

CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

R. BRUCE JOSTEN
EXECUTIVE VICE PRESIDENT
GOVERNMENT AFFAIRS

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September 29, 2015

The Honorable Bob Goodlatte
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable John Conyers, Jr.
Ranking Member
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Goodlatte and Ranking Member Conyers:

The U.S. Chamber of Commerce, the world's largest business federation representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations, and dedicated to promoting, protecting, and defending America's free enterprise system, strongly supports H.R. 2745, the "Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act of 2015."

This legislation is long overdue. As a matter of basic fairness, a proposed merger undergoing antitrust review should be subject to the same government review process regardless of whether the review is conducted by the Department of Justice (DOJ) or the Federal Trade Commission (FTC). The SMARTER Act addresses this concern and is based on the bi-partisan Antitrust Modernization Commission (AMC) recommendations to Congress that state:

Congress should amend Section 13(b) of the Federal Trade Commission Act to prohibit the Federal Trade Commission from pursuing administrative litigation in Hart-Scott-Rodino Act merger cases.

Congress should ensure that the same standard for the grant of a preliminary injunction applies to both the Federal Trade Commission and the Antitrust Division of the Department of Justice by amending Section 13(b) of the Federal Trade Commission Act to specify that, when the Federal Trade Commission seeks a preliminary injunction in a Hart-Scott-Rodino Act merger case, the Federal Trade Commission is subject to the same standard for the grant of a preliminary injunction as the Antitrust Division of the Department of Justice.

Under current law, the standard for a court to grant the DOJ a preliminary injunction is different than the standard written in law for the FTC. However, in practice, the Assistant Attorney General for Antitrust and Chair of the Federal Trade Commission have over the years consistently downplayed this difference in testimony before Congress. The SMARTER Act

would ensure that regardless of which agency reviews a proposed transaction, the standard by which a court grants a preliminary injunction is in fact the same.

The SMARTER Act also would require the FTC to go to court to challenge proposed mergers on the merits, in the same manner as the DOJ. There is nothing in the law that determines whether the DOJ or FTC reviews a merger, therefore merging parties should not be subject to two different processes that have the potential to generate different outcomes. The FTC should, like the DOJ, go to court, and mergers should be challenged on the merits before a judge.

The SMARTER Act would not make it any easier for mergers to be cleared as the legislation would not alter the merit review standard in the law. Instead, the SMARTER Act would create efficiencies and guarantee fairness by ensuring proposed merger transactions are reviewed under the same process regardless of whether the transaction happens to be reviewed by the DOJ or FTC. For this reason, the Chamber strongly supports passage of the SMARTER Act.

Sincerely,

A handwritten signature in black ink, appearing to read "R. Bruce Josten". The signature is fluid and cursive, with the first name "R." and last name "Josten" being the most prominent parts.

R. Bruce Josten

cc: Members of the Committee on the Judiciary