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Federal Trade Commission

Opening Keynote of Commissioner Noah Joshua Phillips*

Competing for Companies: How M&A Drives Competition and Consumer Welfare

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Good morning and thanks for having me. I'm excited to be back at the Global Antitrust Economics Conference here at NYU. Last year, I stood here and spoke about the idea that common ownership presented a competition problem, and how the antitrust assumptions underlying the common ownership theory run up against our understanding of corporate law and policy. Today, I want to talk about another context where corporate law, governance, and antitrust come together: namely, the market for corporate control.

Considering the market for corporate control is critical. As politicians and the popular press focus increasingly on antitrust, they—and policymakers like me—need to take into account what experience and learning tell us about the market; and avoid policies that undermine it.

The market for corporate control is, essentially, competition *for* companies, competition to run them better. This competition comes from a number of sources,

* The views expressed are my own and do not necessarily reflect those of the Commission or of any other Commissioner.

including other firms (which may be current or potential rivals), and private equity firms or activist investors specializing in identifying and enhancing under-performing firms.

The market for corporate control is not about consolidation. In fact, it can be, and has in American history been, also a mechanism for *de*consolidation, forcing firms to focus on core strengths and shed extraneous efforts.

This competition for the company can meaningfully benefit consumer welfare. By ousting subpar managers, and keeping management on their toes, the market for corporate control can increase efficiency within a firm, making it a stronger competitor that, for instance, is more innovative, offers better prices or higher quality, or increases output. The market for corporate control is a market mechanism that forces firms to compete.

Given the competition, and, thus, real consumer benefits, that the market for corporate control can drive, I'd like to spend some time today unpacking what the market for corporate control is, how it operates, and how antitrust agencies should consider its effects when making decisions. The punchline being that policies that work *with* beneficial market forces work better, and last longer, than those that ignore or work in opposition to them.

I. The Market for Corporate Control

The notion of a "market for corporate control" was revolutionary when Henry Manne first outlined it, in his seminal 1965 article.[1] Up to that time, following Berle

[1] Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); *see also* Blanaid Clarke, *The Market for Corporate Control: New Insights from the Financial Crisis in*

and Means,[2] corporate law scholarship preoccupied itself with the assumption that management had all the power and shareholders had no meaningful way to constrain it, leaving shareholders open to self-dealing and other managerial abuse.[3] Antitrust law and scholarship, for its part, thought mergers between competitors generally to have "no important saving grace", and their only justification—aside from increasing market power—was a sort of "failing firm" defense, that the transaction would avoid liquidation or bankruptcy.[4]

Manne's groundbreaking work challenged both these premises, introducing a new, procompetitive, rationale for such transactions. Drawing on the New Institutional Economics literature's insight that we should not rely on the "black box theory of the firm and a plain vanilla theory of markets", he questioned how

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Ireland, 36 SEATTLE U.L. REV. 577, 578 ("Like much of Manne's work, Mergers and the Market for Corporate Control has been described quite correctly as 'groundbreaking,' 'revolutionary,' and 'pioneering.' Roberta Romano argued that the article marked the 'intellectual origin of what would become the new paradigm for corporate law.'" (quoting Daniel Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, *Manne, Mergers and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005)).

[2] ADOLF A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1933).

[3] *See, e.g.*, Bayless Manning, Book Review, 67 YALE L.J. 1477, 1485-87 (1958) (reviewing J.A. LIVINGSTON, THE AMERICAN STOCKHOLDER (1958)) ("In 1932, Berle and Means vivisected the modem corporation. They found a virtually omnipotent management and an impotent shareholdership."); William J. Carney, *The Legacy of "The Market for Corporate Control" and the Origins of the Theory of the Firm*, 50 CASE W. RES. L. REV. 215, 223 (1999) ("Managers were viewed as possessing virtually complete discretionary power over firm assets. Logically, it would follow that they were also claimants on the residual cash flows of the firm. Stockholders, content with a 'satisfactory' return, were in effect no different than holders of risky debt.")

[4] Manne, *supra* note 1, at 110 ("Mergers among competitors would seem to have no important saving grace. The position has gained considerable legal currency that any merger between competing firms is at least suspect and perhaps per se illegal.").

transaction costs might be affecting firm organization and strategies.[5] Manne's basic idea, in his own words, was:

> that the control of corporations may constitute a valuable asset; that this asset exists independent of any interest in either economies of scale or monopoly profits; that an active market for corporate control exists; and that a great many mergers are probably the result of the successful workings of this special market.[6]

To summarize: competition to run a firm, or competition for the firm, is a real phenomenon driving M&A strategy and decision-making. The competitive impulse—"Hey, I can do that better!"—applies to management just as well as, say, product development.

Management matters. In fact, a book Gallup published earlier this month bears this out, finding that 70% of firm productivity depends on the quality of management.[7] How robust are the findings? Gallup called this conclusion "'the single most profound, distinct and clarifying finding' in its 80-year history".[8] In 1965, Manne was concerned that antitrust law was—but should not be—artificially limiting the market for management, i.e., the market for corporate control.

In essence, the way the market for corporate control operates is that, all else equal, a relatively poorly managed firm's underperformance is reflected in a lower

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[5] Oliver E. Williamson, *Opening the Black Box of Firm and Market Organization: Antitrust*, *in* THE MODERN FIRM, CORPORATE GOVERNANCE AND INVESTMENT 12 (Per-Olof Bjuggren & Dennis C. Mueller, eds. 2009).

[6] Manne, *supra* note 1, at 112.

[7] JIM CLIFTON & HIM HARTER, IT'S THE MANAGER (Gallup 2019).

[8] Sam Walker, *The Economy's Last Best Hope: Superstar Middle Managers*, THE WALL STREET J. (Mar. 24, 2019), https://www.wsj.com/articles/the-economys-last-best-hope-superstar-middle-managers-11553313606 (quoting Gallup).

stock price, making the company an attractive target to those who believe they can manage it better. As Manne explained, "the potential return from the successful take-over and revitalization of a poorly run company can be enormous."[9] The tremendous wealth generated by private equity firms and activist investors bears this out, at least in part. But the point is that the value reflects tremendous gains from better management.

The returns from improving a firm's management are myriad and extend not only to the new managers and shareholders, but to consumers. For antitrust purposes, it is critical to recognize that many of these benefits coincide with consumer welfare-enhancing outcomes. For instance, a more efficient firm may increase its output, lower prices, offer better quality or services, or increase innovation. While we tend to think of innovation in terms of new technologies or new pharmaceutical drugs, business innovation (like new management models, new pricing schemes, integration, etc.) is, as Gallup's recent book highlights, also essential to a thriving marketplace.

Competition to manage a firm thus operates to drive consumer welfare. Firms profit principally by providing value to consumers—by competing to offer superior products and services at better prices—not by engaging in anticompetitive conduct. If the goal is competition—and it should be—then market mechanisms compelling firms to compete are not just good, but essential. No amount of

[9] Manne, *supra* note 1, at 113.

government intervention can match the power of the market; and, where the latter fights against the former, it will be less effective.

The welfare increases from the market for corporate control can arise not only from consolidation, but also from deconsolidation. The theory of the market for corporate control does not depend on an increase in market share, or a company's size. It is about moving resources to their highest valued uses, and there is no *ex ante* rule for where that value may be located. The goal of the law, in keeping with Coase,[10] should be to facilitate that move by reducing transaction costs, provided it is not otherwise anti-competitive. As we'll see, empirical as well as anecdotal evidence indicates that the consumer welfare benefits of a functioning market for corporate control can arise independently of size or market power factors.

For years, scholars and policy-makers around the world have recognized and accepted the notion of the market for corporate control.[11] While Manne's primary target in 1965 was antitrust law, corporate law has embraced his lessons more enthusiastically. Frank Easterbrook argues that the existence of the market for corporate control should make us skeptical of incumbent managers' resistance to changes in management, including, for instance, tender offers.[12] In the U.S.,

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[10] R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937); R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

[11] *See e.g.*, McChesney, *supra* note 1, at 246 ("But the good news is that the notion of a market for corporate control is now so well established that its origins no longer need citation."); Paul A. Pautler, *Evidence on Mergers and Acquisitions*, 3 & n.12 (2001), https://www.ftc.gov/sites/default/files/documents/reports/evidence-mergers-and-acquisitions/wp243_0.pdf ("Many economists consider an active market for corporate control an important safeguard against inefficient management.").

[12] *See, e.g.*, Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1169 (1981).

scholars like him and Jonathan Macey, as well as shareholder advisory services, push for governance structures that permit the market for corporate control to function, and avoiding those that impede it by imposing unnecessary transaction costs.[13] The E.U. adopted its 2004 Directive on Takeover Bids[14] following expert input recommending that member states adopt mechanisms "favourable to the development of an efficient market for corporate control in the EU".[15]

The broad acceptance of the positive impact of the market for corporate control reflects ample real-world evidence. Whether a firm's underperformance is reflected in its stock price is, for instance, often readily observable; so we frequently see public instances in which an investor announces its belief that a firm is undervalued.[16] Such actions can lead to changes in management, to changes in incumbent management behavior, or to other outcomes that may be procompetitive.

Facts surrounding a recent case at the Federal Trade Commission bear out a version of this dynamic. Last April, Genuine Parts Company announced it would

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[13] *See, e.g.*, Jonathan R. Macey, et al., *The Regulation of Corporate Acquisitions: A Law and Economics Analysis of European Proposals for Reform*, 1995 COLUM. BUS. L. REV. 495 (1995); *see also* George Bittlingmayer, *The Market for Corporate Control (Including Takeovers)*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME III (Bouckaert & Gerrit, eds., 1998).

[14] Directive 2004/25/EC of the European Parliament and of the Council of 21 April 2004 on takeover bids, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0025&from=EN.

[15] REPORT OF HIGH LEVEL GROUP OF COMPANY LAW EXPERTS ON ISSUES RELATED TO TAKEOVER BIDS, at 63 (Brussels, Jan. 2002); *see also* Clarke, *supra* note 1, at 580-84.

[16] In an example about which I'll elaborate shortly, Elliott Management, an activist fund manager, wrote a letter to eBay's board, outlining an opportunity it believed could lead to eBay's stock being valued 75 to 100 percent higher than it was at the time of the writing. *See* Press Release, Elliott Management Sends Letter to Board of Directors of eBay, BUSINESS WIRE (January 22, 2019), https://www.businesswire.com/news/home/20190122005513/en/Elliott-Management-Sends-Letter-Board-Directors-eBay. And in another striking example, Catherine Wood, Chief Investment Officer of ARK Invest, wrote an open letter to Tesla, arguing that Tesla—then valued at $420 per share—"should be valued somewhere between $700 and $4,000 per share in five years." *See* Catherine Wood, *Dear Elon: An Open Letter against Taking Tesla Private*, ARK INVEST (Aug. 22, 2018), https://ark-invest.com/research/tesla-private.

spin off its office supply wholesale distribution business, S.P. Richards, and merge it with its direct and primary competitor in this space, Essendant.[17] Depending on how you define the market, this was a merger to monopoly. Staples, Inc.—a retailer of office products and related services—soon thereafter made an unsolicited initial proposal to Essendant. Unlike an S.P. Richards/Essendant deal, the Staples variant would not eliminate a direct competitor, but rather would combine firms at different stages of the office supply distribution chain. Essendant declined Staples' initial proposal, opting for the horizontal merger.[18] Just weeks later, however, Staples made another bid for Essendant, which Essendant's board determined was reasonably likely to lead to a "Superior Proposal", and further negotiations ensued. After months of back and forth, Genuine Parts declined to make any further offers, and Staples emerged as the successful bidder.

As you may have read, the Commission divided on how to address the vertical merger; but I'm not aware of anyone who believes the S.P. Richards deal—the horizontal version—was *less* anti-competitive. In other words, market forces helped drive the realization of an almost certainly better deal from an antitrust perspective—avoiding a deal between two primary, direct competitors that almost certainly would have raised far more significant competitive concerns. The market

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[17] *Genuine Parts to Merge S.P. Richards Business with Essendant*, REUTERS (Apr. 12, 2018), https://www.reuters.com/article/us-genuine-parts-divestiture-essendant/genuine-parts-to-merge-s-p-richards-business-with-essendant-idUSKBN1HJ1NB.

[18] *Essendant Confirms Receipt of Two Proposals: An Unsolicited All-Cash Offer from Staples, Inc. and a Contingent Cash Payment from Genuine Parts Company as an Enhancement to the agreed upon Merger*, PR Newswire (May 16, 2018), https://www.prnewswire.com/news-releases/essendant-confirms-receipt-of-two-proposals-an-unsolicited-all-cash-offer-from-staples-inc-and-a-contingent-cash-payment-from-genuine-parts-company-as-an-enhancement-to-the-agreed-upon-merger-300649992.html.

for corporate control was allowed to act, in concert with the antitrust laws, and it yielded greater consumer welfare.

Empirical evidence corroborates that the market for corporate control generates value for shareholders, and not at cost to consumers. Studies find the "evidence indicates that corporate takeovers generate positive gains, that target firm shareholders benefit", that, on average, "bidding firm shareholders do not lose", and further, that the "gains created by corporate takeovers do not appear to come from the creation of market power".[19] These findings are consistent with the idea

[19] Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, J. FIN. ECON. 11 (1983) ("The evidence indicates that corporate takeovers generate positive gains, that target firm shareholders benefit, and that bidding firm shareholders do not lose. The gains created by corporate takeovers do not appear to come from the creation of market power. With the exception of actions that exclude potential bidders, it is difficult to find managerial actions related to corporate control that harm shareholders. Finally, we argue the market for corporate control is best viewed as an arena in which managerial teams compete for the rights to manage corporate resources."); *see also* Gregg A. Jarrell, James A. Brickley & Jeffrey M. Netter, *The Market for Corporate Control: The Empirical Evidence Since 1980*, 2 J. ECON. PERSPECTIVES 49 (Winter 1988) ("This review has confirmed the basic conclusions of Jensen & Ruback's (1983) review article and has shed light on some questions Jensen and Ruback were forced to leave unanswered."); Mark L. Mitchell & Kenneth Lehn, *Do Bad Bidders Become Good Targets?*, 98 J. POLITICAL ECON. 372, 396 (1990) ("[A]lthough critics often lament the advent of hostile 'bust-up' takeovers (i.e., takeovers that are followed by large divestitures of the target firms' assets), this paper supports the argument that hostile bust-up takeovers often promote economic efficiency by reallocating the targets' assets to higher-valued uses."); Bradley, Desai & Kim, *The Rationale Behind Interfirm Tender Offers: Information or Synergy?*, 11 J. FIN. ECON. 183 (1983) ("There is empirical evidence that corporate acquisitions by tender offers provide significant and positive abnormal returns to the stockholders of both the target and the acquiring firms. This finding is consistent with the hypothesis that tender offers are an attempt by the bidding firm to exploit some specialized resource by gaining control of the target and implementing a higher-valued operating strategy." (citations omitted)); Roberta Romano, *A Guide to Takeovers: Theory, Evidence, and Regulation*, 9 YALE J. REG. 119 (1992) ("Though no single theory is sufficient to explain all takeovers, the empirical evidence is most consistent with explanations of takeovers as value-maximizing events for target firm shareholders that enhance social efficiency."); Andrade, Mitchell & Stafford, *New Evidence and Perspectives on Mergers*, 15 J. ECON. PERSPECTIVES 103, 117 (2001) ("Our analysis of the immediate stock market response to more than 4,000 mergers completed during the 1973-1998 concurs with these prior reviews [including Jensen & Ruback]."); Pautler, *supra* note 11 (surveying the literature); Kathleen Fuller, et al., *What Do Returns to Acquiring Firms Tell Us? Evidence from Firms that Make Many Acquisitions*, 57 J. FIN. 1763, 1766-78 (2002) ("Our results indicate that bidder shareholders gain when the bidding firm buys a private firm or a subsidiary of a public firm and lose when the bidder buys a public firm.").

that a market for corporate control is real and not dependent on anticompetitive reductions in output or increases in market share. Rather, it can be an important force for enhancing competition and consumer welfare.

All of this is not to say the market for corporate control always functions perfectly, that shareholder value always aligns with consumer welfare, or that M&A decisions are never driven by anticompetitive goals.[20] But it does establish the market for corporate control as one to be fostered, and demonstrate the kind of trade-offs that come with chilling M&A activity generally.

II. Deconsolidation: The Market for Corporate Control in Action

The deconsolidating function of the market for corporate control underscores the point. While transactions consolidating high-profile companies tend to receive the lion's share of the popular ink, deconsolidation and spin offs—also important results of the market for corporate control—tend to receive considerably less. I want to dwell a bit today on these kinds of transactions. I take no view on the management or the criticism or proposals in any of the examples I'll discuss, but use them only to illustrate the market for corporate control in action.

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[20] Martin Lipton and others argue that activist investors and other market-for-corporate-control participants taking stakes in companies lead corporate managers to focus unduly on increasing stock prices in the short term. *See, e.g.*, Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187 (1991). But a recent Federal Reserve report contradicts these allegations. NAOMI FELDMAN ET AL., THE LONG AND THE SHORT OF IT: DO PUBLIC AND PRIVATE FIRMS INVEST DIFFERENTLY? (Board of Governors of the Federal Reserve System 2018), https://www.federalreserve.gov/econres/feds/files/2018068pap.pdf ("Our findings suggest that public stock markets facilitate greater investment, on average, particularly in risk, uncollateralized investments. . . . These results suggest that firms with access to capital markets are able to invest more and in particular invest substantially more in R&D—arguably the hardest to collateralize, and most uncertain investments.").

The market for corporate control can force deconsolidation on longstanding, more traditional companies and high tech ones alike. General Electric (GE)—founded by Thomas Edison in 1890[21] and which grew to become a quintessential conglomerate, with everything from nuclear power plants to jet engines to Saturday Night Live—is currently in the midst of significant restructuring. After peaking around 2000, GE's share price tumbled in recent years.[22] GE responded by announcing it would spin off approximately $20 billion worth of business units in order to focus on its core strengths.[23] GE has since spun off several business units, including energy,[24] railroad,[25] industrial-engine,[26] and healthcare,[27] to buyers including existing firms in the same or adjacent spaces and private equity firms.[28]

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[21] *Thomas Edison & The History of Electricity*, GE, https://www.ge.com/about-us/history/thomas-edison (last visited May 29, 2019).

[22] *John Flannery Gets Down to Business Restructuring General Electric*, THE ECONOMIST (June 28, 2018), https://www.economist.com/business/2018/06/28/john-flannery-gets-down-to-business-restructuring-general-electric.

[23] Elizabeth Fournier & Matthew Monks, *GE's Shock CEO Ouster Leaves Billions in Disposals Up for Grabs*, BLOOMBERG (Oct. 8, 2018), https://www.bloomberg.com/news/articles/2018-10-08/general-electric-s-dealmaking-in-new-hands-after-flannery-ousted; Alwyn Scott, *GE Breakup Leaves It with Best and Worst Performers*, REUTERS (June 26, 2018), https://www.reuters.com/article/us-ge-divestiture/ge-breakup-leaves-it-with-best-and-worst-performers-idUSKBN1JM0ZT.

[24] Dana Cimilluca et al., *GE to Combine Oil and Gas Business with Baker Hughes*, THE WALL STREET J. (Oct. 31, 2016), https://www.wsj.com/articles/ge-to-combine-oil-and-gas-business-with-baker-hughes-1477908407?mod=article_inline.

[25] Thomas Gryta, *GE to Merge Rail Division with Wabtec in $11 Billion Deal*, THE WALL STREET J. (May 21, 2018), https://www.wsj.com/articles/ge-to-merge-rail-division-with-wabtec-in-11-billion-deal-1526904626?mod=article_inline.

[26] Ben Dummett & Dana Mattioli, *GE Agrees to Sell Industrial-Engines Unit to Private-Equity Firm Advent*, THE WALL STREET J. (June 25, 2018), https://www.wsj.com/articles/ge-nears-deal-to-sell-industrial-engines-unit-to-private-equity-firm-advent-1529875852?mod=mktw.

[27] Berkeley Lovelace Jr., *GE Expects to Sell Off Almost Half of Its Health Unit, Upping Original Plans, CEO Culp Says*, CNBC (Jan. 31, 2019), https://www.cnbc.com/2019/01/31/ge-expects-to-sell-off-almost-half-of-its-health-unit-ceo-culp-says.html.

[28] For instance, GE sold its industrial engine unit to private equity firm Advent International. Dummett & Mattioli, *supra* note 26.

When GE released its 2018 fourth-quarter earnings report, announcing that it sold $8 billion of assets that quarter, its shares increased as much as 18%.[29]

Even Silicon Valley—often characterized today as being immune to antitrust laws or market forces—feels the effects of the market for corporate control. Hewlett Packard, for instance, was a pioneering Silicon Valley firm.[30] From its start in a one-car garage in 1938,[31] HP grew and expanded over several decades to become a global company "involved in nearly every part of the tech business: PCs, printers, servers, supercomputers, software, storage, networking, services and other businesses".[32]

Beginning around the mid-2000s, analysts came to believe that HP would perform better if it split off businesses, allowing the component parts to increase focus on their respective strengths.[33] While HP resisted for a time, it ultimately split into HP Inc. (HPQ), comprised of the PCs and printer businesses, and HP Enterprises (HPE), comprised of the corporate hardware and services operations.

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[29] Ethel Jiang, *We Just Got the Latest Indication that Wall Street Loves GE's restructuring Plan*, MARKETS INSIDER (Feb. 1, 2019), https://markets.businessinsider.com/news/stocks/general-electric-stock-price-wall-street-reaction-to-earnings-report-2019-2-1027917173.

[30] *See Hewlett-Packard*, SILICON VALLEY GUIDE, http://siliconvalleyguide.info/company-headquarters/hewlett-packard/ (last visited May 29, 2019).

[31] *Id.*; *Timeline of Our History*, HP, https://www8.hp.com/us/en/hp-information/about-hp/history/hp-timeline/timeline.html (last visited May 29, 2019).

[32] Therese Poletti, *What GE Can Learn from Hewlett Packard about Breakups*, MARKET WATCH (June 28, 2018), https://www.marketwatch.com/story/what-ge-can-learn-from-hewlett-packard-about-breakups-2018-06-26.

[33] *See* Therese Poletti, *H-P Finally Heeds Wall Street's Call in Splitting Up*, MARKET WATCH (Oct. 6, 2014), https://www.marketwatch.com/story/h-p-heeds-wall-streets-call-in-splitting-up-2014-10-06; https://www.marketwatch.com/story/what-ge-can-learn-from-hewlett-packard-about-breakups-2018-06-26; Brian Womack, *After One of Tech's Biggest Breakups, HP Inc. Comes Out on Top*, BLOOMBERG (Aug. 22, 2017), https://www.bloomberg.com/news/articles/2017-08-22/after-one-of-tech-s-biggest-breakups-hp-inc-comes-out-on-top.

This was not the company's first foray into spin-offs—HP spun off what is now Agilent Technologies, its original test-and-measure business, over a decade earlier—but it was the most significant. The HPQ-HPE split became final in November 2015. By June 2017, HPE made two additional deconsolidation moves: spinning off its enterprise services to Computer Science Corporation and merging its software segments with Micro Focus.[34]

By May 2018, HPE was up 42%, and HPQ was up 67%, both beating the NASDAQ composite, which was up just 31%.[35] In the words of one reporter: "HP's fall from grace between 2010 and 2013 is now the stuff of business legend. A company that had been a doyen of Silicon Valley was laid low by a succession of bad managements."[36] "Bad management" that was, ultimately, corrected not by government action but by the market for corporate control.

With eBay, once a market-leading tech platform, two important—and one, so far, still potential—spin offs offer examples of the market for corporate control in action. The first involves PayPal. PayPal IPO'd in 2002, and became a wholly owned subsidiary of eBay later that year.[37] In 2015, following significant pressure from Carl Icahn, eBay reexamined its ownership of PayPal, and concluded that spinning off the PayPal payments division would allow both it and the eBay commerce

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[34] Jay Wei, *Hewlett Packard Enterprise: In a Business Breakup Fever*, SEEKING ALPHA (Jun. 6, 2017), https://seekingalpha.com/article/4079229-hewlett-packard-enterprise-business-breakup-fever.

[35] Dana Blankenhorn, *HP Inc.: The HP Split Worked*, YAHOO! FINANCE (May 31, 2018), https://finance.yahoo.com/news/hp-inc-hp-split-worked-121242257.html.

[36] *Id.*

[37] *It's Official: eBay Weds PayPal*, CNET (Oct. 3, 2002), https://www.cnet.com/news/its-official-ebay-weds-paypal/.

division to have "more focus, more flexibility, more agility, [and] more ability to move quickly", according to the CEO at the time.[38]

Both commerce and payments faced increasing competitive pressure. For instance, in the months leading up to the 2015 announcement, Apple announced its new Apple Pay system, Google and Amazon were renewing focus on their existing payment options, and other competitors, like the now-prolific Square, were gaining popularity.[39] The market for corporate control was exerting pressure—which eBay management ultimately could not ignore—counseling deconsolidation that would allow the business units to play to their strengths. While the effect on eBay's stock appears minimal as of earlier this year, PayPal has clearly benefited: increasing 134% since the split.[40]

The second notable, and still pending, example involving eBay is the recent calls for it to divest its ticket-sales business, StubHub. Elliott Management argues such a spinoff could bring in more than $16 billion.[41] Starboard Value LP, another

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[38] Deepa Seetharaman & Supantha Mukherjee, *eBay Follows Icahn's Advice, Plans PayPal Spinoff in 2015*, REUTERS (Sept. 30, 2014), https://www.reuters.com/article/us-ebay-divestiture/ebay-follows-icahns-advice-plans-paypal-spinoff-in-2015-idUSKCN0HP13D20140930.

[39] Vauhini Vara, *Why eBay and PayPal Broke Up*, THE NEW YORKER (Oct. 1, 2014), https://www.newyorker.com/business/currency/ebay-paypal-broke. The payments space continues to be highly competitive today—Venmo (now owned by PayPal) has taken off; numerous other fintech players, like credit card companies, including MasterCard and Visa, and banks, serveral of which worked together to create payments app Zelle, and tech companies like Google and Apple (which recently announced it would be launching an Apple credit card), as well as numerous startups, are all continuing to explore ways to make payments easier for consumers.

[40] Cara Lombardo & Laura Stevens, *Starboard, Elliott Management Call on eBay to Shed StubHub, Classifieds*, THE WALL STREET J. (Jan. 22, 2019), https://www.wsj.com/articles/elliott-management-calls-for-ebay-to-shed-stubhub-classified-ads-business-11548166204.

[41] *Id.*; Michael J. de la Merced, *eBay to Consider Selling StubHub in Peace Deal with Activist Hedge Funds*, THE NEW YORK TIMES (Mar. 1, 2019), https://www.nytimes.com/2019/03/01/business/dealbook/ebay-activist-investors-stubhub.html.

hedge fund, has echoed that sentiment. eBay opposes the proposal, but has responded by “streamlin[ing] its international operations and tak[ing] steps to increase advertising revenue”.[42]

What the efficacy of the market for corporate control to force deconsolidation highlights is the role the market itself has to play in addressing the frequent concerns we hear addressed about firm size. If that concerns you, you should want to unleash the forces that significantly restructured some of the great concerns in American history: GE, Hewlett Packard, ITT. The market for corporate control has worked, and can work, to cut large firms down to size.

III. Antitrust Implications

All these examples underscore the reality that competition to manage a firm is a real phenomenon underlying certain M&A strategies. This competition for the company is directly analogous to “competition for the contract”—which antitrust law recognizes as an important form of competition.[43] Firms may not compete for the contract on a day-to-day basis, but instead may compete periodically for exclusive contracts, bid for better shelf space, or innovate products to win an RFP. In the same way, competition for the company does not manifest at all times. But it does nonetheless drive meaningful competition.

[42] de la Merced, *supra* note 41.

[43] *See, e.g.*, Harold Demsetz, *Why Regulate Utilities?*, 11 J.L. & ECON. 55 (1968); *Paddock Publications, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 45 (7th Cir. 1996) (Easterbrook, J.) (“Competition-for-the-contract is a form of competition that antitrust laws protect rather than proscribe, and it is common. Every year or two, General Motors, Ford, and Chrysler invite tire manufacturers to bid for exclusive rights to have their tires used in the manufacturers’ cars. Exclusive contracts make the market hard to enter in mid-year but cannot stifle competition over the long run, and competition of this kind drives down the price of tires, to the ultimate benefits of consumers.”).

Competition better to manage firms, in turn, can yield consumer welfare benefits such as lower prices, better services and quality, and increased innovation. It can thwart inefficient arrangements preventing the realization of such benefits much more effectively than government intervention. And it can do so without increasing a firm's market power or size. In fact, these benefits can arise even when the market for corporate control leads to a *decrease* in a firm's size, as it sometimes does.

That these benefits can arise even when a firm's size diminishes underscores that beneficial buyers might be those who are not current competitors, be they potential competitors, startups, or private equity (or other) buyers specializing in firm management. The market for corporate control theory and evidence demonstrate that managing a firm is its own value, and so it is unsurprising that some firms may specialize in just this kind of management.

Adopting a categorical rule that deems certain kinds of buyers as "bad" for antitrust purposes would be anticompetitive. It would undermine this competition to better run firms—competition that, in turn, has real consumer benefits; competition that can, also, cut firms down to size.[44]

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[44] Consider the debate over the impact of common ownership on competition. If, in fact, large fund managers holding significant stakes in competing firms is not giving management the incentives they need to compete as much as they should, the market for corporate control offers the most efficient and most effective mechanism for creating such an incentive. *See* Commissioner Noah Joshua Phillips, U.S. Fed. Trade Comm'n, Prepared Remarks at The Global Antitrust Economics Conference, Taking Stock: Assessing Common Ownership, New York, NY (Jun. 1, 2018), https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf; Commissioner Noah Joshua Phillips, U.S. Fed. Trade Comm'n, Prepared Opening Remarks at FTC Hearing #8: Competition and Consumer Protection in the 21st Century: Corporate Governance, Institutional Investors, and Common Ownership, New York, NY (Dec. 6, 2018),

In addition to squelching the consumer benefits that can arise when better managers are put in charge, there are further costs associated with limiting the pool of potential buyers. Doing so necessarily reduces competition to manage firms, thereby decreasing the likelihood that better managers will oust the inferior ones. It also reduces the likely sale price of the firm, by reducing the pool of bidders and the competitiveness of bidders within that pool. It makes management more complacent, reducing their incentive to compete.

And it decreases exit options. The adage that "barriers to exit are barriers to entry"—makes the general, but too often overlooked, point that the harder it is to exit, the higher the cost of entering in the first place.[45] This is a concern that should be kept front of mind in regulating our innovation-driven economy.[46] Startups, for instance, help to drive innovation and dynamic growth, and often are cited as examples of why antitrust enforcers need to intervene to prevent mergers and acquisitions that threaten to gobble up all the startups.

But while M&A can threaten competition, it can also *foster* it. The vast majority of startups fail, and leading explanations include various managerial

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https://www.ftc.gov/system/files/documents/public_statements/1454690/phillips_-_ftc_hearing_8_opening_remarks_12-6-18.pdf.

[45] *See, e.g.*, STEPHEN MARTIN, INDUSTRIAL ORGANIZATION IN CONTEXT, 128-29 (Oxford U. Press 2009) ("Risk-averse potential entrants will require a greater assurance of profitability before coming into a market, the greater the extent to which entry involves making sunk investments. In his sense 'barriers to exit are barriers to entry.'").

[46] For instance, McKinsey found 84% of executives agree innovation is important to their growth strategy. *Growth & Innovation*, MCKINSEY & COMPANY, https://www.mckinsey.com/business-functions/strategy-and-corporate-finance/how-we-help-clients/growth-and-innovation (last visited May 29, 2019); *see also* ACCENTURE 2015 US INNOVATION SURVEY, INNOVATION: CLEAR VISION, CLOUDY EXECUTION (2015), https://www.accenture.com/t20180705T112257Z__w__/us-en/_acnmedia/PDF-10/Accenture-Innovation-Research-ExecSummary.pdf (finding 84% of executives say their organization's strategy is "extremely dependent" or "very dependent" on innovation).

failings.[47] Acquisition is a critical exit path for many or most that do not, the chilling of which will deter not only innovation but the investment pipeline on which that innovation depends.[48] To preserve the innovation that has been critical to our economy's growth over the last several decades, we need to be cognizant of these kinds of potential tradeoffs, and avoid chilling incentives innovate unnecessarily or unintentionally.

Adopting dramatic legislation that would impair significantly the M&A market would threaten just such harms. Scholars have long-recognized legislation might undermine market activity that drives consumer and societal welfare. Aspects of, for example, the Williams Act and—key for antitrust purposes—the Hart-Scott-Rodino Antitrust Improvements Act raise such concerns.[49] Hart-Scott-Rodino is key to preventing anticompetitive mergers in their incipiency; but it balances the concerns I've raised here today. To be most effective, Hart-Scott-Rodino needs to be tailored to identifying and addressing competition issues only. Beyond that, it loses its purpose and distorts the market for corporate control.

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[47] *See, e.g.*, *The Top 20 Reasons Startups Fail*, CB INSIGHTS (Feb. 2, 2018), https://www.cbinsights.com/research/startup-failure-reasons-top/.

[48] *See, e.g.*, SCOTT KUPOR, SECRETS OF SANDHILL ROAD (2019).

[49] *See e.g.*, Jonathan R. Macey, *State Anti-Takeover Statutes: Good Politics, Bad Economics*, 1988 WIS. L. REV. 467, 489-90 (1988) ("[T]he Williams Act—which places disclosure obligations on tender offerors—imposes significant delays in the tender offer process and raises the costs of mounting a tender offer. Thus it reduces the incentives for individuals and firms to make such offers."); Bilal Sayyed, *A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption*, ANTITRUST SOURCE 1 (Apr. 2013) ("While the [Hart-Scott-Rodino] Act has had a positive effect on the Agencies' ability to identify, remedy, and, if necessary, to enjoin anticompetitive mergers, it has also imposed costs, some of which are unnecessary for accomplishing the Act's purpose. . . . The Act may also restrict or discourage shareholders from interacting with management. Because of the narrow reading of the investment-only exemption, such interaction may preclude reliance on the exemption. This disincentive runs counter to policies that encourage more communication between shareholders and management.").

Coming back to Coase, the goal is to allow the assets to move to their highest valued use, and transaction costs slow that down or even grind it to a halt. In doing so, overly-aggressive legislation and regulation destroys real avenues for consumer value creation.

CONCLUSION

The idea of the market for corporate control in many ways revolutionized how we approach corporate law. It also has important implications for antitrust. That M&A strategy is not always dictated by desires to take unfair advantage of shareholders or consumers, but by real opportunities to enhance a firm's competitive position (and societal welfare in the process) is one so appealing that, in hindsight, it seems it should have been articulated and accepted earlier.

Today, we have the advantage of years of experience observing the market for corporate control in action. We know that it can lead firms to consolidate as well as to deconsolidate. It can be a force against concentration. We know that buyers specializing in firm management may be able to increase the efficiency of such firms in ways that benefit consumer welfare. And we know that impairing the proper functioning of this market is anticompetitive. Regulators, including antitrust regulators, should seek to foster its operation. By doing so, we can help to make markets more competitive and to move resources to their highest valued uses. Moving forward, we should (1) look for opportunities to unleash the market forces that spur competition; and (2) tread carefully with proposals that would inhibit it.

Thank you.