

**Statement of Commissioner Christine S. Wilson**

In the Matter of Staples, Inc. / Essendant, Inc.

File No. 181-0180

January 28, 2019

Staff in this case conducted a thorough examination, sifted through the resulting evidence to identify legitimate antitrust concerns, and crafted a remedy to address them. I therefore support the action the Commission takes today. Given my dissenting colleagues' desire to abstract from the facts of this case to discuss vertical merger policy writ large, I write separately to express my views. To be clear, I base my vote upon the theories, evidence, and facts of this case, rather than upon any general view of what the Commission's vertical merger policy is or should be.

**A. The Concerns Voiced About Vertical Mergers Are Part of a Broader Debate**

It is fashionable today to argue that antitrust policy has long been too permissive. My two dissenting colleagues echo this claim,<sup>1</sup> citing left-leaning Washington think tanks and a few academics.<sup>2</sup> According to some proponents of this view, our alleged laxity in antitrust enforcement has led to historic levels of consolidation and concentration. This, in turn, is apparently the cause of all that ails us, from declining competitiveness to greater income inequality, stagnant wages, and reduced innovation.<sup>3</sup>

Yet there is scant evidence that markets are less competitive today than they were in some ill-defined golden age of yore. Commentators most often point to general upward trends in the number of mergers, their valuations, or the size of the largest businesses.<sup>4</sup> While I do not dispute the accuracy of these broad statistics, they simply do not support such a sweeping claim about

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<sup>1</sup> Dissenting Statement of Commissioner Rebecca Kelly Slaughter at 2 & n.6, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) (“I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement. . . . I am also concerned about under-enforcement of horizontal mergers.”); Dissenting Statement of Commissioner Chopra at 2, Staples/Essendant, File No. 181-0180 (Jan. 28, 2019) (“I share the concerns raised by Commissioner Slaughter and agree that our approach can lead to lax enforcement.”).

<sup>2</sup> Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1 (“Right now, a great debate is taking place in Washington policy circles and even around the country at family dinner tables. The debate concerns the consequences for American citizens of fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy.”); *see id.* at 1 n.1 (collecting citations to work by the Roosevelt Institute, Open Markets Institute, and academics Grullon et al.).

<sup>3</sup> *See, e.g.*, Senate Democrats, A Better Deal: Cracking Down on Corporate Monopolies, at 1 (2017) [hereinafter A Better Deal], <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf> (“Over the past thirty years, growing corporate influence and consolidation has led to reductions in competition, choice for consumers, and bargaining power for workers. The extensive concentration of power in the hands of a few corporations hurts wages, undermines job growth, and threatens to squeeze out small businesses, suppliers, and new, innovative competitors.”)

<sup>4</sup> *See, e.g.*, Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 2 (arguing vertical mergers “present an enforcement challenge that we must meet” because “companies announced mergers at record rates in 2018,” “three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components,” and “some observers believe that recent high-profile vertical mergers . . . will spark further vertical merger activity”); A Better Deal, *supra* note 3, at 1 (“Over the last thirty years, courts and permissive regulators have allowed large companies to get larger, resulting in higher prices and limited consumer choice in daily expenses such as travel, cable, and food and beverages.”).

the failure of American antitrust policy. What I would find persuasive, but have not seen, is evidence that firms' market power has increased significantly in relevant *antitrust* markets throughout the American economy and that this change has meaningfully harmed American consumers.<sup>5</sup> My dissenting colleagues do not make this more probative claim, and for good reason; there is no such evidence today.

What we see instead are highly flawed analyses<sup>6</sup> that have been roundly criticized.<sup>7</sup> Perhaps the most common mistake assumes increased concentration, and consequently consumer harm, using *ad hoc* estimates of increased revenue shares in one industry or another.<sup>8</sup> As any practitioner knows, broadly defined "industries" are rarely coterminous with relevant antitrust markets,<sup>9</sup> which usually are defined around the demand substitutes available to customers. Nor are revenues always the best measure of competitive significance. Even if these industry revenue shares were calculated within a relevant antitrust market, and even if they contained all relevant competitors,<sup>10</sup> courts routinely recognize that such shares are merely the first step in a much deeper market power analysis.<sup>11</sup> They therefore tell us nothing about whether merger policy has

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<sup>5</sup> As in any case we bring, such an analysis typically requires one to define a relevant market, identify competitors, estimate each rival's competitive significance, evaluate entry, exit, repositioning, and other changes to these competitive dynamics, and estimate how consumer welfare is likely to change as a result of the proposed transaction.

<sup>6</sup> See OPEN MARKETS INSTITUTE, AMERICA'S CONCENTRATION CRISIS (2019), available at <https://concentrationcrisis.openmarketsinstitute.org/>; JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY (2015); COUNCIL OF ECONOMIC ADVISORS, BENEFITS OF COMPETITION AND INDICATORS OF MARKET POWER (updated May 2016), available at [https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502\\_competition\\_issue\\_brief\\_updated\\_cea.pdf](https://obamawhitehouse.archives.gov/sites/default/files/page/files/20160502_competition_issue_brief_updated_cea.pdf).

<sup>7</sup> See Michael Vita & F. David Osinski, *John Kwoka's Mergers, Merger Control, and Remedies: A Critical Review*, 82 ANTITRUST L.J. 361 (2018); Joshua D. Wright, "Market Concentration," Note submitted to the Hearing on Market Concentration, Directorate for Financial and Enterprise Affairs, Competition Committee, OECD (June 7, 2018), [https://one.oecd.org/document/DAF/COMP/WD\(2018\)69/en/pdf](https://one.oecd.org/document/DAF/COMP/WD(2018)69/en/pdf); Gregory J. Werden & Luke M. Froeb, *Don't Panic: A Guide to Claims of Increasing Concentration*, ANTITRUST (forthcoming 2019), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3156912](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3156912) (critiquing the CEA analysis).

<sup>8</sup> See, e.g., OPEN MARKETS INSTITUTE, *supra* note 6; Senate Democrats, A Better Deal, *supra* note 3, at 2-3.

<sup>9</sup> For example, the Open Markets Institute estimates market shares for the \$525 billion "e-commerce" industry, which is hardly a relevant antitrust market. See OPEN MARKETS INSTITUTE, *supra* note 6, "E-Commerce."

<sup>10</sup> Omitting or conflating competitors is a common defect in these data. For example, the recent Open Markets Institute analysis discloses in fine print that it omits all imports, which are significant for products such as washing machines. See *id.* ("Data does not include market share for foreign imports."). The same analysis also lumps all "Store Brand" (private label) peanut butter brands together, thereby treating products sold by many different competitors as if they were all under one roof. See *id.*, "Peanut Butter."

<sup>11</sup> See, e.g., *United States v. General Dynamics Corp.*, 415 U.S. 486, 494-98 (1974) (affirming the district court's dismissal of a merger challenge in which "[t]he Government sought to prove a violation of § 7 of the Clayton Act principally through statistics showing that within certain geographic markets the coal industry was concentrated among a small number of large producers; that this concentration was increasing; and that the acquisition of United Electric would materially enlarge the market share of the acquiring company and thereby contribute to the trend toward concentration" because "[i]n *Brown Shoe v. United States*, we cautioned that statistics concerning market share and concentration . . . were not conclusive indicators of anticompetitive effects" and finding that changes in a coal miner's ability to compete in the future merit discounting its present market share); *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 185 F.3d 606, 623 (6th Cir. 1999) (explaining, in a Section 2 case, that "market share is only a starting point for determining whether monopoly power

allowed firms to amass the market power required to raise prices, restrict output, or reduce quality.

Despite the dearth of evidence that antitrust policy has failed to arrest the accumulation of market power,<sup>12</sup> many – including proponents of the so-called “Better Deal” – question essentially everything we have learned about sound antitrust enforcement. They ask: Should we continue to use the consumer welfare standard as our lodestar, or instead jettison it in favor of a more flexible (and amorphous) multifaceted analysis that examines a merger’s impact on wage levels, employment, suppliers, competitors, and any other goals the decision-maker cares to add? Should we continue to evaluate horizontal mergers under the current framework, which considers industry structure alongside entry, efficiencies, and several other competitive dynamics,<sup>13</sup> or should we return to earlier rules that emphasized industry structure to the exclusion of any other relevant factors?<sup>14</sup> Finally, and most pertinent for today’s discussion, should we assume that, in the words of Commissioner Slaughter, vertical mergers “can be just as pernicious in sapping our economy’s vitality”<sup>15</sup> and that “the current approach to vertical integration has led to substantial under-enforcement”?<sup>16</sup>

## B. Procedural Concern

Before turning to the substance, my dissenting colleagues’ eagerness to rethink vertical merger policy raises a procedural concern: It is folly to think that the Commission unilaterally can “fix”

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exists, and the inference of monopoly power does not automatically follow from the possession of a commanding market share”). These cases make clear that courts have rejected the old Structure-Conduct-Performance paradigm advanced by Joe Bain. *See generally* Herbert J. Hovenkamp, *The Neal Report and the Crisis in Antitrust*, at 4, *Univ. Iowa L. Stud. Res. Paper No. 09-09* (Mar. 5, 2009), *available at* [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1348707](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1348707) (describing the fall of the S-C-P model into “the dung heap of defunct economic doctrines”).

<sup>12</sup> Although there is today no evidence of a widespread failure of competition policy, there is ample evidence that vested interests abuse government regulation to carve out spaces safe from competition. Competitor-erected licensing requirements keep capable individuals from entering the vocations of their choice. Certificate of need requirements keep new hospitals from entering incumbents’ regions. Local government regulations restrict the ability of “gig economy” competitors, particularly ride-hailing services and short-term lodging rental firms, to compete against long-established franchises. Sectoral regulation, such as in banking, communication, and transportation, often favors large incumbents over nimble new competitors. Regulatory processes at the U.S. Food and Drug Administration – for example, Citizens’ Petitions – are abused by branded manufacturers to delay the entry of lower-cost generic competitors, sometimes for years. Government-imposed restraints are at least as deleterious to competition as those imposed by private entities, and in many instances are more durable.

<sup>13</sup> *See* U.S. DEP’T OF JUSTICE & FED. TRADE COMM’N, *HORIZONTAL MERGER GUIDELINES* (issued Aug. 19, 2010), *available at* <https://www.ftc.gov/sites/default/files/attachments/merger-review/100819hmg.pdf>.

<sup>14</sup> *See, e.g.*, Open Markets Institute, *The Failure and Potential Redemption of Federal Merger Policy* at 2, Comments Submitted to the U.S. Federal Trade Commission, Hearings on Competition and Consumer Protection in the 21<sup>st</sup> Century, Comment #FTC-2018-0053-D-0021 (filed Aug. 20, 2018) [hereinafter Open Markets Institute FTC Comments] (“The agencies should look to the 1968 Merger Guidelines as a template. Accordingly, they should abandon the current rule of reason-like framework and establish market share and market concentration thresholds for horizontal and vertical mergers. Mergers that exceed these thresholds should be presumptively or per se illegal.”)

<sup>15</sup> Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 1.

<sup>16</sup> *Id.* at 2.

this perceived problem simply by being more aggressive. As the decision of the federal district court in the AT&T-Time Warner case makes clear,<sup>17</sup> the antitrust agencies do not have the last word, and aggressive agency enforcement may well backfire by creating binding precedents that constrain future challenges to problematic deals.

### C. Substantive Concerns

Recognizing both our limited authority to alter antitrust law and the fact that we as government enforcers bear the ultimate burden of proof before a neutral decision-maker (*i.e.*, a federal court), let us finally turn to the crux of the issue raised by my dissenting colleagues: What do we know about the likely competitive effects of vertical mergers?

We know that vertical mergers by definition combine firms that operate at different levels of production. Consequently, and unlike in a horizontal merger, a vertical merger does not alter concentration in any relevant market.<sup>18</sup> Purely vertical mergers therefore do not implicate many of the key competitive dynamics – and particularly the elimination of current competition between the merging firms – at play in horizontal mergers.<sup>19</sup> Indeed, even the scholar my colleague cites in support of her sweeping skepticism of existing vertical merger policy says that competitive harm is likely to occur only in a narrow set of circumstances.<sup>20</sup> Ultimately, we seek to determine not whether harm is theoretically possible, but whether – as required by Section 7

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<sup>17</sup> *United States v. AT&T*, No. 17-2511, slip op. at 4 (D.D.C. June 12, 2018), *appeal docketed*, No. 18-5214 (D.C. Cir.)

<sup>18</sup> For example, if a merger unites a firm with 30 percent of upstream market and a firm with 25 percent of the downstream market, immediately after close the combined firm would still control 30 percent of the upstream market and 25 percent of the downstream market. Its shares have not changed, nor have those of its competitors. By contrast, a horizontal merger combining firms with 25 and 30 percent of the *same* relevant antitrust market results in a combined firm with 55 percent and a marketplace with one fewer competitor.

<sup>19</sup> *See, e.g.*, D. Bruce Hoffman, Director, FTC Bureau of Competition, Vertical Merger Enforcement at the FTC: Remarks at the Credit Suisse 2018 Washington Perspectives Conference, at 2-3, Washington D.C., Jan. 10, 2018, *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/1304213/hoffman\\_vertical\\_merger\\_speech\\_final.pdf](https://www.ftc.gov/system/files/documents/public_statements/1304213/hoffman_vertical_merger_speech_final.pdf) (“In contrast [to horizontal mergers], vertical mergers do not combine substitutes, and in fact often involve complements . . . . Where horizontal mergers reduce competition on their face . . . vertical mergers do not.”).

<sup>20</sup> *See* Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that “efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases”); Steven C. Salop, *Revising the Vertical Merger Guidelines*: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 8 (Nov. 1, 2018), *available at* [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_5\\_georgetown\\_slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf) (“A stronger overarching procompetitive presumption for vertical mergers does not make sense *in oligopoly markets*.”); *see also, e.g.*, James C. Cooper, Luke M. Froeb, Dan O’Brien, & Michael G. Vita, *Vertical Merger Policy as a Problem of Inference*, 23 INT’L J. INDUS. ORG. 639, 641 (2005) (“The theory shows that vertical practices potentially can harm competition. This finding is fragile, however, as anticompetitive equilibria emerge only under specific – and difficult to verify – assumptions about (among other things) costs, demand, the nature of input contracts, conditions of entry, the slope of reaction functions, and the information available to firms.”).

of the Clayton Act – such harm is likely to “substantially lessen competition, or to tend to create a monopoly” in a relevant antitrust market.<sup>21</sup>

On the other side of the ledger, we know that integrating operations at different levels of production often yields clear economic benefits.<sup>22</sup> Perhaps the most commonly cited benefit in the economic literature is the elimination of double marginalization (EDM), which is simply to say that a firm has an economic incentive to reduce the total profit margin it charges customers when it operates at successive levels of production.<sup>23</sup> Some commentators view EDM as a phenomenon inherent in vertical mergers,<sup>24</sup> which may indicate that a lower burden of proof for at least some efficiencies claims would be appropriate in the vertical merger context.<sup>25</sup> That said, our recent hearing on vertical mergers featured a lively debate on whether EDM arises in all vertical mergers.<sup>26</sup> Focusing solely upon the narrow circumstances under which anticompetitive effects are plausible,<sup>27</sup> economic theory suggests that the potential gains from EDM are likely significant.<sup>28</sup>

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<sup>21</sup> 15 U.S.C. § 18; *AT&T*, No. 17-2511, slip op. at 4 (holding the government failed to meet its burden under Section 7 “to establish that the proposed transaction is likely to lessen competition substantially”).

<sup>22</sup> For the seminal work, see R.H. Coase, *The Nature of the Firm*, 4 *ECONOMETRICA* 386 (1937).

<sup>23</sup> See, e.g., Francine Lafontaine, Vertical Mergers: Presentation at the FTC Hearings on Competition and Consumer Protection in the 21st Century, at 86 (Nov. 1, 2018), available at [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_5\\_georgetown\\_slides.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_5_georgetown_slides.pdf) (“Eliminating ‘double markups’”); Remarks of D. Bruce Hoffman, *supra* note 19, at 3 (“Due to the elimination of double-marginalization and the resulting downward pressure on prices, vertical mergers come with a more built-in likelihood of improving competition than horizontal mergers.”); Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, *ANTITRUST*, at 74, 75-76 (Fall 2007) (seeking to categorize the circumstances under which the net competitive effects of a vertical merger, including the elimination of double marginalization, “will benefit consumers” or “might be anticompetitive”).

<sup>24</sup> Transcript at 19, 25, 116, 141, FTC Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), available at [https://www.ftc.gov/system/files/documents/public\\_events/1415284/ftc\\_hearings\\_session\\_5\\_transcript\\_11-1-18.pdf](https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18.pdf) (statements of Prof. Shapiro) (“[T]here are some inherent efficiencies – at least possible efficiencies including elimination of double marginalization. . . . So I think what is fundamentally different is that how do we handle the efficiencies in the vertical deals than horizontal, and we are hearing from panels about these inherent efficiencies, which economists would agree with, including me.”)

<sup>25</sup> The FTC also held hearings on the appropriate welfare standard. See FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearings #1 & #5 (review of competition and consumer protection landscape, concentration and competitiveness in the U.S. economy, privacy regulation, consumer welfare standard in antitrust; consumer welfare and vertical merger policy), Sept. 13, 2018 & Nov. 1, 2018, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>. This debate similarly could have implications for the analysis of both vertical and horizontal mergers. For example, if total surplus (or aggregate economic welfare) is selected as the appropriate welfare standard, then it would be unnecessary to analyze whether and to what extent efficiencies may be passed through to consumers. See, e.g., Roger D. Blair and D. Daniel Sokol, *Welfare Standards in U.S. and E.U. Antitrust Enforcement*, 81 *FORDHAM L. REV.* 2497 (2013).

<sup>26</sup> See FTC, Hearings on Competition and Consumer Protection in the 21st Century, Hearing #5 (consumer welfare and vertical merger policy), Nov. 1, 2018, <https://www.ftc.gov/news-events/events-calendar/ftc-hearing-5-competition-consumer-protection-21st-century>.

<sup>27</sup> Hearing #5 Transcript, *supra* note 27, at 19, 25, 116, 141, (statements of Prof. Salop and Msrs. Hoffman and Yde agreeing that, in Mr. Yde’s words, “we are only going to look at vertical transactions where we are confident that we are looking at an oligopoly at both stages”); Salop, *Revising the Vertical Merger Guidelines*, *supra* note 20, at 8

Vertical mergers also generate other procompetitive benefits. For example, these mergers allow firms at successive levels to coordinate their production, design, or innovation activities, thereby reducing costs, increasing quality, and speeding the introduction of new products.<sup>29</sup> Vertical integration also incentivizes greater investment by harmonizing upstream and downstream incentives and by reducing transaction costs, “free-riding,” and the risk of hold-up.<sup>30</sup> Although my colleague is correct to note that vertical agreements short of a merger can confer similar procompetitive benefits,<sup>31</sup> I have not seen any evidence – and she does not cite any – for the proposition that these contractual arrangements necessarily replicate the benefits of a full merger. To the contrary, economists have long known that there are many circumstances in which contractual arrangements may be inferior to mergers.<sup>32</sup>

We also know that economic models that attempt to predict the net competitive effect of a given vertical merger are often more art than science. Most models identify the possibility of both procompetitive and anticompetitive effects, and sometimes even their magnitude, but make no attempt to assign probabilities to any of them. Standing alone, these “highly stylized [and] largely game-theoretic models” do not provide clear guidance on how to separate the wheat from

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(arguing “[e]nforcement should be focused on oligopoly markets” because in these markets the risk of anticompetitive harm may be larger and the likelihood of procompetitive benefits may be smaller); Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L.J. 1962, 1972 (2018) (“While vertical mergers in oligopoly markets should not be subject to near-per se illegality, they also are not entitled to near-per se legality.”); *see id.* at 1967 (“[F]oreclosure concerns cannot simply be dismissed in oligopoly markets.”); *id.* at 1969 (“[I]n oligopoly markets with multiple competitors, vertical mergers can harm competition from input or customer foreclosure, even without coordination.”).

<sup>28</sup> Cooper, Froeb, O’Brien, & Vita, *supra* note 20, at 658 (“Most models that predict (potential) harm from vertical restraints require pre-existing market power at multiple stages of production. This condition usually implies the existence of efficiencies from vertical control, and the magnitude of the efficiency often rises monotonically with the level of pre-existing market power.”).

<sup>29</sup> *See, e.g.*, Salop, *Revising the Vertical Merger Guidelines*, *supra* note 20, at 13.

<sup>30</sup> *See, e.g.*, Lafontaine, *Vertical Mergers*, *supra* note 23, at 86.

<sup>31</sup> *See* Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 4 (asserting “claimed [efficiency] benefits should not be taken at face value” because, among other things, “[t]he claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements”).

<sup>32</sup> *See, e.g.*, Paul L. Joskow, *Vertical Integration*, in HANDBOOK OF NEW INSTITUTIONAL ECONOMICS 321 (C. Menard & M. Shirley eds., 2008) (summarizing the literature on various forms of vertical integration, from contracting to merger, and explaining that “[c]ontractual incompleteness, and its interaction with the attributes of different types of transactional attributes including asset specificity, complexity, and uncertainty, plays a central role in the evaluation of the relative costs of governance through market-based bilateral contracts versus governance through internal organization”); Oliver E. Williamson, *The Theory of the Firm as Governance Structure: From Choice to Contract*, 16 J. ECON. PERSP. 171, 179-192 (2002) (describing the “make-versus-buy” decision, graphing the relative attractiveness of various options, and addressing its application to vertical integration); Benjamin Klein, Robert G. Crawford, & Armen A. Alchian, *Vertical Integration, Appropriable Rents, and the Competitive Contracting Process*, 21 J. L. & ECON. 297 (1978) (identifying “the possibility of post-contractual opportunistic behavior” as one reason a firm may choose “an intrafirm rather than an interfirm transaction”).

the chaff.<sup>33</sup> The economic evidence regarding completed transactions, however, indicates the typical vertical merger does not harm competition.<sup>34</sup>

Given limitations in the models, and particularly in their ability to reliably predict anticompetitive harm, we must marry these theoretical models with hard evidence collected during the investigation. When the theory and facts both point to a potential diminution in competition, it may be appropriate to take remedial steps, as we have done here. When the model, the evidence, or both do not support this view, it is not appropriate to act.

#### **D. When Crafting a Remedy, We Must Take Care Not to Impose a Cure Worse than the Disease**

Even when we identify a vertical merger that presents meaningful antitrust problems, that is not the end of the analysis. As in any case, we must then choose a remedy that is narrowly tailored to address the likely competitive harms without doing collateral damage. This task is sometimes more difficult than it sounds; as I have written previously, misguided behavioral remedies – particularly in vertical mergers – have sometimes *decreased* competition and harmed consumers. For example, I have been deeply troubled by behavioral remedies imposed in previous vertical mergers that required “compulsory innovation,” the “compulsory FRAND licensing of a product that did not yet exist,” and “long-term bans on serving specific current clients.”<sup>35</sup>

Given the risks of either undershooting or overshooting the mark, I support conducting targeted retrospectives to analyze prior enforcement decisions and determine whether, going forward, revisions to enforcement policy or remedies need to be undertaken. I have long advocated for a more extensive merger retrospectives program, as retrospectives serve as an important check on

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<sup>33</sup> Michael A. Salinger, *Vertical Mergers*, in I OXFORD HANDBOOK OF INTERNATIONAL ANTITRUST ECONOMICS 551, 574 (Roger D. Blair & D. Daniel Sokol eds., 2015).

<sup>34</sup> See, e.g., Francine Lafontaine & Margaret Slade, *Vertical Integration and Firm Boundaries: The Evidence*, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding “even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances”); Cooper, Froeb, O’Brien, & Vita, *supra* note 20, at 658 (“Most studies find evidence that vertical restraints/vertical integration are procompetitive” and “[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings.”); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission’s Hearings on Competition and Consumer Protection in the 21st Century, *Vertical Mergers*, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies “indicated vertical integration resulted in positive welfare changes” or “no change” in welfare); David Reiffen and Michael Vita, *Is There New Thinking on Vertical Mergers? A Comment*, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, *Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment*, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that “efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases”).

<sup>35</sup> Christine Wilson & Keith Klovers, *Yes We Can, But Should We? Merger Remedies During the First Obama Administration*, CPI ANTITRUST CHRONICLE 2 (Dec. 2014). As I explained there, I have substantially fewer qualms about long-standing and less invasive tools, such as the “firewalls, fair dealing, and transparency provisions” the Antitrust Division endorsed in the 2004 edition of its *Policy Guide*. U.S. DEP’T OF JUSTICE, ANTITRUST DIVISION POLICY GUIDE TO MERGER REMEDIES 22-25 (June 2004), available at <https://www.justice.gov/sites/default/files/atr/legacy/2011/06/16/205108.pdf>.

whether we are employing sound enforcement policies.<sup>36</sup> But I am wary of clearing mergers with remedies, after extensive investigations, while simultaneously threatening to undo those mergers later, which is precisely what Commissioner Slaughter hopes to do.<sup>37</sup> Absent certainty, a merged entity will be reluctant to make capital and other investments that may be lost if a subsequent merger challenge forces it to unwind the transaction. This uncertainty is bad for both businesses and their consumers. If applied on anything like the scale Commissioner Slaughter envisions, it also risks returning the Commission to its earlier role as the “national nanny” with an ongoing mandate to monitor prices, output, entry, and other marketplace developments throughout the economy.<sup>38</sup>

## Conclusion

For all of these reasons, I have grave concerns about my dissenting colleagues’ enthusiasm for treating all vertical mergers with skepticism and conducting a fundamental reevaluation of our vertical merger policy. Policy should be dictated by applicable law and relevant facts. On that basis, there are very few vertical mergers that should be challenged. Two of my colleagues believe that this is one of those few vertical mergers that the Commission should challenge, based on nothing more than a hunch that Staples “may” or “might” be able to harm rivals by integrating vertically. I prefer to base my analysis on the evidence we have gathered and the law as it exists today, and therefore vote to accept the limited relief we order.

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<sup>36</sup> See “Dynamic Efficiencies in Merger Analysis,” Submission of the Business and Industry Advisory Committee, Presented by Christine S. Wilson to the OECD Competition Committee (June 6, 2007) at para. 58 (asserting that “it would be instructive for enforcement agencies to perform retrospective studies of merger enforcement decisions . . . to assess the efficacy of merger policy generally, and would be particularly useful in assessing the impact of dynamic efficiencies, given that benefits from such efficiencies may accrue over extended periods of time”).

<sup>37</sup> Dissenting Statement of Commissioner Slaughter, *supra* note 1, at 9-10 (“With the benefit of pre-commitment, hindsight, and ongoing monitoring, we may be able to refine and bolster confidence in our analysis and deter or prosecute future anticompetitive conduct by Staples. Ultimately, if there is sufficient evidence of actual anticompetitive effects as a result of the transaction, we can and should bring an enforcement action to break-up the merger.”).

<sup>38</sup> See, e.g., Daniel A. Crane & Thibault Schrepel, *The Democrats’ ‘Better Deal’ Is Neither Better Nor a Deal*, N.Y.U. J. L. & BUS. 1, 4 (2017) (“Allowing the agencies to give conditional blessing to a merger and then hover over the merged company for years with the constant threat of divestiture would create a ‘national nanny’ culture in which the agencies became de facto regulators rather than competition enforcement agencies. The fear of post hoc divestiture orders would deter beneficial investments and tearing apart companies integrated for years would result in chaos and economic loss (for all of the reasons recognized by the D.C. Circuit in *Microsoft*). It’s a bad idea.”).