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

Re: Comments to the FTC's Notice of Proposed Rulemaking on Premerger Notification and Waiting Period Requirements; 16 CFR Parts 801- 803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P110014

To Whom it May Concern:

The U.S. Chamber of Commerce (Chamber) welcomes the opportunity to provide the Federal Trade Commission (FTC) with comments on the proposal to modify pre-merger notification requirements under the Hart-Scott-Rodino Act (HSR), to create an exemption for *de minimis* acquisitions of voting securities. Through this letter, the Chamber wishes to convey its views on the proposal and expound upon the benefits of the exemption. However, we also wish to share our concern regarding some of the limitations on the availability of the exemption, as well as the expansion of the definition of "person" in Section 801.1(a)(1) to include "associates." We believe this change will add significant costs and burdens, but more importantly be unworkable. We are also concerned that carving out of the de minimis exemption transactions that involve a competitor or vendor-vendee relationship, which seem unlikely to raise any competitive concerns will impose a burden on parties without providing a corresponding benefit to the Agencies.

The De Minimis Exemption Properly Carves Out Transactions Unlikely to Pose Competitive Risk

The FTC and the Antitrust Division of the Department of Justice (Agencies) have a strong interest in determining which acquisitions are likely to be anticompetitive and challenging them before they are consummated. At the same time, the Agencies have a strong interest in not unduly taxing or delaying transactions that are pro-competitive or competitively neutral. Moreover, with limited resources, it is important for the Agencies to focus their efforts on those acquisitions that are actually likely to raise anticompetitive concerns. Filings are regularly received by the Agencies for acquisitions of 10% or less of a target's voting securities that are not solely for the purpose of investment, but nonetheless present no competition concerns. The proposed *de minimis* exemption properly seeks to exclude such transactions from HSR filing requirements.

The HSR filing requirements should reflect the actual needs of the Agencies and avoid unnecessary procedural burdens on the parties to a transaction, rather than serving as a rote procedural checkpoint. The evidence shows that the Agencies have not identified any acquisitions of less than 10% that presents a significant competition concern.[1] As such, the proposed *de minimis* exemption would be in the best interest of the Agencies.

By eliminating filing requirements for categories of acquisitions that have been demonstrated to be unlikely to create competitive concerns, the Agencies can better allocate and direct resources to the transactions that present the potential for competitive harm. HSR filing requirements also inflict unnecessary burden on deals that do not raise competitive issues. The costs to transacting parties extend beyond just the substantial fees associated with filing. Due to financing and other deal pressures, the waiting period can impact the commercial viability and cost of the transaction, especially for assets mangers. As Commissioner Phillips noted, "[t]oday, in effect, HSR operates as a tax on activities that can often be beneficial. But it is not supposed to be a tax, whether on shareholder input or mergers and acquisitions activities. It is also not supposed to be an early-warning system for tender offers and corporate takeovers…"[2] The proposed amendments would lower this burden on transacting parties, while also addressing the "regulatory burdens of an overbroad HSR requirement for certain minority investments that do not raise competition concerns."[3]

Problematically the De Minimis Exemption is Subject to Limitations that Narrow its Availability

Typically, investors holding less than 10% of the outstanding voting securities of an issuer do not actively participate in the day-to-day business decisions of an issuer. They may participate, along with other significant shareholders, in shareholder engagements designed to discuss the broad strategic decisions of an issuer, but with the primary motive of informing proxy voting decisions and protecting their investment (or also potentially carrying out a fiduciary responsibility), rather than any potentially anticompetitive reason. The proposed exemption would ensure that such transactions are not unduly tied up with unnecessary regulatory filings and review by the Agencies.

However, we are concerned with the Agencies' attempt to define a "competitively significant relationship" and vendor-vendee relationships. First, the *de minimis* exemption would not apply where the acquiring party holds 1% or more of a competitor of the target.

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[1] 16 CFR Parts 801- 803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules, Project No. P110014; Federal Trade Commission, pg. 7 (noting that "from FY 2001 to FY 2017, the Agencies received a total of 26,856 HSR filings, including 1,804 for acquisitions of 10% or less of outstanding stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less.")

[2] Statement of Commissioner Noah Joshua Phillips, *Hart-Scott-Rodino Act Premerger Notification Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking*, Matter No. P110014 (Sept. 18, 2020).

[3] Department of Justine, Office of Public Affairs, *Antitrust Division Supports Modernizing Merger Filing Exemptions for Certain Investments: The Time Has Come to Update the Merger Filing Rules* (Sept. 21, 2020).

Evidence based rule-making is a standard best practice and legal requirement for regulation. It remains unclear whether common ownership of competitors by institutional investors can result in undue influence or other anticompetitive effects. The Chamber believes that the 1% threshold is arbitrary, and an unnecessarily low threshold level of ownership in a competitor to ensure the Agencies receive filings that provide meaningful insight into the impact of holdings in competitors. It is unclear how the Agencies can legally justify such a substantial change beyond the current HSR filings requirements for transactions implicating a speculative academic theory. The Chamber objects to this limitation as the theories of harm concerning common ownership remain hypothetical and untested. Without clear and compelling evidence that common ownership at trivial levels can produce anti-competitive harm, the Agencies should refrain from relying on this theory as the justification for needlessly expanding HSR filings that are costly, burdensome, and unworkable.

Under the NPRM's proposal, *de minimis* exemption would likewise not apply where the acquiring party is a "competitor" of the target – either due to an overlapping NAICS[4] code or competition in any line of commerce with the target. The Chamber understands that this exception is intended to ensure that potentially anticompetitive acquisitions of *de minimis* shares of voting securities dos not occur without notification to the Agencies. However, the term "competitor" is defined very broadly and subjectively under the proposed rules and thus will not be useful or effective at limiting unnecessary filings.

In particular, the first prong of the "competitor" definition, which would include any currently held entity that reports revenues under a single NAICS Code in common with an entity whose voting securities are to be acquired, regardless of whether the two entities are actually competitors. Not only would this exception preclude the use of the exemption when there are no real competitive issues involved, it would require any investor wishing to use the exemption to discern the entire list of NAICS codes used by all entities in which it has an investment. Trying to apply a subjective line of commerce analysis is similarly unworkable and not useful to the Agencies.

The Agencies have suggested that the *de minimis* exemption also would not apply where the acquiring party has a vendor-vendee relationship with the target in which the annual sales exceed $10 million. The Chamber proposes that such a limitation is unnecessary and would be too burdensome to implement. Confirming the existence and value of potential vendor-vendee relationships within a large multi-layered company with numerous subsidiaries would be a substantial undertaking. Again, given the limited risk of anticompetitive harm from investments of less than 10 percent, the Chamber does not believe the burden is worth the potential benefit to the Agencies. If the Agencies insist on the need to receive some information regarding sales between the parties to a transaction, the Chamber encourages the agencies to limit the required information to purchases by the acquiring party from the target, which could at least theoretically raise concerns about input foreclosure, rather than purchases by the target from the acquiring entity, as those sales appear even less potentially relevant to the Agencies concerns regarding not

[4] The North American Industry Classification System (NAICS) is the standard used by Federal agencies in classifying business establishments for the purpose of collecting, analyzing, and publishing statistical data related to the U.S. business economy. Persons submitting HSR filings are required to aggregate their revenues by NAICS code.

having notice of potentially anticompetitive investments that would fall within the *de minimis* exception.

The Agencies have also indicated that the *de minimis* exemption would not apply where the acquiring party has any employee, principal, or agent who also serves as an officer or director of the target, or a competitor of the target. The Chamber does not object to this limitation, which could reduce any concerns about interlocking directorates.

The information necessary to evaluate whether a transaction is exempt from reporting under proposed Section 802.15 should not be unduly burdensome. To reduce the burden, the Chamber encourages the Agencies to consider removing the competitor exception, as well as excluding the proposed vendor-vendee limitation.

Expanding the Definitions of the Person Filing Notification to Include Associates is Costly, Burdensome, Unworkable, and Unnecessary

The Chamber also has serious concerns about the Agencies' proposal to amend the definition of "person" in Section 801.1(a)(1) to include "associates." Although the Chamber recognizes that the proposal seeks to capture more complete filings from investment entities filing as acquiring persons, in practice this proposal will be extraordinarily burdensome and costly, with little probative value. The Commission should abandon this aspect of its proposal.

Investment fund families are often structured in a manner that would cause each separately managed fund in the family to be an "associate" of every other fund as a result of the funds sharing a common investment advisor, even though the funds act independently, generally have broadly diversified shareholder bases, and are not under common "control" for purposes of the HSR Act.[5] Under current HSR regulations, each fund determines any potential HSR reporting obligations separately, without regard to the holdings of other associated funds, unless such funds share a single Ultimate Parent Entity.[6] This treatment is entirely appropriate in light of the independent manner in which these funds invest.

Redefining an acquiring or acquired person to include a fund manager and all the various investment funds advised by that manager would significantly increase the administrative and investment expenses of those funds and impose novel compliance burdens on their advisers. Further, requiring the consolidation of all associated funds for purpose of HSR filings would require the investment manager to monitor and scrutinize, on an aggregated basis, each investment decision of every fund manager under its control, as any investment decisions by one fund manager may inadvertently have an effect on or be affected by another fund.

[5] An "associate" is an entity that: a) has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity; b) has its operations or investment decisions, directly or indirectly, managed by the acquiring person; c) directly or indirectly controls, is controlled by, or is under common control with a managing entity; or d) directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity. 16 C.F.R. § 801.1(d)(2).

[6] See 16 C.F.R. §§ 801.1, 801.2.

Beyond the significant burden such a change would propose, the new filing requirements for “associates” would prove unworkable as well as add a significant and unjustifiable compliance burden for asset managers. It is not practical in the context of investment funds to make notifications that could require potential investments to be held under HSR rules for up to 30 days before closing. For investment funds, the rebalancing of a fund’s portfolio and the time-sensitive nature of investment opportunities are routine considerations that run afoul with the proposed HSR rule as drafted. Investments of this nature need to be executed in seconds, not days, let alone weeks. The HSR proposal clearly lacks a practical understanding of the financial markets and the consequences of potential “freezes” to investors.

The HSR proposal would constrain asset managers’ participation in the capital markets and ability to provide timely capital to U.S. companies. U.S. companies may not be able to obtain capital from asset managers who are subject to the “freezes” described above or who have made the operational decision to avoid investments that could trigger these filings. This could result in higher costs of capital for U.S. companies and the reallocation of meaningful U.S. investor capital away from U.S. companies.

While the Agencies may be interested in examining coordinated acquisitions between associated investment funds, the extraordinary additional burdens this change would place on investors far outweighs any potential probative value. Indeed, under current regulations, HSR filers are required to provide certain information about associated funds, to the extent of their knowledge or belief. This information is appropriately limited, however, to information about overlapping holdings and investments with the target. As a result, the Chamber believes that the Agencies’ current guidelines are more than sufficient for any legitimate need the Agencies may have in assessing a potential investment. For all of these reasons, the proposed HSR changes to capture “associates” should be dropped from the final rule.

Furthermore, we remind the Agencies that investment funds are already subject to strong regulation by the Securities and Exchange Commission (SEC) that includes disclosure requirements similar to those sought under the proposed amendments. In fact, such regulation includes regular reporting through Form 13F reports (as well as schedule13D and 13G filings) by investment managers, which provides transparency into equity ownership by investment managers across all funds over which a manager exercises investment discretion. The amendments as proposed by the Agencies would fundamentally alter fund management with overly burdensome new reporting requirements that would extend far beyond reporting and impose immense financial costs on investors. Moreover, as a result of the Agencies’ proposed aggregation provision, subsequent delays in finalizing investment transactions would harm investors who would have otherwise benefitted from more timely acquisitions or rebalancing of their accounts. Given both the onerous additional reporting requirements on investment managers together with the deleterious impact to investors, the Agencies should not proceed on such proposed amendments without corresponding input and thorough analysis from the SEC.

Conclusion

The Chamber thanks you for the opportunity to comment on this proposed rulemaking regarding Hart-Scott-Rodino coverage and exemptions. We hope these comments are helpful in shaping the conversation to ensure that HSR filing requirements adequately capture the needs of the Agencies in enforcing competition policy and upholding the consumer welfare standard.

Sincerely,

Sean Heather

Thomas Quaadman