

ANTITRUST TRADE AND PRACTICE

Expert Analysis

Merger Review at FTC And Department of Justice

On Sept. 10, 2014, the House Judiciary Committee approved H.R. 5402, the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act. Although the bill remains pending in the House, after Republicans achieved control of both Houses of Congress for the first time in eight years this November, commentators are predicting that the SMARTER Act is likely to pass.¹

The SMARTER Act would harmonize the Federal Trade Commission's (FTC) authority to review and challenge mergers with that exercised by the U.S. Department of Justice (collectively, the agencies) in three key respects.² First, it would subject final judgments in FTC merger cases to judicial scrutiny to ensure that decrees are in the public interest, as is required for the Justice Department. Second, it would unify the agencies' preliminary injunction standards. Finally, it would require the FTC to adjudicate contested mergers in federal court rather than its Part III administrative review.

The Justice Department and FTC have concurrent authority to review mergers under Section 7 of the Clayton Act, which prohibits mergers and acquisitions whose effect "may be substantially to lessen compe-



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tion, or tend to create a monopoly."³ With spilt authority, only one agency receives "clearance" to investigate a particular transaction. The outcome of the clearance process is not always predictable.

Disputes between the agencies in the clearance process are resolved based upon expertise in the product or industry at issue. As a result, entities operating in industries where one regulator has developed a clear expertise can predict their reviewing agency, but others are left to guess. For instance, the agencies "are both active in the defense, healthcare and other spaces, even sometimes trading back and forth transactions involving certain industries and even certain companies."⁴

Yet whether the FTC or Justice Department reviews a transaction has a particular effect on the process for seeking injunctive relief. Although the agencies' enforcement authority is uniform, each sues to enjoin mergers under different statutes: the FTC under Section 13(b) of the FTC Act and Justice Department under Section 15 of the

Clayton Act.⁵ The problem arises because courts have interpreted this statutory distinction as a significant difference, with the FTC enjoying both a lower standard of proof for injunctive relief and certain procedural nuances to its administrative practice that inure to its benefit.

Preliminary Injunction

The traditional four-factor test private litigants face to obtain a preliminary injunction balances the likelihood of success on the merits and equities. The plaintiff must show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary injunctive relief, that the balance of equities tips in his favor, and that an injunction is in the public interest."⁶

As with private litigants, the Justice Department is entitled to preliminary relief where it "has shown a reasonable likelihood of success on the merits and whe[re] the balance of equities tips in its favor."⁷ Unlike private parties, however, most courts presume irreparable harm when the Justice Department seeks to enjoin an antitrust violation. In practice, the Justice Department often agrees to consolidate the preliminary and permanent injunction phases of its merger challenges under Fed. R. Civ. P. 65(a)(2), which allows courts fully to adjudicate transactions contested by the Justice Department within a matter of

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months. In addition to ensuring speed and efficiency, consolidation also requires that the Justice Department prove a Section 7 violation rather than simple likelihood of success on the merits.

By contrast, recent decisions set forth a lower threshold for the FTC to achieve injunctive relief and pave the way for a lengthy administrative adjudication. Section 13(b) allows the FTC to enjoin a merger “[u]pon a proper showing that, weighing the equities and considering the Commission’s likelihood of ultimate success, such action would be in the public interest.”⁸

In *FTC v. Whole Foods*, Judge Janice Rogers Brown began by explaining the “traditional four-part equity standard for obtaining an injunction” does not apply to the FTC.⁹ The FTC is an “expert agency” that Congress determined “should be able to obtain injunctive relief more readily than private parties.”¹⁰ The FTC need not show irreparable harm, and private equities, such as merging parties’ interest in the transaction proceeding, “alone cannot override the FTC’s showing of likelihood of success.”¹¹ Because the equities often weigh in the FTC’s favor due to the public interest in antitrust enforcement, it “will usually be able to obtain a preliminary injunction blocking a merger by ‘rais[ing] questions going to the merits so serious, substantial, difficult[,] and doubtful as to make them fair ground for thorough investigation.”¹²

Thus far, as predicted by Judge Brett M. Kavanaugh, who dissented in *Whole Foods*, the standard has proven deferential to the FTC. In *FTC v. CCC Holdings*, Judge Rosemary M. Collyer found in favor of the FTC and issued a preliminary injunction despite finding the evidence “complicated and uncertain.”¹³ Indeed, Collyer rejected the FTC’s primary theory that the merger between two of the industry’s three participants would result in unilateral effects. Instead, the FTC carried the day based on its structural coordinated effects allegations

that a two-firm market “may result in a debilitating race to the bottom.”¹⁴ The court reasoned that defendants’ “strong” rebuttal arguments that “may ultimately win the day” were not for it to decide because that decision is left for administrative adjudication by the FTC.¹⁵

The standard announced in *Whole Foods* and employed in *CCC Holdings* is troubling for a number of reasons. To begin, it has proven deferential to the FTC as prosecutor. *CCC* represented not only a litigation victory for the FTC (its first district court Section 13(b) victory in seven years), but the lower barrier to injunction also augments the FTC’s leverage when negotiating settlements. And, perhaps most significantly, it increases the importance of the FTC’s role as adjudicator.

The SMARTER Act would harmonize the FTC’s “authority with respect to mergers” with that exercised by the Justice Department.

The FTC’s practice is to seek a preliminary injunction to preserve the status quo pending an administrative trial before its in-house administrative law judge (ALJ). The ALJ’s findings are appealable to the full commission. In turn, the commission’s decision can be reviewed by the circuit court of appeals. This lengthy process itself can be a deal killer: parties often abandon mergers rather than endure administrative review. As a result, the grant or denial of a preliminary injunction is usually outcome determinative. Parties typically abandon transactions after preliminary injunction defeat and the Agencies tend to follow the same course, abandoning prosecution after a failed request for preliminary relief.

FTC Administrative Process

The role of the FTC’s administrative process came to the forefront in another case litigated just before *Whole Foods*

was decided. In May 2008, the FTC sued to block Inova Health System Foundation’s acquisition of Prince William Hospital Center. It is a case remembered less for its merits (they were never decided) than its procedure. In *Inova*, the FTC initiated an administrative action against the transaction three days before suing in the Eastern District of Virginia for a preliminary injunction. The FTC also took extraordinary steps to streamline and expedite its administrative proceeding, even appointing one of its own, Commissioner J. Thomas Rosch, in place of an ALJ. The administrative adjudication was the FTC’s preferred forum, and its strategy was to take every opportunity to emphasize the agency’s expert adjudicative role, while downplaying the role of the courts. Indeed, before the district court, the FTC deemphasized the importance of the preliminary injunction proceeding, which was solely “to maintain the status quo while the ALJ hears the full cases on the merits,” complete with “full discovery” and “live witnesses.”¹⁶

In opposition, the hospitals sought to prioritize—and emphasize the significance of—the preliminary injunction hearing before the district court. Defendants argued that FTC’s decision to file suit for relief “that only this Court can award” spoke to the district court’s paramount role.¹⁷ Moreover, they argued that the court’s decision on the preliminary injunction likely would be outcome determinative, making live testimony and cross-examination vital. But defendants’ entreaties were rejected by Judge Claude M. Hilton—a seasoned “rocket docket” jurist with a penchant for deciding matters on the papers.

In an oral ruling, Hilton found that the pending administrative hearing narrowed the issue before him such that deciding the motion on the papers was appropriate.¹⁸ Less than a week later, the hospitals surrendered, abandoning the merger in the face of the FTC’s “unusual process” that “threatened to prolong completion

of the merger by as much as two years.”¹⁹

SMARTER Act

Passage of the SMARTER Act would harmonize the standards by which the FTC and Justice Department challenge mergers. It would sync the FTC’s settlement procedures with the Justice Department’s, eliminate the beneficial and low threshold to injunctive relief afforded to the FTC (but not the Justice Department), and spare parties of the tactical advantages and deliberate pace of administrative proceedings.

The first of these changes—syncing settlement procedures—is of lesser import and has not been our focus here. Under the Tunney Act, Justice Department consent decrees are subject to a 60-day comment period and an Article III review to ensure that the decree is in the public interest.²⁰ FTC consent decrees are subject to commission acceptance and a 30-day comment period.²¹ Most importantly for the parties, it is both agencies’ practice to allow the transaction to close while the comment periods required by the Tunney Act and FTC rules are pending.

However, the second and third changes—reconciling the standard for injunctive relief and eliminating the FTC’s ability to challenge mergers in administrative proceedings—are the pivotal issues. Harmonizing the requirements to obtain preliminary relief for violations of Section 7 is a no brainer: The FTC’s capable litigators should face the same hurdles as the Justice Department’s. The law should not “allow the FTC to just snap its fingers and temporarily block a merger.”²² The agencies’ authority under Section 7 of the Clayton Act is uniform. The standards each faces to make use of that authority should be as well.

Similarly, eliminating the FTC’s ability to wrangle parties with “unusual process” that favors administrative adjudication at the expense of the traditional role of Article III courts is another favorable change. As noted by the hospitals in *Inova*, even expedited process can delay time-sensitive mergers by as much as two

years. Although FTC rules revised in 2009 streamline the Part III process along the lines used in *Inova*, the lengthy nature of administrative actions remains in stark contrast to the Justice Department’s district court proceedings.²³ Time is of the essence in nearly every acquisition; the length of the FTC’s adjudicative process should not be a prosecutorial weapon. The SMARTER Act’s elimination of Part III proceedings challenging violations of Section 7 would accomplish this goal.

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Merging parties (and their advisors) certainly would benefit from uniform application of the laws and the prospect of swift Article III adjudication of problematic mergers. Beer companies would face the same scrutiny at Justice Department as liquor companies would at the FTC. And companies whose industries have no clear agency-expert will not have to assess the merits and timing of their deals based upon the agency that they draw.

Though it appears that a legislative fix, such as the SMARTER Act, will be required to achieve these goals, arguably this was Congress’ intent from the start. The FTC is now in its 100th year, but its authority to enjoin transactions under Section 13(b) is relatively young. Section 13(b) was an addition to the Trans-Alaska Pipeline Authorization Act of 1973. The House Report for the bill emphasized that it should not be read “to impose a totally new standard of proof different from that which is now required of the Commission” and it remains the “duty of the court to exercise independent

judgment on the propriety of issuance of a” preliminary injunction.²⁴

Beyond returning to or clarifying the standards intended by Congress when it provided the FTC with its Section 13(b) authority, the SMARTER Act also codifies key recommendations of the bipartisan, expert Antitrust Modernization Commission (AMC). In 2007, the AMC urged Congress to “ensure that the same standard for the grant of a preliminary injunction applies to both” agencies and amend Section 13(b) to prohibit the FTC from pursuing administrative litigation in merger cases.²⁵ Following *Whole Foods*, *CCC*, and *Inova*, it is all the more necessary to implement these proposed changes so that the merging parties and both agencies are on a level playing field.

1. Melissa Lipman, “Merger Bill May Gain Traction Under Republican Congress,” *LAW 360*, Nov. 5, 2014.

2. H.R. 5402, 113th Cong. (2014).

3. 15 U.S.C. §18.

4. Comments of the American Bar Assoc. Sec. of Antitrust Law on Proposed Legislation, “Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014” at 2 n.3, available at http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_equalrules2014.authcheckdam.pdf

5. 15 U.S.C. §53(b) (FTC); 15 U.S.C. §25 (Justice Department).

6. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2007).

7. *United States v. Siemens Corp.*, 621 F.2d 499, 505 (2d Cir. 1980).

8. 15 U.S.C. §53(b).

9. *Fed. Trade Comm’n v. Whole Foods*, 548 F.3d 1028, 347-48 (D.C. Cir. 2008) (Brown, J.).

10. *Id.* at 355 (Tatel, J., concurring).

11. *Id.* at 348, 354 (Brown, J.).

12. *Id.* (quoting *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714-15 (D.C. Cir. 2001)).

13. *Fed. Trade Comm’n v. CCC Holdings*, 605 F.Supp.2d 26, 30 (D.D.C. 2009).

14. *Id.* at 67.

15. *Id.*

16. Brief in Opposition to Motion for a Scheduling Order and Expedited Status Conference, *Fed. Trade Comm’n v. Inova Health Sys. Found.*, No. 1:08-cv-460 (E.D. Va. May 20, 2008), ECF No. 11.

17. Reply in Support of Motion for a Scheduling Order and Expedited Status Conference, *Inova Health Sys.*, No. 1:08-cv-460 (E.D. Va. May 29, 2008), ECF No. 30.

18. Transcript of Hearing at Fed. Trade Comm’n, 74 Fed. Reg. 1804 (Jan. 13, 2009) and 74 Fed. Reg. 20,205 (May 1, 2009).

19. Statement from Inova Health System and Prince William Health System about the Proposed Merger (June 6, 2008), available at <http://www.inovanewsroom.org/statement-from-inova-health-system-and-prince-william-health-system-about-the-proposed-merger/>.

20. 15 U.S.C. §16.

21. 16 C.F.R. §2.34.

22. *Whole Foods*, 548 F.3d at 365 (Kavanaugh, J., dissenting).

23. See Rules of Practice for Fed. Trade Comm’n, 74 Fed. Reg. 1804 (Jan. 13, 2009) and 74 Fed. Reg. 20,205 (May 1, 2009).

24. H.R. Rep. No. 93-624, at 31 (1973).

25. Antitrust Modernization Comm’n, Report and Recommendations Ch. II, Recommendations 25-26 (April 2, 2007), available at http://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.