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January 31, 2021

Federal Trade Commission
Office of the Secretary
Constitution Center
400 7th St SW, Suite 5610
Washington, DC 20024

Re: Comments to the FTC's Advanced Notice of Proposed Rulemaking; 16 CFR parts 801-803; Hart-Scott Rodino Rules ANPRM, Project No. P110014

To Whom it May Concern:

The U.S. Chamber of Commerce welcomes the opportunity to provide the Federal Trade Commission (FTC) with top level comments on the advanced notice of proposed rulemaking (ANPRM) to determine potential changes to the Hart-Scott-Rodino (HSR) Act. While the ANPRM seeks specific inputs that are better answered by our members, the Chamber appreciates the opportunity to share with you the following policy considerations as the FTC weighs the feedback it receives from this consultation.

Acquisition Price/Employee Compensation

The ANPRM questions focus on how the acquisition price is calculated for purposes of assessing whether the minimum transaction threshold is met. It specifically asks whether or not employee compensation is included. The Chamber believes that employment-related compensation should not be included in calculating the size of the transaction to determine whether the transaction meets the HSR reporting threshold.

Attempts to include retention bonuses or other forms of employee compensation, including equity compensation (e.g., restricted stock units), in HSR threshold calculations run counter to principles of corporate finance that guard against conflating the value of the target at the time of acquisition with compensation to employees, which is part of the cost of operating the acquired business in the future. Further, the fiduciary duties of a target company's board to its shareholders generally require the board to maximize value for shareholders (not employees) and thus would prevent accepting compensation paid to employees in lieu of consideration for stock paid to the shareholders. This point drives home the difference between the purchase price for the acquisition of the target business or assets and the bonuses or other compensation for employee retention.

When considering acquisitions, buyers commonly evaluate not just the physical assets and intellectual property of the target, but also the employees responsible for creating the target companies' products and/or services. Unlike physical and intangible assets, however, the acquirer does not gain ownership of employees' future services, even though the employees may be important to the successful operation or integration of the acquired business.

Retained employees are often vital to the successful integration of an acquisition. Retention bonuses and other forms of employee compensation incentivize such employees to remain with the business after the acquisition. Where the skill and knowledge of founders and principal employees are key for the future success of an acquisition, retention bonuses may be large, reflecting the employees' importance to the acquired business.

Retention bonuses or equity awards are usually distributed over a set period of years and amounts are fluid and depend on retention and performance years after the acquisition. Thus, these are payments for *future* services, contingent of future performance, and employees can and do leave acquired companies without receiving the full —or even any of the—forecasted value of their retention bonuses. HSR reporting focuses on payments to acquire control at a set point in time, not employee compensation for future work. Any change in reporting guidance that would require valuations to include future employee compensation—in most instances compensation that is not even distributed until several years after an acquisition and dependent on employees remaining employed and meeting certain performance metrics—would misapprehend the purpose of these future payments and introduce great uncertainty into the valuation calculation.

Maintaining a distinction between acquisition price and future employee compensation is prudent: employee compensation for future work is not payment for ownership or control of a target company and thus is not consideration for an acquisition.

Acquisition Price/Debt

The ANPRM seeks input on the inclusion of debt in the acquisition price. As the ANPRM notes, the Premerger Notification Office (PNO) has long taken the view that debt may be excluded from acquisition price in many circumstances, a "position [that] dates from the earliest days of interpreting the HSR Rules. . ." See, e.g., PNO Informal Interpretations 18040001 (Apr. 18, 2018) (confirming purchaser funds used to pay debt of the target are not included in determining the acquisition price for purposes of the HSR size of transaction threshold); 1211011 (Sept. 20, 2012) ("the PNO's current position is that the repayment of debt may be deducted from the acquisition price only where the debt is held by, or secured by, Target."); 1904001 (Apr. 3, 2019) (parties may "reduce the acquisition price by the amount of debt being retired (not assumed) by the buyer").

The Chamber believes that the PNO's long-held position remains appropriate. This treatment is consistent with principles of corporate finance and accounting that distinguishes debt, a liability of the acquired entity, as distinct from equity, associated with control. The PNO's interpretation of debt assumed by the buyer (*i.e.,* essentially a payment *in addition* to payment for the seller's equity) versus the use of the purchaser's funds to retire the seller's debt (*i.e*., a *reduction* in the funds available for the seller's equity) recognizes that distinction, and should not be modified.

Fair Market Value Determinations

The ANPRM seeks comment on the determination of Fair Market Value (FMV), and whether additional guidance from the Commission might provide assistance in the calculation of FMV, in the limited circumstances where such a calculation is necessary. The ANPRM also seeks input on whether the Commission should mandate an independent FMV for selected transactions to ensure consistency with standard valuation practices.

Rule 801.10 provides guidance on whether an FMV calculation is necessary to determine whether an acquisition meets the size of transaction threshold. Pursuant to rule 801.10, a fair market value determination may be necessary for acquisitions in certain, limited circumstances: 1) where the acquisition price is not determined; and 2) for asset acquisitions, even if the acquisition price is determined, because the rule requires a comparison of the FMV to the acquisition price for such asset acquisitions. For example, the acquisition price may be undetermined for transactions where consideration includes contingent payments. The size of transaction in specific, enumerated instances is based on the FMV of the assets, voting securities, or non-corporate interests being acquired. Another example is the acquisition of exempt assets, where the FMV of the non-exempt assets determines whether the acquisition is reportable. Under current rule 801.10(c)(3), the FMV "shall be determined in good faith by the board of directors of the ultimate parent entity included within the acquiring person, or, if unincorporated, by officials exercising similar functions; or by an entity delegated that function by such board or officials."

The FTC, through its Premerger Notification Office, has already addressed these issues with detailed guidance regarding FMV determination, generally only requiring that FMV be determined in good faith and commercially reasonable manner. For example, in a transaction with exempt assets, a reasonable formulation of FMV is what a willing buyer would pay to acquire the nonexempt assets in an arm's length, negotiated transaction, valued as part of an on-going business enterprise. Similarly, in a transaction with contingent payments, a reasonable FMV generally is the amount a third-party buyer, in an arm's length transaction, would pay at present in cash for the stock or assets being acquired without any contingent payment. Thus, because the FMV is defined as what a third-party buyer would pay at present, the amount is typically close to or exactly the same as the acquisition price the buyer has agreed to pay for the transaction.

The FTC's current guidance regarding FMV recognizes that the acquiring person is in the best position to calculate transaction value. It is common for acquiring parties to conduct extensive diligence before negotiating transaction consideration and they may obtain fairness opinions from investment bankers or other analysts for this purpose.

Because the current guidance is appropriate and effective, requiring an independent FMV would be unnecessary and impose unnecessary cost and burden on the parties to the transaction, possibly leading to delays in transaction closings. Thus, the Chamber objects to this provision as it will impose a costly burden on closing parties for no additional insights into transaction value or impact on competition.

Potential Expansions of Filing Requirements

The ANPRM also raises the prospect of increasing the costs and burdens associated with HSR filings by amending the information disclosure requirements for reportable transactions, and, in particular, the scope of the acquiring company's prior acquisition history in Item 8. To be clear, the Chamber is not opposed to amendments to the required HSR disclosures that may help the Agencies better identify acquisitions that raise potential competitive concerns, consistent with the law's recognition of the need to balance the interests of transacting parties in avoiding unnecessary burdens.

The proposed revision to Item 8's requirement to eliminate *any* nexus between the transaction subject to the HSR filing and the required disclosure of the acquiring entity's prior acquisitions over the preceding five years, however, does not meet that basic test. While reliance on overlapping NAICS codes to provide that nexus between the present transaction and prior relevant acquisitions may be imperfect, to eliminate any nexus whatsoever is the equivalent of inviting a "fishing expedition" into long closed transactions with little benefit to the Agencies. Moreover, to the extent that the transaction under review raises potential competitive concerns, the Agencies could certainly request disclosure of prior related transactions as part of any investigation.

Real Estate Investment Trusts

The ANPRM seeks input on the current application of the PNO's ordinary course of business exception to real estate investment trust (REIT) acquisitions of properties and other REITs. The Chamber believes that the PNO's long-held position remains appropriate because: (1) since REITs are required to focus on real estate, acquisitions of real estate assets and REITs are ordinary course transactions that fit squarely within this exception; (2) the rules applicable to REITs have not been revised substantially since the 1980s, and therefore there is no reason for any change to this application of the ordinary course of business exception to REITs; and (3) the costs of REITs unnecessarily filing thousands of HSR notices would greatly outweigh any benefit to the PNO since the vast majority of these transactions have little or no competitive implication due to the fungible nature of most commercial real estate.

Definition of "Solely for the Purpose of Investment"

The ANPRM also seeks to review current rules surrounding acquisitions of voting securities to determine if updates are necessary. Currently, the HSR Act exempts acquisitions that are made solely for the purpose of investment. However, the ANPRM asks if "it is appropriate to rethink the definition of 'solely for the purpose of investment'. The Chamber believes there is an opportunity for modernization through greater alignment with the Securities and Exchange Commission's (SEC) guidelines.

As the ANPRM describes, there are differences in approach regarding passive investment activities by the SEC and the FTC. In particular, "the SEC has a broad view of the types of activities" that demonstrate when an acquisition is made with an intent to change or influence control of the issuer. The SEC understands that investors today expect to have access to managers of their capital on a range of issues, such as informed proxy voting, that are not associated with control of the issuer.

The Chamber is concerned with the FTC's narrower interpretation that may limit engagement with issuer management. There are benefits to a single standard based off the SEC's clear guidance that industry participants readily understand. Accordingly, the Chamber encourages the FTC to consider greater harmonization of its "solely for the purpose of investment" rules with those of the SEC.

The Chamber thanks you for the opportunity to share our views with these comments.

Sincerely,

Sean Heather

Thomas Quaadman