INVESTMENT COMPANY INSTITUTE

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April 21, 2022

Federal Trade Commission
Office of the Secretary
April Tabor, Secretary
600 Pennsylvania Avenue, NW, Suite CC-5610 (Annex J)
Washington DC 20580

Department of Justice
Office of the Assistant Attorney General, Antirust Division
Jonathan Kanter, Assistant Attorney General
950 Pennsylvania Avenue, NW
Washington DC 20530

Re: January 18, 2022 Request for Information on Merger Enforcement

Dear Ms. Tabor and Mr. Kanter:

The Investment Company Institute ("ICI")[1] submits these comments in response to the "Request for Information on Merger Enforcement" issued by the Federal Trade Commission ("FTC" or "Commission") and the Antitrust Division of the Department of Justice ("DOJ") (collectively, the "Antitrust Agencies").[2] ICI is providing comments on Request 12.h., which asks: "Is the [current merger] guidelines' approach to common ownership and horizontal stockholding adequate? If not, what changes should be made?"

ICI respectfully submits that the existing DOJ/FTC Horizontal Merger Guidelines ("DOJ/FTC Merger Guidelines") should not be revised to account for measurements of common ownership when analyzing proposed acquisitions.[3]

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[1] The Investment Company Institute (ICI) is the leading association representing regulated investment funds. ICI's mission is to strengthen the foundation of the asset management industry for the ultimate benefit of the long-term individual investor. Its members include mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and UCITS and similar funds offered to investors in Europe, Asia and other jurisdictions. Its members manage total assets of $31.0 trillion in the United States, serving more than 100 million investors, and an additional $10.0 trillion in assets outside the United States. ICI has offices in Washington, DC, Brussels, London, and Hong Kong and carries out its international work through ICI Global.

[2] US Department of Justice and US Federal Trade Commission, Request for Information on Merger Enforcement (Jan. 18, 2022), https://www.justice.gov/opa/press-release/file/1463566/download.

[3] There is likewise no need to address common ownership under any vertical merger guidelines to the extent the DOJ and FTC choose to issue vertical guidelines separately when revising the guidelines. We note that Section 13 of the existing Horizontal Merger Guidelines addresses "acquisitions of minority positions involving competing firms"

The impact of common ownership on competition is an unproven hypothesis that companies will compete less aggressively if their minority investors also hold minority positions in rival companies. This hypothesis stems from the theory that companies will consider and place weight on the profits of other companies held by their minority owners when making business decisions. In other words, they will operate their companies to maximize their minority investors' portfolio returns instead of their own company's profits. However, there is no evidence that companies do this when their minority investors are regulated mutual funds or other institutional investors, which is the context in which common ownership is most frequently discussed.

To date, attempts to test the hypothesis, including predominantly statistical analyses attempting to show correlation between proposed measurements of common ownership and certain observations, have struggled with acknowledged data and methodological problems. Despite access to expanded data and evolving techniques, these studies thus far have not been able to provide a reliable validation of correlation, much less a causal relationship, between common ownership and any adverse impact on competition. The FTC also has acknowledged that the academic debate is unsettled.[4]

Moreover, over the six years since proponents of the common ownership hypothesis began to raise concerns, the Antitrust Agencies have been unable to identify real-world evidence to substantiate the concerns despite reviewing millions of business documents during merger reviews and business-conduct investigations. Nor has the Antitrust Agencies' own focused work on the hypothesis, such as the FTC's hearing on common ownership in 2019[5] or DOJ's

under the header "Partial Acquisitions." This section has been read to apply to "cross-ownership" transactions in which a company or its ultimate parent entity acquires a minority interest in a competitor of the company. This section has not been read to apply to "common ownership," which instead refers to a situation in which a person acquires only minority interests in two or more companies that compete with one another. We take no position on whether the existing guidelines on Partial Acquisitions adequately address competitive concerns in a cross-ownership scenario. However, as the DOJ and FTC have recognized, the viability of antitrust concerns about cross-ownership does not indicate that there are any valid antitrust concerns about common ownership. *See* DOJ/FTC Submission of the United States to OECD Hearing on Common Ownership by institutional investors and its impact on competition at 1 (Nov. 28, 2017) (distinguishing between "cross-ownership" and "common ownership") (hereafter "OECD Submission"), *available at* https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common_ownership_united_states.pdf.

[4] Notice of Proposed Rulemaking, *Premerger Notification, Reporting and Waiting Period Requirements*, 85 Fed. Reg. 77053, 77061 (Dec. 1, 2020).

[5] The FTC held a workshop on common ownership in December 2018 as part of its "Hearings on Competition and Consumer Protection in the 21st Century" series and invited public comments. FTC, FTC Hearing #8: Common Ownership (Dec. 6, 2018), https://www.ftc.gov/news-events/events/2018/12/ftc-hearing-8-common-ownership. ICI submitted two comment letters relating to this hearing. *See* Letter from ICI to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201) (Aug. 20, 2018) ("August 2018 ICI Letter"), *available at* https://www.ici.org/system/files/attachments/18_ici_common_ownership_ltr.pdf; Letter from ICI to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings, Hearing Number Eight (Docket ID: FTC-2018-0107) (Jan. 15, 2019) ("January 2019 ICI Letter"), *available at* https://www.ici.org/system/files/attachments/31568a.pdf.

investigation of common ownership in the airlines industry in 2015,[6] generated evidence that substantiates the hypothesis. We also are not aware of any enforcement or other action by the Antitrust Agencies that is based on harms to competition arising from common ownership, or a citation to any documentary or testimonial evidence supporting a conclusion that common ownership has such effects.[7] Without evidence supporting the hypothesis, despite years of opportunities and efforts to search for such evidence, there is no foundation or meaningful benefit for revisions to account for the common ownership hypothesis in the DOJ/FTC Merger Guidelines.

I. Regulated Funds, US Households and the Common Ownership Hypothesis

ICI appreciates the opportunity to share its views on common ownership on behalf of regulated funds that include open-end funds (or mutual funds), exchange-traded funds ("ETFs"), and other funds that are registered and regulated under the Investment Company Act of 1940 ("1940 Act"), and similarly regulated funds outside the United States (generally, "regulated funds" or "funds"). Regulated funds are a core way for Americans to save for retirement and other financial goals. Mutual funds, ETFs, and closed-end funds provide important benefits to retail consumers such as professional management, diversification, and reasonable cost, all while being subject to regulation and oversight by the Securities and Exchange Commission (SEC).

Households, *i.e.*, retail investors, hold 94% of long-term mutual funds.[8] Mutual funds represent 58% of defined contribution plan assets and 44% of individual retirement account assets.[9] This is how Americans are investing to achieve their most important financial goals. Regulated funds channel investment of everyday savers to our capital markets, supporting economic activity and market-based financing.[10] Furthermore, regulated funds are highly transparent and provide

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[6] We note that the DOJ previously investigated common ownership in the airlines industry in 2015, *see* Drew Harwell et al., *Justice Dept. Investigating Potential Airline Price Collusion*, WASH. POST, July 1, 2015 (citing to demands for copies of airline communications with shareholders and stock analysts about seat capacity). The DOJ and FTC also submitted a joint paper on common ownership to the OECD in 2017. *See* OECD Submission. Reports also suggest that in February 2019, DOJ and FTC were asking merging parties for communications with investors in the course of Second Requests and other merger investigations. To our knowledge, these efforts have not generated conclusive evidence of competitive harm from common ownership.

[7] In 1979, the DOJ brought and lost a Clayton Act Section 7 case in which a person, not an institutional investor, held a 48% interest in one company and sought to acquire a 19% interest in that company's competitor. *United States v. Tracinda Investment Corp*., 477 F. Supp. 2d 1093 (C.D. Cal. 1979). The district court held that even if this investment transaction was within the scope of Section 7, the DOJ "utterly failed to show any anticompetitive effect." *Id*. at 1106. Moreover, this case is better framed as cross-ownership transaction as the court viewed the investor as the "controlling shareholder" of the first company due to its 48% interest. *Id*. at 1096.

[8] Investment Company Institute, Fact Book 2021 at 68, *available at* https://www.icifactbook.org/pdf/2021_factbook.pdf.

[9] *Id*. at figure 2.5 (mutual funds in US household retirement accounts).

[10] *See id*. at figure 1.11 (demonstrating Americans have more household wealth in regulated funds than households in more bank-centric countries) and 46-47 (describing the role of registered investment companies in financial markets).

detailed information to their investors, markets and others regarding their investments and activities. Through regulated funds, retail investors gain exposure to markets and expertise that would otherwise be unavailable or difficult to access in an efficient way.

Funds and other institutional investors often pursue their investment objectives and manage risk through diversification, including by holding investments across multiple companies competing in the same industry. Mutual funds offer investors diversification in ways that would otherwise be difficult or impossible for these investors to obtain on their own. For example, many make periodic investments to their retirement accounts, allocating amounts to regulated funds with index-based and active investment strategies that provide exposure to a broad range of equities and other securities.[11] Proponents of the common ownership hypothesis assert that diversification behavior leads to anti-competitive effects that are carried out through either active or passive mechanisms.

ICI has consistently emphasized the fundamental flaws of this hypothesis in prior submissions to the Federal Trade Commission,[12] including how it does not comport with the fundamental reality of how funds and their advisers, as fiduciaries and agents, invest on behalf of everyday investors. Further, we have highlighted the significant harms to investors and capital markets of adopting policy measures to limit common ownership outright or require common shareholders to forfeit certain rights.[13] Given these real and substantial harms, ICI has urged policymakers not to impose such measures absent conclusive—and not speculative—proof of harm to competition. Too much is at stake for American savers and markets.

II. Even as "Context," Common Ownership is Not Useful in Merger Reviews

The Antitrust Agencies would not obtain meaningful benefit from evaluating levels of common ownership in an industry for context when analyzing the competitive effects of a proposed merger or acquisition. ICI is not aware of any merger case in the United States in which common ownership factored into an agency or a court's analysis of the competitive effects of a proposed

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[11] Virtually all registered investment companies comply with Subchapter M of the Internal Revenue Code, which has specific diversification requirements among other conditions.

[12] Our prior submissions have pointed out the flaws of the common ownership hypothesis with respect to (i) the purported observation of a correlation between levels of common ownership and price or output effects; (ii) the proponents' assumptions about the incentives and ability of asset managers to influence how issuers compete; and (iii) the proponents' theories about passive effects on issuer management's incentives. *See* August 2018 ICI Letter; January 2019 ICI Letter; Letter from ICI to Bilal Sayyed, FTC Office of Policy Planning (Nov. 4, 2019) ("November 2019 ICI Letter"), *available at* https://www.ici.org/system/files/attachments/19_ltr_ftc.pdf. *See also* Letter from ICI to the Federal Trade Commission regarding Premerger Notification; Reporting and Waiting Period Requirements; RIN 3084-AB46 – Notice of Proposed Rulemaking and Advance Notice of Proposed Rulemaking (16 CFR Parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014) (Feb. 1, 2021), *available at* https://www.ici.org/system/files/attachments/33113a.pdf.

[13] Proposed policy measures include limiting common ownership outright or forcing shareholders that exceed a de minimis level of common ownership to forfeit fundamental rights, such as the ability to vote in corporate elections. Similarly, some have proposed measures that restrict voting in ways that would limit the ability of institutional investors to engage with companies.

merger. The experience of authorities in the European Union considering common ownership, however, supports the lack of meaningful benefit.

In *Dow/DuPont* (2017) and *Bayer/Monsanto* (2018), the European Commission ("EC") considered common ownership as "an element of context in the appreciation of any significant impediment to effective competition."[14] Analysis of these reviews reveals that the EC did not conduct any case-specific analyses of how common ownership impacted its conclusions on the competitive effects of the transactions. In *Dow/Dupont*, the EC engaged in a lengthy discussion of the academic literature but did not apply it to the facts of the case. The EC expressly disclaimed any reliance on statistical (mHHI) computation of the levels of common ownership in the industry because it was unable to perform a case-specific analysis.[15] Instead, the EC cited rough measurements of common ownership to bolster the conclusions it had reached based on a more traditional merger analysis.[16] The EC approached the hypothesis similarly in *Bayer/Monsanto*, only using common ownership to suggest that its conclusions based on traditional market shares were understated.[17]

Analysis of these EC cases reveals why accounting for common ownership in merger reviews would not be beneficial:

- First, traditional analyses are adequate. Common ownership is merely used to bolster conclusions already reached and supported through traditional analyses. Devoting scarce agency resources to investigate common ownership as background context is not constructive.

- Second, there is no analytical framework available that the Antitrust Agencies can apply to reliably predict competitive effects from common ownership. The EC decisions point to academic papers for general theories, but they offer no framework to apply and test those theories based on the facts specific to a given transaction. The EC could not measure the extent of common ownership (using mHHI) in the relevant markets without making speculative assumptions about control weights and thus declined to do so.[18] Moreover, the EC had no basis to identify what levels of mHHI are associated with competitive effects, and the academic literature also does not answer this key question.

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[14] Commission 21/03/2018, Case M.8084 *Bayer/Monsanto* ¶ 228; Commission 27/03/2017, Case M.7932 *Dow/DuPont* Annex 5.

[15] *See Dow/Dupont* at Annex 5, ¶ 79.

[16] *Id*. at ¶¶ 80-81. ("A small number of common shareholders, 17, collectively own 21% of BASF, Bayer, and Syngenta and around 29%-36% of Dow, DuPont and Monsanto. Based thereupon, the Commission considers that, in general, market shares used by the Commission for the purpose of the assessment of the Transaction tend to underestimate the concentration of the market structure. . ..").

[17] *Bayer/Monsanto* at ¶ 228.

[18] *Dow/Dupont* at Annex 5, ¶ 79 ("The Commission acknowledges that it did not perform a case-specific assessment that would justify applying a specific assumption on the control weights γij. As a consequence, the Commission does not rely on MHHI computation in this Decision.")

Even if the academic debate were settled—and it is not—relying on generalized theories about common ownership to block transactions in which any common ownership is present would be unreliable and inconsistent with the case-by-case analysis required by Section 7 of the Clayton Act.[19]

- Third, the EC decisions in the *Dow/DuPont* and *Bayer/Monsanto* case contain no cites to documents or testimony demonstrating that common owners influence how those companies compete, or that the existence of common ownership has any bearing on those companies' competitive strategies or business plans. As discussed below, the absence of evidence from investigated mergers and more generally across the Antitrust Agencies' merger reviews and conduct investigations should give DOJ and FTC substantial doubt about the merits of the common ownership hypothesis and the probative value of the academic studies offered in support of the hypothesis.

III. There is No Enforcement Benefit from Scrutinizing Institutional Investor Transactions

ICI is not aware of any enforcement decisions involving an institutional investor that held only minority positions in competing companies. As a threshold matter, such transactions, if made solely for investment purposes and not to bring about a substantial lessening of competition, would fall outside of the scope of Section 7 of the Clayton Act.[20] For regulated funds and their investors, subjecting diversified holdings to Section 7 investigations would be devastating to the ordinary course investment activities of those funds.

Proponents of the common ownership hypothesis, however, argue that diversification of investments across companies that are competitors does lessen competition and ought to be addressed under Section 7. As proof, they have pointed to disputed statistical analyses, which purport to find a correlation between common ownership and price effects, or other observations linked with anticompetitive harm.

On how diversification causes such effects, proponents explain that common ownership either: (i) creates opportunities for the investors to actively influence—through voting rights or meetings with company management—the companies to compete less aggressively against the investors' other holdings; or (ii) passively causes those companies to compete less aggressively against the investors' other holdings because, even without active influence, those companies will naturally seek to maximize the portfolio returns of their investors instead of own-firm

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[19] *See Brown Shoe Co., Inc. v. United States*, 370 U.S. 294, n.38 (1962) ("Statistics reflecting the shares of the market controlled by the industry leaders and the parties to the merger are, of course, the primary index of market power; but only a further examination of the particular market its structure, history and probable future can provide the appropriate setting for judging the probable anticompetitive effect of the merger.").

[20] 15 U.S.C. § 18 ("This section shall not apply to persons purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."); *see also Tracinda*, 477 F.3d at 1098-1100 (finding that a cross-ownership acquisition of a 19% share in a competitor fell within the investment exemption to Section 7 of the Clayton Act).

profits.[21] Yet, no one has produced evidence that either (i) or (ii) occurs. The belief that these scenarios occur is based on conjecture and an unsupported extension of the theory of cross-ownership to the common ownership and institutional investor context. For everyday savers and households, such as those in a diversified mutual fund, *e.g.*, an S&P 500 fund or mid-cap equity fund, common ownership is not supported by common sense.[22]

If common ownership were impacting how companies operate, then one would expect that the DOJ and FTC would encounter evidence of such impact through their merger reviews and investigations into companies' business conduct. For example, with respect to the active influence hypothesis of causation, institutional investors at times communicate with company management. If institutional investors were using such communications to encourage companies to compete less aggressively, then such evidence would have been discovered in the documents that the DOJ and FTC receive from company management in the course of Second Request merger reviews, in responses to civil investigative demands in collusion and monopolization investigations, and in discovery in antitrust litigation. Likewise, company management that sought to resist such influence would likely complain or testify that such behavior was occurring.

Similarly, with respect to the passive hypothesis, the Agencies would see evidence in how companies make business decisions. The common ownership hypothesis proceeds from the belief that company management necessarily places weight on the profits of other companies held by their largest investors. But actual evidence that company management places weight on rivals' profits because of minority investments by mutual funds is lacking. For example, companies often prepare financial models to assess the profitability of their various business opportunities, and the DOJ and FTC regularly receive copies of such models in the course of their investigations. If companies were considering the impact of their business decisions on mutual fund portfolio returns, then that would be reflected somewhere in their financial modeling.[23] The Agencies also would see other documentary evidence of companies considering impacts on regulated funds and other institutional investors in business plans, quarterly reviews, emails, and other business records. Likewise, company witnesses would have testified or responded in DOJ and FTC interviews that they consider their investors' other holdings and give

[21] *See e.g.*, Einer Elhauge, *The Causal Mechanisms of Horizontal Shareholding*, 82 OHIO ST. L.J. 1, 2-3 (2021).("The precise effects of such common shareholding will vary depending on just how much influence the common shareholders have over the corporations. But debate about that issue often obscures a basic economic reality: to *whatever* extent these common shareholders have influence over corporate conduct, it must cause the corporations to take into account the interests of the other commonly held corporations more than they would if their ownership was totally separate.").

[22] ICI Viewpoints, Sean Collins, Chief Economist, "Common Sense Does Not Support Common Ownership" (Jan. 2021) *available at* https://www.ici.org/viewpoints/22-view-commonownership.

[23] We note that ICI has questioned how practically this would work. In our November 2019 letter to the FTC's Office of Policy Planning, we describe the fiduciary duties that govern an investment adviser's activities, the unrealistic assumptions about the incentives of asset managers and their clients and explain that corporate managers likely could not determine independently which competitive strategy would most benefit common owners or their advisers. *See* November 2019 ICI Letter.

them weight when making decisions. Yet the Agencies have produced no evidence that companies factor common ownership into how they make business decisions.

As noted above, the models purporting to find correlations between measurements of common ownership and competitive effects have been criticized for their methodological flaws[24] and problems with the data.[25] Other statistical studies have reached opposite conclusions based on alternative specifications.[26] Measurements of common ownership are thus not reliable predictors of competitive effects.

For all the reasons discussed above, the Antitrust Agencies should not rely on generalized hypotheses or statistical measurements of common ownership when reviewing transactions.[27] Absent real-world evidence that common ownership impacts how companies compete, we suggest that it would be inappropriate and inconsistent with Section 7 of the Clayton Act to consider common ownership in the course of merger investigations.

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We appreciate the opportunity to comment on this significant review. If you have any questions, please contact me at solson@ici.org, Nhan Nguyen, Assistant General Counsel at

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[24] *See, e.g.*, Matthew Backus, Christopher Conlon, and Michael Sinkinson, *Common Ownership and Competition in the Ready-to-Eat Cereal Industry*, NBER Working Paper No. 28350 (2021) (finding that application of mHHI-based methodology to ready-to-eat cereal industry produces "spurious" correlations between common ownership and price changes); Patrick Dennis, Kristopher Geradi, and Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry*, Federal Reserve Bank of Atlanta Working Paper 2019-05 (2019) (forthcoming in J. OF FINANCE) (finding that correlation between common ownership and airline ticket prices stems from airline market shares rather than levels of institutional ownership); Daniel P. O'Brien and Keith Waehrer, *The Competitive Effects of Common Ownership: We Know Less than We Think,* 81 ANTITRUST L.J. 729 (2017) (questioning the mHHI methodology of common ownership studies on airline and banking industries based on the measure of concentration used).

[25] *See, e.g.*, Eric Lewis and Randy Chugh, DOJ Economic Analysis Group Discussion Paper, *Common Ownership and Airlines: Evaluating an Alternative Ownership Data Source* 19-1 (Apr. 2019) ("We find that [Azar, Tecu, and Schmalz's (AST)] results on common ownership [from their 2018 airlines study] are not robust to source of ownership data. In particular, we cannot replicate AST's results if we use Thomson Reuter's Ownership Product (OP) data as the ownership data source rather than Thomson Reuter's Spectrum (SP) data. We find that the coefficient on MHHI delta is much closer to zero, statistically insignificant, and usually negative when we use the OP data rather than the SP data.").

[26] *See, e.g.*, Jacob Gramlich and Serafin Grundl, *Testing for Competitive Effects of Common Ownership*, Finance and Economics Discussion Series 2017-029, Washington: Board of Governors of the Federal Reserve System (2017) (applying a distinct methodology and finding that that the results from a study on common ownership in the banking industry are not robust and that statistical evidence of common ownership impacting competition is mixed); Pauline Kennedy, Daniel. P. O'Brien, Minjae Song, and Keith Waehrer, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence*, Working Paper (2017) (using two different empirical approaches to estimate effects of common ownership on airline prices and finding no evidence of causation).

[27] As discussed in the prior section, there is also no analytical framework that would enable the Antitrust Agencies to determine on a case-by-case basis whether common ownership has any bearing on the likelihood of anticompetitive effects.

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Regards,

/s/

Susan M. Olson
General Counsel

cc: The Honorable Lina Khan, Chair FTC
The Honorable Rebecca Kelly Slaughter, Commissioner FTC
The Honorable Noah Joshua Phillips, Commissioner FTC
The Honorable Christine S. Wilson, Commissioner FTC