

**Statement
of the
American Hospital Association
before the
Subcommittee on Antitrust, Competition Policy and Consumer Rights
of the
Committee on the Judiciary
of the
U.S. Senate**

Hearing on the
“Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015”

October 7, 2015

On behalf of nearly 5,000 member hospitals, health systems and other health care organizations, and our 43,000 individual members, the American Hospital Association (AHA) appreciates the opportunity to submit this statement to the Judiciary Committee’s Subcommittee on Antitrust, Competition Policy and Consumer Rights in support of S. 2102, the Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, also known as the SMARTER Act.

S. 2102 is a bill that has been narrowly crafted to accomplish one important outcome: to ensure that all proposed transactions face the same enforcement process and standard of review regardless of whether the Federal Trade Commission (FTC) or the Antitrust Division of the Department of Justice (DOJ) reviews the transaction. It codifies key recommendations of the bipartisan Antitrust Modernization Commission created in 2002.¹ In particular, S. 2102 amends the Clayton Act, 15 U.S.C. §§ 12-27, and the FTC Act, 15 U.S.C. §§ 41-58, to eliminate the FTC’s ability to bring administrative proceedings to challenge a proposed transaction under Section 7 of the Clayton Act, 15 U.S.C. § 18, and to require both the FTC and the DOJ to meet the same preliminary injunction standard when moving for a preliminary injunction in federal court.

¹ See http://govinfo.library.unt.edu/amc/report_recommendation/toc.htm.



Both the FTC and DOJ are charged with enforcing Section 7 of the Clayton Act, which prohibits transactions whose effect “may be substantially to lessen competition, or to tend to create a monopoly.”² However, the two agencies follow different enforcement processes and are subject to different standards of review. While the DOJ litigates transactions in a full hearing on the merits in federal court before an impartial judge, the FTC’s practice is to pursue a preliminary injunction in federal court while at the same time commencing internal administrative proceedings in which the agency has a decided advantage. Moreover, a federal judge applies a different, and arguably more deferential, standard of review to a request for a preliminary injunction from the FTC, as compared to the same request from the DOJ. Therefore, parties whose proposed transaction is reviewed by the FTC can reasonably expect a more burdensome enforcement process, a higher likelihood of abandoning the transaction, and the potential for a different substantive outcome.

The disparate treatment of proposed transactions depending upon whether the FTC or DOJ challenges the transaction under Section 7 of the Clayton Act demands a clear and targeted congressional response. The AHA urges Congress to pass S. 2102 for two reasons:

1. The bill harmonizes the FTC’s authority to review and challenge proposed transactions with that exercised by the DOJ, while preserving the FTC’s ability to pursue administrative litigation to enforce laws and regulations exclusively within its purview.
2. In so doing, the bill removes a deterrent to hospital integration and realignment, which is essential for success in the changing health care landscape.

S. 2102 HARMONIZES THE FTC’S AND THE DOJ’S AUTHORITY TO REVIEW AND CHALLENGE PROPOSED TRANSACTIONS

Although the FTC and DOJ have concurrent jurisdiction to enforce Section 7 of the Clayton Act, the FTC and DOJ have developed a “clearance” process over time by which review of certain proposed transactions is allocated either to the FTC or DOJ. There is no difference in the size or structure of the transactions allocated to each agency. The only relevant difference between the transactions reviewed by the FTC, as opposed to the DOJ, is the sector of the economy in which the parties to the transaction operate. Nevertheless, there are significant differences between the enforcement processes followed by and the standards of review applicable to the two agencies.

If the DOJ reviews a transaction and chooses to enforce Section 7 of the Clayton Act, it often agrees with transacting parties to consolidate proceedings for preliminary and permanent injunctive relief under Rule 65(a)(2) of the Federal Rules of Civil Procedure.³ As a result, the DOJ and the transacting parties benefit from a streamlined process to a full hearing on the merits within a matter of months. Congress did not specify a specific standard of review for DOJ requests for a preliminary injunction to enforce Section 7 of the Clayton Act. As a result, federal courts typically apply a modified version of the traditional four-factor test for preliminary

² 15 U.S.C. § 18.

³ See Fed. R. Civ. P. 65(a)(2).

injunctions, which, among other things, requires a showing of the DOJ's likelihood of success on the merits. However, since, in practice, the DOJ often agrees to consolidate the preliminary and permanent injunction phases of its enforcement actions, the DOJ in almost all cases must prove a violation of Section 7 of the Clayton Act, rather than simple likelihood of success on the merits, to block a proposed transaction.

Alternatively, if the FTC reviews a transaction and chooses to enforce Section 7 of the Clayton Act, it files a motion for a preliminary injunction in federal court while simultaneously initiating internal administrative proceedings. Moreover, because these proceedings are not consolidated, the FTC can proceed with administrative litigation regardless of the outcome of the preliminary injunction hearing. In the past, the FTC has suggested that "the norm should be that the [administrative litigation] can proceed even if a court denies preliminary relief."⁴

This two-step process, as compared to the DOJ's more streamlined process, costs transacting parties both time and money. For example, there was an approximately three-month lag between the DOJ's issuance of a complaint to American Airlines and US Airways challenging their proposed transaction and the date scheduled for a consolidated hearing on the merits in federal district court, with a ruling expected shortly thereafter.⁵ The transacting parties could then have appealed an opinion in the DOJ's favor to a United States Court of Appeals. In contrast, an administrative law judge took an additional nine months to rule on the consummated transaction between ProMedica Health System and St. Luke's Hospital after a federal judge granted the FTC's request for a preliminary injunction. ProMedica Health System and St. Luke's Hospital then appealed the administrative law judge's decision to the full Commission, which took an additional three months to uphold the administrative law judge's decision.⁶ Only then, one year after a federal judge granted the FTC's request for a preliminary injunction, could the transacting parties appeal the Commission's decision to a United States Court of Appeals.

Congress did specify a "public interest" standard of review for FTC requests for a preliminary injunction to enforce Section 7 of the Clayton Act.⁷ This standard requires a court to grant the FTC's request for a preliminary injunction "[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 Most practitioners agree there is a perception that the standard is deferential to the FTC. Therefore, transacting parties assume a judge will grant the FTC's request for a preliminary injunction, and the FTC will further litigate the proposed transaction in internal administrative proceedings which inure to its benefit.

⁴ Rules of Practice, 73 Fed. Reg. 58,832, 58, 837 (Oct. 7, 2008) (proposed rules).

⁵ See <http://www.justice.gov/atr/case/us-et-al-v-us-airways-group-inc-and-amr-corporation>.

⁶ See <https://www.ftc.gov/enforcement/cases-proceedings/101-0167/promedica-health-system-inc-corporation-matter>.

⁷ See Section 13(b) of the FTC Act, 15 U.S.C. § 53(b).

⁸ *Id.*

The cumulative effect of the FTC's two-step enforcement process, as compared to the more streamlined DOJ enforcement process, as well as the arguably more lenient standard of review applicable to FTC motions for a preliminary injunction to enforce Section 7 of the Clayton Act, is to deter some lawful and procompetitive transactions. Transacting parties facing a challenge by the FTC bear the additional cost in time and money of simultaneously litigating a motion for a preliminary injunction before a federal judge applying an arguably more lenient standard, while also preparing to litigate the merits of the proposed transaction before a FTC administrative law judge. There also is the uncertainty of whether the FTC will pursue administrative litigation, regardless of the outcome of the preliminary injunction hearing. Given that time is of the essence in almost every transaction, transacting parties faced with a FTC enforcement action under Section 7 of the Clayton Act often choose to abandon their otherwise lawful and procompetitive transactions rather than assume the uncertainty and cost of protracted litigation. Alternatively, transacting parties whose proposed transaction is reviewed by the DOJ do not face the decision whether to abandon their transaction under the same set of conditions.

The FTC has acknowledged on multiple occasions that its two-step enforcement process can cause delay and uncertainty for transacting parties. In 2009, the FTC instituted comprehensive changes in its procedural rules purportedly to expedite administrative proceedings, but as demonstrated by the ProMedica Health System-St. Luke's Hospital transaction, the FTC administrative proceedings remain cumbersome and lengthy in contrast with DOJ's consolidated hearing on the merits.⁹ More recently, the FTC revised its Rules of Practice to reinstate a pre-2009 practice of staying administrative litigation pending the outcome of a preliminary injunction hearing. The FTC also reaffirmed a 1995 policy statement that limited the agency's ability to pursue administrative litigation following the denial of a request for a preliminary injunction, unless the FTC determines that doing so would be in the public interest.¹⁰ But discretionary and often temporary changes to the FTC's rules and policies are no substitute for permanent correction of the problem.

While these revisions to its Rules of Practice are a step in the right direction, they do not: 1) shorten the time frame for administrative proceedings in enforcement actions under Section 7 of the Clayton Act; 2) remove all uncertainty as to whether the FTC will pursue administrative litigation following the denial of a request for a preliminary injunction; 3) ensure all proposed transactions receive a full hearing on the merits in federal court; or 4) address the different standards of review applicable to FTC and DOJ requests for a preliminary injunction. S. 2102 accomplishes these objectives without encroaching on the FTC's ability to enforce laws and regulations exclusively within its purview in internal administrative proceedings. Additionally, the FTC would have the same ability as the DOJ to appeal a loss in federal court to a United States Court of Appeals if the transaction raised a significant legal issue, as the FTC did in *FTC v. Phoebe Putney Health System, Inc.*¹¹ As a result, all transacting parties, no matter in which

⁹ See Rules of Practice, 74 Fed. Reg. 20,205 (May 1, 2009) (to be codified at 16 C.F.R. pt. 3-4).

¹⁰ See Revisions to Rules of Practice, 80 Fed. Reg. 15,157 (Mar. 23, 2015) (to be codified at 16 C.F.R. pt. 2-4).

¹¹ 133 S. Ct. 1003 (2013).

field they operate, will face the same enforcement process and standard of review in federal court regardless of whether the FTC or DOJ reviews their proposed transaction.

At least one FTC Commissioner has recently stated that she supports “legislative efforts at making the merger review process as similar as possible across the two antitrust agencies.”¹² Specifically, Commissioner Olhausen would support any legislation, including S. 2102, “that ensured that courts apply the same PI [Preliminary Injunction] standard to actions brought by the FTC and DOJ” and that made the FTC’s recent revisions to its Rules of Practice “more permanent and restrictive.”¹³ According to Commissioner Olhausen, even with these changes, such a bill “will [not] significantly impact the good work the Commission does in the antitrust area.”¹⁴

S. 2102 ELIMINATES A DETERRENT TO HOSPITAL INTEGRATION AND REALIGNMENT

Hospitals, in particular, have been adversely impacted by the different process and standard of review applicable to FTC enforcement actions under Section 7 of the Clayton Act. As a result of the “clearance” process that has developed over time, the FTC reviews all transactions involving hospitals, and, thus, every hospital transaction challenged by the FTC is subject to the FTC’s unfair and punitive two-step enforcement process, as well as the arguably more lenient standard of review that applies to FTC requests for a preliminary injunction.

The additional time and financial burden of litigating a hospital transaction first at the preliminary injunction hearing and then in internal administrative proceedings has deterred many hospitals from pursuing potentially lawful and procompetitive transactions. For example, Inova Health System Foundation,¹⁵ OSF Healthcare System,¹⁶ and Reading Health System¹⁷ have all abandoned proposed transactions that are potentially lawful and procompetitive rather than face a lengthy and expensive administrative litigation with the FTC.

This phenomenon will only get worse as greater integration and alignment become even more essential for hospitals to be successful in the changing health care landscape. Both public and private forces are fueling the drive toward an efficient and effective continuum of care that delivers care to communities in innovative ways and in new, more cost-effective and convenient

¹² Maureen K. Olhausen, Comm’r, Fed. Trade Comm’n, *A SMARTER Section 5*, Remarks before the U.S. Chamber of Commerce, at 18 (Sept. 25, 2015), *available at* https://www.ftc.gov/system/files/documents/public_statements/804511/150925smartersection5.pdf.

¹³ *Id.* at 15-17.

¹⁴ *Id.* at 18.

¹⁵ *See* <http://www.law360.com/articles/58795/facing-ftc-challenge-hospitals-drop-merger-plans>.

¹⁶ *See* <http://www.law360.com/articles/329680/ill-health-systems-ditch-merger-plans-after-ftc-antitrust-suit>.

¹⁷ *See* <http://www.law360.com/articles/395215/pa-hospital-merger-killed-after-ftc-broaches-challenge>.

settings. For example, there are significant financial penalties levied on hospitals that are unable to coordinate care and uncertain rewards for hospitals that accept financial risk to keep their communities healthy. Moreover, there are new technologies and care delivery models to which hospitals must adapt if they are to remain viable. The need to become more efficient and obtain access to capital to meet these challenges is leading to more integration and alignment among hospitals.

The FTC's continued use of its two-step enforcement process presents a roadblock to this drive for more efficient hospital integration and alignment. Transacting parties will continue to abandon potentially lawful and procompetitive transactions rather than bear the cost in time and money of moving proposed transactions through a preliminary injunction hearing and then internal administrative proceedings that inure to the FTC's benefit. S. 2102 removes these obstacles by forcing the FTC to avail itself of the same enforcement process and standard of review applicable to DOJ enforcement actions. As a result, the FTC will be required to face a full hearing on the merits in federal court before an impartial judge in every enforcement action against a proposed hospital transaction.

CONCLUSION

The AHA supports enforcement of the antitrust laws; however, all transacting parties, including hospitals, should face the same enforcement process and standard of review regardless of whether the FTC or DOJ reviews the proposed transaction. The agencies' authority to enforce Section 7 of the Clayton Act is uniform, and the processes followed by and the standards of review applicable to each agency's enforcement actions should be as well. S. 2102 accomplishes this goal and ensures both the FTC and DOJ will rely exclusively on the federal court system to determine the competitiveness of a transaction, ensuring transacting parties, including hospitals, receive a full hearing on the merits.