Dissenting Statement of Commissioner Julie Brill
In the Matter of Reynolds American, Inc. and Lorillard Inc.

File No. 141-0168
May 26, 2015

A majority of the Commission has voted to accept a consent to resolve competitive concerns stemming from Reynolds American, Inc.'s $27.4 billion acquisition of Lorillard Tobacco Company, a transaction combining the second and third largest cigarette manufacturers in the United States. Under the terms of the consent, Reynolds will divest some of its weaker non-growth brands – Winston, Kool, and Salem – as well as Lorillard's brand Maverick to Imperial Tobacco Group plc, a British firm that currently operates as Commonwealth here in the United States.[1] The Commission will allow Reynolds to retain its sought-after growth brands, Camel and Pall Mall, as well as Lorillard's flagship brand Newport. I respectfully dissent because I am not convinced that the remedy accepted by the Commission fully resolves the competitive concerns arising from this transaction. By accepting the parties' proposed divestitures and allowing the merger to proceed, the Commission is betting on Imperial's ability and incentive to compete vigorously with a set of weak and declining brands. For the reasons explained below, Imperial's ability to do so is at best uncertain. I thus have reason to believe that Reynolds' acquisition of Lorillard, even after the divestitures to Imperial, is likely to substantially lessen competition in the U.S. cigarette market. As a result of the Commission's failure to take meaningful action against this merger, the remaining two major cigarette manufacturers – Altria/Philip Morris and Reynolds – will likely be able to impose higher cigarette prices on consumers.

I have reason to believe this merger increases both the likelihood of coordinated interaction between the remaining participants in the cigarette market, and the likelihood that the merged firm will unilaterally exercise market power. While both theories are presented in the Commission's Complaint,[2] I describe below additional facts and evidence not included in the Complaint that I believe illustrate why the transaction remains anticompetitive, notwithstanding the divestitures to Imperial.

Coordinated Effects

Under a coordinated effects theory, as set forth in the 2010 Horizontal Merger Guidelines, the Commission is likely to challenge a merger if the following three conditions are met: "(1) the merger would significantly increase concentration and lead to a moderately or highly concentrated market; (2) that market shows signs of vulnerability to coordinated conduct []; and (3) the [Commission has] a credible basis on which to conclude that the merger may enhance that vulnerability."[3] Importantly, the Guidelines explain "the risk that a merger will

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[1] Reynolds will also sell Lorillard's e-cigarette Blu to Imperial; that sale is not part of the Commission's proposed order.
[2] Complaint, ¶ 8, *In the Matter of Reynolds American Inc. and Lorillard Inc.,* File No. 141-0168, (May 26, 2015).
[3] U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES § 7.1 (2010) [*hereinafter* Guidelines].

induce adverse coordinated effects may not be susceptible to quantification or detailed proof. . .".[4] The Guidelines also instruct that "[p]ursuant to the Clayton Act's incipiency standard, the Agencies may challenge mergers that in their judgment pose a real danger of harm through coordinated effects, even without specific evidence showing precisely how the coordination likely would take place."[5]

I have reason to believe that the facts in this case demonstrate a substantial risk of coordinated interaction because all three conditions for coordinated interaction spelled out in the Horizontal Merger Guidelines are satisfied.

The first condition is easily satisfied. After the dust settles on the merger and divestitures, Reynolds and market leader Altria/Philip Morris will have over 80 percent of the U.S. market for traditional combustible cigarettes.[6]

The second condition is also easily satisfied. The Guidelines identify a number of market characteristics that are generally considered to make a market more vulnerable to coordination.[7] These include (1) evidence of past express collusion affecting the relevant market; (2) firms' ability to monitor rivals' behavior and detect cheating with relative ease; (3) availability of rapid and effective forms of punishment for cheating; (4) difficulties associated with attempting to gain significant market share from aggressive price cutting; and (5) low elasticity of demand. The cigarette market has many of these characteristics.

First, for the last decade, the cigarette market in the United States has been dominated by three firms – Reynolds, Lorillard, and Altria/Philip Morris – which together represent over 90 percent of the market. Over the same 10-year period, these "Big Three" tobacco firms have made lock-step cigarette list price increases unrelated to any change in costs or market fundamentals.[8]

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[4] *Id*.
[5] *Id*.
[6] As the majority notes, the relevant market is combustible cigarettes in the United States. Statement of the F.T.C., *In the Matter of* Reynolds American Inc. and Lorillard Inc., File No. 141-0168, May 26, 2015, at 1 [*hereinafter* Majority Statement].
[7] Guidelines, *supra* note 3,. at § 7.2.
[8] In this context, it is worth noting that, in 2006, U.S. District Judge Kessler held Reynolds, Lorillard, Philip Morris, and a number of other cigarette manufacturers liable under the Racketeer Influenced and Corrupt Organizations Act (RICO). *United States v. Philip Morris*, 449 F. Supp 2d 1 (D.D.C. 2006), *aff'd* 566 F.3d 1095 (D.C. Cir. 2009). In a lengthy decision containing over 4000 paragraphs of findings of fact, the district court highlighted the coordinated nature of the defendants' activities in furtherance of the racketeering scheme. The conduct involved was indirectly related to price, as the overarching purpose behind the scheme was to maximize the competing cigarette firms' profits. The district court explained that "[t]he central shared objective of Defendants has been to maximize the profits of the cigarette company Defendants by acting in concert to preserve and enhance the market for cigarettes through an overarching scheme to defraud existing and potential smokers. . . ." (*Philip Morris*, 449 F. Supp 2d at 869). The court also found that "[t]here is overwhelming evidence demonstrating Defendants' recognition that their economic interests would best be served by pursuing a united front on smoking and health issues and by a global coordination of their activities to protect and enhance their market positions in their respective countries." (*Id.* at 119). I find this evidence troubling when viewed in conjunction with the evidence in this case showing the U.S. cigarette market's vulnerability to coordinated interaction relating to prices.

Second, there is a high degree of pricing transparency at the wholesale and retail levels in the cigarette market, giving cigarette manufacturers the ability to monitor each other's prices and engage in disciplinary action necessary to maintain coordination. The major manufacturers all receive detailed wholesale volume information from firms collecting data. Reynolds and Lorillard also receive numerous analyst reports that track manufacturers' pricing behavior and project whether the industry will enjoy a stable or aggressive competitive environment as a result. These conditions will allow the new "Big Two" cigarette manufacturers to quickly detect volume shifts due to price cuts and other competitive activity, allowing them to monitor each other's prices, detect cheating, and quickly discipline each other – or threaten to do so. Third, many U.S. smokers are addicted to tobacco, resulting in fairly inelastic market demand, and rendering successful coordination more profitable for industry members. As the Guidelines describe, coordination is more likely the more participants stand to gain from it.

Apart from the market characteristics identified in the Guidelines that make a market more vulnerable to coordination, it is important to consider that the cigarette market in the United States has experienced an ongoing decline in volume for over 20 years. This creates pressure on manufacturers to increase prices to offset volume losses, potentially easing the difficulties associated with formation of coordinating arrangements by making price increases a focal strategy.

In 2004, the Commission elected not to challenge the merger of Reynolds and Brown & Williamson in part because it found that the cigarette market was not vulnerable to coordinated interaction. However, three key market dynamics have changed since then. These three changes have limited the market significance of the discount fringe and its ability to constrain cigarette prices, and increased entry barriers – both of which make the market more vulnerable to coordination. First, Reynolds' Every Day Low Price (EDLP) program, substantially modified in 2008 to reposition and grow Pall Mall as the EDLP brand, requires participating retailers to maintain Pall Mall as the lowest price brand sold in the store, creating an effective price floor that discount manufacturers are not allowed to undercut. Second, the vast majority of states that signed the Tobacco Master Settlement Agreement ("MSA") have enacted Non-Participating Manufacturer Legislation and Allocable Share Legislation, further diminishing the impact of discount brands.[9] Under this legislation, companies that do not participate in the MSA—

[9] The Tobacco Master Settlement Agreement ("MSA") was entered in November 1998, originally between the four largest U.S. tobacco companies – Philip Morris Inc., R.J. Reynolds, Brown & Williamson and Lorillard – the original participating manufacturers ("OPMs"), and the attorneys general of 46 states, the District of Columbia, Puerto Rico, Guam, the Virgin Islands, American Samoa, and the Northern Marianas. The MSA resolved over 40 lawsuits brought by the states against tobacco manufacturers to recover billions of dollars in costs incurred by the states to treat smoking related illnesses and to obtain other relief. The OPMs agreed (1) to make multi-billion dollar payments, annually and in perpetuity, to the states and (2) to significantly restrict the way they market and advertise their tobacco products, including a prohibition on the use of cartoons in cigarette advertising or any other method that targets youth. In exchange, the states agreed to release the OPMs, and any other tobacco company that became a signatory to the MSA, from past and future liability arising from the health care costs caused by smoking. All MSA states subsequently enacted legislation requiring non-participating manufacturers ("NPMs") to make certain payments based on the number of cigarettes sold into the state. These payments are placed in an escrow account to ensure that funds are available to satisfy state claims against NPMs. Although all MSA states enacted this legislation, many NPMs were not making the required payments, or were exploiting a loophole by withdrawing their escrow deposits in a way that conflicted with the legislation's intent. To address those issues, many states adopted

typically the discount cigarette manufacturers—are required to pay an escrow fee to approximate the costs incurred by the participating cigarette companies, thereby eliminating much of the cost advantage that discounters had previously enjoyed. Third, the FDA's 2010 regulations,[10] implementing the 2009 Family Smoking Prevention and Tobacco Control Act,[11] restrict tobacco advertising and promotion in the United States. Thus the 2010 FDA regulation limits the ability of new firms to enter the market, and limits the ability of existing fringe market participants to grow through aggressive advertising. The combined effect of these three, relatively new market dynamics has been a reduction in the competitive significance of the fringe discount brand manufacturers. Indeed, the number of discount brand manufacturers has fallen from over 100 in 2005, to around 50 today, now representing just two percent of the market.

The third and final condition identified in the Guidelines as leading the Commission to challenge a proposed merger based on a theory of coordination – that the Commission has a credible basis to conclude that the merger may enhance the market's vulnerability to coordination — is also satisfied in this case. Prior to the transaction, a large percentage of Reynolds' portfolio consisted of non-growth brands (including Winston, Kool, and Salem), and overall Reynolds' volumes were declining. In the years leading up to this transaction Reynolds also had a noticeable portfolio gap, as it lacked a strong premium menthol brand. Reynolds initiated new competition in the menthol segment with the introduction of Camel Crush and Camel Menthol, but Reynolds was still playing catch-up. Seeking to stop further volume loss to its competitors' menthol brands —Lorillard's Newport and Altria/Philip Morris' Marlboro — Reynolds implemented a strategy of aggressive promotion of Camel and Pall Mall. The proposed merger eliminates many of Reynolds' incentives to continue these strategies. With Newport added to its portfolio, Reynolds will no longer face a gap in menthol and will not be subject to the same level of volume losses. Post-transaction, there will be greater symmetry between Altria/Philip Morris and Reynolds, bringing Reynolds' incentives into closer alignment with Altria/Philip Morris to place greater emphasis on profitability over market share growth. This increase in symmetry between Reynolds and Altria/Philip Morris thus enhances the market's vulnerability to coordination.[12]

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additional legislation to provide enforcement tools to ensure that NPMs make the required escrow payments ("complementary enforcement legislation"), as well as legislation to close a loophole in the state escrow statutes by preventing NPMs from withdrawing escrow payments in a way that was never contemplated when those statutes were enacted ("Allocable Share Legislation").

[10] Regulations Restricting the Sale and Distribution of Cigarettes and Smokeless Tobacco to Protect Children and Adolescents, 75 FR 13225 (March 19, 2010).

[11] 21 U.S.C. § 301 (2009).

[12] *See* Statement of the F.T.C., *In the Matter of ZF Friedrichshafen AG and TRW Automotive Holdings Corp.*, File No. 141-0235, May 8, 2015, *available at* https://www.ftc.gov/system/files/document/cases/150515zffrn.pdf. *See also* Marc Ivaldi, et al., *The Economics of Tacit Collusion* 66 & 67, Final Report for DG Competition, European Commission (2003), *available at* http://ec.europa.eu/competition/mergers/studies_reports/the_economics_of_tacit_collusion_en.pdf ("By eliminating a competitor, a merger reduces the number of participants and thereby tends to facilitate collusion. This effect is likely to be the higher, the smaller the number of participants already left in the market.") ("[I]t is easier to collude among equals, that is, among firms that have similar cost structures, similar production capacities, or offer similar ranges of products. This is a factor that is typically affected by a merger. Mergers that tend to restore symmetry can facilitate collusion.").

Unilateral Effects

This transaction also raises concerns about unilateral anticompetitive effects, because it eliminates the growing head-to-head competition between Reynolds and Lorillard. The Guidelines explain that "[t]he elimination of competition between two firms that results from their merger may alone constitute a substantial lessening of competition."[13] As the majority explains, the Commission's econometric modeling showed likely price effects from the combination of the parties' cigarette portfolios.[14]

The econometric analysis supports the substantial qualitative evidence of unilateral anticompetitive effects. For years, Lorillard's Newport brand has been able to rely on strong brand equity and brand loyalty to sustain its high market share and high prices for its menthol product line. As noted above, Reynolds, on the other hand, has been lagging behind Altria/Philip Morris and Lorillard in terms of profitability and pricing, with no comparably strong menthol product. As a result, in recent years Reynolds has been making efforts to challenge Newport's established leadership position and increase its share in menthol through increased promotional activity. Reynolds also engaged in the first innovation in this industry in many years with the introduction of Camel Crush,[15] which has generated strong sales growth for a new brand. Post-merger, with Newport in its hands, Reynolds will no longer need to innovate or increase its promotional activity to increase its share in menthol.

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In sum, I have reason to believe that this merger poses a real danger of anticompetitive harm through coordinated effects and unilateral exercise of market power in the U.S. cigarette market.

Adequacy of Divestitures to Imperial to Restore Competition

As the Supreme Court has stated, restoring competition is the "key to the whole question of an antitrust remedy."[16] Both Supreme Court precedent and Commission guidance makes clear that any remedy to a transaction found to be in violation of Section 7 of the Clayton Act must fully restore the competition lost from the transaction,[17] and a remedy that restores only *some* of the competition lost does not suffice.[18] Because Clayton Act merger enforcement is predictive, it

[13] Guidelines, *supra* note 3, at § 6.
[14] Majority Statement, *supra* note 6, at 2.
[15] Camel Crush allows consumers to change the cigarette from non-menthol to menthol or from menthol to stronger menthol by crushing a menthol capsule inside the filter.
[16] *United States v. E.I. du Pont de Nemours & Co.*, 366 U.S. 316, 326 (1961).
[17] *Ford Motor Co. v. United States*, 405 U.S. 562, 573 (1972) ("The relief in an antitrust case must be 'effective to redress the violations' and 'to restore competition.' . . . Complete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws.").
[18] *See* F.T.C. Frequently Asked Questions About Merger Consent Order Provisions, *available at* https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/mergers/merger-faq ("There have been instances in which the divestiture of one firm's entire business in a relevant market was not sufficient to maintain or restore competition in that relevant market and thus was not an acceptable divestiture package. To assure effective relief, the Commission may thus order the inclusion of additional assets beyond those operating in the relevant

is hard to define what will precisely fully restore lost competition in any given case. The agency has on occasion allowed for remedies that are not an exact replica of the pre-merger market, usually when there is evidence that the buyer can have a strong competitive impact with the divested assets. Yet the focus of the inquiry is always on whether the proposed divestitures are sufficient to maintain or restore competition in the relevant market that existed prior to the transaction.[19]

Under these well-grounded principles, I have serious concerns about whether the divestiture remedy in this case is sufficient to restore competition in the U.S. cigarette market. As a preliminary matter, it is worth noting that, post-transaction, Imperial will be less than one-third the size of the combined Reynolds/Lorillard, with a 10 percent market share compared to the combined Reynolds/Lorillard's 34 percent market share. Prior to the transaction, Reynolds and Lorillard were more comparable in size to each other – Reynolds with a 26 percent market share and Lorillard with a 15 percent market share. And despite the divestitures, the HHI will increase 331 points to 3,809. Moreover, there is nothing dynamic about the cigarette market by any measure that could plausibly make these measures less useful in analyzing the likelihood of the divestiture to fully restore the competition lost from this transaction.

Beyond the resulting increased concentration, the question is whether Imperial can nonetheless maintain or restore competition in the market with the divested brands due to its own business acumen and incentives post-divestiture. I have reason to believe Imperial will not be up to the job. Indeed, I believe Imperial's post-divestiture market share may overstate its competitive significance. Through this transaction, Reynolds will obtain the second largest selling brand in the country (Newport), and keep the third largest selling brand (Camel). Imperial, on the other hand, will continue to have no strong brands in its portfolio. Reynolds' Winston, Kool, and Salem are declining and unsuccessful. Their combined market share has gone from approximately 14 percent in 2010 to 8 percent in 2013 (a 6 percent decline), and they are still losing share. It is no surprise that Reynolds would want to unload these weak brands, and refuse to provide a meaningful divestiture package that would replace the competition lost through its merger with Lorillard. I am not convinced that Imperial will have any greater ability to grow these declining brands. Indeed, I have reason to believe that Winston, Kool, and Salem, as well as Maverick, will languish even further outside the hands of Reynolds and Lorillard.

There is no doubt that Imperial *hopes* to make these brands successful and will make every attempt to do so. Imperial's strong global financial position will help. The Commission

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market. . . In all cases, the objective is to effectuate a divestiture most likely to maintain or restore competition in the relevant market. . . At all times, the burden is on the parties to provide concrete and convincing evidence indicating that the asset package is sufficient to allow the proposed buyer to operate in a manner that maintains or restores competition in the relevant market.").

[19] *Id.* ("Every order in a merger case has the same goal: to preserve fully the existing competition in the relevant market or markets. . . An acceptable divestiture package is one that maintains or restores competition in the relevant market. . ..."). *See also* Statement of the F.T.C.'s Bureau of Competition on Negotiating Merger Remedies, at 4, January 2012, *available at* https://www.ftc.gov/system/files/attachments/negotiating-merger-remedies/merger-remediesstmt.pdf ("If the Commission concludes that a proposed settlement will remedy the merger's anticompetitive effects, it will likely accept that settlement and not seek to prevent the proposed merger or unwind the consummated merger.").

cannot rely on hopes and aspirations alone, however. We must base our decision on facts and demonstrated performance in the market. And it is by this measure that Imperial, with the added weak brands from Reynolds, comes up short. Imperial has a poor track record of growing acquired brands in the U.S. Imperial entered the U.S. market in 2007 by acquiring Commonwealth.[20] At that time Imperial also aspired to increase share. However, Imperial was not successful. Commonwealth's market share has declined since it was acquired by Imperial, and stands at less than three percent today. While in FY 2014 Imperial may have achieved modest growth with one of its other brands, USA Gold, that growth was only focused on limited geographic markets, and doesn't give me confidence that Imperial can implement a national campaign growth strategy. Reynolds, with much greater experience in the U.S. market, made numerous efforts to reinvigorate Winston, Kool, and Salem, but failed.[21] In light of Imperial's much worse track record here in the U.S., I am unconvinced that it will have *more* luck in making its wishful plans a reality.

The majority notes that, outside the United States, Winston is the number two cigarette brand, and Imperial plans to make Winston the main focus of its strategy in the United States post-transaction.[22] But Winston's dichotomous position – a strong brand outside the United States and a weak brand in the United States – has held for many years. And Reynolds' multiple efforts to reposition Winston in light of its strong global position have not had any effect on slowing the dramatic decline of Winston in the United States. Indeed, by placing Winston at the center of its U.S. strategy, Imperial is demonstrating the same tone-deafness to the unique dynamics of the U.S. market that has caused Imperial to lose market share since it entered the U.S. market in 2007.

My concerns about Imperial's ability to succeed where Reynolds has failed is heightened by the fact that Imperial will have no "anchor" brand to gain traction with retailers, and as a result will have limited shelf space available to it. The divestitures of Maverick from Lorillard and Winston, Kool, and Salem from Reynolds effectively de-couple each divested brand from a strong anchor brand. These anchor brands —Newport and Camel, the second and third best-selling brands in the country – gave Maverick, Winston, Kool, and Salem increased shelf space and promotional spending, helping to drive the limited sales they had. Maverick in particular benefits from Newport's brand success: Lorillard gives it a portion of Newport's shelf space, and when Lorillard advertises Newport, it advertises Maverick too. In Imperial's hands, the divested brands will not have the same shelf space or the benefit of strong advertising that comes with their anchor brands. I believe that the decoupling of the divested brands from Camel and Newport will serve to further exacerbate their decline.

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[20] In 1996 Commonwealth acquired brands required by the Commission to be divested to resolve competitive concerns stemming from B.A.T. Industries p.l.c.'s $1 billion acquisition of The American Tobacco Company. B.A.T. Industries p.l.c., *et al*, 119 F.T.C. 532 (1995).

[21] The majority interprets the evidence before us as showing that Reynolds emphasized Camel and Pall Mall but only put "limited marketing support behind Winston and Kool." *See* Majority Statement, *supra* note 6, at 3. In contradistinction to the majority, I believe the evidence before us demonstrates that on numerous occasions Reynolds sought – valiantly but without success – to grow Winston and Kool, even while emphasizing Camel and Pall Mall.

[22] Majority Statement, *supra* note 6, at 2.

Recognizing Imperial's shelf space disadvantage, the proposed Consent requires Reynolds to make some short term accommodations in an attempt to give Imperial a fighting chance in its effort to gain some shelf space in stores. First, the Consent envisions Reynolds entering into a Route to Market ("RTM") agreement with Imperial, whereby Reynolds agrees to provide Imperial a portion of its post-acquisition retail shelf space for a period of five months following the close of the transaction. Imperial will pay Reynolds $7 million for this agreement. Under the terms of the RTM agreement, Reynolds commits for a period of five months to continue placing Winston, Kool, and Salem on retail fixtures according to historic business practices, and to assign Imperial a defined portion of Lorillard's current retail shelf-space allotments to use as it sees fit. Second, Reynolds is also undertaking a 12-month commitment to remove provisions in new retail marketing contracts that would otherwise require some retailers to provide it shelf space in proportion to its national market share, where Reynolds national market share is higher than its local market share. The intent of this commitment is to increase Imperial's ability to obtain shelf space at least proportional to its local market share in many retail outlets for a period of 12 months.

I have reason to believe that these provisions are insufficient to make up for Imperial's significant shelf space disadvantage. The five-month RTM Agreement and 12-month commitment pertaining to Reynolds' allocation of shelf space according to its local market share are too short. While Imperial may be optimistic that it can establish sufficient shelf space in this limited time frame, nothing in the RTM Agreement and 12-month local market share commitment will alter retailers' incentives to allocate their shelf space to popular products that sell well when those time periods expire. Even if Imperial offers better terms and uses former Lorillard salespeople who have preexisting relationships with retailers to push for greater shelf space, it likely will still be in retailers' economic interest to allocate shelf space to the strong Reynolds and Altria/Philp Morris brands, not to Imperial's collection of weak and declining brands.[23] And at the end of Reynolds' 12-month local market share commitment, Reynolds will be able to squeeze Imperial's shelf space by requiring many retailers to provide it shelf space in proportion to its higher-than-local national market share. While Imperial may attempt to maintain its retail visibility by offering stores lucrative merchandising contracts, Reynolds and Altria/Philip Morris will no doubt counter those efforts with their own lucrative contracts. In the short run, arguably this may be beneficial for competition, but in the long run, Imperial's market presence will diminish and the market will in all likelihood become a stable duopoly.[24]

[23] The majority places its bet on Imperial in part based on the transfer to Imperial of "an experienced, national sales force from Lorillard." Majority Statement, *supra* note 6, at 2. I do not believe the transfer of some of Lorillard's sales staff to Imperial will transform Imperial into a significant competitor in the U.S. market. Lorillard's transferred sales staff will not be able to overcome the significant market dynamics described herein. Moreover, Lorillard's sales staff likely will be unable to fundamentally transform Imperial's lackluster competitive performance in the U.S. market because, as the majority itself acknowledges, "pre-merger Lorillard . . . has not been a particularly aggressive competitor in this market, having instead been generally content to rely on Newport's strong brand equity to drive most of its sales." Majority Statement, *supra* note 6, at 3.

[24] The majority relies on the fact that Imperial will have more favorable incentives as compared with those of the pre-merger Lorillard, since Lorillard was not a particularly aggressive competitor. Majority Statement, *supra* note 6, at 3. But that comparison does not capture the full picture of the competitive harm from this transaction. Reynolds, not Lorillard, was the firm injecting some competition into the market. And as described herein, once Reynolds adds Lorillard's flagship Newport brand to its portfolio, Reynolds will have a portfolio of brands that is symmetrical to Altria/Philip Morris, resulting in a significant change in its incentives post-merger. In considering whether

Conclusion

There is a great deal of discussion among academia, industry and other stakeholders about the negative impact on the market stemming from over enforcement of the antitrust laws.[25] There is consensus that over enforcement, also known as "Type 1 errors" or "false positives", can harm businesses and consumers by preventing what could otherwise be procompetitive conduct; many commentators believe Type 1 errors can also have a chilling effect on future procompetitive conduct.[26] However, failing to bring antitrust enforcement actions can also cause significant harms to consumers. As has been recently demonstrated by an in-depth study of merger retrospectives, harm from under enforcement, also known as "Type 2 errors" or "false negatives", can come in the form of significant price increases.[27] The Commission has always been very careful not to take enforcement action that turns out not to be warranted, an approach I fully support. This Commission also normally pays close attention when we are presented with insufficient divestitures or other remedies, to avoid under enforcement errors that can cause significant harm to consumers. Unfortunately, the majority has failed to do so in this case.

For all of these reasons, I respectfully dissent.

Imperial will fully restore the competition lost from this transaction, the majority seems to omit from its analysis Reynolds' changed incentives post-merger, and the effect that these changed incentives will have to substantially lessen competition in the U.S. market.

[25] *See, e.g.*, Christine A. Varney & Jonathan J. Clark, Chicago and Georgetown: An Essay in Honor of Robert Pitofsky, 101 Geo. L.J. 1565 (2013); Bruce H. Kobayashi and Timothy J. Muris, Chicago, Post-Chicago, and Beyond: Time to Let Go of the 20th Century, 78 Antitrust L. J. 147 (2012); Alan Devlin and Michael Jacobs, Antitrust Error, 52 Wm. & Mary L. Rev. 75 (2010); *Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004); Frank H. Easterbrook, The Limits of Antitrust, 63 Tex. L. Rev. 1, 15-16 (1984).

[26] *Id.*

[27] John Kwoka, MERGERS, MERGER CONTROL, AND REMEDIES, A RETROSPECTIVE ANALYSIS OF U.S. POLICY, 2015.