

# The Antitrust Divergence at the FTC: Beyond Vertical Mergers

BY DARREN S. TUCKER AND THOMAS BOHNETT

**P**ARTISAN SPLITS ON ANTITRUST enforcement are not new, but some recent divides have gone beyond the usual differences between Republicans and Democrats. Today, we see disagreements among commissioners at the Federal Trade Commission on foundational aspects of competition policy, such as the goals of enforcement, the FTC's burden of proof, and the role of economic evidence. This divergence found its fullest expression in two recent vertical merger consent decrees—*Sycamore Partners II, L.P., Staples, Inc. and Essendant Inc. (Staples)*<sup>1</sup> and *Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc. (Fresenius)*<sup>2</sup>—but the policy differences that led to such divergent views in those cases are unlikely to stay limited to the vertical merger context. The implications for practitioners and their clients (as well as agency staff) are negative, including longer merger reviews and less predictable enforcement.<sup>3</sup>

## Overview of Staples Case

In 2018, Sycamore Partners (Sycamore), owner of office supply retailer Staples, proposed to purchase Essendant, a wholesaler of office products. Staples did not compete with Essendant but did compete with Essendant's independent broker customers for the sale of office products to midsized business customers,<sup>4</sup> thus raising vertical integration issues. All commissioners agreed that an information firewall to protect the competitively sensitive information of Essendant's independent broker customers was warranted—relief consistent with several other recent enforced vertical mergers.<sup>5</sup>

The two Democrats, Commissioners Slaughter and Chopra, nevertheless dissented based on a range of concerns the majority had dismissed, including raising rivals' costs and the creation of monopsony power from the transaction. In their separate statements, Commissioners Slaughter and Chopra noted that some independent dealers had high switching costs, lamented that staff did not have sufficient data to examine whether Staples was a sufficiently strong competitor in some local markets to give it an incentive to raise prices to

Essendant's customers, and questioned whether the combination would lead to any merger-specific efficiencies.<sup>6</sup> Commissioner Slaughter also called for a "targeted retrospective investigation" of the Staples-Essendant tie-up, and more broadly, wrote that she thought that 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."<sup>7</sup> In his statement, Commissioner Chopra expressed concern that staff had not adequately investigated the possibility that the combined firm would be able "to squeeze its suppliers," which he viewed as problematic even if it led to "some cost savings for end-user purchasers."<sup>8</sup>

In response, Chairman Simons and Commissioners Wilson and Phillips issued a statement explaining that staff investigated but found no basis for imposing additional relief under the dissenters' theories. The majority first rejected a foreclosure theory premised on Essendant raising prices to its independent dealer customers, some of which would then switch to Staples.<sup>9</sup> Crediting the staff's analysis, the majority pointed to evidence that Essendant's customers, rather than accepting higher prices from Essendant, would switch to Essendant's largest competitor, S.P. Richards.<sup>10</sup> Further, even if Essendant's independent broker customers raised their prices, the customers that those independent brokers would lose would not turn to Staples because Staples does not provide the "high-touch services" valued by the midsized business customers who currently purchase from Essendant's independent brokers.<sup>11</sup> The majority also rejected monopsony theories of harm, finding that there would be procompetitive efficiencies from the merger related to lower purchasing costs, and that these lower costs would not result from an anti-competitive decrease in purchasing.<sup>12</sup> Finally, the majority rejected Commissioner Slaughter's suggestion for more retrospective studies, explaining that this "approach would likely commit us to doing on the order of five times or more the number we have done in most years, which is not possible with our current resources."<sup>13</sup>

## Overview of Fresenius case

In 2018, Fresenius, the nation's largest provider of in-clinic dialysis services, proposed to acquire NxStage, a manufacturer of in-home dialysis equipment. The transaction was princi-

Darren S. Tucker is a partner and Thomas Bohnett is an associate in the Washington, D.C. office of Vinson & Elkins LLP. The authors thank Hill Wellford and Neil Imus for their helpful comments.

pally vertical in nature, as Fresenius purchased in-home dialysis equipment for use by its patients. The FTC commissioners, by a three-to-two margin, found that no relief was needed for the vertical aspects of the transaction.<sup>14</sup>

Commissioners Chopra and Slaughter issued dissents sharply critiquing the agency's failure to secure any relief to address the vertical integration resulting from the combination. In separate statements, the two commissioners expressed concern that Fresenius would raise the costs of, or stop selling, NxStage's in-home dialysis machine to competitors (a foreclosure concern) and that entry would become more difficult for potential manufacturers of machines that would compete with NxStage's in-home dialysis machine.<sup>15</sup>

The majority dismissed the foreclosure concern on the basis that Fresenius had a strong incentive to expand the in-home dialysis business—a conclusion it said was bolstered by market participant feedback and Fresenius' prior business practices—and dismissed the entry concern on the basis that CVS Health had announced its intention to enter the market for in-home hemodialysis machines after Fresenius announced its planned acquisition of NxStage.<sup>16</sup>

### Considerations Leading to FTC Divergence

The disagreements between the Republican and Democratic commissioners in *Staples* and *Fresenius* do not appear to be premised on differing factual findings of key marketplace information. Commissioners Slaughter and Chopra, for example, did not dispute that it would have been unprofitable for Staples to raise Essendant's prices post-merger, that there was a history of customers switching wholesalers, that there was vigorous competition for wholesale office supplies, or that the combination would not lead to a reduction in demand for office supplies from manufacturers. Likewise, they did not dispute that the transaction would give Fresenius an incentive to improve the adoption of in-home hemodialysis, that Fresenius had a history of supplying other clinics with its dialysis products, or that entry by at least one new competitor (CVS Health) was likely. Instead, the different conclusions in these cases appear to be premised on differing views of the current effectiveness of antitrust enforcement, the role of the consumer welfare standard, the importance of continuity in enforcement, and the role of economic evidence.

**Effectiveness of Recent Enforcement.** The commissioners' views as to whether there has been significant underenforcement of the antitrust laws over the last several administrations is perhaps the key factor animating the differing conclusions in *Staples* and *Essendant*. Commissioners Chopra and Slaughter frequently express concern about underenforcement, which they assert is underscored by rising levels of concentration in the economy.

Commissioner Slaughter has warned that “concentration is increasing across many sectors of the economy, and our citizens are feeling the pinch of that concentration in their lived experience as both consumers and workers.”<sup>17</sup> In *Staples*,

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Commissioner Slaughter noted “a great debate” about the consequences of “fewer and more dominant companies controlling large swaths of industries and firms across sectors of the economy.”<sup>18</sup> She cited news reports that 2018 saw “record rates” of mergers, and that most of the largest mergers from 2016 to 2018 had vertical components.<sup>19</sup> Against this backdrop, Commissioner Slaughter wrote that she is “particularly concerned that the current approach to vertical integration has led to substantial underenforcement”<sup>20</sup> and that vertical mergers “present an enforcement challenge that we must meet.”<sup>21</sup>

Commissioner Chopra has voiced similar “concerns about increasing concentration” in the economy<sup>22</sup> and how “large corporations increasingly dominate the economy.”<sup>23</sup> He laments that “[o]ver the past decade, we have watched the decentralized internet converge under a handful of corporate umbrellas.”<sup>24</sup> In his view, “our approach [to vertical mergers] can lead to lax enforcement.”<sup>25</sup>

Perhaps as a result, Commissioners Chopra and Slaughter's dissents in *Staples* and *Fresenius* appear to apply a relatively low threshold for seeking relief for potentially problematic conduct, as well as a relatively high standard for accepting claimed efficiencies. In *Staples*, Commissioner Slaughter cited approvingly a legislative proposal that would shift the burden of proof to parties to mergers in excess of \$5 billion.<sup>26</sup> Commissioner Chopra appeared ready to condemn the Fresenius transaction on the basis that Fresenius “might have the incentive” to engage in anticompetitive conduct.<sup>27</sup> At least in concentrated industries, Commissioners Chopra and Slaughter appear ready to dispense with the presumption that vertical (and perhaps horizontal) mergers are lawful.

Commissioners Chopra and Slaughter appear skeptical of efficiencies claims, at least in vertical mergers. In her *Staples* dissent, Commissioner Slaughter said that the FTC is “too credulous about claimed procompetitive benefits unique to vertical integration.”<sup>28</sup> Similarly, in *Fresenius*, Commissioner Chopra wrote, disbelievingly, “[t]he Majority believes that, after this transaction, the market will benefit from the standard theoretical improvements from vertical integration.”<sup>29</sup>

The Republican commissioners, in contrast, have questioned whether problematic levels of concentration exist or whether there is credible evidence of underenforcement. In *Staples*, the majority disputed that there has been underen-

forcement against anticompetitive vertical mergers and asserted that “the sources cited in the dissent have been subject to substantial criticism for both methodological flaws and irrelevance to competition policy.”<sup>30</sup> The majority also argued that a Section 7 challenge requires that harm to competition be “probable (not certain) and substantial . . . . Simply theorizing a harm that might arise out of a merger is not enough.”<sup>31</sup>

Commissioner Wilson has been particularly forceful on these points. In *Staples*, she argued that “general upward trends in the number of mergers, their valuations, or the size of the largest businesses . . . do not support such a sweeping claim about the failure of American antitrust policy.” Commissioner Wilson expressed incredulity that “markets are less competitive today than they were in some ill-defined golden age of yore.”<sup>32</sup> She assailed the validity of studies and analyses underlying Commissioner Slaughter’s dissent and challenged the notion that “the [FTC] unilaterally can ‘fix’ this perceived problem simply by being more aggressive.”<sup>33</sup> According to Commissioner Wilson, “we as government enforcers bear the ultimate burden of proof before a neutral decision-maker (i.e., a federal court).”<sup>34</sup> She cited the failed challenge to the AT&T-Time Warner merger as an example of the perils of Commissioner Slaughter’s proposed approach.<sup>35</sup>

Similarly, Commissioner Phillips, in a November 2018 speech, disagreed with the view that concentration levels should influence enforcement decisions: “while concentration has a role in modern enforcement, it is far more nuanced.”<sup>36</sup>

In keeping with the spirit of the FTC’s Hearings on Competition and Consumer Protection in the 21st Century (Hearings), Chairman Simons has expressed openness to the possibility that the FTC could be underenforcing the antitrust laws, saying that the results of recent merger retrospectives could be read “as indicating underenforcement.”<sup>37</sup> But Chairman Simons’ joining the majority statement in *Staples* suggests that he is unlikely to fundamentally adjust enforcement until sufficient empirical evidence demonstrates a need for recalibration.

The Republican commissioners appear far more willing to credit efficiencies claims for vertical mergers than their Democratic colleagues. Commissioner Wilson said that “it may be appropriate to presume that certain vertical efficiencies are verifiable and substantial in the absence of strong evidence to the contrary.”<sup>38</sup> Similarly, Commissioner Phillips declared that “vertical integration is generally pro-competitive, or competitively neutral.”<sup>39</sup>

**Adherence to the Consumer Welfare Standard.** Commissioners Chopra and Slaughter have at times called for evaluating conduct according to a broader range of considerations than is typically encompassed in consumer welfare-centered analysis. The Republican commissioners have shown no desire to depart from the consumer welfare standard and questioned what would replace it.

In his dissents in *Staples* and *Fresenius* and in various speeches, Commissioner Chopra has suggested abandoning,

or at least supplementing, the consumer welfare standard, by having antitrust enforcers pursue other goals such as:

- Protecting small firms<sup>40</sup>
- Ensuring that buyers will own assets they propose to acquire for an extended period<sup>41</sup>
- Promoting civil rights and democracy<sup>42</sup>

The promotion of these goals led Commissioner Chopra to object to the Fresenius transaction on the basis that the only small company in the market would be acquired<sup>43</sup> and to the Staples transaction on the basis that the transaction could lead to a transfer of income from suppliers to the merged firm and its customers.<sup>44</sup> In addition, Commissioner Chopra has raised concerns about private equity firms acquiring assets either outright (*Staples*) or as divestiture buyers (*Linde AG/Praxair, Inc.*).<sup>45</sup> In his view, private equity funds have financing, executive compensation, and governance structures that often lead them to take on excessive debt and go bankrupt or to sell recently acquired assets.

Commissioner Slaughter has said that while there are legitimate concerns about abandoning the consumer welfare standard, she did not believe that “they justify the status quo.”<sup>46</sup> She questioned whether, in the context of sky-high litigation costs and the complexity of antitrust trials, the consumer welfare standard “really is administrable as it is applied today.”<sup>47</sup>

Republican commissioners, in contrast, show no signs of moving away from the consumer welfare standard. Commissioner Wilson noted the relative ease with which the consumer welfare standard is administered<sup>48</sup> and that “the claimed shortcomings of the consumer welfare standard are contradicted by the evidence.”<sup>49</sup> While defending the consumer welfare standard, Commissioner Wilson has advocated for a total welfare standard “without regard for how gains or losses are distributed” between producers and consumers.<sup>50</sup> She criticized what she termed the “multiple goals” approach of the Democrats, which “would make antitrust enforcement more susceptible to political whims and influence.”<sup>51</sup> Likewise, Commissioner Phillips said that he is “skeptical that, in the first place, consumer welfare critics have laid a solid foundation for their claims or, in the second, they offer administrable alternatives that would solve the harms they identify.”<sup>52</sup>

The Republican majority has, in general, not agreed with Commissioner Chopra’s concerns about private equity buyers. In *Staples*, the majority wrote: “the application of that general [negative] view [of private equity] to the facts of this case does not raise a cognizable antitrust concern.”<sup>53</sup> Further, “[t]he Commission does not dwell on motives that have no relevance to how the acquiring company would use the acquired business to harm the competitive process.”<sup>54</sup> Chairman Simons explained that “I think it would be a mistake to categorically condemn private equity buyers and prohibit them from participating in the process,” while adding that he did think that a “more in-depth due diligence analysis” is called for when evaluating their participation in a given merger.<sup>55</sup>

A closely related difference between the Republican and Democratic commissioners is how they weigh risks of Type 1

(overenforcement) versus Type 2 (underenforcement) error. Commissioner Phillips has raised concerns that moving away from the consumer welfare standard would “block[] deals that would help consumers.”<sup>56</sup> Talking about the pre-consumer welfare era of antitrust enforcement, he said “there was little dispute that many procompetitive transactions—that is, deals that would help shareholders, employees and customers alike—were barred.”<sup>57</sup> Similarly, Commissioner Wilson said that moving away from the consumer welfare standard would mean “we will unwittingly chill procompetitive transactions and conduct.”<sup>58</sup>

The Democrats, on the other hand, express more concern about the harm from, and frequency of, underenforcement. Commissioner Slaughter in her *Staples* dissent wrote that “I am concerned that we end up allowing vertical mergers that are anticompetitive in an effort to avoid challenges to procompetitive mergers.”<sup>59</sup> Commissioner Chopra said, “While we often focus on the costs of action and regulation, we should also be asking ourselves about the cost of inaction and whether we are missing out on the innovation and progress that come with a competitive marketplace.”<sup>60</sup>

**Importance of Continuity.** The commissioners have different orientations toward changes in the FTC’s enforcement standards; although, here the split is not so clearly along party lines. Commissioners Phillips and Wilson frequently emphasize the value of continuity and predictability in the FTC’s decisions. In his opening statement at his confirmation hearing, Commissioner Phillips said that “[t]he FTC must maintain predictability and intellectual rigor.”<sup>61</sup> In a speech given shortly after the issuance of the *Staples* decision, Commissioner Wilson said, “there is no reason to fundamentally ‘rethink’ vertical merger policy given how much we know about the economics of vertical integration.”<sup>62</sup>

In contrast with his Republican colleagues, Chairman Simons has made openness to change a hallmark of his tenure. When announcing the start of the FTC’s Hearings, he said that “important and significant questions recently have been raised about whether we should rethink our approach to some of these issues. Therefore, it would be a mistake to adopt a policy of continuity without some serious reflection and evaluation.”<sup>63</sup>

In *Staples* and *Fresenius*, Commissioners Slaughter and Chopra showed no hesitation in applying new standards for reviewing vertical mergers. Both previously signaled that they were ready to make immediate changes to address perceived shortcomings in enforcement. At the opening of the FTC’s Hearings, Commissioner Slaughter said that “[i]t is simply not plausible that a meaningful self-examination will lead to the conclusion that nothing should change.”<sup>64</sup> Later in the Hearings, Commissioner Chopra said, “this must be the start of changing our approach to face the realities of an economy dominated by large firms.”<sup>65</sup>

**Role of Economic Evidence.** While perhaps not a novel difference, the current Republican and Democratic commissioners tend to emphasize the use of different analytical

tools to evaluate competitive effects, in particular how much weight to give to economic analysis.

Commissioner Slaughter wrote in *Staples* that she was “worried about the reliability and permissiveness of the conclusions we draw from the [economic] evidence gathered and analysis conducted by staff.”<sup>66</sup> Commissioner Chopra likewise criticized the majority in *Staples* for putting too much weight on economic models. Commissioner Chopra wrote that “[w]e must be humble about [the] predictive power [of economic models].”<sup>67</sup> As a result, both put little weight on the staff’s raising rivals’ costs analysis in *Staples*.

In addition, Commissioners Slaughter and Chopra have raised questions about whether the FTC should assume that companies profit maximize, an assumption underlying neoclassical economics. In Commissioner Chopra’s view, “large corporations . . . frequently do not make decisions in ways that our economics textbooks predict.”<sup>68</sup> While her statement is not entirely clear in this respect, Commissioner Slaughter appeared to object to the *Staples* transaction on the basis that *Staples* might increase Essendant’s prices post-merger even though this would be unprofitable.<sup>69</sup>

### Commissioners’ Positions Reflect Current Debates

In many respects, the commissioners’ views echo the broader debate in legal, economic, and policy circles about the goals and effectiveness of recent antitrust enforcement. Commissioners Chopra and Slaughter’s statements reflect the influence of the progressive “New Brandeis” school of antitrust, while the Republican commissioners’ approach aligns with the consumer welfare-focused approach that has guided antitrust enforcement for the last few decades.

Commissioners Slaughter and Chopra have shown sympathy for those claiming that the permissiveness of recent antitrust enforcement has led to detrimental levels of concentration in the economy. Before joining the FTC, Commissioner Slaughter helped the Democratic Party develop its *Better Deal* platform,<sup>70</sup> the first action item of which is “[p]revent[ing] big mergers that would harm consumers, workers, and competition.” Commissioner Slaughter’s call for retrospectives in *Staples* maps onto the *Better Deal*’s second policy prescription, which is to “[r]equire regulators to review mergers after completion to ensure they continue to promote competition,”<sup>71</sup> as well as a 2017 bill introduced by the Congressional Antitrust Caucus that would require the FTC and DOJ to conduct annual merger retrospectives.<sup>72</sup> In 2018, Commissioner Chopra hired as a legal fellow the author of a series of papers arguing for a shift away from consumer-welfare focused antitrust analysis.<sup>73</sup>

On the other side, the Republican commissioners could hardly be more closely tied to the mainstream of antitrust legal and policy circles. Both Chairman Simons and Commissioner Wilson have long, distinguished careers in private practice as well as prior FTC service under former Chairman Timothy J. Muris, whose self-professed guiding word when he led the agency in the first Bush Administration was “con-

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tinuity.”<sup>74</sup> Commissioner Phillips also has offered critiques of “[t]hose who propose to change antitrust.”<sup>75</sup>

### Implications for Practitioners

Notwithstanding what appears to be a substantial divide between the Republican and Democratic commissioners on key aspects of enforcement policy, it would be a mistake to assume that three-to-two splits will become the new normal at the FTC or that Republicans or Democrats will vote as a bloc. Commissioners have crossed party lines in several cases. Chairman Simons joined the two Democrats in *1-800 Contacts, Inc.*,<sup>76</sup> and Commissioner Slaughter joined her Republican colleagues in *Speedway Motorsports, Inc. and Oil-Chem Research Corporation*.<sup>77</sup> On some issues, such as those involving intellectual property rights, Chairman Simons may take a position in between his Republican and Democratic colleagues.

Still, divergence among commissioners on key aspects of merger enforcement may portend lengthier Second Request investigations. In addition, merging parties may need to address a wider range of potential concerns, particularly at the later stages of Second Request investigations. These effects will likely be exacerbated when one or more Republican commissioners are recused from a matter. Absent that, the outcome of most investigations seems unlikely to change.

Longer and less certain merger reviews are likely for both horizontal and vertical mergers. The reasons why the majority and minority disagreed in *Staples* and *Fresenius* had little to do with the appropriate analytical standards for vertical mergers, or even for mergers generally. That the divergence among the commissioners became apparent in two vertical merger cases, as opposed to horizontal merger or conduct cases, is likely just a reflection of the ebb and flow of cases that reach the Commission. It is notable that there were also disagreements about horizontal aspects of the *Staples* transaction.

The divergent views among commissioners will also make issuance of new or updated enforcement guidelines with bipartisan support more challenging. New vertical merger guidelines, which have been discussed as part of the recent Hearings, seem particularly unlikely in the current environment.

The narrowness of the margin held by those favoring a more mainstream approach means that a change in party in the White House could precipitate a dramatic shift in enforcement. Many of the current candidates on the left have come out in favor of the *Better Deal's* antitrust prescriptions. A new assistant attorney general or FTC commissioner appointed by a Democratic president could entail sweeping change. Given that the average length of a Second Request is nearly a year, transactions announced as early as the end of this year could fall within a new enforcement environment.

Notwithstanding this uncertainty, there are near-term potential opportunities for practitioners as well. For instance, buyers with low levels of debt can emphasize that point to

Commissioner Chopra to address his oft-stated concerns about the ability of debt-laden buyers to provide meaningful competition. Relatedly, buyers can demonstrate the reasonableness of executive compensation structures and plans to hold assets for the long term as a way of assuaging concerns about reckless, stock-option induced decision-making, another concern of Commissioner Chopra's. Commissioner Slaughter has expressed particular interest in post-merger monitoring of what she deems close calls in merger enforcement, and so merging parties could emphasize their willingness to respond to regular information requests related to their merger as an alternative to a formal consent decree. ■

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<sup>1</sup> Statement of Commissioner Rohit Chopra, Sycamore Partners II, L.P., Staples, Inc. and Essendant Inc., FTC File No. 181-0180 (Jan. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448335/181\\_0180\\_staples\\_essendant\\_chopra\\_statement\\_1-28-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448335/181_0180_staples_essendant_chopra_statement_1-28-19_0.pdf) [hereinafter Chopra *Staples* Statement]; Statement of Commissioner Rebecca Kelly Slaughter, Sycamore Partners II, L.P., Staples, Inc. and Essendant Inc., FTC File No. 181-0180 (Jan. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448321/181\\_0180\\_staples\\_essendant\\_slaughter\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf) [hereinafter Slaughter *Staples* Statement].

<sup>2</sup> Statement of Commissioner Chopra, Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227 (Feb. 19, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1455733/171\\_0227\\_fresenius\\_nxstage\\_chopra\\_statement\\_2-19-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455733/171_0227_fresenius_nxstage_chopra_statement_2-19-19.pdf) [hereinafter Chopra *Fresenius* Statement]; Statement of Commissioner Slaughter, Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227 (Feb. 19, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1455740/171\\_0227\\_fresenius-nxstage-slaughter\\_statement\\_2-19-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455740/171_0227_fresenius-nxstage-slaughter_statement_2-19-19.pdf) [hereinafter Slaughter *Fresenius* Statement].

<sup>3</sup> We limit our observations to the five current FTC commissioners and do not address possible divergences between the FTC and Department of Justice.

<sup>4</sup> Statement of Chairman Joseph J. Simons, Commissioner Noah Joshua Phillips, and Commissioner Christine S. Wilson at 1, Sycamore Partners II, L.P., Staples, Inc. and Essendant Inc., FTC File No. 181-0180 (Jan. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448321/181\\_0180\\_staples\\_essendant\\_slaughter\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448321/181_0180_staples_essendant_slaughter_statement.pdf) [hereinafter Majority *Staples* Statement].

<sup>5</sup> See Broadcom Limited, FTC File No. 171-0027 (July 3, 2017) (Analysis and Aid to Public Comment), [https://www.ftc.gov/system/files/documents/cases/1710027\\_broadcom\\_brocade\\_analysis.pdf](https://www.ftc.gov/system/files/documents/cases/1710027_broadcom_brocade_analysis.pdf); Coca-Cola Company, FTC File No. 101-0107 (Sept. 27, 2010) (Analysis and Aid to Public Comment), <https://loadtest.ftc.gov/sites/default/files/documents/cases/2010/09/100927cocacolaanal.pdf>; PepsiCo, Inc., FTC File No. 091-0133 (Feb. 26, 2010) (Analysis and Aid to Public Comment), <https://www.ftc.gov/sites/default/files/documents/cases/2010/02/100226pepsicoanal.pdf>.

<sup>6</sup> Chopra *Staples* Statement, *supra* note 1, at 2-4; Slaughter *Staples* Statement, *supra* note 1, at 8-9.

<sup>7</sup> Slaughter *Staples* Statement, *supra* note 1, at 5, 9. Commissioner Slaughter repeated her call for a general practice of conducting retrospectives, especially as to vertical mergers, in subsequent remarks. In an April 12, 2019 speech at the Hearings, she said, “To the extent that retrospectives can help us improve our predictive tools and analysis or correct prior decisions, we need to do more of them. And given the increased complexity of analyzing vertical integration, I believe we should focus our resources on reviewing our enforcement decisions regarding vertical mergers.” Commissioner Rebecca Kelly Slaughter, Prepared Remarks at Hearings on Competition and Consumer Protection in the 21st Century: Merger Retrospectives (Apr. 12,

- 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1513758/slaughter\\_remarks\\_at\\_ftc\\_retrospectives\\_hearing\\_4-12-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1513758/slaughter_remarks_at_ftc_retrospectives_hearing_4-12-19.pdf).
- <sup>8</sup> Chopra *Staples* Statement, *supra* note 1, at 2.
- <sup>9</sup> Majority *Staples* Statement, *supra* note 4, at 1.
- <sup>10</sup> *Id.* at 2.
- <sup>11</sup> *Id.*
- <sup>12</sup> *Id.* at 2–3.
- <sup>13</sup> *Id.* at 6.
- <sup>14</sup> Statement of Chairman Simons, Commissioner Phillips, and Commissioner Wilson at 1–2, Fresenius Medical Care AG & Co. KGaA and NxStage Medical, Inc., FTC File No. 171-0227 (Feb. 19, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1455733/171\\_0227\\_fresenius\\_nxstage\\_chopra\\_statement\\_2-19-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455733/171_0227_fresenius_nxstage_chopra_statement_2-19-19.pdf) [hereinafter Majority *Fresenius* Statement]. There was also a horizontal aspect to the transaction, which was resolved through a consent decree. All five commissioners agreed that the transaction would reduce competition in the market for bloodline tubing, necessitating divestiture of NxStage’s bloodline tubing business to a third party.
- <sup>15</sup> Chopra *Fresenius* Statement, *supra* note 2, at 3–4 (“For entrants, even ones with existing plans, the numbers will not add up, and fewer new machines will make it to market.”); Slaughter *Fresenius* Statement, *supra* note 2, at 2 (“I am concerned that Fresenius will have the profit incentive to foreclose or raise the costs of its rivals . . .”).
- <sup>16</sup> Majority *Fresenius* Statement, *supra* note 14, at 2.
- <sup>17</sup> Commissioner Rebecca Kelly Slaughter, Remarks Before George Washington University Law School 1 (Sept. 24, 2018) [hereinafter Slaughter Sept. 24, 2018 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1412806/slaughter\\_-\\_closing\\_remarks\\_for\\_6th\\_annual\\_bill\\_kovacic\\_antitrust\\_saloon\\_9-24-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1412806/slaughter_-_closing_remarks_for_6th_annual_bill_kovacic_antitrust_saloon_9-24-18.pdf).
- <sup>18</sup> Slaughter *Staples* Statement, *supra* note 1, at 1.
- <sup>19</sup> *Id.* at 2.
- <sup>20</sup> *Id.*
- <sup>21</sup> *Id.*
- <sup>22</sup> Comment of Commissioner Rohit Chopra, Hearing #1 on Competition and Consumer Protection in the 21st Century 1 (Sept. 6, 2018) [hereinafter Chopra Sept. 6, 2018 Comment], [https://www.ftc.gov/system/files/documents/public\\_statements/1408196/chopra\\_-\\_comment\\_to\\_hearing\\_1\\_9-6-18.pdf](https://www.ftc.gov/system/files/documents/public_statements/1408196/chopra_-_comment_to_hearing_1_9-6-18.pdf).
- <sup>23</sup> Commissioner Rohit Chopra, FTC Hearings on Consumer Protection and Competition, Remarks Before New York University School of Law (Dec. 6, 2018) [hereinafter Chopra Dec. 6, 2018 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1432481/remarks\\_of\\_commissioner\\_chopra\\_at\\_ftc\\_hearing\\_on\\_corporate\\_governance.pdf](https://www.ftc.gov/system/files/documents/public_statements/1432481/remarks_of_commissioner_chopra_at_ftc_hearing_on_corporate_governance.pdf).
- <sup>24</sup> Commissioner Rohit Chopra, Remarks at ABA Section of Antitrust Law Annual Spring Meeting, Tech Platforms, Content Creators, and Immunity (Mar. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1510713/chopra\\_-\\_aba\\_spring\\_meeting\\_3-28-19\\_0.pdf](https://www.ftc.gov/system/files/documents/public_statements/1510713/chopra_-_aba_spring_meeting_3-28-19_0.pdf).
- <sup>25</sup> Chopra *Staples* Statement, *supra* note 1, at 1.
- <sup>26</sup> Slaughter *Staples* Statement, *supra* note 1, at 5 n.22.
- <sup>27</sup> Chopra *Fresenius* Statement, *supra* note 2, at 4.
- <sup>28</sup> Slaughter *Staples* Statement, *supra* note 1, at 4.
- <sup>29</sup> Chopra *Fresenius* Statement, *supra* note 2, at 4.
- <sup>30</sup> Majority *Staples* Statement, *supra* note 4, at 4.
- <sup>31</sup> *Id.* at 6.
- <sup>32</sup> Statement of Commissioner Christine S. Wilson at 1–2, Sycamore Partners, II, L.P., Staples, Inc. and Essendant Inc., FTC File No. 181-0180 (Jan. 28, 2019), [https://www.ftc.gov/system/files/documents/public\\_statements/1448307/181\\_0180\\_staples\\_essendant\\_wilson\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1448307/181_0180_staples_essendant_wilson_statement.pdf).
- <sup>33</sup> *Id.* at 2–4.
- <sup>34</sup> *Id.* at 4.
- <sup>35</sup> *Id.*
- <sup>36</sup> Commissioner Noah Joshua Phillips, Looking Back to the Future: What the Past Can Tell Us About the Future of Antitrust, Remarks Before the Technology Policy Institute (Nov. 15, 2018) [hereinafter Phillips Nov. 15, 2018 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1456097/looking\\_back\\_to\\_the\\_future.pdf](https://www.ftc.gov/system/files/documents/public_statements/1456097/looking_back_to_the_future.pdf).
- <sup>37</sup> Chairman Joseph Simons, Remarks Before Georgetown Law Global Antitrust Enforcement Symposium (Sept. 25, 2018), [https://loadtest.ftc.gov/system/files/documents/public\\_statements/1413340/simons\\_georgetown\\_lunch\\_address\\_9-25-18.pdf](https://loadtest.ftc.gov/system/files/documents/public_statements/1413340/simons_georgetown_lunch_address_9-25-18.pdf); see also Nomination Hearing, Senate Committee on Commerce, Science, and Transportation, 115th Cong. (Feb. 14, 2018) (testimony of Joseph Simons) (“At a high level, I believe that big is not necessarily bad. I also believe that big is not necessarily good. Sometimes big is good, sometimes big is bad, and sometimes it’s both at the same time.”).
- <sup>38</sup> Commissioner Christine S. Wilson, Vertical Merger Policy: What Do We Know and Where Do We Go? Remarks Before the GCR Live 8th Annual Antitrust Law Leaders Forum (Feb. 1, 2019) [hereinafter Wilson Feb. 1, 2019 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1455670/wilson\\_-\\_vertical\\_merger\\_speech\\_at\\_gcr\\_2-1-19.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455670/wilson_-_vertical_merger_speech_at_gcr_2-1-19.pdf).
- <sup>39</sup> Commissioner Noah Phillips, FTC Hearing #5: Competition and Consumer Protection in the 21st Century, Remarks Before Georgetown University Law Center at 1–2 (Nov. 1, 2018) [hereinafter Phillips Nov. 1, 2018 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1419437/20181101\\_njp\\_opening\\_remarks\\_ftc\\_hearings.pdf](https://www.ftc.gov/system/files/documents/public_statements/1419437/20181101_njp_opening_remarks_ftc_hearings.pdf).
- <sup>40</sup> Chopra *Fresenius* Statement, *supra* note 2, at 3 (favoring “an ecosystem of small firms” over larger firms with significant financial resources); Chopra Sept. 6, 2018 Comment, *supra* note 22, at 1.
- <sup>41</sup> Chopra *Staples* Statement, *supra* note 1, at 4.
- <sup>42</sup> Commissioner Rohit Chopra, Remarks before Silicon Flatirons Conference at 1 (Feb. 10, 2019) [hereinafter Chopra Feb. 10, 2019 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1453633/remarks\\_of\\_commissioner\\_chopra\\_at\\_silicon\\_flatirons.pdf](https://www.ftc.gov/system/files/documents/public_statements/1453633/remarks_of_commissioner_chopra_at_silicon_flatirons.pdf) (concentration in the tech sector poses challenges “to fair economic competition . . . to our civil rights . . . [and] to our democracy”).
- <sup>43</sup> Chopra *Fresenius* Statement, *supra* note 2, at 1.
- <sup>44</sup> Chopra *Staples* Statement, *supra* note 1, at 2.
- <sup>45</sup> Chopra Dec. 6, 2018 Speech, *supra* note 23, at 3; Statement of Commissioner Rohit Chopra, Linde AG, Praxair, Inc. and Linde PLC, FTC File No. 171-0068 (Oct. 22, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1416947/1710068\\_praxair\\_linde\\_rc\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1416947/1710068_praxair_linde_rc_statement.pdf); see also @chopraFTC, Twitter (Jan. 28, 2019, 3:05 PM), <https://twitter.com/chopraftc/status/1090023140468633600> (“Many of these funds load companies up with debt and sell off the best assets. This can kill off competition . . .”).
- <sup>46</sup> Slaughter Sept. 24, 2018 Speech, *supra* note 17, at 4.
- <sup>47</sup> *Id.*
- <sup>48</sup> Commissioner Christine S. Wilson, Welfare Standards Underlying Antitrust Enforcement: What You Measure is What You Get, Remarks Before George Mason Law Review 22nd Annual Antitrust Symposium at 5 (Feb. 15, 2019) [hereinafter Wilson Feb. 15, 2019 Speech], [https://www.ftc.gov/system/files/documents/public\\_statements/1455663/welfare\\_standard\\_speech\\_-\\_cmr-wilson.pdf](https://www.ftc.gov/system/files/documents/public_statements/1455663/welfare_standard_speech_-_cmr-wilson.pdf) (“The consumer welfare standard is generally considered to be relatively easy to administer.”).
- <sup>49</sup> *Id.* at 5.
- <sup>50</sup> *Id.* at 12.
- <sup>51</sup> *Id.* at 10.
- <sup>52</sup> Phillips Nov. 1, 2018 Speech, *supra* note 39.
- <sup>53</sup> Majority *Staples* Statement, *supra* note 4, at 3.
- <sup>54</sup> *Id.*
- <sup>55</sup> *Interview with Joseph Simons*, ANTITRUST SOURCE (Feb. 2019), [https://www.americanbar.org/content/dam/aba/publishing/antitrust\\_source/2018-2019/at\\_source-february2019/feb19\\_full\\_source.pdf](https://www.americanbar.org/content/dam/aba/publishing/antitrust_source/2018-2019/at_source-february2019/feb19_full_source.pdf).
- <sup>56</sup> Phillips Nov. 15, 2018 Speech, *supra* note 36, at 8.
- <sup>57</sup> *Id.* at 5.

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- <sup>58</sup> Wilson Feb. 15, 2019 Speech, *supra* note 48.
- <sup>59</sup> Slaughter Staples Statement, *supra* note 1, at 4.
- <sup>60</sup> Chopra Feb. 10, 2019 Speech, *supra* note 42, at 5.
- <sup>61</sup> Noah Joshua Phillips, Nominee, Fed. Trade Comm'n, Prepared Statement (Feb. 14, 2018).
- <sup>62</sup> Wilson Feb. 1, 2019 Speech, *supra* note 38.
- <sup>63</sup> Chairman Joseph Simons, Remarks Announcing the Competition and Consumer Protection Hearings (June 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](https://www.ftc.gov/system/files/documents/public_statements/1385308/prepared_remarks_of_joe_simons_announcing_the_hearings_6-20-18_0.pdf).
- <sup>64</sup> Commissioner Rebecca Kelly Slaughter, Remarks at Hearings on Competition and Consumer Protection in the 21st Century (Sept. 21, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1412049/commissioner\\_slaughter\\_opening\\_remarks\\_for\\_ftc\\_competition\\_and\\_consumer\\_protection\\_hearings\\_sept21.pdf](https://www.ftc.gov/system/files/documents/public_statements/1412049/commissioner_slaughter_opening_remarks_for_ftc_competition_and_consumer_protection_hearings_sept21.pdf).
- <sup>65</sup> Chopra Dec. 6, 2018 Speech, *supra* note 23.
- <sup>66</sup> Slaughter Staples Statement, *supra* note 1, at 4.
- <sup>67</sup> Chopra Staples Statement, *supra* note 1, at 3.
- <sup>68</sup> Chopra Dec. 6, 2018 Speech, *supra* note 65, at 1.
- <sup>69</sup> Slaughter Staples Statement, *supra* note 1, at 8. Similar concerns do not appear in her Fresenius statement.
- <sup>70</sup> Responses of Rebecca Kelly Slaughter to Senate Questionnaire, [https://www.commerce.senate.gov/public/\\_cache/files/962d4513-9936-47f2-a742-e9da55084f59/9ABFF10AB50049E73B3E81503C666252.majority-qfrs—rebecca-kelly-slaughter.pdf](https://www.commerce.senate.gov/public/_cache/files/962d4513-9936-47f2-a742-e9da55084f59/9ABFF10AB50049E73B3E81503C666252.majority-qfrs—rebecca-kelly-slaughter.pdf) (“In my capacity as a Senate staff member, I provided substantive and technical advice on the Better Deal platform, which represents the Congressional Democrats’ proposal for legislative changes to antitrust law”).
- <sup>71</sup> Senate Democrats, *A Better Deal: Cracking Down on Corporate Monopolies*, <https://www.democrats.senate.gov/imo/media/doc/2017/07/A-Better-Deal-on-Competition-and-Costs-1.pdf>.
- <sup>72</sup> Merger Retrospective Act of 2017, H.R.4538, 115th Congress (2017–2018).
- <sup>73</sup> David Streitfield, *Amazon’s Antitrust Antagonist Has a Breakthrough Idea*, N.Y. TIMES (Sept. 7, 2018), <https://www.nytimes.com/2018/09/07/technology/monopoly-antitrust-lina-khan-amazon.html>; see also Lina M. Khan, *Amazon’s Antitrust Paradox*, 126 YALE L.J. 710, 792–97 (2017); Lina Khan & Sandeep Vaheesan, *Market Power and Inequality, The Antitrust Counter-revolution and its Discontent*, 11 HARV. L. & POL’Y REV. 234 (2017).
- <sup>74</sup> Oversight Hearing, Senate Committee on the Judiciary, 107th Cong. (Sept. 19, 2002) (testimony of Timothy J. Muris). Commissioner Wilson mentioned Muris 12 times in her confirmation hearing.
- <sup>75</sup> Phillips Nov. 15, 2018 Speech, *supra* note 36.
- <sup>76</sup> Opinion of the Commission, 1-800 Contacts, Inc., FTC Docket No. 9372 (Nov. 7, 2018), [https://www.ftc.gov/system/files/documents/cases/docket\\_no\\_9372\\_opinion\\_of\\_the\\_commission\\_redacted\\_public\\_version.pdf](https://www.ftc.gov/system/files/documents/cases/docket_no_9372_opinion_of_the_commission_redacted_public_version.pdf).
- <sup>77</sup> Statement of Federal Trade Commission, Speedway Motorsports, Inc. and Oil-Chem Research Corp., FTC File No. 002-3256 (Aug. 9, 2018), [https://www.ftc.gov/system/files/documents/public\\_statements/1400498/x010021\\_oil\\_chem\\_speedway\\_jjs\\_mko\\_njp\\_rks\\_statement.pdf](https://www.ftc.gov/system/files/documents/public_statements/1400498/x010021_oil_chem_speedway_jjs_mko_njp_rks_statement.pdf).