Hostile Cash Tender Offers present a number of challenges that do not arise in friendly deals. Because the target does not want to be acquired, its board of directors frequently adopts protective measures, such as poison pills and other takeover defenses designed to prevent the threatened acquisition. This resistance can arise despite the acquisition’s potential to improve efficiency and increase shareholder value. Significantly, the target board does not have absolute discretion in adopting and utilizing takeover defenses. Rather, in its effort to protect its shareholders, it can only employ defensive measures that are proportionate to the threat posed by the offer.1

Although a target’s board facing an unwanted suitor will most often allege that the firm is threatened by an inadequate offer, it is not uncommon for the target’s board to claim that the offer violates the antitrust laws.2 This makes sense because if a transaction is blocked or abandoned on antitrust grounds, then not only is the offering price illusory, but the extended antitrust review may distract management and destroy value, and the target’s price may fall below even the pre-offer level.

Where the target’s board adopts a poison pill or other defensive measures, the offeror typically brings an action in the target’s state of incorporation (e.g., suit in Delaware Chancery Court) for an injunction to require the target’s board to remove the takeover defenses.3 Where the target justifies its defensive measures on the grounds that the transaction likely violates the antitrust laws, the offeror will argue that there is no antitrust obstacle to the transaction. This argument is difficult to make credibly where a federal antitrust agency has reached the conclusion that the acquisition would violate Section 7 of the Clayton Act and has threatened or actually brought suit. In that case, one path forward for the offeror is to defeat the government in court as quickly as possible and thus remove the antitrust obstacle to closing.

The problem, however, is that the Federal Trade Commission has in the past taken the position that it need not seek an injunction in district court to stop a hostile cash tender offer because the transaction cannot close given the existence of a poison pill or other defensive measures. In that case, the FTC has only brought a Part III proceeding. Thus, while there is no legal impediment to closing because Part III does not operate as an injunction, the parties cannot close on the offer as long as the target’s defensive measures stay in place. And where those defensive measures are being justified, in part, by the alleged existence of antitrust approval risk, it may be difficult to persuade a state court that the defensive measures should be withdrawn for lack of an antitrust issue when the federal government has already initiated a Part III proceeding.

The result is that in cash tender offers, an acquiring company facing a poison pill or other takeover defenses may be required to first beat the FTC in Part III, which may take as much as twice as long as a district court action. Thus, in the case of a cash tender offer challenged by the FTC, the offeror may be unable to avail itself of the strategic option of quickly beating the FTC in district court, an option that exists outside of the cash tender offer context. This result seems wrong as a matter of policy because the Hart-Scott-Rodino (HSR) Act includes provisions designed to expedite the review of cash tender offers—namely, a shortened waiting period for cash tender offers and allowing the second waiting period to run once the offeror certifies substantial compliance as opposed to waiting for the target to comply as well.4 Indeed, the express purpose of these two provisions was to harmonize HSR review of cash tender offers with the Williams Act of 1968, which gave target shareholders protections to ensure speedy and accurate access to information needed to make an informed decision as to whether they should accept the offer.5

Because Part III proceedings take longer than district court proceedings, it may effectively take longer to obtain resolution of the antitrust issues in cash tender offers than in friendly
mergers. This result seems contrary to Congressional intent. Thus, where the combination of Part III proceedings and the target’s defensive measures might cause the offeror to abandon the transaction, counsel for the offeror should consider a number of strategies to resolve antitrust issues quickly. Unfortunately, these strategies are not guaranteed to succeed. Notably, this problem has not arisen at the DOJ, perhaps in part because they cannot bring an action in Part III.

The Williams Act
The Williams Act of 1968 radically altered the execution of tender offers by mandating disclosure obligations as well as rules for how long tender offers must remain open. Its purposes were to protect investors, who often did not have sufficient information to make informed decisions, and to ensure that there was an efficient market for corporate control. In so doing, Congress recognized that cash tender offers are an important tool that helps ensure an efficient market for corporate control. These changes balanced power between bidders and target shareholders by enabling the shareholders to more accurately assess the risks associated with the transaction. By leveling the information playing field, Congress reduced structural asymmetries in the market for corporate control, thus improving the market’s efficiency by reducing transaction costs.

The delicate nature of this balance of power is confirmed by state anti-takeover jurisprudence, where a delay of a mere ten days in the tender offer has been deemed “inimical” to the purposes of the Williams Act.

The Williams Act’s purpose is consistent with economic theory that an efficient market for corporate control helps ensure that management and boards run their companies in a way that maximizes shareholder value. Studies confirm that targets experience significant increases in stock value after a successful tender offer. These increases are larger than the price increases associated with friendly mergers, which may suggest that tender offers create stronger synergies than other mechanisms that alter corporate control. These transactions also produce the largest positive externalities to the economy more generally, including the “lessening of wasteful bankruptcy proceedings, [spurring] more efficient management of corporations, [increasing] the protection afforded [to] non-controlling corporate investors, increas[ing] mobility of capital, and generally [promoting] a more efficient allocation of resources.”

Antitrust Review of Cash Tender Offers
Cash tender offers from direct horizontal competitors create the greatest potential efficiencies because competitors are best able to enjoy the fruits of economies of scale and scope, including the elimination of duplicative management. Thus, takeover bids from competitors are the most likely to maximize combined shareholder value because competitors are uniquely capable of achieving certain efficiencies that decrease the point at which expected return equals the cost of acquisition, plus any transaction costs.

Cash tender offers from competitors are also the most likely to generate antitrust challenges and resistance from the target’s management. These transactions entail the greatest probability that the duplicative target management would be displaced by the efficient management of the bidder and thus the greatest probability that the target’s board will resist. Such defensive measures may violate fiduciary duties, destroy shareholder value, and hamper the operation of the market for corporate control. When Congress enacted the Williams Act, it acknowledged the harms to the market for corporate control that flow from board entrenchment and drafted the statute carefully to avoid exacerbating this problem.

By adopting different rules for cash tender offers in the HSR Act, Congress acknowledged the tension between the efficiencies these bids could produce, the antitrust risk they present, and the possibility that a target’s board would attempt to protect its own jobs.

Despite Congress’s clear attempts to protect the market-disciplining effect of time sensitive cash tender offers, the FTC has in at least one recent instance disregarded Congress’s concern. In Omnicare’s cash tender offer to acquire PharMerica, the FTC brought only a Part III action, forgoing the typical practice of seeking a district court injunction at the same time. Although Omnicare was technically free to launch the tender offer given that the filing of a Part III action does not block the transaction from closing, it would have been futile to do so because PharMerica’s incumbent board had adopted a poison pill. The PharMerica board, however, was not willing to rescind the pill, and therefore Omnicare was unable to close.

Omnicare needed to resolve the pending antitrust challenge to its offer in order to increase the probability that a Delaware court would intervene. But Part III proceedings are typically not resolved in a short enough time frame to keep the tender offer open.

Although the FTC has revised its rules to expedite Part III proceedings (which have been described as “glacial”), these revisions have not made Part III proceedings as fast as district court proceedings. Over the last five years, Part III merger challenges consistently have had their initial hearing date scheduled almost exactly 150 days after the issuance of the administrative complaint. In contrast, over the last five
The existence of a poison pill or other defensive measures, coupled with the FTC’s power to initiate proceedings that promise to resolve antitrust risk on a much slower time frame than a district court proceeding, effectively gives the FTC a veto over tender offers.

years the average duration before a district court decision on a preliminary injunction in FTC merger challenges has been 117 days from the filing of the FTC’s complaint.26

Furthermore, in a Part III proceeding, an Administrative Law Judge (ALJ) decision finding that the merger does not violate the antitrust laws and allowing it to proceed would likely be reviewed by the full Commission (and potentially reversed by it).27 As a result, it takes approximately a year to get through a Part III proceeding.28 In short, a Part III proceeding without a simultaneous district court proceeding may operate as a death sentence to a hostile cash tender offer.

The existence of a poison pill or other defensive measures, coupled with the FTC’s power to initiate proceedings that promise to resolve antitrust risk on a much slower time frame than a district court proceeding, effectively gives the FTC a veto over tender offers. This harms the market for corporate control because the most efficient bidders are dissuaded from bidding, as they face the greatest likelihood of generating FTC opposition, and it destroys shareholder value by pressuring shareholders to accept a lower offer from a bidder that presents less antitrust approval risk, even in cases where the FTC has a relatively weak case on the merits.29

Strategic Alternatives in Cash Tender Offers Before the FTC

Some members of Congress have raised a number of concerns regarding the FTC’s use of Part III proceedings. Indeed, the Standard Merger and Acquisition Reviews Through Equal Rules (SMARTER) Act is partially motivated by the belief that Part III proceedings should not be used in non-consummated merger cases.30 Given the limited prospect of Congressional action in the near future, counsel should make themselves aware of strategic options in the case where the FTC has brought a Part III proceeding but not a district court action to challenge a cash tender offer.

First, the bidder can negotiate a consent decree even prior to filing the HSR form and issuing a tender offer. For example, Air Products & Chemicals negotiated a consent decree with the FTC before it filed its HSR notification with respect to its attempt to acquire Airgas. An Air Products press release noted that with the decree in hand, “[t]here remain[ed] no substantive impediments to closing immediately other than the intransigence of the Airgas board.”31 Yet, in such a scenario, the bidder has significantly less leverage during the negotiation with the FTC because it does not have the ability to credibly threaten to go to court if the negotiations with the FTC reach an impasse. These instances of enhanced FTC bargaining power partially motivated the SMARTER Act.32

Second, the bidder could request that the FTC seek a preliminary injunction in district court.33 The FTC may take the position that it cannot do so because the acquiring company cannot close the deal until the takeover defenses are removed by a state court or by the board, thus depriving the agency of the immediacy element typically required in cases seeking preliminary injunctions. However, the FTC in other contexts has argued, and some courts have held, that the FTC’s preliminary injunction standard does not include a requirement of immediate or irreparable harm in the absence of preliminary relief.34 Instead, courts need only determine that the injunction would be in the public interest after “weighing the equities and considering the Commission’s likelihood of ultimate success . . . .”35 This distinction was designed to “place[] a lighter burden on the Commission than that imposed on private litigants by the traditional equity standard . . . .”36 It is an open question whether this means that a district court can hear a preliminary injunction if there is no dangerous probability that the merger could close.

Third, the bidder or target shareholders could seek a declaratory judgment that a proposed merger would not violate the antitrust laws. Where a tender offer is outstanding and the FTC has not cleared the transaction, the bidder and target shareholders are forced to choose “between abandoning [their] rights or risking prosecution,” precisely the sort of dilemma the Declaratory Judgment Act (DJA) was designed to resolve.37

While there is no bright line rule as to what allegations and proof are needed to obtain a declaratory judgment, a party must show that given “all the circumstances,” there exists a “[1] a substantial controversy, [2] between parties having adverse legal interests, of [3] sufficient immediacy and reality to warrant the issuance of a declaratory judgment.”38 These requirements are not defeated when the plaintiff withholds some action for fear of exposing itself to litigation.39

It is by no means certain that a court would grant an offeror’s request for declaratory relief. Courts may find themselves bogged down by counterfactuals of whether the shareholders would tender if the FTC approved the transaction, as well as whether the true source of the injury is the board entrenching itself or the agency’s failure to act. Nonetheless, given “all the circumstances,” the use of declaratory judgment to provide the target’s shareholders with better information about antitrust approval risk comports well with the purposes of the DJA, HSR Act, and the Williams Act.

Fourth, provided the bidder agrees not to consummate the transaction until final resolution of the antitrust issues, the FTC could seek a full trial on the merits in an expedited manner in district court.40 The DOJ typically seeks this type of
expedited trial.\textsuperscript{41} For example, in the DOJ’s challenge to the merger of SunGard and Comdisco, the parties consented to an extremely expedited proceeding in response to the time sensitivity of the concurrent bankruptcy proceedings. \textsuperscript{42} The DOJ was able to investigate the transaction and the court rendered a judgment in just four months.\textsuperscript{43} Because a full trial avoids the potential preliminary injunction requirement of immediate irreparable harm, it allows the court to reach a decision on the merits of the transaction. While SunGard was an exceptional example of judicial expediency and regulatory prudence, it shows that the FTC can still achieve its mandates and respect Congressional signals when circumstances require a particular sensitivity to delay.\textsuperscript{44}

\textbf{Conclusion}

Hostile takeovers are difficult and become even more so when there are antitrust impediments to the transaction. The battle for corporate control frequently takes place in a Delaware court where the offeror argues that the defensive measures employed by the target’s board breach its fiduciary duties and the board responds by arguing that its defenses are a proportionate response to a threat to the company posed by an offer that would violate the antitrust laws if consummated. The board’s argument obviously gets stronger if the FTC has announced that it will oppose the deal and has filed suit and gets weaker if the offeror defeats the FTC’s lawsuit.

It is unclear whether the FTC’s decision not to seek an injunction in the Omnicare case represents a policy choice or just a one-off litigation decision. Regardless, forcing hostile cash tender offerors into lengthy Part III proceedings instead of a faster proceeding in district court seems inconsistent with the clear Congressional intent to have HSR review of non-cash tender offers.\textsuperscript{45} Such delays create an obstacle for an efficient market for corporate control and upset the delicate balance of power between shareholders and incumbent management struck by the Williams Act.

In future cases, there is a strong argument that the FTC should always bring a district court action in addition to a Part III proceeding. In the absence of an FTC action in district court, the bidder is required to negotiate a consent decree with the FTC without a litigation backstop, seek a declaratory judgment, or simply terminate the transaction. All three of these options put greater burdens on the bidder in a cash tender offer, which seems inconsistent with both the Williams and HSR Acts.\textsuperscript{46}

\begin{itemize}
  \item An earlier version of the HSR Act provided for a 21-day waiting period instead of the 15-day period adopted in the final version. After acknowledging the importance of cash tender offers in ensuring efficient operations of corporations, the final bill was described as attempting to “strike a balance” between the purposes of the Williams Act and the need for antitrust review. See H.R. Rep. No. 94-1373, at 12–13 (1976), reprinted in 1976 U.S.C.C.A.N. 4119, 4126–27.
  \item See 113 CONG. REC. 24,664 (1967) (“Today, the public shareholder in deciding whether to reject or accept a tender offer possesses limited information.”). The required disclosures include the size of the holdings, the source of the funds, financing arrangements, the purpose of the tender offer, and the plans of the offeror. Relevant provisions have been codified as 15 U.S.C. § 78m(d) and 15 U.S.C. § 78n(d)(1).
  \item See Edgar v. MITE Corp., 457 U.S. 624, 634 (1982) (“Congress sought to protect the investor not only by furnishing him with the necessary information but also by withholding from management or the bidder any undue advantage that could frustrate the exercise of an informed choice.”); 113 CONG. REC. 24,664 (1967) (“It has been strongly urged that takeover bids should not be discouraged, since they often serve a useful purpose by providing a check on entrenched but inefficient management.”).
  \item See David Offenberg & Christo Pirinsky, How Do Acquirers Choose Between Mergers and Tender Offers?, 116 J. FIN. ECON. 331 (2015) (discussing the speed advantages of tender offers over mergers and how the delays associated with government review reduce the attractiveness of tender offers as a tool).
  \item See MITE Corp., 457 U.S. at 633–34 (“This policy of ‘evenhandedness’ represented a conviction that neither side in the contest should be extended additional advantages vis-à-vis the investor, who if furnished with adequate information would be in a position to make his own informed choice.”) (citation omitted).
  \item See H.R. REP. No. 90-1711, at 4 (1968) (“The persons seeking control, however, have information about themselves and about their plans which, if known to investors, might substantially change the assumptions on which the market price is based. This bill is designed to make the relevant facts known so that shareholders have a fair opportunity to make their decision.”). The effect of information asymmetries on corporate governance is so well documented that Gregory Mankiw’s introductory microeconomics textbook highlights this issue as its first case study related to information asymmetries. See N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 485–86 (4th ed. 2007) (discussing how in the corporate context, information asymmetries exacerbate the principal-agent problem and how boards of directors oversight of management just shifts the problem to a different set of actors). The importance of information asymmetries is borne out by the fact that in 2001 the Nobel Prize in Economics was awarded to three economists who had studied the phenomenon. Nobel Media AB, The Sveriges Riksbank Prize in Economic Sciences in Memory of Alfred Nobel 2001, NOBELPRIZE.ORG (Oct. 10, 2001), http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2001/press.html.
  \item See Joseph E. Seagram & Sons, Inc. v. Conoco, Inc., 519 F. Supp. 506, 508 (D. Del. 1981) (“In so holding, the court found that the 20-day state provision was inimical to the purposes of the Williams Act and that the tender offeror was thus likely to succeed on his preemption claim.”) (citing Kennecott Corp. v. Smith, 637 F.2d 181 (3d Cir. 1980)).
  \item These increases are not the result of post-merger market power but rather are likely the result of efficiencies or synergies. Michael C. Jensen & Richard S. Ruback, The Market for Corporate Control: The Scientific Evidence, 11 J. FIN. ECON. 5, 7–8 (1983).
  \item See id. The study does not indicate whether this difference is statistically significant.
  \item Firms often have superior industry-specific information about their competitors, and therefore are better able to identify inefficiently managed firms in their industry. For example, competitors are more likely to understand industry benchmarks for profit, capital expenditures, R&D, and SG&A ratios. Those with relatively weaker information will either bid above the true value and generate inefficiencies by transferring bidder shareholder value
\end{itemize}
to target shareholders, or they will bid below the true value, which will either destroy target shareholder value or be resisted by target management on the basis that it undervalues the target. Because these bidders are more likely to generate an antitrust challenge, they may actually face a unique set of expected transaction costs. Some evidence suggests that the regulatory time delay may comprise the largest component of these additional costs. J. Gregory Sidak, Antitrust Preliminary Injunctions in Hostile Tender Offers, 30 Kansas L. Rev. 491, 493 (1982) ("The litigation costs that an antitrust injunction imposes on an offeror, though substantial, seem unlikely to exceed the offeror’s risk-adjusted expected benefit from the takeover. Rather, delay seems to be the more determinative tactical result of an antitrust injunction.") (citation omitted). Ideally, these costs should be minimized to avoid discouraging otherwise efficient transactions. Insofar as the FTC raises the transaction costs to these bidders through delay and costs associated with defending against the challenge, it dissuades efficient transactions.

Mergers that conglomerate relatively unrelated firms are rarely challenged by antitrust regulators, but they also present few opportunities to generate synergies. After a wave of these sort of mergers in the 1960s and 1970s, the ensuing period discredited the notion that this would achieve efficiencies. The 1980s produced a large increase in hostile tender offers aimed at "busting up" these conglomerates. Gerald F. Davis et al., The Decline and Fall of the Conglomerate Firm in the 1980s: The Deinstitutionalization of an Organizational Form, 59 Am. Soc. Rev. 547, 547–48 (2007).

See Donald C. Langevoort, State Tender-Offer Legislation: Interests Effects and Political Competency, 62 Cornell L. Rev. 213, 228 (1977) ("The original pro-management version of the Williams Act first introduced in 1965, contained a twenty-day waiting period requirement.").


See id.


See supra text accompanying note 5.

As alleged in a complaint against Pharmacia’s board in Delaware Chancery court, “[D]uring August 2011, the Director Defendants adopted a Stockholder Rights Agreement (the ‘Poison Pill’), which will effectively render closing the Tender Offer impossible . . . the Poison Pill was clearly designed to entrench current management to the detriment of the Pharmacia’s stockholders . . . .” Verified Complaint at ¶ 12, Omnicare, Inc. v. Pharmacia Corp., 2011 WL 3983186 (Del. Ch. dismissed 2012). The case was never decided because the offer was revoked after the FTC initiated Part III proceedings.


Eleven merger-related Part III proceedings were identified between 2011 and the present.


In the Schering-Plough matter, the Commission was subsequently reversed by the circuit court, after the court criticized the Commission for carving out “arbitrary exceptions,” contradicting itself, and arriving at a conclusion that was “undercut” by “substantial and overwhelming evidence.” Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1062 & n.10, 1071 (11th Cir. 2005).

According to the FTC Rules of Practice, it will take five months to the administrative hearing, 30 business days for a hearing, up to 100 days for the ALJ initial decision, and 100 days for a Commission decision reviewing and potentially reversing an ALJ decision. See FTC Rules of Practice, 16 C.F.R. §§ 3.11(b)(4), § 3.41(b)(4), § 3.51(a), § 3.52(a)(1) (2009).

In 1988, executives at Stevens were faced with takeover bids from Odyssey and Pepperell. Odyssey seemed poised to retain Stevens’s top executives, which led Stevens to resist Pepperell’s bid on grounds that it “presented serious antitrust considerations.” In the midst of a bidding war, the FTC gave Pepperell the “green light” if it agreed to divest a portion of Stevens. “This made it clear to all parties that the bidding might go much higher.” The bidding process, which started “early in February,” was brought to a close a little over two months after it started through a joint Pepperell-Odyssey offer only after the FTC clarified the antitrust approval risk associated with Pepperell’s offer. See Robert J. Cole, 3-Month Battle for J.P. Stevens Ends, N.Y. Times (Apr. 26, 1988), http://www.nytimes.com/1988/04/26/business/3-month-battle-for-jp-stevens-ends.html?pagewanted=all

The SMARTER Act, being considered by the Senate, would require the FTC to seek to enjoin mergers permanently in an Article III court rather than preliminarily enjoin them in a district court and then litigate the antitrust merits in a Part III proceeding. Motivating this change is the view that because of its follow-on Part III proceeding, the FTC is subject to different standards than is the DOJ in an Article III court proceeding. As of April 4th, 2016, the Bill had passed the House of Representatives and had been referred to the Senate. H.R.2745–Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015, CONGRESS.GOV (Aug. 23, 2016, 7:12PM), https://www.congress.gov/bill/114th-congress/house-bill/2745. The relevant provision has been generally well received by at least one FTC commissioner. Maureen Ohlhausen, Commissioner, Fed. Trade Comm’n, Remarks at the U.S. Chamber of Commerce: A SMARTER Section 5 (Sept. 25, 2015), https://www.ftc.gov/system/files/documents/public_statements/084511/150925smartersection5.pdf.

Notably, the Airgas poison pill was upheld by the Delaware court on the grounds that the board had concluded in good faith that Air Products’ offer was inadequate, a conclusion that was supported by the fact that “the three Air Products Nominees on the Airgas board have now wholeheartedly joined in the board’s determination—what is more, they believe it is their fiduciary duty to keep Airgas’s defenses in place.” Air Products & Chemicals, 16 A.3d at 122.

Part of the motivation for the SMARTER Act is that the FTC has greater leverage over the DOJ because the FTC can pursue a drawn out Part III proceeding. See H.R. Rpt. No. 113-658, at 4 (2014).

Insofar as the FTC simply does not wish to give the bidder a chance to challenge its decision or maintains that the FTC would not be able to satisfy the requirement of a preliminary injunction, this option would be ineffective.


bl[e] the eggs” after the merger is consummated weighs in favor of the public equities). While relevant to the equities, reading this to suggest that an immediate irreparable harm is a prerequisite for the FTC to be granted an injunction would undo the very conscious alteration embodied in 15 U.S.C. § 53(b).

37 As codified in 28 U.S.C. § 2201. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 129 (2007) (“The dilemma posed by that coercion—putting the challenger to the choice between abandoning his rights or risking prosecution—is ‘a dilemma that it was the very purpose of the Declaratory Judgment Act to ameliorate.’”) (citation omitted).

38 MedImmune, 549 U.S. at 127 (citation omitted)

39 See id. at 128–29 (“Our analysis must begin with the recognition that, where threatened action by government is concerned, we do not require a plaintiff to expose himself to liability before bringing suit to challenge the basis for the threat—for example, the constitutionality of a law threatened to be enforced.”). This hypothetical differs from two identified examples where parties unsuccessfully sought to use a declaratory judgment to resolve antitrust approval issues. In Cableamerica Corp. v. FTC, 795 F. Supp. 1082 (N.D. Ala. 1992), the plaintiffs attempted to preclude the FTC from conducting HSR review. In another case, SCI sought a declaratory judgment that its proposed hostile acquisition of Loewen would not be anticompetitive in order to prevent Loewen’s board from resisting the transaction on antitrust grounds; the declaratory judgment action was dismissed when Loewen brought a competing suit to block the transaction in the Eastern District of New York. The Loewen Grp., Inc., Loewen Group Prevails in Texas Federal Court—Loewen’s Antitrust Lawsuit Against SCI to Proceed in New York Federal Court (Form 8-K) (Dec. 1, 1996), https://www.sec.gov/Archives/edgar/data/845577/0000950150-96-001491.txt.

40 See, e.g., United States v. Sungard Data Sys., Inc., 172 F. Supp. 2d 172, 179 (D.D.C. 2001) (“On the morning of October 23—just minutes before the Bankruptcy Court was to approve the acquisition—this Court entered a stipulated order by which the parties agreed to preserve the status quo until the earlier of 1) the Court’s ruling on plaintiff’s request for permanent injunctive relief or 2) November 15, 2001.”).

41 See H.R. Rep. No. 114-449, at 3–4 (2015) (“Generally, DOJ agrees with the transaction parties to combine the proceedings for both a preliminary injunction and permanent injunction before the district court.”).

42 See Stephen M. Axinn, Merger Review and Litigation Involving the Acquisition of Bankrupt Companies, ANTITRUST, Summer 2002, at 74–75. In the context of a challenge to a cash tender offer, the court may be unable to reproduce such a short timeline because the HSR Act affords regulators less time to review cash tender offers. See 15 U.S.C. § 18(a)(1)(B).


44 See H.R. Rep. No. 114-449, at 3–4 (2015) (“The FTC’s practice is to seek only a preliminary injunction, despite the fact that it has the authority to consolidate the proceedings in the same fashion as DOJ. In fact, the FTC has affirmatively fought against efforts to consolidate the preliminary injunction and permanent injunction proceedings.”). Typically the FTC seeks a preliminary injunction in support of a Part III proceeding; in fact, where the FTC seeks a preliminary injunction, it is required to file a Part III complaint within 20 days. 15 U.S.C. § 53(b)(2). Thus, as long as the FTC does not seek a preliminary injunction, as would be the case in an expedited trial, it is free to challenge the acquisition in a federal court.

45 This conclusion is only reinforced in light of the changes the proposed SMARTER Act would make and their underlying motivations.