CHAMBER OF COMMERCE
OF THE
UNITED STATES OF AMERICA

September 17, 2018

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

Submitted electronically via regulations.gov

RE: Competition and Consumer Protection in the 21st Century Hearings, Subject: Common Ownership

Dear Commissioners:

The U.S. Chamber of Commerce appreciates the opportunity to comment on the Federal Trade Commission's ("FTC" or "Commission") upcoming "Competition and Consumer Protection in the 21st Century Hearings," with regard to acquisitions and holding of a non-controlling ownership interest in competing companies (also known as common ownership).[1] The Chamber urges the Commission to avoid unwarranted and hasty changes in policy to curtail common ownership, which would harm consumers and business financing. Any change in this area should have a thorough analysis required by law.

The Chamber believes that any change in antitrust policy requires demonstrable evidence that common ownership has an anti-competitive effect. To date, the economic research is theoretical and falls short of the standard of harm found in U.S. antitrust law.

Additionally, some foreign regulators are evaluating common ownership as a mechanism to prevent U.S. financial firms from operating in their jurisdiction;

[1] José Azar, Martin C. Schmalz, and Isabel Tecu, "Anticompetitive Effects of Common Ownership," May 10, 2018.

effectively using common ownership for protectionist purposes to prevent competition from American firms.

Initial research asserting anti-competitive effects in the airline and banking industries arising from common ownership has attracted considerable attention. Subsequent research has found flaws in the methodology of the original research. This later research has also determined no anti-competitive effects of common ownership.

Noah Phillips, Commissioner of the Federal Trade Commission, reviewed the research on common ownership in thoughtful remarks entitled "Taking Stock: Assessing Common Ownership," presented at The Global Antitrust Economics Conference in June 2018 concluded: "For now, I do not believe we know enough to warrant policy changes."[2]

Common ownership does not increase consumer prices.

Numerous studies have found no relationship between common ownership and higher prices, and some studies have concluded that common ownership promotes competitive outcomes. For example:

- **O'Brian and Waehrer (2017):** When measuring the causal relationship between common ownership and prices charged by companies, O'Brian and Waehrer (2017)[3] found no correlation. They also argued that the Modified Herfindahl-Hirschmann Index (MHHI) methodology that previous researchers used to point to an apparent correlation was methodology developed for cases of cross-ownership. O'Brian and Waehrer argued this methodology is inappropriate to apply to common ownership.

- **Dennis, Gerardi, and Schenone (2018):** "This paper questions the applicability of the theory of horizontal mergers and cross-ownership theory on

[2] Noah Joshua Phillips, "Taking Stock: Assessing Common Ownership," June 1, 2018.
[3] Daniel P. O'Brien and Keith Waehrer, "The Competitive Effects of Common Ownership: We Know Less Than We Think," February 22, 2017.

the context of common ownership, and empirically analyzes the relationship between ticket prices and common ownership in the airline industry. In sharp contrast to the findings in Azar, Schmalz, and Tecu (2017), we find no evidence of such a relationship."[4]

- **Kennedy, O'Brien, Song, and Waehrer (2017):** "Using data from the airline industry, we estimate the effects of common ownership on airline prices using price regressions and a structural oligopoly model consistent with the theory of partial ownership proposed in O'Brien and Salop (2000). Contrary to recent empirical research based on the same data, we find no evidence that common ownership raises airline prices."[5]

- **Buckberg, Herscovici, Jovanovic, Reitzes (2017)**: "We believe that the empirical literature cited by Posner et al. in support of competitive harm from horizontal shareholding is far from definitive and suffers from potential flaws. As such, there are doubts whether horizontal shareholding creates a competitive problem that justifies invoking a particular blanket "remedy," as opposed to a case-by-case analysis and more selective remediation. Analysis of the costs of the proposed blanket solution, which may be substantial…is lacking."[6]

- **Kwon (2016):** "This paper shows that higher common ownership of natural competitors is associated with more use of relative performance evaluation (RPE)...These findings suggest that institutional investors with common ownership exert a strong influence on executive compensation in a positive way: less alignment of pay with industry performance."[7]

[4] Carola Schenone, Patrick J. Dennis, and Kristopher Gerardi, "Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry," January 2018.
[5] Pauline Kennedy, Daniel P. O'Brien, Minjae Song, and Keith Waehrer, "The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence," July 2017.
[6] Elaine Buckberg, Steven Herscovici, Branko Jovanovic, and James Reitzes, "Proposal to Remedy Horizontal Shareholding is Flawed," July 1, 2017.
[7] Heung Jin Kwon, Department of Economics, University of Chicago, "Executive Compensation under Common Ownership," November 29, 2016.

<u>Non-controlling shareholders do not have the ability to influence competition.</u>

Even if common owners had the incentive to affect performance in an industry, they would not have the ability to do so since shareholders do not have the opportunity to vote on competition strategy. Research into public voting records has shown this, and a paper by Professor Anjan Thakor[8] notes, "Competitive strategy is entirely within the purview of management and most of the time not subject to any kind of public disclosure or debate."

If a single investor owned a controlling share in all the firms in an industry, competition would likely soften. However, common owners with a non-controlling interest would have no opportunity to reduce competition. Companies would likely defer to the bulk of their shareholders who are not intra-industry diversified, and those shareholders would likely prefer that the companies maximize their own profits, rather than industry profits.[9]

<u>Asset managers have a fiduciary duty to *all* of their clients and act on their behalf. Attempting to influence anti-competitive results in an industry would go against this duty.</u>

Asset managers' common ownership has been a focal point of some researchers. However, asset managers do not invest on their own behalf and are accountable to all of their clients—not just those with common ownership shares. Not only do they not have an incentive to attempt to influence the performance of a particular industry, it would go against their fiduciary duty to their clients.

Asset managers operate under an agency business model and are not the economic owners of the asset. The assets they manage belong to institutions and individuals who are their clients (i.e., the "asset owners.") The investment results

[8] "The Economic Consequences of Regulatory Protection and Extraterritorial Reach," commissioned by CCMC, written by Professor Anjan V. Thakor, European Corporate Governance Institute, Financial Theory Group Fellow, and John. E. Simon Professor of Finance at Washington University, Olin School of Business

[9] Thomas A. Lambert and Michael E. Sykuta, University of Missouri School of Law, "The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms," May 2018 ("Lambert and Sykuta (2018)")

directly benefit the asset owners. Ginsburg and Klovers (2018) note this misconception among researchers in favor of limiting common ownership: "We believe the argument for antitrust enforcement against common ownership is misguided. First, proponents conflate management by investment managers and economic ownership by individual account holders and therefore incorrectly attribute allegedly anticompetitive conduct to the investment managers."[10]

Moreover, asset managers have an incentive to provide all of their clients returns—not just those with common ownership shares. Their clients are invested in a host of strategies, including investment in competitors in the same industry as well as other investment approaches.

Lambert and Sykuta (2018) point to Vanguard's minority ownership of American, Delta, Southwest, and United airlines and note that different competitive outcomes would be better for different Vanguard funds: "Vanguard's total ownership of each airline is divided among its many funds. Investors in those individual funds would have divergent preferences as to whether the airlines should maximize industry or own-firm profits and, if the latter, which airlines' profits should be maximized." Essentially, returns to retail investors depend on fund performance and the competitive outcome that maximizes retail investors' profits will differ among funds.

Limiting common ownership would increase the costs of investment products for retail investors, including retirees and investors saving for retirement.

Proposals to limit common ownership in a variety of ways, including through changes to existing antitrust laws or new regulation, would limit institutional investors' and mutual funds' abilities to diversify their holdings, which ultimately could increase retail investors' costs and risks.

As noted by O'Brien and Waehrer (2017),[11] "Institutional investors (e.g., mutual funds) frequently take positions in multiple firms in an industry in order to

[10] Douglas H. Ginsburg and Keith Klovers, "Common Sense About Common Ownership," April 27, 2018.
[11] Daniel P. O'Brien and Keith Waehrer, "The Competitive Effects of Common Ownership: We Know Less Than We Think," February 22, 2017.

offer diversified portfolios to retail investors at low transaction costs. A change in antitrust or regulatory policy toward these investments could have significant negative implications for the types of investments currently available to retail investors."

Lambert and Sykuta (2018) echo similar concerns: "The policy solutions that have been proposed for dealing with the purported problem would radically rework an industry that has provided substantial benefits to investors, raising the costs of portfolio diversification and enhancing agency costs at public companies."

Conclusion

The Committee on Capital Markets Regulation found that "the economic results of the common ownership research have now been countered by subsequent academic studies, and antitrust analysis based on the early research has been premature. No solutions are necessary to a problem that has not yet been proven to exist."[12] We agree.

We share the goals of consumer protection and promoting competition in the marketplace. In the case of common ownership, we encourage the Commission to consider the extensive research that shows there are no anti-competitive results due to non-controlling interest in competing companies.

Moreover, proposals to limit common ownership could actually *hurt* consumers, not protect them. Thank you for the opportunity to comment on these topics. We are happy to discuss any questions or comments you may have.

Sincerely,

Tom Quaadman & Sean Heather

[12] Committee on Capital Markets Regulation, "Common Ownership and Antitrust Concerns," November 2017