PREPARED STATEMENT OF

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on

The "Standard Merger and Acquisition Reviews Through Equal Rules Act of 2014"

Before the

House Subcommittee on Regulatory Reform, Commercial and Antitrust Law

House Judiciary Committee

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ABBOTT B. LIPSKY, JR.

Mr. Chairman and Honorable Members of the Subcommittee, my name is Abbott B. Lipsky, Jr. and I am a partner in the Washington, D.C. office of Latham & Watkins LLP. I am very grateful for your invitation to testify today on the discussion draft of the SMARTER Act, a bill that, if enacted, would equalize the enforcement tools applied by the two federal antitrust agencies to mergers and other structural transactions. This testimony provides my own views as an individual with thirty-eight years' experience as an antitrust lawyer. In presenting this testimony I am not representing any party.

I have been involved in a variety of cases involving antitrust challenges to mergers and other structural transactions from diverse perspectives – as a staff attorney and then as Deputy Assistant Attorney General in the Antitrust Division, as the chief global antitrust counsel at the Coca-Cola Company, and as a private practitioner representing parties engaged in structural transactions. I have represented parties in structural transaction matters before both federal agencies and before the courts (as well as before numerous antitrust enforcement agencies in a wide variety of jurisdictions around the world), and I have had the opportunity to confront in real time the situations and issues that would be addressed by the SMARTER Act. I support the two main thrusts of the SMARTER Act – to clarify that traditional injunction standards apply regardless of which federal antitrust agency challenges a structural transaction in court, and to provide equivalent procedures for each agency in cases involving structural transactions. This testimony focuses on the latter aspect.

Following President Clinton's designation of Prof. Robert Pitofsky as Chairman of the FTC, the Commission clarified its policy of reassessing the public interest in pursuing administrative litigation in structural transaction cases when the federal courts had denied a

Commission request for injunction.[1] The issuance of this Statement was perceived in part as a response to criticism of the Commission's previous use of administrative litigation in such circumstances. In one case the Commission had pressed its merger challenge through years of administrative litigation following rejection of its application for a court injunction, only to conclude ultimately that the proposed merger was indeed lawful.[2] Although the Policy Statement was not by any means an ironclad promise to avoid administrative litigation in similar cases, I am not aware of any administrative case pursued subsequently by the Commission in the circumstances addressed by the 1995 Statement. I am aware of at least two cases in which the policy was explicitly followed, and there may be more.[3]

Legislation that largely embodies the approach taken by the FTC following issuance of the 1995 Policy Statement is warranted in light of this experience. Existing law gives the FTC extraordinary flexibility to determine how and when it will pursue administrative litigation challenging structural transactions. The cost and duration of administrative litigation – especially when added on top of the already costly and time-consuming legal processes involved in the resolution of a suit for injunction – can easily discourage stakeholders from considering lawful and procompetitive transactions on the margin. There are structural transaction cases that persisted in administrative litigation for as long as nine years (including some time pending before a federal appeals court).[4] The possibility of lengthy and costly administrative litigation for transactions that are cleared to the FTC for investigation complicates the stakeholders' legal assessment of structural transactions. This is because there is no reliable basis to determine whether a transaction will be reviewed or challenged by the FTC as distinct from the Department

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[1] Commission Statement of Policy, Administrative Litigation Following the Denial of a Preliminary Injunction, 60 Fed. Reg. 39,741 (Aug. 3, 1995).

[2] R.R. Donnelley & Sons Co., 120 F.T.C. 36 (1995).

[3] FTC Press Release, FTC Closes its Investigation of Arch Coal's Acquisition of Triton Coal Company's North Rochelle Mine (June 13, 2005), available at http://www.ftc.gov/news-events/press-releases/2005/06/ftc-closes-its-investigation-arch-coals-acquisition-triton-coal (visited March 31, 2014); FTC Press Release, FTC Ends Administrative Litigation in Western Refining Case (October 3, 2007), available at http://www.ftc.gov/news-events/press-releases/2007/10/ftc-ends-administrative-litigation-western-refining-case (visited April 1, 2014).

[4] FTC Press Release, Coca-Cola Company (May 18, 1995) (noting settlement and indicating parties' intent to dismiss pending appeal), available at http://www.ftc.gov/news-events/press-releases/1995/05/coca-cola-company (visited April 1, 2014).

of Justice. And even for cases that clear to the FTC, there can be no assurance that victory in court would assure that the Commission would not proceed with administrative litigation.

It has been said that administrative litigation offers the opportunity to create a more complete record and to develop and apply more specialized expertise for structural transaction cases than is available through court litigation. While these are plausible assertions, the historical record does not confirm that FTC administrative litigation has produced superior policy innovations or greater quality in decision making for structural transaction cases, relative to Department of Justice enforcement and judicial decision making.

This is not to detract from the FTC's proper role in developing merger expertise and in contributing to antitrust enforcement and policy innovations in this and other fields. The FTC has contributed to a variety of such innovations in the recent past, but these have occurred primarily in the fields of microeconomic analysis and the issuance of substantive and other guidelines. Recently the FTC has made contributions to merger enforcement policy in close partnership with the Department of Justice.[5] Even when the two agencies were openly feuding about a number of issues – clearance of specific transactions, Hatch-Waxman settlements, substantive standards for competitive assessment of unilateral conduct – the agencies' close cooperation on merger enforcement policy has been consistent. Such cooperation is a desirable and appropriate facet of our dual federal enforcement structure, and merger enforcement is the leading example of cooperation between the two federal agencies.

FTC innovation has not been confined to administrative litigation, but has included a diverse variety of non-litigation activities, such as holding workshops and seminars on targeted subjects of interest. Recently the Commission has exercised its unique authority to investigate a competitive policy issue of broad significance (patent assertion entities) under its unique 6(b)

[5] The most recent versions of the Horizontal Merger Guidelines (August 19, 2010) and the Commentary on the Horizontal Merger Guidelines (March 2006) were issued jointly by the FTC and the Antitrust Division, as were the Antitrust Guidelines for Collaborations Among Competitors (April 2000), governing many forms of joint venture that, like mergers, may also be challenged under Clayton Act Section 7, 15 U.S.C. §18. Some documents relevant to assessment of structural transactions have been issued separately, such as the Policy Guide to Merger Remedies (Antitrust Division, June 2011), and Negotiating Merger Remedies, Statement of the FTC Bureau of Competition (January 2012).

provision. Through these and other similar activities the FTC also enlists the help of leading lawyers as well as academics and consultants in microeconomics, industrial organization, econometrics, and other fields that have long supported policy development for antitrust enforcement. Many innovations probably originate in fresh appointments to the Commission and to its various staff components including the Bureau of Competition, the Office of the General Counsel, the Bureau of Economics. I give credit to past FTC initiatives in a variety of enforcement areas, but I do not think that legislation to reduce material procedural differences in enforcement methods between the two federal agencies with specific regard to structural transaction will tend to undermine the Commission's capacity to make future innovations in the field of enforcement policy regarding structural transactions (or otherwise).

The need to ensure that U.S. antitrust enforcement procedures are accurate and efficient is now greater than at any time in our history. The U.S. serves as a model for antitrust enforcement around the world. Since the Hart-Scott-Rodino Act of 1976 imposed mandatory premerger notification on significant transactions affecting U.S. commerce, scores of other jurisdictions around the world have adopted similar mandatory premerger notification schemes. Maintaining vigorous economic growth and innovation requires increased attention to the design and implementation of antitrust procedures to assure maximum objectivity, accuracy and efficiency of antitrust enforcement around the world. Every competition regime should engage in frequent reassessment of the necessity of the burdens it imposes, whatever antitrust policy objectives it claims to serve. The U.S. – the jurisdiction with the world's strongest record of antitrust enforcement – should exercise leadership in demonstrating its willingness to adjust its procedures to obtain maximum appropriate impact at minimum cost. Legislation to accomplish the two main objectives of this legislation would be a welcome demonstration of such leadership.

I would be pleased to answer questions and to provide any further support that the Subcommittee may request.