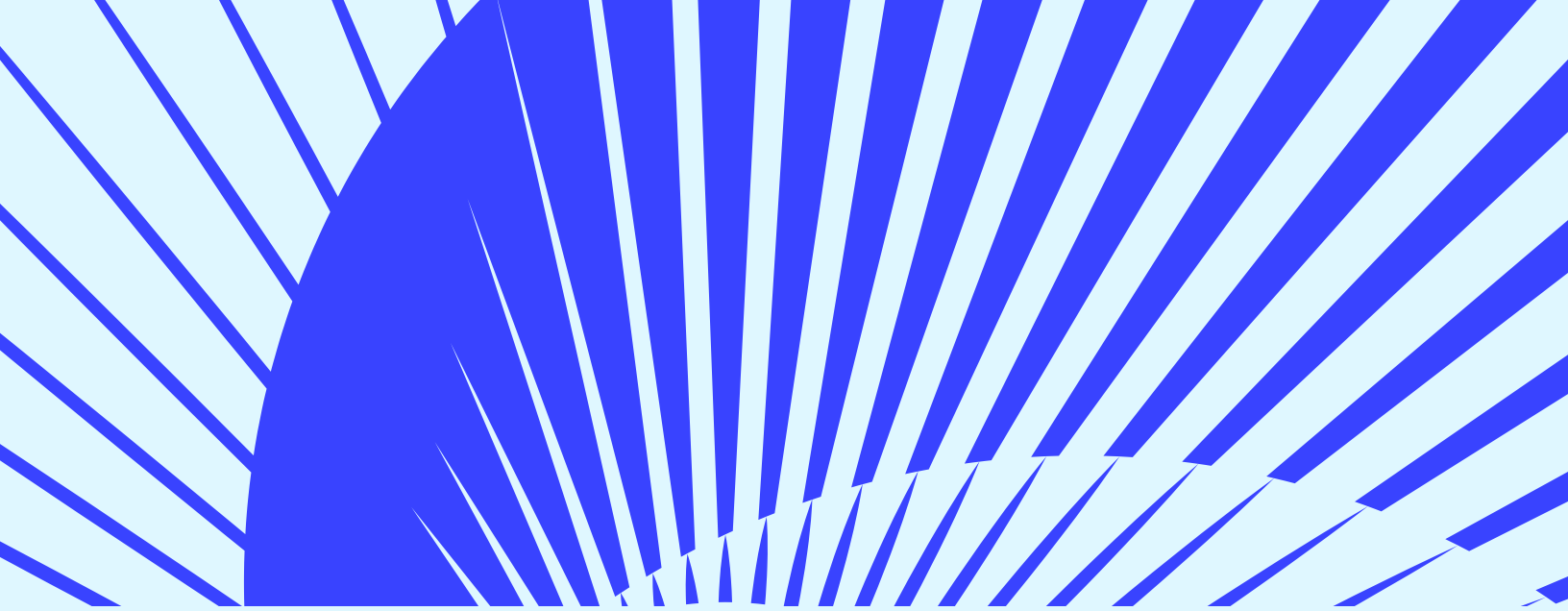


U.S. Chamber of Commerce

U.S. Capital Markets Are in Danger from Proponents of Common Ownership Hypothesis

Spring 2022 Report

Summary

Despite increasingly intense competition, the United States still has the deepest and most diverse capital markets in the world. Our strong financial markets allow entrepreneurs to start new ventures, existing businesses to grow and adapt, and investors to save for the future. These markets are so efficient that businesses worldwide come to the American markets to raise capital.

But that model, which supports an eco-system of start-ups, job creation, and retirement security for millions of Americans, may be in danger from economic interventionists who support a misguided hypothesis known as "common ownership." The common ownership hypothesis claims that institutional investors holding a minority percentage of stock in multiple companies in the same sector of the economy reduce competition and raise prices. The proponents of the common ownership hypothesis are wrong regarding the effects of common ownership upon the economy. Furthermore, the policy changes proposed by these activists would harm entrepreneurship and damage U.S. economic competitiveness.

An institutional investor is a large organization, such as an investment firm, mutual fund, pension fund, or insurance company, that makes substantial investments in the stock market and elsewhere on behalf of its investors who are the asset owners. An institutional investor can invest money into multiple companies in the same market—referred to as common ownership or non-controlling interest in competing companies. For instance, an index fund that tracks the entire U.S. stock market might invest in multiple airlines or banks on behalf of its investors. For decades, investment funds have held stock in numerous companies, some in the same sector, to balance their portfolios, spread the benefits of their expertise across economic sectors, and give individual investors the benefits of professionally managed, diversified portfolios.

The academics and policymakers who support the common ownership hypothesis often point to two academic studies that claimed to find a correlation between a noncontrolling interest in competing companies and higher prices in the airline and banking industries. Numerous subsequent studies, however, have examined and contradicted those findings, casting doubt on the theory that overlapping ownership alone is enough to affect companies' competitive behavior. Nevertheless, advocates who seek to limit institutional investors from investing in multiple companies in the same market rely on flawed studies lacking empirical evidence to promote aggressive policy ideas that would reshape institutional investing with severe consequences for individual investors and capital markets.

In the past, multiple-party coalitions in the United States and European Union have dismissed the common ownership hypothesis. However, new threats of antitrust actions may put this hypothesis on the radar in ways that were unthinkable just a few years ago. The negative consequences of any limitations on

investments are cause for serious concern, including a restriction on capital and reduction in investment in startups and small companies, thereby hobbling future economic growth. In addition, investors such as the 50% of American families who invest in mutual funds or save for retirement through 401(k) plans would be made worse off through increased fees and increased risk by the undercutting of diversification of asset portfolios.

This white paper discusses the benefits of allowing common ownership of companies in the same industry; analyzes academic literature to show that common owners do not impair competition; and explains how restricting the investments of institutional investors would harm capital markets, companies, investors, and consumers.

In particular, the assessment of academic literature results in the following key findings:

- There is virtually no empirical evidence that common owners harm competition.
- The most recent studies on the topic have found no correlation between common owners and higher prices.
- There is a lack of evidence indicating that institutional investors try to limit competition; there is also no evidence that they could even if so inclined.

Accordingly, most scholars and senior government officials have concluded that policymakers should not change the regulatory framework governing institutional investments and that to do otherwise could seriously damage capital markets and harm individual investors.

I. Capital Markets and Individual Investors Benefit from Portfolio Diversification, Including in the Same Sector

Common ownership—diversified institutional investors holding partial, minority interests in competing corporations in the same sector of the economy[1]—offers many advantages to both institutional and individual investors. Most importantly, this practice allows investors, whether they invest predominantly in funds (including mutual funds and index funds) or individual securities, another way to diversify their portfolios to minimize investment risks. To balance their portfolios, both institutions and individuals could invest in an entire sector of the economy, thereby mitigating any volatility in a portfolio and offsetting any idiosyncratic risks of single-company investments. The fact that institutions manage their funds professionally and pool the investment of numerous clients to achieve economies of scale allows individuals to access and participate in diversified investments that would normally be available only to larger investors.

Some of the largest "common owners" are not owners at all—they are institutional investment managers who manage assets on behalf of their clients, including individual investors and retirement funds. Large asset managers usually manage multiple funds, including sector funds that focus on assets in the same segment of the economy or index funds that attempt to mimic the entire economy. Such funds are managed independently and in accordance with their own stated investment objectives. Therefore, the various clients of an asset manager may hold the same underlying securities in different funds. This is widespread in financial markets. According to one study, there is a 90% probability that two competing firms in the S&P 1500 will have a large horizontal shareholder in common.[2]

Because institutional investors often invest in multiple companies in the same industry as a result of investing in a variety of funds, hundreds of millions of American investors benefit from the ability to engage in such portfolio diversification. In 2020, 45.7% of U.S. households owned shares in a mutual fund.[3] These households hold, on average, six mutual funds, and more than a quarter of households own seven or more mutual funds.[4] Households acquire these stakes through a variety of sources, including employer-sponsored retirement plans.

1. Noah Joshua Phillips, "*Taking Stock: Assessing Common Ownership*," June 1, 2018, at https://www.ftc.gov/system/files/documents/public_statements/1382461/phillips_-_taking_stock_6-1-18_0.pdf.
2. Jacob Greenspon, "*How Big a Problem Is It That a Few Shareholders Own Stock in So Many Competing Companies?*," Harvard Business Review, February 19, 2019, at https://hbr.org/2019/02/how-big-a-problem-is-it-that-a-few-shareholders-own-stock-in-so-many-competing-companies.
3. Statista Research Department, Share of households owning mutual funds in the U.S. 1980-2020, at https://www.statista.com/statistics/246224/mutual-funds-owned-by-american-households/.
4. Investment Company Institute, *Letter to FTC Regarding Competition and Consumer Protection in the 21st Century Hearings*, August 20, 2018, at https://www.ici.org/system/files/attachments/18_ici_common_ownership_ltr.pdf.

In addition to helping investors, allowing common ownership improves the performance of publicly traded companies, particularly by allowing companies to raise capital more easily. For instance, a new health care or transportation company might attract equity investment from fund managers already familiar with the industry. If investors face limitations in the investments they can make within the same sector, then startups and growing companies will be hampered in their efforts to raise critical capital to support their business growth. Moreover, according to studies, institutional investors exert positive pressure on companies in ways that benefit shareholders broadly. Institutional investors enhance productivity, managerial efficiency, and financial disclosure, in part because these investors have the time and expertise to advise companies regarding performance issues.[5]

5. Phillips, *supra* at 1, citing Philippe Aghion, John Van Reenan, and Luigi Zingales, "*Innovation and Institutional Ownership*," American Economic Review, vol. 103, no. 1 (February 2013): p. 277, (productivity), at https://www.aeaweb.org/articles?id=10.1257/aer.103.1.277; Ghasan A. Baghdadi, Ishaq M. Bhatti, Lily H.G. Nguyen, and Edward J. Podolski, "*Skill or Effort? Institutional Ownership and Managerial Efficiency*," Journal of Banking and Finance, vol. 91 (April 2018): p. 19 (managerial efficiency), at https://www.sciencedirect.com/science/article/abs/pii/S0378426618300682; Audra L. Boone and Joshua T. White, "*The Effect of Institutional Ownership on Firm Transparency and Information Production*," Journal of Financial Economics 117, no. 3, (July 2015): p. 508 (financial disclosure), at https://www.sciencedirect.com/science/article/abs/pii/S0304405X15000914.

II. Evidence Shows Common Owners Do Not Impair Competition

Several years ago, two papers called into question the benefits of having common owners. Their basic hypothesis contends that corporate managers know that their large institutional shareholders also hold stock in competitors and, therefore, soften competition to benefit those minority shareholders. These papers alleged that common ownership correlated with higher prices for consumers in two industries: airlines and banking. One paper (the "Airline Paper"), led by José Azar, Martin Schmalz, and Isabel Tecu, found that airline ticket prices were 3% to 7% higher in the average U.S. airline route than would be the case under separate ownership.[6] The other paper (the "Banking Paper"), also led by Azar, found that common owners inhibit competition in the banking industry, leading to less innovation and less favorable savings and loan rates for consumers.[7]

Both papers have proved controversial. Since their publication, other analyses have cast doubt on their methodology, contradicted their findings, and questioned the ability and even desire of institutional investors to lessen competition.[8] Accordingly, most scholars and regulators have concluded that there is no evidentiary basis for adopting new rules to regulate or prohibit common owners.

A. Subsequent papers called into question the methodology of the Airline and Banking Papers

Authors of several subsequent academic papers reviewed the evidence and found that the original papers improperly conflated common owners with overall industry concentration, thereby undermining the Airline and Banking Papers' results.

Specifically, one of the subsequent papers showed that the supposed positive correlation between common owners and ticket prices stemmed from market share, not ownership and control.[9] In other words, the market's structure, rather than the common ownership hypothesis, explained the price of tickets.

6. José Azar, Martin C. Schmalz, & Isabel Tecu, "*Anti-Competitive Effects of Common Ownership*," Journal of Finance, vol. 73, no. 4 (May 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2427345.
7. José Azar, Sahil Raina, and Martin Schmalz, "*Ultimate Ownership and Bank Competition*," (May 2019), at http://econweb.umd.edu/~sweeting/ultimate_ownership_bank_competition%5B1%5D.pdf.
8. *See generally* Phillips, *supra* note 1; Patrick Dennis, Kristopher Gerardi, and Carola Schenone, "*Common Ownership Does Not Have Anti-Competitive Effects in the Airline Industry,*" Journal of Finance, (September 2021), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3063465.
9. *Id.*

B. Subsequent papers found no correlation between common owners and higher prices

More recent studies have found no correlation, much less causation, between common owners and higher prices. Two papers concluded that there was no evidence that common owners raised airline ticket prices and, like many other papers, that the results in the Airline Paper were driven by methodological shortcomings.[10] A third paper, using price regressions and structural model estimation, found no evidence in its conclusion that common owners raise prices, and corrected the methodological shortcomings in the original papers by adjusting for industry concentration.[11]

In addition, one recent academic paper[12] by Azar and Vives includes an adjusted view acknowledging that the prior research in the Airline paper excluded a crucial missing variable (i.e., interindustry common ownership) and now concludes that consumer prices in the airline industry have in fact declined, not increased, in tandem with a growth in common ownership by BlackRock, Vanguard, and State Street.

C. There is little or no evidence that common owners cause higher prices

To the extent that some questions remain about whether there is correlation between common owners and higher prices, no one has demonstrated, or even provided a persuasive theory, about how common owners cause higher prices. Specifically, the Airline and Banking papers assumed that an institutional investor can influence a company's business strategy even if it owns only a small share of a company's stock.

The papers also assumed that investors have incentives to direct managers to take anticompetitive actions and that they can incentivize investment managers to act on their behalf. Yet no one has provided any persuasive evidence, grounded in investigations or empirical data, to support these assumptions. As two advocates conceded, "The theory literature to date does not identify what mechanism funds may use to soften competition."[13]

10. Dennis et al., *supra note* 8; Jacob Gramlich and Serafin Grundl, "*Estimating the Competitive Effects of Common Ownership*" Board of Governors of the Federal Reserve System (March 2017), at https://doi.org/10.17016/FEDS.2017.029r1.
11. Pauline Kennedy, Daniel P. O'Brien, Minjae Song, and Keith Waehrer, "*The Competitive Effects of Common Ownership: Economic Foundations and Empirical Evidence*" (July 2017), at https://ssrn.com/abstract=3008331. See Kennedy et al. at p. 5: "The improvement of our price regressions over those of AST is two-fold. First, the dependent and independent variables are chosen based on a functional relationship consistent with the theory of partial ownership, which is not the case for AST's regressions. In particular, our price regressions do not include concentration as an explanatory variable and therefore avoid the interpretation problems associated with price-concentration regressions. Second, AST did not fully instrument for the MHHI [modified Herfindahl-Hirschman Index]; they instrumented only for the component of the MHHI associated with common ownership (the MHHI delta), but not for the other component (the HHI). Our price regressions fully instrument for common ownership."
12. José Azar, and Xavier Vives, "*Revisiting the Anticompetitive Effects of Common Ownership*," IESE Business School Working Paper (September 2021), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2925855.
13. Fiona Scott Morton and Herbert Hovenkamp, "*Horizontal Shareholding and Antitrust Policy*," Yale Law Journal, vol. 127, no. 7 (May 2018): pp. 2026, 2031, at https://www.yalelawjournal.org/feature/horizontal-shareholding-and-antitrust-policy.

In addition, there is little or no empirical evidence to support the assumption that institutional investors who hold a minority position in a company have any ability to suppress competition.

Scholars have concluded that "it is implausible to expect that index fund managers would seek to facilitate significant anticompetitive behavior."[14]

D. No one has identified a plausible mechanism through which institutional investors could suppress competition

Beyond that, no one has identified a plausible legal means through which institutional investors might instruct or persuade a company's executives to compete less vigorously. Of course, the existing antitrust laws already prohibit any concerted efforts to discourage vigorous competition. Although there have been investigations, as far as it has been publicly reported, there is little evidence suggesting that there have been any phone calls, emails, or other communications in which investors discouraged competition; indeed, William Baer, former head of the Department of Justice's (DOJ's) Antitrust Division, confirmed that the DOJ investigated issues of common owners but chose not to pursue a case relying on the common ownership hypothesis.[15]

Some advocates have speculated that common owners might vote their shares in favor of lax competition. It is unclear, however, how an investor would or could communicate such preferences through shareholder voting. In addition, one paper found "no evidence that shareholders vote on competitive strategy" or even that director candidates run on issues related to competitive strategy.[16] As the same paper pointed out, "there is no obvious way in which shareholders can vote for 'soft competition.'"[17]

E. A company's managers have personal incentives to compete vigorously

A company's executives have incentives to compete vigorously. When their company performs better than their competitors, they are likely to benefit through larger compensation packages and more marketability for higher roles, whereas executives are less likely to receive promotions for lowering output or decreasing profit.[18] One paper found that, in the airline industry, executive compensation

14. Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, "*The Agency Problems of Institutional Investors,*" 31 Journal of Economic Perspectives, vol. 31, no.3 (Summer 2017): pp. 89, 110, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2982617.
15. Brad Karp, "*Antitrust Executive Order and Common Ownership*," Paul, Weiss, Rifkind, Wharton & Garrison LLP (May 2016), at https://corpgov.law.harvard.edu/2016/05/24/antitrust-executive-order-and-common-ownership. *See also* Daniel P. O'Brien and Keith Waehrer, "*The Competitive Effects of Common Ownership: We Know Less Than We Think*," Antitrust Law Journal, vol. 81, no. 3 (February 2017), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2922677 (concluding that the available evidence does not support policy changes or the proposition that common ownership raises prices).
16. Edward Rock and Daniel Rubinfeld, "*Defusing the Antitrust Threat to Institutional Investor Involvement in Corporate Governance*," NYU Law and Economics Research Paper No. 17-05 (March 2017), at https://ssrn.com/abstract=2925855.
17. *Id.*, p. 9.
18. *See* Lambert and Sykuta, "*The Case for Doing Nothing about Institutional Investors' Common Ownership of Small Stakes in Competing Firms*," University of Missouri School of Law Legal Studies Research Paper (December 2018), at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3173787.

structures reward those whose companies outperform their peers.[19] Another paper found that corporate executives are rewarded more for outperforming peer firms as investors' noncontrolling interest in competing companies increases.[20] Indeed, recent research indicated that, to the extent that institutional investors have influence, they may push executive compensation away from alignment with industry performance and more toward the company's performance,[21] while another paper concluded that shareholder voting plays a limited role in setting executive compensation altogether.[22]

Finally, corporate law is clear that "[i]n carrying out their managerial roles, directors are charged with an unyielding fiduciary duty to the corporation and its shareholders," not to a particular subset of shareholders.[23] Managers are highly unlikely to prefer to protect the interests of minority shareholders, including some institutional investors, at the expense of their fiduciary obligations to other shareholders.

In short, no academic paper empirically confirms any conjectured mechanism where minority, noncontrolling shareholders of competing firms affect these firms' competitive strategies.

F. As a matter of theory, institutional investors have many reasons to prefer robust competition

There are reasons to doubt the other underlying assumptions of the Airline and Banking papers. Institutional investors have many reasons to prefer vigorous intrasector competition because such competition would help other companies within the investors' portfolio, including the sector's customers and suppliers.

Index funds typically are broadly diversified; as a result, anticompetitive conduct that benefits one industry likely would harm companies in other industries. For example, if airlines collude or compete less vigorously to raise ticket prices, then all the industries that use airlines would pay higher prices. Similarly, the airlines' suppliers and related industries, such as manufacturers and hotels, would suffer from reduced demand for flying.

Any hypothetical reduction in competition in one industry would arguably hurt common owners who invest in companies in other industries and thus would be contrary to the interests of those owners. The empirical work behind the common ownership hypothesis fails to account for how reduced competition in one industry might affect the value of client holdings in other industries.

Institutional investors typically hold stock in many sectors of the economy. Within the context of the Global Industry Classification Standards are 11 sectors, 24 industry groups, 68 industries, and

19. Heung Jin Kwon, "*Executive Compensation under Common Ownership*" (November 2016), at http://fmaconferences.org/Boston/ExecutiveCompensationunderCommonOwnership.pdf.
20. *See* Rock and Rubinfeld, *supra*, at pp. 24-25 (analyzing 2015 proxy statements from American Airlines and Delta Airlines and concluding that both companies compensate their executives based on relative performance).
21. Kwon, *supra*.
22. Rock and Rubinfeld, *supra*.
23. *See* Phillips, *supra* note 1.

157 subindustries.[24] It is implausible that institutional investors have the inclination or capacity to articulate, advocate, and implement comprehensive anticompetitive strategies across any part of this spectrum in a manner that would improve their returns, especially while accounting for the negative upstream and downstream impact of reduced output. Accordingly, the assumption that institutional investors can—or even have any inclination to—suppress competition in any particular sector is, at best, dubious. Further, the aggregate ownership by these institutional investors is spread across numerous funds in a complex, with each retaining its own investment strategies, boards, and adviser fiduciary duties. As a practical matter, a fund manager cannot have a common view for a single company since investments are held across differing funds.

G. Regulators have concluded that common owners do not inhibit competition

For all these reasons, federal regulators have concluded that there is no persuasive evidence that common owners inhibit competition. In a comprehensive speech, Noah Phillips, a commissioner on the Federal Trade Commission (FTC), explained the following:

> *"The large institutional investors do not appear to be at the apex of a massive antitrust conspiracy. They do not appear to be encouraging portfolio companies to lighten up on competition, nor eliciting from them confidential information which then is shared with other portfolio companies. Nor do we have evidence of corporate managers consulting with their large shareholders about whether and how not to compete with rivals—or thinking internally about them. This "economic blockbuster" thus seems a little light on plot."*[25]

> "U.S. antitrust enforcers remain unconvinced that common ownership is an antitrust violation."

Commissioner Phillips further explained, "U.S. antitrust enforcers remain unconvinced that common ownership is an antitrust violation."[26] Other enforcement officials agree. Bruce Hoffman, former director of the FTC's Bureau of Competition, expressed similar sentiments;[27] Barry Nigro, former deputy assistant attorney general in the Antitrust Division, agreed that an antitrust case against common owners "is likely to encounter skepticism in the courts."[28]

24. George Dallas, "*Common Ownership: Do Institutional Investors Really Promote Anti-Competitive Behavior?*," International Corporate Governance Network (December 2018), at https://corpgov.law.harvard.edu/2018/12/02/common-ownership-do-institutional-investors-really-promote-anti-competitive-behavior/.
25. Phillips, *supra* note 1.
26. *Id.*
27. *See* Bruce Hoffman (May 2018), at https://globalcompetitionreview.com/ftc-sceptical-of-common-ownership-and-data-theories-says-hoffman.
28. Barry A. Nigro, "*Cross-Ownership by Institutional Investors*," Fried, Frank, Harris, Shriver & Jacobson LLP (March 2016), at https://corpgov.law.harvard.edu/2016/03/31/cross-ownership-by-institutional-investors/.

This skepticism remains the official global position of the United States. In late 2017, in a joint statement to the Organisation for Economic Co-operation and Development (OECD), the United States asserted that it had found insufficient "evidence of anticompetitive effects" from common owners. The submission concluded, "Given the ongoing academic and research debate, and its early stage of development, the U.S. antitrust agencies are not prepared at this time to make any changes to their policies or practices with respect to common ownership by institutional investors."[29] There simply is no persuasive evidence that common owners cause competitive problems in any sector of the economy.

29. U.S. submission to OECD Hearing on Common Ownership (December 2017), at https://one.oecd.org/document/DAF/COMP/WD(2017)86/en/pdf.

III. Restricting Common Owners Would Harm Capital Markets, Companies, Investors, and Consumers

Anticompetitive behavior already violates the antitrust laws. If an institutional investor plays a role in facilitating anticompetitive activities among portfolio companies, the investor, its employees, and the companies could face liability under Section 1 of the Sherman Act, which prohibits cartels. As Commissioner Phillips explained, "antitrust enforcers have tools already at our disposal for monitoring and disciplining anticompetitive activity, and will use those tools to intervene where the law and the evidence provide a basis for doing so."[30]

Nevertheless, advocates of the common ownership hypothesis have proposed many aggressive ideas to address this unsubstantiated hypothetical problem. One proposal would limit an investor's ownership stakes within a given industry to 1% unless the investor commits to "pure passivity," an idea whose own advocates admit would upend "the basic structure of the financial sector."[31]

Other proposals would restrict the ability of institutions to invest in multiple companies in the same sector. For example, in 2020, the FTC proposed a rule that would have required asset managers to aggregate holdings in an issuer across all of its managed funds to determine whether the institution held a high enough percentage of the asset to trigger a reporting requirement under the Hart-Scott-Rodino Act.[32] This rule would require institutions to submit more transactions for federal review, even though the institution itself typically does not own the underlying asset, and even though shares held within a single firm might be managed for different clients, in accordance with separate investment goals and guidelines, and voted in different ways. If promulgated, this rule would delay the completion of investment opportunities and dramatically increase both the number of transactions that require federal review and the attendant filing fees—fees ultimately borne by the millions of individual investors who consume financial services. A requirement to report transactions for federal review will undoubtedly cause institutional investors, at minimum, to reconsider their investment in companies if it will be subject to extra scrutiny or otherwise delayed by the FTC. As a consequence, investors will lose opportunities for investment and diversification in their retirement accounts.

All of these proposed policy measures are being offered despite unsubstantiated academic debate and are designed to address a speculative problem that has

30. Phillips, *supra* note 1.
31. Eric A. Posner, Fiona M. Scott Morton, and E. Glen Weyl, "*A Proposal to Limit the Anticompetitive Power of Institutional Investors*," Antitrust Law Journal, vol. 81, no. 3 (November 2017): pp. 669, 670, at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2872754.
32. *See* FTC Release, FTC to Hold Virtual Q&A Sessions in November on Proposed Amendments to HSR Rules and Advanced Notice of Proposed HSR Rulemaking, October 19, 2020, at https://www.ftc.gov/news-events/press-releases/2020/10/ftc-hold-virtual-qa-sessions-november-proposed-amendments-hsr.

not been proven to exist. These measures would seriously damage capital markets, corporations, and individual investors by increasing the cost of raising capital for companies (particularly new and smaller companies), raising fees for individual investors, and lessening the ability of both individual and institutional investors to diversify their portfolios. The common ownership hypothesis should not be the basis for any policy action, and any policy measures stemming from this hypothesis would be completely unwarranted.

A. Restricting common owners would damage capital markets

Institutional investors supply capital to companies to grow their business, create jobs, and innovate. Proposals to limit common owners, however, would fundamentally restructure capital markets and could limit the ability of companies to raise capital. Some proposals would cap institutional investment in certain sectors altogether, while others would make it less attractive for investors to put their money into American equities by denying them the voting rights that typically accompany investments in equities.

Moreover, such proposals could reduce investment in startups. A new airline or energy company might have trouble attracting capital because institutional investors, already invested in other companies in the same sector, may not want to bear the risk that a new investment would run afoul of new rules.

Finally, any restrictions would dramatically raise costs for investors. New rules would require investors to calculate and monitor market shares in every market where their institutions held stock of multiple competitors.[33] This process would unnecessarily raise management fees, further reducing the amount of capital available to companies, particularly startups and smaller companies that are particularly sensitive to the costs and difficulty of raising capital. Moreover, any such restrictions would also eliminate the continued availability of index funds as an investment option. As a result, the many retail investors who overwhelmingly hold these low-cost investments in their accounts would be forced into other investment vehicles.

B. Restricting common owners would worsen corporate performance

For corporations, proposals that would restrict common owners would constrain institutional investors from providing information that can help to improve corporate performance. As noted previously, studies have shown that institutional

33. Thomas Lambert, "*Mere Common Ownership and the Antitrust Laws*," 61 Boston College Law Review, vol. 61, no. 8 (March 2020, at https://lawdigitalcommons.bc.edu/bclr/vol61/iss8/5/.

investors improve corporate performance.[34] In addition, such restrictions would create regulatory tension for financial advisors, who currently maintain a fiduciary duty to monitor portfolio companies on behalf of their clients and to engage with those firms in a principled manner. To the detriment of the shareholders and corporations alike, certain policy proposals would restrict the ability of these institutional investors to engage with the corporations and would further separate corporate managers from the corporations' owners.[35]

Indeed, some proposals would deny institutional investors who are common owners a shareholder's right to vote at general meetings or to engage with both executive management and the board. Any of these ideas would undermine the rights of minority shareholders.

C. Restricting common owners would wreak havoc on individual investors

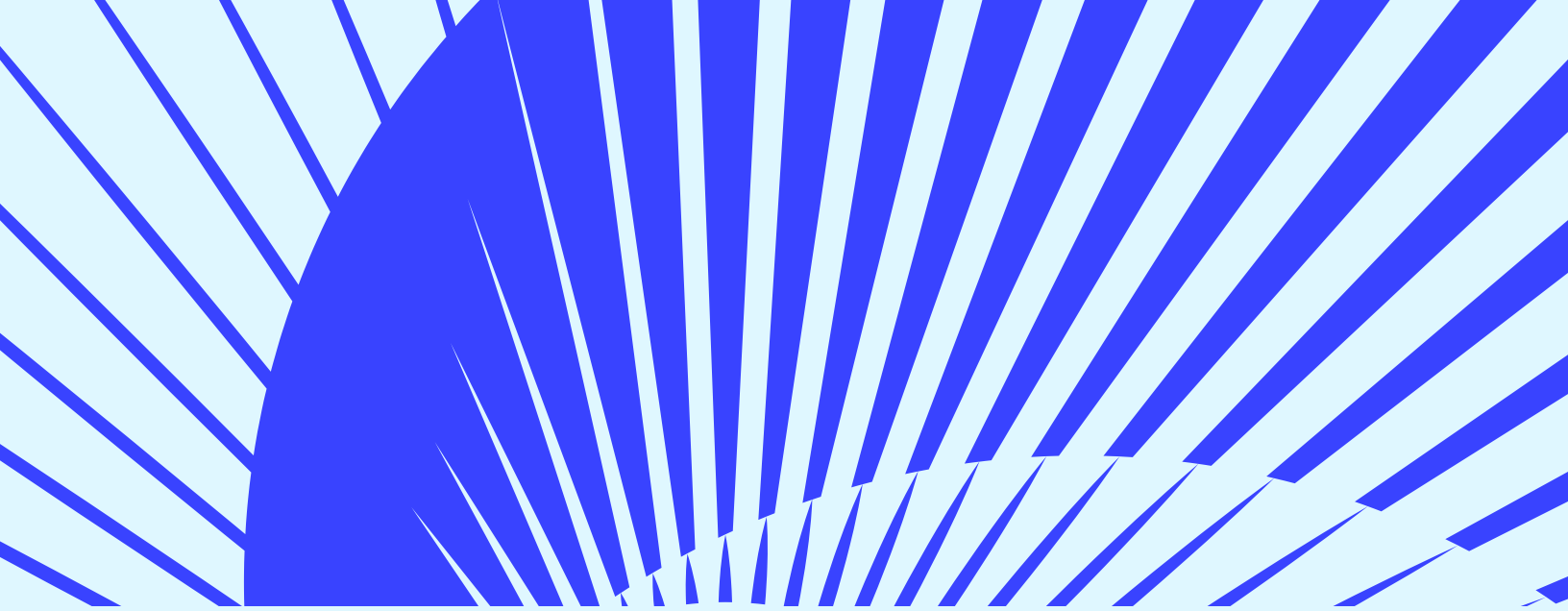
For individual investors, restrictions on how an investor could invest would result in increased costs of investment products and permit fewer investment options. For instance, such limits could upend 401(k) plans' ability to offer a well-diversified menu of funds to workers, thereby raising costs and restricting choices for retirees and investors saving for retirement.[36]

With less access to well-diversified index funds, individual investors would need to assume more financial risk, spend more time attempting to diversity their finances themselves, or pay higher fees for access to professional portfolio managers. As a result, regulatory changes could upset the financial planning process for almost half of all American households.[37]

Conclusion

Many investors hold a noncontrolling interest in competing companies. This is a pillar of American capital markets. It helps companies attract capital and enables both institutional and individual investors to diversify risk. With little or no persuasive empirical evidence that common owners limit competition, and with efforts to suppress competition already illegal and enforceable, policymakers should reject proposals that limit common ownership. Instead, policymakers should allow the capital markets to continue to flourish.

34. *E.g.*, Dorothy S. Lund, "*The Case against Passive Shareholder Voting*," Journal of Corporation Law, Vol. (September 2020), at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=13741&context=journal_articles; Lucian A. Bebchuk, Alma Cohen, and Scott Hirst, "*The Agency Problems of Institutional Investors*," Journal of Economic Perspectives, vol. 31, no. 3 (Summer 2017): pp. 89, 110, at https://www.aeaweb.org/articles?id=10.1257/jep.31.3.89; Leo E. Strine, Jr., "*Can We Do Better by Ordinary Investors? A Pragmatic Reaction to the Dueling Ideological Mythologists of Corporate Law*," Columbia Law Review, vol. 114, no. 2 (2014): pp. 449, 477, at https://columbialawreview.org/content/can-we-do-better-by-ordinary-investors-a-pragmatic-reaction-to-the-dueling-ideological-mythologists-of-corporate-law/.
35. Investment Company Institute, *supra*.
36. *Id.*
37. Douglas Ginsburg, U.S. Court of Appeals, "*Why Common Ownership Is Not an Antitrust Problem*," (December 2018), at https://corpgov.law.harvard.edu/2018/12/04/why-common-ownership-is-not-an-antitrust-problem/.



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