THE HART–SCOTT–RODINO ACT'S FIRST AMENDMENT PROBLEM

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The Hart–Scott–Rodino Antitrust Improvements Act (HSR Act) is a centerpiece of federal antitrust law. Designed to aid enforcement of Clayton Act Section 7, which prohibits mergers and acquisitions that "may . . . substantially . . . lessen competition" or "tend to create a monopoly,"[1] the statute requires the prospective acquirer of an issuer's voting securities exceeding a certain amount[2] to notify the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) of the potential acquisition, pay a filing fee,[3] and observe a thirty-day waiting period before proceeding.[4] The FTC or DOJ may thereafter issue to the proposed acquirer a "second request" for additional information about the acquisition, and conduct an investigation, take testimony, and seek to prevent the acquisition. Investors that have acquired shares without complying with these requirements are subject to civil penalties of up to $40,000 per day.[5]

Because the HSR Act is supposed to concern itself only with transactions that may lessen competition, when Congress enacted the statute in 1976 it exempted eleven types of transactions from its filing requirement, and it also authorized the FTC to exempt other acquisitions "not likely to violate the antitrust laws."[6] The most prevalent and

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1 15 U.S.C. § 18 (2012).

2 Under the current thresholds, if the transaction is more than $80.8 million but less than $323 million, a filing is necessary only if the "size of person" test is met. 15 U.S.C. § 18a(2)(B); 82 Fed. Reg. 8524 (Jan. 26, 2017). The "size of person" test is satisfied if (a) the ultimate parent entity (UPE) of either the acquiring or acquired person has sales or assets of $161.5 million or more; and (b) the other UPE has sales or assets of $16.2 million or more. 15 U.S.C. § 18a(2)(B)(ii); 16 C.F.R. § 801.1(a)(1); 82 Fed. Reg. 8524 (Jan. 26, 2017).

3 The filing fees currently range from $45,000 to $280,000, depending on the size of the transaction. 16 C.F.R. § 803.9. These fees amount to tens of millions of dollars annually and provide a substantial portion of the FTC's operating budget. The FTC 2018 budget request to Congress projects HSR filing fees of $112.7 million. FED. TRADE COMM'N, CONGRESSIONAL BUDGET JUSTIFICATION, FISCAL YEAR 2018, 2, 4 (2017).

4 15 U.S.C. § 18a; 16 C.F.R. § 803.10.

5 *See* 15 U.S.C. § 18a(g)(1); 16 C.F.R. § 1.98; 81 Fed. Reg. 42,476–78 (June 30, 2016).

6 15 U.S.C. §§ 18a(c), (d)(2)(B); *see also* Premerger Notification; Reporting and Waiting Period Requirements, 53 Fed. Reg. 36,831-03, 36,833 (Sept. 22, 1988) (to be codified at 16 C.F.R. pts. 801–03) ("[W]henever the Commission can

important exemption is the "Investment-Only" carve-out (the I-O Exemption), which applies to "acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer."[7]

Congress created these exemptions intending that the filing requirement would apply only to "the very largest corporate mergers—about the 150 largest out of the thousands that take place every year."[8] But things have turned out quite differently. In recent years, even with its numerous exemptions, the HSR Act's filing requirement has applied to more than ten times the number of transactions originally envisioned.[9] This is in part because the FTC has consistently advanced and enforced an unduly restrictive view of the I-O Exemption. The FTC's interpretation has deprived all types of investors, including large institutions and hedge funds, of the ability to avoid the HSR Act's thirty-day waiting period and substantial filing fees.

Two years after the HSR Act became law, the FTC adopted Rule 801.1(i)(1),[10] which provides: "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[11]

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determine that a class of transactions is unlikely to violate the antitrust laws, it has sought, with the concurrence of the Assistant Attorney General for Antitrust, to exempt such transactions from all notification obligations and the delay inherent in premerger review."); FED. TRADE COMM'N, THIRD ANNUAL REPORT TO CONGRESS PURSUANT TO SECTION 201 OF THE HART–SCOTT–RODINO ANTITRUST IMPROVEMENTS ACT OF 1976, 14 (1979) [hereinafter THIRD ANNUAL HSR REPORT] (stating as a goal of the FTC rules to "minimize[]" "[i]nterference with mergers and acquisitions that do not raise significant antitrust issues").

7 15 U.S.C. § 18a(c)(9); 16 C.F.R. § 802.9 (incorporating statutory exemption). Qualified "institutional investors" are exempted from the HSR Filing Requirement if they acquire stock in the ordinary course of business, solely for the purpose of investment, and as a result of the acquisition will not own more than 15% of the issuer's outstanding voting securities. 16 C.F.R. § 802.64.

8 H.R. REP. NO. 94-1373, at 11 (1976).

9 For fiscal years 2015 and 2014, there were, respectively, 1,801 and 1,663 transactions reported under the HSR Act. FED. TRADE COMM'N, HART–SCOTT–RODINO ANNUAL REPORT, FISCAL YEAR 2015, 1 (2015).

10 *See* 15 U.S.C. §§ 18a(d)(2)(A), (C) (authorizing FTC to "define the terms" used in the HSR Act and "prescribe such other rules as may be necessary and appropriate to carry out the purposes" of the Act).

11 16 C.F.R. § 801.1(i)(1). The Rule includes as an "example" the following: "If a person holds stock 'solely for the purpose of investment' and thereafter decides to influence or participate in management of the issuer of that stock,

Concurrent with enactment of the Rule, the FTC released a "Statement of Basis and Purpose" (SBP), further explaining:

> [M]erely voting the stock will not be considered evidence of an intent inconsistent with investment purpose. However, certain types of conduct could be so viewed. These include but are not limited to: (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.[12]

While the adoption of Rule 801.1(i)(1) and issuance of the SBP left uncertainty regarding the I-O Exemption, with them the FTC made clear that unless the acquirer has "no intention" of *speaking* about any issue arguably bearing on the "formulation, determination, or direction" of a "basic" business decision of the issuer, the acquirer risks losing its eligibility for the Exemption.[13]

The FTC's restrictive interpretation of the I-O Exemption has been reinforced in the intervening years—by both "informal" statements regarding the scope of the Exemption[14]

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the stock is no longer held 'solely for the purpose of investment.'" *Id.*

12 43 Fed. Reg. 33,450, 33,465 (July 31, 1978).

13 16 C.F.R. § 801.1(i)(1).

14 The FTC says that its "[i]nformal interpretations provide guidance from previous staff interpretations on the applicability of the HSR rules to specific fact situations." FTC, *Informal Interpretations*, https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations [https://perma.cc/ZB7Z-D3VC]. In 1990, for example, the Assistant Director of the FTC's Pre-Merger Notification Office (PNO) stated that "if a significant shareholder *makes suggestions* to the issuer's management that it undertake certain actions, whether or not they require shareholder approval, such conduct may be construed as evidencing an intent inconsistent with an investment only intent." John M. Sipple, Jr., Chief, Fed. Trade Comm'n Premerger Notification Office, Remarks Before the N.Y. State Bar Association, Antitrust Section (Jan. 16, 1990) (emphasis added). In 2014, the Premerger Notification Office (PNO) stated: "As long as the shareholders are not engaging in any of the activities inconsistent with investment purpose described in the SBP for the 1978 final rules, *or attempting to influence* the basic business decisions of the issuer in any other way, the exemption is available." FTC, 1407003 Informal Interpretation (July 3, 2014), https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/1407003 [https://perma.cc/BUU8-V2JB] (emphasis added). In 2015, FTC personnel stated on the agency's website that "any investor who is considering *engaging with management* or any person considering taking a

and more than fifteen enforcement actions by the FTC and DOJ for alleged improper reliance on the Exemption.[15] With these statements and enforcement actions, it has become evident that, from the standpoint of the agencies, an acquisition made only for "investment" requires complete passivity at the time of investment and the foreseeable future. Any acquisition accompanied by speech that might influence the management or decisionmaking of the company (which is hardly a clear standard) means the purchase was for purposes other than mere investment.[16] If, at the time of acquisition, the investor *might* in the future speak with management about corporate governance, or executive compensation, or strategic business decisions, then the I-O Exemption is unavailable.[17] Accordingly, investment funds

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board seat should proceed with caution when relying on the Investment-Only Exemption." FTC, *"Investment-only" means just that* (Aug. 24, 2015, 5:25 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/investment-only-means-just [https://perma.cc/HGM4-CQ3M] (emphasis added). Although "informal," these statements are sufficiently "official" that they are maintained on the FTC's website page dedicated to HSR Act enforcement.

15 In 2016, an enforcement action against ValueAct resulted in an $11 million settlement—the largest amount yet paid to resolve an alleged improper reliance on the I-O Exemption. *See* Harry T. Robins & David R. Brenneman, *HSR Act Violations Continue Trend of Heightened Enforcement, Increased Fines in 2016*, MORGAN LEWIS (Jan. 18, 2017) https://www.morganlewis.com/pubs/hsr-act-violations-continue-trend-of-heightened-enforcement-increased-fines-in-2016 [https://perma.cc/E2DU-8YJA]. Prior enforcement actions were filed against Third Point, Biglari Holdings, and other firms, and well as some individuals. *See* Scott A. Sher & Christopher A. Williams, *Rethinking the Investment-Only Exemption*, THRESHOLD, Vol. XV, No. 1, at 56–57 (Fall 2014) https://www.wsgr.com/publications/PDFSearch/sher-1214.pdf [https://perma.cc/JC7A-TP68]; Statement of the Fed. Trade Comm'n, In the Matter of Third Point, File No. 121-0019 (Aug. 24, 2015) [hereinafter FTC Statement in the Matter of Third Point].

16 *See* FTC PNO, Informal Interpretation No. 1304004 (Apr. 09, 2013) ("If the investment is 10% or less and *completely* passive, the exemption is available." (emphasis added)); Plaintiff's Statement of Legal Theory at 6, United States v. Farley, No. 1:92-cv-01071 (N.D. Ill. June 8, 1994) ("The exemption applies only to purchasers who intend to hold voting securities as purely passive investors."); *see also* James W. Mullenix, *The Premerger Notification Program at the Federal Trade Commission*, 57 ANTITRUST L.J. 125, 128 (1988) (Then-Assoc. Dir., FTC Bureau of Competition, explaining: "The position of the Bureau of Competition is that solely for the purpose of investment means solely for the purpose of investment. It does not mean mostly, primarily, partially, largely, or any other '-ly.'").

17 Consider, for example, an investor that has no current plans to engage with management absent an unforeseen occurrence—such as the unexpected death of the CEO, or disclosure of internal accounting irregularities. Most significant investors understandably would want to communicate with management in the event of such developments, but under the FTC's view even this conditional intent to influence "basic business decisions" seemingly would

and advisers that merely keep open the possibility of weighing in on corporate governance matters appear, under the agencies' view, to fall outside the I-O Exemption.

Rule 801.1(i)(1), the SBP, and the agencies' enforcement actions therefore have collectively created powerful incentives for acquirers to forego speech even arguably relating to the business decisions of the issuer. By doing so, acquirers avoid the non-trivial filing fee and otherwise applicable mandatory thirty-day waiting period before proceeding with the transaction. Many acquirers under the 10% threshold unsurprisingly opt for silence, refraining from speaking out about issues potentially bearing on "the basic business decisions of the issuer."[18]

They should not have to do so. While the antitrust laws are unquestionably important for well-functioning markets and a vibrant economy, the government's enforcement of them is subject to constitutional constraints. The enforcement agencies have veered off course by effectively coercing large numbers of speakers that should qualify for the I-O Exemption to abstain from engaging in otherwise permissible speech in order to avoid the HSR filing fee and waiting period (and by coercing others to pay the filing fee and observe the thirty-day waiting period so that they *can* engage in permissible speech), thereby effecting a widespread infringement of the First Amendment, which cannot be justified by legitimate antitrust enforcement objectives.

The I-O Exemption discourages speech addressing important topics—like employee and executive compensation, what business practices to undertake or avoid, and advocacy positions to be taken with government officials.[19] As the ultimate owners of the company, shareholders express their opinions about these and many other subjects. They do so with the encouragement of the U.S. Securities and Exchange Commission (SEC),[20] and in furtherance of their own

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deprive the acquirer of eligibility for the I-O Exemption.

18 16 C.F.R. § 801.1(i)(1).

19 *See* Bilal Sayyed, *A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption*, THE ANTITRUST SOURCE 1 (Apr. 2013) ("The Act may also restrict or discourage shareholders from interacting with management. . . . This disincentive runs counter to policies that encourage more communication between shareholders and management.").

20 During her tenure as SEC Chair, Mary Jo White urged shareholders to "seek engagement with [company management] on an issue first before turning to a shareholder proposal," and management to "embrace" shareholder communication so that "more shareholders will be incentivized to choose direct engagement" with management. Mary Jo White, *Building Meaningful*

fiduciary duties to their investors. The First Amendment safeguards the right to speak and communicate about such issues.[21] In addition, the unwarranted restriction on the expressive rights of those covered by the HSR Act deprives listeners of their First Amendment right to receive and hear that speech.[22]

At least one current and one former FTC Commissioner appear to recognize such problems. On August 24, 2015, the FTC and DOJ filed both a complaint and proposed settlement regarding Third Point LLC's alleged violations of the HSR Act related to the company's 2011 acquisition of stock in Yahoo.[23] Commissioners Maureen Ohlhausen and Joshua Wright, however, dissented from the decision to file a complaint, contesting the agency's "narrow" interpretation of the I-O Exemption as "not in the public interest" because it "is likely to chill valuable shareholder advocacy while subjecting transactions that are highly unlikely to raise substantive antitrust concerns to the notice and waiting requirements of the HSR Act."[24]

A threshold question when evaluating a speech restriction is whether the restraint is content-based—that is, whether it "applies to particular speech because of the topic

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Communication and Engagement with Shareholders, SOCIETY OF CORPORATE SECRETARIES AND GOVERNANCE PROFESSIONALS, 69TH NATIONAL CONFERENCE (June 25, 2015), https://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html [https://perma.cc/B2M7-827H].

21 *See* Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 641 (1994) ("At the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence."); *see also* Paul S. Miller, *Shareholder Rights: Citizens United And Delaware Corporate Governance Law*, 28 J.L. & POL. 51, 67 (2012) ("[A]ll sides agree that shareholders, like corporations, have important First Amendment rights."); *cf.* FEC v. Mass. Citizens for Life, Inc., 479 U.S. 238, 255 (1986) (plurality opinion) ("The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities."); *see also* NAACP v. Button, 371 U.S. 415, 433 (1963) ("The threat of sanctions may deter [the exercise of First Amendment rights] almost as potently as the actual application of sanctions.").

22 *See*, *e.g.*, Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976) (affirming that the First Amendment protects the right of the speaker and the "right of the listener to receive the information sought to be communicated"); Stanley v. Georgia, 394 U.S. 557, 564 (1969) (stating that it is "well established" that the First Amendment protects the "right to receive information").

23 *See* FTC Statement in the Matter of Third Point, *supra* note 15.

24 Federal Trade Commission, In the Matter of Third Point, File No. 121-0019, *Dissenting Statement of FTC Comm'rs* 1 (Aug. 24, 2015) [hereinafter *Dissenting Statement of FTC Comm'rs*]; *see also id.* at 2.

discussed or the idea or message expressed."[25] Whereas "defining regulated speech by particular subject matter"[26] is the most "obvious" example of a content-based regulation of speech, "others are more subtle, defining regulated speech by its function or purpose."[27] And, as the Supreme Court has explained, the Constitution "demands that content-based restrictions on speech be presumed invalid and that the Government bear the burden of showing their constitutionality."[28]

Under the Supreme Court's precedents, the I-O Exemption and FTC's Rule appear to be content-based restrictions on speech because they are directed at communications about specific topics of discussion (i.e., those affecting "the formulation, determination, or direction of the basic business decisions of the issuer.").[29] As such, they should be subject to strict scrutiny, which "requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[30] But even if the Rule were deemed content-neutral, "intermediate" First Amendment scrutiny would apply, requiring that the regulatory scheme not burden protected speech in a manner "disproportionate in light of the relevant regulatory objectives."[31]

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25 Reed v. Town of Gilbert, 125 S. Ct. 2218, 2227 (2015).

26 *Id.*

27 *Id.*

28 Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (citation omitted).

29 In connection with settlement of its recent enforcement action against ValueAct, the DOJ responded to a citizen's public comment asserting that Rule 801.1(i)(1) violates the First Amendment "because it requires a stockholder to pay a sizeable fee and to temporarily refrain from additional stock purchases in order to exercise his or her right to communicate with management about the company," contending the Rule "is content neutral and does not violate the First Amendment." Plaintiff's Response to Public Comment, United States v. VA Partners I, LLC, 16-cv-01672, at 9 (N.D. Cal. Oct. 17, 2016). The DOJ, however, provided no analysis to support its view, and the only case it cited was *Cableamerica Corp. v. Federal Trade Commission*, 795 F. Supp. 1082, 1093 (N.D. Ala. 1992) ("The government has a compelling interest in enforcing the antitrust laws . . . . The incidental restriction on [Plaintiff's] First Amendment rights resulting from the HSR Act reporting procedure is no greater than is essential to the furtherance of the government's interest."). In *Cableamerica*, however, the First Amendment right allegedly infringed was the "right *not* to speak," *id.* at 1092 (emphasis added), and the First Amendment rights discussed here were not raised by the Plaintiff or addressed by the court in that case.

30 *Reed*, 125 S. Ct. at 2231 (quotations omitted).

31 *Id.* at 2235–36. Even when intermediate scrutiny is applicable, a regulation will be sustained only if "it furthers an important or substantial government interest; . . . the government interest is unrelated to the

"The principal purpose of the Act is to facilitate Government identification of mergers and acquisitions likely to violate federal antitrust laws before the proposed deals are consummated."[32] As the House of Representatives report accompanying the bill stated, the HSR Act "giv[es] the government antitrust agencies a fair and reasonable opportunity to detect and investigate large mergers of questionable legality before they are consummated."[33] And there should be no doubt that doing so is a legitimate aim of the federal government. Yet the I-O Exemption, as interpreted in Rule 801.1(i)(1) and applied by the agencies, fails to advance that aim in a fashion sufficiently tailored to avoid infringement of First Amendment rights under either strict or intermediate scrutiny.

The FTC recognized more than thirty years ago that "nearly all acquisitions of 10 percent or less will have no antitrust significance."[34] It is therefore unsurprising that, while the FTC and DOJ subject thousands of transactions under the 10% threshold to the HSR Act's filing requirement, the agencies have never reported blocking or imposing conditions on an acquisition of stock by a minority investor (less than 10%) who was neither a competitor of the issuer nor actively involved on the issuer's board of directors.[35] And if the underlying transaction is unlikely to cause competitive harm under the antitrust laws, then the government has no

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suppression of free expression; and the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 662 (1994); *see also* Packingham v. North Carolina, 137 S. Ct. 1730, 1736 (2017); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980). The "basic analysis" is to consider "the seriousness of the harm to speech, the importance of the countervailing objectives, the extent to which the law will achieve those objectives, and whether there are other, less restrictive ways of doing so." *Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring). The speech restrictions the HSR Act imposes, as explained below, appear unable to survive this third prong of the intermediate scrutiny test.

32 Pharm. Research & Mfrs. of Am. v. FTC, 790 F.3d 198, 199 (D.C. Cir. 2015).

33 H.R. REP. NO. 94-1373, at 5 (1976).

34 53 Fed. Reg. 36,831, 36,837 (Sept. 22, 1988) (to be codified at 16 C.F.R. pts. 801–03).

35 Of 1,801 HSR filings during fiscal year 2015, only 2.7% were even subject to "second requests." Over the last twenty years, the FTC and DOJ have reported challenging more than 900 transactions. Only nine of those actions raised concerns related to an acquirer's ownership of less than 10% of the issuer's stock. Each of those nine investigations, however, involved acquisitions where there was either a vertical or horizontal relationship between the acquirer and the acquired entity. None of the more than 900 transactions involved a non-competitor's acquisition of less than 10% of the issuer's stock.

justification for requiring compliance, which clearly impinges on First Amendment rights.

The FTC seems to acknowledge (unwittingly, we presume) that it has gone astray, stating in 2015 that its enforcement of the HSR filing requirement "does not hinge" on whether the underlying transactions "were likely to produce any competitive harm," adding: "If the FTC's referrals to DOJ depended on whether the underlying transaction is likely to cause any competitive harm, it would undermine our ability to enforce compliance with the HSR Act's notification and waiting period requirements."[36] These statements evidence the uncoupling of the filing requirement from its original and appropriate rationale: identifying transactions likely to pose competitive concerns before they occur. They also reflect the agency's insufficient consideration of the First Amendment burdens their construction of the I-O Exemption imposes.

"[R]egulating speech must be a last—not first—resort," and "if the Government *could* achieve its interests" without restricting speech, then it "must do so."[37] When evaluating whether government action interferes with freedom of speech, courts "must give the benefit of any doubt to protecting rather than stifling speech."[38] In addition, if limiting the availability of the I-O Exemption to those willing to forego otherwise protected speech furthered a legitimate antitrust enforcement objective, that limitation plainly fails to do so in a "narrowly tailored" way, because it restricts more speech "than is essential to the furtherance of that interest."[39]

Here, both antitrust and economic theory, as well as the experiences of the antitrust enforcement agencies, cast serious doubt on the notion that acquisitions of less than 10% of an issuer's stock are likely to lessen competition.[40]

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36 FTC Statement in the Matter of Third Point, *supra* note 23, at 2.

37 Thompson v. W. States Med. Ctr., 535 U.S. 357, 371, 373 (2002) (emphasis added).

38 Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 451 (2007).

39 *Turner*, 512 U.S. at 653, 662.

40 *See Dissenting Statement of FTC Comm'rs*, *supra* note 24, at 4 ("[W]e strongly encourage our colleagues on the Commission and at the Department of Justice's Antitrust Division to explore potential modifications to the HSR Rules or a legislative amendment to the HSR Act designed to eliminate filing requirements for a category of stock acquisitions that have proven unlikely after 40 years of experience to raise competitive concerns."); Sayyed, *supra* note 19, at 8 ("[T]he Commission has twice proposed to exempt all acquisitions of 10 percent or less of an issuer's outstanding voting securities."); *see also* 53 Fed. Reg. 36,831, 36,838 (proposed Sept. 22, 1998) (to be codified at 16 C.F.R. pts. 801–03) (noting that the antitrust agencies appear never to have challenged an

There would be no meaningful interference with the legitimate objectives of the HSR Act were the agencies to require that they be notified about such transactions without also imposing the speech restrictions, which now serve as a precondition for avoiding filing fees and a waiting period.[41] This would allow the agencies to evaluate these transactions just as they do now, but without chilling or preventing otherwise protected speech.

In the unlikely event such an acquisition resulted in the lessening of competition or anticompetitive practices, it would still be subject to Section 7 of the Clayton Act (and other substantive antitrust laws), and the DOJ and FTC have adequate remedies to address any competitive concerns after the transactions are consummated. These transactions, by definition, are not ones in which entities or operations are combined. Ownership of an interest in a company can readily be undone, as at least some FTC Commissioners have recognized.[42]

The overlap in First Amendment and constitutional "vagueness" doctrines further compounds concerns about the impact of the I-O Exemption on freedom of expression. A law is impermissibly vague under the Due Process Clause when it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[43] And "[t]he vice of unconstitutional vagueness" is "aggravated" where a statute "inhibit[s] the exercise of individual freedoms affirmatively protected by the Constitution," requiring

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acquisition of 10% or less).

41 Such notification may be more than is necessary. *See* James J. O'Connell, *Antitrust Enforcement in the Next Administration: A Partial Wish List*, ANTITRUST 5, 7 (Summer 2016) ("[T]he HSR Act itself came about during an age when access to information was far more difficult and limited than it is today. Thanks to the Internet, Google, EDGAR, and countless other sources, any FTC or DOJ staff can command instant and often free access to company and market data far beyond what the framers of the HSR Act could have imagined . . . . [This] suggests that perhaps the idea of requiring parties to even modest transactions to fill out a form and submit it to the agencies, to ensure that the agencies are aware of the deal and get the information they may need to evaluate it, may warrant a 21st century re-evaluation.").

42 *Dissenting Statement of FTC Comm'rs*, *supra* note 24, at 2 ("[A]ny necessary remedies can be obtained post-consummation without imposing a substantial burden on either the agency or the parties.").

43 FCC v. Fox Television Studios, Inc., 567 U.S. 239, 253 (2012) (quoting United States v. Williams, 533 U.S. 285, 304 (2008)); *see also* McDonnell v. United States, 136 S.Ct. 2355, 2373 (2016) (noting that serious constitutional questions arise where the government's construction gives the statute a "standardless sweep").

"rigorous adherence" with Due Process requirements "to ensure that ambiguity does not chill protected speech."[44]

The statutory I-O Exemption is vague because the meaning of "solely for the purpose of investment" is ambiguous, and the statute does not explain what it means. The FTC's attempts to clarify this language through Rule 801.1(i)(1), the SBP, and numerous formal and informal interpretations have also left vague key phrases and terms.[45] The FTC has, for example, expressed that the I-O Exemption be available only if a purchaser has "no intention" to influence a "basic" decision.[46] But it has not defined or provided limiting constructions for any of these terms, which seemingly turn on subjective assessments that could vary by investor and by issuer.[47] This pervasive vagueness would be problematic with respect to almost any regulatory requirement, but it is particularly troubling when free speech is impinged and non-compliance with the government's scheme is punishable by a penalty of $40,000 per day.

What, then, is to be done about the HSR Act's First Amendment problem?

One option is for the FTC and DOJ to abandon their narrow interpretation of the I-O Exemption—starting with amendment of Rule 801.1(i)(1) and the SBP. While an amended rule could take many forms, to avoid impairing First Amendment rights it should abstain from penalizing

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44 Cramp v. Bd. of Publ. Instruction, 368 U.S. 278, 287 (1961); *Fox*, 567 U.S. at 240.

45 *See, e.g.*, Jack Sidorov, *BNA Insights: DOJ's ValueAct HSR Compliance Case Raises Four Questions That Are Hard to Pass Over*, BLOOMBERG BNA: MERGERS & ACQUISITIONS LAW REPORT 1–4 (2016) (analyzing the ambiguity with respect to several aspects of the standard); Malcolm R. Pfunder, *Shareholder Activism and the Hart–Scott–Rodino Act Exemption for Acquisitions of Voting Securities Solely for the Purpose of Investment*, 20 ANTITRUST 74, 77 (Summer 2006) (former Assistant Director of the Premerger Notification Office) ("[T]he uncertainties (and therefore potential risks) in this area are many."); Sher & Williams, *supra* note 15, at 40–41 ("Significant ambiguity and uncertainty exist today as to what it means for an acquisition to be 'solely for the purpose of investment.'").

46 16 C.F.R. § 801.1(i)(1).

47 *Cf*. Buckley v. Valeo, 424 U.S. 1, 76 (1976) (recognizing the "serious problems of vagueness" associated with regulation's use of the term "influence," and applying a limiting construction); Yamada v. Snipes, 786 F.3d 1182, 1188 (9th Cir. 2015) ("assum[ing] without deciding that the term 'influence' may be vague under some circumstances," and upholding regulation by applying a "limiting construction" offered by the regulator); Tucson Woman's Clinic v. Eden, 379 F.3d 531, 554 (9th Cir. 2004) (requirement that physicians treat patients "with consideration, respect, and full recognition of the patient's dignity and individuality" was unconstitutionally vague because such terms had widely varying meanings to different people).

acquirers of relatively small amounts of voting shares for *speaking* about issues, which may affect the company in which the investment is being made.[48] For example, the I-O Exemption could be available so long as an investor does not engage in the *specific* conduct enumerated in the SBP.[49] Or it could be available to anyone acquiring less than 10% of an issuer's voting stock.

A second option is for Congress to amend the HSR Act. If it does, it could elect to exempt from the Filing Requirement all transactions currently small enough to qualify for the I-O Exemption, abandoning the requirement that the acquisition be only for "investment." It could also confer that exemption except when the acquirer is a competitor or has overlapping executives or directors with the company in which the investment is being made.[50] Such amendments to the HSR Act would address virtually all of the First Amendment problems created by the current interpretation and enforcement of the I-O Exemption.

A third path is for an acquirer to challenge the I-O Exemption and Rule 801.1(i)(1) in court. Although the agencies have collectively brought more than fifteen enforcement actions alleging that an acquirer of stock had improperly relied on the Investment-Only Exemption, the target of the enforcement action settled in each instance.

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48 *See* Sher & Williams, *supra* note 15, at 58 ("[T]he FTC should seriously consider clarifying that investor speech—without more—is not inconsistent with the investment-only exemption."). The FTC's current construction of the I-O Exemption stands in contrast to the SEC's regulatory provisions relating to Section 13(d) of the 1934 Act, 17 C.F.R. § 240.13d-1. The purpose of that provision is to provide notice to other shareholders and management that an investor may be seeking to become active in the management of the issuer. Unlike the FTC's regulatory scheme, however, the SEC's regulations: (a) apply a 5% threshold based on the issuer's market capitalization (and not an arbitrary fixed dollar amount irrespective of the company's size); (b) require notice *after* the acquisition (not a pre-acquisition notice-and-wait period); and (c) do not require filing fees in excess of $200,000. While the purpose furthered by Section 13(d) differs somewhat from the antitrust concerns that animate the HSR Act, Section 13(d) demonstrates the FTC's approach to the I-O Exemption could be far more narrowly tailored.

49 The dissenting FTC Commissioners in the Third Point matter proposed such an approach as the "more immediate option" compared with an overhaul of the statutory and regulatory scheme, pointing out that such an approach would be "entirely consistent with previous HSR cases settled by the antitrust agencies." *Dissenting Statement of FTC Comm'rs*, *supra* note 24, at 3–4.

50 The potential antitrust implications of overlapping ownership of horizontal rivals by financial institutions has received recent attention in the academic community. *See*, *e.g.*, Eric A. Posner et al., *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, 81 ANTITRUST L.J. (forthcoming 2017); Einer Elhauge, *Horizontal Shareholding*, 129 HARV. L. REV. 1267 (2016).

Therefore, no court has yet had to grapple with the First Amendment issues discussed here—or other possible constitutional objections, including those based on equal protection[51] or the due process concerns presented by the vagueness of the statutory I-O Exemption and the Rule mentioned earlier. But when the government's interpretation of a statute raises serious constitutional questions, a court is required to consider whether "other permissible and less troubling interpretations exist."[52] Here, a permissible and less troubling interpretation of the I-O Exemption arguably exists. For example, the Court could reject the FTC's Rule and determine that under the statutory exemption an acquisition of voting securities is solely for investment unless there is an intent to "control" the company in which the investment is being made. This construction would bring interpretation of the I-O Exemption into alignment with how one court interpreted the provision in Section 7 of the Clayton Act concerning stock acquisitions made "solely for investment."[53] This interpretation would also be consistent with Congress's original judgment to exclude acquisitions solely for the purpose of investment as "*de minimis* non-control" stock acquisitions.[54] If, however, a court were unable to interpret the I-O Exemption to avoid constitutional infirmity, it could find offending applications of the HSR Act unconstitutional—which would likely lead Congress and the agencies to take action.

These changes (and perhaps others) to the I-O Exemption would address constitutional concerns about its scope and application while preserving the ability of the FTC and DOJ to monitor and enforce compliance with the antitrust laws. Regardless of which precise path is taken, steps to remedy the HSR Act's First Amendment problem are long overdue.

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51 Treating those who wish to purchase stock *and* speak freely differently from those who wish to purchase stock but have no interest in commenting or communicating about the issuing company (the former must notify the government and wait for permission to proceed, while the later may proceed immediately with their purchases without the need for approval) may raise equal protection concerns. *Cf.* Police Dept. of City of Chicago v. Mosley, 408 U.S. 92, 94–102 (1972).

52 Valenzuela Gallardo v. Lynch, 818 F.3d 808, 817 (9th Cir. 2016).

53 *Cf.* United States v. Tracinda Inv. Corp., 477 F. Supp. 1093, 1098–1102 (C.D. Cal. 1979) (interpreting a corollary provision in Section 7 of the Clayton Act concerning stock acquisitions made "solely for investment," 18 U.S.C. § 18 (2012), noting that the "control-investment distinction" is "a most useful judicial tool in tackling the investment exemption issue").

54 *See, e.g.*, H.R. REP. NO. 94-1373, at 11 (1976); S. REP. NO. 94-803, at 8, 66 (1976).