ValueAct Partners and Hart-Scot-Rodino: Ending the Competition Between Investor Interest and Antitrust Law

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VALUEACT PARTNERS AND HART-SCOTT-RODINO: ENDING THE COMPETITION BETWEEN INVESTOR INTEREST AND ANTITRUST LAW

AMY D’AVELLA*

I. Introduction .................................................................................................................. 98
II. The Same Information, Different Standards: Antitrust Law Competes with Securities Law ......................................................................................................................... 99
   A. Hedge Fund Disclosures under the Williams Act and the Hart-Scott-Rodino Act ...................................................................................................................... 99
   B. Williams Act & Wolf Packs .................................................................................... 102
   C. Credit Suisse v. Billings ....................................................................................... 104
   D. Hart-Scott-Rodino Act Enforcement Against ValueAct Partners ........................ 104
III. Disclosure Before v. Disclosure After: Antitrust & Securities Laws Compete ................................................................................................................................. 105
   A. The Credit Suisse Test Part I: Hart-Scott-Rodino Interferes with the Markets ......................................................................................................................... 106
   B. Credit Suisse Test Part II: The Four Factors Applied to ValueAct ..................... 110
   C. ValueAct’s Competitive Impact .......................................................................... 112
   D. Correcting Course with Credit Suisse and the Public Interest Standard ............. 115
IV. Readjusting the Burden and Actually Enforcing Antitrust ................................. 116
V. Conclusion .................................................................................................................. 117

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I. INTRODUCTION

While hedge fund activism has exploded in frequency and debate in recent decades, the financial regulatory world is still adapting to the phenomenon.\(^1\) Designed to be subject to minimal oversight, hedge funds came under fire in the aftermath of the 2008 financial crisis and new rules required additional disclosures to the Securities and Exchange Commission ("SEC").\(^2\) Scholarship on this topic often advocates for more effective reporting mechanisms to disclose hedge fund acquisitions and holdings.\(^3\) But few commentators consider that the disclosure requirements imposed by regulations, particularly those pertaining to antitrust goals, are no longer compatible with the reigning legal framework.\(^4\) A particularly stark example of the failure of corporate law to keep up with activist investors is evident when comparing the freedom the SEC permits hedge “wolf packs” with the limitations the Federal Trade Commission ("FTC") imposes on all activist investors; the latter nullifying the benefits of the former. The 2016 enforcement of the Hart-Scott-Rodino Antitrust Improvements Act ("Hart-Scott-Rodino") against hedge fund ValueAct Partners ("ValueAct") has spooked many activist funds and prompted a discussion of the limits of their abilities within the law.\(^5\) This Note argues that the District Court for the

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1. See Wulf Kaal & Dale Oesterle, The History of Hedge Fund Regulation in the United States, COLUM. L. SCH. BLUE SKY BLOG (Feb. 29, 2016), http://clsbluesky.law.columbia.edu/2016/02/29/the-history-of-hedge-fund-regulation-in-the-united-states/ (detailing the advent of hedge funds as an exception to certain securities regulation and the attempts since the 1980s hold them accountable to oversight rules).

2. Id. (outlining the new requirements imposed on hedge funds by Dodd-Frank including disclosure of firm performance, risk metrics, and positions).


5. See Final Judgment at 4, United States v. VA Partners I, LLC, No. 16-cv-01672 (WHA), 2016 U.S. Dist. LEXIS 163605 (N.D. Cal. Nov. 1, 2016) (holding that the defendants were enjoined from making a covered acquisition without filing and observing the waiting period as required by Hart-Scott-Rodino).
Northern District of California incorrectly approved the ValueAct consent decree because it failed to consider the supremacy of securities law over antitrust law in investor disclosure.6

II. THE SAME INFORMATION, DIFFERENT STANDARDS: ANTITRUST LAW COMPETES WITH SECURITIES LAW

A. Hedge Fund Disclosures under the Williams Act and the Hart-Scott-Rodino Act

The Williams Act, enforced by the SEC, governs public disclosures required by institutional investors, most notably 13(d) and 13(g) filings.7 The Williams Act was passed in 1968 and amends the 1934 Securities Exchange Act (“Exchange Act”).8 Within ten days of acquiring five percent or more of a company’s stock, investors are required to file a 13(d) disclosure statement.9 Under 13(d), investors must also disclose whether they acquired the securities as a member of a group.10

Investors who do not intend to influence the decisions or direction of a company, known as passive investors, are permitted to file a 13(g) when acquiring more than five percent (but less than twenty percent) of a company’s stock.11 The intent of the Williams Act is to update investors on holdings that could potentially impact a company.12 Since passive investors are only holding the stock for purposes of investment and may not shape corporate behavior, the 13(g) form requires less information.13 However,

6. Id. at 7.
10. See id. § 240.13d-1(b)(1)(iii) (citing 15 U.S.C. § 78m(d)(3) (2018)) (“[A group occurs] when two or more persons act as a partnership, limited partnership, syndicate, or other group for the purpose of acquiring, holding, or disposing of securities of an issuer.”).
11. Id.; see also Ethan A. Klingsberg et al., Active vs. Passive Investing: The Struggle of 2 Agencies, LAW360 (July 27, 2016, 1:13 PM), https://www.law360.com/articles/821838/active-vs-passive-investing-the-struggle-of-2-agencies (noting that “passive” investors qualifying for 13(g) status may still engage an issuer on certain corporate governance issues when the investor is also engaging other issuers in its portfolio on the same topics).
13. Id. at 3; see R. Christopher Small, Passive Investors, Not Passive Owners, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (Jan. 21, 2015), https://corpgov.law.har
like the 13(d) form, the 13(g) form must be submitted by passive investors within ten days of the acquisition.14 Schedules 13(d) and 13(g) when filed are made publicly available by the SEC.15

The Hart-Scott-Rodino Act amended the Clayton Antitrust Act of 1914.16 Investors are impacted by the Hart-Scott-Rodino Act when acquiring securities deemed sufficiently significant; they must notify the FTC of their intent to purchase these securities and await FTC approval before purchasing.17 Filings made to the FTC are not made public until approved, unless an investor requests expedited review of securities acquisition requests.18 The investigation period prior to approval generally lasts thirtydays, although it could take longer if the FTC requests additional information.19 Investors seeking to acquire ten percent or less of a company’s stock solely for the purposes of investment are exempt from Hart-Scott-Rodino approval prior to purchase.20

While not codified, the FTC confines the “investment-only” exemption to shareholder “passivity.”21 Passive investors are only allowed to engage in a narrow scope of activity before the FTC approves their securities purchase.22

vard.edu/2015/01/21/passive-investors-not-passive-owners-2/ (explaining that, officially, a passive investor can shape governance issues only in a very limited sense, but that the effects of passive investors on corporate governance issues need further investigation).

22. Rules, Regulations, Statements and Interpretations Under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 43 Fed. Reg. 33,450, 33,465 (July 31, 1978) (noting in background that while voting securities will not preclude an investor from claiming “investment-only” exemption, the following behaviors will: “(1) Nominating a candidate
Investors have long complained that the government’s passivity definition is unclear. In every case that the Department of Justice ("DOJ") or FTC has pursued involving the violation of the Hart-Scott-Rodino Act "investment-only" exemption, the subject of the allegations settles in the form of a consent decree. These consent decree settlements follow procedures set by the Antitrust Procedures and Penalties Act, also known as the Tunney Act. Litigating under the Tunney Act is rarely a viable option for defendants given the time commitment and the time sensitivity of securities purchases. Further, the risk of the steep fines should the defendant lose in court often plays a coercive role in the defendant’s decision to settle.

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.

23. See Barry A. Nigro, Jr., ValueAct Settlement: A Record Fine for HSR Violation, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. (July 19, 2016), https://corpgov.law.harvard.edu/2016/07/19/valueact-settlement-a-record-fine-for-hsr-violation/ (explaining that there is no case law on the “investment-only” exemption so investors must rely on guidance from settlements, speeches, and informal interpretations, and noting that the broader application of the ValueAct settlement remains uncertain since the government relies on the “totality of the circumstances” of investor behavior to determine whether a violation has occurred).

24. See Scott E. Gant et al., The Hart-Scott-Rodino Act’s First Amendment Problem, 1 CORNELL L. REV. ONLINE 1, 12 (2017). See generally Org. for Econ. Co-operation and Dev., COMMITMENT DECISIONS IN ANTITRUST CASES 3 (2016), https://www.ftc.gov/system/files/attachments/us-submissions-oecd-other-international-competition-fora/1606commitmentdecisions-us.pdf (explaining the consent decree process of settling antitrust cases, which culminates in an agreement between parties, and “begins with the filing of a complaint by DOJ in federal district court that alleges the theory of harm and the relevant markets, along with a Competitive Impact Statement and a proposed final judgment that the Division will ask the court to enter after the public comment period.”).


27. See Philip Goldstein, A Critique of the ValueAct Settlement, HARV. L. SCH. ON CORP. GOVERNANCE & FIN. REG. (Aug. 5, 2016), https://corpgov.law.harvard.edu/2016/08/05/a-critique-of-the-valueact-settlement/ (citing the severe increase in civil penalties as the reason why ValueAct agreed to a consent decree, but does not concede DOJ’s allegations).
The settlements are called consent decrees, and require the DOJ and the FTC to publish a Competitive Impact Statement which details the DOJ’s views on the enforcement.\textsuperscript{28} The DOJ and the FTC must technically allow for a sixty-day public comment period before a district court may enter judgment on a consent decree.\textsuperscript{29} Judges publish a decision on consent decrees based on a public interest standard of review.\textsuperscript{30} This benchmark is highly contentious for its alleged lack of clarity.\textsuperscript{31}

Though judges overseeing Tunney Act proceedings rarely disapprove of a proposed consent decree, they are permitted to exercise their discretion in evaluating 1) the decree’s competitive impact, and 2) the impact of the decree “upon the public generally and individuals alleging specific injury.”\textsuperscript{32} While the courts typically give extreme deference to the DOJ or FTC, the intent of the 2004 revisions to the Tunney Act was to give judges little flexibility.\textsuperscript{33}

\textbf{B. Williams Act & Wolf Packs}

The Williams Act created a loophole where shareholders can collaborate without disclosing their holdings or united efforts.\textsuperscript{34} As long as investors do not conspire to create formal agreements with other shareholders to act

\begin{itemize}
\item \textsuperscript{28} 15 U.S.C. § 16(b).
\item \textsuperscript{29} See Ben James, Senators Say DOJ Is Ignoring the Tunney Act, LAW360 (Sept. 28, 2006, 12:00 AM), https://www.law360.com/articles/10947 (citing a letter from members of Congress alleging that the DOJ allows mergers to go forward before the formal completion of the Tunney Act process culminating in the sixty day review period wherein the public may comment and the courts officially approve of the consent decree).
\item \textsuperscript{30} 15 U.S.C. § 16.
\item \textsuperscript{31} See Lawrence M. Frankel, Rethinking The Tunney Act: A Model for Judicial Review of Antitrust Consent Decrees, 75 ANTITRUST L. J. 549, 550, 570 (2008) (explaining that the purview of a judge when evaluating a Tunney Act consent decree is vague despite a 2004 amendment that attempted to solidify a judge’s evaluative framework).
\item \textsuperscript{32} 15 U.S.C. § 16(e); see also Rachel Frank, Comment, Still Mocking Judicial Power?: Determining Deference Accorded to the Justice Department in Reviewing Consent Decrees in Horizontal Mergers, 9 ELON L. REV. 171, 204 (2017) (noting that while district court rulings on Tunney Act consent decrees do not have force of law they still have some influence on precedent and provide direction to DOJ).
\item \textsuperscript{33} 15 U.S.C. § 16(g); see ORG. FOR ECON. CO-OPERATION AND DEV., supra note 24, at 4 (stating that when considering a Tunney Act consent decree courts may not “substitute its opinion on the best way to resolve the government’s claims. . .”).
\item \textsuperscript{34} 17 C.F.R. § 240.13d-1(b)(ii)(k) (2018); see David A. Katz, Section 13(d) Reporting Requirements Need Updating, HARV. L. SCH. FORUM ON CORP. GOVERNANCE & FIN. REG. (Apr. 12, 2012), https://corpgov.law.harvard.edu/2012/04/12/section-13d-reporting-requirements-need-updating/ (citing a 2011 petition to the U.S. Securities and Exchange Commission that advances a ten-day disclosure window which would allow investors to acquire a significant portion of stocks discreetly).
\end{itemize}
collectively and as long as an individual holds less than five percent of a company’s shares, investors can dodge group disclosures. This phenomenon, known as a “wolf pack,” is defined as “a loose network of activist investors that act in a parallel fashion but deliberately avoid forming a ‘group’ under section 13(d)(3) of the [Exchange Act].” These packs are often driven by a “lead wolf” who sets the action plan for other shareholders to follow; hedge funds often fill this lead role.

Though not explicitly regulated in SEC rules, the United States Court of Appeals for the Second Circuit authorized wolf packs so long as they do not collude for the acquisition of stock. John Coffee and Darius Palia, leading experts on the wolf pack tactic and its evolution, analyzed recent court rulings and found judges reluctant to find the existence of a group even when a shareholder block clearly pushed the boundaries of prohibitions against collectively acquiring and voting shares. Wolf packs are a highly controversial vehicle that many stakeholders think cheat the Williams Act instead of complying with it. Though the SEC is well aware of the complaints about its reporting process, which is alleged to facilitate wolf pack behavior, it has yet to change those disclosure rules.

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35. See John C. Coffee, Jr. & Darius Palia, The Wolf at the Door: The Impact of Hedge Fund Activism on Corporate Governance, 41 J. CORP. L. 545, 568 (2016) (explaining how wolf packs escape disclosure because the SEC sees “parallel action by like-minded activist investors, even when accompanied by discussions among them, does not, without more, give rise to a group for purposes [of disclosure].”).

36. Id. at 562.

37. See Slawotsky, supra note 3, at 298–99 (explaining that a lead investor will acquire five percent or more of a company and in the ten-day period before they must publicly disclose their purchase will both continue to acquire stock and also let other investors know of their activist plans; the end result is an informal shareholder block which is aligned in activist intent but has not formed a formal agreement).

38. 17 C.F.R. § 240.13d-1(b)(ii)(k); CSX Corp. v. Children’s Inv. Fund Mgmt. LLP, 654 F.3d. 276, 282–83 (2d Cir. 2011).

39. See Coffee & Palia, supra note 35, at 568 (listing the following types of shareholder blocks that were found not to be a “group”: (1) “two Schedule 13D filers and a Schedule 13G filer... where one was a well-known raider and all three discussed among themselves how to improve the value of the target company”; and (2) “a joint slate of directors proposed by the investors”).


41. See Comments on Rulemaking Petition, supra note 40 (considering petitions but not listing any official revisions to 13(d) disclosures).
Securities and antitrust law are often at odds in questions of corporate noncompliance.\(^4\) In *Credit Suisse Securities (USA) LLC v. Billing*,\(^4\) the Supreme Court questioned not whether securities or antitrust laws were broken, but if they were reconcilable.\(^4\) Respondents brought a claim against Credit Suisse arguing that the brokers colluded to drive up securities prices.\(^4\)

Antitrust and securities law came into conflict because, while initial public offerings ("IPOs") are governed by securities law, the petitioners brought an antitrust suit.\(^4\) The Court applied a four-part test to determine whether antitrust law should not be enforced: 1) the issue is "squarely within" securities regulations; 2) the SEC wields authority; 3) the SEC is actively regulating; and 4) there exists "serious conflict" between the antitrust and securities regulatory bodies.\(^4\) In holding that the antitrust laws did not apply, the Court ruled that "antitrust action in this context is accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address competitive conduct."\(^4\)

D. Hart-Scott-Rodino Act Enforcement Against ValueAct Partners

In 2016, the DOJ issued a Hart-Scott-Rodino Act enforcement against the hedge fund ValueAct for failure to qualify for the "investment-only" exemption.\(^4\) This enforcement was not only the largest Hart-Scott-Rodino "investment-only" penalty to date, but also the most stringent governmental interpretation of passivity.\(^4\)

The ValueAct complaint cited the fund's accumulation of stock in both Baker Hughes and Halliburton, following the announcement of the planned

\(^{42}\) Is There Life After Trinko and Credit Suisse? The Role of Antitrust in Regulated Industries: Hearing Before the H. Comm. on the Judiciary, 111th Cong. 5 (2010) (statement of Howard Shelanski, Deputy Director for Antitrust, FTC) (detailing a long history of litigation to determine when antitrust law applies to regulated industries, such as securities).


\(^{44}\) *Id.* at 267.

\(^{45}\) *Id.* at 269–270.

\(^{46}\) *Id.* at 268–269.

\(^{47}\) *Id.* at 274.

\(^{48}\) *Id.* at 284.


\(^{50}\) See Nigro, *supra* note 23 (noting that ValueAct penalty was close to twice as large as the largest ever prior Hart Scott Rodino settlement); Klingsberg et al., *supra* note 11 (citing the ValueAct settlement as the potential spark of a new direction in shareholder activism because the enforcement targeted communication between investors and companies that is common practice).
merger between the two companies.\textsuperscript{51} The DOJ alleged ValueAct broke the law by not 1) providing the government with notice of its intent to acquire the stock, nor 2) observing the waiting period during which the government would approve or deny ValueAct’s request for purchase.\textsuperscript{52} According to the DOJ, ValueAct did not meet the “investment-only” exception because it intended at the outset to become involved in decision making at Baker Hughes and Halliburton.\textsuperscript{53} The consent decree that the DOJ reached with ValueAct required ValueAct to abstain from a long list of communications with entities in which they invested prior to government approval.\textsuperscript{54}

III. DISCLOSURE BEFORE VS. DISCLOSURE AFTER: ANTITRUST & SECURITIES LAWS COMPETE

The ValueAct court made two fundamental errors in its judgment against the hedge fund to allegedly violate the Hart-Scott-Rodino Act.\textsuperscript{55} First, it failed to recognize that Hart-Scott-Rodino interferes with the administration of securities law by imposing a preemptive disclosure requirement on investors who would otherwise be able to discretely make purchases under the Williams Act.\textsuperscript{56} Securities law values the ability of investors to disclose investments only after completion, as evidenced by the Williams Act and the evolution of wolf packs which legally push the Williams Act’s boundaries.\textsuperscript{57} The ValueAct court should have applied the test established by Credit Suisse to find that Hart-Scott-Rodino cannot force investors to comply with

\textsuperscript{52} Id. ¶ 19.
\textsuperscript{53} 15 U.S.C. § 18 (2018); Complaint ¶¶ 4, 12, 13, 16, VA Partners, LLC, 2016 U.S. Dist. LEXIS 163605 (No. 3:16-cv-01672) (arguing among the factors amounting to ValueAct’s failure to meet the exemption was their brand as an activist investor, and communications with its partners and investors about plans to facilitate the Baker Hughes-Halliburton merger).
\textsuperscript{54} See VA Partners, LLC, 2016 U.S. Dist. LEXIS 163605 at *4–5 (prohibiting ValueAct from the following investor actions without government approval: 1) suggesting a merger or acquisition; 2) suggesting a merger or acquisition in which ValueAct holds a stake; 3) developing the terms of a public merger or acquisition; 5) suggesting to the company modifications of corporate structure subject to shareholder approval; and 6) becoming involved in strategy development pertaining to pricing or production).
\textsuperscript{57} See CSX Corp. v. Children’s Inv. Fund Mgmt. (UK) LLP, 654 F.3d. 276, 278–79 (2d Cir. 2011) (holding that wolf packs may form without disclosure).
disclosure requirements that undermine securities markets.58

The court’s second error was the failure to find that the DOJ’s proposed consent decree was not in the public interest and, therefore, should not have been enforced. But for the confines of the Tunney Act,59 the ValueAct court might have recognized that activist investors are an asset to antitrust enforcement as well as corporate governance and performance, and consequently would not have punished ValueAct’s activism.60

A. The Credit Suisse Test Part I: Hart-Scott-Rodino Interferes with the Markets

Credit Suisse established that, when evaluating whether securities law and antitrust law conflict, courts must analyze whether antitrust enforcement is “accompanied by a substantial risk of injury to the securities markets and by a diminished need for antitrust enforcement to address anticompetitive conduct.”61 Looking at both ValueAct and Hart-Scott-Rodino through the lens of Credit Suisse, a court would find that Hart-Scott-Rodino interferes with securities law and market operations, and so is improperly applied to pre-merger antitrust disclosure given its incompatibility with securities disclosures.62 Further, early disclosure prompted by Hart-Scott-Rodino interrupts market operations by diminishing market returns.63 Comparing the freedom of wolf packs, at the extreme end of the permitted activity under the Williams Act, with the oppressiveness of Hart-Scott-Rodino on all activist investors highlights the market obstruction imposed by this particular antitrust regulation on investors.64 Hart-Scott-Rodino systematically

60. See Josè Azar et al., Anti-Competitive Effects of Common Ownership, 73(4) J. FIN. 1513, 1541(2018) (discussing the positive antitrust behavior of activist hedge funds); Alon Brav et al., Hedge Fund Activism, Corporate Governance, and Firm Performance, 63 J. FIN. 1729, 1730 (2008) (finding that hedge funds provide benefits to shareholders through their ability to influence and hold management accountable).
61. Credit Suisse, 551 U.S. at 284.
62. See 15 U.S.C. § 18(a) (requiring government approval and disclosure before purchasing securities of a certain threshold); Credit Suisse, 551 U.S. at 284 (finding antitrust law incompatible with securities law and thus inapplicable when enforcing the antitrust law poses “a substantial risk of injury to the securities markets”).
63. See Credit Suisse, 551 U.S. at 283–84 (holding that antitrust law cannot interfere in the “efficient functioning of the securities markets” when securities law also governs).
undermines the benefits afforded to investors by the Williams Act.\textsuperscript{65}

Though the courts have never revisited \textit{Credit Suisse}, its framework easily applies in evaluating the Hart-Scott-Rodino Act given the contrast between the SEC’s intent\textsuperscript{66} and Hart-Scott-Rodino’s oppressive impact.\textsuperscript{67} The Court held in \textit{Credit Suisse} that the IPO process constitutes an activity “central to the proper functioning of well-regulated capital markets.”\textsuperscript{68} It seems straightforward to draw this conclusion when analyzing ValueAct’s securities activities or when one considers that \textit{Credit Suisse} gave deference to the IPO underwriters’ marketing activities. Both of these actions are analogous to communications between issues and investors, as regulated by Hart-Scott-Rodino.\textsuperscript{69}

Regarding purchase timing, a key element of securities markets, Hart-Scott-Rodino deprives funds the stealth that the Williams Act affords wolf packs and other investors; inopportune disclosure to the issuer can be a significant disadvantage to investors.\textsuperscript{70} When filing a Hart-Scott-Rodino disclosure, investors must choose whether they want to purchase securities earlier, potentially when the market price and influence opportunity is ideal, or wait and enjoy covert acquisition lest a public disclosure increase the stock price and disrupt the firm’s strategy.\textsuperscript{71} A court would find that, in this

\begin{itemize}
\item \textsuperscript{65} See 15 U.S.C. § 18(a) (requiring investors to disclose before purchase); 17 C.F.R. § 240.13d-1(a) (2018) (allowing investors to disclose after purchase); Lucian A. Bebchuk et al., \textit{Pre-Disclosure Accumulations by Activism Investors: Evidence and Policy}, 39 J. CORP. L. 1, 17 (2013) (citing data which indicates that early disclosure causes lower returns to investors).

\item \textsuperscript{66} See Robert G. Vaneko, Comment, \textit{Regulations 14A and 13D and the Role of Institutional Investors in Corporate Governance}, 87 NW. U. L. REV. 376, 383 (1992) (explaining the Congressional intent of the Exchange Act, which the Williams Act amends, is to protect investors by requiring disclosures by market participants).

\item \textsuperscript{67} See 15 U.S.C. § 18(a) (preventing investors from making a stock purchase at the time of their choice, without issuer notification, and without government approval).

\item \textsuperscript{68} \textit{Credit Suisse}, 551 U.S. at 265.

\item \textsuperscript{69} \textit{Id.} at 276 (stating the importance of marketing in the administration of an IPO, governed by securities regulation, should not be obstructed by conflicting antitrust laws).

\item \textsuperscript{70} See Joe Sims & Deborah P. Herman, \textit{The Effect of Twenty Years of Hart-Scott-Rodino on Merger Practice: A Case Study in the Law of Unintended Consequences Applied to Antitrust Legislation}, 65 ANTITRUST L.J. 865, 886 (1997) (arguing that investors following Hart-Scott-Rodino and waiting for government approval of their transactions “may also forgo other strategic opportunities—opportunities that may be lost forever, even if the current transaction is ultimately abandoned.”); \textit{SAYYED}, supra note 4, at 15–16 (noting that among the costs to investors imposed by Hart-Scott-Rodino “include (i) the delayed implementation of efficiencies associated with an acquisition [and] (ii) interference with the market for corporate control.”).

\item \textsuperscript{71} See 15 U.S.C. § 18(a) (requiring investors to seek government approval before securities purchases of a certain size); see also Andrew Ross Sorkin, \textit{One Secret Buffett Gets to Keep}, N.Y. TIMES (Nov. 14, 2011, 9:24 PM), https://dealbook.nytimes.com/2011/11/14/one-secret-buffett-gets-to-keep/?mcubz=0&_r=0 (“[T]he simple disclosure of an
instance, antitrust law quashes the securities law advantage not only in conflict but “overly deter[s] . . . practices important in” the securities purchasing process.  

By comparison, the SEC recognizes the importance of investor freedom by only mandating disclosure after stock purchases are complete, and by giving a broader definition to “passive” investors which allows more investor-issuer engagement without disclosure. As exemplified by its minimal speech regulation in proxy contests, the SEC has further prioritized the liberation of investor-issuer communication. Under the Williams Act, any investor is allowed to communicate with other shareholders and the issuer, whereas the same investors under Hart-Scott-Rodino may not even manifest the intent to influence the issuer, let alone communicate that intent. Given that the SEC has specifically addressed the flexibility it allows in disclosure as compared to Hart-Scott-Rodino, a court would find the Williams Act and Hart-Scott-Rodino Act in conflict.

The Hart-Scott-Rodino Act requires investors to give issuers notice of their intent to purchase shares. Consequently, the law diminishes

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72. Credit Suisse, 551 U.S. at 285; see Ohlhausen & Wright Statement, supra note 4 (expressing concern that enforcement of Hart-Scott-Rodino against funds chills shareholder advocacy).

73. Compare 15 U.S.C. § 18(a) (mandating disclosure and a waiting period before securities purchases), with 17 C.F.R. § 240.13d-1(a) (2018) (requiring disclosure after securities purchases without a waiting period before purchasing). See generally Peter Jonathan Halasz et al., Activism and Passivity: HSR Act and Section 13(d) Developments for Investors, SCHLUETE ROTH & ZABEL (July 18, 2016), https://www.srz.com/images/content/1/4/v2/146491/072816-Activist-Investing-Update-HSR-Act-and-Section-13d-Develop.pdf (explaining that shortly after the ValueAct enforcement was announced, the SEC published guidance specifically articulating that failure to qualify as a passive investor under Hart-Scott-Rodino will not necessarily preclude an investor for qualifying as passive and thus eligible for 13(g) status under the Williams Act).

74. See Thomas W. Briggs, Corporate Governance and the New Hedge Fund Activism: An Empirical Analysis, 32 J. CORP. L. 681, 687 (2007) (describing the SEC’s view of proxy contests, among the most important tools in shareholder activism, citing significant flexibility among investors in how much they must disclose to the SEC and when, which gives shareholders immense freedom in communication).

75. See 17 C.F.R. § 240.13d-1 (refraining from imposing communications limitations between issuers and investors prior to securities purchases); Feinstein et al., supra note 21 (warning investors that expression of intent could jeopardize an investors’ claim of exemption under the “investment-only” rule).

76. See Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, U.S. SEC. & EXCHANGE COMMISSION, https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm (last updated July 14, 2016) (providing guidance on 13(g) filing requirements, and allowing a broader spectrum of “passive” shareholder behavior without disclosure than Hart-Scott-Rodino).

77. Richard B. Holbrook, Jr. et al., Over a Barrel: Strategic Considerations for

78. See 17 C.F.R. § 240.13d-1(a) (giving investors time in between a securities purchase and the issuer’s inevitable discovery).

79. Holbrook et al., supra note 77; Brav et al., supra note 60, at 1730.

80. Holbrook et al., supra note 77.


82. See Bebchuk et al. supra note 65, at 17 (citing data which indicates that early disclosure causes lower returns to investors).

83. See Bebchuk & Jackson, supra note 81, at 49–50 (arguing that shortening disclosure timelines will reduce the number of block shareholders which in turn will reduce stock returns); Slawotsky, supra note 3, at 279 (noting that activist hedge funds “gravitate towards badly managed companies, and without such activists, smaller shareholders are powerless to remedy the situation.”).

84. See Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264, 275 (2007) (holding that when there is a clear repugnancy between securities and antitrust law, securities law supersedes); Complaint ¶¶ 1–6, United States v. VA Partners, LLC, No. 16-cv-01672, 2016 U.S. Dist. LEXIS 163605, at *1 (N.D. Cal. Nov. 1, 2016) (No. 3:16-cv-01672) (finding that communication with an investor of a certain threshold and the issuer without government approval or disclosure violates the Hart-Scott-Rodino Act).

85. See CSX Corp. v. Children’s Inv. Fund Mgmt. LLP, 654 F.3d 276, 309 (2d Cir. 2011) (holding that Hart-Scott-Rodino deters the type of investors who enhance market returns).
may engage with a company free of disclosure as long as they hold less than five percent of its shares.\textsuperscript{86}

The Credit Suisse Court also noted that securities law preempts antitrust laws when the securities law provides a “diminished need for antitrust enforcement to address anticompetitive conduct.”\textsuperscript{87} Critics of Hart-Scott-Rodino point out that it rarely has a significant impact on preventing its stated claim — anticompetitive behavior.\textsuperscript{88} If a court applied Credit Suisse’s emphasis on preventing antitrust litigation that interferes with the securities markets, it would find that Hart-Scott-Rodino obstructs market efficiency by giving companies opportunities to block activist shareholders that securities law does not provide.\textsuperscript{89} A court would also be moved by the same fear articulated by the Credit Suisse Court: “chilling” permissible securities behavior due to a fear of antitrust violations.\textsuperscript{90} The repugnancy is most clear when comparing the freedoms allowed to a wolf pack and the restrictions on an individual investor such as ValueAct.\textsuperscript{91}

\textbf{B. Credit Suisse Test Part II: The Four Factors Applied to ValueAct}

Had the ValueAct court properly shed the Tunney Act confines, it would have applied the long-held precedent that securities law preempts antitrust law when the two conflict.\textsuperscript{92} The Credit Suisse test aptly applies to

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{86} See 17 C.F.R. § 240.13d-1 (2018) (requiring disclosure only after the purchase of five percent or less of an issuer’s securities and without restriction on communications between issuer and shareholder either before or after acquisition).
\item \textsuperscript{87} Credit Suisse, 551 U.S. at 284.
\item \textsuperscript{88} 15 U.S.C. § 18a(a) (2018); see SAYYED, supra note 4, at 15–16, 18 (discussing the disproportional use of agency energy on Hart-Scott-Rodino filing review when most filings present no anticompetitive potential, and only three percent of filings give the FTC pause for further review, which is not to say those applications are not later decided to be nonthreatening and approved).
\item \textsuperscript{89} Credit Suisse, 551 U.S. at 282 (holding that the antitrust claims against securities underwriters were incompatible with securities laws and thus inapplicable because the antitrust laws “forbid[] . . . a wide range of joint conduct that the securities law permits or encourages. . . .”).
\item \textsuperscript{90} \textit{id.} at 283.
\item \textsuperscript{91} \textit{id.} Compare CSX Corp. v. Children’s Inv. Fund Mgmt. LLP, 654 F.3d 276, 309 (2d Cir. 2011) (holding informal shareholder group coordination is permissible under securities law), with United States v. VA Partners I, LLC, No. 16-cv-01672 (WHA), 2016 U.S. Dist. LEXIS 163605, at *1 (N.D. Cal. Nov. 1, 2016) (holding that investors who own a certain threshold of an issuer’s stock may not communicate with the issuer without prior government approval).
\item \textsuperscript{92} See William T. Reid IV, Comment, \textit{Implied Repeal of the Sherman Act Via the Williams Act}: Finnegan v. Campeau Corp., 65 ST. JOHN’S L. REV. 965, 971, 976 (1991) (describing court history of antitrust preemption conditions with examples Silver v. Stock Exchange, a 1963 case where the Supreme Court decided that “antitrust law could coexist
\end{enumerate}
\end{footnotesize}
ValueAct’s behavior and sufficiently nullifies the prosecution under the Hart-Scott-Rodino Act’s “investment-only” exception. ValueAct’s disclosures were “squarely within” the SEC’s purview since ValueAct would be required to report relevant purchases in its 13(d) filing. The SEC would penalize ValueAct for failure to report mandatory disclosures, as the one of the Commission’s primary functions is “actively” regulating disclosures. Further, the SEC has primary authority in investor-company communication and over communications where an investor may purchase securities, which are the two primary limitations imposed on investors under Hart-Scott-Rodino. 

Applying this to the ValueAct case, a court would likely find significant conflict between antitrust and securities laws since the fund would have been entitled to purchase without observing an approval waiting period, and could have also begun engaging with other shareholders, at any time before or after acquisition, without a company disclosure. The latter element is particularly crucial provided that the imposition of the former did not render the workings of the latter ineffectual” and Finnegan v. Campeau Corp., a 1990 case where the Second Circuit held “that applying antitrust laws to tender offers would upset the equilibrium of neutrality among bidders, shareholders, and management that the Williams Act seeks to achieve.”

93. Credit Suisse, 551 U.S. at 282 (stating that the involvement of antitrust courts in securities matters “mean that the securities-related costs of mistakes is unusually high.”).

94. See 17 C.F.R. § 240.13d-1(a) (2018) (“Any person who, after acquiring directly or indirectly the beneficial ownership of any equity security of a class which is specified in paragraph (i) of this section, is directly or indirectly the beneficial owner of more than five percent of the class shall, within 10 days after the acquisition, file with the Commission, a statement containing the information required by Schedule 13(d).”) (emphasis added)).

95. See Press Release, Sec. & Exh. Comm’n, SEC Announces Charges Against Corporate Insiders for Violating Laws Requiring Prompt Reporting of Transactions and Holdings (Sept. 10, 2014), https://www.sec.gov/news/press-release/2014-190 (“These reporting requirements under . . . Section 13(d) or (g) of the Exchange Act apply irrespective of profits or a person’s reasons for acquiring holdings or engaging in transactions. The failure to timely file a required beneficial ownership report, even if inadvertent, constitutes a violation of these rules.”).

96. See 15 U.S.C. § 18(a) (2018) (limiting interactions between investors and issuers prior to securities purchase approval, also limiting the timing of an investor’s securities purchase); Mary Jo White, Chair, Soc’y of Corp. See’ys & Governance Prof’ls, Building Meaningful Communication and Engagement with Shareholders (June 25, 2015), https://www.sec.gov/news/speech/building-meaningful-communication-and-engagement-with-shareholde.html (ascribing the proxy process, which falls under the SEC’s regulatory authority, as one of the most important communication outlets between shareholders and companies); What We Do, U.S. SEC. & EXCH. COMMISSION, https://www.sec.gov/Article/whatwedo.html (last updated June 10, 2013) (describing the SEC’s authority over communication between investors and shareholders as well as the conditions under which investors may purchase).

97. Compare United States v. VA Partners I, LLC, No. 16-cv-01672 (WHA), 2016 U.S. Dist. LEXIS 163605, at *7–9 (N.D. Cal. Nov. 1, 2016) (holding that an issuer may
because ValueAct was denied the speech privileges under antitrust law when the Exchange Act and SEC regulations clearly permit the same type of communication.98

The Supreme Court in Credit Suisse emphasized that antitrust and securities laws are clearly repugnant when they “produce conflicting guidance, requirements, duties, privileges, or standards of conduct.”99 Under SEC regulations, but not FTC regulations, ValueAct can purchase stock at the opportune moment of their choosing and influence management.100 If a court evaluated a case with similar facts to ValueAct and applied Credit Suisse, it would likely find that a hedge fund’s ability to engage in activist behavior “is central to the proper functioning of well-regulated capital markets.”101

C. ValueAct’s Competitive Impact

The Northern District of California wrongly decided ValueAct because it neglected to properly consider the competitive impact of activist shareholders.102 Hart-Scott-Rodino requires disclosure of securities purchases above a certain threshold by non-passive investors, implying that Congress believes active investors are more likely to stimulate anticompetitive behavior.103 Pre-merger disclosure by activist investors is a

not even manifest intent to engage an issuer on management issues, let alone act on that intent without government approval and disclosure of a securities purchaser), with 17 C.F.R. § 240.13d-1(b) (imposing only disclosure following a securities acquisition, refraining from regulating investor-issuer speech prior to purchase).

98. Compare Complaint ¶ 26, VA Partners I, LLC, 2016 U.S. Dist. LEXIS 163605, (No. 3:16-cv-01672) (citing meetings between securities acquirer and issuer without government approval or disclosure as evidence of Hart-Scott-Rodino violation), with 17 C.F.R. § 240.13d-1 (mandating securities disclosure only after purchase, and does not require issuer-investor communication preapproval).


100. See 15 U.S.C. § 18(a) (requiring securities purchasers to obtain approval before the purchase is complete); 17 C.F.R. § 240.13d-1 (requiring securities disclosure only after acquisition).

101. Credit Suisse, 551 U.S. at 276.

102. 15 U.S.C. § 16(b); see Competitive Impact Statement at 10, VA Partners I, LLC, 2016 U.S. Dist. LEXIS 163605 (No. 3:16-cv-01672) (reiterating the standard which the district court was required to evaluate the ValueAct consent decree, including “the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.”).

103. See Regulations, Statements, and Interpretations Under the Hart-Scott-Rodino Antitrust Improvements of 1976, 43 Fed. Reg. 33,450 (July 31, 1978) (stating that the
misguided attempt to enforce antitrust principles as demonstrated by the ValueAct case which imposed significant consequences upon an investor who did not pose an anticompetitive threat.  

Recent scholarship indicates that horizontal shareholding among large institutional investors as opposed to activist hedge funds poses a significant problem in antitrust. This emphasizes the absurdity of requiring activists to seek permission before acquiring securities when passive investors do not need pre-approval and are a greater threat to anticompetitive behavior. Research shows that the anticompetitive effects of horizontal shareholding emerge without communication between shareholders and management, again underscoring the purposelessness of restricting ValueAct’s discussions with Baker Hughes and Halliburton.

The government’s allegations that ValueAct was attempting to facilitate the merger of Baker Hughes and Halliburton remain unproven because,
while ValueAct did purchase stocks in competing firms, there was no trial.\textsuperscript{108} But, even if ValueAct had discussed the merger with both companies, the proportion of its role as an influencer in a merger decision compared with the burden of applying for securities acquisition does not justify the latter.\textsuperscript{109} Further, activist funds like ValueAct are more likely than passive index funds to spur a company to be more competitive.\textsuperscript{110}

In ValueAct, the FTC had the opportunity to review the antitrust implications and rejected the Baker Hughes-Halliburton merger before it was complete.\textsuperscript{111} But with little connection between its antitrust goals and ValueAct, the FTC still fined them — a single investor in billion-dollar companies — $11 million for possibly having discussions about a potential merger.\textsuperscript{112} If the district court had properly analyzed the competitive impact of ValueAct, it would have recognized that the consent decree did not sufficiently demonstrate ValueAct’s antitrust competitive impact.\textsuperscript{113} Further, the consent decree was not in the public interest because it inhibited the means by which activist shareholders bolster competition and market

\textsuperscript{108} VA Partners I, LLC, 2016 U.S. Dist. LEXIS 163605, at *1; see Nigro, supra note 23.

\textsuperscript{109} See David Benoit, U.S. v. ValueAct: A Lawsuit to Define Activism, WALL ST. J. (Apr. 4, 2016, 7:03 PM), https://www.wsj.com/articles/justice-department-sues-valueact-over-baker-hughes-halliburton-disclosures-1459794637 (noting that as of its last regulatory filings close to the time of DOJ’s complaint against it, ValueAct only owned 5.3% of Baker Hughes and roughly 1.9% of Halliburton).

\textsuperscript{110} See 15 U.S.C. § 18 (2018) (implying that active firms pose a greater risk to antitrust than passive firms since the two only passive investors are exempt from premerger disclosure); Azar et al., supra note 60, at 7 (arguing that activist hedge funds steward the competitive efforts of their issuers, finding that large institutional investors have the opposite effect even if they are “entirely ‘passive’ in terms of corporate governance (other than voting)”).

\textsuperscript{111} See 15 U.S.C. § 46(a) (authorizing the FTC to investigate any business for compliance with antitrust laws); id. § 45(a)(1) (authorizing the FTC to prevent companies from “using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.”); Matt Levine, Sometimes It’s Hard for Owners to Talk to Companies, BLOOMBERG (July 13, 2016, 2:38 PM), https://www.bloomberg.com/view/articles/2016-07-13/sometimes-it-s-hard-for-owners-to-talk-to-companies (arguing that Hart-Scott-Rodino may be helpful to the government’s antitrust agenda but it was unnecessary to apply it to ValueAct since it ultimately blocked the Baker Hughes-Halliburton merger for reasons that had nothing to do with ValueAct’s communication with either company).

\textsuperscript{112} See VA Partners I, LLC, 2016 U.S. Dist. LEXIS 163605, at *1 (alleging no actual antitrust violations against ValueAct but only finding them liable for failure to file a disclosure form).

\textsuperscript{113} See 15 U.S.C. § 16(e)(1)(a) (requiring the court to consider a consent decree in light of its alignment with the public interest and impact on competition in relevant markets).
returns.\footnote{114}

\textbf{D. Correcting Course with Credit Suisse and the Public Interest Standard}

In the absence of the Tunney Act, the ValueAct court may have correctly applied \textit{Credit Suisse} to Hart-Scott-Rodino’s impact on the timing of securities purchase disclosures and found that it improperly interfered with securities regulation.\footnote{115} The system through which the government lodges Hart-Scott-Rodino complaints gives the DOJ and the FTC an oppressive amount of power so that companies almost always settle through consent decrees.\footnote{116} The courts’ “rubber stamp” authority under the Tunney Act has created two legal obstacles in Hart-Scott-Rodino adjudication.\footnote{117} First, a judge has never had the opportunity to offer a clear and consistent definition of “passive investor.”\footnote{118} Secondly, a judge has never applied \textit{Credit Suisse} to Hart-Scott-Rodino cases involving alleged non-passive investors.\footnote{119}

However, if the public interest standard (as dictated by the Tunney Act) must be applied, the district court in \textit{ValueAct} should have recognized that communication between shareholders and issuers is in the public interest because it increases corporate oversight and competition.\footnote{120} In fact, one of

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\begin{itemize}
\item \footnote{114. See \textit{id.} \S 16(e)(1) (requiring judges to determine whether a DOJ consent decree is in the public interest); \textit{VA Partners I, LLC}, 2016 U.S. Dist. LEXIS 163605, at *1; see also Azar et al., \textit{supra} note 60, at 7 (finding activist shareholders benefit competition).


\item \footnote{116. See \textit{JOSEPH G. KRAUSS ET AL., THE TUNNEY ACT: A HOUSE STILL STANDING, THE ANTITRUST SOURCE} 2 (2007), https://www.americanbar.org/content/dam/aba/publishing/antitrust/source/Jan07_Krauss6_20fauthcheckdam.pdf (stating that the 2004 update to the Tunney Act was meant to broaden the judicial standard beyond the previous evaluative benchmark that judges simply ensure that decrees do not mock judicial power).

\item \footnote{117. 15 U.S.C. \S 16; \textit{KRAUSS ET AL., supra} note 116, at 1.


\item \footnote{119. \textit{See Gant et al., supra} note 24, at 12–13 (stating that an “investment-only” allegation against an investor under Hart-Scott-Rodino has never been adjudicated in trial).

\item \footnote{120. \textit{See Ohlhausen & Wright Statement}, \textit{supra} note 4 (responding to the FTC’s enforcement against hedge fund Third Point for violating the “investment-only” Hart-Scott-Rodino exemption saying, “we believe such a narrow interpretation of the}


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the world’s most powerful activist shareholders, Third Point, fought for more
competition during the Dow and DuPont negotiations which represented the
most significant merger in recent years and a big concern among antitrust
watchdogs.121 The ValueAct court was incorrect in finding that ValueAct’s
communication with its stock issuers was not in the public interest and thus
further subverted public interest by failing to revise the passive investor
definition to reflect the positive impact of hedge fund activism.122 The more
accurate determination by the court is that the narrow definition of “passive
investor,” as outlined by DOJ, has the potential to chill investor
communication with shareholders, which the court in Credit Suisse sought
to avoid.123 This is against the public interest as activist shareholders provide
an effective corporate oversight function which has anticompetitive spillover
effects and actually help the FTC in its antitrust goals.124

IV. READJUSTING THE BURDEN AND ACTUALLY ENFORCING ANTITRUST

While the DOJ may consider the ValueAct enforcement to be a boon in
catching anticompetitive behavior before it begins, its impacts have far more
negative results than positive.125 Congress should eliminate all pre-

116

AMERICAN UNIVERSITY BUSINESS LAW REVIEW Vol. 8:1

‘investment-only’ exemption is not in the public interest” given that “the type of
shareholder advocacy pursued by [Third Point] here often generated well-documented
benefits to the market for corporate control.”).

121. See Jack Kaskey, Third Point’s Loeb Suggests Carving DowDuPont Into Six
/news/articles/2017-05-24/third-point-s-loeb-suggests-carving-dowdupont-into-six-
companies (describing Third Point’s efforts to persuade Dow and DuPont to split into
six entities instead of three upon merging).

122. See Sims & Herman, supra note 70, at 885–86 (explaining that the transaction
delays caused by the Hart-Scott-Rodino disclosure process can negatively impact the
economy); see also Bebchuk & Jackson, supra note 81, at 18–19 (citing evidence that
investors who hold blocks of shares, such as activist hedge funds, provides a critical
oversight function which enhances corporate governance).

that antitrust laws may be inapplicable when they could potentially prohibit behavior
otherwise legal under securities law); see also Howard A. Shelanski, The Case for
(articulating that the Credit Suisse decision was based on the Supreme Court’s concern
that lower courts, when confronted with an antitrust claim, would not have the proper
securities law expertise and thus legal securities behavior will be deterred for fear of
antitrust challenges).

in anticompetitive behavior); see also Hadiye Aslana et al., The Product Market Effects
of Hedge Fund Activism, 119 J. Fin. Econ. 226, 227 (2016) (finding that companies react
to the shareholder activism within rival companies by “not only by reducing prices but
also by improving their own productivity, cost and capital allocation efficiency, and
product differentiation”).

125. See Sims & Herman, supra note 70 (detailing the discrepancy in costs to
investment disclosure requirements from the Hart-Scott-Rodino Act and
amend Hart-Scott-Rodino to serve instead as a consent doctrine whereby
investors understand that, with acquisition of stock, they will be subject to
antitrust scrutiny. Consequently, Congress would remove the FTC’s
authority to review and reject securities purchases prior to completion.
Instead of pursuing proactive securities acquisition disclosures, Congress
should empower the FTC to perform reactive monitoring on acquisitions.
This new approach should parallel the approach taken by the SEC in insider
trading cases. An amended Hart-Scott-Rodino should require the FTC to
analyze 13(d) disclosures and utilize big data capabilities to detect unusual
trading behavior that could have anticompetitive impacts. The FTC can
use this information to employ advanced antitrust enforcement mechanisms
and focus agency resources on the entities merging, rather than on the
investors involved.

V. CONCLUSION

The DOJ and United States District Court for the Northern District of
California, were incorrect in issuing the decision against ValueAct; the
District Court should have properly restrained the DOJ from applying
overly-restrictive limitations on investor communication which conflict with
securities laws. The Hart-Scott-Rodino Act interferes with investment
strategy and is incompatible with securities law, as exemplified
by the existence of wolf packs, in contrast to the FTC’s restrictions on activist
investors. The ValueAct decision demonstrates the failures of the Hart-Scott-

126. See 15 U.S.C § 18 (prohibiting securities acquisitions of a certain threshold
without government pre-approval, subject to a discrete list of exemptions).
127. See Daniel M. Hawke, The SEC’s “Trader-Based” Approach to Insider Trading
Enforcement, ARNOLD & PORTER (Sept. 13, 2006), https://www.apks.com/en/perspe-
citives/publications/2016/09/the-secs-trader-based-approach-to-insider (detailing
the SEC’s two approaches to insider trading investigations: the “security based”
approach which relies on news reports, tips, and events to identify trades made immediately before,
and the “trader based” approach which analyzes trading patterns in individual and
institutional investors).
128. See Reuters, Here’s How the SEC is Using Big Data to Catch Insider Trading,
(describing the SEC’s sophisticated trading analytical capabilities).
129. See How Mergers are Reviewed, FED. TRADE COMM’N, https://www.ftc.gov/
news-events/media-resources/mergers-and-competition/merger-review (last visited Feb.
14, 2019) (outlining the merger review process wherein companies seeking a merger
over a certain dollar threshold must get approval before culmination).
LEXIS 163605, at *1 (N.D. Cal. Nov. 1, 2016).
Rodino review structure to properly adjudicate alleged violations.\textsuperscript{131} Therefore, it should be revised to minimize opportunity costs to shareholders and align with the freedoms granted by securities law.\textsuperscript{132}

\textsuperscript{131} 15 U.S.C. § 16.

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