Consumer Federation of America

Comments of
The Consumer Federation of America
Submitted to
The Federal Reserve
on the
Proposed Morgan Stanley-E*Trade Merger
May 1, 2020
(As Revised May 4)

BACKGROUND ON MERGER REVIEW

For almost four decades there has been growing concern about lax enforcement of antitrust laws that has allowed increases in concentration and abuse of the market power to which concentration gives rise. The concern has been focused on "horizontal" concentration – the merger of firms that compete directly with one another (head-to-head) in the sale of products that are substitutes. "Vertical" concentration, the merger of firms that sell products that complement one another – are related but not seen as substitutes -- has also been a growing concern.

The economic theory that allowed, even urged, antitrust authorities to take less action against concentration and the abuse of market power, had its origins in the teaching of the Chicago School of law and economics. It has been termed market fundamentalism, although it embodied and combined long standing elements of *laissez-faire,* neoclassical and, more recently, neoliberal, and trickle-down economics. This theory, which urged courts to dismiss concerns about abuse of market power, rested on extreme assumptions that market power is transitory and less onerous than traditionally thought, and that vertical integration is much more likely to result in efficiency than abuse.

Those assumptions were challenged from the earliest days of their application to legal practice.[1] The empirical evidence in the economic and antitrust literatures shows that the

[1] For a sampling of the early and late literature see, in the economics literature see, on contestability: Shepherd, William G. 1984, "'Contestability' vs. competition," *American Economic Review* 74(4), September; Shepherd, William G. 1988, "Entry barriers, contestability, and predatory pricing," *Revue d'Economie Industrielle,* 46(4); Martin, Stephen, 2001, "Contestability," updated chapter from Advanced Industrial Economics, Wiley Blackwell; Evenden and Williams, 2000; Joseph Stiglitz, offers a critique of contestability in Socialism, pp. 117-119. For additional data see Cooper, Mark and Bruce Kushnick, 2016, Comments and Reply of the Consumer Federation of America and the New Networks Institute, before the Federal Communications Commission, in the matter of Business Data Service in an Internet Protocol Environment, Investigation of Certain Price Cap Local Exchange

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assumptions of market fundamentalism simply do not fit reality. The lax antitrust enforcement promoted by these faulty assumptions has resulted in reduced competition and increased abuse of consumers. The failure of theory to correctly predict real world behavior has been so clearly and overwhelmingly exposed that almost two dozen Nobel prizes in economics have been awarded to individuals who demonstrate the many aspects of the erroneous basis and conclusions of market fundamentalism. Table 1 presents a list of the Nobel Prizes organized into five schools of thought.

TABLE 1: NOBEL LAUREATES ON MARKET IMPERFECTIONS, WITH STIGLITZ REFERENCES

Structural & Societal Flaws	Endemic Tendencies	New Institutional & Transaction Cost Economics	Behavioral Economics	End of Value-free Economics/Return of Political Economy
Structural Flaws			**Human Behavior**	
Krugman, 2008;	Stiglitz, 2001;	Coase, 1991;	Simon 1957;	Sen, 1998;
Heckman, 2008;	Spence 2001;	North, 1993	Akerloff, 2001;	Bannerjee, Duffo
Deaton, 2015;	Tirole 2014;	Fogel, 1993;	Kahneman, 2002;	& Kremer, 2019
Technological	Hart & Holstrom,	Ostrom, 2009;	Smith, 2002;	
Change	2016	Williamson, 2009	Shiller, 2013;	
Solow, 1956;			**Strategic Conduct**	
Nordhaus, 2018;			Nash 1991;	
Romer, 2018			Selton, 1994;	
			Harsanyi, 1994;	
			Thaler, 2011	

Source: Updated from, Mark Cooper, "Comments of the Consumer Federation of America on Copyright Policy, Creativity and Innovation in the Digital Economy," Before the *United States Department of Commerce, Patent and Trademark Office,* November 13, 2013, p. 26, and Mark Cooper, *The Political Economy of Electricity: Progressive Capitalism and the Struggle to Build a Sustainable Power Sector* (Preager, 2017), Chapters 4 and 7.

These Nobel laureates made it clear that market fundamentalism is a deficient theory of real-world behavior because it fails to depict the reality of market performance. Two points should be stressed in considering this table. First, these critiques are overwhelmingly American. Five-sixths of these Noble Prizes were awarded to economists identified with the United States (although a few also listed other nations, as well). Just under half of all the prizes in economics awarded to those who list the U.S. as an identifier were for this critical work. More prizes were awarded to U.S.-based economists offering work critical of the neoclassical model than were awarded to non-U.S. economists for work not identified as critical. Given the combination of evidence and high-level thinking about market imperfections and failure, we find that not only is market functioning as described by market fundamentalists called into doubt, but so too are the assumptions about underlying economic motivations.

Carrier Business Data Service Tariff Pricing Plans, Special Access for Price Cap Local Exchange Carriers, AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket Nos. 16-143, 15-247, 05-25, RM-10593, June 27, In antitrust see, Lawrence Anthony Sullivan, "Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?," *The University of Pennsylvania Law Review,* 1977, 125, Einer Erlhauge, Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory, Harvard John M. Olin Discussion Paper Series, October 16, 2009; Salop, On rent seeking: Barak Orbach, 2015, "A State of Inaction: Regulatory Preferences, Rent, and Income Inequality," Theoretical Inquiries in Law, 16; Salop, 2018, xx ; Jonathan Baker, 2012, "Exclusion as a Core Competition Concern." 78 Antitrust L.J., Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals," Fordham Law Review, 2013: 81 "Whatever Did Happen to the Antitrust Movement?" Notre Dame Law Review, 2018, 94:2.

Second, the broad critiques strengthen the case for considering the conditions under which markets perform poorly. It follows then that policy interventions are appropriate to correct market imperfections and market failures. In fact, few if any of these Nobel laurates abandon capitalist markets as central economic institutions. Their primary goal is to identify the sources of market failure with greater precision and prescribe policies to reduce the imperfections, all while preserving the positive, dynamic forces of markets.

While the concern about lax antitrust enforcement has occurred across the board, it has recently become particularly intense when considering the digital economy. The claim has been made that these markets would be best served by a single firm because powerful economies of scale mean they had a tendency to "tip" to a single firm, against competition between many firms. In this theory, monopoly is durable and several questions immediately challenge inaction.

First, many of the products they now sell in their ever-expanding bundles were not "invented" by the dominant firms; they were acquired through mergers and acquisitions. Competition in complements died an unnatural death that antitrust was supposed to prevent.

Second, the creation of huge bundles of products makes it more difficult for competitors to enter the main business of these dominant firms, i.e. it has an anticompetitive effect across the board.

Third, the dominant firms engage in blatantly anticompetitive behaviors to undermine competition in their core businesses. They do not rely on size alone to undermine competition, indicating that their dominance is not "natural" in any sense.

Fourth, absent competition in complements and core businesses, efficiency gains are not passed through to consumers; they are pocketed by dominant firms.

Fifth, many of the costs imposed on the public cannot be measured in simple terms of price increases that are frequently used by antitrust authorities. They are qualitative (like diminution of competition and reduced innovation) and non-economic (like the loss of privacy or denial of consumer choice).

The concern about excessive, horizontal concentration and "unnatural," vertical integration that results from lax antitrust enforcement is not limited to strictly digital products, although the most intense scrutiny has lately been focused on firms like Google and Facebook. Because digitization is spreading rapidly through the economy and affecting all sectors, it applies across the board.

Moreover, some sectors have been identified for special scrutiny of both antitrust and regulation for two reasons. They play a special role in determining economic growth and it is extremely difficult to weed out anticompetitive practices with one set of tools. Antitrust has been intensified in these sectors and regulation is also applied. Two examples come readily to mind – the communications and financial sectors. Mergers are pending in both of these sectors that raise many of these issues, e.g. Google-FitBit and Morgan Stanley-E*Trade. The remainder of these comments deal with the latter.

As the following text box shows, CFA adopted this framework in our analysis of the financial meltdown that led to the Great Recession. The complex vertical relationships that pose a challenge to antitrust and regulation was a central concern of that analysis. We also noted the tendency of policymakers to focus on short term solutions and, once the crisis had eased, failed to tackle longer term reform. We have a similar concern about the current crisis, Although the current crisis has a different origin, it places similar stresses on and highlight weaknesses in the financial sector. This is why we call for a pause in the review of this merger and the adoption of a more vigorous and rigorous approach before the work of merger review begins again, as it must.

POLICY RESPONSES TO MARKET FAILURE: SPOTLIGHT ON THE FINANCIAL SECTOR

Testimony of Dr. Mark Cooper, Director of Research, Consumer Federation of America On Too Big to Fail? The Role of Antitrust Law in Government-Funded Consolidation in the Banking Industry Subcommittee on Courts and Competition Policy Committee on the Judiciary United States House of Representatives, March 17, 2009.

Capitalism without bankruptcy is like Catholicism without hell; it lacks a sufficiently strong motivational mechanism to ensure good behavior. The financial system should never have been allowed to become exposed to a plague of banks and other financial institutions that were deemed to be "too big to fail." Moreover, size is not the only cause of systemic risk… complex and opaque interconnections among firms… also create systemic risk…. [S]some products… are so complex and prone to spread like a virus through the financial system that they pose a threat of systemic risk because they afflict so many institutions and they are nearly impossible to unwind when they fail. In other words, we must prevent products and institutions from becoming "too big or too complicated to fail."

Restoration of Effective Prudential Regulation is Vitally Necessary to Restore the Health of the Financial System. While we believe that vigorous antitrust enforcement is critically important to promoting a competitive industry that protects the public from a variety of abuses, we also believe that the only way to prevent the public from being exposed to the moral hazard of "too big or too complicated to fail" is to regulate financial institutions and products in a manner that imposes effective discipline directly on their behavior. Antitrust authorities do not have any special expertise in understanding systemic risk and the principles of antitrust law do not reach systemic risk. Given the financial sector's tendency to parallel, procyclical behavior (contagion) with complex products and opaque balance sheets, even an unconcentrated market can easily pose a systemic risk…

Efficiency Defense. Over the past several decades antitrust has given far too much deference to efficiency at the expense of competition. The theory that private actors should be allowed to acquire market power where efficiency would be advanced rested in part on the assumption that firms would perceive and pursue their interest in a manner that promoted the consumer interest. The economic literature is fairly clear that there is not much evidence there are efficiencies from mergers; in financial services the record looks even more dismal. We in the public interest movement have always maintained that the pursuit of private profit is not always synonymous with the public good and challenged the efficiency argument because, absent competition, firms with market power are not compelled to share the efficiency gains with the consumer….

Vertical Leverage. The digital economy of the 21st century is very much an economy made up of platforms in which layers of complementary products and services sit atop one another. In traditional antitrust analysis, markets may look like separate markets vertically organized, but their close interconnection, frequently through technological dependency, renders the threat of exercise of vertical leverage much greater than was the case in the physical markets of the 19th and 20th centuries. Tying, anticompetitive bundling and exclusionary conduct take on much greater significance. Thus, in the antitrust space, just as in the realm of prudential regulation of financial institutions, we have been afflicted by irrational exuberance for unregulated markets. The need for reform does not demand a radical new experiment. Rather, it demands a return to the traditional values of progressive capitalism that served us so well in the half century after the New Deal. The market fundamentalism of the past thirty years was the radical experiment and it has failed miserably.

Mark Cooper BS Barbara Roper, *Reform of Financial Markets, The Collapse of Market Fundamentalism and the First Steps to Revitalize the Economy,* Consumer Federation of America, April 2009

The Flaws in Market Fundamentalism. Left to its own devices, the market suffers from inherent or endemic flaws as a result of which it fails to consistently achieve its primary function of efficiently allocating resources to uses. These flaws are highly inter-connected, so one could draw the lines and distinctions between problems in various ways. The important lesson is that there is a nexus of problems that plagues market fundamentalism in the financial sector and leads to its failure to execute its proper function in the economy.

Conclusion. Because of the nature of the current crisis, there is a natural tendency to move from the emergency repair of the system to focus on how to resolve or cushion the collapse of financial markets. Ultimately, however, the threat of collapse of a systemically significant financial institution is not the only problem that afflicts financial markets. The comprehensive view of systemic risk taken by the administration must be applied to the other areas where regulatory reform is needs. Reforming the financial system to ensure it plays its proper role in our economy will not be complete or effective until the Congress adopts and the administration implements policies to prevent excessive risk taking, perverse compensation schemes, and conflicts of interest more broadly and to provide much greater transparency and fairness for investors, consumers and regulators in the financial markets.

This paper provides the analytic framework for understanding why a comprehensive solution is necessary to repair the financial system in the United States.

THE PROPOSED MORGAN STANLEY-E*TRADE MERGER

The market for online, discount brokerages has been competitive and consumer-friendly for many years. It did more than provide a lower-cost option for consumers; it forced full-service firms to compete on cost and quality of service in order to retain market share. Although discount brokerage is currently undergoing significant concentration in addition to the present proposal for vertical integration, there is no reason to believe that it cannot remain competitive and would not continue to innovate new, consumer-friendly business models. Of course, players in the market would like it to yield high profits and large merger premiums offered from big banks, who have an interest in killing competition, are attractive. It is unlikely, however, that Morgan Stanley will continue to compete with lower prices and more choices. It is much more likely that it will seek to move consumers to its proprietary products, even when they are inferior to other options now available on the E*Trade platform.

At the same time, by acquiring a large group of online customers with significant discretionary income at play in the market, Morgan Stanley is buying a large potential market for its other products. Leveraging the new, larger bundle, Morgan Stanley will gain an advantage over its potential competitors in its core businesses. This bundle may preclude or weaken competition in the core market.

Fierce competition has lowered prices and squeezed profits among firms offering financial advice, as shown in Figure 1.[2] But that is no reason to allow mergers and vertical integration to diminish competition in the sector. This is precisely the moment that innovation and new technology can produce more consumer-friendly, sustainable business models. As we have shown in the analysis of other sectors, this process of "disintermediation" is the hallmark of consumer-friendly competition in physical space and, especially in cyberspace and financial markets, "[o]n Wall Street, as elsewhere, hot ideas quickly get imitated."[3] The search for differentiation and added value is ongoing, to differentiate products and escape from commoditization. Companies hate this process, consumers love it, and competition is the great force that drives it forward.

Historical experience has shown that financial services firms that operate as fiduciary advisers, but with extensive conflicts of interest, have a powerful incentive and the ability to behave badly, exploiting whatever market power they have and utilizing information and behavioral advantage to abuse consumers.

> These dual-registered investment advisers (DRs) have several conflicts of interest including affiliated mutual funds, insurance cross-selling, and mutual fund revenue sharing. Further, DRs appear to charge retail clients higher fees than independent RIAs, and regulators frequently discipline DRs. Finally, DRs invest RIA client assets in institutional classes of the same underperforming mutual funds they offer brokerage clients. Hence, many DRs may fall short of the fiduciary standard.[4]

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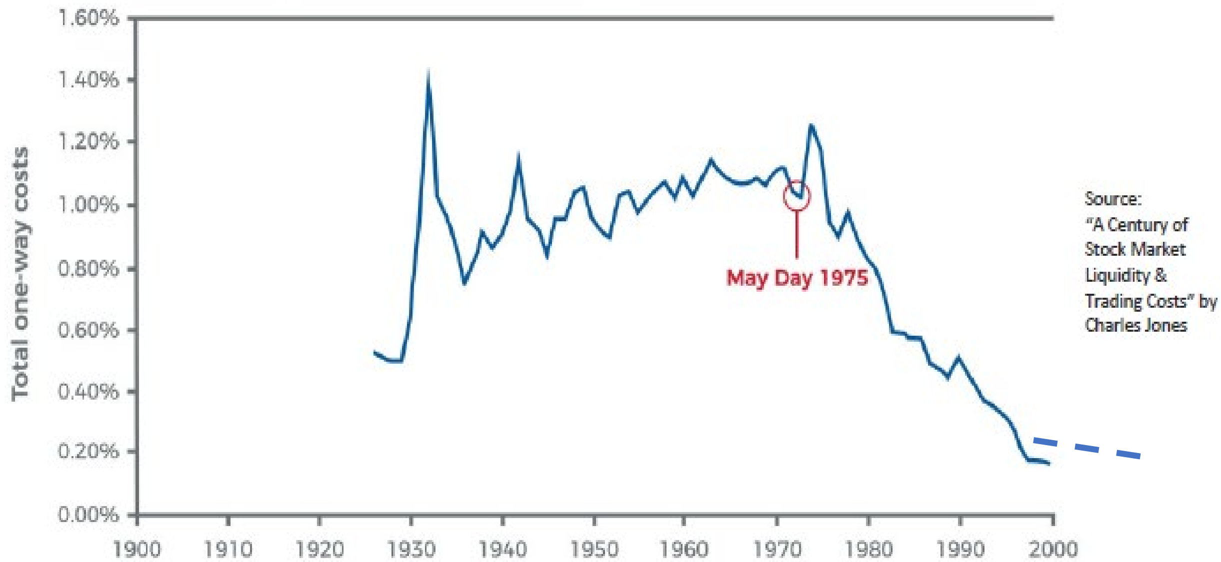
[2] Michael Kitches, Director of Research Pinnacle Advisory Group, "Five Industry Trends Reshaping Financial Advice," Consumer Federation of America, October 28, 2019, Slide 6. Hereafter Kitches, Five Industry Trends). See Also, The B2C Robo-Advisor Movement Is Dying, But Its #FinTech Legacy Will Live On!, May 2, 2016, kitces.com/blog/robo-advisor-growth-rates-and-valuations-crashing-from-high-client-acquisition-costs
[3] Id., Slide 8.
[4] Nicole M. Boyson, *The worst of both worlds? Dual-registered investment advisers*, Northeastern University, April 1, 2019, citations omitted throughout.

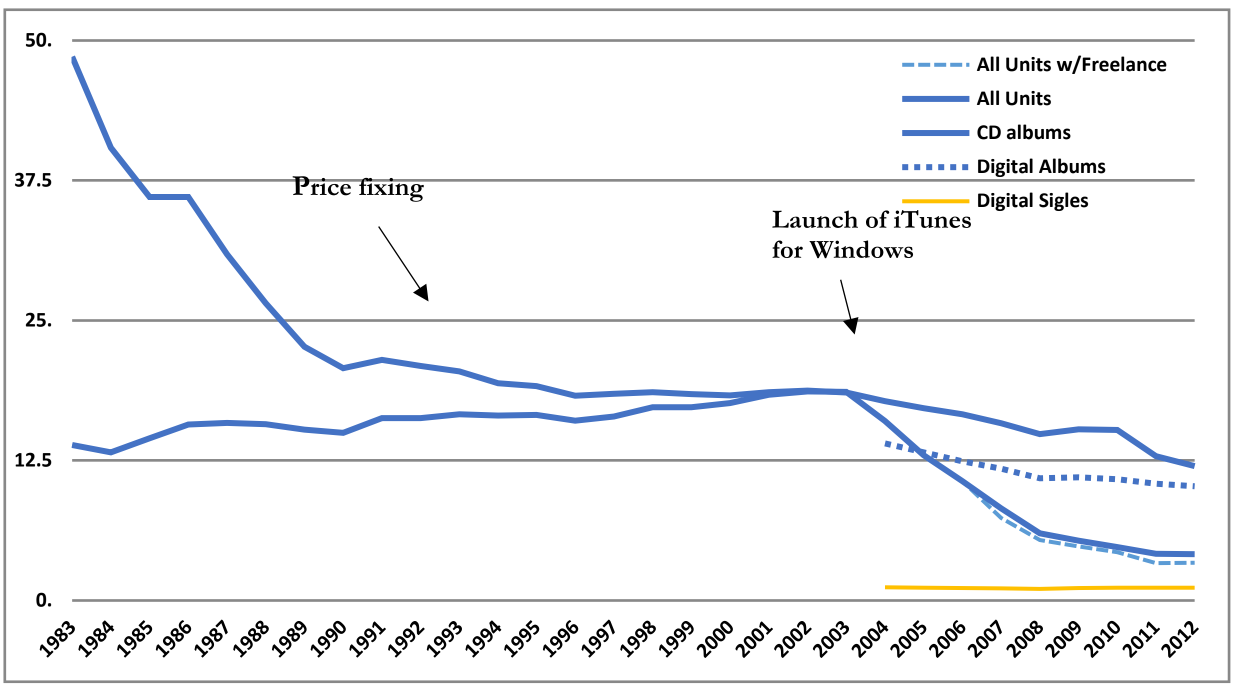
FIGURE 1: EXAMPLES OF COMPETITION-DRIVEN, CONSUMER-FRIENDLY DISINTERMEDIATION

Five Industry Trends Reshaping Financial Advice:
Average one-way transaction costs (half spread + NYSE commission)



charles SCHWAB 1975 TD Ameritrade 1975 Scottrade 1980 E*TRADE 1982

Real Revenue Per Unit Shipped, in the CD and Digital Eras (2012 $)



Source: Mark Cooper, "Comments of the Consumer Federation of America on Copyright Policy, Creativity and Innovation in the Digital Economy," Before the *United States Department of Commerce, Patent and Trademark Office,* November 13, 2013, p. 32, data based on RIAA, Year-End Statistics; GDP deflator

In fact, there is no better example of the fundamentally anticompetitive nature of the big investment banks than Morgan Stanly's reaction to ending the anticompetitive practices of fixed fees in 1975. The preference for anticompetitive structures and the disdain for competition was expressed by Morgan Stanley, among others, as the Congressionally mandated, SEC regulated end of administered rates, approached. As one author put it,

> Increasingly impatient, SEC officials in September 1973 demanded that fixed commission rates be eliminated, and this time, they gave a deadline: May 1, 1975. Adding weight to that mandate, Congress included in the 1975 amendments to the Securities Act a provision requiring the NYSE to eliminate fixed commission rates, again by the May 1 deadline. As the NYSE Board of Governors realized, it was almost impossible to challenge Congress on the rate issue-the only way to do so would be on Constitutional grounds, and that was highly unlikely to work.' The time had come to unfix rates. Morgan Stanley chairman Robert Baldwin, a former Navy lieutenant, ominously labeled the coming deregulation as Mayday— the international distress call…. he predicted that rate deregulation would cause the failure of between 150 to 200 investment banks… Contrary to fears, Mayday led to no major long-term disruptions of the securities industry. [5]

Pro-competitive, consumer-friendly change is disruptive and has consequences for the industry, but that is no reason to reject it.

> While approximately one hundred investment banks did fail, the lean, efficient firms that survived went on to flourish in the deregulated environment. A decade afterwards, NYSE chairman John J. Phelan hailed Mayday as "the best thing that ever happened for the industry:' Indeed, the benefits of rate deregulation were many-among them, tumbling commission fees, a decline in market fragmentation, and the emergence of discount brokerage services like Charles Schwab.[6]

In the long run, the pillars on which stable consumer benefits stand include entrants who behave well, internal industry structures that lean against bad behavior, and ultimately regulators who use their powers to protect the public, while relying on workable competition. This is a formula as old as capitalism itself.

> In no small part, the success of Schwab was due to the company's consistent and early adoption of quality advertising and promotional activities…. Yet the staggering volume of trades in recent years, combined with rapid advances in technology, have enabled firms to offer such low rates. Taking advantage of the cheaper transaction fees, many investors have increased their trading activity. While it is good that investors can make less costly trades and can "shop around" for the best bargain, it is unclear whether the increased trading itself is a positive

[5] Michael Coyne, "Ending a NYSE tradition: The 1975 Unraveling of Broker's fixed commissions and its Long-term impact on Financial Advertising," *Fairfield University, Business Faculty Publications Charles F. Dolan School of Business,* 2007, pp. 135-136.
[6] Id., p. 136.

development. Before Mayday 1975, more investors maintained a "buy and hold" strategy, whereas today, a more short-term investing attitude has gained strength.[7]

While one can debate some of the practices of the industry and the failures of regulators to police bad practices, the declining fee curve provides the justification for the overall undertaking. Today, as over half a century ago, fear of destructive competition is not a justification for giving up on competition.

We are at a moment of disruption in financial services, as in many industries, in which business models can evolve and regulation must adapt to that evolution.[8] The consumer-friendly, procompetitive solution is not increased concentration and vertical integration. A classic example of this is the office supply superstore market, where, twenty years ago, Staples and Home Depot insisted they had to merge to survive. When the court rejected their merger, they proceeded to compete head to head for decades, to the benefit of consumers and the economy. Even today, business models continue to evolve, but that is exactly the point, competition produces results that are consumer-friendly and that businesses can live with.[9]

CONCLUSION: PAUSE MERGER REVIEW DURING A TIME OF NATIONAL CRISIS AND CONDUCT CLOSE SCRUTINY WHEN MERGER EVALUATION RETURNS

It has been widely recognized that the COVID-19 pandemic presents a unique challenge to our society that will change everything. Until we understand the full extent of those changes, we need to pause business as usual. Once the crisis abates, policymakers will engage in a deep discussion of the necessary changes. At that point, we can return to business as "usual," which will certainly be a new "normal." Antitrust and oversight over financial institutions is one of the most important areas for this recalibration. Therefore, the Federal Reserve should suspend consideration of the Morgan Stanley-E*Trade merger, while new approaches and guidelines are developed.

Ironically, as noted above, vertical integration and mergers were an area of law and practice that the economic and antitrust literatures had identified as in need of extensive reinvigoration and recalibration. Even without the crisis, change was in the air and this merger demands close scrutiny. If the merging parties insist on moving forward, the merger should be quickly rejected so that there is as little harm as possible to the competitive terrain of the industry.

If there is a pause, then, when the merger is ultimately considered, the Federal Reserve must give it a thorough review. The long series of questions that U.S. and EU analysts had identified for vertical mergers must be fully considered and carefully addressed in any review of a merger of this type.[10] In a lengthy analysis of the AT&T-Time Warner merger, which involved

[7] Id., pp. 137-138.
[8] Kitches, Five Industry Trends, Slides 24, 28-30.
[9] Alan Wolf, "Life After Retail: Staples & Office Depot Search For Greener Pastures," *Twice*, Sep 19, 2018, https://www.twice.com/retailing/staples-office-depot-search-greener-pastures.
[10] The literature is voluminous. See Mark Cooper, "Antitrust Practice, Economic Evidence and Market Reality Compel the Department of Justice to Oppose the AT&T-Time Warner Merger," *Consumer Federation of America*

both horizontal and vertical aspects, and covered conceptual and empirical evidence on the harmful effects of excessive concentration and vertical integration, we outlined the general concerns expressed by U.S. and EU authorities. We will not repeat the analysis here, except to identify (as in Table 2) the many issues that had led the analysts to conclude that vertical issues deserve much more attention from antitrust authorities. These are the issue that the Fed must address when it considers this merger.

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and Public Knowledge, March 2018, for a discussion. The literature cited therein includes the following: Atalay, Enghin Ali Hortaçsu and Chad Syverson, 2014, "Vertical Integration and Input Flows," 104 *American Economic Review;* Riordan, Michael H. and Steven C. Salop, 1995, "Evaluating Vertical Mergers – A Post Chicago Approach," *Antitrust Law Journal,* 63(2).;Riordan, Michael H. and Steven C. Salop, 1995, "Evaluating Vertical Mergers – A Post Chicago Approach," *Antitrust Law Journal,* 63(2); Baker, Jonathan B., 1996, "Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer Clauses," 64 *Antitrust L. J.* 517; Pitofsky, Robert, 1997, *Vertical Restraints and Vertical Aspects of Mergers ;A U.S. Perspective*, Fordham Corporate Law Institute, 24th Annual Conference on International Antitrust Law and Policy, October 16; Salop, Steve, C., 1999, "Usage Leverage to Preserve Monopoly: Discussion of Katz and Shapiro Paper," in Eisenach, Jeffrey, A. and Thomas M. Lenard, (eds),1999, *Competition, Inovation and the Microsoft Monopoly: Antitrust in the Digital Marketplace* (Kluwer, Boston); Northnet, Inc., "An Open Access Business Model for Cable Systems: Promoting Competition & Preserving Internet Innovation on A Shared, Broadband Communications Network, Ex parte, Application of America online Inc., & Time Warner, Inc. for Transfer of Control, FCC, CS Docket No. 00-30, October 16, 2000, cited in Mark Cooper, *Open Architecture as Communications Policy,* Stanford Law School, Center for Internet and Society, 2004:168-169; Comments of the Writers Guild of America Regarding Harmful Vertical and Horizontal Integration in the Television Industry, Appendix A; Sylvia M. Chan-Olmstead, "Self-Dealing or Market Transaction?: An Exploratory Study of Vertical Integration in the U.S. Television Syndication Market," *Journal of Media Economics,* 19 (2); Cooper, Mark and Derek Turner, 2007, The Negative Effect of Concentration and Vertical Integration on Diversity and Quality in Video Entertainment, Telecommunications Policy Research Conference; Caves, Kevin W., Chris C. Holt and Hal J. Singer, 2013, "Vertical Integration in Multichannel Television Markets: A Study of Regional Sports Networks," *Review of Network Economics*, 66; Nocke, Volker and Lucy White, 2007, "Do Vertical Mergers Facilitate Upstream Collusion?," *American Economic Review*, 97; Pitofsky, Robert (ed.), 2008, *How the Chicago School Overshot the Mark* (Cambridge, MA: Oxford Univ. Press); Church, Jeffrey, 2008, "Vertical Mergers," *Issues In Competition Law And Policy*; Salop, Steven C., 2008, "Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark," in *How the Chicago School Overshot the Mark.*, edited by Robert Pitofsky (Cambridge, MA: Oxford Univ. Press); Normann, Hans-Theo, 2009, "Vertical Integration, Raising Rivals' Costs and Upstream Collusion," 53 European Economic Review, 53; Nocke, Volker and Lucy White, 2010, "Vertical Merger, Collusion, and Disruptive Buyers", 28 *International Law And Industrial Organization,* 350; Economist*,* 2016, "Vertical Limit: AT&T's takeover of Time Warner should be blocked," October 29; Hastings, Justine S. and Richard J. Gilbert, *Market Power,* "Vertical Integration and the Wholesale Price of Gasoline," *Journal of Industrial Economics, 53;* Moellers, Claudia, Hans-Theo Normann and, Christopher M. Snyder, 2017, "Communication in vertical markets: Experimental evidence," International Journal of Industrial Organization, 50; Sallet, Jon, 2016, "The Interesting Case of the Vertical Merger," American Bar Association Fall Forum, November 17; Salop, Steven C., 2018, "Invigorating Vertical Merger Enforcement," *Yale L.J.*

TABLE 2: CONCERNS ABOUT THE ABUSE OF MARKET POWER RESULTING FROM VERTICAL INTEGRATION THAT MUST BE ADDRESSED BY ANTITRUST AUTHORITIES

Input Foreclosure (IF)
Market Structure
Ability of fringe to compete
Behavior of integrated firms
Impact of contractual terms
Availability of substitute inputs
Incentives of other firms to parallel
Ability to undermine competition -- withholding, quality degradation, or price increase
Competitive fringe ability to constrain
Pass through of variable cost
Ability to capture customers
Impact of reciprocity

Customer Foreclosure (CF)
Bargaining leverage
Ability to self-supply

Unilateral Incentives (UI)
Earning on input, compared to retail product
Relative margins
Barriers to entry
Vulnerability to coordination
Incentive to deal with independents
Access to and use of competitively sensitive information
Who are the mavericks, how do firms behave toward them

Price Increases ($)
Cost symmetry
Cost and ability to punish market participants
Balance of upward and downward pressure on prices

Evasion of regulation (ER)
Evasion of regulation: ability, profitability

Respectfully submitted,

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