PREPARED STATEMENT OF

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BEFORE THE SUBCOMMITTEE ON REGULATORY REFORM, COMMERCIAL AND ANTITRUST LAW

HOUSE JUDICIARY COMMITTEE

HEARING ON

H.R. 2745, THE "STANDARD MERGER AND ACQUISITION REVIEWS THROUGH EQUAL RULES ACT OF 2015"

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Mr. Chairman and Members of the Subcommittee, thank you for inviting me to testify today on H.R. 2745, the "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015" ("SMARTER Act").

I support this reasonable legislation, which implements the recommendations of the Antitrust Modernization Commission. The bill sensibly harmonizes the FTC's procedural rights to challenge proposed mergers and acquisitions with the standards applicable to the DOJ Antitrust Division.

As a former FTC Commissioner, I served on the Commission when the HSR Act was enacted into law and during the development of the premerger notification rules. Since leaving the agency, I have been in private practice for more than 30 years, with substantial experience in merger investigations and enforcement actions. My experience also includes serving as a past chair of Baker & McKenzie's global antitrust practice.

At the outset, let me emphasize that I believe in the FTC's mission and the important contribution it makes to merger enforcement. This legislation would not in any way impair the Commission's ability to maintain a vigorous enforcement program. Rather, it would ensure that the same litigation procedures are used by both agencies in non-consummated mergers and acquisitions, which is consistent with the unified structure of the HSR statute.

The HSR Act was adopted precisely to give the agencies advance notice of significant proposed acquisitions and sufficient time to conduct a thorough investigation before a deal can be consummated. Almost everything about the statute requires close coordination between the

FTC and DOJ, including administration of the premerger notification program, issuance of well-received merger guidelines and determination of which agency will review a particular transaction. The vast majority of reportable deals present no antitrust issues and are cleared after a brief review, often in less than 30 days. The one major exception to this coordinated, shared responsibility is when an investigation cannot be resolved and goes to the litigation stage.

The litigation path in FTC and DOJ merger cases differs in two important respects – first, the standards for granting a preliminary injunction and, second, the venue for litigating the merits.

As to preliminary injunction standards, the FTC is governed by Section 13(b) of the FTC Act, 15 U.S.C. § 53(b), which authorizes TROs and preliminary injunctions to be granted "[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. . . ." In addition to eliminating the traditional irreparable injury requirement, a number of courts have interpreted the "likelihood of success" test to be satisfied if the FTC raises questions going to the merits "so serious, substantial, difficult and doubtful as to make them fair ground for thorough investigation, study, deliberation and determination by the FTC in the first instance and ultimately by the Court of Appeals."[1]

Whatever this standard means, and it is hard to equate it with a likelihood of success (however weak the likelihood might be), it is based on the faulty premise that an injunction is necessary because there has not yet been "thorough investigation, study, deliberation and determination by the FTC." To the contrary, when FTC and DOJ merger cases get to court, the agencies have already conducted extensive investigations that typically take 6 months or longer. That is why DOJ is usually willing to proceed immediately to a trial on the merits and seek a

[1] *FTC v. Whole Foods Mkt., Inc.*, 533 F.3d 869, 882 (D.C. Cir. 2008) (Tatel, J., concurring) (emphasis added).

permanent injunction. It is useful to note that Section 13(b) was enacted in 1973, three years before passage of the HSR Act. Prior to adoption of 13(b), the FTC was severely curtailed in obtaining preliminary injunctive relief and had to rely on the restrictive All-Writs Act, 28 U.S.C. § 53(a), to obtain temporary relief.[2]

While DOJ is governed by traditional equity standards when seeking a preliminary injunction, courts have relaxed the test to the degree that irreparable injury may be presumed if a likelihood of success can be shown and, in such circumstances, the balance of equities will generally favor the government.[3] Still, the Antitrust Division believes the FTC generally carries a lighter burden when seeking preliminary injunctive relief in merger cases. As outlined in the Division's staff manual,

> [t]he courts, in applying the FTC's statutory standard, have given it the liberal interpretation intended by Congress. *See, e.g., FTC v. Whole Foods Market, Inc.*, 533 F.3d 869, 875 (D.C. Cir. 2008) (Brown, J.) and 883 (Tatel, J.); *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 714, 727 (D.C. Cir. 2001); and *FTC v. Univ. Health, Inc.*, 938 F.2d 1206, 1216-17 (11th Cir. 1991); and *FTC v. Exxon Corp*., 636 F.2d 1336, 1343 (D.C. Cir. 1980). In light of the concurrent jurisdiction of the Department of Justice and the FTC to enforce Section 7 of the Clayton Act, the Division should argue that the authority of the Department of Justice to seek preliminary relief under Section 15 of the Clayton Act (15 U.S.C. § 25) should be interpreted in a manner consistent with 15 U.S.C. § 53(b).[4]

Yet, there is no indication that the standard applied to DOJ has hampered its merger enforcement efforts and the Division's successful track record in recent years, whether by fully litigating cases or extracting more favorable settlements, is instructive.

Although Section 13(b) expressly authorizes district court judges to grant both preliminary and permanent injunctions, the FTC consistently takes the position that merits trials involving non-consummated mergers should be conducted in administrative proceedings and not

[2] *See FTC v. Dean Foods, Co.*, 384 U.S. 597 (1966).
[3] *See U.S. v. Siemens, Corp.*, 621 F.2d 499 (2d Cir. 1980); *U.S. v. UPM-Kymmene Oyj*, 2003 U.S. Dist. LEXIS 12820 (N.D. Ill. 2003).
[4] Antitrust Division Manual, Fifth Edition, at page IV-20 (last updated April 2015).

in the federal courts. Without FTC concurrence, federal judges are powerless to issue permanent injunctions.

The practical effect of the divergent litigation schemes at the FTC and DOJ is that in virtually all non-consummated merger cases involving the FTC the outcome is determined at the preliminary injunction stage, whereas DOJ cases typically consolidate the preliminary and permanent injunction hearing. In essence, for FTC cases, the preliminary injunction hearing is the *de facto* merits hearing, regardless of who wins. That means merging companies face a tougher hurdle in FTC cases than they do in DOJ cases where a permanent injunction hearing requires the government to prove a Section 7 violation by a preponderance of the evidence.

To illustrate, let me compare the timeline for a couple of DOJ cases – *Oracle*[5] and *H&R Block*[6] - that were litigated to conclusion in permanent injunction hearings with a pending FTC merger case – *FTC v. Sysco and US Foods*, No. 15-cv-00256 APM (D.D.C. 2015). The *Oracle* and *H&R Block* cases took a little over 6 and 5 months, respectively, from filing of the complaint to issuance of the district court's decision. In the ongoing FTC case, the Commission filed its administrative complaint on February 26 of this year and set a hearing date to begin on July 21, 2015, approximately 5 months later. As in virtually all FTC cases involving reportable transactions, there is a parallel federal court proceeding where the Commission is seeking a preliminary injunction to block the transaction pending conclusion of the administrative proceeding. The hearing in the court case is now over and the parties are awaiting the judge's ruling, which should be forthcoming later this month or sometime in July.

[5] *U.S. v. Oracle Corp.*, 331 F.Supp.2d 1098 (N.D. Cal. 2004).
[6] *U.S, v, H&R Block, Inc.*, 833 F.Supp.2d 36 (D.D.C. 2011).

Thus, in the above comparison, the FTC's preliminary injunction case will be completed in about the same length of time as the DOJ permanent injunction cases, but the key difference is that the FTC's administrative hearing will just be starting. Under the Commission's rules, that proceeding (including the trial, ALJ decision and appeals to the full Commission) will take another 7 months before the agency issues its final decision, resulting in litigation (court + agency) that is at least twice as long as a typical DOJ merger case. And, the FTC decision timeline takes into account rules changes that the Commission has adopted in recent years to speed up its administrative cases. It is, therefore, no surprise that mergers do not survive in FTC cases beyond the preliminary injunction stage, given the lengthy agency investigation, subsequent litigation and any appellate review.

Some may argue that the Commission's administrative process allows the agency to advance the development of effective merger policy through its own proceedings, as envisioned when the FTC was created. That may be true in other areas of antitrust and consumer protection where the law is less developed or primarily within the province of the agency. The Commission has made significant contributions in those areas , but a completely different paradigm exists for reportable acquisitions and mergers where, as noted above, the agencies enforce the law under a jointly developed program, including economically based substantive guidelines that are being accepted by the courts and integrated into their decisions. Moreover, the FTC's administrative process in HSR-reportable cases is not contributing to the development of merger law because the cases never get that far. Of course, the Commission's authority to litigate consummated mergers in administrative proceedings is left untouched by this legislation, and the agency has had recent success in such cases.

I would add one other comment. The bill, while harmonizing the FTC's litigation procedures with those of DOJ for non-consummated mergers and acquisitions, would not subject the Commission to Tunney Act review of merger litigation settlements. I agree with that approach. The Tunney Act procedures are awkward and ill-suited to the settlement of merger cases and should not be extended to the FTC.

In conclusion, the pending legislation is needed to correct an inequitable disparity between the FTC's and DOJ's litigation procedures.