

# COMMITTEE ON CAPITAL MARKETS REGULATION

January 14, 2021

Donald S. Clark, Secretary  
Federal Trade Commission  
600 Pennsylvania Avenue NW  
Suite CC-5610 (Annex J)  
Washington, DC 20580

Re: 16 CFR parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules (“**HSR Act Proposal**”); Project No. P110014

Dear Sir:

The Committee on Capital Markets Regulation (the “**Committee**”) appreciates the opportunity to comment on the HSR Act Proposal that would subject registered investment companies (“**RICs**”) and other investment entities<sup>1</sup> making certain investments to a thirty-day transaction delay, filing fees, and increased reporting obligations under the Federal Trade Commission (the “**FTC**”) and Department of Justice (the “**DOJ**”) pre-clearance process for acquisitions that may have competitive implications.<sup>2</sup>

The Committee does not support the HSR Act Proposal, as it could have negative implications for the U.S. capital markets, including by increasing investor costs.<sup>3</sup> Although it is not clear that acquisitions of a minority stake by RICs in an issuer have any competitive implications, if the FTC seeks information regarding such transactions, then the agency may obtain it from the Securities and Exchange Commission (the “**SEC**”), which has public databases that provide details regarding the owners of public companies and holdings of RICs. Such an alternative approach by the FTC would avoid the unnecessary disruption of U.S. capital markets.

Founded in 2006, the Committee is dedicated to enhancing the competitiveness of U.S. capital markets and ensuring the stability of the U.S. financial system. Our membership includes forty leaders drawn from the finance, investment, business, law, accounting, and academic communities. The Committee is chaired jointly by R. Glenn Hubbard (Dean, Columbia Business School) and John L. Thornton (Chairman, The Brookings Institution) and led by Hal S. Scott (Emeritus Nomura Professor of International Financial Systems at Harvard Law School and President of the Program on International Financial Systems). The Committee is an independent and nonpartisan 501(c)(3) research organization, financed by contributions from individuals, foundations, and corporations.

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<sup>1</sup> For the purposes of this letter, “investment entities” includes other types of collective investment entities, such as exchange-traded funds organized as unit investment trusts.

<sup>2</sup> FED. TRAD. COMM’N, *Notice of proposed rulemaking: Premerger Notification; Reporting and Waiting Period Requirements*, 85 FED. REG. 77053 (Dec. 1, 2020), <https://www.federalregister.gov/documents/2020/12/01/2020-21753/premerger-notification-reporting-and-waiting-period-requirements> [“**HSR Act Proposal**”].

<sup>3</sup> Although the HSR Act Proposal would significantly impact all investment entities, we focus our analysis on RICs, which represent a crucial source of diversification and returns for ordinary retail investors, to illustrate our concerns.

Our letter proceeds in four parts. First, we summarize the Hart-Scott-Rodino Act (the “**HSR Act**”), which is intended to provide the FTC and DOJ with advance notice of acquisitions that may have competitive implications. Second, we summarize the HSR Act Proposal and its potential impact on the filing and delay requirements imposed by the HSR Act on acquisitions by RICs. Third, we describe the impact that the HSR Act Proposal would have on U.S. capital markets and address specific issues with the HSR Act Proposal. Finally, we set forth an alternative approach that would provide the FTC with information that it seeks without disrupting U.S. capital markets.

## **HSR Filing and Delay Requirements**

The primary purpose of the HSR Act is to provide the FTC and DOJ with the opportunity and information necessary to review transactions that may have a negative impact on competition and that may be difficult to unwind after consummation.<sup>4</sup> If a proposed merger or acquisition exceeds certain dollar size thresholds, then the HSR Act requires that the parties furnish premerger notification to the FTC and DOJ, and the transaction is generally subject to an automatic thirty-day delay on closing absent early termination or a secondary information request (the “**HSR filing and delay requirement**”).<sup>5</sup>

HSR filings include the following information for each party: financial statements, annual reports filed with the SEC, third-party reports evaluating the competitive effect of the transaction, and additional information about the parties’ revenues, subsidiaries, minority investments, and minority shareholders exceeding certain ownership thresholds.<sup>6</sup>

However, acquisitions by RICs are exempt from HSR filing and delay requirements, so long as the acquisition is made in the ordinary course of business and “solely for the purpose of investment,” and so long as the RIC will hold 15% or less of the outstanding voting securities of the issuer as a result of the acquisition.<sup>7</sup> For an acquisition to be considered “solely for the purposes of investment,” the acquirer must have “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>8</sup>

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<sup>4</sup> See generally U.S. FED. TRADE COMM’N, *What is the Premerger Notification Program: An Overview* (March 2009), <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>.

<sup>5</sup> PAUL HASTINGS, *New HSR Thresholds Announced for 2020* (Jan. 29, 2020), <https://www.paulhastings.com/publications-items/details/?id=c931ab6e-2334-6428-811c-ff00004cbded>.

<sup>6</sup> See U.S. FED. TRADE COMM’N, *The Form and Instructions* (Sept. 25, 2019), <https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions>. See also U.S. FED. TRADE COMM’N, *What is the Premerger Notification Program: An Overview*, 6 (March 2009), <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>; DORSEY, *The HSR Merger Review Process: Basics and Recent Developments*, 8 (April 29, 2019), <https://www.dorsey.com-/media/files/uploads/images/042919-dorsey-seminar-hsr-ma-issues-materials.pdf?la=en>.

<sup>7</sup> Other investment entities that are not RICs are similarly exempt from HSR filing and delay requirements, however the applicable ownership threshold is 10%. 16 C.F.R. § 802.64(b); 16 C.F.R. § 801.1(i)(1). See also 16 C.F.R. § 802.9.

<sup>8</sup> 16 C.F.R. § 801.1(i)(1). See also CLEARY GOTTLIEB, *U.S. Antitrust Agencies Propose HSR Rule Changes That Would Increase Filings and Burden*, 2 (Sept. 24, 2020), <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/us-antitrust-agencies-propose-hsr-rule-changes-that-would-increase-filings-and-burden.pdf>; CADWALADER, *Further Guidance on the HSR Act Investment-Only Exemption for Seemingly “Passive” Investors Engaging with Management* (Nov. 2, 2016); Bruce Sokler, Dionne Lomax, Robert Kidwell, Farrah Short, *Investment Fund Violates “Investment-Only” HSR Exemption*, MINTZ (August 26, 2015); Barry A. Nigro Jr., *The HSR Act’s Investment-Only Exemption for Targets and Activist Investors*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 23, 2015), <https://corpgov.law.harvard.edu/2015/02/23/the-hsr-acts-investment-only-exemption-for-targets-and->

## The HSR Act Proposal

The HSR Act Proposal would expand the scope of the application of the HSR filing and delay requirements to RICs and other investment entities.

First, in determining whether an RIC's ownership in an issuer is below the 15% threshold for exemption, the HSR Act Proposal would require the aggregation of affiliated investment entities' holdings.<sup>9</sup> RICs, such as mutual funds, are not presently required to aggregate holdings of affiliated investment entities when determining if a specific RIC owns more than 15% of an issuer.<sup>10</sup> Of course, if an RIC's holdings must be aggregated with the holdings of affiliated investment entities in an issuer, then it is more likely that HSR size thresholds will be crossed, thereby triggering the filing and delay requirement.<sup>11</sup>

Second, certain RICs would potentially no longer qualify for the "investment-only" exemption because, according to the HSR Act Proposal, their investment stewardship activities (such as voting and shareholder engagement) may impact the basic business decisions of the issuers that they own, and therefore the acquisition would not be with "investment-only" intent.<sup>12</sup> For instance, the HSR Act Proposal states that the exemption is "available if the acquiring person plans to do nothing but hold the stock...however, a great deal of potential shareholder engagement involves more than merely holding... stock."<sup>13</sup>

Although the HSR Act Proposal would establish a new exemption from the HSR Act's requirements for RICs and other investment entities that own 10% or less of a company, regardless of their investment intent, the new exemption is largely unusable for large asset managers.<sup>14</sup> That is because if the acquiring RIC owns more than 1% of the outstanding voting securities of any competitor of that issuer, then the exemption is not available.<sup>15</sup> For example, an RIC that owns 2% of American Airlines and 2% of Delta Airlines would not qualify for the exemption for a new investment in any airline. In practice, many large RICs would be excluded from the new exemption as they or their affiliated investment funds generally own more than 1% in a competitor company across many industries. The HSR Act Proposal states that it excludes such acquisitions from the exemption on the basis that common ownership of companies may be harming competition.<sup>16</sup> The

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[activist-investors/](#); HAYNES BOONE, *FTC Reminds Investment Funds that Reliance on "Investment Only" Exemption from HSR is Risky Business* (Sept. 17, 2015), <https://www.haynesboone.com/alerts/ftc-reminds-investment-funds-that-reliance-on-investment-only-exemption-from-hsr-is-risky-business>; Joel Mitnick and Ngov Pham Hulbig, *Proposed HSR Amendments Will Affect Financial Investors*, THE NATIONAL LAW REVIEW XI(14) (Oct. 1, 2020), <https://www.natlawreview.com/article/proposed-hsr-amendments-will-affect-financial-investors>.

<sup>9</sup> Aggregation would also apply to other non-RIC investment entities when determining their eligibility for the lower 10% exemption. Furthermore, by requiring aggregation of ownership between affiliated RICs and non-RICs, the HSR Act Proposal would effectively apply the 10% threshold to such RICs.

<sup>10</sup> HSR Act Proposal, *supra* note 2, at 77055-77056; CLEARY GOTTLIEB (Sept. 24, 2020), *supra* note 8, at 2-3.

<sup>11</sup> CLEARY GOTTLIEB (Sept. 2020), *supra* note 8, at 2; WINSTON & STRAWN, *FTC Proposes Two Significant Changes to HSR Rules* (Sep 29, 2020), <https://www.winston.com/en/competition-corner/ftc-proposes-two-significant-changes-to-hsr-rules.html>; HSR Act Proposal, *supra* note 2, at 77061-77062.

<sup>12</sup> See HSR Act Proposal, *supra* note 2, at 77059.

<sup>13</sup> HSR Act Proposal, *supra* note 2, at 77059.

<sup>14</sup> HSR Act Proposal, *supra* note 2, at 77061.

<sup>15</sup> HSR Act Proposal, *supra* note 2, at 77061.

<sup>16</sup> HSR Act Proposal, *supra* note 2, at 77061.

common ownership theory contends that companies are less likely to compete with one another if they have the same stockholder.<sup>17</sup>

## Analysis

### *Impact on U.S. Capital Markets and Investors*

We are concerned that an expansion of the applicability of HSR delay and filing requirements would have a significant negative impact on U.S. capital market functioning and on investor transaction costs. In recent years, the asset management industry has seen significant consolidation and there are presently over a dozen U.S. asset management firms with over \$1 trillion in assets under management.<sup>18</sup> Since the HSR Act Proposal would require aggregation across affiliated investment funds, it is likely that many acquisitions by RICs and other investment entities managed by these large firms would become subject to HSR filing and delay requirements.<sup>19</sup>

An increase in HSR filing requirements would raise the administrative burden on both asset managers and the FTC itself, and the impact on investors would be significant. For example, each HSR filing would trigger direct filing fees between \$45,000 and \$280,000 as well as the indirect legal expense of preparing each filing,<sup>20</sup> which typically exceed the direct filing fees. These costs would ultimately be borne by fund investors. More importantly, the mandatory thirty-day delay would effectively prevent impacted RICs from executing their investments on a timely basis, and to the extent the increase in HSR filings slows the FTC's transaction review process, these delays may extend even longer than thirty days.<sup>21</sup>

Delays on investments by RICs would have a number of negative consequences for investors, as mutual funds and exchange traded funds, whether actively or passively managed, depend on time-sensitive execution strategies that are designed to optimize returns for fund shareholders.

Index funds, which represent over 51% of the assets under management by RICs that invest primarily in U.S. equities,<sup>22</sup> have to adjust their portfolio to reflect changes in the index that they

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<sup>17</sup> HSR Act Proposal, *supra* note 2, at 77061.

<sup>18</sup> See COMMITTEE ON CAPITAL MARKETS REGULATION, *Reforming U.S. Capital Markets to Promote Economic Growth*, 93 (May 19, 2020), <https://www.capmktsreg.org/2020/05/19/reforming-u-s-capital-markets-to-promote-economic-growth/>; PENSIONS & INVESTMENTS, *Special Report: Largest money managers: 2020* (June 1, 2020), <https://www.pionline.com/managers2020>. See also PENSIONS & INVESTMENTS, *Research Center: Money Manager* (last accessed Dec. 20, 2020), <https://researchcenter.pionline.com/v3/rankings/money-manager/databl>.

<sup>19</sup> See HSR Act Proposal, *supra* note 2, at 77057-77058; CLEARY GOTTLIEB (Sept. 24, 2020), *supra* note 8.

<sup>20</sup> U.S. FED. TRADE COMM'N, *The Form and Instructions*, III (Sept. 25, 2019), <https://www.ftc.gov/enforcement/premerger-notification-program/form-instructions>.

<sup>21</sup> See, e.g., U.S. FED. TRADE COMM'N, *Getting in Sync with HSR Timing Considerations* (Aug. 31, 2017), <https://www.ftc.gov/news-events/blogs/competition-matters/2017/08/getting-sync-hsr-timing-considerations>; DUANE MORRIS, *Expect Delays in Merger Reviews by FTC and DOJ During COVID-19 Restrictions* (March 25, 2020), [https://www.duanemorris.com/alerts/expect\\_delays\\_merger\\_reviews\\_ftc\\_doj\\_during\\_covid19\\_restrictions\\_0230.html](https://www.duanemorris.com/alerts/expect_delays_merger_reviews_ftc_doj_during_covid19_restrictions_0230.html).

<sup>22</sup> COMMITTEE ON CAPITAL MARKETS REGULATION, *Reforming U.S. Capital Markets to Promote Economic Growth*, 78-79 (May 19, 2020), <https://www.capmktsreg.org/2020/05/19/reforming-u-s-capital-markets-to-promote-economic-growth/>.

are tracking. For example, index funds that track the S&P 500 are designed to hold each underlying stock in proportion to its market capitalization. If a new company is added to the S&P 500 (such as Tesla), then these index funds must purchase that stock and sell other stocks so that their portfolios continue to track the index. However, index funds subject to the HSR thirty-day delay would be unable to track the applicable index on a timely basis.

Of course, the investment strategies of active funds, which constitute the remaining 49% of the assets under management by RICs that invest primarily in U.S. equities,<sup>23</sup> also depend on time-sensitive execution. For example, suppose that an active fund manager expects that a portfolio company will outperform quarterly earnings expectations. The HSR delay would prevent active fund managers from executing a trade based on such a determination within thirty days of the quarterly earnings report. This would deprive investors of the value of active management.

RICs' ability to timely execute transactions is also important for the functioning of U.S. capital markets. Doing so, for example, allows them to minimize the price impact of their large purchases. By requiring RICs to notify the market of their intention to make a purchase and then imposing a thirty-day delay on that purchase, the HSR Act Proposal would increase the price impact associated with that purchase, which would increase transaction costs for U.S. investors. Imposing an artificial delay on the execution of securities transactions would also reduce the timely incorporation of information in pricing securities, thereby decreasing the price efficiency of stocks.

In short, the HSR delay requirement would have a significant negative impact on U.S. investors by increasing transaction costs for RICs, reducing the ability of index funds to track indices on a timely basis, and unduly restricting active management strategies. We further note that the HSR filing and delay requirement is designed to give the FTC and DOJ the opportunity to preemptively review and challenge acquisitions that are difficult to unwind.<sup>24</sup> However, the acquisition of minority equity holdings by RICs can easily be unwound. Therefore, the HSR filing and delay requirement is unnecessary in the context of minority holdings by RICs.

### *The FTC Should Not Require Aggregation of Affiliated Investment Entities*

As noted earlier, the HSR Act Proposal would also require the aggregation of holdings by affiliated RICs and other investment entities in determining whether an RIC owns more than 15% of an issuer. In our view, RICs should *not* be required to aggregate the holdings of affiliated investment entities when determining whether each RIC exceeds the 15% threshold for the “investment-only” exemption. Each RIC is managed as a distinct entity with its own investment strategy and owners. Therefore, investment decisions to purchase or sell an ownership stake in an issuer for an RIC are made separately from investment decisions by affiliated RICs. Furthermore, the Investment Company Act strictly limits transactions between affiliated RICs, ensuring that affiliated RICs are in fact independent and do not share risk. Indeed, the legal framework

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[economic-growth/](#). See also INVESTMENT COMPANY INSTITUTE, *Investment Company Factbook*, 40 (2020), [https://www.ici.org/pdf/2020\\_factbook.pdf](https://www.ici.org/pdf/2020_factbook.pdf).

<sup>23</sup> *Id.*

<sup>24</sup> U.S. FED. TRADE COMM’N, *What is the Premerger Notification Program: An Overview*, 1 (March 2009), <https://www.ftc.gov/sites/default/files/attachments/premerger-introductory-guides/guide1.pdf>.

governing the operation of RICs ensures that they can be effectively resolved without impacting affiliated investment companies.<sup>25</sup>

### *Investment Stewardship Does Not Determine or Direct Basic Business Decisions*

In order to qualify for the investment-only exemption, an RIC must have “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>26</sup> However, the HSR Act Proposal would potentially eliminate the investment-only exemption for RICs on the basis that their investment stewardship activities (such as voting and engagement) may impact the basic business decisions of issuers. Specifically, the HSR Act Proposal states that “a discussion between shareholders and company executives may begin with the amount of compensation...but then evolve into how each executive’s compensation will be determined by the company’s performance. This discussion may touch on basic business decisions, precluding the use of [investment-only] exemption.”

However, while investment stewardship can have significant positive effects on corporate governance,<sup>27</sup> the “investment-only exemption” should still apply to RICs, because their voting and shareholder engagement activities do not indicate an “intention of participating in the formulation, determination or direction of the basic business decisions of the issuer.” RICs do not have control over the key business operating decisions, such as earnings targets, growth targets, corporate strategy, or investments in research and development. Although investment stewardship activities by RICs involve voting and engagement on executive compensation arrangements, such engagement is generally limited in practice to the relationship between pay and performance and does not provide RICs with the ability to effectively formulate, determine or direct key operating decisions. The same is true for voting and engagement on other corporate governance issues such as the election of the board of directors. We therefore believe that RICs should continue to qualify for the “investment-only” exemption.

### *The Flawed Common Ownership Theory Should Not Form the Basis of Public Policy*

The HSR Act Proposal would also establish a “new” exemption for acquisitions by RICs and other investment entities regardless of investment intent, so long as the RIC owns less than

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<sup>25</sup> See COMMITTEE ON CAPITAL MARKETS REGULATION, *Letter to the Financial Stability Board*, 5-6 (April 7, 2014), <https://www.capmktsreg.org/2014/04/07/committee-submits-letter-on-non-bank-non-insurer-g-sifi-methodologies-to-fsbiosco/>.

<sup>26</sup> 16 C.F.R. § 801.1(i)(1). See also CLEARY GOTTLIEB, U.S. Antitrust Agencies Propose HSR Rule Changes That Would Increase Filings and Burden, 2 (Sept. 24, 2020), <https://www.clearygottlieb.com/-/media/files/alert-memos-2020/us-antitrust-agencies-propose-hsr-rule-changes-that-would-increase-filings-and-burden.pdf>; CADWALADER, Further Guidance on the HSR Act Investment-Only Exemption for Seemingly “Passive” Investors Engaging with Management (Nov. 2, 2016); Bruce Sokler, Dionne Lomax, Robert Kidwell, Farrah Short, *Investment Fund Violates “Investment-Only” HSR Exemption*, MINTZ (August 26, 2015); Barry A. Nigro Jr., *The HSR Act’s Investment-Only Exemption for Targets and Activist Investors*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Feb. 23, 2015), <https://corpgov.law.harvard.edu/2015/02/23/the-hsr-acts-investment-only-exemption-for-targets-and-activist-investors/>; HAYNES BOONE, *FTC Reminds Investment Funds that Reliance on “Investment Only” Exemption from HSR is Risky Business* (Sept. 17, 2015), <https://www.haynesboone.com/alerts/ftc-reminds-investment-funds-that-reliance-on-investment-only-exemption-from-hsr-is-risky-business>.

<sup>27</sup> See CAPITAL MARKETS REGULATION, *Reforming U.S. Capital Markets to Promote Economic Growth*, 116-128 (May 19, 2020), <https://www.capmktsreg.org/2020/05/19/reforming-u-s-capital-markets-to-promote-economic-growth/>.

10% of the issuer and does not own more than 1% of competitor companies.<sup>28</sup> As described earlier, the restriction on RIC ownership of competitor companies is based on the common ownership theory.<sup>29</sup>

The Committee strongly disputes claims that common ownership produces anticompetitive effects. Not only is the underlying theory flawed, but the empirical literature that purports to support it suffers from serious methodological errors.<sup>30</sup> The Committee has explored these empirical issues in detail, as we summarize here. We are therefore opposed to the FTC applying HSR filing and delay requirements to any acquisitions by RICs or other investment entities on the basis of the common ownership theory.<sup>31</sup>

At the outset of our analysis, we note that the academic literature on which the effects of common ownership theory are premised, generally focus on ownership of competitor companies that exceed 5%, not 1%, as put forth by the HSR Act Proposal.<sup>32</sup> Indeed, the academic proponents of common ownership theory have not argued that 1% ownership in competitor companies has a significant effect on competition. The basis for the 1% threshold in the HSR Act Proposal is therefore without support from even the flawed academic research that we now address.

Common ownership theory posits that when a common owner holds equity in competing firms in a concentrated industry, management of these firms will reduce competition with each other, maximizing the common owner's returns rather than their own firm-specific returns.<sup>33</sup> Crucially, this assumes that common owners have the economic incentive to decrease competition among their portfolio firms and the corporate control necessary to pressure portfolio firm management to do so.<sup>34</sup> Both of these assumptions are flawed as applied to RICs and similar investment entities.<sup>35</sup>

As to economic incentives, the empirical literature on common ownership focuses narrowly on the specific industries under study, neglecting common owners' aggregate portfolios and misunderstanding their incentives.<sup>36</sup> By doing so, the studies attribute motives to fund managers that they do not have. For instance, Azar, Schmalz, and Tecu (2018) suggest that

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<sup>28</sup> HSR Act Proposal, *supra* note 2, at 77061.

<sup>29</sup> HSR Act Proposal, *supra* note 2, at 77061.

<sup>30</sup> COMMITTEE ON CAPITAL MARKETS REGULATION, *Common Ownership and Antitrust Concerns* (November 2017), <https://www.capmksreg.org/wp-content/uploads/2017/11/CCMR-Common-Ownership-1.pdf> [“CCMR Statement (2017)’]. See also, COMMITTEE ON CAPITAL MARKETS REGULATION, *Nothing But The Facts: Common Ownership: Theory Meets Reality* (Jan. 15, 2019), <https://www.capmksreg.org/2019/01/15/nothing-but-the-facts-statement-common-ownership-theory-meets-reality/> [“CCMR NBTF (2019)’]; Hal Scott, *There is no need to curb common shareholding*, FINANCIAL TIMES (March 31 2019), <https://www.ft.com/content/e083f526-5148-11e9-8f44-fe4a86c48b33>; COMMITTEE ON CAPITAL MARKETS REGULATION, *An analysis of Proposals to Restrict Institutional Ownership* (April 2019), <https://www.capmksreg.org/2019/03/31/an-analysis-of-proposals-to-restrict-institutional-ownership/> [“CCMR Proposal Analysis (2019)’]. See also KPMG, *Common Ownership and Competition* (Jan. 2020), <https://assets.kpmg/content/dam/kpmg/uk/pdf/2020/01/common-ownership-and-competition.pdf>.

<sup>31</sup> CCMR Statement (2017), *supra* note 30, at 1-2.

<sup>32</sup> See, e.g., Jose Azar, Martin Schmalz, Isabel Tecu, *Anti-Competitive Effects of Common Ownership*, 25 and 52 (March 2017), <https://media.iese.edu/research/pdfs/WP-1169-E.pdf> (“Only common ownership by shareholders ranked first and second has a positive and highly statistically significant effect on ticket prices.”).

<sup>33</sup> CCMR Statement (2017), *supra* note 30, at 2.

<sup>34</sup> CCMR NBTF (2019), *supra* note 30, at 1.

<sup>35</sup> CCMR Statement (2017), *supra* note 30, at 3.

<sup>36</sup> CCMR Statement (2017), *supra* note 30, at 2.

institutional common ownership of airlines causes anticompetitive increases in average ticket prices (of 3-7%).<sup>37</sup> However, they ignore how higher ticket prices negatively affect *the rest* of a fund manager's portfolio.<sup>38</sup> Although higher prices may benefit airlines, which constitute around 1% of the S&P 500, they negatively impact firms that *consume* airline services by way of business travel, which represent the remaining 99%.<sup>39</sup> It is entirely inappropriate to assume that fund managers will desire and encourage anticompetitive behavior in one industry when it negatively impacts their portfolios as a whole.

Common ownership theory also makes unrealistic assumptions about the extent of influence and control held by common owners.<sup>40</sup> For example, the empirical literature assumes that, even when common owners own less than 10% of a company, they still have sufficient control to produce anticompetitive behavior.<sup>41</sup> However, this core assumption is not supported by the empirical evidence.<sup>42</sup> Furthermore, BlackRock demonstrates that Azar, Schmalz and Tecu (2018)'s finding that common ownership can increase airline ticket prices relies on the false assumption that investment funds retain control over companies when they are in bankruptcy.<sup>43</sup> In fact, index funds do not even own companies when they are in bankruptcy, so they clearly cannot control them.<sup>44</sup> The BlackRock research further demonstrates that, if periods of bankruptcy are properly excluded from the study, then common ownership of airlines does not produce anticompetitive effects on airline ticket prices.<sup>45</sup>

## Alternative Approach

As noted earlier, widening the application of the HSR filing and delay requirements would have a significant negative impact on the functioning of U.S. capital markets and on U.S. investors. Instead, the FTC could obtain much of the information provided by the HSR filing from the SEC, which has an extensive public database of up-to-date ownership information from 13F filings by institutional investment managers, 13D/G filings by investors that acquire more than 5% of any class of publicly traded securities, and quarterly disclosures by RICs themselves. Obtaining such information from the SEC, rather than unnecessarily imposing burdensome HSR filing requirements on acquisitions by RICs, would be a much better outcome for U.S. investors and capital markets.

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<sup>37</sup> José Azar, Martin Schmalz and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, JOURNAL OF FINANCE 73 (2018).

<sup>38</sup> CCMR Statement (2017), *supra* note 30, at 3.

<sup>39</sup> CCMR NBTF (2019), *supra* note 30, at 2; CCMR Statement (2017), *supra* note 30, at 3.

<sup>40</sup> CCMR Statement (2017), *supra* note 30, at 2.

<sup>41</sup> CCMR Statement (2017), *supra* note 30, at 2.

<sup>42</sup> CCMR Statement (2017), *supra* note 30, at 3.

<sup>43</sup> BLACKROCK, *Common Ownership Data is Incorrect* (Jan. 2019),

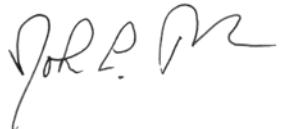
<https://www.blackrock.com/corporate/literature/whitepaper/policy-spotlight-common-ownership-data-is-incorrect-january-2019.pdf>.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

Thank you very much for your consideration of the Committee's position. Should you have any questions or concerns, please do not hesitate to contact the Committee's President, Prof. Hal S. Scott (hscott@law.harvard.edu), or Executive Director, John Gulliver (jgulliver@capmksreg.org), at your convenience.

Respectfully submitted,



John L. Thornton  
Co-CHAIR



Hal S. Scott  
PRESIDENT



R. Glenn Hubbard  
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