



February 1, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Submitted online via <http://www.regulations.gov>

Re: 16 CFR parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014

Dear Madam Secretary,

BlackRock welcomes the opportunity to respond to the Notice of Proposed Rulemaking (the “NPRM”) issued by the Federal Trade Commission (the “FTC”) proposing changes to the premerger notifications rules (the “HSR Rules”) that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “HSR Act”).¹ As an asset manager investing on behalf of diverse clients spanning the investing community, we support a regulatory regime that increases transparency, protects investors and facilitates responsible growth of US capital markets.

The HSR Rules are intended to ensure that US product markets and capital markets remain fair and competitive. Competitive markets are in the best interests of investors, and BlackRock fully supports this objective. BlackRock agrees with the FTC on the need to modernize the HSR Rules. We are, however, concerned that the proposed changes to the HSR Rules’ position calculation methodology are not warranted and would severely impact end investors. BlackRock welcomes the FTC’s intention to enhance the proportionality of the HSR Rules by enacting a new exemption for transactions that are unlikely to harm competition. We are, however, similarly concerned that carve-outs based on speculative theories drastically narrow the new exemption’s availability. We believe that any changes to existing rules must consider their potential impacts on savers, retirees and other end investors, and also ensure the efficient functioning of the equity markets.

In this letter, we provide an asset manager’s perspective in response to the proposals in the NPRM and make several recommendations to safeguard the continued effectiveness of the HSR Rules, in line with the FTC’s objectives, while seeking to mitigate the risk of unintended consequences. We will continue to engage with the FTC on the HSR Rules and welcome further discussion on any of the points that we raise in this letter.

¹ Federal Trade Commission, Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR 77053 (Dec. 1, 2020) (“NPRM”).

Introduction

At BlackRock, we help millions of people build savings that serve them throughout their lives. The money we manage is not our own; it belongs to people who rely on us to act in their best interests. Our clients include pension plans, foundations, charities, official institutions, insurance companies, corporations, and millions of individuals who are largely saving for long-term goals. Their money is allocated and managed according to the terms of an investment management or trust agreement or the governing documents of a fund.²

When BlackRock's clients have assigned us voting rights, we vote on their behalf with the aim of long-term value creation. BlackRock's investment stewardship activities, including proxy voting and issuer engagement, focus on issues that support sustainable long-term performance, such as board composition and effectiveness, governance, and management of environmental impacts. BlackRock does not engage in investment stewardship activities with the aim of dictating issuers' day to day business decisions, which we believe is the responsibility of the issuer's board and management. We also do not seek to use interventional tools to advance our stewardship goals, such as submitting shareholder proposals, nominating directors or soliciting proxies.

BlackRock is a global leader in index investing solutions, offering clients a wide range of index strategies managed against over 1,000 benchmarks. Index investing has profoundly changed the way investors seek returns, manage risk and build portfolios. For nearly 50 years, index investment vehicles have lowered costs and simplified access to diversified investments for all investors, from individual savers to sophisticated institutions. Investors can use index funds to construct diversified portfolios or to take tactical views on certain sectors or geographies. Index strategies are also often used as low-cost building blocks in actively managed portfolio allocation strategies. Index funds help more people build wealth, fund retirement and achieve other key financial goals with more convenience and transparency than ever before.

Executive Summary – Impact of Proposals & Key Recommendations

i. Impact of the HSR Rules on Asset Managers

Under the HSR Rules, certain transactions – including minority acquisitions of voting securities above a certain dollar threshold – require a premerger notification filing to the FTC and the Antitrust Division of the Department of Justice (“DOJ,” and together with the FTC, “antitrust agencies”) by the acquiror (such as an asset manager, on behalf of its clients) and a responsive filing by the issuer of the securities. A notification filing initiates an initial review period of up to 30-days, during which the filer may not purchase additional shares. Each filing incurs a fee ranging from \$45,000 to \$280,000, depending on the size of the proposed transaction.

The HSR Rules today include two important exemptions that are available to asset managers that acquire public equity securities on behalf of their clients. An exemption from filing HSR notifications for holdings of up to 15% of a company's stock is available to funds registered under the Investment Company Act of 1940 (“40 Act funds”), among others (the “institutional

² In this letter we use the term “fund” to refer broadly to the various types of investment vehicles through which asset managers offers their clients investment management solutions globally, including registered funds, unregistered funds and the banks and trust companies that manage and maintain collective trust funds.

investor exemption”),³ and an exemption for holdings of up to 10% is available to other entity types (the “investment-only exemption”).⁴ The availability of both exemptions depends on an investor having “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”⁵ This includes a restriction on nominating candidates to the issuer’s board, proposing actions requiring shareholder approval, or soliciting proxies.⁶ These exemptions are widely used by traditional asset managers, which typically hold securities on behalf of their clients solely for the purpose of investment, allowing them to offer their clients a broad range of investment solutions, including index funds, without having to make premerger notification filings.

ii. Proposed Changes in the NPRM

The NPRM highlights two challenges the antitrust agencies face today and suggests changes to the HSR Rules to address them. First, the NPRM notes that the current ultimate parent entity (“UPE”) rules do not require investment entities filing HSR notifications to disclose substantive information regarding their complete organizational structure and the total economic stake of the issuer being acquired. To close this information gap, the FTC proposes broadening the definition of “person” under the HSR Rules to include a UPE’s “associates.” This change (“associates aggregation”) would require investment entities filing HSRs to disclose information about associated entities and their holdings. As drafted, the proposal would also require the aggregation of holdings across funds under common management when monitoring against the filing and exemption thresholds, including open-end mutual funds, closed-end mutual funds, exchange-traded funds (“ETFs”), hedge funds and collective trust funds (“CTFs”) that share common or affiliated managers.

Second, the NPRM notes that HSR filings for 10% or smaller positions are a drain on the antitrust agencies’ resources and a distraction from transactions that are more likely to present competition concerns. From 2001 through 2017, the antitrust agencies did not challenge any acquisition of 10% or less of a company’s voting securities, out of over 1,800 such filings received. In order to reduce the number of HSR filings received for transactions that “almost never present competition concerns,”⁷ the FTC proposes adopting a new exemption for acquisitions of 10% or less, regardless of the investor’s intent (the “de minimis exemption”). The de minimis exemption would be unavailable when the investor is deemed under the proposed rule to have a “competitively significant relationship”⁸ with the issuer, including when the acquiring person holds more than 1% of the outstanding voting securities of a competitor of the acquired entity or when the acquiring person has a commercial relationship with the acquired entity valued at more than \$10 million annually.

iii. Impact of the Proposed Changes

Associates aggregation would cause the ordinary course investing activities of traditional asset managers to more frequently exceed the HSR exemption thresholds, triggering an exponential increase in the number of HSR filings they file. Becoming subject to an HSR reporting obligation would impair funds’ ability to operate, severely impacting the ability of underlying

³ 16 CFR 802.64.

⁴ 16 CFR 801.1.

⁵ *Id.*

⁶ Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33465 (July 31, 1978).

⁷ NPRM at 77055.

⁸ NPRM at 77061.

investors to meet their investment objectives. These investors would essentially have their stock positions frozen while their HSR filings are pending review by the antitrust agencies, generating significant tracking error and cash drag for index funds and opportunity costs for actively managed funds. This would diminish returns for underlying investors, including pension plans and individuals saving for retirement, and impair the efficiency and attractiveness of US capital markets. Associates aggregation would also undermine the availability of critical exemptions from HSR reporting that play an important role in asset managers' ability to meet the needs of their clients.

We do not believe the FTC has articulated a harm that associates aggregation effectively addresses, nor has the FTC explained how the data it would receive in newly-triggered HSR filings would be used. To the contrary, the FTC has stated that small acquisitions of public securities do not present competition concerns. Associates aggregation artificially combines such acquisitions based on common management, ignoring the fact that funds within one diversified asset manager are each managed in accordance with their own individual investment guidelines. Furthermore, it is difficult to see how acquisitions through index strategies, which are contractually mandated to track an underlying index, could create competition concerns that necessitate such significant filing burdens.

The FTC's proposal to enact a new 10% de minimis exemption that does not require compliance with passivity restrictions correctly recognizes how unlikely it is for most minority stock acquisitions to present competition concerns – indeed, under the FTC proposal, this is even so when an investor seeks to influence an issuer's basic business decisions.⁹ We support the FTC's aim in proposing this new exemption, which has the potential to introduce a meaningful degree of proportionality on the application of the HSR Rules without impacting their effectiveness in protecting competition. We are, however, concerned that proposed carve-outs would narrow the exemption's availability to asset managers like BlackRock that invest broadly across markets for the benefit of unrelated end investors, each with their own individual investment objectives. We do not believe that a sound basis exists for determining that the scenarios addressed in the carve-outs are competitively sensitive and should form the basis for exclusions from the new exception.

iv. Key Recommendations

We believe that the FTC's stated objectives in the NPRM can be achieved in a manner that mitigates the risk of unintended, but potentially far-reaching, harm to investors, companies and the US capital markets. Below are our key recommendations, which are discussed in more detail in this letter:

- 1. Consider a single set of amendments to the HSR Rules that are also responsive to comments received in response to the Advanced Notice of Proposed Rulemaking ("ANPRM").**¹⁰ A single set of amendments would provide the best opportunity to address the well-recognized need for modernization of the HSR Rules to account for changes in investment management and stewardship roles, while providing consistency and certainty to investors, issuers and the capital markets. We address the opportunities for modernization of the HSR Rules and other issues raised in the ANPRM in a supplemental letter we have submitted to the comment file, also included as [Appendix A](#) to this letter.

⁹ NPRM at 77093.

¹⁰ Federal Trade Commission, Advance Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR. 77042 (Dec. 1, 2020).

- 2. Withdraw or refine the associates aggregation proposal, which has not been justified, would not produce actionable data and would severely impact end investors.** The FTC has not demonstrated that investment funds holding minority positions in voting stock present competition concerns that would be addressed through associates aggregation. The FTC has further not demonstrated how data collected from aggregated HSR filings from these types of shareholders will be of use. Freezing purchases during the waiting period would lead to increased risk and diminished returns for underlying investors, the asset owners, and decrease the efficiency and competitiveness of the US capital markets. We urge the FTC to withdraw the aggregation proposal in its entirety.

In the alternative, we suggest three possible ways that the FTC could achieve the stated objective of this measure while minimizing collateral impact:

- a) Exempt institutional investors from aggregation.** The managers of these funds are required by law and applicable fiduciary duties to act solely in the best interest of the specific investors in each fund and not the investors of other funds that may also be managed by the same investment adviser or its affiliates. Aggregating the positions held by institutional investors has not been justified and would impose substantial burdens on end investors that the HSR Rules today explicitly protect.
 - b) Exempt index funds from aggregation.** Index funds, by definition, are rules-based investors, tracking the investment results of an underlying benchmark by investing in the benchmark's constituents at the indicated weightings. They do not make trading decisions accounting for the holdings of any other funds, whether or not they are under common management. Subjecting index funds to aggregation would cripple their ability to accurately track benchmarks and eliminate the core benefit that index investing is designed to deliver. This would directly harm the individuals and institutions that rely on index funds for low cost portfolio construction solutions.
 - c) Tailor the application of aggregation.** Applying associates aggregation selectively to certain areas of the HSR Rules would provide the antitrust agencies with the information they seek on HSR filings, while limiting the impact on ordinary course investment activities. Among other suggestions we make in this letter, the FTC could apply aggregation to filing thresholds but not exemption thresholds.
- 3. Confirm the continued availability of existing exemptions that are critical to asset managers.** If adopted as proposed, associates aggregation would effectively gut several existing exemptions that are critical to asset managers without providing any rationale as to why they should no longer be available for use. The 15% institutional investor exemption may no longer be available to asset managers that hold securities across funds that do (e.g. '40 Act funds) and do not (e.g. UCITS funds) qualify as institutional investors. Further, the exemption for non-US funds' minority acquisitions of non-US issuers' voting securities may no longer be available to US asset managers whose subsidiaries manage non-US funds. This would unfairly advantage managers whose funds are exclusively institutional investors as well as non-US funds that are a part of a non-US asset management organization. Revisions to these exemptions and clarification of how they would be impacted by associates aggregation are required in order to mitigate the risk of these consequences.

- 4. Remove the common ownership carve-out from the de minimis exemption, which is based on a nascent theory that does not provide an adequate basis for rulemaking, does not serve the objectives of the NPRM and adds an element of uncertainty for investors.** While BlackRock supports the creation of a new exemption that is not conditioned on compliance with activity restrictions, the de minimis exemption adopts the common ownership theory – a disputed theory in the academic literature that has been subject to criticism on practical, theoretical and empirical grounds. As currently formulated, the proposal adopts the theory in an extreme form without empirical or theoretical basis: by implementing the extraordinarily low ownership threshold of 1%, not requiring a showing of any attempt by an investor to influence a company and not requiring a finding of concentration or anticompetitive effects in a particular sector.

As proposed, the de minimis exemption would be available only to shareholder activists, hostile bidders and other managers of concentrated portfolios that seek to influence issuers' basic business decisions – the very types of investors that the FTC has frequently found to violate existing HSR Rules. The new exemption would be unavailable to traditional asset managers who manage funds holding broadly diversified portfolios and engage in traditional stewardship activities. Retaining the de minimis exemption while eliminating the common ownership carve-out would support the stated objectives of the NPRM and provide investors with much-needed clarity around their investment stewardship activities.

Detailed Analysis of Changes Proposed Under the NPRM

i. Associates Aggregation

In attempting to solve for one problem identified in the NPRM (incomplete information in certain HSR filings), associates aggregation would exacerbate the other problem identified in the NPRM (unnecessary filings for transactions unlikely to raise competition concerns). As drafted, the associates aggregation proposal would subject end investors, asset managers, companies issuing shares and the antitrust agencies to significant costs and operational burdens.

Under the current rules, the UPE aggregation methodology provides for the disaggregation of certain types of funds that are deemed to be their own UPE. This allows asset managers to monitor against the applicable HSR filing and exemption thresholds separately for each UPE. The UPE methodology reflects the decentralized fiduciary duties that asset managers owe to their many clients. Asset managers offer their clients a wide range of investment solutions through a variety of investment platforms and vehicles, responding to client needs around investment strategies, legal and regulatory requirements and time horizons. Asset managers manage each of these products independently in accordance with the terms of an investment management or trust agreement or the governing documents of a fund.

At BlackRock, securities of a single issuer are commonly held across multiple UPEs in order to meet the needs of our diverse and global client base. This is driven by clients exercising choice around investment strategy, product type and location, and not by a desire to structure investments to remain below filing or exemption thresholds. Requiring the aggregation of positions held across multiple UPEs simply because they are under common management does not reflect the fact that the positions held across multiple UPEs do not represent a unitary position. These positions are not held on behalf of a single client, do not follow a single set of investment guidelines and are not held in furtherance of a single investment objective.

Given the decentralized nature of the ownership and management of positions held across the funds and accounts of a large asset manager, we do not believe that acquisitions of public equities held across multiple UPEs, when considered in the aggregate, raise competition concerns. To the contrary, they represent a collection of small positions, the review of which the FTC has acknowledged are a drain on the antitrust agencies' resources and divert FTC resources and attention from transactions that are more likely to present competition concerns.

In particular, it is difficult to see how acquisitions of public equity securities by multiple index funds under common management raise competition concerns that would be addressed by aggregation. Index funds have captured a growing share of global investible assets over the last decade and represent a significant portion of the public equity securities BlackRock holds on behalf of its clients. Requiring the aggregation of positions held across multiple index funds simply because they are under common management does not reflect the fact that each index fund has a separate contractual duty under its governing documents to track the relevant benchmark. Index funds, by definition, do not make investment decisions accounting for the holdings of any other fund under common management. Given that index funds are inherently indifferent to the investment activities of other funds under common management and do not have control over the inclusion or weighting of an issuer in an index, we do not believe that acquisitions of public equities across multiple index funds, when considered in the aggregate, present competition concerns.

Requiring aggregation across associates would lead to the filing of an exponentially higher number of HSR reports than are filed today, the impact and cost of which would be borne by end investors, which include pension plans and individuals saving for retirement. Large asset managers would be required to file HSR reports for a substantial portion of their portfolio holdings, the companies issuing shares would face the burden of submitting responsive filings, and the antitrust agencies would be tasked with reviewing and opining on each filing. We estimate that BlackRock alone would be immediately required to file 400-500 HSR filings should associates aggregation be adopted in its current form. Trade associations estimate that the asset management industry as a whole may be required to file in excess of 1,000 day-one HSR filings. This would account for an approximately 40% increase over the total number of HSR filings the FTC received in 2020.¹¹ Many more filings would be required on an ongoing basis as investments in affected funds are rebalanced and clients continue to deploy cash in their investment portfolios. The massive volume of filings that would be triggered by the associates aggregation proposal almost certainly outweighs any reduction in filings by the small number of investors who will be eligible to rely on the de minimis exemption.

With an average reporting burden of 47-52 hours per filing according to the FTC's estimate,¹² compliance with the associates aggregation rule would cause asset managers to incur large new expenses, including hiring additional compliance personnel, building new compliance systems, counsel fees and filing fees ranging from \$45,000 to \$280,000 per issuer per filing.¹³

¹¹ <https://www.ftc.gov/enforcement/premerger-notification-program>.

¹² The Paperwork Reduction Act section of the NPRM notes that the Office of Management and Budget estimated burden for HSR filings under the existing rules is 37 hours, and that associates aggregation is estimated to increase the burden by 10-15 hours per filing. This estimate is a considerable understatement and does not reflect the increased burden on issuers who would be required to submit responsive filings. 85 FR 77053, 77065.

¹³ The NPRM asserts that asset managers are "already accustomed to looking into the holdings of those associates," so "requiring additional information about entities that have already been identified should be manageable." While this may be the case for a

These expenses would result in higher investment management fees for investors, further diminishing expected returns for asset owners in a low yield environment. Management fees across the investment management industry, particularly for index funds, have been consistently declining over the years due to technological innovation and robust competition. Today, individuals and institutions can assemble a diversified, global portfolio of assets with a management fee in the single-digit basis points. The very significant costs of regularly making HSR filings would fall directly on end investors, endangering a positive trend that has given more and more savers access to affordable investment solutions.

Furthermore, the requirement to delay an acquisition for up to 30 days while a filing is pending would negatively impact end investors in the form of increased portfolio risk and decreased investment returns. The mandatory delay would generate significant opportunity costs for actively managed funds and both tracking error and cash drag for index funds. Index providers regularly update or “rebalance” their indexes to ensure that the composition of an index adequately reflects its stated methodology. Index funds must expeditiously reconfigure portfolio holdings to match the rebalanced index in order to continue to achieve their index-tracking objective. For context, in 2020, BlackRock traded 5,500 rebalances across its global equity index portfolios. Limiting an index fund’s ability to participate in these time-sensitive index change events could harm a fund’s performance and ability to achieve its investment objectives. This would lead to increased risk for underlying investors – pension plans and individuals saving for retirement – and decrease the efficiency of US capital markets in channeling capital to companies.

Finally, the technical operation and application of associates aggregation would significantly narrow the availability of two additional important exemptions:

Associates aggregation would make the 15% institutional investor exemption unavailable to asset managers offering a variety of investment vehicles, unfairly advantaging those few asset managers whose sole product offerings are through vehicles qualifying as institutional investors. Under the current HSR Rules, the institutional investor exemption is not available when “any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired.”¹⁴ Because asset managers commonly hold shares in a single issuer across entities that 802.64(a) considers to be institutional investors (e.g. ’40 Act funds) as well as entities that are not institutional investors (e.g. UCITS funds), in all but the rarest of circumstances asset managers would no longer be able to avail themselves of the institutional investor exemption. As a result, unless the exception in 802.64(c)(2) is eliminated, associates aggregation would serve as a penalty on asset managers who offer a product suite that includes vehicles other than those listed in 802.64(a). Substantially narrowing the availability of the institutional investor exemption would also contravene Congress’ intent in exempting these entities from HSR reporting in the HSR Act.¹⁵

narrow class of activist investors and private equity firms, this does not accurately reflect how asset managers’ compliance and technology systems operate and significantly understates the impact this operational and financial burden would have on end investors who invest in products offered by the large class of asset managers that do not today routinely make HSR filings in connection with their ordinary course investments.

¹⁴ 16 CFR 802.64(c)(2).

¹⁵ 15 USC 18a(c)(11). “The following classes of transaction are exempt from the requirements of this section [. . .] acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business.”

Associates aggregation would make the foreign-to-foreign exemption unavailable to funds managed by US asset managers, unfairly advantaging non-US funds that are a part of a non-US asset management organization. US asset managers whose non-US funds today rely on the HSR exemption in 802.51(b)(1) for minority acquisitions of a non-US issuer's voting securities may no longer be able to use that exemption at all if the UPE concept is eliminated from the definition of foreign person under 801.1(e)(2). If non-US funds ultimately managed by US asset managers could no longer rely on the exemption in 802.51(b)(1), they would have limited ability to avail themselves of an exemption for acquisition of non-US issuers. This is because meeting the requirements of 802.51(a) - establishing that the non-US issuer does not hold US assets with an aggregate total market value exceeding \$94 million and that its aggregate sales in or into the US did not exceed \$94 million in the most recent fiscal year - is nearly impossible on the basis of publicly available information. As a result, associates aggregation would serve as a penalty on non-US funds that are part of a US asset management organization.

ii. De Minimis Exemption – Common Ownership Carve-out

BlackRock supports the enactment of the de minimis exemption. We believe this exemption is grounded in a reasoned determination that minority acquisitions of voting stock are unlikely to present competition concerns. The de minimis exemption has potential to provide asset managers with additional certainty around their investment stewardship activities. We are, however, concerned that the proposed carve-outs for relationships that are deemed under the NPRM to be competitively sensitive would have the effect of making the de minimis exemption unavailable to asset managers like BlackRock that invest broadly across markets on behalf of their clients. We do not believe that a sound basis exists for determining that these relationships create competition concerns that warrant exclusion from the proposed exception.

Managers of both index and actively managed funds commonly hold positions in competing issuers, either in a single fund or in multiple funds under common management. The carve-out for acquirors holding 1% or greater positions in competing firms is therefore expected to make the proposed de minimis exemption unavailable to large asset managers who invest broadly across capital markets. Ironically, the de minimis exemption will remain available to the small subset of investors who typically hold a small number of concentrated positions, including hedge funds and the activist investors that the FTC has repeatedly found to have violated the HSR Act.¹⁶ When the HSR Statement of Basis and Purpose defined the contours of the 802.9 and 802.64 exemptions, it identified the types of conduct that shareholders use to exert influence over an issuer that may give rise to competition concerns. These actions include nominating a candidate to an issuer's board, proposing action requiring shareholder approval and soliciting proxies.¹⁷ The de minimis proposal now rejects this concept and advances the contradictory proposition that the most activist of shareholders, whose core investment strategy involves seeking to influence firms' basic business decisions, pose less of a competition concern than shareholders who take none of these actions but simply manage diversified portfolios that invest broadly across markets.

¹⁶ See, e.g., *United States v. VA Partners I, LLC*, Case 3:16-cv-01672 (2016); *United States v. Third Point Offshore Fund, Ltd.*, Case 1:15-cv-01366 (2015).

¹⁷ *Premerger Notification; Reporting and Waiting Period Requirements*, 43 FR 33450, 33465 (Jul. 31, 1978).

In explaining the rationale for this carve-out, the FTC acknowledged that the academic debate around the common ownership theory remains ongoing.¹⁸ Far from being settled, the common ownership theory remains hotly contested in the economics, finance and legal literature. Major issues have been identified in the common ownership literature to date, and no plausible causal mechanism has been established. Basing a major rulemaking with far-reaching implications for end investors on an implausible theory that is unsupported by evidence is inappropriate. Putting these concerns aside, there is simply no basis under current US antitrust law for enforcement against a common owner, and, as a result there is no corresponding basis for the common ownership theory to be reflected in the HSR Rules.¹⁹

The manner in which the NPRM incorporates the common ownership theory reflects a particularly extreme and unsubstantiated view of the theory – that overlapping ownership itself, across all industries and without any affirmative intervention by a shareholder, causes an anticompetitive effect. The ownership level at which the NPRM carves-out common holdings – a mere 1% of an issuer’s outstanding voting shares – fails to reflect the very limited influence that a 1% shareholder has over an issuer. There is absolutely no basis to conclude that a 1% shareholder could exert any degree of anticompetitive influence over an issuer even if it were motivated to do so. The NPRM further applies the carve-out to firms across all industries, both concentrated and non-concentrated, without considering whether ownership interests as low as 1% in these scenarios could even theoretically result the kind of harm to competition that would support a finding of a violation under Section 7 of the Clayton Act. This aggressive interpretation of the common ownership theory is not supported by the nascent academic literature on the theory, and we do not believe that this extreme version of the theory forms a sound basis for a reasoned rulemaking.

Indeed, given that the FTC itself has acknowledged that the common ownership debate is unsettled, and there currently is no established framework for the antitrust agencies to analyze such acquisitions and holdings, it is unclear what utility an HSR filing would serve when a shareholder is rendered ineligible to rely on the de minimis exemption in this context. Considering that the HSR form instructions themselves would not require disclosure of 1% holdings in competing entities (or entities reporting in the same NAICS code), an investor that is not able to rely on the new de minimis exemption because it holds a 1% interest in a competitor of the acquired entity would not even be required to disclose that interest in its HSR filing.

HSR reporting is not the appropriate tool for the FTC to use to assess the impact of the common ownership theory, and it is poorly suited for this purpose. HSR was enacted to allow the antitrust agencies to review and potentially challenge mergers and acquisitions before they are consummated, after which assets may be integrated and it becomes difficult in practice to “unscramble the eggs.” If the antitrust agencies were to determine that common

¹⁸ NPRM at 77061 and 77091. This point was reiterated in the FTC staff’s Q&A session on the de minimis exemption on November 10, 2020.

¹⁹ Thomas A. Lambert, *Mere Common Ownership and the Antitrust Laws*, 61 B.C. L. Rev. 2913 (2020). The goal of the HSR premerger notification regime is to give the antitrust agencies an opportunity to review transactions that have potential to violate antitrust laws before their consummation. Liability under Section 7 of the Clayton Act requires a showing that a share acquisition provided a shareholder with a probable mechanism of action to substantially lessen competition. Merely holding 1% of an issuer’s outstanding voting shares without more simply does not meet this standard. If there is no basis under current antitrust law for enforcement on this permutation of the common ownership theory, 1% ownership alone should not disqualify a shareholder from eligibility for the de minimis exemption.

ownership posed competitive concerns, minority stakes in public companies could quickly be divested on the open market. Further, information regarding diversified shareholders' ownership positions in competing entities is already disclosed under Securities and Exchange Commission ("SEC") reporting rules that require 5% beneficial owners to file reports on Schedule 13D or 13G and institutional investors with investment discretion over \$100 million in listed equities to file reports on Form 13F. Imposing a 30-day waiting period and filing fees on ordinary course investment activity where no integration of assets occurs to account for the common ownership theory is unwarranted and places unnecessary burdens on end investors, market participants and the antitrust agencies. If the FTC requires ownership data in a format or at a time that differs from current SEC disclosure rules, a memorandum of understanding between the FTC and the SEC could facilitate enhancements.²⁰ Likewise, if the FTC would require the augmentation of existing filings with additional data or clarifications, the two agencies could cooperate on a joint project to modernize these SEC filings.

iii. De Minimis Exemption – Vendor/Vendee Carve-out

As proposed, the de minimis exemption would also be unavailable when an acquiring person and an acquired entity have a commercial relationship resulting in \$10 million in annual sales in either direction. This is a novel and unproven theory of harm that should not form the basis for rulemaking. We are not aware of any enforcement action brought on a vertical theory of harm where the investment in a vendor or vendee firm was less than 10%. The DOJ/FTC Vertical Merger Guidelines issued in June 2020 and the Commentary on Vertical Merger Enforcement issued in December 2020 do not even mention the concept of competitive concerns arising from minority investments in vertically related firms. We therefore do not believe that a basis has been established to consider vendor/vendee relationships of this size to be competitively sensitive, and do not believe that HSR reporting is the appropriate tool for the FTC to use to assess the impact of these relationships.

Further, the \$10 million threshold proposed in the NPRM is arbitrary and does not account for the commercial significance this size of a relationship has on companies of varied sizes. Large asset managers are consumers of a vast array of commercial services from companies they invest in on behalf of their clients, including leased office space, technology services, water and power. They are also providers of a vast array of commercial services to companies they invest in on behalf of their clients, including risk management services, investment solutions for corporate retirement plans and cash management services for a company's corporate treasury. While the NPRM notes that a final rule may exclude ordinary course goods and services, it's difficult to envision how the FTC could position such an exemption in a way that captures the myriad relationship types that are typical in today's interconnected economy. We strongly recommend that the FTC eliminate the vendor/vendee carve-out from the final rule because the FTC has not demonstrated that such a relationship affects competition.

BlackRock's Recommendations

Below, we provide our recommendations for achieving the objectives of the NPRM while also seeking to mitigate unintended impacts on investors, companies, and the efficiency of US capital markets.

²⁰ Similar to the [Interagency Memorandum of Understanding](#) entered into between the SEC and the DOJ on June 22, 2020 with the aim to "foster cooperation and communication between the agencies."

1. Consider a single set of amendments to the HSR Rules that are also responsive to comments received in response to the ANPRM.

The topics covered in the NPRM and the investment-only exemptions are intrinsically intertwined, and the unavailability of the de minimis exemption to most asset managers makes the need for clarity on the parameters of the 802.9 and 802.64 exemptions more pressing than ever. After 44 years of reporting requirements assessed on a UPE-by-UPE basis, fundamental changes to the aggregation methodology for HSR reporting must be done in tandem with a clarification and broadening of the 802.9 and 802.64 exemptions. A single set of amendments to the HSR Rules would provide the best opportunity to address the well-recognized need for modernization, while preserving consistency and certainty for investors. We address the opportunities for modernization of the 802.9 and 802.64 exemptions and other issues raised in the ANPRM in a supplemental letter we have submitted to the comment file, also included as [Appendix A](#) to this letter.

2. Ensure that the changes to the position calculation methodology under the HSR Rules do not trigger a substantial number of HSR filings for investments that are unlikely to raise competition concerns.

a) Withdraw the associates aggregation proposal

The FTC has not articulated what benefit is served or harm avoided by requiring the aggregation of equity positions held by associates in monitoring to the various HSR exemption thresholds. They likewise have not explained what utility the data disclosed on the HSR filings of aggregated entities would have in helping the FTC evaluate the impact these minority acquisitions of securities have on competition. Considering the lack of justification for the associates aggregation proposal and the significant impact on end investors described above, we urge the FTC to withdraw the aggregation proposal in its entirety.

b) Exempt acquisitions by institutional investors, which the FTC has determined are unlikely to impact competition

In the alternative, the FTC should only move forward with a final rulemaking on associates aggregation in a manner that lessens the burden on investors who invest through funds that are considered institutional investors. To achieve this, the FTC should carve out institutional investors from aggregation in any final rulemaking and explicitly clarify that these entities do not have associates. Carving-out institutional investors would be a simple-to-implement solution to the myriad challenges that associates aggregation presents to end investors and asset managers, especially considering that “institutional investors” is already a defined term under the HSR Act, which includes ‘40 Act funds, banks and trust companies. ‘40 Act funds and CTFs maintained and managed by banks and trust companies are commonly used by individuals and institutions investing to achieve their long-term goals.

In requiring the aggregation of positions held by ‘40 Act-registered mutual funds and ETFs under common management, the associates aggregation proposal ignores the strict regulatory requirements imposing fiduciary duties on their managers. ‘40 Act funds are subject to oversight by boards of directors or trustees, which are typically composed of a majority of independent directors or trustees. These boards engage investment advisers to manage a fund’s day-to-day investment activities. The advisers of these funds are required by law and fiduciary duties to act at all times in the best interests of their investors, not the investors of other funds that may also be managed by the same investment adviser or its

affiliates. A fund board is empowered to terminate an adviser and appoint a new adviser if they believe doing so is in the fund’s investors’ best interest. The impact of the associates aggregation proposal on savers who invest through mutual funds and ETFs would be substantial. These funds managed \$26 trillion of assets in 2019 and made up 23% of households’ financial assets, 58% of defined contribution retirement plan (“DC plan”) assets, and 44% of IRA assets.²¹

Similarly, in requiring the aggregation of positions held by CTFs, the associates aggregation proposal ignores the strict requirements imposing fiduciary duties on bank trustees and managers. Bank-maintained and managed CTFs are subject to oversight by either the U.S. Office of the Comptroller of the Currency (in the case of a bank trustee and manager that is nationally chartered) or the applicable state banking regulator (in the case of a bank trustee and manager that is state chartered), and each CTF is organized as a trust that is legally separate from any other CTF and from the bank trustee and manager. Unlike ’40 Act-registered mutual funds and ETFs, a CTF is also subject to oversight by the U.S. Department of Labor and to the terms of the U.S. Employee Retirement Income Security Act of 1974, as amended (“ERISA”), if ERISA plan assets are invested in the CTF. To invest in a CTF, a client, such as a defined benefit or DC plan, must have a direct fiduciary relationship with the bank trustee and manager under either an investment management or trust agreement. Like the advisers that manage ’40 Act-registered mutual funds and ETFs, a bank that administers and manages a CTF is required by applicable law, including ERISA, to act at all times in the best interests of its fiduciary clients whose assets are invested in that CTF, without regard to any other fiduciary clients whose assets may be invested in other CTFs maintained and managed by the bank or any funds under common management by affiliated advisers. The impact of the associates aggregation proposal on savers, such as DC plan participants, who invest through CTFs would also be substantial. CTFs managed \$3.8 trillion of assets in 2019 and made up over 30% of 401(k) plan assets.²²

Distinct treatment for ’40 Act funds as well as bank- and trust company-managed CTFs is supported by the original HSR Statement of Basis and Purpose,²³ which justified the enactment of the institutional investor exemption on three primary grounds: (i) acquisitions by institutional investors are likely to have an insubstantial effect on competition; (ii) ordinary course investments by institutional investors frequently exceed 10%; and (iii) imposing a waiting period on institutional investors could disrupt the securities markets. Existing FTC guidance also supports distinct treatment for ’40 Act funds that are organized as series of statutory trusts, a common fund structure for mutual funds and ETFs. The FTC staff has previously recognized that trusts do not have associates, and therefore the holdings of ’40 Act funds organized as series of a trust would not have to be aggregated with other investment entities under common management.²⁴ Applying the new aggregation rules to institutional investors would result in harms to end investors that Congress intended to protect through the enactment of the institutional investor exemption, and runs counter to the principles articulated in the Statement of Basis and Purpose that still hold true today.

²¹ https://www.icifactbook.org/ch2/20_fb_ch2

²² Cerulli Associates, The Cerulli Report: U.S. Defined Contribution Distribution 2020 and U.S. Retirement Markets 2020.

²³ Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33465 (July 31, 1978).

²⁴ FTC Premerger Notification Office Informal Interpretation 16110001 <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/16110001>.

c) Exempt index investment products, such as index mutual funds, ETFs and CTFs, as their sole aim is to track a benchmark and they are inherently indifferent to the holdings and investment activities of associated funds

In the alternative, and as proposed in the NPRM,²⁵ the FTC should carve out funds that seek to deliver the performance of an underlying index, including index mutual funds, ETFs and CTFs, from associates aggregation and explicitly clarify that these types of funds do not have associates.

Index funds hold voting securities solely as a means of achieving a financial return that mimics the return of the fund's underlying benchmark, which is generally developed and maintained by an independent third-party index provider. Index providers use rules-based methodologies to define the scope of each index, such as which securities or financial instruments are included and their respective weightings. In order to comply with their governing documents, index funds' holdings in an issuer are dictated by the weight of the issuer in the index developed by the index provider and the amount of assets held by the fund. Index funds, by definition, do not make trading decisions accounting for the holdings of any other fund under common management. Because they are inherently indifferent to the investment activities of other funds under common management and do not have control over the inclusion or weighting of an issuer in an index, the FTC should recognize that common management of index funds is irrelevant to a competition analysis and exempt index funds from associates aggregation.

Investors in index funds are particularly sensitive to the impact of the financial burdens of HSR reporting. Index funds allow end investors, including pension plans and individuals saving for retirement, to construct diversified portfolios at an extraordinarily low cost. These cost savings are driven in part by the scale of large, diversified asset managers – the same managers that would be most impacted by associates aggregation. The ultimate result of associates aggregation will be to increase the cost of saving for retirement and other long-term financial goals for millions of individuals, especially those investing through index strategies.

Investors in index funds are also particularly sensitive to the impact of the 30-day HSR review period. The composition of an index changes frequently as index providers conduct periodic and ad hoc reviews to ensure that issuers meet the criteria outlined in their methodology. For example, providers will rebalance and reconstitute their indexes – reweight and remove or add issuers – based on certain corporate actions (including stock splits, mergers, spin-offs, or bankruptcies) and market conditions. Due to the frequency of index rebalances, an index fund may not be capable of meeting its investment objective of tracking an index if it is subject to a 30-day waiting period on acquisitions. The inability to hold an index component, or to hold it at the proper weighting, can lead to tracking error for index funds, which results in increased portfolio risk that is borne by end investors.

d) Tailor the aggregation requirements to provide the antitrust agencies with better information on HSR filings, while limiting the impact on ordinary course investment activities that have been recognized as not presenting competition concerns

The FTC's stated concerns that associates aggregation aims to address could be remedied by more narrowly tailored rule changes. The following alternative approaches to implementing associates aggregation would provide the FTC with the filings that they believe the current

²⁵ NPRM at 77058.

HSR Rules do not capture and the information regarding competitors that current filings do not provide, while limiting the impact on ordinary course operations of asset managers and lessening the burden of HSR filings on entities that are not relevant to a substantive antitrust analysis. These approaches are not all mutually exclusive, and some could be adopted in parallel to address the FTC's stated goals.

- **The FTC could apply associates aggregation to the size-of-transaction threshold and other HSR thresholds, but not the exemption thresholds under 802.9 and 802.64.** Doing so would address the FTC's concerns around structuring investments across multiple funds to avoid a reporting obligation, such as the example described in the NPRM. Under this approach, a manager that divides an acquisition of voting securities across multiple funds for purposes of evading reporting or in connection with an investment involving seeking to influence an issuer's basic business decisions would still trigger an HSR filing if the value of the securities held across those funds exceeds the size-of-transaction threshold. At the same time, a mutual fund, ETF or bank or trust company that manages and maintains CTFs that does not have evasive intent and does not seek to influence an issuer's basic business decisions could continue to rely on the investment-only exemptions with thresholds measured on a UPE level. The investment-only exemption thresholds should be treated differently from other HSR thresholds, such as the size-of-transaction test, because investors that rely on the investment-only exemptions do not have an intent to participate in issuers' basic business decisions and their trading activity is therefore less likely to impact competition. Continuing to measure the investment-only thresholds at a UPE level would resolve the issues for institutional investors and index funds described above.
 - **The FTC could apply associates aggregation only for the purposes of determining whether an investor qualifies for the new de minimis exemption.** It is logical that in order to take advantage of the new de minimis exemption, all holdings under common management should be aggregated to determine if the 10% threshold is met; otherwise, an activist investor would be able to use the exemption to acquire control of an issuer by dividing holdings across multiple funds. The information gaps the FTC seeks to address through associates aggregation will also be most pronounced in the case of activist investors and hostile bidders who could avail themselves of the new de minimis exemption. These types of investors routinely structure investments across funds in the manner described in the NPRM to avoid a reporting obligation, and their behavior is more likely to give rise to competition concerns than investors that comply with the activity restrictions of the investment-only and institutional investor exemptions.
 - **The FTC could apply associates aggregation to Items 4 through 8 of HSR filings, but not to HSR filing thresholds.** Should an HSR filing be triggered, the FTC would require the filing person to disclose information regarding all of their associates. Doing so would satisfy the stated goal of the NPRM of ensuring that the antitrust agencies are provided with more substantive information about an actual HSR filer, the structure of their funds and the complete analysis of the investor's holdings of the acquired entity. At the same time, this approach would avoid myriad additional filings that the FTC could expect to receive if associates aggregation were applied to HSR filing and exemption thresholds as proposed in the NPRM.
- 3. Confirm the continued availability of existing exemptions that are critical to asset managers, to mitigate the risk of prolonged investor uncertainty.**

If the FTC adopts the associate aggregation rule as proposed without any adjustments, exceptions, or exclusions, we believe that the FTC should, at the very minimum, provide guidance to resolve inconsistencies that this approach would create relating to other elements of the HSR Rules. Specifically, we recommend that the FTC:

- **Eliminate the exception in 802.64(c)(2) so that asset managers can continue to use the institutional investor exemption for acquisitions by an eligible entity of an issuer's securities**, even if their associated non-institutional investor funds also hold an interest in the same issuer's securities, as described above.
 - **Clarify that even where holdings of associates must be aggregated, institutional investors can continue to hold up to 15% across all associated institutional investors and that associate entities that are not institutional investors can hold up to 10% across all non-institutional investor entities, as long as the acquiring person in the aggregate does not exceed 15%.** This clarification is necessary to address a situation where, for example, an institutional investor mutual fund and an associated non-institutional investor fund each hold 5% of an issuer. In this case, the non-institutional investor fund would not be able to acquire any additional shares because the acquiring person would hold 10% in the aggregate, but the mutual fund could still acquire up to an additional 5%.
 - **Ensure that the definition of foreign person under 801.1(e)(2) continues to be based on the UPE concept** so that non-US funds that are part of a US asset management complex could continue to rely on the foreign issuer exemption in 802.51(b)(1) for minority investments in non-US issuers.
 - **Provide practical guidance on how to apply the associates analysis across various complex fund structures.** While the NPRM states that investors are already accustomed to conducting the associates analysis and looking into holdings of associates, that is correct for only a small subset of investors: private equity firms whose core business involves completing M&A transactions and activist investors whose core business involves influencing the basic business decisions of issuers. In contrast, traditional asset managers historically have infrequently filed HSRs for their ordinary course investment activities because of their ability to avail themselves of the investment-only and institutional investor exemptions applied on a UPE-by-UPE basis. If the FTC issues the proposed aggregation rule, it should offer investors the opportunity to submit questions regarding various fund structures and provide guidance on how those fund structures should be analyzed for purposes of aggregation, similar to the Virtual Q&A Sessions that the FTC held in November 2020 on the NPRM and ANPRM.
 - **Release the language of any aggregation rules well in advance of their taking effect**, so that investors can appropriately prepare their compliance monitoring systems and make applicable filings in order to ensure that their funds are not locked out of the markets when the rules ultimately take effect.
4. **Remove the common ownership carve-out from the de minimis exemption, which is based on a nascent theory that does not provide an adequate basis for rulemaking, does not serve the objectives of the NPRM and adds an element of uncertainty for investors.**

As proposed, the de minimis exemption would only be available in practice to shareholder activists, hostile bidders and other managers of concentrated portfolios that seek to influence issuers' basic business decisions, but would be unavailable to traditional asset managers with broadly diversified portfolios. The exemption is therefore unlikely to be effective in supporting the stated objectives of the NPRM and adds an element of uncertainty for investors.

The proposed carve-out takes as its foundation the academic theory of common ownership. As the NPRM itself and the statement from Commissioner Phillips accompanying the NPRM²⁶ both note, the common ownership debate is far from settled. Basing a major rulemaking on an implausible theory that is unsupported by evidence is inappropriate and premature. The growing body of literature finding flaws in the empirical methodology of the foundational common ownership papers has continued to develop, and recent papers have criticized the legal and theoretical framework upon which the common ownership proponents have relied to advocate for regulatory remedies. The de minimis exemption adopts the common ownership theory in its most extreme form - without an adequate basis - by implementing the extraordinarily low ownership threshold of 1%, not requiring a showing of any attempt by an investor to influence a company, not requiring a showing of harm to consumers and not confining the carve-out to issuers operating in a concentrated industry.

As described above, HSR form instructions do not require disclosures of competing investments of this small size in recognition of the fact that they are very unlikely to present competition concerns. As a result, an investor that is disqualified from using the de minimis exemption because it holds a 1% interest in a competitor would not disclose that interest in its HSR filing, creating a significant inconsistency. We urge the FTC to eliminate the common ownership carve-out in its entirety.

5. Remove the vendor/vendee carve-out from the de minimis exemption, which sets an arbitrary cap on ordinary course commercial relationships.

We further urge FTC to eliminate the carve-out from eligibility to rely on the de minimis exemption for vendor/vendee relationships. The competition impact of a vendor/vendee relationship has never been established, nor has it formed the basis of regulatory action in the HSR space. Even the narrowly interpreted investment-only exemptions do not consider a vendor/vendee relationship between an investor and issuer. We are not aware of any enforcement action brought on a vertical theory of harm involving a lower than 10% investment in a vendor or vendee firm. The recently issued DOJ/FTC Vertical Merger Guidelines do not even address the concept of competitive concerns arising from minority investments in vertically related firms. We therefore do not believe that a basis has been established to consider vendor/vendee relationships of this size to be competitively sensitive. The proposed carve-out seeks to ensure that the FTC receives HSR filings for transactions that, based on our understanding, have never been challenged. Prior to incorporating this novel theory of potential harm in a new exemption, we believe that the FTC should first solicit feedback on the types and sizes of vendor/vendee relationships that could have an impact on competition.

In the alternative, we recommend replacing the dollar threshold in the vendor/vendee carve-out with a percentage threshold. This approach would allow the FTC to evaluate materiality on

²⁶ [Statement of Commissioner Noah Joshua Phillips](#), Hart-Scott-Rodino Act Premerger Notification, Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking (Sep. 18, 2020).

the basis of the relative significance a commercial relationship has as a percentage of a vendor's total annual revenue or a vendee's total annual expenses to determine materiality. We further recommend enacting a broad exemption for ordinary course commercial relationships that have been entered into on arms' length terms and conditions in order to protect shareholders' ability to enter into commercial dealings without being concerned that those relationships would jeopardize their ability to remain eligible for critical HSR exemptions.

We thank the FTC for providing the opportunity to comment on the NPRM, and we welcome the opportunity to further discuss any of the information or recommendations we have provided.

Sincerely,

Sandra Boss
Senior Managing Director, Global Head of Investment Stewardship

Christopher J. Meade
Senior Managing Director, General Counsel & Chief Legal Officer

Kathryn Fulton
Managing Director, Co-Head of Global Public Policy Group

Appendix A

Response to Advance Notice of Proposed Rulemaking



February 1, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Submitted online via <https://www.regulations.gov>

Re: 16 CFR parts 801-803: Hart-Scott-Rodino Rules ANPRM, Project No. P110014

Dear Madam Secretary,

BlackRock welcomes the opportunity to respond to the Advance Notice of Proposed Rulemaking (the “ANPRM”) and request for information relating to Section IV Acquisitions of Small Amounts of Voting Securities (16 CFR 801.1, 802.9, 802.64) issued by the Federal Trade Commission (“FTC”).¹ At BlackRock, we help millions of people build savings that serve them throughout their lives. The money we manage is not our own; it belongs to people who rely on us to act in their best interests. We believe that competitive markets are in the best interests of investors, and BlackRock fully supports the FTC’s objective of ensuring that US product markets and capital markets remain fair and competitive.

We support the FTC’s observation that market and business practices are constantly evolving and agree that it is timely to evaluate whether the premerger notification rules (the “HSR Rules”) that implement the Hart-Scott-Rodino Antitrust Improvements Act (the “HSR Act”) still serve their intended purpose. We believe that any changes to existing rules must consider their potential impacts on savers, retirees and other end investors, and also ensure the efficient functioning of the equity markets. Our recommendations in this letter are addressed to Section IV, which pertains to the ordinary course business activities of traditional asset managers such as BlackRock.

Executive summary

As an asset management firm², BlackRock’s business is providing investment solutions to institutional and individual clients worldwide. Our clients include pension plans, foundations, charities, official institutions, insurance companies, corporations, and millions of individuals who are largely saving for long-term goals, such as retirement or their children’s education. Simply put, BlackRock’s purpose is to help more and more individuals experience financial well-being. BlackRock considers itself a “traditional asset manager” in that we manage primarily long-term investment strategies. Two-thirds of the assets we manage relate to retirement – often with time horizons of several decades. This drives our own long-term perspective.

¹ Federal Trade Commission, Advance Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR 77042 (Dec. 1, 2020).

² BlackRock was listed on the New York Stock Exchange in 1999, and is a public company, with no majority owner.

As a fiduciary asset manager, our business is fundamentally different from other types of financial institutions, such as banks. We invest solely on behalf of our clients, the asset owners who bear the risk and enjoy the returns from investment. Fiduciary asset managers are required to act in the best interest of their clients, the asset owners. Investments are made according to the terms of an investment management agreement or governing documents of the fund chosen by the client.

Share ownership in publicly traded equity securities typically includes the right to vote on proposals put forward at an annual or special shareholder meeting by management, and occasionally put forward by shareholders. As an asset manager, BlackRock casts these votes on behalf of our clients and funds whenever they have delegated voting authority to us. As a fiduciary, BlackRock is required to vote in the best interests of our clients. To make informed voting decisions, BlackRock will engage with issuers directly on topics impacting the long-term value of our clients' investments. Investment stewardship by asset managers typically focuses on issues that support sustainable long-term performance, such as board composition and effectiveness, governance, and management of environmental impacts. Asset managers, like BlackRock, do not use stewardship engagements to dictate the day to day management activities of an issuer, which are the responsibility of the issuer's board and management.

BlackRock recommends modernizing the investment-only exemption to remove uncertainty for investors by recognizing the role of investment stewardship in providing long-term value to investors. We also recommend maintaining the institutional investor exemption for '40 Act Funds and increasing the 15% threshold to limit market disruption due to ordinary course investing by institutional investors. Lastly, we recommend exempting index funds from HSR reporting because their sole purpose is to track the performance of an index, which removes any indicia of intent to influence day to day management of an issuer. These recommendations are made in support of the FTC's assessment that there is a need to update the premerger notification rules that implement the HSR Act to ensure that they are as current and relevant as possible and continue to serve their intended purpose of ensuring competitive markets.

Key recommendations

1. Modernize the investment-only exemption to remove uncertainty for investors.

- a) Current informal interpretations of the investment-only exemption extend beyond the original stated objective.** Increasingly narrow interpretations of the investment-only exemption by a series of FTC senior staff statements and informal interpretations extend beyond the original Statement of Basis and Purpose (the "SBP")³ and have created confusion for investors.
- b) Recognize that investment stewardship is an intrinsic aspect of modern investing, serving to protect and enhance long-term value.** Addressing the uncertainty in interpreting the investment-only exemption benefits investors and issuers as corporate governance practices evolve in a way that is conducive to long term value.
- c) Align the investment-only exemption with SEC non-control standard.** Harmonization with the Securities and Exchange Commission's (the "SEC") Section 13 non-control standards would reduce regulatory ambiguity for investors without posing a threat to competition.

³ Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450 (July 31, 1978).

2. **Maintain the institutional investor exemption for '40 Act Funds and increase the 15% threshold.**
 - a) **Continue to apply the institutional investor exemption to '40 Act Funds because they do not seek to influence management.** Investment companies registered under the Investment Company Act of 1940 ("40 Act Funds") engage with issuers to inform proxy voting and investment decisions, not to direct their basic business decisions.
 - b) **Increase the 15% threshold for institutional investors to limit market disruption due to ordinary course investing.** Institutional investors are increasingly important to efficient capital markets, do not seek to direct the basic business decisions of issuers and should be afforded greater ability to engage in normal business operations.
3. **Exempt index funds from HSR reporting because their sole purpose is to track the performance an index.** Index investment decisions are made in accordance with a rules-based methodology, which removes any indicia of intent to influence day to day management of an issuer. Alternatively, a separate exemption with a higher HSR threshold should be created to account for the HSR waiting period's profound impact on the fund's ability to accurately track an index.

Additionally, as we note in our separate comment letter responding to the FTC's Notice of Proposed Rulemaking ("NPRM"), we believe that some of the proposals would have unintended negative consequences for investors and issuers, harm the efficiency of US capital markets, and increase the burden on the FTC and Department of Justice to review filings for transactions that are very unlikely to present antitrust issues.⁴ Considering the uncertainty these new proposals create, it is timely that the FTC clarify and broaden the investment-only and institutional investors exemptions to mitigate any unintended negative consequences.

SECTION IV OF THE ANPRM - ACQUISITIONS OF SMALL AMOUNTS OF VOTING SECURITIES

We agree with the FTC's view that significant changes in investor engagement and the institutional investor landscape have occurred since the HSR Rules were promulgated in 1978. The HSR Act provides an exemption from the reporting requirements for acquisitions that are made "solely for the purpose of investment" and that result in an investor holding 10% or less of an issuer's outstanding voting securities (the "investment-only exemption").⁵ The HSR Rules define "solely for the purpose of investment" to mean that a potential filing person "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."⁶ The HSR Rules make an additional exemption available to certain types of institutional investors, which are exempt from HSR reporting when making acquisitions of 15% or less of an issuer's outstanding voting securities in the ordinary course of business solely for the purpose of investment (the "institutional investor exemption").⁷ Any

⁴ The proposal to broaden the definition of "person" under the HSR Rules to include both an ultimate parent entity ("UPE") and its associates will effectively require asset managers to aggregate holdings across all funds under their management, despite each fund being managed independently in accordance with the terms of an investment management agreement or governing documents. This would result in a significantly higher number of unnecessary HSR filings, generating substantial costs and risk for investors, without achieving the objectives of the HSR Act. Further, large, diversified asset managers will be unable to rely on the proposed de minimis exemption due to the overly broad and speculative carve-outs for "competitively significant relationships."

⁵ 16 CFR 802.9.

⁶ 16 CFR 801.1(i)(1).

⁷ 16 CFR 802.64.

investor faces substantial penalties (currently \$43,792 maximum amount per day per issuer⁸) for failing to file HSR if they incorrectly rely on either exemption.

Considering the evolution of the asset management industry over the 42 years since the HSR Rules' enactment and the FTC's recent rule proposals regarding the aggregation of associates and the de minimis exemption, it is critical and timely that the FTC review the investment-only and institutional investor exemptions because their availability is critical to asset managers. We provide our recommendations with the objective of serving the pro-competitive goals and policies driving the HSR pre-merger notification regime, while also promoting informed voting and efficient capital markets.

1. Modernize the investment-only exemption to remove uncertainty for investors.

a) Current informal interpretations of the investment-only exemption extend beyond the original stated objective.

BlackRock welcomes and supports the FTC's long-standing practice to provide informal guidance on HSR reportability questions. However, the investment-only exemption under 802.9 has been progressively interpreted in an increasingly narrow manner in speeches and public comments by FTC staff⁹ when compared to the SBP. In the SBP, the FTC identified certain enumerated activities that will almost always disqualify an investor from relying on the investment-only exemption. These actions were listed in the SBP as examples of conduct that could be viewed as evidence of an intent inconsistent with the investment-only and include:

- (i) nominating director candidates to the board of the issuer,
- (ii) proposing corporate action requiring investor approval,
- (iii) soliciting proxies,
- (iv) serving as an officer or director of the issuer,
- (v) being a competitor of the issuer, or
- (vi) doing any of the above acts with an entity directly or indirectly controlling the issuer.

Beyond these activities, the FTC has looked at the specific facts and circumstances of a case when determining whether other types of activities and communications would disqualify an investor from relying on the investment-only exemption, but never provided broad based guidance to investors.

FTC statements¹⁰ related to compliance with the investment-only exemption have created uncertainty for traditional asset managers around engagement with an issuer's management or board, regardless of reason for the engagement or topics discussed. If the FTC staff proceeds to continuously narrow the interpretation, BlackRock is concerned that any type of communication with an issuer's management or board – including contact that traditionally is not activist, contact confined to environmental, social and governance (“ESG”) and other topics that promote sustainable business practices (collectively, “investment stewardship

⁸ 16 CFR 1.98(a).

⁹ Marian R. Bruno, Deputy Director, Federal Trade Commission, Prepared Remarks Before the American Bar Association: Hart-Scott-Rodino at 25 (June 13, 2002); Debbie Feinstein, Ken Libby & Jennifer Lee, “Investment-only” means just that, Federal Trade Commission Blog (Aug. 24, 2015) <https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/investment-only-means-just>; Federal Trade Commission Premerger Notification Office Informal Interpretation 18010003 <https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/18010003>.

¹⁰ Id.

topics”) and contact that complies with the SEC’s non-control standards – may at some point be viewed as inconsistent with the investment-only exemption.

In such an environment, prophylactic HSR filings are not a practicable solution for large, diversified asset managers like BlackRock, who would suffer drastic interruptions due to the requirement to delay acquisitions for up to 30 days while a filing is pending. The delay would generate significant opportunity costs for actively managed funds and curtail the investment objectives of managers of index funds who must acquire additional voting securities in order to track a specified index that is generally determined by an independent third-party index provider. The 30-day waiting period could generate significant tracking error and cash drag for index funds, which could reduce the investment returns for clients in today’s historically low interest rate environment. Clients could also be harmed by prophylactic HSR filings because they would likely bear the costs of significant filing fees and legal expenses associated with the filings. There is broad consensus that individual investors have greatly benefited from low cost, highly liquid, and broadly diversified investment products that large asset managers offer. In addition, issuers would bear the additional burden in submitting responsive HSR filings for these ordinary course transactions. Any increased costs and investment delays that may be introduced by HSR filings will result in needless harm to investors, asset managers and issuers.

The FTC has not provided any actionable guidance on the types of activities that fall *within* the investment-only exemption’s scope, other than simply exercising the most basic investor right to vote their securities.¹¹ The remaining fact-specific past interpretations have created a high degree of uncertainty regarding whether investors have triggered an obligation to file an HSR notification when they have, or even consider potentially having, ordinary-course discussions with management on investment stewardship topics that impact long-term investor value without the intention of participating in the basic business decisions of an issuer. This uncertainty creates regulatory risk, legal costs, and could serve to limit conduct that is consistent with long-term investing, which is beneficial to investors, issuers, and capital markets, with no corresponding benefit to protecting competition.

In order to provide investors with clarity around their engagement activities, we propose that the FTC clarify that engagement with issuers regarding investment stewardship topics is consistent with the investment-only exemption. BlackRock favors a corresponding amendment of the HSR Rules or the issuance of a formal interpretation, but would welcome supporting guidance in other forms, such as speeches, informal interpretations, or posts on the FTC website. Investment stewardship engagement, as described in sub-section (b) below, is now an intrinsic aspect of modern investing. Engagement that is conducted on a reactive basis to obtain necessary clarifications on corporate actions that are contained on an issuer’s proxy ballot should be clarified as consistent with the investment-only exemption because informed proxy voting does not equate to participating in the basic business decisions of an issuer. Further, engagement to explain the rationale driving a voting decision should also be clarified as consistent with the investment-only exemption. This proposal is consistent with other regulatory standards and investor expectations as further described in sub-sections (b) and (c) below.

b) Recognize that investment stewardship is an intrinsic aspect of modern investing, serving to protect and enhance long-term value.

¹¹ Id.

i) Investment stewardship has changed since 1978

Investment stewardship refers to engagement with issuers to promote corporate governance practices that are consistent with long-term value creation. Investment stewardship practices have changed significantly since 1978, and these changes have accelerated over the past twenty years. In the 1990s, proxy voting was viewed as largely an administrative, rather than an analytical, activity for traditional asset managers. Staff members cast votes usually based on whether an issuer's governance practices (as disclosed in an issuer's proxy materials) complied with the asset manager's voting guidelines. Even if an asset manager's voting guidelines were in the public domain, it was not necessarily clear to an issuer why an investor may have cast a vote against management, making it difficult for an issuer to address issues of investor concern. Today, many traditional asset managers have robust in-house analytical resources dedicated to proxy voting and engagement to facilitate better understanding between issuers and their investors on key governance issues. BlackRock's investment stewardship principles and practices are anchored in our fiduciary duty to look after our clients' long-term economic interests and are informed by the feedback we receive from clients and issuers, regulators, market developments, research and insights published by thought leaders, and observations and analysis by BlackRock specialists. Further, in the last decade there have been changes in US corporate governance practices through both law and standards that have brought proxy voting to the forefront for issuers because they have demonstrated the effectiveness of voting. Examples include annual director elections, majority vote standards, proxy access, and SEC rules on say-on-pay.

Over the past decade, a growing number of regulators have recognized the importance of good corporate governance and investment stewardship. Today, when an asset manager has the authority to vote on behalf of its clients, stewardship codes and regulatory guidance encourage, and in some cases mandate, them to do so. More than 20 stewardship codes around the world call on institutional investors, including asset managers, to be engaged in corporate governance in the interests of shareholders.¹² While the US does not have a national stewardship code, frameworks such as the Stewardship Framework for Institutional Investors and Corporate Governance Principles ("ISG Principles") for US-listed companies have developed. The ISG principles have been endorsed by numerous prominent CEOs of US companies who have signed the Commonsense Corporate Governance Principles.¹³ Further, the SEC's standard for beneficial ownership reporting support engagement on corporate governance.¹⁴ These efforts are emblematic of the strong consensus both globally and in the US regarding the benefits of strong corporate governance.

ii) Investors and issuers benefit from investment stewardship

Investment stewardship by asset managers – encompassing both voting and engagement – helps ensure that diverse investor perspectives are heard by management, plays a role in

¹² Brazil Stewardship Code; Canadian Coalition for Good Governance Principles for Governance Monitoring, Voting and Shareholder Engagement; Denmark Stewardship Code; European Fund and Asset Management Association Code for External Governance; Hong Kong Principles of Responsible Ownership; Italian Stewardship Principles; Japan's Stewardship Code; Kenya Stewardship Code; Korea Stewardship Code; Netherlands Eumedion Best Practices for Engaged Share-Ownership; Singapore Stewardship Principles for Responsible Investors; South Africa Code on Responsible Investing; Swiss guidelines for institutional investors; Taiwan Stewardship Principles for Institutional Investors; The FPC's UK Stewardship Code; The Investor Stewardship Group Stewardship Framework for Institutional Investors and Corporate Governance Principles for US listed companies; UN PRI; OECD Principles of Corporate Governance.

¹³ <https://www.governanceprinciples.org/>.

¹⁴ <https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm>.

promoting sound corporate governance and responsible business practices and supports long-term value creation for the investors who participate in capital markets. For example, research has shown that issuers with committed, diverse and experienced board members who actively advise and oversee management deliver sustainable long-term financial returns.¹⁵ By allowing investors the ability to hold issuers to high standards, engagement can yield consumer welfare benefits such as lower prices, better services and quality, and increased innovation.¹⁶ In addition, by monitoring corporate practices, engaging with boards and management, and casting votes on behalf of investors when BlackRock is delegated their proxy, asset managers can amplify the voices of investors who may not themselves have the resources or expertise to regularly cast informed votes at issuers' shareholder meetings.

Because asset owners frequently assign their asset managers proxy voting authority, engagement on stewardship topics is often viewed as an intrinsic aspect of modern investing. As a fiduciary asset manager, BlackRock is required to vote in the best interests of its clients. Failing to obtain information about an issuer's governance and long-term value creation or failing to provide feedback when requested and appropriate, can be considered a failure by asset managers to adhere to their fiduciary obligation to make informed proxy voting decisions on behalf of their clients.

Engagement is beneficial to issuers when an investor has concerns about governance or long-term value creation. Issuers have advised that communication of such concerns directly to management or the board is preferable to speculating over the rationale driving a vote against management. BlackRock believes that issuers value a candid and open dialogue with their investors on items that will be the subject of an investor vote. We have seen many issuers enhance their investor relations functions to broaden their focus from research analysts to building relationships with their long-term investors.

iii) Investment stewardship fundamentally differs from shareholder activism

Traditional asset managers do not engage with issuers to dictate a specific corporate strategy or basic business decisions, which they believe are the responsibility of boards and management. Rather, they engage with issuers to inform their thinking on items that are being put to a shareholder vote and to exchange ideas on corporate governance and sustainable business practices. While the specific topics discussed in traditional asset manager engagements have evolved with time and differ from manager to manager, BlackRock's current engagement topics include director independence and capacity, enhanced disclosures, and other key long-term investor interests.¹⁷

In contrast, "activist" investors are focused on participating in and affecting the management of a specific issuer to influence an issuer's strategic business direction. Activist investors routinely use interventional tools including the submission of shareholder proposals, nominating directors to boards, and soliciting proxies. Unlike traditional asset managers that seek to provide diversified investment products and invest broadly across the capital markets (e.g., low cost funds that track the S&P 500), activists often make concentrated investments in a single issuer in an industry with an aim to exert control, change the issuer's core business strategies, and/or induce merger and acquisition activity. As a result of their investment objectives and engagement strategies, activist investors are much more likely to raise

¹⁵ [FCLTGlobal- Data Shows That Diverse Boards Create More Value.](#)

¹⁶ See, e.g., Commissioner Noah Joshua Phillips' May 2019 speech on the pro-competitive effects of the fight for corporate control.

¹⁷ [BlackRock - Our 2021 Stewardship Expectations: Global Principles and Market-level Voting Guidelines.](#)

competitive concerns than traditional asset managers.¹⁸ BlackRock believes that the investment-only exemption should distinguish between these two types of shareholder engagement.

c) Align the investment-only exemption with the SEC non-control standard.

In a complex regulatory environment, creating common standards that apply to market participants' actions benefits investors, issuers, and regulators. Common standards allow investors to predict the ramifications of their actions and help regulators share the burden of monitoring those actions. This is especially true in the context of the investment-only exemption under the HSR Rules and the SEC's beneficial ownership reporting rules. Investors who must monitor their activities to ensure compliance with the investment-only exemption are also generally subject to the SEC beneficial ownership reporting rules. While both regulatory regimes contain exemptions for investors not seeking control of issuers, the SEC approach has provided clarity on the types of investor activities that do not give rise to a control determination. Accordingly, BlackRock proposes that the FTC adopt the SEC's approach to non-controlling investors. This would have the effect of creating regulatory certainty for investors, benefiting issuers through engagement and reducing the FTC burden of reviewing HSR filings that are unlikely to pose competition concerns.

For SEC beneficial ownership reporting purposes, an investor is considered to be non-controlling as long as it has not acquired voting securities "with any purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect."¹⁹ Like the investment-only exemption, the SEC beneficial ownership reporting rules provide differentiated treatment to investors with varying levels of involvement in an issuer's business activities. Investors eligible to report their 5% or greater positions on the short-form Schedule 13G must certify their compliance with the SEC's control standards on each filing they make. Through decades of guidance and caselaw since the beneficial ownership disclosure rules were first enacted in 1968, the SEC has crafted a clear standard for determining whether an investor's engagement activities would deem them controlling or non-controlling. The SEC standard's application has kept pace with developments in asset management and investment stewardship practices.

The SEC considers both the content and context of an investor's engagement with an issuer to be relevant to an analysis of the investor's passivity.²⁰ When the subject matters discussed in an engagement are confined to non-control topics, an engagement is considered to be consistent with non-control. Non-control topics include governance matters, such as executive compensation, social and public interest issues, removal of staggered boards and majority voting standards.²¹ Engagements on control topics are inconsistent with passivity. These topics include promoting the issuer's sale, the sale of a material amount of assets and changes to the issuer's capitalization structure. Similarly, when an engagement is part of a

¹⁸ See, e.g., the [Department of Justice's July 12, 2016 settlement with ValueAct](#) and the [Federal Trade Commission's Aug. 24, 2015 settlement with Third Point](#).

¹⁹ 17 CFR 240.13d-1(b)-(c).

²⁰ <https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm>.

²¹ Id. "Generally, engagement with an issuer's management on executive compensation and social or public interest issues (such as environmental policies), without more, would not preclude a shareholder from filing on Schedule 13G so long as such engagement is not undertaken with the purpose or effect of changing or influencing control of the issuer and the shareholder is otherwise eligible to file on Schedule 13G."

broad effort by an investor to promote good governance practices across all its investments, an engagement is deemed to be consistent with non-control.²²

The SEC standard creates certainty for engaged investors who communicate with issuers to drive long-term investor value and promote issuer accountability. It also benefits issuers because it allows for meaningful engagement with investors, which as noted in Section 1(b) above, is welcomed and appreciated by issuers because it creates a mutual understanding about corporate governance and sustainable business practices. In our experience, engagement can, and often does, avoid the use of voting as a blunt force instrument because the investor has a better understanding of what is driving an issuer's policies. Issuers can take comfort in knowing that engagement by their investors who comply with the SEC's standard is not for the purpose of exerting control over management or part of a targeted activist campaign. This leads to a more open and productive dialogue between the issuer and investor.

Due to the ambiguity around the application of the FTC's investment-only exemption to investment stewardship activities, investors are uncertain whether the investment-only exemption, as currently applied and interpreted, allows for this mutually beneficial engagement. The absence of clarification on the investment-only exemption could significantly reduce issuer engagement and deprive traditional asset managers and their clients from having a voice with respect to their investment. This chilling effect on investor engagement runs counter to the strong public policy in favor of such engagement.²³ Adopting the SEC standard for non-controlling investors will ensure the FTC will receive HSR filings from investors who are actually engaged in investment behavior that may pose competition concerns, rather than receiving countless filings from investors prophylactically filing for fear that ordinary course engagement on investment stewardship topics could run afoul of the investment-only exemption. Free from the burden of reviewing filings based on ordinary course non-controlling engagement, the FTC can devote its resources to matters the FTC has itself identified as being likely to pose competitive concerns.

2. Maintain the institutional investor exemption and increase the 15% threshold.

a) Continue to apply the institutional investor exemption to '40 Act Funds because they do not seek to influence management.

Institutional investors are exempt from HSR reporting when making acquisitions of 15% or less of an issuer's outstanding voting securities in the ordinary course of business and solely for the purpose of investment.²⁴ The SBP explained that certain types of entities qualify for a higher exemption threshold under the HSR Rules because they are viewed as constrained by law or fiduciary duty from participating in the management of the issuers they invest in, or are generally considered to be uninterested in affecting management of the issuers who stock they hold. In granting these investors a higher exemption threshold, the HSR Rules sought to "reduce the disruption of the securities markets that could result from requiring [institutional investors] to report and observe a waiting period."²⁵ In making this distinction, the SBP recognized the significant role that institutional investors play in the capital markets. We urge the FTC to continue to consider '40 Act Funds as institutional investors because, as when HSR

²²Id.

²³ [BlackRock – Asset managers of scale give voice to investors and support the economy.](#)

²⁴ 16 CFR 802.64.

²⁵ Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33465 (July 31, 1978).

Rules were enacted, '40 Act Funds today have a “relatively insubstantial effect on competition.”²⁶

'40 Act Funds remain “uninterested in affecting the management of the companies whose stock they hold” as the FTC originally stated in the SBP. Any investment stewardship by or on behalf of '40 Act Funds informs proxy voting decisions to create long term value. This is in contrast with the engagement sometimes conducted by unregistered or “private” activist funds, such as hedge funds and private equity funds, with the objective of affecting the issuer’s management, seeking board seats and vigorously advocating for significant corporate changes, such as a merger or large corporate sale.

'40 Act Funds are a critical component in the retirement, education and financial planning of millions of Americans. American households are the largest group of '40 Act Fund investors.²⁷ '40 Act Funds managed 23% of household financial assets at year-end 2019.²⁸ Specifically, mutual funds made up a significant portion of defined contribution retirement plan assets (58%) and individual retirement accounts (44%) at year-end 2019.²⁹ From a policy perspective, it is critical that '40 Act Funds remain eligible for the higher exemption available to institutional investors because the lower exemption threshold for non-institutional investors increases the likelihood that '40 Act Funds will trigger HSR reporting and attendant waiting periods, creating significant burdens preventing them from fulfilling their investment objectives and strategies. The result could be diminished investment returns for countless households across the US due the increased tracking error for index funds and opportunity costs for active funds associated with a 30-day waiting period on acquisitions. The removal of '40 Act Funds from the institutional investor exemption would contravene the purpose of this exemption, which is to “reduce the disruption of the securities markets that could result from requiring [institutional investors] to report and observe the waiting period before such acquisitions.”³⁰

b) Increase the 15% threshold for institutional investors to limit market disruption due to ordinary course investing.

In 1978, the FTC recognized the importance of institutional investors to capital markets by creating a higher threshold in order to “to minimize the act’s impact upon these entities’ normal operations.”³¹ Since 1978, the proportion of US public equities managed by institutional investors has risen steadily. In order to avoid unnecessary market disruptions, greater investment ability should be afforded to institutional investors. While the SEC beneficial ownership reporting regime imposes a 20% limit on non-institutional investors’ ability to avail themselves of the short-form Schedule 13G, no such limit applies to holdings of institutional investors who certify to the SEC that the securities being reported were acquired in the ordinary course of business and not “with the purpose, or with the effect, of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having that purpose or effect.”³² This additional latitude is afforded to institutional investors in recognition of the fact that “[institutional investors] that purchase securities in the

²⁶ Id.

²⁷ https://www.icifactbook.org/ch2/20_fb_ch2.

²⁸ Id.

²⁹ Id.

³⁰ Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33465 (July 31, 1978).

³¹ Id.

³² 17 CFR 240.13d-1(b).

ordinary course of business may be unduly burdened by a limitation on the amount of securities” they may hold.

While the SEC and FTC have distinct roles, both agencies are committed to ensuring that markets are competitive and fair. Adoption of the SEC standard would further these commitments and remain consistent with the purpose of the HSR Act, as the FTC has acknowledged that the anticompetitive potential of the institutional investor transactions exempted by the rule is low.³³ Accordingly, we recommend that the FTC increase the institutional investor threshold to 20%.

3. Exempt index fund from HSR reporting because their sole purpose is to track the performance of an index.

Index investing was created in the mid-1970s and evolved significantly since the HSR Rules were promulgated in 1978. Index funds provide numerous benefits to both individuals and institutional investors including market-wide diversification, cost efficiency, transparency, and operational simplicity. Index funds, including mutual funds and exchange traded funds (“ETFs”) seek to track the performance of a designated index, such as the S&P 500 or the Russell 1000. Index funds seek to hold securities of an issuer at a weighting that generally reflects the weighting in their benchmark index, which is generally created and maintained by an independent third-party index provider.³⁴ Index providers are responsible for constructing and monitoring indexes, and each provider uses a unique, rules-based methodology to do so. This methodology is used to define the scope of the index, such as which issuers are included and their respective weightings. As such, index fund managers do not make investment decisions based on an issuer’s business, financial or strategic performance, or an existing or prospective relationship between the investor and such issuer, but rather solely based on the methodology set forth by the indexes they track. Investors purchase index funds due to their ability to replicate an index as closely as possible, not based on beating the benchmark. This rules-based methodology, which gives authority to the index provider in determining the index components and weighting of the issuers removes any indicia of intent by the index fund manager to influence day to day management of an issuer.

In addition, index funds are particularly sensitive to interruptions in their trade activities. The composition of an index changes frequently as index providers conduct periodic and ad hoc reviews to ensure that issuers meet the criteria outlined in their methodology. For example, providers will rebalance and reconstitute their indexes - reweight and remove or add issuers-based on certain corporate actions (e.g. stock splits, mergers, spin-offs, or bankruptcies) and market conditions. Due to the frequency of index rebalances, an index fund may not be capable of meeting its investment objective of tracking an index if it is subject to a 30-day waiting period on acquisitions. The inability to hold an index component, or to hold it at the proper weighting, can lead to tracking errors for index funds, which results in increased portfolio risk that is borne by the investor.

The FTC should recognize the index-tracking purpose of index funds and the significant operational repercussions of HSR waiting periods on index rebalances and reconstitutions and, on that basis, exempt them from HSR reporting. Alternatively, we recommend that the FTC provide a higher HSR reporting threshold for index fund holdings. A new exemption or an increase in the reporting threshold for index funds would be particularly important if the

³³ Id.

³⁴ E.g., Standard and Poor's or Russell Investments.

aggregation rules proposed in the NPRM ultimately apply to index funds, such that the holdings of multiple index funds under common management would have to be aggregated for purposes of determining whether HSR thresholds are met. Because different indexes often include the same issuers, an asset manager that manages funds that track multiple indexes will necessarily have to hold investments in a single issuer across multiple index funds, sometimes in excess of the applicable HSR filing or the current exemption thresholds on an aggregated basis.

Conclusion

Modernization of the investment-only exemption removes uncertainty for investors and clarifies the role of investment stewardship in providing long-term value to asset owners. Maintaining the institutional investor exemption for '40 Act Funds and increasing the 15% threshold allows the FTC to continue to fulfill the purpose of HSR without disrupting the ordinary course investment activity of institutional investors. Exempting index funds from HSR reporting recognizes the singular investment goal of tracking an index, which removes the indicia of intent to influence the day to day management of an issuer. Our recommendations are timely considering the proposed aggregation of associates, which, if adopted as proposed, would significantly narrow or eliminate the availability of the investment-only and institutional investor exemptions to asset managers.

We thank the FTC for their efforts to ensure that the HSR Rules continue to serve their intended purpose in an investment landscape that has evolved significantly since 1978, and we welcome the opportunity to discuss any questions or comments regarding BlackRock's recommendations.

Sincerely,

Sandra Boss
Senior Managing Director, Global Head of Investment Stewardship

Christopher J. Meade
Senior Managing Director, General Counsel & Chief Legal Officer

Kathryn Fulton
Managing Director, Co-Head of Global Public Policy Group