UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

Office of Commissioner
Rebecca Kelly Slaughter

STATEMENT OF
COMMISSIONER REBECCA KELLY SLAUGHTER

In the Matter of Sycamore Partners, Staples, and Essendant
Commission File No. 181-0180
January 28, 2019

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.[1] While mergers between direct competitors contribute to this phenomenon and raise competitive concerns, vertical mergers that integrate trading partners can be just as pernicious in sapping our economy's vitality.

By its proposed acquisition of Essendant, Inc. ("Essendant"), Sycamore Partners, the parent company of Staples, Inc. ("Staples"), would acquire the country's largest, and one of only two, nationwide office product wholesale distributors. Today, the Commission voted to accept a proposed consent agreement placing certain conditions on the Staples-Essendant merger. While I appreciate that the Commission chose to impose conditions rather than clearing the transaction outright, I disagree with the Commission's decision because I believe that staff identified significant evidence of likely harm, and I do not believe that the parties have provided evidence showing that the merger's likely harm is offset by cognizable procompetitive benefits. I also agree with many of the points raised by Commissioner Chopra in his dissent; he has done a thorough job outlining the horizontal elements of this transaction and articulating important points for the Commission's consideration.

I write separately to highlight some observations regarding vertical merger enforcement generally, to explain my dissent, and to urge the Commission to commit to a retrospective investigation of the merger that will facilitate the Commission's ability to take any necessary enforcement action, including against any anticompetitive conduct by the post-merger firm.

[1] *See, e.g.*, Adil Abdela & Marshall Steinbaum, *The United States Has a Market Concentration Problem*, (Sept. 11, 2018), http://rooseveltinstitute.org/wp-content/uploads/2018/09/The-United-States-has-a-market-concentration-problem-brief-final.pdf; Open Markets Institute, AMERICA'S CONCENTRATION CRISIS (Nov. 29, 2018), https://concentrationcrisis.openmarketsinstitute.org; Gustavo Grullon, Yelena Larkin, & Roni Michaely, "Are U.S. Industries Becoming More Concentrated?" (last revised Oct. 27, 2018), https://ssrn.com/abstract=2612047 (concluding that, "[i]n the last two decades, over 75% of U.S. industries have experienced an increase in concentration levels" and that concentrated industries have higher profit margins without increased operational efficiency).

Observations Regarding Vertical Merger Enforcement

Notwithstanding the majority's apparent view that the resolution of a vertical merger investigation is an inappropriate occasion for a discussion of vertical merger enforcement generally, I would like to make some broad observations about vertical mergers and share my views on how the Commission should approach them before addressing the specific merits of the Staples-Essendant merger.

Vertical tie-ups are occurring across the economy, and they present an enforcement challenge that we must meet. According to Thomson Reuters, companies announced mergers at record rates in 2018,[2] and three of the five largest mergers announced between 2016 and the fall of 2018 had vertical components.[3] Moreover, some observers believe that recent high-profile vertical mergers, including the potential clearance of the AT&T-Time Warner merger by the courts, will spark further vertical merger activity.[4]

Given the enormous impact these mergers will have on the economy, markets, and consumers, the Commission should carefully examine all mergers, including vertical mergers, with a forward-looking perspective. As the Supreme Court explained, Section 7 of the Clayton Act enables the Commission to prevent anticompetitive mergers in their incipiency without having to wait until the merger's anticompetitive effects come to fruition.[5] I am particularly concerned that the current approach to vertical integration has led to substantial under-enforcement.[6]

---

[2] *See* Thomson Reuters, *Mergers & Acquisitions Review, First Nine Months of 2018*, at 1–2, 5 (2018).

[3] *See id.*; Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2017*, at 3, 6 (2017); Thomson Reuters, *Mergers & Acquisitions Review, Full Year 2016*, at 2, 6 (2016); U.S. Dep't of Justice Press Release, "Justice Department Challenges AT&T/DirecTV's Acquisition of Time Warner." (Nov. 20, 2017) (discussing harm from vertical merger); U.S. Dep't of Justice Press Release, "Statement of the Department of Justice Antitrust Division on the Closing of its Investigation of the Cigna-Express Scripts Merger." (Sept. 17, 2018) (discussing vertical merger analysis); U.S. Dep't of Justice Press Release, "Justice Department Requires CVS and Aetna to Divest Aetna's Medicare Individual Part D Prescription Drug Plan Business to Proceed with Merger." (Oct. 10, 2018) (citing vertical integration); *see also* U.S. Dep't of Justice Press Release, "Lam Research Corp. and KLA-Tencor Corp. Abandon Merger Plans." (Oct. 5, 2016) (discussing potential harm from abandoned vertical merger); European Commission Press Release, "Commission Approves Acquisition of Rockwell Collins by UTC, Subject to Conditions." (May 4, 2018) (citing vertical component).

[4] Tony Romm & Brian Fung, *AT&T- Time Warner Merger Approved, Setting the Stage for More Consolidation Across Corporate America*, WASH. POST, (June 12, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/06/12/att-time-warner-decision; Cecelia Kang, Brooks Barnes, & Michael J. de la Merced, *AT&T-Time Warner Ruling has Deal Makers Bracing*, N.Y. TIMES, (June 10, 2018), https://www.nytimes.com/2018/06/10/technology/att-time-warner-ruling.html.

[5] *See Brown Shoe Co. v. United States*, 370 U.S. 294, 317–18 (1962) ("[I]t is apparent that a keystone in the erection of a barrier to what Congress saw was the rising tide of economic concentration, was its provision of authority for arresting mergers at a time when the trend to a lessening of competition in a line of commerce was still in its incipiency. Congress saw the process of concentration in American business as a dynamic force; it sought to assure the Federal Trade Commission and the courts the power to brake this force at its outset and before it gathered momentum."); *Phila. Nat'l Bank v. United States*, 374 U.S. 321, 362 (1963) (Section 7 "requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future").

[6] I am also concerned about under-enforcement of horizontal mergers, but for the purposes of this case I am confining my comments to vertical merger analysis. *Cf.* Steven C. Salop & Daniel P. Culley, *Revising the U.S. Vertical Merger Guidelines: Policy Issues and an Interim Guide for Practitioners*, 4 J. ANTITRUST ENFORCEMENT 1,

Concerns about vertical mergers are not new.[7] We know that vertical mergers, particularly those involving highly concentrated markets, can pose a variety of significant threats to competition.[8] Indeed, agency investigations have identified a range of competition concerns,[9] including limiting access to or raising the costs of key inputs,[10] restricting access to an important customer,[11] inhibiting entry by new competitors,[12] evading regulations,[13] facilitating coordination,[14] or, as the Commission also alleged in this case, allowing anticompetitive information sharing.[15] But, among the enforcement actions that the Commission brings, many are settled with behavioral remedies rather than divestitures, and few of our enforcement actions challenge vertical mergers outright.[16]

3–5 (2016) (documenting a decline in the number of vertical merger enforcement actions by presidential administration after the period between 1994 and 2000, but also noting that the level of enforcement is impracticable to judge absent further information); Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018) (showing that, in the period between 2001 and 2018, the number of vertical merger enforcement actions remain lower than the six-year period between 1994 and 2000).

[7] Some have argued that vertical mergers are rarely, if ever, anticompetitive and in fact are almost always procompetitive. *See* Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself*, 225–45 (1978); Richard A. Posner, *Antitrust Law*, 223–29 (2d ed. 2001). However, more recent economic literature provides good cause to be skeptical about this perspective. For a summary of Post-Chicago School thinking on vertical mergers, see Steven C. Salop, *Invigorating Vertical Merger Enforcement*, 127 YALE L. J. 1962, 1966 n.17 (2018) (identifying papers). The 1984 Merger Guidelines, which offer agency guidance on non-horizontal mergers, took a particularly narrow view of harm from vertical integration, and have recently been criticized as inconsistent with contemporary analysis and ripe for revision. *Compare* U.S. Dep't of Justice, 1984 Merger Guidelines (1984), http://www.justice.gov/sites/default/files/atr/legacy/2007/07/11/11249.pdf *with* Fed. Trade Comm'n, Hr'g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 57:3-15, 68:9-11 (Nov. 1, 2018) (Prof. Shapiro stating that the 1984 Merger Guidelines are not consistent with contemporary vertical merger analysis, noting the "complete shift" in agency thinking on unilateral effects, and calling for revised guidelines); *but see* Paul Yde, *Non-Horizontal Merger Guidelines: A Solution in Search of a Problem?*, ANTITRUST, 74–82 (Fall 2007).

[8] Such threats can also be heightened in nascent or rapidly evolving markets, markets with significant barriers to entry, or markets that may benefit from potential entry.

[9] *See* D. Bruce Hoffman, *Vertical Merger Enforcement at the FTC*, 4–7 (Jan. 10, 2018) (summarizing recent vertical merger enforcement actions), https://www.ftc.gov/public-statements/2018/01/vertical-merger-enforcement-ftc; Steven C. Salop & Daniel P. Culley, *Vertical Merger Enforcement Actions: 1994–July 2018* (Georgetown Univ. Law Ctr., Aug. 23, 2018).

[10] *See* In re The Boeing Company, Dkt. C-4188 (compl. filed Oct. 3, 2006), https://www.ftc.gov/sites/default/files/documents/cases/2006/10/0510165complaint.pdf.

[11] *See* U.S. Dep't of Justice Press Release, "AMC Required to Divest Movie Theatres, Reduce NCM Ownership and Complete Screen Transfers in Order to Complete Acquisition of Carmike Cinemas." (Dec. 20, 2016), https://www.justice.gov/opa/pr/amc-required-divest-movie-theatres-reduce-ncm-ownership-and-complete-screen-transfers-order.

[12] *See* Fed. Trade Comm'n Press Release, "FTC Seeks to Block Cytyc Corp.'s Acquisition of Digene Corp." (June 24, 2002).

[13] *See* In re Fresenius Medical Care AG & Co. KGaA, Dkt. C-4236 (compl. filed Oct. 21, 2008), https://www.ftc.gov/sites/default/files/documents/cases/2008/10/081021freseniuscmpt.pdf.

[14] *See* United States v. Premdor, Inc. (compl. filed Aug. 3, 2001), https://www.justice.gov/atr/case-document/complaint-184.

[15] *See* In re PepsiCo, Inc., Dkt. C-4301 (compl. filed Feb. 26, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/02/100226pepsicocmpt.pdf; In re The Coca-Cola Company, Dkt. C-4305 (compl. filed Sept. 27, 2010), https://www.ftc.gov/sites/default/files/documents/cases/2010/09/100927cocacolacmpt.pdf; In re Broadcom Limited, Dkt. C-4622 (compl. filed July 3, 2017), https://www.ftc.gov/system/files/documents/cases/1710027_broadcom_brocade_complaint.pdf.

[16] *See* Salop & Culley, *supra* note 9.

I understand that predicting the net effects of vertical mergers can be difficult, but I am worried about the reliability and permissiveness of the conclusions we draw from the evidence gathered and analysis conducted by staff. I am concerned that we end up allowing vertical mergers that are anticompetitive in an effort to avoid challenges to procompetitive mergers.

In particular, I am concerned that our conclusions depend on unreliable assumptions and predictions about how a vertically integrated firm will conduct itself and are too credulous about claimed procompetitive benefits unique to vertical integration.[17] The Commission should always thoroughly investigate all potential theories of harm in vertical mergers. Where the Commission identifies competitive concerns, it should be more willing to challenge and seek to block vertical mergers.

Where the Commission finds evidence that a vertical merger is likely to enhance a firm's incentive and ability to engage in anticompetitive conduct, the parties must demonstrate that claimed efficiencies are verifiable, merger-specific, do not arise from anticompetitive reductions in output or service, are not mitigated by any costs necessary to achieve the efficiencies, and fully offset the anticompetitive harm.[18] If these requirements are not met, then the Commission should challenge the merger.

Merging parties will almost always cite benefits of vertical integration, including enhancing product quality, reducing costs, or streamlining operations.[19] But such claimed benefits often go unsubstantiated. The claimed benefits may not be merger-specific and instead may be achieved via unilateral conduct or contractual arrangements. Even where they are merger-specific, the claimed benefits may be mitigated or eliminated by opportunity costs.[20] To the extent that our enforcement decisions rely on claimed efficiency benefits of a transaction, those claimed benefits should not be taken at face value; any investigation should include a requirement that the parties substantiate the magnitude and merger-specificity of the claimed benefits in the same way the Commission endeavors to substantiate theories of harm.[21] In other

[17] Professor Salop articulated a similar concern in his recent article on vertical merger enforcement, criticizing an enforcement framework that "presum[es] that efficiency benefits are highly likely while competitive harms are unlikely or speculative." Salop, *supra* note 7, at 1963.

[18] In addition, I share Commissioner Chopra's concern that merger effects that are claimed as "efficiencies" may in fact be harms that cannot be credited as procompetitive benefits.

[19] *See* Steven C. Salop & Daniel P. Culley, *Potential Competitive Effects of Vertical Mergers: A How-To Guide for Practitioners*, GEORGETOWN LAW FACULTY PUBLICATIONS AND OTHER WORKS. 1392 at 5, 32–37 (2014), https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=2404&context=facpub.

[20] *See* Salop, *supra* note 7, at 1970–71 n.37 (citing William P. Rogerson, "A Vertical Merger in the Video Programming and Distribution Industry: Comcast-NBCU" (2011), in *The Antitrust Revolution: Economics, Competition, and Policy*, 534 (John E. Kwoka, Jr. & Lawrence J. White eds., 6th ed. 2014)).

[21] *Cf.* U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) [Hereinafter "Horizontal Merger Guidelines"] ("Efficiencies are difficult to verify and quantify, in part because much of the information relating to efficiencies is uniquely in the possession of the merging firms. Moreover, efficiencies projected reasonably and in good faith by the merging firms may not be realized. Therefore, it is incumbent upon the merging firms to substantiate efficiency claims so that the Agencies can verify by reasonable means the likelihood and magnitude of each asserted efficiency, how and when each would be achieved (and any costs of doing so), how each would enhance the merged firm's ability and incentive to compete, and why each would be merger-specific."); Steven C. Salop, *The AT&T/Time Warner Merger: How Judge Leon Garbled Professor Nash*, 6 J. OF ANTITRUST ENFORCEMENT 459, 467–68 (2018).

words, have the parties met their burden of providing adequate evidence to show that the claimed benefits are verifiable, merger-specific, and sufficiently large to give the Commission enough comfort that the merger indeed will not be, on balance, anticompetitive?

In practice, the likely anticompetitive effects of some vertical mergers may be difficult to predict reliably enough at the time of the transaction to mount a successful challenge. This uncertainty does not excuse the Commission from its obligation to utilize all of our authority to ensure that parties never abuse their position.[22] As noted above, the Commission's authority under Section 7 is forward-looking, and we are charged with preventing the exercise or attainment of market power, not merely correcting its abuse. It is particularly important that enforcers are mindful of this point when evaluating mergers between vertical partners in a supply chain; it may be more difficult to predict whether vertical mergers will be anticompetitive, procompetitive, or competitively neutral, but such difficulty does not alter our fundamental obligation to preempt illegal vertical integration.

When faced with a close case—a vertical merger that raises meaningful competitive concerns, but where we have not identified sufficient evidence to justify a court challenge,[23] or where we obtained a limited consent decree—the Commission would do well to adopt a general practice of planned retrospective investigations that could inform subsequent enforcement decisions, including a decision to challenge the consummated merger if necessary.[24] While the anticompetitive effects of consummated mergers are more difficult to remedy and involve significant interim competitive harms from delayed enforcement, the ability to bring such challenges is an important enforcement backstop.[25]

In such close cases, the Commission should commit publicly, at the time the investigation concludes, to a follow-up retrospective investigation a few years after the merger is consummated and should require the parties to provide whatever data might be necessary to complete it.[26] To the extent necessary, the Commission should also request and obtain

---

[22] Some have proposed additional legislative authority that would shift the burden of proof to the parties to certain mergers to show that their transaction is unlikely to substantially lessen competition. For example, Senator Amy Klobuchar proposed legislation that would shift the burden of proof to parties to certain large vertical mergers (in excess of $5 billion) or certain vertical mergers involving very large firms (with assets, net annual sales, or market capitalization exceeding $100 billion). *See* Consolidation Prevention and Competition Promotion Act of 2017, S.1812, 115th Cong. (2017) [Hereinafter "CPCPA"].
[23] *See* 15 U.S.C. § 21(b); 15 U.S.C. § 45(b).
[24] The idea of routinely conducting retrospectives of close-call vertical mergers has been suggested by others, including Professor Tim Wu and former Commission Chairman Robert Pitofsky. *See* Tim Wu (@superwuster), Twitter (Nov. 26, 2018, 9:33 AM) https://twitter.com/superwuster/status/1067109078214864896 ("Re-reading [the] AT&T - Time Warner opinion I am struck by sense that in hard vertical cases, retroactive merger review might be the way to go. Indeed the US might even announce that the merger will be watched."); Robert Pitofsky, "Subsequent Review: A Slightly Different Approach to Antitrust Enforcement." (Aug. 7, 1995) (Suggesting that, in close cases, the Commission "put[] the parties on notice that at some future time—two, three or four years down the road—it intends to revisit the market segment and the transaction to see if the transaction and others like it led to anticompetitive effects."), https://www.ftc.gov/public-statements/1995/08/subsequent-review-slightly-different-approach-antitrust-enforcement.
[25] *See, e.g.*, *Steves and Sons, Inc. v. JELD-WEN, Inc.*, 2018 WL 4855459 (Oct. 5, 2018) (order requiring divestiture in private consummated merger enforcement action).
[26] The Commission could seek and obtain such information from merging parties, and other firms, pursuant to Section 6 of the Federal Trade Commission Act. *See* 15 U.S.C. § 46.

information from relevant third parties. This retrospective should compare the reality of the post-merger market with the predictions the Commission made at the time of the transaction about whether anticompetitive harms and benefits would be realized.

Where the Commission's predictions were incorrect and there is sufficient evidence of anticompetitive effects as a result of the transaction, this retrospective investigation would allow the Commission to challenge the consummated merger or any anticompetitive behavior by the merged entity. Knowing that the Commission will conduct such a follow-up study also could disincentivize the parties from making over-reaching claims during the investigation and incentivize them to behave in a more procompetitive manner after the merger is consummated.[27] Furthermore, if the Commission finds that the parties had materially misrepresented the likely effects or benefits of the merger, it can take appropriate action.[28]

At a minimum, these retrospective investigations could allow the Commission to analyze whether its predictions about market behavior were accurate and to improve its analysis going forward. As the majority concedes, such retrospectives can have significant value. Chairman Simons has spoken frequently about the importance of the Commission's "tradition of self-critical examination,"[29] and routine study of the accuracy of our analysis can play an important

---

[27] *See* Pitofsky, *supra* note 24 ("First, parties claiming efficiencies or brushing off the possibility of anticompetitive practices may be induced in the years following the merger to pursue more aggressively the efficiencies or avoid more carefully anticompetitive effects. Second, lawyers, economists and others defending transactions may be a little more cautious in submitting extravagant claims if they know they will be called to account at a later date.").

[28] *Cf*. Fed. Trade Comm'n Press Release, "Hearst Corp. to Disgorge $19 Million and Divest Business to Facts and Comparisons to Settle FTC Complaint." (Dec. 14, 2001) (disgorgement and divestiture obtained for illegally withholding materials required for Hart-Scott-Rodino notification and consummating anticompetitive merger); U.S. Dep't of Justice Press Release, "Bristol-Myers Squibb Pleads Guilty to Lying to the Federal Government About Deal Involving Blood-Thinning Drug." (May 30, 2007) (guilty plea obtained and fine levied for two violations of the False Statements Act in connection with a Commission conduct matter); *see also* European Commission Press Release, "Commission Fines Facebook €110 Million for Providing Misleading Information About WhatsApp Takeover." (May 18, 2017) (fine levied for providing incorrect or misleading information during merger investigation). To be sure, parties must refrain from making material misrepresentations in connection with any government proceeding, not merely vertical merger investigations. I emphasize this requirement here to underscore the importance of truthful and correct representations by parties as part of our forward-looking merger review. The spirit of this prohibition should deter not only explicit misrepresentations but also pre-merger claims or pre-commitments that are generally inconsistent with post-merger conduct. *Cf*. Kenneth Li, *AT&T's WarnerMedia Accuses DOJ with 'Collaborating' with Dish in HBO Dispute*, REUTERS (Nov. 1, 2018), https://www.reuters.com/article/us-media-att-dish/atts-warnermedia-accuses-doj-with-collaborating-with-dish-in-hbo-dispute-idUSKCN1N667O (Department of Justice criticizing WarnerMedia blackout of HBO on Dish network following AT&T proposed commitment to refrain from blackouts on Turner networks following a merger with Time Warner).

[29] *See* Prepared Remarks of Chairman Joseph Simons, at 3, Hearing on Oversight of the Federal Trade Commission, Before the Committee on Commerce, Science, and Transportation Subcommittee on Consumer Protection, Product Safety, Insurance, and Data Security, United States Senate, (Nov. 27, 2018), https://www.ftc.gov/system/files/documents/public_statements/1423967/js_oral_remarks_hearing_on_oversight_of_the_federal_trade_commission.pdf; *see also* Prepared Remarks of Chairman Joseph Simons Announcing the Competition and Consumer Protection Hearings, at 3 (Jun. 20, 2018), https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf.

role in that tradition.[30] The Commission has already identified one recent merger as a potential subject of a retrospective investigation, including on the effects of efficiencies.[31] Similarly, Bureau of Economics Director Bruce Kobayashi has urged stakeholders to identify vertical mergers that merit retrospective investigation.[32] I applaud and join these calls for retrospective review generally, and I emphasize their importance as part of our vertical merger enforcement program.

I acknowledge that these retrospective investigations will require significant resources, and I share the majority's concerns about how best to allocate our existing resources. I do not believe that a program of retrospective investigations in close cases would require unlimited resources, however, because these instances should arise relatively infrequently.[33] I understand that reasonable Commissioners can disagree on what constitutes a close case—this case appears to be one such example—but I would nevertheless propose that the Commission determine whether a retrospective is appropriate based on the evidence presented in a given case. In any event, as with other areas of enforcement, I believe that bolstering our program of retrospective merger reviews is a compelling reason for Congress to devote additional resources to the Commission's enforcement activities. If the majority's intuition is correct that the Commission encounters enough close cases to require a dramatic increase in our appropriations in order to staff retrospectives for such cases, then we owe it to ourselves and to the public to advocate for and dedicate adequate resources to scrutinize and improve upon our conclusions.[34]

<u>Staples/Essendant Case</u>

As noted above, Essendant is one of only two nationwide office product wholesale distributors, along with S.P. Richards ("SPR"). SPR and Essendant provide important services to local and independent office product resellers, who, in turn, serve the office product needs of mid-sized businesses across the country.[35] Staples competes with independent resellers to serve mid-sized businesses and, as a result of this vertical merger, Staples will control the price and quality of the wholesale distribution services that Essendant provides to Staples's Essendant-backed independent reseller competitors.

---

[30] Retrospective analysis has also received additional legislative support. Senator Amy Klobuchar's bill promised to expand Commission authority to obtain information relevant to retrospective analysis of merger consent decrees. *See* CPCPA, *supra* note 22.

[31] Statement of the Commission, Concerning the Proposed Affiliation of CareGroup, Inc.; Lahey Health System, Inc.; Seacoast Regional Health System, Inc.; BIDCO Hospital LLC; and BIDCO Physician LLC (Nov. 29, 2018).

[32] Fed. Trade Comm'n, Hr'g No. 5: Competition and Consumer Protection in the 21st Century, Tr. 86:2-15 (Nov. 1, 2018).

[33] *Cf.* Pitofsky, *supra* note 24 ("Circumstances that justify 'subsequent review' or 'conditional clearance' are rare. Most times, the enforcement agencies are in a position to make the difficult prediction that anticompetitive effects will or will not occur.").

[34] *Cf.* Pitofsky, *supra* note 24 ("[T]he approach offers some hope, never air tight, that enforcement officials perplexed by the uncertainties of a situation, will not make the mistake of allowing deals to proceed that have major anticompetitive and anticonsumer effects. If the significant anticompetitive effects begin to occur after the transaction is complete, all concerned parties know the enforcement agency may review the deal again and take actions necessary to preserve or restore a competitive market.").

[35] Essendant and SPR also serve resellers who, in turn, serve small and large businesses.

I appreciate that the Commission's staff have given serious treatment to a range of theories of anticompetitive harm from the merger. I am also pleased that the Commission imposed conditions that seek to deal with the very real threat of anticompetitive information sharing and to enhance our ability to review Staples's future acquisitions in the office supply industry. I voted against the resolution of this investigation, however, because I believe that staff identified significant evidence of likely harm to competition, and I am concerned that the conclusions drawn from the evidence staff identified may underestimate the likely harm. I am also concerned that the parties have not met their burden of substantiating the efficiencies necessary to offset the transaction's likely harm. The conditions imposed by the Commission's proposed consent order do not fully resolve these concerns.

As noted in the statement of the majority, staff conducted an analysis of whether the integrated firm could profitably implement a strategy of raising rivals' costs. Staff's analysis considered the extent to which independent resellers would switch to SPR and the extent to which mid-sized businesses would switch from independent resellers to Staples given such a strategy. The result of staff's analysis indicated that the transaction would result in significant harm. The majority accuse me of mischaracterizing this analysis. I do not; I simply disagree with the conclusion that the majority draws from staff's analysis. I believe this analysis is evidence of harm. It suggests that, as a result of a strategy of raising rivals' costs, mid-sized businesses would be forced to pay higher prices or suffer diminished quality of service regardless of which supplier they chose for their office supply needs.

The majority have concluded that independent resellers can easily switch from Essendant to SPR if the integrated firm implemented such a strategy, and, therefore, that this strategy would not be profitable. The key relevant inputs in staff's analysis, however, are consistent with the conclusion that independent resellers can easily switch from Essendant to SPR, and staff's analysis nonetheless predicts significant harm. Moreover, some qualitative evidence indicates that switching from Essendant to SPR is costly for independent resellers.

The majority have offered reasons to believe that the harm estimated in staff's analysis is too high or insufficiently reinforced by other lines of evidence. I acknowledge those points, but I believe that staff's analysis is significant evidence that harm from the transaction is likely, and, indeed, I am concerned that there are reasons to believe that the estimated harm is too low. For example, we did not have data at sufficient levels of granularity to assess whether there are certain markets where mid-sized businesses would switch to Staples in larger numbers than we have estimated. In addition, I am concerned that independent resellers have only two viable options in the market for nationwide wholesale distribution today—Essendant and SPR—and that *de novo* entry by other firms into the nationwide wholesale distribution business is unlikely. As a result, even if SPR is a viable alternative to Essendant for many independent resellers, it is likely the only viable option and thus may be able to charge higher prices to resellers looking to avoid a relationship with Staples.

The majority insist that their decision does not rest on crediting claimed efficiencies, but given my disagreement about whether and to what extent there is evidence of likely harm, I briefly describe below my assessment of the efficiencies evidence adduced in this investigation. Taking staff's estimate of harm on its face, the Commission must ask whether there is sufficient evidence to conclude that cognizable efficiencies do in fact offset that estimate. I am not persuaded that there is such evidence.

As an initial matter, upon review of the record, I do not believe that efficiencies from the elimination of double marginalization are a meaningful effect of this merger. Focusing on the identified claims, I am concerned that the parties have not produced evidence showing that the claimed efficiencies are indeed efficiencies and not harms, are merger-specific, are not mitigated by any costs that must be incurred to achieve the efficiencies, or will likely be realized at sufficient magnitudes after the merger is consummated.[36] The Commission brings significant experience to bear in our analysis of efficiencies in the office supply industry, but that expertise does not excuse the parties from meeting their burden to substantiate their claims, and I do not believe that the remaining substantiation provides a sufficient basis to credit the efficiency claims made in this case. Confronted, as I am, with what I believe to be evidence of likely harm and a lack of evidence of cognizable, offsetting efficiencies, I must respectfully disagree with the majority that the transaction is unlikely to result in anticompetitive harm outside the scope of the Commission's order.

Our consent order does not address Staples's control over Essendant prices to its independent reseller competitors or its enhanced incentives to hamper independent reseller competitiveness. I also share Commissioner Chopra's concerns about the efficacy of the firewall to remedy the information sharing harm. Accordingly, I do not believe the consent order fully remedies the merger's likely anticompetitive effects.

A Retrospective and Monitoring

The Commission's order requires that Staples provide prior notice of any acquisitions in excess of 10% of any independent reseller or other marketer of office supplies. Staples's market position relative to other independent resellers was a significant issue in our investigation, and I believe that prior notice will be a useful tool for the Commission to monitor whether Staples will pursue a strategy of raising rivals' costs in local office supply markets.

In addition, I call on the Commission to commit publicly to a targeted retrospective investigation, within several years of the acquisition's consummation, to evaluate other aspects of the market bearing on our analysis, and to assess whether such developments are consistent with our pre-merger analysis. Besides this analysis, I urge the Commission to monitor conduct in this industry, and I encourage Essendant-backed independent resellers and other stakeholders to report any evidence of anticompetitive conduct by Staples. 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

[36] As discussed in note 21 above, our analysis of efficiencies claims is predicated on information in the parties' possession. This is true in both horizontal and non-horizontal mergers. It is therefore incumbent on the parties to substantiate their claimed efficiencies, including by detailed and comprehensive responses to requests from Commission staff, to allow the Commission to credit any cognizable efficiencies against any likely harm. *Cf.* Horizontal Merger Guidelines § 10; *see also* Herbert J. Hovenkamp, *Appraising Merger Efficiencies*, 24 GEO. MASON L. REV. 703, 726 (2017) ("[I]nformation is asymmetrical: firms almost always know more about their own internal processes and the costs of changing them than any outsider, including the merger enforcement Agencies.").

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.