Washington Center for Equitable Growth
Making Antitrust Work for the 21st Century
Washington, DC
October 6, 2016
Keynote Remarks of Commissioner Terrell McSweeny[1]

Good morning. It is a pleasure to be here today. I would like to thank the Center for Equitable Growth for the invitation to speak to you.

In the two sessions this morning, you've heard from a number of distinguished academics and practitioners about the development of antitrust law over the past 40 years and about the relationship between antitrust, growth, and inequality.

There is no question that these are important and timely issues.

Last year, the *Wall Street Journal* reported, "a growing number of industries in the U.S. are dominated by a shrinking number of companies."[2] The article noted that nearly two-thirds of publicly traded companies operated in markets that had become more concentrated between 1996 and 2013.[3]

Earlier this year, President Obama signed an executive order directing executive agencies to take steps to promote competition within their areas of responsibility.[4] That order was accompanied by a Council of Economic Advisers issue brief, which noted indicators suggesting increasing concentration across a number of industries and decreasing business and labor dynamism.[5] The links among these findings are not yet fully understood.

It may also be the case that rising economic rents – and their shift away from labor and toward capital – may be a factor in the rise in income inequality in the United States. In a recent paper, Jason Furman and Peter Orszag suggested that "consolidation may be contributing to the changing distribution of capital returns" in the United States.[6]

---

[1] I would like to thank Brian O'Dea and Jenny Schwab for their contributions to this speech. The views expressed in this speech are my own and do not necessarily reflect those of the Commission or any other Commissioner.

[2] Theo Francis & Ryan Knutson, Wave of Megadeals Tests Antitrust Limits in U.S., WALL ST. J., Oct. 18, 2015, http://www.wsj.com/articles/wave-of-megadeals-tests-antitrust-limits-in-u-s-1445213306.

[3] *See id.*

[4] *See* Exec. Order No. 13725, 81 Fed. Reg. 23417-19 (April 15, 2016), https://www.gpo.gov/fdsys/pkg/FR-2016-04-20/pdf/2016-09346.pdf.

[5] Council of Econ. Advisers, *Issue Brief: Benefits of Competition and Indicators of Market Power*, April 15, 2016, https://www.whitehouse.gov/sites/default/files/page/files/20160414_cea_competition_issue_brief.pdf.

[6] Jason Furman & Peter Orszag, *Firm-Level Perspective on the Role of Rents in the Rise in Inequality*, Presentation at "A Just Society" Centennial Event in Honor of Joseph Stiglitz, Columbia University, Oct. 16, 2015,

While there is, undoubtedly, still much work to be done in order to better understand these trends and the linkages between them, I believe there is a growing consensus that suggests a troubling decrease in competition. It is well established that competition benefits consumers via lower prices, greater quality, and greater innovation.[7] Innovation, in turn, leads to productivity growth and better living standards.[8] In labor markets, competition to attract and retain workers also leads to higher wages. So it is worrisome when we see indicators of declining competition.

Against this backdrop, the role antitrust plays in maintaining competitive markets has become, quite appropriately, an important topic of public debate.

Ironically, antitrust enforcers do not have a monopoly on competition policy. That's why the President's executive order encouraging agencies across the federal government to consider actions they can take within their authority to promote competition is important. I hope the next Administration continues this wise policy.

Today I am going to focus my remarks on the vital role antitrust enforcers must continue to play. There is a great deal that antitrust does extremely well today. Over the last seven years, U.S. enforcers have challenged a larger proportion of merger transactions than in the previous two decades. It has been a great privilege for me to work with so many talented and dedicated lawyers and economists, both as a Commissioner at the Federal Trade Commission and in my time at the Department of Justice.

But there are also some areas of the antitrust enterprise that – to be quite candid – could use some work.

First, we must enforce effectively. Second, we must continue to protect opportunity and advocate for competition. Third, we must eliminate barriers to effective antitrust enforcement, including antiquated federal immunities and protectionist state laws. Finally, we must continually seek to improve our understanding of markets, economics, and the theories underlying antitrust enforcement. That includes subjecting to critical scrutiny even "conventional wisdom" in antitrust.

---

https://www.whitehouse.gov/sites/default/files/page/files/20151016_firm_level_perspective_on_role_of_rents_in_inequality.pdf.

[7] William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic and Legal Thinking*, J. ECON. PERSPECTIVES, Vol. 14, No. 1 (Winter 2000), http://faculty.haas.berkeley.edu/shapiro/century.pdf.

[8] Carl Shapiro, *Competition and Innovation: Did Arrow Hit the Bull's Eye?, in* THE RATE & DIRECTION OF INVENTIVE ACTIVITY REVISITED, 361-410 (Josh Lerner & Scott Stern eds., 2010) http://faculty.haas.berkeley.edu/shapiro/arrow.pdf.

Effective Enforcement

Over the past several decades, there has been an increased emphasis on avoiding "false positives" in antitrust – that is, in avoiding bringing cases where we may turn out to be wrong. Some suggest that we have developed a bit of a preoccupation with false positives in modern antitrust.[9] In close cases where there is uncertainty about the future, the thinking goes, it is better to err on the side of letting the market tend to itself. These commenters believe that intervention might threaten potentially efficient mergers or conduct.

I do not subscribe to that line of thinking. There will usually be some uncertainty about the future. It is, after all, the future. The goal of each case should be to consider the best available relevant evidence and make the decision that leads to the best results for consumers and competition. That means a willingness to accept the occasional false positive.

Congress certainly understood this when it drafted the Clayton Act in 1914 to prohibit agreements or business practices where their effect "*may be* to substantially lessen competition…"[10] As the Supreme Court held in *Brown Shoe*, "Congress used the words '*may be*' … to indicate that its concern was with probabilities, not certainties."[11] Forward-looking antitrust enforcement is as important and necessary today as it was in 1914.

Both the Supreme Court and the *Horizontal Merger Guidelines* counsel strongly against inaction when assessing the future effects of a merger that will produce a high level of market concentration. In fact, they set the default to action on the part of the antitrust agencies by declaring such mergers presumptively unlawful.

There are also those who insist that there is no place in modern antitrust for the presumptions endorsed by the Supreme Court in *Philadelphia National Bank* and set forth under the *Guidelines*.[12] The best way to assess these criticisms is to ask whether the application of the

---

[9] Daniel L. Rubinfeld, *On the Foundations of Antitrust Law and Economics*, in HOW THE CHICAGO SCHOOL OVERSHOT THE MARK 51, 57 (Robert Pitofsky ed.) (2008). ("I am troubled that the concern about false positives (bringing inappropriate cases) has tended to trump worries about false negatives (failing to bring appropriate cases). Losing cases or cases that are seen as inappropriate often come under visible attack, whereas one has to listen carefully to hear about cases that should have been pursued that were not." See also Jonathan B. Baker, Taking the Error Out of "Error Cost" Analysis: What's Wrong with Antitrust's Right, 80 ANTITRUST L.J. No. 1 (2015), http://www.americanbar.org/tools/digitalassetabstract.html/content/dam/aba/publishing/antitrust_law_journal/at_journal_80i1_baker.pdf.

[10] Clayton Act §§ 2, 3, 7 (1914) (emphasis added).

[11] *Brown Shoe Co. v. United States*, 370 U.S. 294, 323 (1962).

[12] See, e.g., Timothy J. Muris and Bilal Sayyed, Three Key Principles for Revising the Horizontal Merger Guidelines, THE ANTITRUST SOURCE 15 n.66, April 2010, http://www.law.gmu.edu/assets/files/publications/working_papers/1256ThreeKeyPrinciples.pdf (describing an article by Professors Michael Katz and Howard Shelanski that suggests retaining the structural presumption only in cases of merger to monopoly and commenting: "We disagree that a presumption is appropriate even in this context"); Joshua Wright, Truth on the Market Blog, "The Guidelines Should Be Revised to Reject the PNB

presumption is yielding bad results. The available data suggest that U.S. enforcers rarely block procompetitive mergers.[13] Indeed, the evidence suggests that the "conventional wisdom" that mergers generally tend to lead to efficiency gains may itself be suspect. Recent research suggests that mergers frequently fail to deliver their promised efficiency gains.[14] In a recent interview, Judge Richard Posner – himself a leading figure in the ascension of the Chicago School[15] – observed that "[i]t's very unclear that mergers are primarily about increasing efficiency."[16]

Other critics of modern antitrust enforcement argue that antitrust law and competition enforcers simply cannot keep pace with change in dynamic, high-tech markets and therefore should not intervene in them.[17] In these markets, they argue, even well intentioned enforcement may do more harm than good.[18] I believe that there is broad international consensus that antitrust enforcers can and should play a vital role in protecting competition in the high-tech, digital economy by preserving the process of innovation and keeping markets open for innovators. Competition enforcers should not turn a blind eye toward anticompetitive behavior in high-tech markets simply because we cannot predict the future with certainty.[19]

Structural Presumption," Oct. 26, 2009, http://truthonthemarket.com/2009/10/26/the-guidelines-should-be-revised-to-reject-the-pnb-structural-presumption/ (stating that "The Agencies should revise the Guidelines to affirmatively abandon use of the structural presumption to demonstrate a substantial lessening of competition"); John Harkrider, Proving Anticompetitive Impact: Moving Past Merger Guidelines Presumptions, 2005 COLUM. BUS. L. REV. 317 (2005), at 12-13, http://www.axinn.com/media/article/27_Moving_20Past_20Merger_20Guidelines_20Presumptions.pdf (recommending that the Guidelines' market concentration presumption "should be eliminated").

[13] *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 94-95 (2015).

[14] *See, e.g.*, Aloke Ghosh, *Does Operating Performance Really Improve Following Corporate Acquisitions*?, 7 J. CORP. FIN. 151 (2001).

[15] *See* John Cassidy, After the Blowup: Laissez-Faire Economists Do Some Soul-Searching – and Finger Pointing, New Yorker, Jan. 11, 2010, http://www.newyorker.com/magazine/2010/01/11/after-the-blowup (describing Judge Posner as someone "who for decades has been a leading figure in the conservative Chicago School of economics").

[16] *See Philadelphia National Bank at 50: An Interview with Judge Richard Posner*, 80 ANTITRUST L.J. 2 (2015), http://www.americanbar.org/content/dam/aba/publishing/antitrust_law_journal/at_journal_80i2_posner.authcheckdam.pdf.

[17] *See, e.g.*, Ronald A. Cass, *Antitrust for High-Tech and Low: Regulation, Innovation, and Risk*, 9 J. L. ECON. & POL'Y 169 (2012-2013), http://heinonline.org/HOL/Page?handle=hein.journals/jecoplcy9&g_sent=1&collection=journals&id=177; Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to High Technology Competition*, 44 WM. & MARY L. Rev. 65 (2002), http://scholarship.law.wm.edu/wmlr/vol44/iss1/3.

[18] For a description of these arguments, *see* Howard A. Shelanski, *Information, Innovation, and Competition Policy for the Internet*, 161 U. PA. L. REV. 1663, 1671-5 (2013), http://heinonline.org/HOL/Page?handle=hein.journals/pnlr161&div=44&g_sent=1&collection=journals; Ilene K. Gotts, Scott Sher & Michelle Lee, *Antitrust Merger Analysis in High-Technology Markets*, 4 Eur. Competition J. 463, 464-5 (2008), https://www.wsgr.com/PDFSearch/sher1208.pdf.

[19] Even in dynamic markets, changes in market structure may be episodic and infrequent. Facebook's displacement of Myspace is often cited as an example of the tenuous position of seemingly dominant firms in digital markets. But

Bringing and Winning Merger Cases

When we view mergers, we must use all the tools in our toolbox to assess potential anticompetitive effects. This requires not just an analysis of price effects – but also how it impacts quality and innovation. Enforcers must consider all the available economic evidence – econometric models and merger simulations – and also party documents and declarations by industry participants that shed light on how a market operates. While sophisticated quantitative tools can be very useful, especially when adequate data are available, enforcers must be mindful of qualitative evidence, like contemporaneous documents, that can be the best available evidence of a transaction's likely competitive effect.

Antitrust enforcers should not abandon coordinated effects theories. Following the 1992 *Horizontal Merger Guidelines*, unilateral effects analysis has overtaken coordinated effects as the predominant theory on which the U.S. antitrust agencies challenge mergers. Perhaps one reason for this is that econometric techniques for predicting unilateral effects have developed considerably over time, and the *Guidelines* now devote additional attention to them. While that may be true, coordinated effects analysis remains a valuable tool for enforcers in protecting consumers. It can be difficult in some cases to predict the precise point at which a market vulnerable to coordinated conduct will reach a "tipping point" when coordination is more likely to occur. Once a concentrated market *does* reach a tipping point, however, there is little antitrust enforcers can do to remedy conscious parallelism and other forms of tacit coordination. This is why merger reviews require prediction – when confronted with markets that are highly concentrated and vulnerable to coordinated conduct, enforcers shouldn't hesitate to act when factors likely to increase risk of coordination are present.[20]

In recent years, enforcers have also had to demonstrate a willingness to challenge anticompetitive mergers. In the FTC's recent victories blocking the proposed mergers between Sysco and US Foods and Staples and Office Depot, the merging parties offered potential fixes that the FTC rejected after careful analysis determined them inadequate to preserve competition.

Facebook passed Myspace eight years ago. Google has been the leading U.S. search engine for 12 years running and has accounted for over 60 percent of searches since 2008. (Data from comScore.) I am not suggesting that the continued success of either company is problematic in and of itself. My point is merely that industry structure may prove as durable in digital and high-tech fields as in "old economy" markets. It would be a mistake to view the mere possibility of disruptive entry as a reason to refrain from appropriate antitrust enforcement in digital and high-tech markets. *See* Terrell McSweeny, *Disruptors, Data & Robots: Competition Enforcement in the Digital Economy*, Keynote Remarks at Chatham House Conference Globalization of Competition Policy: Striving for Convergence?, June 23, 2016, https://www.ftc.gov/system/files/documents/public_statements/966493/mcsweeny_-_chatham_house_keynote_6-23-16.pdf; Terrell McSweeny, *Competition Law: Keeping Pace in a Digital Age*, Keynote Remarks at 16th Annual Loyola Antitrust Colloquium, April 16, 2016, https://www.ftc.gov/system/files/documents/public_statements/945343/mcsweeny_-_loyola_antitrust_colloquium_keynote_4-15-16.pdf.

[20] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010).

These cases demonstrate that enforcers should not shy away from "litigating the fix" where we believe it is appropriate to safeguard post-merger competition.

The courts in both of these cases reaffirmed the long-standing and widely accepted role that market concentration presumption plays in merger analysis. The *Guidelines* establish a presumption of market power for mergers that cause a significant increase in concentration and result in highly concentrated markets.[21] But the presumption is only the beginning of a more extensive analysis. The Commission considers competitive effects, the feasibility of entry, expansion, repositioning, and claims of efficiencies and failing firm to identify instances in which application of the presumption might be misplaced. While the FTC certainly did not rest on the presumption in *Sysco* and *Staples*, both courts reaffirmed the continuing significance of the presumption and its role in suggesting the likelihood of anticompetitive harm.

Moreover, the agencies and the courts continue to be appropriately skeptical of the merging parties' claimed efficiencies where the evidence demonstrates that the efficiencies are speculative, not merger-specific, and unlikely to be passed on to consumers.

Of course, antitrust enforcers do not prevail in all of their merger challenges. For example, the Commission challenged the merger between the second and third largest sterilization companies in the world, alleging that the merger would have prevented important innovations in the market.[22] Unfortunately, we lost that one.[23] While I disagree with the court's ruling, this case shows that the FTC takes innovation seriously.

Bringing and Winning Conduct Cases

It is equally important that we enforce effectively when we identify anticompetitive conduct. The FTC's track record in this area is relatively strong.

For example, for nearly two decades, the FTC has worked to stop anticompetitive reverse payment settlements where a drug company pays a potential generic rival to drop its patent challenge and delay entering the market. The FTC's efforts met with considerable and sustained resistance from many in the industry, but in 2013, the FTC won a major victory at the Supreme Court in the *Actavis* case.[24] Following the *Actavis* decision, the number of reverse payment

[21] *See id.* § 5.3.

[22] Compl., *FTC v. Steris Corp.*, No. 1:15-cv-0108 (N.D. Ohio filed June 4, 2015), https://www.ftc.gov/system/files/documents/cases/150529sterissynergytro.pdf.

[23] Order Returning Matter to Adjudication and Dismissing Compl. (Oct. 30, 2015), https://www.ftc.gov/system/files/documents/cases/151030sterissynergyorder.pdf.

[24] *FTC v. Actavis*, 133 S. Ct. 2223 (2013).

settlements has decreased.[25] Last year, the FTC secured a $1.2 billion settlement in *FTC v. Cephalon* related to anticompetitive reverse payments.[26] Earlier this year, the FTC filed suit against Endo and generic firms for entering into illegal reverse payment agreements to delay entry of generic versions of two drugs.[27] It would be helpful to clarify that all pay-for-delay deals are presumptively illegal – bipartisan legislation proposed by Senators Klobuchar and Grassley would do so. Moreover, while the FTC must continue to aggressively use its antitrust authority to prevent anticompetitive conduct and mergers that keep drug prices high, there are limits to antitrust enforcers' ability to counter high drug prices absent evidence of anticompetitive conduct.

Conduct cases can prove especially challenging for enforcement agencies. Oftentimes, there is no case law directly on point, and the cases themselves can require substantial time and energy to prosecute. Though these types of cases take a great deal of resources and are not easy to win, they are worth bringing.

Protecting Opportunity

Competition enforcers also have a role to play in advocating for competition at the state and local levels. Sometimes this takes the form of advocating on behalf of the competition introduced by new entrants.[28] But it can also mean safeguarding economic opportunity by advocating against prescriptive occupational licensing regimes.

Take, for example, state occupational licensing laws. A White House report found that the share of workers subject to state licensing laws has grown five-fold since the 1950s.[29] There can be valid quality, health, and safety reasons for imposing licensing requirements. But licensing laws can also reduce competition, harm consumers, and heighten income inequality by

---

[25]FTC Bureau of Competition Report, *Overview of MMA Agreements Filed in FY2014* at 1, https://www.ftc.gov/system/files/documents/reports/agreements-filled-federal-trade-commission-under-medicare-prescription-drug-improvement/160113mmafy14rpt.pdf.

[26]FTC Press Release, *FTC Settlement of Pay for Delay Case Ensures $1.2 Billion in Ill-Gotten Gains Relinquished, Refunds Will Go to Purchasers Affected by Anticompetitive Tactics*, May 28, 2015, https://www.ftc.gov/news-events/press-releases/2015/05/ftc-settlement-cephalon-pay-delay-case-ensures-12-billion-ill.

[27] *Endo* is the first FTC case to challenge a so-called "no-AG commitment" as a reverse payment. A no-AG commitment is a pledge by the branded drug company not to compete with the generic firm by marketing its own generic version of its drug following the agreed-upon entry date. Compl., *FTC v. Endo Pharms., Inc.*, No. 16-1440 (E.D. Pa. filed Mar. 30, 2016), https://www.ftc.gov/system/files/documents/cases/160331endocmpt.pdf.

[28] *See* Andy Gavil, Debbie Feinstein, & Marty Gaynor, *Who Decides How Consumers Should Shop?*, FTC's Competition Matters Blog, Apr. 24, 2014, http://www.ftc.gov/news-events/blogs/competition-matters/2014/04/who-decides-how-consumers-should-shop.

[29] COUNCIL OF ECON. ADVISERS, DEPT. OF LABOR, AND DEP'T. OF TREASURY, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 17 (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf.

"shift[ing] resources from workers with lower-income and fewer skills to those with higher income and skills."[30]

The FTC has focused its advocacy on commenting on regulations that may unduly restrict competition in certain fields – especially when licensing boards are controlled by active market participants. And, the FTC has taken enforcement action when these practices eliminate competition.

In general, I believe it will continue to be important for federal antitrust enforcers to express concern about state laws that thwart competition. The FTC has won two important Supreme Court victories clarifying the scope of the state action antitrust immunity, *North Carolina State Board of Dental Examiners*[31] and *Phoebe Putney*.[32] However, we continue to see efforts aimed at shielding potentially anticompetitive conduct from federal antitrust enforcement. This is particularly so in health care. For example, we continue to advocate against Certificates of Public Advantage ("COPAs"), cooperative agreements, and other state legislation granting broad antitrust immunity to health care providers. These laws – no matter how well intentioned – are unlikely to replicate the significant benefits of competition.[33] Indeed, I have significant concern that cooperative agreements likely protect deals that impose competitive harms far exceeding their proffered benefits.

Targeting Barriers to Effective Antitrust Enforcement

Eliminate Antiquated Federal Immunities

Antiquated federal immunities present another barrier to effective antitrust enforcement. The McCarran-Ferguson Act, for example, exempts "the business of insurance" from the reach of the antitrust laws. Congress passed McCarran-Ferguson more than 70 years ago. At the time, the concern was that antitrust might preempt state regulation. This concerns makes little sense today.

McCarran-Ferguson is just one of many industry-specific exemptions and carve-outs from antitrust laws. These exemptions and immunities may have made sense when they were created – Congress generally established them for industries that were closely regulated. But

[30] *See id* at 12

[31] *North Carolina St. Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (upholding the FTC's challenge of the exclusion of non-dentists from competing with dentists in the provisioning of cosmetic teeth whitening services by a board of dentists).

[32] *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003 (2013) (State action doctrine did not apply where Georgia did not clearly articulate and affirmatively express a policy allowing hospital authorities to make acquisitions that substantially lessen competition).

[33] Statement of the Federal Trade Commission, *In the Matter of Cabell Huntington Hospital, Inc.*, Docket No. 9366 (July 6, 2016), https://www.ftc.gov/system/files/documents/public_statements/969783/160706cabellcommstmt.pdf.

many exemptions have held over despite deregulation in the underlying industries, including freight rail, common carrier activity, and agriculture.

This leads to gaps in antitrust enforcement. For example, rail carrier mergers are exempt from antitrust law falling solely within the jurisdiction of the Surface Transportation Board (STB). In the 1980s, the STB actively encouraged rail carriers to merge to rationalize excess capacity.[34] The number of major rail carriers in the United States fell from over 40 to just seven between 1980 and 2000. In the late 1990s, the STB approved mergers that reduced the number of major rail carriers from three to two in the western and eastern United States.[35]

Provide Adequate Resources To Enforcers

Every government body must manage its resources in deciding what is and is not possible. The antitrust agencies are no exception to that – we need resources to do our jobs. Antitrust litigation, in particular, is an expensive undertaking. Last year, global M&A activity surpassed $5 trillion for the first time ever.[36] The Administration's 2017 budget proposed increasing funding of the FTC and the Antitrust Division of the DOJ by ten percent.[37]

Develop Frameworks To Keep Pace with Our Changing Economy

At its inception, the FTC was given the authority to study trends in the marketplace to develop expertise as markets evolve. This mandate has proven crucial to the FTC's ability to keep pace with new technology and the competitive implications of innovations. We conduct workshops and solicit comments from industry participants and study industries. This improves our knowledge base and adds to the information that is available to policymakers.

The FTC's efforts to increase our knowledge and understanding are inward-looking as well as outward-looking. We are currently conducting a study of the effectiveness of remedies accepted by the Commission in past merger cases. We are examining 90 merger orders entered between 2006 and 2012, and interviewing divestiture buyers and market participants in the process.[38] The results of the study, which should be available by year's end, will help inform and shape how we approach remedies going forward.

---

[34] *See* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 1499-1500 (7th ed. 2012)

[35] *See id.*

[36] Fidelia Liu, "Global M&A Volume Surpasses $5tr for First Time on Record," Dealogic, Dec. 29, 2015, http://www.dealogic.com/media/market-insights/ma-statshot/.

[37] Melissa Lipman, DOJ, FTC Would See Jump in Antitrust Funding in 2017 Budget, Law360, Feb. 9, 2016, http://www.law360.com/articles/757266/doj-ftc-would-see-jump-in-antitrust-funding-in-2017-budget.

[38] *See* Fed. Trade Comm'n, Remedy Study, https://www.ftc.gov/policy/studies/remedy-study.

Thankfully, the challenge of making antitrust even better is not borne by the FTC and DOJ alone. We are joined in this endeavor by researchers and academics who share our goal of protecting competition and making the economy work for all Americans. Professor Kwoka's recent study of merger retrospectives, for example, has shifted the conversation about modern merger enforcement. Whereas before, much of the academic literature focused on the theoretical dangers of blocking procompetitive mergers, Professor Kwoka's empirical work found little evidence to support those concerns.[39] His work suggests that our focus should instead be on the dangers and costs of false negatives. Other recent studies have suggested that when a few investors own substantial shares of multiple firms in a concentrated market, it can lead to higher prices in that market.[40] While more research is needed, this is novel and important work.

The second panel this afternoon presented a number of ideas for new directions for economic research related to antitrust. I will add a few of my own. First, vertical issues don't always receive the attention they should, and I welcome research on the potential for harm arising from vertical conduct. The current *Vertical Merger Guidelines*, which were last revised in 1984, no longer reflect the practice of enforcers or the best analytic frameworks for analyzing vertical issues. Second, big data and algorithms are likely to play an increasingly important role in how prices are set in countless markets over the coming years. Research into the competitive implications of these developments would be of immense value.

Lastly, I think it is well worth re-examining even those principles and premises that are received as "conventional wisdom" in antitrust. Many antitrust practitioners subscribe to the notion that a monopolist can only take its monopoly profit once and so we needn't worry much about tying. That view was based on a broad application of the single monopoly profit theory, which as Professor Elhauge and others have pointed out, happens to be "wrong in most cases."[41] Just because something is conventional wisdom doesn't mean it is right.

In conclusion, I welcome the Center for Equitable Growth's mission to encourage and support analysis that improves our understanding of antitrust law, opportunity, and income equality.

---

[39] *See* MERGERS, MERGER CONTROL, AND REMEDIES, *supra* note 13.

[40] *See* Einer Elhauge, *Essay: Horizontal Shareholding*, 129 Harvard L. Rev. 1267 (Mar. 2016); Azar, Shmalz & Tecu, *Anti-Competitive Effects of Common Ownership* (University of Michigan Ross School of Business Working Paper No. 1235 (April 2015).

[41] Einer Elhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, Harvard John M. Olin Center for Law, Economics, and Business Discussion Paper No. 629 (Oct. 16, 2009).