Prepared Statement of
The Federal Trade Commission

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

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

Washington, DC
October 7, 2015

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

Congress created the Commission in 1914 as an independent, bipartisan agency to augment the existing antitrust enforcement efforts. Congress gave the FTC unique tools to

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

Of the proposed mergers that warrant additional agency investigation to determine whether they violate Section 7, the FTC has challenged, on average, 21 that were likely to harm competition in each of the past five fiscal years.

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

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

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

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

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

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

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

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

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

[14] ProMedica Health Sys., Inc. v. FTC, 749 F.3d 559 (6th Cir. 2014).

indispensable to health plans post-merger, resulting in higher prices and less incentive to innovate. The court described the Commission's opinion finding the merger anticompetitive as "comprehensive, carefully reasoned, and supported by substantial evidence in the record."[15]

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

The Commission has also sought to prevent mergers in other critical sectors of the economy. In February, following an extensive investigation, the FTC filed an administrative complaint to block the merger of the two largest foodservice distributors in the country, Sysco Corporation and US Foods, Inc.[17] The $231 billion foodservice industry supplies food and related products to restaurants, government agencies, school and workplace cafeterias, hotels and resorts, and hospitals.[18] To prevent the companies from consummating the merger and integrating their operations pending a full administrative trial, the FTC (the) 4(F)6(T)1(C]TJ -0.0oyv5rB b)Tj

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

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

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

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

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

[19] The following states joined the suit: California, Illinois, Iowa, Maryland, Minnesota, Nebraska, North Carolina, Ohio, Tennessee, Pennsylvania, and Virginia.
[20] *Sysco*, 2015 WL 3958568, at *1.
[21] See, e.g., *FTC v. Univ. Health, Inc.*, 938 F.2d 1206 (11th Cir. 1991);

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

In 2011, the Commission also used its adjudicative process to challenge Polypore's consummated acquisition of Microporous, two leading providers of components for batteries.[24] Following an administrative trial, the Commission ruled that the transaction, th.k Ž E AJ` Œesulitveeg n

The Commission's administrative decisions in non-merger antitrust cases further demonstrate the value of the Commission's adjudicative process. The Commission's longstanding efforts to stop anticompetitive reverse payment

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

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

The Supreme Court's ruling in Actavis vindicated nearly twenty years of Commission work to combat unlawful reverse payments, benefiting consumers, businesses, and taxpayers, all of whom paid inflated prices as a result.

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

Yet another example of the way the Commission has used its administrative process to shape antitrust law for the benefit of consumers is in the area of state action. State action has been a Commission focus for many decades, beginning with early challenges to taxicab regulations in the 1970s and continuing today. In 2003, for instance, the Commission issued a staff report identifying areas in which the state action doctrine had expanded beyond the original principles articulated by the Supreme Court in Parker v. Brown.[35] These efforts laid the groundwork for the FTC's Supreme Court victory earlier this year in N.C. Dental.[36] The Court agreed with the Commission's administrative decision that "a state board on which a controlling number of decision-makers are active market participants in the occupation the board regulates must satisfy [the] active supervision requirement in p-4(r)-1on rn pe activbeen6Tm6(25-2.2 299-

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

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

As we understand it, the proposed legislation aims to remove certain aspects of the FTC's adjudicative function. In our view, these legislative changes are unnecessary and risk undermining the beneficial role the Commission plays in merger enforcement. Although the Commission's process for challenging potentially harmful transactions does include an administrative hearing, there is no evidence that the Commission's procedures prejudice the parties. Accordingly, there is no need to alter the FTC's administrative process.

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

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

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

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

[44] Id.

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

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

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

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

[46] Sysco Corp., 2015 WL 3958568, at *9.

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

forward with administrative litigation.[48] Significantly, in the last 20

IV. Conclusion

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