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Re: January 18, 2022, Request for Information on Merger Enforcement; SIFMA AMG Regarding Common Ownership Theory

The Asset Management Group (the "AMG") of the Securities Industry and Financial Markets Association ("SIFMA") appreciates the opportunity to respond to the January 18, 2022, Request for Information on Merger Enforcement of the Antitrust Division of the United States Department of Justice (the "Division") and the United States Federal Trade Commission (the "FTC" and, together with the DOJ, "the agencies").

The AMG represents asset management firms which serve millions of individual and institutional investors saving for retirement, education, and emergencies, and trying to reach other investment goals. The AMG's members have combined assets under management exceeding $45 trillion. The clients of AMG member firms include tens of millions of individual investors, registered investment companies, endowments, and pension funds.

With this wealth of industry experience, the AMG responds to the agencies' question concerning common ownership. The agencies ask whether "the guidelines' approach to common ownership and horizontal stockholding [is] adequate[.]" The answer is yes. The approach to common ownership embodied in the operative Merger Guidelines is sufficient to counter any potential anticompetitive conduct by making fact-specific inquiries when confronted by partial acquisitions across rival firms.

The common ownership hypothesis asserts that investor holdings of small, non-controlling stakes in rival firms inherently lead to anticompetitive effects. To incorporate this hypothesis into the Merger Guidelines would be premature. Not only is the hypothesis unsettled among economists and academics, other government authorities have concluded that it is not a sufficient basis for

regulatory action. In addition, incorporation of the hypothesis into the Merger Guidelines would harm investors, especially retail investors.

1. <u>The Agencies Have the Tools They Need to Challenge Anticompetitive Transactions</u>

Incorporating the common ownership hypothesis into the Merger Guidelines is unnecessary because the FTC and the Division already have the tools that they need to challenge anticompetitive partial acquisitions of rival firms. Section 13 explains that the "Agencies . . . also review acquisitions of minority positions involving competing firms, even if such minority positions do not necessarily or completely eliminate competition between the parties to the transaction."[1]

Section 13 is appropriately fact-specific and recognizes that "[p]artial acquisitions, like mergers, vary greatly in their potential for anticompetitive effects."[2] The "specific facts of each case" matter when it comes to common ownership of rival firms, and the 2010 Horizontal Merger Guidelines direct the FTC and the Division to look to three factors—the ability of a common owner to influence conduct of rival firms, blunted incentives of rival firms to compete, and access of rival firms to competitively sensitive information—to evaluate and challenge such transactions.

Indeed, the FTC and the Division have challenged partial acquisitions when the potential buyers owned significant interests in competitors of the firm being acquired. In 2008, the Division challenged the proposed acquisition of Clear Channel Communications by a group of private equity investors which also had substantial ownership interests in Cumulus Media Partners and in Univision, all of which operated radio stations throughout the United States.[3] Following the acquisition, the private equity firms would have had significant control over all three entities: between 14% and 70% of the voting interests in each entity and the ability to appoint between 14% and two-thirds of the members of the board of directors of each entity.[4] The companies ultimately agreed to a broad divestiture order.[5] Similarly, in 2017, the FTC challenged a transaction between Red Ventures and Bankrate because Red Ventures' two largest private equity shareholders owned the closest competitor of Bankrate in the third-party senior living referral service industry.[6] Red Ventures and Bankrate agreed to divest Bankrate's third-party senior living referral service business.[7]

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[1] 2010 Horizontal Merger Guidelines § 13.

[2] *Id.*

[3] *See* Compl. ¶¶ 3, 5–6, *United States v. Bain Cap, LLC., et al.*, No. 08-cv-245 (D.D.C. Feb. 13, 2008), ECF No. 1.

[4] *Id.* ¶¶ 2–3, 5–6.

[5] Final Judgment, *United States v. Bain Cap., LLC, et al.*, No. 08-cv-245 (D.D.C. July 29, 2008), ECF No. 8.

[6] *See* Compl., *In the Matter of: Red Ventures Holdco, LP & Bankrate, Inc.*, No. C-4627 (Fed. Trade Comm'n Nov. 2, 2017).

[7] *See* Decision & Ord., *In the Matter of: Red Ventures Holdco, LP & Bankrate, Inc.*, No. C-4627 (Fed. Trade Comm'n Mar. 1, 2018).

2. Incorporating the Common Ownership Hypothesis Into the Merger Guidelines Would Be Premature

Given the tools available to the agencies, it would be premature to incorporate the unsettled common ownership hypothesis into the Merger Guidelines.

The Merger Guidelines have long been—and should remain—grounded in accepted economic theories of competition and markets. A primary objective of the first Merger Guidelines, said Nobel laureate Oliver E. Williamson, was "putting antitrust enforcement on sounder economic foundations."[8] And achieving this objective has been the goal of the revisions subsequent to the 1968 Merger Guidelines across administrations. When the Merger Guidelines were updated in 2010, Assistant Attorney General Christine A. Varney explained that the revisions were "necessary to fulfill . . . [this] original objective." [9] Assistant Attorney General James F. Rill said much the same thing when the Division and FTC issued the 1992 Merger Guidelines: "The 1992 guidelines represent the next logical step in the development of merger analysis. They incorporate the best legal and economic knowledge about the effects of mergers."[10]

Incorporating the common ownership hypothesis into the Merger Guidelines now would undermine this objective and place the Guidelines on *less* sound economic foundations. In 2017, the United States wrote in a submission to the Organisation for Economic Co-operation and Development that "the empirical literature on the competitive implications of common ownership by institutional investors is still in its early stages."[11] This is still the case. Not only are economists continuing to debate the hypothesis, other government authorities have deemed the hypothesis too speculative to provide a basis for regulatory action.

(a) It Is Unsettled Whether Economic Evidence Supports the Common Ownership Hypothesis

The common ownership hypothesis was popularized by research conducted by José Azar, Martin Schmalz, and Isabel Tecu that purports to find a relationship between airline prices and common ownership.[12] The authors argue that public company shareholders include asset managers who may influence company management to act anticompetitively, but identify no causal

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[8] Oliver E. Williamson, *The Merger Guidelines of the U.S. Department of Justice-- In Perspective, Remarks at the 20th Anniversary of the 1982 Merger Guidelines* 5 (June 10, 2002), https://www.justice.gov/archives/atr/merger-guidelines-us-department-justice-perspective.

[9] *See* Christine A. Varney, *An Update on the Review of the Horizontal Merger Guidelines, Remarks as Prepared for the Horizontal Merger Guidelines Review Project's Final Workshop* 1 (Jan. 26, 2010), https://www.justice.gov/atr/speech/update-review-horizontal-merger-guidelines.

[10] Press Release, Justice Department and Federal Trade Commission Issue Horizontal Merger Guidelines ii (Apr. 2, 1992), https://www.justice.gov/archive/atr/public/press_releases/1992/0270.htm.

[11] *Hearing on Common Ownership by institutional investors and its impact on competition – Note by the United States* 6 (Dec. 6, 2017), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-2010-present-other-international-competition-fora/common_ownership_united_states.pdf.

[12] José Azar, Martin C. Schmalz, and Isabel Tecu, *Anticompetitive Effects of Common Ownership*, 73 J. Fin. 1513 (May 2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345.

mechanism through which this could take place.[13] The authors conclude that "a hidden social cost – reduced product market competition – accompanies the private benefits of diversification and good governance."[14] Azar and Schmalz, together with Sahil Raina, also studied common ownership and the banking industry, concluding that common ownership led to higher fees and lower interest rates for individual deposit accounts.[15]

Subsequent academic studies have criticized the methods and hypothesis in these articles and cast doubt on whether there is competitive harm as a result of investor holdings in rival firms. Patrick Dennis, Kristopher Gerardi, and Carola Schenone analyzed the findings of Azar et al.'s airline industry study and concluded that there was no evidence of a relationship between ticket prices and common ownership in the airline industry.[16] Several other studies come to the same conclusion,[17] including a new study by José Azar, which concluded that common ownership by three large asset managers was associated with *lower* airline prices (while common ownership by others was associated with higher prices).[18]

In addition, other academics have studied common ownership and its effect in other industries, with mixed results at best.[19] A recent article in the Yale Journal on Regulation conducted an analysis of managerial incentives, concluding that common ownership at current levels is unlikely to alter such incentives, and thus the theory that common ownership incentivizes

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[13] *See id.*

[14] *Id.*

[15] José Azar, Sahil Raina, & Martin C. Schmalz, *Ultimate Ownership and Bank Competition* (May 4, 2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2710252.

[16] Patrick J. Dennis, Kristopher Gerardi, & Carola Schenone, *Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry*, Federal Reserve Bank of Atlanta Working Paper Series (2019), https://www.econstor.eu/bitstream/10419/228245/1/1668949245.pdf.

[17] *See, e.g.*, Pauline Kennedy, Daniel P. O'Brien, Minjae Song, & Keith Waehrer, *The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence* (July 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3008331 ("contrary to recent empirical research" based on data from the airline industry, there is "no evidence that common ownership raises airline prices"); Thomas A. Lambert & Michael E. Sykuta, *The Case for Doing Nothing About Institutional Investors' Common Ownership of Small Stakes in Competing Firms* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173787 (concluding that anticompetitive harm from institutional investors' common ownership is "implausible and that the empirical studies supporting the theory are methodologically unsound"); C. Scott Hemphill & Marcel Kahan, *The Strategies of Anticompetitive Common Ownership*, 129 Yale L. J. 1392, 1392 (Mar. 2020), https://www.yalelawjournal.org/article/strategies-of-anticompetitive-common-ownership (finding that "most proposed [causal] mechanisms" linking common ownership and anticompetitive effects "either lack significant empirical support or else are implausible").

[18] José Azar & Xavier Vives, *Revisiting the Effects of Common Ownership* (Sept. 27, 2021), https://blog.iese.edu/xvives/files/2021/10/Revisiting-the-anticomp-eff.pdf.

[19] *See, e.g.*, Edward B. Rock & Daniel L. Rubinfeld, *Antitrust for Institutional Investments*, 82 Antitrust L. J. 221 (2018); Menesh S. Patel, *Common Ownership, Institutional Investors, and Antitrust*, 82 Antitrust L. J. 279 (2018).

managers to lower output is not credible.[20] The article also surveyed the literature and found that "the hypothesis that common ownership at current levels reduces competition is highly implausible."[21] A 2021 article by Andrew Koch, Marios Panayides, and Shawn Thomas detailed their empirical investigation of whether common ownership within industries is "systemically associated with decreased competition" and found that "common ownership is neither robustly positively related with industry profitability and output prices nor robustly negatively related to non-price competition measures."[22] In short, their "results are inconsistent with increased common ownership generally resulting in reduced competition."[23] Another recent study by Katharina Lewellen and Michelle Lowry concluded that the effects attributed to common ownership are caused by other factors, such as differential responses of firms or industries to the 2008 financial crisis.[24] A 2016 study concerning common ownership and executive compensation concluded that common ownership actually increases the incentives to compete by sensitizing executives to their performance relative to rivals.[25]

Importantly, the common ownership hypothesis relies on a number of incorrect assumptions about the asset management industry that must be accounted for before the hypothesis could be settled. The literature frequently ignores how investment advisors' incentives, as well as the incentives of their clients, are structured and regulated, often leading to erroneous conclusions.

Given that research concerning the common ownership hypothesis is inconclusive and, in fact, casts doubt on the merits of the hypothesis, incorporating the speculative hypothesis into the Merger Guidelines risks damaging the credibility of the Guidelines and the weight afforded to them by the courts.

(b) Government Authorities Outside the United States Have Concluded That the Common Ownership Hypothesis Is Speculative

The Division and FTC should follow the lead of other governmental bodies that have reviewed or studied the common ownership hypothesis and have deemed it too speculative to provide a basis for regulatory action at this time. For example, a May 2020 study commissioned by the European Parliament's Committee on Economic and Monetary Affairs concluded that "whether and in which circumstances common ownership is beneficial or deleterious for

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[20] *See* Merritt B. Fox & Menesh S. Patel, *Common Ownership: Do Managers Really Compete Less?*, 39 Yale J. Reg. 136 (2022), https://openyls.law.yale.edu/bitstream/handle/20.500.13051/17929/05.%20Fox%20Patel%20Article.%20Final%20136-227.pdf?sequence=4.

[21] *Id.* at 189.

[22] Andrew Koch, Marios Panayides, & Shawn Thomas, *Common Ownership and Competition in Product Markets*, 139 J. Fin. Econ. 109, 111 (Jan. 2021).

[23] *Id.* at 116.

[24] Katharina Lewellen & Michelle Lowry, *Does common ownership really increase firm coordination*, 141 J. Fin. Econ. 322 (July 2021).

[25] Heung Jin Kwon, *Executive Compensation Under Common Ownership* (Nov. 29, 2016), http://fmaconferences.org/Boston/ExecutiveCompensationunderCommonOwnership.pdf.

competition, innovation, and, ultimately, citizen welfare is still an open debate."[26] Six months later, the European Commission explained that "the phenomenon of common shareholding proved to be particularly complex, and disentangling its various effects continues to be challenging," and stated that it is a "good candidate for future research."[27] The German Monopolies Commission has also determined it would be "premature" to use competition law or regulatory action to address common ownership.[28]

3. **<u>Incorporating the Common Ownership Hypothesis Into the Merger Guidelines Would Harm Investors</u>**

Incorporating the common ownership hypothesis into the Merger Guidelines would also improperly suggest that common ownership is inherently anticompetitive and, potentially, restrict common ownership entirely, even as it helps the millions of American investors who rely on investment for retirement and other savings.[29]

The ability of their clients to own small stakes in competitor firms makes it possible for managers to comply with the well-established principle of diversification. At the most basic level, diversification means purchasing a mix of investments (*i.e.*, purchasing equities in different companies and/or sectors) so that exposure to any one security is limited. While diversification does not guarantee positive returns, it can reduce portfolio volatility and improve risk-adjusted returns over time. Diversified investment products can be managed through a variety of strategies between index management (strategies that seek to replicate the risk-return profile of a securities index) and active management (strategies that seek to earn a return that exceeds a benchmark return or to achieve an absolute return target).

The most popular diversified investment product is the mutual fund. According to the Investment Company Institute, as of 2020, nearly 46% of U.S. households owned mutual funds.[30] In addition to directly owning mutual funds, individuals often own other diversified investment

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[26] *See* Simona Frazzani, Kletia Noti, Maarten Pieter Schinkel, Jo Seldeslachts, Albert Banalestañol, Nuria Boot, & Carlo Angelici, *Barriers to Competition through Joint Ownership by Institutional Investors* 100 (May 2020), https://www.europarl.europa.eu/RegData/etudes/STUD/2020/652708/IPOL_STU(2020)652708_EN.pdf.

[27] JTC Tech. Rep., Eur. Comm'n, *Common Shareholding in Europe* 14 (Sept. 2020), https://publications.jrc.ec.europa.eu/repository/handle/JRC121476; *see also* Parliament of the Commonwealth of Australia, House of Representatives Standing Committee on Economics, *Report on the implications of common ownership and capital concentration in Australia* iv-v (Mar. 2022), https://parlinfo.aph.gov.au/parlInfo/download/committees/reportrep/024882/toc_pdf/Reportontheimplicationsofcommonownershipandcapitalconcentrationin Australia.pdf;fileType=application%2Fpdf (recommending continued examination of the common ownership phenomenon).

[28] *See* German Monopolies Comm'n, *Summary: Competition 2018*, 5 (July 2018), https://www.monopolkommission.de/en/press-releases/219-biennial-report-xxii-competition-2018.html.

[29] *See* Fox & Patel, *supra* note 20, at 212–16 (describing the harms of several remedies).

[30] Investment Company Institute, *A Review of Trends and Activities in the Investment Company Industry* 152 (2021), https://www.ici.org/system/files/2021-05/2021_factbook.pdf.

products as part of a pension plan or 401(k). At the end of 2020, mutual funds accounted for 59% of defined contribution plan assets and 45% of IRA assets.[31]

Investors have benefited from economies of scale in asset management and are paying lower investment management fees than ever before. Over the last two decades, average annual expenses on equity mutual funds have dropped from 0.99% of assets to 0.50%.[32] In 2018, Reuters estimated that for workers saving $20,000 a year in a 401(k), the decrease in expenses meant $100,000 more in their 401(k) over 30 years, assuming an annual rate of return of 6.41%.[33] Fees have also dropped because of the use of index benchmarking, which has made it possible for asset managers to invest in all of the securities included in a securities market index, offering a diversified product at a lower cost.

Limiting ownership of small stakes in competitor firms would raise investment costs by impeding the ability of managers to diversify and manage portfolios. As described above, millions of Americans rely on access to reasonably priced diversified investment products, but mutual funds and other diversified investment products would be required to alter their investment strategies and potentially divest billions of dollars from public companies to comply with limitations. This remedy might also discourage investment in smaller firms and new entrants, contrary to the aims of antitrust enforcers: asset managers, forced to limit the number of issuers in an industry in which they can invest, may consolidate their investment allocations within an industry to a smaller subset of representative, well-established issuers with large market capitalizations. In addition, limiting an investment manager's ability to invest within a sector may restrict the ability to hedge, thereby increasing investor risk and undermining effective risk management practices for the economy as a whole.

Thus, incorporating the common ownership hypothesis into the Merger Guidelines will likely raise costs for investors.

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[31] *Id.* at 197.

[32] Investment Company Institute, *Trends in the Expenses and Fees of Funds, 2020*, 27 ICI Research Perspective 1, 3 (Mar. 2021), https://www.ici.org/system/files/attachments/pdf/per27-03.pdf.

[33] Tim McLaughlin, *Investors Save Billions as Funds Cut Fees, Fight for Market Share*, REUTERS (Oct. 3, 2018), https://www.reuters.com/article/us-funds-fees-outlook-analysis/investors-save-billions-as-funds-cut-fees-fight-for-market-share-idUSKCN1MD18I.

We appreciate the efforts of the FTC and the Division to solicit comments concerning merger enforcement generally and, in particular, the common ownership hypothesis. As described above, it would be premature and detrimental to the millions of American investors who rely on investments for retirement and other savings, as well as to the credibility of the Merger Guidelines, to incorporate the hypothesis therein.

SIFMA AMG sincerely appreciates your consideration of these views and concerns. We stand ready to provide any additional information or assistance that the FTC or the Division might find useful. Please do not hesitate to contact Lindsey Keljo at 202-962-7312 or lkeljo@sifma.org with any questions.

Sincerely,

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