n.11 (D.D.C. 2009), the court had this to say:

> Defendants take issue with the FTC's interpretation of the "serious, substantial" question standard set forth in *Heinz* and *Whole Foods*, asserting: "[Y]ou can talk about substantial questions, doubtful questions, whatever.... [W]hat those cases say [is that] it simply means nothing other than likelihood of success on the merits." Parker, Tr. (2/17 p.m.) at 41:24-42:3 (Mitchell). *While Defendants' statement is literally true, precedents irrefutably teach that in this context "likelihood of success on the merits" has a less substantial meaning than in other preliminary injunction cases*. *Heinz* not only emphasized this point but *Whole Foods* makes clear that *Heinz* remains good law. The analysis of likelihood of success "measure[s] the probability that, after an administrative hearing on the merits, the Commission will succeed" in proving that the effect of a merger "*may* be to substantially lessen competition or tend to create a monopoly." (citation omitted) (emphasis added).

Moreover, following the *Whole Foods* decision in 2008, the Commission defended what it called the "deferential" standard applied in that case in a letter to then-House Judiciary Committee Chairman John Conyers and Ranking Member Lamar Smith. In that letter the FTC expressly contrasted the merger enforcement responsibilities of the FTC and DOJ. A copy is attached.

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

December 23, 2008

The Honorable John Conyers, Jr.
Chairman
Committee on the Judiciary
United States House of Representatives
Washington, D.C. 20515-6216

Dear Chairman Conyers:

Thank you for your letter of December 18, 2008, asking for the Commission's views on the different ways in which the Federal Trade Commission and the Department of Justice enforce Section 7 of the Clayton Act, which prohibits mergers or acquisitions that tend to create a monopoly or substantially lessen competition. 15 U.S.C. § 18. We take very seriously all correspondence from members of Congress, but have paid special heed to your letter because it concerns the very nature of the Federal Trade Commission (FTC) as it has existed for nearly a century.

You note in your letter that the Antitrust Modernization Commission (AMC) has recommended that the procedures and substantive legal standards of the FTC and the Justice Department's Antitrust Division (the Division) be harmonized by having the FTC adopt the Division's procedures and standards in cases arising under the Hart-Scott-Rodino Act (HSR), 15 U.S.C. § 18a. The AMC's recommendations in this respect were not unanimous. Several Commissioners dissented.[1] The AMC Report is correct in stating that the procedures and standard in preliminary injunction cases brought under Section 13(b) of the FTC Act are different from the procedures and standard applicable to preliminary injunctions in litigation conducted by the Division. This difference exists by design, and the way the FTC has functioned has served the public interest well.

However, there is no difference in the ultimate determination of whether an acquisition is illegal under the Clayton Act. The standard is the same whether the Department of Justice brings the action in federal court or whether there is administrative litigation before the FTC: each

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[1] For example, Vice-Chair (and former General Counsel of the Judiciary Committee) Yarowsky and Commissioner Cannon dissented from the recommendation that the Commission adopt a policy to challenge HSR mergers only in federal court. Similarly, Vice-Chair Yarowsky and Commissioners Burchfield and Cannon dissented from the recommendation that the same standards for granting a preliminary injunction apply to actions brought by the Antitrust Division and the FTC.

agency must establish by a preponderance of the evidence that the acquisition may substantially lessen competition.

The Antitrust Division is an arm of the Justice Department, which of course is an Executive Branch agency. Like a number of other Justice Department divisions, its function is primarily prosecutorial in nature. As such, the Division does not decide the antitrust cases it prosecutes. Those cases are prosecuted in, and decided by, the federal district courts, generally in permanent injunction proceedings. Those courts are not specialized antitrust courts. To the contrary, they are generalist courts, which handle hundreds of other cases, criminal and civil, in which the few antitrust cases tried are, except in actions for permanent injunctions, frequently decided by juries rather than the courts themselves.

By contrast, as you know, the FTC is not an Executive Branch agency like the Justice Department or its various divisions. It was instead created by the Congress as an independent agency. To be sure, its members are appointed by the President and the President selects the Chairman from among the sitting Commissioners. But the President's appointments are subject to confirmation by the Senate, and no more than three of the five Presidential appointees may be members of the same political party. Moreover, the FTC's activities are subject to oversight by various congressional committees, which have rigorously exercised their oversight responsibilities. Also, the FTC, unlike the federal district courts, was conceived by the Congress as a specialized agency, expert in the consumer protection and antitrust matters entrusted to it. Finally, unlike the Division or any other arm of the Justice Department, the FTC was not supposed to be strictly and solely a prosecutorial agency. Instead the Congress gave it *both* prosecutorial and judicial functions.

These differences between the FTC and the Division are not the result of Congressional inadvertence or of any arrogation of powers by the FTC. They are the result of thoughtful deliberation by the Congress and President, which created the agency in 1914. Representative Covington, who authored the original bill, emphasized that, because the agency would have specialized expertise and experience, it should have both prosecutorial and judicial functions. He declared in pertinent part:

> [T]he function of the Federal Trade Commission will be to determine whether an existing method of competition is unfair and, if it finds it to be unfair, to order discontinuance of its use. In doing this, it will exercise power of a judicial nature. . . . The Federal Trade Commission will, it is true, have to pass upon many complicated issues of fact, but the ultimate question for decision will be whether the facts found constitute a violation of the law against unfair competition. In deciding that ultimate question the Commission will exercise power of a judicial nature.

Congressional Record, Sept. 10, 1914, at 14931-33.

This conception of the FTC is reflected in Section 5 of its organic statute. It empowers the FTC to issue a complaint when it has "reason to believe" that an unfair method of competition or an unfair or deceptive act or practice has occurred and that the complaint would

be "in the public interest," and then, after a "hearing," to make "findings as to the facts" and to issue a "cease and desist" order against any such violation. Notably, the federal district courts are not given any jurisdiction or power to review FTC adjudicative decisions, and the power to review those decisions is given exclusively to the federal appellate courts. 15 U.S.C. § 45.

Accordingly, the federal courts have repeatedly described the FTC as an agency that is independent, possesses "experience" and "expertise" in "the problems to be met," and has "judicial" or "quasi-judicial" functions. *See Humphrey's Executor v. United States*, 295 U.S. 602, 624-25, 631 (1935); *see also Hosp. Corp. of Am. v. FTC*, 807 F.2d, 1381, 1386 (7th Cir. 1986) ("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 determination of antitrust questions. It sought the assistance of an administrative body in resolving such questions and indeed expected the FTC to take the leading role in enforcing the Clayton Act . . . .") (Posner, J.); *FTC v. Whole Foods Market, Inc.*, 2008 U.S. App. LEXIS 24092, at *33 (Tatel, J., quoting Judge Posner).

Thus, from its very inception the Commission has had the authority, and the mandate, to initiate administrative proceedings whenever it found reason to believe that a law it enforces is being violated and at the conclusion of such proceedings to issue final cease and desist or divestiture orders upon finding actual law violations.

In 1973 Congress determined that the public interest would best be served by allowing the Commission to obtain temporary and preliminary injunctions from the federal district courts in aid of adjudicative proceedings to be conducted before the FTC. At that time, Congress enacted Section 13(b) to strengthen the FTC's adjudicatory capability by, among other things, empowering the FTC to seek preliminary injunctive relief from the federal district courts pending plenary trials at the Commission. 15 U.S.C. § 53 (b). Often times, it is hard to remedy an anticompetitive merger once the parties have completed the transaction. In enacting that legislation, Congress made it clear that the federal district courts should not usurp the FTC's adjudicatory function in such cases. Thus, the legislative history declared that "[t]he intent is to maintain the statutory or 'public interest' standard which is now applicable, and not to impose the traditional 'equity' standard of irreparable damage, probability of success on the merits, and the balance of hardships favors the petitioner. . . [T]hat standard is not appropriate for the implementation of a Federal statute by an independent regulatory agency where the standards of the public interest measures the propriety and need for injunctive relief." H. R. Rep. No. 624, 93rd Cong., 1st Sess. 31 (1971).

Reflecting its recognition of the intentions of Congress as expressed in these statutes and their legislative history, the courts of appeals have fashioned a 13(b) standard that safeguards the public interest in having the Commission instead of the federal district courts judge the merits of the antitrust and consumer protection matters entrusted to it. For example, in *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15, 726 (D.C. Cir. 2001), the court held that issuance of preliminary injunctive relief is presumptively in the public interest if the FTC raises questions going to the merits sufficiently serious, substantial, difficult and doubtful as to make them a "fair ground for

investigation."[2] The D.C. Circuit has just re-affirmed this deferential standard in denying a petition for rehearing en banc and issuing only slightly revised panel decisions in *Whole Foods Market*, 2008 U.S. App. LEXIS 24092.

In short, if the Commission were simply a prosecutor like the Antitrust Division, instead of exercising dual prosecutorial and judicial functions, that would not only reverse the Congressional intent that has prevailed for nearly a century; it would also differentiate the Commission in this respect from numerous other federal independent agencies. Under the Administrative Procedure Act (APA), many such agencies possess the dual functions which Congress has intended the FTC to exercise. The FTC was intended to apply specialized antitrust expertise to important competition issues. It serves the public interest in maintaining competitive markets by providing this expertise.[3]

One of the most critical advantages, and a cornerstone characteristic of administrative agencies, is expertise. The Congress and the Executive have long recognized that the ability of agencies to devote continuous time, supervision, and expertise to complex problems calling for specialized knowledge is a critical advantage and an important reason for the creation of administrative agencies. With its expertise and unique institutional tools, the Commission was created to be – and continues to function as – a forum for expert adjudication.

This is not to say that the Commission cannot better perform its adjudicatory function. In fact, that is exactly what the Commission is trying to accomplish by amending the rules of practice applicable to the FTC's adjudicatory (Part 3) proceedings. However, there is arguably at least as strong a case for legislation that would vest in the FTC exclusive jurisdiction over all HSR merger matters prosecuted by the federal government (or that would require the Division to prosecute its HSR merger case in plenary trials conducted at the FTC) as there is for legislation requiring the FTC, like the Division, to conduct its HSR merger litigation exclusively in the federal district courts. *See* 1989 Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission at 108-118.

Finally, we emphasize that the FTC will *not* ignore the rulings and jurisprudence of the federal courts. To the contrary, the Commission's 1995 Statement, where the FTC declared that it will not automatically proceed to administrative litigation when a preliminary injunction has been denied, and instead will consider the five factors outlined in the Statement, proceeding on a

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[2] Other appellate courts have embraced this standard as well. *See FTC v. University Health Inc.*, 938 F.2d 1206, 1218 (11th Cir. 1991); *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1162 (9th Cir. 1984) (*per curiam*).

[3] In its current composition, the Commission has unparalleled antitrust expertise and experience. All four of the current Commissioners have extensive antitrust expertise and experience. Combined, the current Commissioners have nearly a century of antitrust experience (and one has served as the Director of the FTC's Bureau of Consumer Protection).

case-by-case basis, will remain operative.[4] 1995 Statement of the Federal Trade Commission Policy Regarding Administrative Merger Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741, 39743 (1995). And, of course, all of the FTC's decisions in plenary trials are subject to review by the federal appellate courts, including the Supreme Court. Accordingly, in applying the Sherman and Clayton Acts, the FTC will continue to adhere to the jurisprudence of those courts.

Thank you for giving us this opportunity to comment on these important issues. We are at your disposal to testify about them at a hearing or to discuss them more informally with you and your staff.

By direction of the Commission,

Donald S. Clark
Secretary

cc: The Honorable Lamar S. Smith
United States House of Representatives
Washington, D.C. 20515

[4] The five factors are: (1) the factual findings and conclusions of law 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 injunction 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.