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4 H.R. 2745, THE STANDARD MERGER AND ACQUISITION REVIEWS

5 THROUGH EQUAL RULES ACT OF 2015

6 Tuesday, June 16, 2015

7 House of Representatives

8 Committee on the Judiciary

9 Subcommittee on Regulatory Reform, Commercial and Antitrust

10 Law

11 Washington, D.C.

12 The subcommittee met, pursuant to call, at 2:09 p.m., in
13 Room 2141, Rayburn Office Building, Hon. Thomas Marino
14 [chairman of the subcommittee] presiding.

15 Present: Representatives Marino, Goodlatte, Farenthold,
16 Collins, Bishop, Johnson, Conyers, DelBene, and Peters.

17 Also Present: Anthony Grossi, Majority Counsel; Slade
18 Bond, Minority Counsel; and Andrea Lindsey, Clerk.

19 Mr. MARINO. The Subcommittee on Regulatory Reform,
20 Commercial and Antitrust Law will come to order. Without
21 objection, the chair is authorized to declare recesses of the
22 committee at any time.

23 We welcome everyone to today's hearing on H.R. 2745, the
24 Standard Merger and Acquisition Reviews Through Equal Rules
25 Act of 2015. I will recognize myself for an opening
26 statement.

27 Today's hearing is on the Standard Merger and
28 Acquisition Reviews Through Equal Rules Act of 2015, known as
29 the SMARTER Act. This legislation enacts an Antitrust
30 Modernization Commission recommendation that the standards
31 and processes applied in the merger review process should be
32 identical between our two antitrust enforcement agencies.

33 Since 1914, two Federal agencies have enforced our
34 Nation's antitrust laws, the Department of Justice and the
35 Federal Trade Commission. When a company wishes to merge
36 with or purchase another company, it notifies both antitrust
37 enforcement agencies of the proposed transaction.
38 Ultimately, only one agency reviews the transaction to
39 determine whether it violates the antitrust laws, and there
40 is no fixed rule to determine which agency will conduct this
41 review.

42 When the reviewing antitrust enforcement agency
43 concludes that the proposed transaction violates the

44 antitrust laws, it then seeks to prevent the parties from
45 consummating the deal. It is at this stage of the merger
46 review process that the AMC identified a problem.

47 The AMC noted that there are different standards applied
48 and processes available to the FTC and DOJ when each agency
49 seeks to block a proposed transaction. Each agency is
50 subject to a different preliminary injunction standard.

51 Additionally, the FTC has the option to unwind or
52 prevent the closing of the transaction through administrative
53 litigation. DOJ, on the other hand, cannot.

54 The AMC concluded that although certain of the
55 differences between the FTC and DOJ may have some benefits,
56 the disparities between the dual merger review processes
57 result in unfairness and uncertainty. In light of this
58 finding, the AMC recommended that Congress harmonize the
59 merger review processes and standards between the two
60 antitrust enforcement agencies.

61 The SMARTER Act effectuates this recommendation. This
62 legislation was carefully drafted to reform only the merger
63 review process. The SMARTER Act does not prevent the FTC
64 from pursuing administrative litigation in conduct cases
65 against consummated transactions or in any other context
66 outside of the merger review. This narrow construction is
67 consistent with the AMC's recommendations.

68 Our witnesses today come with experience in the FTC, the

69 DOJ, the AMC, and in private practice. I look forward to
70 hearing their testimony on the important reforms contained in
71 the SMARTER Act.

72 And I now recognize the ranking member of the
73 Subcommittee on Regulatory Reform, Commercial and Antitrust
74 Law, Mr. Johnson of Georgia, for his opening statement.

75 Mr. JOHNSON. Thank you, Mr. Chairman.

76 Today's hearing is an important opportunity to consider
77 the Federal Trade Commission's critical role in developing
78 and enforcing antitrust law.

79 Congress first established the Federal Trade Commission
80 in 1914 to safeguard consumers against anticompetitive
81 behavior by specifically empowering the commission with the
82 authority to enforce, clarify, and develop antitrust law.
83 Under the process of administrative litigation, also known as
84 Part III litigation, the committee may seek permanent
85 injunctions in its own administrative court in addition to
86 its ability to seek preliminary injunctions in Federal
87 district court.

88 This additional authority is a unique mechanism that
89 takes advantage of the commission's longstanding expertise to
90 develop some of the most complex issues in antitrust law.

91 Today, this subcommittee will consider the Standard
92 Merger and Acquisition Review Through Equal Rules, or SMARTER
93 Act. This bill would create a uniform standard for

94 preliminary injunctions in cases involving mergers,
95 acquisitions, joint ventures, or similar transactions and,
96 alarmingly, eliminate the commission's century-old authority
97 to administratively litigate these cases.

98 Proponents of the SMARTER Act argue that divergent
99 standards for enjoining mergers may undermine the public's
100 trust in the efficient and fair outcomes of merger cases.
101 But it is unclear that these differences are material, let
102 alone that the differences have led to divergent outcomes in
103 merger cases.

104 In the absence of any evidence, it is difficult to
105 support wholesale changes to longstanding antitrust practices
106 at the FTC for consistency's sake alone based solely on
107 speculative harms. But even assuming that there are material
108 differences in cases brought under these standards, we should
109 strike a balance in favor of competition by lowering the
110 burden of proof in cases brought by the Justice Department,
111 not by raising the commission's burden for obtaining
112 preliminary injunctions. Courts already require a lower
113 burden of proof in cases brought by the commission and
114 Justice Department precisely because both are expert agencies
115 equipped with large staffs of economists who analyze numerous
116 mergers on a regular basis that may only bring cases that are
117 in the public interest.

118 To the extent that we should address perceived

119 | differences in the standard for preliminary injunctions in
120 | merger cases, legislation should favor increased competition,
121 | not the interest of merging parties.

122 | The SMARTER Act would also eliminate the FTC's authority
123 | to administratively litigate mergers and other transactions
124 | under Section 5(b) of the FTC Act. Leading authorities in
125 | antitrust across party lines have expressed serious
126 | reservations with eliminating the commission's administrative
127 | litigation authority.

128 | For instance, Bill Kovacic, a former Republican chair of
129 | the commission, has referred to this aspect of the bill as
130 | "rubbish," noting that the commission has used administrative
131 | litigation to win a string of novel antitrust cases that
132 | courts have ultimately upheld where the commission has had to
133 | fight every single foot along the way.

134 | Edith Ramirez, the chairwoman of the FTC, likewise wrote
135 | last Congress that eliminating the FTC's administrative
136 | litigation authority would "fundamentally alter the nature
137 | and function of the FTC."

138 | In light of these concerns, I sincerely hope that we can
139 | work to find an evenhanded solution that promotes competition
140 | in the market and protects the public interest.

141 | And with that, I thank the chairman, and I yield back.

142 | Mr. MARINO. Thank you, Mr. Johnson.

143 | The chair now recognizes the chairman of the full

144 Judiciary Committee, Mr. Bob Goodlatte of Virginia, for his
145 opening statement.

146 Chairman GOODLATTE. Thank you, Mr. Chairman.

147 I believe our Nation's antitrust laws serve an important
148 function in rooting out anticompetitive and discriminatory
149 behavior in the marketplace. I also believe that, to be
150 effective, these laws must be administered fairly and
151 consistently.

152 Today's hearing focuses on the Standard Merger and
153 Acquisition Reviews Through Equal Rules Act, or the SMARTER
154 Act, which makes important reforms to ensure that our
155 antitrust laws are prosecuted in this manner. Specifically,
156 the bill amends the standards and processes applied to
157 proposed transactions so that they are no longer determined
158 by the flip of a coin.

159 One of the responsibilities of the Judiciary Committee
160 is to ensure that the enforcement of our Nation's antitrust
161 laws is fair, consistent, and predictable. We discharge this
162 responsibility through vigorous oversight of the antitrust
163 enforcement agencies and vigilant supervision of the existing
164 antitrust laws. To assist the committee in its antitrust
165 oversight, the Antitrust Modernization Commission was formed
166 and charged with conducting a comprehensive examination of
167 the antitrust laws and existing enforcement practices.

168 Following this review, the AMC issued a 540-page report

169 | that detailed the issues it examined and provided a number of
170 | recommendations for legislative, administrative, and judicial
171 | action. One of the issues the AMC examined was the existing
172 | disparities in the standards applied to and processes used by
173 | the Department of Justice and the Federal Trade Commission
174 | when they seek to prevent the consummation of a proposed
175 | transaction.

176 | As the AMC report states, parties to a proposed merger
177 | should receive comparable treatment and face similar burdens,
178 | regardless of whether the FTC or DOJ reviews their merger. A
179 | divergence undermines the public's trust that the antitrust
180 | agencies will review transactions efficiently and fairly.

181 | More importantly, it creates the impression that the
182 | ultimate decision as to whether a merger may proceed depends
183 | in substantial part on which agency reviews the transaction.

184 | The subject of today's hearing, the SMARTER Act, solves
185 | the issue highlighted by the AMC. Specifically, the bill
186 | eliminates the disparities in the merger review process so
187 | that companies face the same standards and processes
188 | regardless of whether the FTC or DOJ reviews their proposed
189 | transaction.

190 | The SMARTER Act contains two principal reforms to the
191 | antitrust laws. First is the harmonization of the
192 | preliminary injunction standards that DOJ and the FTC must
193 | meet in court. The second reform is the removal of the FTC's

194 ability to pursue administrative litigation following
195 judicial denial of a preliminary injunction request.

196 The Department of Justice cannot conduct administrative
197 litigation, and it is unfair for some parties to be subject
198 to administrative litigation while others avoid this prospect
199 merely as a result of the identity of the reviewing antitrust
200 enforcement agency. Notably, the removal of the FTC's
201 administrative powers is constructed narrowly and applies
202 solely to the context of merger review cases.

203 The AMC recommended this removal and went on to state,
204 "Elimination of administrative litigation in HSR Act merger
205 cases will not deprive the FTC of an important enforcement
206 option. Although administrative litigation may provide a
207 valuable avenue to develop antitrust law in general, it
208 appears unlikely to add significant value beyond that
209 developed in Federal court proceedings for injunctive relief
210 in HSR Act merger cases. Whatever the value, it is
211 significantly outweighed by the costs it imposes on merging
212 parties in uncertainty and litigation costs."

213 The SMARTER Act is a common-sense, straightforward
214 measure that implements reforms advanced by the bipartisan
215 members of the AMC. Furthermore, it is an important step to
216 achieving this committee's goal of ensuring our Nation's
217 antitrust laws are enforced in a manner that is fair,
218 consistent, and predictable.

219 I look forward to hearing today's testimony from our
220 esteemed panel of witnesses regarding the SMARTER Act, and I
221 yield back the balance of my time.

222 Mr. MARINO. Thank you, Chairman Goodlatte.

223 The chair recognizes the full Judiciary Committee
224 ranking member, Mr. Conyers of Michigan, for his opening
225 statement.

226 Mr. CONYERS. Thank you, Mr. Chairman.

227 And to my colleagues, this so-called SMARTER Act would
228 make the Federal Trade Commission adhere to the same merger
229 enforcement procedures as the Justice Department's Antitrust
230 Division for proposed mergers, acquisitions, and other
231 similar transactions. There are several reasons that lead me
232 not to recommend this measure.

233 By weakening the commission's independence this bill, in
234 fact, undermines Congress' original intent in creating the
235 commission in the first place. For good reasons that are
236 still relevant today, Congress established the commission to
237 be an independent administrative agency, and we must be
238 mindful of these reasons as we consider arguments in favor of
239 the SMARTER Act.

240 Even though the Justice Department's antitrust
241 enforcement authority already existed at the time the
242 Congress created the commission in 1914, Congress established
243 this agency in direct response to the department's failure to

244 | enforce the Sherman Antitrust Act of 1890, as well as the
245 | act's perceived failure to stop the wave of mergers and
246 | corporate abuses that occurred during the 24 years following
247 | its enactment.

248 | The commission is an independent body of experts tasked
249 | with the developing antitrust law and policy free from
250 | political influence and particularly executive branch
251 | influence. Congress specifically gave the commission broad
252 | administrative powers to investigate and enforce laws to stop
253 | unfair methods of competition, as well as the authority to
254 | use an administrative adjudication process to help it develop
255 | policy expertise rather than requiring the commission to try
256 | cases before a generalist Federal judge.

257 | Unfortunately, the SMARTER Act, rather than
258 | strengthening the commission's authority, does the opposite.

259 | A greater concern is the act's elimination of the
260 | administrative adjudication process for merger cases under
261 | Section 5(b) of the Federal Trade Commission Act. By doing
262 | so, the bill effectively transforms the commission from an
263 | independent administrative agency into another enforcement
264 | agency indistinguishable, in fact, from the Justice
265 | Department.

266 | The commission's administrative authority is designed to
267 | serve its role as an independent administrative agency.
268 | Eliminating it, therefore, threatens the commission's

269 distinctive role and independence. Make no mistake,
270 eliminating the commission's administrative authority opens
271 the door for ultimate elimination of the commission's role in
272 competition and antitrust enforcement and policy development.

273 You don't have to take my word for it alone. While
274 supporting the bill's harmonization of preliminary injunction
275 standards applicable to two antitrust enforcement agencies,
276 the former Republican commission chairman has also publicly
277 said that the rest of the SMARTER Act is "rubbish." The
278 former chairman understood the ultimate effect of the SMARTER
279 Act, and so do I, when he commented, let me put it this way,
280 behind the rest of the SMARTER Act is the fundamental
281 question of whether you want the Federal Trade Commission
282 involved in competition law.

283 Similarly, commission Chairwoman Ramirez observed last
284 year that the bill would have far-reaching immediate effects
285 and fundamentally alter the nature and function of the
286 commission, as well as the potential for significant
287 unintended consequences.

288 So, finally, the SMARTER Act is problematic because it
289 may apply to conduct well beyond large mergers, which could
290 further curtail the commission's effectiveness. In
291 particular, the SMARTER Act would eliminate the commission's
292 authority to use administrative adjudications not just for

293 | the largest mergers, but for any "proposed merger."

294 | It also removes such authority to remove a joint venture
295 | or similar transaction. Moreover, the measure could be read
296 | to eliminate the use of administrative processes for already
297 | consummated acquisitions, joint ventures, and other types of
298 | transactions that are not mergers as currently drafted.

299 | I recognize that the bill's authors have tried in good
300 | faith to respond to some of the concerns expressed by myself
301 | and by the commission last year in response to an early draft
302 | of the SMARTER Act, and I appreciate these efforts.
303 | Moreover, I recognize that the commission itself earlier this
304 | year changed its procedural rules to make it easier to end
305 | the use of administrative litigation where it loses a
306 | preliminary injunction proceeding in court.

307 | My disagreement with the sponsors, however, is more
308 | fundamental, at least regarding whether the commission should
309 | retain its administrative litigation authority at all in
310 | merger cases. This disagreement leads me to oppose the
311 | so-called SMARTER Act, even in its written form.

312 | I thank the chair and yield back my time.

313 | Mr. MARINO. Thank you, Mr. Conyers.

314 | Without objection, other members' opening statements
315 | will be made part of the record.

316 | [The information follows:]

317 | ***** COMMITTEE INSERT *****

318 Would the witnesses please rise to be sworn in and raise
319 your right hand?

320 Do you swear that the testimony you are about to give
321 before this committee is the truth, the whole truth, and
322 nothing but the truth, so help you God?

323 Let the record reflect that the witnesses have answered
324 in the informative.

325 Please be seated.

326 I am going to begin by introducing all of the witnesses,
327 and then we will come back for your opening statements. If I
328 mispronounce your name, please do not hesitate to tell me.

329 Our first witness is Ms. Garza, the co-chair of
330 Covington & Burling's antitrust and competition law practice
331 group. In private practice, she has been involved in some of
332 the largest antitrust matters in the last 30 years, and many
333 other litigation and regulatory matters on behalf of Fortune
334 500 companies. Before joining Covington, Ms. Garza served as
335 acting assistant attorney general in charge of the Antitrust
336 Division at the Department of Justice.

337 Ms. Garza also was appointed by President George W. Bush
338 to chair the Antitrust Modernization Commission, a
339 bipartisan, blue-ribbon panel created by Congress to study
340 and report to the President and Congress on the state of
341 antitrust enforcement in the United States. The AMC report
342 has been widely praised for providing a valuable framework

343 | for policy proposals.

344 | Ms. Garza received her B.S. from Northern Illinois
345 | University and her J.D. from the University of Chicago.

346 | Welcome, Ms. Garza.

347 | Mr. Clanton as the senior counsel at Baker & McKenzie,
348 | where he also served as head of the firm's global and North
349 | American antitrust practice groups. Mr. Clanton has over 30
350 | years of experience representing clients in high-profile and
351 | complex antitrust matters. Prior to joining the law firm,
352 | Mr. Clanton served as a commissioner and acting chairman of
353 | the Federal Trade Commission.

354 | Mr. Clanton received his B.A. from Andrews University
355 | and his J.D. from Wayne Law School, where he served on law
356 | review.

357 | Welcome, Mr. Clanton.

358 | Mr. Tad Lipsky is a partner in the Washington, D.C.,
359 | office of Latham & Watkins. He is recognized internationally
360 | for his work on both U.S. and global antitrust law and
361 | policy, and has handled antitrust matters throughout the
362 | world.

363 | Before Latham & Watkins, Mr. Lipsky served as the chief
364 | antitrust lawyer for the Coca-Cola Company for 10 years. Mr.
365 | Lipsky also served as deputy assistant attorney general under
366 | William F. Baxter, who sparked profound antitrust law changes
367 | while serving as President Reagan's chief antitrust official.

368 Mr. Lipsky received his B.A. from Amherst College, his
369 M.A. from Stanford University, and his J.D. from Stanford Law
370 School.

371 Welcome, sir.

372 Our final witness is Mr. Bert Foer, the founder and
373 former president of the American Antitrust Institute. Prior
374 to founding AAI, Mr. Foer served in both private and public
375 capacities in the antitrust field. His public service
376 includes serving as the assistant director and acting deputy
377 director of the Federal Trade Commission's Bureau of
378 Competition. His private sector experience includes working
379 at Hogan & Hartson, serving as the CEO of a midsize chain of
380 retail jewelry stores, working in various trade associations
381 and nonprofit leadership positions, and teaching antitrust to
382 undergraduate and graduate business school students.

383 Mr. Foer served received his B.A. magna cum laude from
384 Brandeis University, and M.A. in political science from
385 Washington University, and his J.D. from the University of
386 Chicago Law School where he was an associate law review
387 editor.

388 Welcome, sir.

389 Each of the witnesses' written statements will be
390 entered into the record in its entirety. I ask that each
391 witness summarize his or her testimony in 5 minutes or less.

392 | And to help you with that, you have timing lights in front of
393 | you. A light will switch from green to yellow, indicating
394 | that you have 1 minute to conclude your testimony. And when
395 | the light turns red, it indicates that the witness's 5
396 | minutes have expired. When it gets to the point of when the
397 | light flashes red, I know you are intent on getting in your
398 | statement, I will politely pick up my hammer and just give
399 | you a little indication to please wrap up.

400 | Ms. Garza, your 5-minute opening statement, please?

401 TESTIMONIES OF DEBORAH GARZA ESQ., PARTNER, COVINGTON &
402 BURLING LLP; DAVID A. CLANTON ESQ., SENIOR COUNSEL, BLAKE &
403 MCKENZIE LLP; ABBOTT B. LIPSKY JR., ESQ., PARTNER, LATHAM &
404 WATKINS LLP; AND ALBERT FOER ESQ., SENIOR FELLOW, AMERICAN
405 ANTITRUST INSTITUTE

406 TESTIMONY OF DEBORAH GARZA

407 Ms. GARZA. Thank you, Chairman Marino, Vice Chairman
408 Farenthold, and members of the Judiciary Committee and the
409 subcommittee. It is a pleasure to testify in support of the
410 SMARTER Act as the former chair of Congress' Antitrust
411 Modernization Commission. That commission was a 12-member
412 bipartisan, blue-ribbon panel comprised of six Democrats,
413 five Republicans, and one independent. It was a bipartisan
414 panel. We were an engaged group of experienced
415 practitioners, several former enforcers and zealous advocates
416 of strong antitrust enforcement, including a former general
417 counsel of the Federal Trade Commission during the Clinton
418 administration, and two former heads of the Antitrust
419 Division during Democratic administrations.

420 So I wanted to put that out there. It is not in my
421 opening statement, but I wanted to be clear that we were

422 Congress' committee and we were structured to be bipartisan,
423 and that is the way that our recommendations came out.

424 The AMC made three recommendations, each of them with
425 bipartisan support, that relate to the subject matter of this
426 hearing, which is creating greater parity between the DOJ and
427 the FTC with respect to merger enforcement.

428 One recommendation was that the FTC should adopt a
429 policy that when it seeks to block a merger, it should seek
430 both a preliminary injunction and permanent relief, and
431 consolidate those two into a single hearing as long as
432 agreement can be reached between the enforcement agency and
433 the parties on an appropriate scheduling order. All of the
434 commissioners joined in that recommendation, with the
435 exception of one Democrat, so five Democrats joined in that
436 recommendation.

437 Second, the AMC recommended that Congress should amend
438 Section 13(b) of the FTC Act to prohibit the Federal Trade
439 Commission from pursuing further administrative litigation if
440 it lost its motion for a preliminary injunction. One
441 Democratic Commissioner declined to join on the basis that,
442 at the time, the FTC had adopted a policy statement saying
443 that it would rarely actually pursue administrative
444 proceedings after losing a preliminary injunction motion.

445 I should say that that policy statement, which was in
446 place at the time of the AMC vote, was revoked. This was the

447 Pitofsky rule that Mr. Lipsky refers to in his testimony, and
448 I do in mine.

449 Third, the AMC recommended that Congress act to ensure
450 that the same standard for the grant of a preliminary
451 injunction apply to both the FTC and the DOJ. Five Democrats
452 joined in that recommendation.

453 The SMARTER Act accomplishes the objectives of each of
454 these recommendations. The premise of the AMC
455 recommendations and the SMARTER Act is very simple: Mergers
456 should not be treated differently depending on which agency
457 happens to review it. The regulatory outcome should not be
458 determined by an agency flip of the coin.

459 I would like to emphasize that this is not
460 anti-enforcement legislation, at least not by the lights of
461 the AMC. We regard it to be pro-enforcement. We regarded
462 that legislative change was important to maintain consensus
463 about the value of a strong enforcement regime and that a
464 perception of unequal or unfair treatment undermines that
465 consensus.

466 Chairman Goodlatte had this in his statement, but I want
467 to read the carefully crafted words of the commission in
468 explaining its recommendation. "Parties to mergers should
469 receive comparable treatment and face similar burdens,
470 regardless of whether the FTC or the DOJ reviews the merger.
471 A divergence undermines the public trust that the antitrust

472 agencies will review transactions efficiently and fairly.
473 More importantly, it creates the impression that the ultimate
474 decision as to whether a merger may proceed depends in
475 substantial part on which agency reviews a transaction. In
476 particular, the divergence may permit the FTC to exert
477 greater leverage in obtaining parties' assent to a consent
478 decree."

479 In closing, I would like to say that no one on the AMC
480 believed at the time, and I do not believe today, that this
481 legislation would make it difficult or impossible for the
482 Federal Trade Commission to do its job. The Justice
483 Department has done very well in pursuing its merger
484 enforcement agenda working with the standards that apply to
485 it. And I firmly believe that the Federal Trade Commission
486 can do so as well. Thank you.

487 [The statement of Ms. Garza follows:]

488 ***** INSERT 1 *****

489 Mr. MARINO. Thank you, Ms. Garza.

490 Mr. Clanton?

491 TESTIMONY OF DAVID A. CLANTON

492 Mr. CLANTON. Thank you, Mr. Chairman, and members of
493 the committee.

494 As you mentioned before, I served on the commission
495 right after the HSR Act was passed, and when we put into
496 place the procedures, which largely are still there today
497 after nearly 40 years.

498 And let me explain just briefly why I think this
499 legislation is right on point. It is targeted. It deals
500 with an issue of fairness that I will explain. And it does
501 not -- it does not, I emphasize that -- create any wholesale
502 revision to the FTC's administrative process.

503 This legislation will focus only on proposed mergers,
504 which essentially are reportable mergers under the HSR Act.
505 And when Congress passed that statute, it created essentially
506 a unified structure for how proposed mergers are to be
507 reported to the FTC and the timelines the FTC has and DOJ,
508 because both agencies are equally involved in that process.
509 The administration of the statute is jointly managed. The
510 FTC is the lead manager in terms of the whole reporting

511 process, but Justice has to concur.

512 In addition to that, over the years, the two agencies
513 ~~for reportable mergers~~ have developed very extensive,
514 substantive merger guidelines that the courts increasingly
515 are accepting and have adopted.

516 So you really have a very unique structure that is
517 specific to this idea and to this whole concept of how merger
518 review should take place.

519 And let me just then go on to talk about what happens in
520 this process. So the parties file merger notifications with
521 both agencies. Both agencies then determine which agency is
522 going to review it. Sometimes you know that in advance.
523 Many times you don't know that in advance. So it could go to
524 one agency or another.

525 After that, if there are antitrust concerns, which is
526 why you end up in litigation, there is a very extensive
527 discovery process, what we call a second request. And the
528 whole process goes on for many, many months, typically 6
529 months or longer. And at the end of that, if there is a
530 problem and the parties cannot work out a settlement, either
531 the FTC or DOJ, depending on the agency, decides if they have
532 to go to court.

533 And here is where the differences start to take place.
534 They haven't occurred previously, but here the FTC has one
535 process where they can go to court and seek a preliminary

536 injunction. And if they get that, then they move forward on
537 their administrative proceeding.

538 By contrast, DOJ goes into court exclusively, and what
539 has happened over recent years, instead of seeking a
540 preliminary injunction, the parties typically agree, ~~and it~~
541 ~~is~~ a hearing on the merits. And that hearing encompasses all
542 of the substantive issues, and DOJ bears the burden of
543 proving a violation of Section 7 of the Clayton Act. So you
544 have a significant contrast right there.

545 And let me just explain briefly on the administrative
546 process for the FTC, they go into court. They seek a
547 preliminary injunction. That preliminary hearing may take
548 several months.

549 There is a case that I mention in my testimony that is
550 going on right now involving ~~Cisco~~ and U.S. Foods. That case
551 was brought in February. The decision is probably going to
552 happen fairly soon from the district court judge. The FTC
553 administrative ~~proceedin~~ doesn't start until July 2 of this
554 year, 5 months after the case was filed.

555 If you just look at the FTC rules, that case will then
556 last for another 7 months. And at that point, ~~it will~~
557 ~~probably be,~~ based on the history of how long it takes DOJ
558 cases which are on the merits, not a preliminary injunction,
559 in the range of 5 or 6 months. And I give ~~two~~ examples of
560 two cases where that happened, two significant cases, by the

561 way.

562 So to ~~sort of~~ get to the point quickly, just using those
563 examples, and we could come up with others, the FTC
564 administrative process takes roughly twice as long as it does
565 to go into Federal court. And at the end of the day, the FTC
566 ~~hearing~~ probably ends on a preliminary injunction decision.
567 ~~And if~~ the companies lose they don't have the time. They
568 have already probably invested a year-plus ~~of the deal~~
569 defending themselves and going through the investigative process.
570 And at the end of that, they face another 7 months, not to
571 mention potential judicial review.

572 So the process is inherently ~~unfair and differential~~,
573 and that is what the legislation seeks to change. And I
574 think that makes sense. The FTC has all the authority in the
575 world and has a lot of experience in bringing cases in
576 Federal court. They are not going to be harmed by this.

577 Thank you.

578 [The statement of Mr. Clanton follows:]

579 ***** INSERT 2 *****

580 Mr. MARINO. Thank you, Mr. Clanton.

581 Mr. Lipsky, your statement, please?

582 TESTIMONY OF ABBOTT B. LIPSKY JR.

583 Mr. LIPSKY. Thank you, Mr. Chairman. I am very honored
584 to be asked to testify today. I am glad to appear before
585 you.

586 I just wanted to quickly echo some of the comments of
587 the previous witnesses. I think I speak for everybody at the
588 witness table here in saying that we all think that the
589 United States was very wise to choose competition and
590 vigorously enforced antitrust law as the main rule of
591 economic organization for the United States. It is one of
592 the things that has helped make the United States the leading
593 economic powerhouse and innovator that it is today.

594 And I think if any of us thought that there was any
595 possibility that this bill would diminish the value of the
596 antitrust laws and antitrust agencies, we wouldn't be here
597 testifying here in support.

598 But I do testify in support like my colleagues, Mr.
599 Clanton and Ms. Garza, because this bill I think very
600 responsibly and in a very limited fashion corrects a very
601 evident unfairness and an illogical aspect of the way that

602 | the procedures have come to work.

603 | You will see my statement that I have taken this over a
604 | bit of history. I guess I have gotten to the point where I
605 | know more history than most people that are around. That is
606 | not a good comment. But this concern particularly about the
607 | use of administrative litigation following an FTC proceeding
608 | in court, it is actually based on some very tangible negative
609 | experience. And you will see I discuss the RR Donnelly,
610 | Meredith/Burda merger, which was proposed in 1989 and went
611 | through administrative litigation, which took 6 years. And
612 | ultimately, the commission decided that the district court
613 | had been right in declining to enter a preliminary
614 | injunction.

615 | And I also mentioned a case involving the Dr Pepper soft
616 | drink brand, an administrative litigation where the FTC
617 | actually won a preliminary injunction under Section 13(b) in
618 | 1986. And despite declaration from the D.C. Circuit that
619 | that matter was moot because it was originally proposed to be
620 | acquired by the Coca-Cola Company, that was the merger that
621 | was enjoined. And then the Dr Pepper brand was sold off,
622 | eventually combined with the 7-Up brand to form the Dr Pepper
623 | Seven-Up Company.

624 | But while all that wonderful soft drink industry history
625 | was proceeding, the Federal Trade Commission was going along
626 | with an administrative litigation. So the RR Donnelly case

627 | and the Dr Pepper case happened to culminate at about the
628 | same time, which was about 1995, shortly after Bob Pitofsky
629 | had been appointed chairman of the Federal Trade Commission
630 | by President Clinton.

631 | Bob Pitofsky knows a tremendous amount about the
632 | antitrust laws and before coming to the commission as
633 | chairman had been in several roles there, including as a
634 | commissioner in a prior administration. And he very wisely,
635 | I think, issued the so-called Pitofsky rule, this 16 CFR
636 | 3.26, the policy statement.

637 | Now the policy statement, if you read it carefully, is a
638 | little bit cagey. It doesn't make any commitments, but it
639 | does say that the decision to proceed to administrative
640 | litigation following a loss of preliminary injunction would
641 | be considered on a case-by-case basis.

642 | And in the context of those two merger cases where the
643 | use of administrative litigation had been very heavily
644 | criticized in the bar, it was understood to essentially
645 | acknowledge the unfairness and the irrationality of having a
646 | situation where if your merger is judged in the Justice
647 | Department, you end up in a judicial proceeding, whereas if
648 | you are judged in the Federal Trade Commission, you face the
649 | possibility of this nearly endless administrative litigation.

650 | In the Dr Pepper situation, it was 9 years, and that was
651 | even before the final disposition by the appellate court.

652 So I think the Pitofsky rule was wise. I think that the
653 commission has largely acted in accordance with the Pitofsky
654 rule. And all the SMARTER Act would do, really, is codify I
655 think what is FTC's better judgment that if there is a loss
656 in the district court, it is best that administrative
657 litigation be foregone.

658 It is true that Congress originally foresaw a very
659 special role in creating this administrative litigation for
660 the FTC. But we also have to take into account that when the
661 13(b) statute, the injunction statute, was passed in 1973, it
662 did provide the commission with the possibility to seek a
663 permanent injunction in the Federal district court. So the
664 commission has a very clear and obvious available authority
665 so that it could decide to go to the district court.

666 I will stop there. Thank you.

667 [The statement of Mr. Lipsky follows:]

668 ***** INSERT 3 *****

669 Mr. MARINO. Thank you, Mr. Lipsky.

670 Mr. Foer, your statement, please?

671 TESTIMONY OF ALBERT FOER

672 Mr. FOER. Thank you, Mr. Chairman, members of the
673 committee.

674 In previous hearings on the SMARTER Act, you heard from
675 Professor John Kirkwood, like myself, a senior fellow of the
676 American Antitrust Institute, and similarly well experienced
677 at the FTC, albeit years ago. We sent the committee a
678 letter, and that is attached. This is a year ago, so that is
679 attached to the testimony, and I understand it will be
680 included.

681 Our position on this legislation, though, has not
682 changed. Put simply, we do not think that the case has been
683 made for new legislation. I will give three reasons.

684 First, while we agree there is no need for differently
685 articulated standards for obtaining a preliminary injunction,
686 we do not perceive that the differences between the FTC and
687 the Justice Department that are addressed by this bill are
688 differences that, in fact, make a difference.

689 Federal courts generally require both agencies to make
690 strong showings of probable anticompetitive effect before a

691 preliminary injunction is issued. In actual practice, it
692 rarely if ever occurs that a merger outcome is influenced
693 much less determined by the theoretically more lenient public
694 interest test for a preliminary injunction under Section
695 13(b) of the FTC Act.

696 Second, if a single theoretical standard is somehow
697 deemed so important, then we suggest, as I think Ranking
698 Member Johnson suggested, that it would make more sense to
699 modify the DOJ standard to conform to the FTC standard, so
700 that the Department of Justice would share the presumption of
701 expertise that is implicit in the FTC standard.

702 And third, prudence compels caution. I sound like a
703 real conservative here. Prudence demands caution when
704 tinkering with the system of dual enforcement, including but
705 not limited to administrative adjudication at the FTC. This
706 system emerged out of robust debate during the 1912
707 presidential election campaign. Congress then was concerned
708 about leaving antitrust enforcement exclusively in the hands
709 of generalist judges, preferring to establish a sister
710 administrative agency with group decision-making by a body of
711 experts.

712 It is no accident that modern merger law has been the
713 result of administrative guidelines developed jointly by the
714 two antitrust agencies rather than by judicial
715 interpretations. It is administrative guidelines to which

716 | both agencies are particularly well-qualified to contribute
717 | which are the key to predictability and efficiency in merger
718 | controls.

719 | Administrative adjudication of mergers offers an
720 | important outlet for the application of such guidelines.

721 | Because of differences in the agency statutes and
722 | procedures, special care must be taken to foresee possible
723 | unintended consequences. To mention one such risk that can
724 | probably be fixed by additional drafting, consummated
725 | transactions involving nonprofit organizations, such as some
726 | important hospital mergers, might be precluded from
727 | administrative adjudication by the FTC. I don't think that
728 | is intended. I don't think it would be wise.

729 | But more important, if Congress takes away the FTC's
730 | administrative adjudication for mergers, it could be starting
731 | down one of those slippery slopes where brakes are likely to
732 | fail.

733 | The Clayton Act Congress and the FTC Congress were one
734 | and the same. Those farsighted legislators valued a
735 | competitive marketplace, which they saw endangered by
736 | ever-growing commercial establishments with ever-growing
737 | economic and political power. And they became convinced that
738 | having two agencies conceived with different structures share
739 | the responsibility, that that would be best to ensure the
740 | competitive economy they wanted to maintain.

741 We at the AAI believe that the DOJ and FTC have
742 contributed importantly to the evolution of merger law and
743 policy, both as cooperators in a joint enterprise and
744 occasionally as rivals, motivated by the desire to outshine
745 the other in the public eye.

746 In this regard, I might mention that the FTC has shown
747 that it has already heard the criticisms of the Antitrust
748 Modernization Commission by taking important steps, including
749 3.26 of its rules to make their process both fairer and
750 quicker.

751 So why act now? Why not let the FTC continue to work
752 its way through? We have not seen a lot of examples of
753 problems, and the examples we see are very old and before the
754 FTC took its lessons from the modernization commission.

755 So I say, why fix a wheel that simply ain't broke?

756 Thank you for, again, listening to our views.

757 [The statement of Mr. Foer follows:]

758 ***** INSERT 4 *****

759 Mr. MARINO. Thank you, sir.

760 We begin now with our questioning for 5 minutes. I am
761 going to ask each of the members to keep their questions to 5
762 minutes.

763 Please bear in mind that we like to get to ask each of
764 you a question, so keep your answers as succinct as possible.

765 I am going to begin with Ms. Garza, please. Ms. Garza,
766 some suggest that the SMARTER Act will make merger
767 enforcement more difficult for the FTC. Do you think DOJ is
768 effective at preventing anticompetitive transactions? And is
769 there any reason to think that the FTC cannot be equally as
770 effective operating under the same rules?

771 Ms. GARZA. Congressman, I think the FTC can be equally
772 effective, and they have shown themselves to be in a number
773 of cases.

774 The way it works now is that after investigating a
775 transaction pursuant to the HSR Act, as Mr. Clanton has
776 mentioned, after undertaking discovery and investigating for
777 3, 4, 6, 8, 12 months, the Justice Department then generally
778 goes to court, if it believes there is a problem. And it
779 produces its evidence and has been successful in a number of
780 cases in proving its case or in extracting a consent judgment
781 from the parties that it feels adequately addresses the
782 issues.

783 There is no reason why the Federal Trade Commission that

784 | has the equal ability to get the same discovery for the same
785 | length of time cannot do the very same thing, go into a
786 | Federal court, prove that a merger is anticompetitive, and
787 | prevail in that way.

788 | All we are talking about here is basically giving the
789 | parties a chance to actually have that day in court. The
790 | concern is that the deal will not hold together. The concern
791 | is that the FTC has the ability and has been exploiting the
792 | process to try to win, not by the merits but by the process,
793 | and that is a problem.

794 | Mr. MARINO. Thank you.

795 | Mr. Clanton, the FTC recently reinstated the Pitofsky
796 | rule that purports to create a higher threshold for
797 | proceeding with administrative litigation against a proposed
798 | transaction.

799 | Do you believe this rule is sufficient on its own, or is
800 | the SMARTER Act still necessary?

801 | Mr. CLANTON. Mr. Chairman, I think the change made
802 | sense. The commission did the right thing. But it only
803 | dealt with one part of the problem, and that relates to
804 | transactions where the commission loses and the parties close
805 | the transaction and the commission continues to litigate. I
806 | think they have not done that in a long time.

807 | There were some bad examples going back a few years, but
808 | my concern really is what happens when the FTC wins and then

809 | you start another phased administrative hearing that ends up
810 | doubling the length of time that you would have if you went
811 | into Federal court directly on the merits.

812 | Mr. MARINO. Thank you, sir.

813 | Mr. Lipsky, in your testimony you discussed two cases
814 | where the FTC pursued administrative litigation after a
815 | Federal court ruling. In one case, the FTC continued
816 | administrative litigation for nearly 6 years after a Federal
817 | court denied its preliminary injunction request. In the
818 | other, the FTC continued administrative litigation after they
819 | had won in Federal court and the parties abandoned the
820 | transaction.

821 | Would these administrative litigation cases have been
822 | allowed to continue if the SMARTER Act was enacted into law?

823 | Mr. LIPSKY. No, Mr. Chairman. I think they would be
824 | prohibited by the SMARTER Act, and I think that is the great
825 | virtue.

826 | I think the intent of the Pitofsky rule and the revision
827 | enacted this year is to try to achieve that same result. And
828 | I think this act is an improvement over the mere
829 | administrative policy statements, because it gives parties
830 | the assurance that the commission will, indeed, act as it
831 | suggests it will act in these policy statements.

832 | And we have to remember that in 2008, there was a
833 | retrenchment. I believe Ms. Garza mentioned that they

834 | actually reversed the Pitofsky rule for a time back in 2008
835 | when they were focusing on the acceleration of administrative
836 | litigation and involving the commission much more directly in
837 | the conduct of the hearings.

838 | So this is a classic example of a good policy that the
839 | commission has followed since 1995, by and large. But one of
840 | the primary merits of the legislation is that it would give
841 | parties the assurance that the commission would adhere to
842 | that sound policy.

843 | Mr. MARINO. Mr. Foer, in 20 seconds, why should some
844 | companies be subject to FTC standards and processes and
845 | others to DOJ standards and processes? Does having different
846 | standards and processes result in fair and consistent
847 | enforcement for our antitrust laws?

848 | Mr. FOER. I am not certain I understood the question.

849 | Mr. MARINO. Having different standards and processes,
850 | is that fair and consistent?

851 | Mr. FOER. The question is theoretical because, in
852 | theory, there are some differences. But my point is that, in
853 | fact, the way things work, these differences don't really
854 | make a difference and are not sufficiently large, in view of
855 | the downside potentials, to justify legislation right now.

856 | Mr. MARINO. Thank you, sir.

857 | The chair now recognizes the ranking member, the
858 | gentleman from Georgia, Mr. Johnson.

859 Mr. JOHNSON. Thank you, Mr. Chairman.

860 Ms. Garza, in your statement, you write, "The premise of
861 SMARTER is simple. A merger should not be treated
862 differently depending on which antitrust enforcement agency,
863 DOJ or FTC, happens to review it. Regulatory outcomes should
864 not be determined by a flip of the merger agency coin."

865 I was puzzled by your characterization of how the
866 agencies go about determining which one will assert
867 jurisdiction.

868 Can you explain what you mean by the flip of a merger
869 agency coin?

870 Ms. GARZA. Representative Johnson, there was a time
871 when, I can honestly tell you, we seriously discussed coin
872 flips when I was at the Justice Department.

873 The issue is that, by and large, the FTC and the DOJ
874 have concurrent jurisdiction to review a merger.

875 Mr. JOHNSON. And they have determined between
876 themselves when they will assert jurisdiction over a
877 particular matter, depending upon each agency's decades of
878 experience over the relevant merging parties' industry.
879 Isn't that correct?

880 Ms. GARZA. Not exactly. There are some industries that
881 tend to be looked at by one agency.

882 Mr. JOHNSON. Well, then in those instances where it
883 can't be determined, the agencies go through a careful

884 | process outlined by the antitrust laws and in some cases
885 | implemented through the Code of Federal Regulations. Isn't
886 | that correct?

887 | Ms. GARZA. I am not sure I caught all of that. But
888 | what I would suggest to you is that it is not always --

889 | Mr. JOHNSON. Well, I guess what I am suggesting is that
890 | it is a little bit more than just simply a coin flip in 99.9
891 | percent of the cases. Isn't that correct?

892 | Ms. GARZA. I probably don't agree with you on that.
893 | But I would ask you the question of why should one industry
894 | like the paper industry be subjected to a different standard
895 | than, I don't know, another industry, like the pharma
896 | industry.

897 | The problem is, if you are going to have two very
898 | diametrically different processes, Congress should consider,
899 | well, is there a reason why one industry -- let's just
900 | assume, for the sake of argument, that --

901 | Mr. JOHNSON. Well, I don't want you to take up all of
902 | my time.

903 | Ms. GARZA. Okay, I don't want to do that either. I can
904 | follow up in writing.

905 | Mr. JOHNSON. Okay.

906 | I would like to hear Mr. Foer's response to what you
907 | have said in response to my questions.

908 | Mr. FOER. Look, I would say that, I said before, there

909 | is a theoretical difference in the standards of how a
910 | preliminary injunction can be issued. But in point of
911 | practice, that doesn't seem to make much difference.

912 | So the real difference comes down to whether or not the
913 | FTC ought to be able to bring a case in front of the
914 | administrative process. And yes, that does take time.

915 | But one question we should look at, and the elephant in
916 | the room, I think, is what do we want our merger policy to
917 | be? We are only talking about less than 3 percent of those
918 | mergers big enough to notify get a second request. And only
919 | about half of those, about 1.5 percent a year, go through any
920 | kind of process that leads to a change in the terms or to
921 | stopping a merger.

922 | So it is a very small percentage of just those mergers
923 | that are really important for the country.

924 | Now, how much time do we think we should spend on
925 | understanding those mergers? If we spend very little time by
926 | rushing it through preliminary and final injunctions, which
927 | is the way we try to do it, then we are giving the advantage
928 | to the merger. If we take a lot of time, we are giving
929 | advantage to the government. We need to find the right
930 | balance.

931 | I think the FTC has a pretty good balance here, which
932 | says --

933 | Mr. JOHNSON. Well, let me ask then, Mr. Lipsky, you

934 | cited a couple cases -- and excuse me for interrupting -- one
935 | back in 1987 and the other in 1991. Can you cite any more
936 | recent cases that show where the FTC continuing to litigate
937 | after a preliminary injunction has been denied has worked an
938 | undue hardship on one of the parties due to the length of
939 | time?

940 | Mr. LIPSKY. I think probably the lead example of where
941 | the commission was using its administrative procedures to
942 | really put tremendous pressure on the parties is the more
943 | recent Inova case.

944 | As I mentioned, since the issuance of the Pitofsky rule
945 | in 1995, the commission has been pretty good about adhering
946 | to that rule. It is just their persistent declining to
947 | affirm that that would be the rule -- they say they have
948 | discretion to do what they have been doing, but they will
949 | never quite promise to do what they have been doing. I think
950 | that is where this legislation would really give the
951 | assurance to all the businesses that have to think about and
952 | plan for this process that is necessary to establish the
953 | rationality of the enforcement regime.

954 | Mr. JOHNSON. Thank you. I yield back.

955 | Mr. MARINO. Thank you, Mr. Johnson.

956 | The chair now recognizes the other gentleman from
957 | Georgia, Mr. Collins.

958 | Mr. COLLINS. Thank you, Mr. Chairman.

959 I appreciate this hearing, again. As we have done a
960 lot, it is time to get some stuff that we have done last
961 Congress, it is time to get it again this Congress. Let us
962 move some stuff forward. So I am hoping this will lead
963 toward mark up and lead toward the floor, because we have had
964 a very similar hearing to this last year. In fact, I think
965 three of you were witnesses in the last hearing we did on
966 this.

967 But I want to make it clear that I am strongly in favor
968 of a strong antitrust enforcement to prevent anticompetitive
969 behavior, as I think are most the members here today.

970 But that said, Mr. Lipsky you mentioned in the last
971 hearing, and we do go back and actually look at those, but it
972 stuck with me. You said that, in some cases, the cost and
973 duration of administrative litigation can discourage
974 stakeholders from behavior that is actually procompetitive.

975 Now, I don't know if you still feel that way or not, but
976 it did stick with me at that point.

977 You seem to want to make a comment. Do you still feel
978 that way?

979 Mr. LIPSKY. Yes, absolutely.

980 Mr. COLLINS. I think that is the interesting thing,
981 because we don't want to do something in preventing
982 anticompetitive behavior and get into discouraging
983 procompetitive behavior. I believe this bill is a step in

984 | the right direction to ensure that, and I think that our
985 | antitrust laws and enforcement efforts are functioning
986 | effectively.

987 | So I think some questions I want to follow up on, Ms.
988 | Garza, as you know, in the 2003 Antitrust Modernization
989 | Commission report, it stated that parties to a proposed
990 | merger should receive comparable treatment and face similar
991 | burdens, regardless of whether it is FTC or DOJ reviews of
992 | the merger, and highlighted that differing treatment could
993 | undermine the public trust that transactions are reviewed
994 | efficiently and fairly.

995 | Last Congress, we discussed the importance of the
996 | process. I want to touch on that again. In your opinion, is
997 | there a real or perceived disparity in enforcement by the two
998 | agencies? And how does the process play into that disparity?

999 | Ms. GARZA. So it is clear that there is a perception
1000 | that there is a disparity. We heard that over and over again
1001 | in testimony before the commission, and it was something that
1002 | the commissioners believed. As I mentioned, a lot of our
1003 | commissioners are very experienced both in the government
1004 | enforcement side and the advisory side.

1005 | I believe that if you sat down in a bar with folks over
1006 | at the DOJ and the FTC and have a discussion with them, they
1007 | would agree with you, too.

1008 | The fact of the matter is that in one case, if I am at

1009 DOJ, I am able to count on, if I want to, being able to have
1010 a day in court. I know that the DOJ is going to agree to do
1011 a consolidated preliminary injunction, permanent injunction
1012 hearing. It is going to take a while. It could still take
1013 more than a year, which is a long time to hold a deal
1014 together, but I know that I am going to get a hearing. There
1015 is some certainty.

1016 If I am at the Federal Trade Commission right now, I
1017 know that I am going to go through that same very lengthy
1018 investigation process, and then I am going to go to court
1019 where they are going to seek a preliminary injunction, and I
1020 would argue to you that if it is in the District of Columbia
1021 where a lot of these cases are going to be, I am going to
1022 have a deferential standard applied, whereas Rich Parker
1023 described it last year as sort of if it is a tie, the tie
1024 goes to the FTC, unlike with the DOJ. The DOJ actually has
1025 to prove its case.

1026 For the FTC, arguably, all they have to do is get to a
1027 tie, and then that gets them to an administrative hearing
1028 with several months more with an ALJ who is an FTC employee,
1029 and then possibly to an appeal to the commission that issued
1030 the complaint, and then possibly back to the court, which
1031 applies a deferential standard. That is a difference in
1032 process.

1033 Mr. COLLINS. You just said something that was not in my

1034 | questions, but you just made a comment that I think
1035 | highlights a bigger issue that goes even beyond this hearing.
1036 | It is the general perception of the public and what we do up
1037 | here not only on the Capitol Hill and in Congress, but also
1038 | the administrative agencies and executive branch agencies.

1039 | And what you said -- I don't think you meant what I am
1040 | going to talk about, but I am going to at least take up what
1041 | you said -- is the American public today, and whether it is
1042 | with going through agencies that don't turn over emails or
1043 | going through problems of budgeting, they always feel like
1044 | the tie goes to the government. The tie goes to the
1045 | government.

1046 | That is an interesting process here where we talk about
1047 | where you said the DOJ has to prove the case. I think what
1048 | we have to do, and I think this bill from my friend from
1049 | Texas actually does that. But I think when we talk about
1050 | this, whether it is anticompetitive or procompetitive, the
1051 | government should not be in the way. This is not baseball
1052 | where the tie goes to the -- this should not be the tie goes
1053 | to the government. It should be what is best for the
1054 | American people, the very ones who put us here.

1055 | And I think, Mr. Foer, in your testimony, one of things
1056 | you actually had sort of implied is they try to outshine each
1057 | other, that basically I think is the way you termed that.

1058 | How do we get by that? I think that is the reason for

1059 | this hearing. I think that is why this is actually a good
1060 | bill.

1061 | And that is why, Mr. Chairman, I am proud to have done
1062 | that.

1063 | But I think you raised a great point on that.

1064 | And with that, Mr. Chairman, I yield back.

1065 | Mr. MARINO. Thank you, Mr. Collins.

1066 | The chair now recognizes the ranking member of the full
1067 | committee, the gentleman from Michigan, Mr. Conyers.

1068 | Mr. CONYERS. Thank you, Mr. Chairman.

1069 | And I thank the witnesses for the discussion here.

1070 | There is a 1989 report on the role of the Federal Trade
1071 | Commission. The American Bar Association's Antitrust Law
1072 | Section recognized that merger enforcement was probably the
1073 | FTC's most important antitrust role.

1074 | Mr. Foer, what is your response to that?

1075 | Mr. FOER. Sir, would you mind repeating the case you
1076 | are talking about?

1077 | Mr. CONYERS. Yes, the American Bar Association's
1078 | Antitrust Law Section thought that the merger enforcement
1079 | role was probably the FTC's most important activity as an
1080 | antitrust provider.

1081 | Mr. FOER. I am sorry, I am not catching on to what rule
1082 | we are talking about here.

1083 | Mr. CONYERS. Mr. Lipsky, are you familiar with that?

1084 Mr. LIPSKY. I think that is referred to as Kirkpatrick
1085 2. It was an ABA report. It was a very broad report on all
1086 the functions of the FTC, right?

1087 Mr. CONYERS. Yes.

1088 Mr. LIPSKY. I think you would probably agree with that
1089 or maybe you don't.

1090 Mr. FOER. I think it was an extremely important
1091 document that led directly to the rebirth of the FTC as a
1092 functioning agency, a reputable agency of government.

1093 Mr. CONYERS. Let me ask this question, Mr. Foer, why
1094 might the SMARTER Act threaten to create a slippery slope to
1095 ending joint enforcement of antitrust law by both FTC and
1096 DOJ?

1097 Mr. FOER. The problem is, why do we need an FTC?
1098 Ultimately, the question would be asked, why do we need a
1099 second body to enforce the laws if, for example, the
1100 administrative process is considered a failure here? "It
1101 takes too long. We have to make everything move faster."

1102 The slippery slope is that the precedent of removing
1103 this power of adjudication can lead people to believe that
1104 the adjudication is not an appropriate way to deal with
1105 antitrust cases. For those of us who believe in strong
1106 antitrust enforcement, and possibly everybody at the table
1107 would agree, I don't know, but I think it would be a
1108 disaster.

1109 Mr. CONYERS. Mr. Lipsky, am I reading too much into
1110 your comments to suggest that you might not feel too badly if
1111 we end the FTC's antitrust enforcement role?

1112 Mr. LIPSKY. Oh, I wouldn't support that statement at
1113 all. I think that is the kind of thing that would require a
1114 much more comprehensive look at the whole enforcement system.

1115 We are just talking about one very limited but impactful
1116 aspect of the enforcement system and a very targeted way of
1117 correcting it, and that is why I support the legislation, not
1118 because I have any broader argument with the existence of the
1119 FTC.

1120 Mr. CONYERS. I am glad to hear that.

1121 Back to Bert Foer again, why is it important for the FTC
1122 to retain its ability to use administrative adjudication in
1123 merger cases?

1124 Mr. FOER. The importance is probably not central,
1125 because a lot of cases could be dealt with through the
1126 preliminary injunction route and are.

1127 But there ought to be and there are reserved under this
1128 commission rule 3.26 the possibility under various
1129 circumstances where the public interest would actually
1130 require holding a trial. And the FTC made it clear it won't
1131 use that ability very frequently or very easily, but we
1132 should not take that possibility away, and especially if we
1133 see it as being used in a responsible way.

1134 Mr. CONYERS. Thank you very much.

1135 And I thank the panel for their comments.

1136 I yield back, Mr. Chairman.

1137 Mr. MARINO. Thank you, Mr. Conyers.

1138 The chair now recognizes the Congresswoman from the
1139 State of Washington, Ms. DelBene.

1140 Ms. DELBENE. Thank you, Mr. Chair.

1141 Thanks to all of you for being here today. We
1142 appreciate your time.

1143 I kind of have a question for everyone, and so we will
1144 see how we go here, but it could be argued that one of the
1145 strengths of administrative litigation is the ability of the
1146 commission to consider novel legal theories and employ
1147 innovative forms of economic analysis, things that the DOJ
1148 may not be able to do.

1149 So how does the commission use of innovative evidence
1150 and novel legal theories advance antitrust law, especially in
1151 today's complex and rapidly changing digital economy where
1152 there may not be precedents out there to rely on?

1153 I guess I will start with you, Ms. Garza.

1154 Ms. GARZA. I don't think I understand the premise of
1155 the question. Both the DOJ and the FTC follow the same
1156 merger guidelines that they have jointly developed and
1157 issued. It is not clear to me what innovative approaches
1158 anyone has in mind with respect to mergers, but to the extent

1159 | that there are any, it is not clear to me why the DOJ would
1160 | be less well placed to pursue them than the FTC.

1161 | Ms. DELBENE. Part of, I think, the question has been
1162 | around having people who have expertise in a given area and
1163 | understanding, and are able to bring that expertise to the
1164 | table, especially on a newer industry or newer type of
1165 | technology.

1166 | Ms. GARZA. But then again, what you are suggesting is
1167 | that -- you still have the role of the court, of the FTC, in
1168 | deciding whether or not there should be a preliminary
1169 | injunction. So there is the issue of whether they should
1170 | have a lesser standard. Then it goes to a single ALJ, which
1171 | is an employee of the FTC.

1172 | The question is, why would the ALJ be in any better
1173 | position to assess a merger than any of our judges that we
1174 | have?

1175 | Bert talks about the difference between a generalist
1176 | court and a specialist court, but the problem, I think what
1177 | people perceive, is that what you are really setting up is a
1178 | system where you get a lower standard for a preliminary
1179 | injunction, and then it goes to a judge who is an employee of
1180 | the Federal Trade Commission, and then it goes to the
1181 | commission that issued the complaint in the first place.

1182 | I am not aware of any evidence such suggests that
1183 | somehow or other that ALJ is in any better position than

1184 | would be a district court judge in the District of Columbia
1185 | or any other district to consider the arguments and the
1186 | evidence that the DOJ or the Federal Trade Commission would
1187 | put forward as to why a transaction would be anticompetitive.

1188 | Ms. DELBENE. Okay. Mr. Foer, if I could get your
1189 | feedback on that?

1190 | Mr. FOER. I think that the ALJ problem is a problem.
1191 | You have to make sure that you have top level, top quality
1192 | ALJs. But an ALJ who deals with antitrust issues day in and
1193 | day out over years is likely to be much more expert and much
1194 | more able to contribute to the systematic development of the
1195 | law than a whole bunch of Federal district court judges, many
1196 | of whom are not trained in economics at all and none of whom
1197 | get very much experience with these cases. Very few Federal
1198 | district court judges deal with more than a few merger cases,
1199 | let's say, in any given year or maybe in a lifetime in a
1200 | court.

1201 | So there is a big difference between attempting to
1202 | develop in a systematic, predictable way a pattern of law,
1203 | and we are doing that largely through guidelines, jointly
1204 | written guidelines, which is great, but we are not getting
1205 | much assistance from the courts in developing this body of
1206 | law.

1207 | There are probably two reasons for that. One I gave
1208 | you, the lack of expertise. But these cases are very fact

1209 intensive, and it is hard to have appeals or to develop
1210 appellate jurisprudence in these kinds of cases. In fact, we
1211 could have a guess about how long it has been since the
1212 Supreme Court took on a merger case. I don't know if any of
1213 us remember one in our lifetimes.

1214 So it is very useful, I think, to have a body of experts
1215 that can handle this law.

1216 Ms. DELBENE. Thank you.

1217 Also, Mr. Foer, I think in your testimony you had talked
1218 about any concern about the SMARTER Act reaching transactions
1219 other than proposed Hart-Scott-Rodino mergers, so I wondered
1220 what your thoughts were on that and whether you think the
1221 bill would apply to other things like consummated
1222 transactions or non-merger activity, or move into that area.

1223 Mr. FOER. Well, I don't think it is going to apply
1224 outside of merger, joint venture, and whatever similar
1225 transactions might mean, although that in itself is an
1226 interesting question.

1227 It could give rise to some litigation down the road of
1228 what is covered and what is not covered. But I don't think
1229 that monopolization cases or cartel cases are going to be
1230 affected by this, nor would nonconsummated mergers. I did
1231 raise a question about nonprofits in that regard, but,
1232 hopefully, this bill would be interpreted so as not to create

1233 a problem that way.

1234 And it is intended to be narrow. I think it largely
1235 achieves that goal. But it is not bad in the sense that this
1236 bill will change areas outside of mergers.

1237 Ms. DELBENE. Thank you.

1238 And I yield back my time, or I am out of time. Thanks.

1239 Mr. MARINO. Thank you, Ms. DelBene.

1240 Seeing no other members to ask questions, and I am told
1241 that we are going to be voting within the next 10 or 15
1242 minutes, this concludes today's hearing.

1243 I want to thank the witnesses for attending. It was
1244 very insightful and pleasant to hear a discussion from four
1245 lawyers who are very, very well-qualified and just brilliant
1246 in their field. So I want to thank you all for being here.

1247 Without objection, all members will have 5 legislative
1248 days to submit additional written questions for the witnesses
1249 or additional materials for the record.

1250 [The information follows:]

1251 ***** COMMITTEE INSERT *****

1252 | Mr. MARINO. I want to thank the people in the gallery
1253 | for being here, and this hearing is adjourned.

1254 | [Whereupon, at 3:24 p.m., the hearing was adjourned.]

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