INVESTMENT COMPANY INSTITUTE

1401 H Street, NW, Washington, DC 20005-2148, USA
202/326-5800 www.ici.org

February 1, 2021

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

Re: Premerger Notification; Reporting and Waiting Period Requirements; RIN 3084-AB46 – Notice of Proposed Rulemaking (16 CFR Parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014)

Dear Ms. Tabor:

The Investment Company Institute ("ICI")[1] submits these comments in response to the Federal Trade Commission's ("FTC" or "Commission") December 1, 2020 Notice of Proposed Rulemaking and Advance Notice of Proposed Rulemaking ("Proposed Rules" or "Proposal") with respect to the Premerger Notification Rules that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act" or "Act").[2]

ICI appreciates this opportunity to comment on the Proposed Rules and hopes that the data and information provided herein will be useful to the Commission in understanding the effects of the Proposed Rules on investment companies, including open-end funds (or mutual funds), exchange-traded funds ("ETFs"), and other funds that are registered and regulated under the Investment Company Act of 1940 ("1940 Act"), and similarly regulated funds outside the United States (generally, "regulated funds" or "funds"). Millions of Americans rely on regulated funds to meet their most important personal financial goals, such as saving for the purchase of a home, preparing for a secure retirement, or paying for higher education. Importantly, regulated funds also channel investment to the US capital markets, thereby fueling economic activity in the United States.

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[1] The Investment Company Institute (ICI) is the leading association representing regulated funds globally, including mutual funds, exchange-traded funds (ETFs), closed-end funds, and unit investment trusts (UITs) in the United States, and similar funds offered to investors in jurisdictions worldwide. ICI seeks to encourage adherence to high ethical standards, promote public understanding, and otherwise advance the interests of funds, their shareholders, directors, and advisers. ICI's members manage total assets of US$28.5 trillion in the United States, serving more than 100 million US shareholders, and US$8.3 trillion in assets in other jurisdictions. ICI carries out its international work through ICI Global, with offices in Washington, DC, London, Brussels, and Hong Kong.

[2] Notice of Proposed Rulemaking, Premerger Notification, Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053 (Dec. 1, 2020) [hereinafter "NPRM"]; Advance Notice of Proposed Rulemaking, Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042 (Dec. 1, 2020) [hereinafter "ANPRM"].

There is a broad range of regulated funds with a variety of investment objectives and strategies available to investors. Regulated funds invest in a wide variety of securities, including equities and bonds, as well as other assets such as commodities, derivatives and futures. Regulated funds are also subject to comprehensive and robust regulatory requirements under the 1940 Act that include requirements related to extensive and frequent disclosure and reporting, valuation and pricing, limits on leverage, prohibitions and restrictions on transactions with affiliates, governance by an independent board of directors, and SEC oversight.[3] Further, non-US regulated funds available to retail investors such as Undertakings for the Collective Investment in Transferable Securities (UCITS) are subject to similar substantive regulation and oversight by local authorities.

To gather insight on the impact of the Proposal's Aggregation Rule[4] on regulated funds and their managers, we conducted a survey of our membership. Twenty-seven members that participated in the survey manage approximately $19.7 trillion of regulated fund assets, representing approximately 75% of all US-regulated fund assets of the end of September 2020. The responses reveal that the Aggregation Rule[5] would impose significant adverse consequences on regulated funds that include unduly large costs and burdens, as well as harm to efficiency and effectiveness of every-day portfolio and investment management processes of regulated funds and asset managers, thereby reducing performance. Unfortunately, the millions of investors who rely on these funds to achieve their financial goals will ultimately bear the costs of these consequences.

These consequences would occur because the proposed Aggregation Rule effectively results in the elimination of the exemptions built into the HSR Act for ordinary course transactions made solely for the purpose of investment, which is contrary to Congressional intent. Eliminating these exemptions will lead to a broader application of the HSR Act, in particular its 30-day waiting period, to asset managers' every-day portfolio and investment management operations. These are the core services that managers provide to their clients and, in the case of regulated funds, how they pursue the investment objectives and strategies disclosed in fund prospectuses and other documents. Given the mechanics of a fund's ordinary course transactions, which involve ongoing, time-sensitive purchases and sales of shares on markets, waiting 30 days is an untenable prospect for regulated funds and asset managers. A 30-day mandatory waiting period in this context—in the midst of real time, changing market conditions—means that investments likely will look very different after a decision to engage in a

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[3] For a more thorough discussion of the regulatory framework applicable to regulated funds and their managers, *see* Appendix A to ICI's 2020 Investment Company Fact Book. *See* INVESTMENT COMPANY INSTITUTE, INVESTMENT COMPANY FACTBOOK at 266-89 (2020), www.icifactbook.org.

[4] "Aggregation Rule" as used herein refers to the Commission's proposal to re-define "person" under 16 C.F.R. § 801.1(a)(1) to include "all associates of the ultimate parent entity." NPRM, 85 Fed. Reg. 77053, 77056.

[5] The Commission has also proposed a new De Minimis exemption. As written, the De Minimis exemption would provide little practical benefit to asset managers. In particular, the overbroad and ambiguous definition of "competitor" proposed for the qualifying criteria, will result in the exemption rarely applying, and reliance on the exemption will be uncertain. See discussion *infra* at Section I(E)(2).

transaction is made and when it can actually be made. Asset managers would be unable to execute even routine transactions such as reallocations, rebalancing, and other ordinary course investments in the most efficient and effective way for regulated funds and other clients.

Unfortunately, the Aggregation Rule and its imposition of the HSR waiting period on ordinary course, portfolio management transactions would seem to force asset managers into the horns of a dilemma to choose either to (i) pre-emptively submit HSR filings well in advance of exceeding applicable thresholds and then rely on the 802.21 exemption to acquire an issuer's shares up to the next threshold over the next five years;[6] or (ii) place artificial limitations on their client's investments so that no HSR filings are triggered (and divestitures may be needed to employ such a strategy). Further, it is not clear whether other options that could address this dilemma, such as the use of derivatives, are possible or even feasible from a cost and performance perspective; any new or different risks of such other options would need to be assessed by an asset manager. In addition to the burdens and impact on performance and efficiency, these two compliance options raise difficult contractual and fiduciary questions regarding how such HSR filing costs, investment caps, or divestitures would be allocated across independent entities that are artificially grouped together by the proposed Aggregation Rule into a single acquiring "person."

Importantly, our survey data show that the proposed Aggregation Rule would trigger, on the effective date, hundreds and potentially more than a thousand, incremental HSR filings that would be required to enable asset managers to continue engaging in ordinary course portfolio management transactions involving certain issuers. The costs associated with these incremental filings would be immense. Regulated funds and their managers would need to remit millions of dollars in HSR filing fees. While the estimated fees alone are daunting, the incremental HSR filings would also impose additional substantial expenses related to attorneys and other specialists required to prepare the filings. These filings would impose significant burdens on issuers as well, who would be required to submit responsive filings. Regulated funds and their managers also would incur significant costs to design, upgrade or purchase compliance programs to analyze and monitor holdings on an aggregated basis. The cost impact is immense when all these elements are considered, and these costs will ultimately be borne by investors.

On a more fundamental level, the Aggregation Rule is inadministrable. Identifying an expanded acquiring "person" would be highly complex and subject to significant ambiguity, given the range of investment advisers and other entities within an organization, the manner in which investment

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[6] This exemption allows the acquirer of voting securities to subsequently acquire additional voting shares of the same issuer during the five-year period following HSR clearance without submitting another HSR filing, so long as these additional acquisitions do not result in cumulative holdings that meet or exceed a higher notification threshold than the one under which it previously filed. *See* 16 C.F.R. § 802.21 (2020). Further, this exemption applies only if the threshold is in fact exceeded within a year after the filing. The ANPRM suggests that the Commission is considering whether to shorten this five-year window. A shorter window would force even more asset managers to cap investments so that no HSR filings are triggered or would force asset managers to make even more pre-emptive filings.

management and advice can be delivered, and an adviser's typical broad range of clients. Separate investment advisers that ordinarily do not share sensitive client information with one another would need to do so for purposes of monitoring aggregate holdings and preparing HSR filings if necessary. Such sharing and coordination, however, raises serious questions about whether this would require breaching informational firewalls that regulated funds and asset managers maintain to comply with SEC and other regulations.

This outcome certainly seems inconsistent with Congressional intent. First, the HSR Act is designed primarily to enable US federal antitrust enforcers to identify potential acquisitions that would violate Section 7 of the Clayton Act. This section, however, does not apply to purchases of "stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition."[7] Second, in response to concerns raised by ICI and other trade associations, Congress built exemptions into the HSR Act in 1976 to exclude ordinary course transactions made solely for the purpose of investment by regulated funds and other financial entities. The Act's legislative history clearly shows that its sponsors sought to avoid undermining these exemptions by telling the Commission not to require aggregation across a common investment adviser. The Aggregation Rule, however, would do exactly what the Act's sponsors told the Commission not to do.

The Commission—in adopting definitions of "person," "affiliate" and "control" in the HSR rules in 1978—itself explicitly rejected proposals that would have aggregated funds with their investment advisers and other clients of the adviser because doing so would have presented unmanageable administrative problems and would be inconsistent with Congressional intent. By proposing the very same aggregation concepts that it previously rejected, the Commission appears to have forgotten its own administrative history and its prior recognition that aggregation is not administrable or otherwise appropriate when applied to funds and their managers.

Moreover, the Commission has not identified any demonstrable benefit that would outweigh the costs and adverse consequences of applying the proposed Aggregation Rule to regulated funds and their managers.[8] The Commission has neither shown that portfolio management activities create competition problems necessitating the Aggregation Rule, nor that HSR filings are an appropriate and useful means to screen for such problems. Specifically, the Commission is rightly unwilling to endorse the "Common Ownership" hypothesis, and instead appears to base its justifications for the Proposed Rules solely on "what if" and "we don't know" arguments. In fact, the Commission has failed to even explain how it would use any of the information from an HSR filing as a screen for investigations of a regulated fund's or manager's transactions.[9] For example, portfolio management transactions are

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[7] Clayton Act § 7, 15 U.S.C. § 18 (2018).

[8] *See* 15 U.S.C. § 18a(d) (requiring that HSR rules be necessary and appropriate).

[9] It is important to recognize that the effective elimination of the 802.64 Institutional Investor exemption does not result in capturing more acquisitions that seek to influence the issuer's operations. Those acquisitions are already outside the scope of

unlikely to generate any Item 4 documents. If the Commission seeks to use such HSR filings to collect information on aggregated holdings, such information could be obtained through far less burdensome and disruptive means, and on a more complete and updated basis, by working with the SEC to identify relevant information in SEC filings.

For all of these reasons, we urge the Commission to abandon the Aggregation Rule in its entirety. To the extent that the Commission seeks information on aggregate holdings of all entities advised by the same investment adviser, it instead should work with a fellow federal regulator such as the SEC to obtain that information in a far less burdensome and disruptive way.

ICI also takes this opportunity to comment on the definition of "solely for the purpose of investment" raised in the Advance Notice of Proposed Rulemaking.[10] The Commission has not proposed any alternative definition, but has asked whether the Commission should harmonize its definition with the SEC's definition of "passive investor." ICI would support such an approach. Harmonizing these definitions will reduce uncertainty and avoid unnecessary duplication in compliance efforts. The SEC's definition serves the purposes of the HSR Act well because it is sufficient to prevent the use of the 802.9 "Investment Only" exemption or 802.64 "Institutional Investor" exemption by entities seeking to influence control of an issuer or how the issuer competes.

The remainder of this letter describes our concerns and provides data and information to substantiate these concerns as follows:

- Section I explains the burdens that the Aggregation Rule would impose on the funds and their managers, and why the rule is inadministrable based on fund operating structures, investment management practices and regulation. We also explain how requiring aggregation would effectively eliminate relevant exemptions from the HSR Act. Further, we detail the difficult compliance choices that asset managers would face if the exemptions are not available and the adverse consequences of those choices on funds and asset manager operations, and ultimately on investors.

- Section II explains why applying aggregation to funds and their managers will not benefit antitrust enforcement, and specifically why the many HSR filings that would result from the Aggregation Rule would not be a useful tool to screen for antitrust violations.

802.64 Institutional Investor exemption and 802.9 Investment Only exemptions. The only incremental transactions captured by the Aggregation Rule are those that are *not* intended to influence how the issuer competes. Why would the Commission want to review more of these transactions under any antitrust theory?

[10] ANPRM, 85 Fed. Reg. 77042, 77047.

- Section III emphasizes the reasons to abandon the Aggregation Rule, but also posits alternatives to the rule that would capture transactions made by entities other than those of regulated funds and reduce the burdens of HSR filings to regulated funds and their advisers.

- Section IV responds to certain questions that the Commission raised in the Advance Notice of Proposed Rulemaking with respect to the definition of "solely for the purpose of investment."

I. The "Aggregation Rule" Would Place Massive Burdens on Regulated Funds and Asset Managers

The Aggregation Rule would impose extensive direct and consequential costs on regulated funds, investors, and their investment advisers. In this section, we

- Identify the dramatic increase in HSR filings and fees that would occur as a result of the Aggregation Rule;

- Explain why the HSR 30-day waiting period is untenable for portfolio management of regulated funds and other clients of asset managers;

- Explain why the Aggregation Rule is likely to force asset managers to take the undesirable step of either pre-emptively submitting HSR filings or capping their clients' investments;

- Describe why aggregation of entities not under common control, *i.e.,* "associates," is not administrable as applied to funds and other clients advised by asset managers;

- Describe how the Aggregation Rule would severely impact and undermine the 802.9 Investment Only exemption, the 802.51 "Foreign Issuer" exemption, and 802.64 Institutional Investor exemption; and

- Highlight the previous consideration and principled rejection of aggregation for regulated funds and asset managers by Congress and the Commission.

A. The Commission has Underestimated the Costs of the Aggregation Rule

The Commission may not fully appreciate the filing burdens and associated costs of the Aggregation Rule on regulated funds and their asset managers.

Our survey data reveals, for example, that member respondents[11] alone would be immediately required to file hundreds of—and potentially over a thousand—incremental HSR filings if the

[11] Twenty-seven ICI members, representing approximately 75% of all US-regulated fund assets of the end of September 2020, responded to the survey.

Aggregation Rule takes effect. This increase is massive when one considers that the total number of *all* HSR filings was 2,089 in 2019[12] and 2,023 in 2020.[13] The increase would occur because, as the HSR Act's sponsors anticipated, aggregating funds with other funds and clients advised by the same investment adviser would make it difficult to satisfy the HSR exemptions. In particular, funds that are "institutional investors" under the HSR rules will be much less likely to qualify for the 802.64 Institutional Investor exemption.

The 802.64 Institutional Investor exemption applies only if the acquiring person—now typically at a single fund level—holds no more than 15% of an issuer's outstanding voting securities. The Aggregation Rule, however, would require a regulated fund to aggregate its holdings with all other regulated funds and other clients advised by the same investment adviser. This may include hundreds, if not thousands, of independent entities not under common HSR control, thus making it more likely that the 15% limit is exceeded. Our survey reveals that the Aggregation Rule would lead 63% of respondents to exceed the limit for at least one issuer on the effective date, which would require them to collectively make more than 350 incremental HSR filings to enable them to continue to engage in portfolio management transactions with respect to the affected issuers. The filing fees alone for these 350 filings would impose a massive cost. If the middle-tier filing fee of $125,000 for holdings valued at $184 million or greater but less than $919.9 million were applied, then they would require $43 million in filing fees.[14] These fees would likely increase the costs of a regulated fund's investment offerings and thus would be borne ultimately by investors.

The number of incremental filings, however, could likely exceed this amount because the 802.64 Institutional Investor exemption also requires that all of the entities in the expanded acquiring person each meet the HSR definition of "institutional investor." Thus, the exemption would not apply if any entity within the acquiring person that holds voting securities in the same issuer is not an "institutional investor."[15] We believe that this may regularly be the case because asset managers often replicate or use successful investment strategies used by regulated funds for other clients that are not considered "institutional investors," such as funds regulated by jurisdictions outside the United States or separate accounts customized for a specific client. Accordingly, the Aggregation Rule is likely to trigger this exception to the exemption and make it unavailable.

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[12] FED. TRADE COMM'N AND DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT: FISCAL YEAR 2019 5 (2019), https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.
[13] Fed. Trade Comm'n, *Premerger Notification Program*, FED. TRADE COMM'N (Dec. 2020), https://www.ftc.gov/enforcement/premerger-notification-program.
[14] The Commission recently proposed these thresholds, but they have not yet been finalized. These thresholds are lower than the thresholds that applied in 2020. *See* Unpublished Notice, Revised Jurisdictional Thresholds for Section 7A of the Clayton Act (Feb. 1, 2021), https://public-inspection.federalregister.gov/2021-02110.pdf.
[15] *See* 16 C.F.R. § 802.64(c) (2020).

If the 802.64 Institutional Investor exemption were no longer available, then funds would have to rely on the 802.9 Investment Only[16] exemption, which itself would only be available if the aggregated holdings of all entities in the acquiring person are below 10% of an issuer's voting securities. Here, our survey reveals that 85% of respondents would exceed that 10% limit for at least one issuer, resulting in ***over 930 incremental HSR filings*** that would be required on the effective date to enable future portfolio management transactions with respect to the affected issuers. We note that this is likely a low estimate based on the low end of the ranges used in our survey. The number of incremental filings, therefore, could easily exceed 1,000, or nearly 50%, of all HSR filings that the FTC receives on an annual basis.

These estimated increases in HSR filings could yet still increase even higher. For example, asset managers who choose to make pre-emptive HSR filings well before exceeding the limits on the 802.9 Investment Only exemption and 802.64 Institutional Investor exemption would generate even more HSR filings. Second, as discussed in subsection (E) below, many more HSR filings could be triggered by how the Aggregation Rule impacts the 802.51 Foreign Issuer exemption,[17] as well as how the Commission applies its current informal guidance on the required intent for the 802.9 Investment Only exemption.[18] In fact, as described further below, some members estimate that the potential effect of the Aggregation Rule on the 802.9 exemption would increase their respective incremental HSR filing burdens by nearly threefold. Therefore, the filings prepared by funds and their managers could potentially increase by well more than half what is currently received by the FTC (and what is prepared by issuers in responsive filings. The cumulative fees associated with those filings also would increase far higher.

In addition to the increased amount of HSR filing fees, other costs to prepare these filings would also be very high. These costs include attorneys' fees to prepare the filing and substantial employee time to collect information on an aggregated basis across the hundreds, and perhaps thousands, of separate "ultimate parent entities" that would be aggregated. For funds and other entities that share a common investment adviser or have associated or affiliated investment advisers, information is not typically kept on the aggregated basis in the way that the Proposed Rules would require. Rather, that information may be intentionally segregated due to firewalls enacted to comply with SEC rules and other regulations. Further, funds also may feature more than one investment adviser and may be managed through sub-adviser relationships.[19] Under those circumstances, independent asset managers with separate compliance systems would have to coordinate and share both competitively sensitive and client sensitive information with one another about their clients' respective holdings to prepare HSR filings and monitor for filing obligations. This is a terrible scenario.

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[16] As used herein, "Investment Only exemption" refers to the exemption provided under 16 CFR § 802.9 for acquisitions made solely for the purpose of investment. *See* 16 C.F.R. § 802.9 (2020).

[17] *See infra* Section I(E)(3).

[18] *See infra* Section I(E)(2).

[19] We also discuss how difficult it is to discern the scope of the acquiring person based on these types of arrangements. *See infra* Section I(D)(3).

To comply with the Proposal, funds and their managers would need to modify their compliance systems to monitor holdings on an aggregated basis. Thirty percent of survey respondents indicated that their current compliance systems could not be modified to accommodate the Proposed Rules, meaning that they would be forced to purchase or build a completely new system. These are significant costs and would also require professional staff to oversee and manage these systems. The remaining respondents believe that they could modify their compliance systems, but more than two-thirds of these respondents indicated that it would either be difficult or extremely difficult to make such changes.

Given the ambiguities of the Proposed Rules, many respondents were unable to identify the full costs of these modifications. However, a significant portion—11% of respondents—expect that their compliance costs would increase by more than 50%, while 27% of respondents expect an increase in compliance costs ranging between 11% and 20%. These increases would be quite burdensome, especially considering that funds and their managers already have substantial baseline compliance costs associated with the SEC's regulatory requirements. Again, these costs will ultimately be borne by investors, including the many retail investors and retirement savers that rely on regulated funds to meet their financial goals.

Information collection efforts also would require extremely burdensome processes that cannot necessarily be automated. For example, although it is highly unlikely that any Item 4 documents of an HSR filing would exist for a fund's transaction,[20] the fund would, based on informal interpretations issued by the Commission's Premerger Notification Office, be required to confirm the absence of such documents with the thousands of officers and directors of the many ultimate parent entities within an expanded acquiring person, including entities that hold no shares of the issuer. Likewise, determining which minority holdings receive revenue in the same NAICS codes as the acquired person, as required in Item 6 of an HSR filing, or determining the geographical sources of an issuer's revenues, especially for foreign issuers, would require a manual process that a fund or asset manager would have to apply to thousands of investments because of the Aggregation Rule.

Contrary to the Commission's belief, these HSR filing burdens and associated costs would disproportionately and greatly affect funds with little to no experience with completing and submitting an HSR filing. The 802.64 Institutional Investor exemption currently permits funds to invest in issuers in the ordinary course of business and solely for the purpose of investment without requiring an HSR notification filing. Unsurprisingly, because nearly all regulated fund transactions are made in the ordinary course of business and solely for the purpose of investment, our survey reveals that 92% of respondents had made no HSR filings for ordinary course investments in the past five years. By expanding what constitutes an acquiring person, the Aggregation Rule would likely require hundreds of incremental HSR filings from entities that are unaccustomed to making any such filings. It would be a completely new filing process to them. Issuers would likewise need to make filings as the acquired

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[20] *See infra* note 69.

person, and many publicly-traded issuers that are widely held may also be unaccustomed to making HSR filings. Clearly, the Commission's stated prediction in the Proposed Rules that the burdens will be limited to the collection of additional information only by companies that are already accustomed to making HSR filings is inaccurate.[21]

B. The HSR Waiting Period is Untenable for Portfolio Management of Regulated Funds

Virtually all antitrust enforcement actions brought under Section 7 of the Clayton Act involve change of control transactions that frequently are negotiated for months before signing. In these types of transactions, the parties will have the luxury of waiting for the HSR 30-day waiting period to expire and build it into their plans.

In contrast, portfolio management by asset managers is a constantly evolving fiduciary process that typically involves open market transactions for which timing and flexibility is critical. Requiring an asset manager to wait for 30 days before executing a transaction would detrimentally affect portfolio management and investment operations. In the case of regulated funds, this requirement would risk harming Americans who are saving for their most important financial goals, including for retirement, education, emergencies and income. Therefore, the adverse impacts of the HSR waiting period on the efficiency, performance, and value of regulated funds are just as concerning as the unduly large HSR filing fees and compliance costs that the Aggregation Rule would ultimately impose on investors.

Regulated funds have various structures that affect the management of their portfolios, including open-end funds (or mutual funds), closed-end funds, and ETFs. Regulated funds offer a variety of investment objectives and strategies for investors that are disclosed in the fund's prospectus. Some funds invest in domestic or global equities and bonds, or subsets or various combinations of equities and bonds. Other funds may invest in equities, bonds, and other securities and financial instruments such as commodities, derivatives and futures. With respect to investment objectives or strategies, some funds are "actively managed" towards a specific objective, while others have an investment objective to follow an index—often referred to as index-based funds.[22] There are a wide variety of indices for index-based investment strategies and a diverse range of active investment strategies. Both a fund's structure and its investment objectives, strategies and policies impact portfolio management and thus its purchase and sale of securities.

Open-end funds (or mutual funds) are the predominant form of regulated funds.[23] The ability to make timely transactions on the open market is critical to their portfolio management. Open-end funds issue redeemable securities and are continuously offered for sale and can be redeemed throughout

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[21] *See* NPRM, 85 Fed. Reg. 77053, 77058.

[22] Approximately 38% of mutual fund and ETF assets follow an index strategy. INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 39 fig 2.8.

[23] INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 30 fig. 2.1.

the business day. Those orders receive the same price—the net asset value ("NAV")—at the next time it is calculated, *i.e.*, typically at 4:00 p.m. EST when exchanges close. This means that there are mutual fund inflows and outflows that must be managed and that impact the fund's portfolio. There also may be investment income coming into a fund from its investments or from sales of securities. These cash flows must be managed to ensure that assets are deployed to achieve the investment objectives stated in the fund's prospectus. Holding cash weighs on performance and the achievement of a fund's objectives.

Markets also are changing every day (and indeed every second), which affect the value of an open-end fund's positions and portfolio allocations. As those portfolio allocations change, portfolio managers may seek to rebalance the portfolio to manage risk or to better align with the fund's stated investment objectives. Ongoing changes in market information also affects an asset manager's investment assessments of how to deploy the fund's assets consistent with the fund's investment objectives. For example, an issuer may move from one investment category, such as a small cap to mid-cap issuer, or identify a new value or growth investment opportunity. For an index-based fund, issuers may be added or deleted from an index by a third party that determines the index, and depending on what strategies a fund follows to "track" the index, allocations to issuers in the index may need to be adjusted. In addition, because indexes do not include cash components, the inability to convert cash inflows into the securities in the index can cause tracking error. Again, this all takes place within the context of flows coming into and out of the mutual fund, which frequently occurs on a daily basis.

Thus, mutual fund portfolio management is a dynamic process for which a mandatory HSR 30-day waiting period would be exceptionally disruptive and detrimental. A waiting period means that investment opportunities may be lost and timely rebalancing and reallocations that are otherwise necessary to track index changes are impeded. The anticipated parameters of an investment may be harmed and will likely have changed due to the real-time movement of markets and prices. These are not transactions in any way akin to a negotiated acquisition of voting securities to gain control or to influence the operation of an issuer.

The inefficiencies and potential loss of value that would be caused by subjecting such ordinary course transactions to the HSR 30-day waiting period would be borne primarily by households, *i.e.*, retail investors, *which hold 95% of long-term mutual funds*.[24] Mutual funds also represent 58% of defined contribution plan assets and 44% of individual retirement account assets[25] and, therefore, clearly are how Americans are investing for their most important financial goals. Imposing an HSR 30-day waiting period by way of the Aggregation Rule would unnecessarily harm the way mutual funds are able to execute their investment objectives, strategies and policies on behalf of these investors.

[24] INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 58.
[25] INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 34 fig. 2.5.

Closed-end funds are another type of regulated fund whose shares are listed on a stock exchange. An estimated three million American households owned these types of funds in 2019.[26] Closed-end funds issue a fixed number of common shares in an initial offering and there may be additional or subsequent offerings. The market price of closed-end fund shares fluctuates similarly to other publicly traded securities and are affected by supply and demand in the marketplace. These funds also can issue one class of preferred shares that offer shareholders dividends, but these shareholders do not participate in the gains and losses of the fund. Once issued, closed-end fund shares are typically bought and sold in the open market and are not purchased or redeemed by the fund, although some closed-end funds may adopt a stock repurchase program or periodically tender for shares.

In contrast to open-end funds, closed-end funds do not need to maintain cash or sell securities to meet redemptions and therefore can invest in less liquid securities. Closed-end funds, subject to strict regulatory limits, can also use structural or portfolio leverage differently than open-end funds. Their portfolios are professionally managed in a way tailored for this structure and in accordance with the fund's stated investment objectives, strategies, and policies. Such funds may be invested in equities, bonds and other securities and assets.

An HSR 30-day waiting period would be just as detrimental and disruptive for the portfolio management of these funds for similar reasons as those for open-end funds, but also would affect closed-end funds differently due to their structural and regulatory differences. For example, subsequent or additional offerings—where new cash would be brought into the portfolio for deployment consistent with the fund's investment objectives—would need to be planned and executed with any potential impacts of an HSR waiting period in mind.

ETFs are another type of regulated fund. In the past decade, demand for ETFs has increased as a vehicle for participating in or hedging against broad movements in the stock market. ETFs are typically organized as open-end funds and must post their NAV each day, but retail investors buy shares on the secondary market through a broker at a market price. The largest portion of the ETF sector is represented in index-based ETFs, but actively-managed ETFs exist as well.[27] The creation and redemption of ETF shares, generally referred to as the primary market, occurs with certain market participants (or authorized participants) that engage in an in-kind transfer of a "basket of securities" in exchange for shares of the ETF. The creation and redemption "baskets of securities" are published each business day for the next trading day. This creation and redemption process can occur rapidly based on movements in supply and demand for the ETF in the secondary market. Thus, an ETF is acquiring or disposing of voting securities in the "basket" on little notice. The in-kind aspect of the creation and redemption of ETF shares is highly important to the efficiencies of an ETF as it reduces transactions fees and other costs, allowing funds to have ready securities for the portfolio rather than having to take cash and then make market purchases. In addition, the transparency of the ETF's portfolio and the

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[26] These households tend to hold a broad range of investments, including other regulated funds. INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 114.
[27] INVESTMENT COMPANY INSTITUTE FACTBOOK, *supra* note 3, at 128.

ability of authorized participants to create or redeem shares at the NAV both promote trading of the shares in the secondary market—where retail investors transact—at a price that approximates the underlying value of the portfolio. Any disruption of the mechanisms or processes through which price discovery occurs or liquidity is expressed could adversely affect the otherwise efficient arbitration of the imbalances between the purchasing and selling interests in shares of an ETF. This would result in wider spreads and ultimately higher trading costs to ETF shareholders transacting in the secondary market.

To observe the HSR 30-day waiting period, an ETF would need to direct the authorized participant not to deliver voting securities of the acquired person when making the in-kind transfer. Creations presumably could only occur partially in cash during a waiting period, despite still posting a basket of securities each day. If subject to the waiting period, the ETF would then have to hold more cash pending expiration of the 30 days, which would obviously impact the performance of the ETF and disrupt otherwise efficient portfolio management; for ETFs that follow an index-based strategy, this would lead to increased tracking error of the referenced index, which would then reduce the value of the index-based ETF to investors.

As clearly illustrated above, the HSR 30-day waiting period would be highly detrimental to portfolio management for regulated funds and their managers, ultimately harming millions of fund investors. Funds provide substantial benefits to investors that include professional management, investment exposure and access to various markets, diversification, and reasonable cost, as well as substantive government regulation and oversight via specific board governance requirements and the SEC's regulatory framework. The Aggregation Rule would dilute and needlessly imperil these benefits by disrupting ordinary course and time-sensitive portfolio management transactions, without any of the benefits of flagging potentially anticompetitive transactions.

In addition, the time it takes for an asset manager to act on a decision to buy or sell a security can adversely impact the efficiency of an orderly market for securities. If a large enough portion of asset management market participants were unable to act readily on a decision to purchase or sell a security due to the waiting period, then the processes and mechanisms upon which markets have historically relied would be disrupted. It is difficult to know what consequences such delays could impose, for example, on the speed and responsiveness with which price discovery occurs, the depth or extent of liquidity, market making, and other fundamental features of efficient markets. These disruptions could adversely affect all market participants and not merely the asset managers or investors who would be subject to the Aggregation Rule. The HSR 30-day waiting period simply does not make sense in the context of these ordinary course transactions for investment, as opposed to acquisitions for control or to influence the issuer, which are already captured without the Aggregation Rule.

C. Asset Managers Are Likely to Either Submit HSR Filings Pre-Emptively or Cap Investments in Response to the Aggregation Rule

If the Commission adopts the Aggregation Rule, then funds and asset managers would likely feel forced to choose among two undesirable compliance strategies: (i) make pre-emptive HSR filings well before reaching the HSR filing thresholds and then rely on the 802.21 exemption to make acquisitions up to the next threshold for the next five years; or (ii) cap their investments so that no HSR filings are required.[28] It is unclear whether other options, such as the use of derivatives, are available or feasible from a cost, risk, and performance standpoint. Both courses of action would impose direct and meaningful costs on regulated funds and asset managers beyond the significant costs of HSR filings. Our survey data reveals that when presented with these two stark options, more than half of respondents (58%) would likely lean to the option of a cap on their aggregated investments.

Asset managers looking to cap investments for their regulated funds and clients might choose to build in some buffers between their clients' aggregated positions and the limits that would disqualify all of those clients' from relying on an exemption. Such buffers could give the asset manager some room to make small portfolio management transactions in an emergency. Such buffers, however, would not be possible for issuers for which the aggregated holdings already exceed the caps in the exemption criteria. For such issuers, the asset manager's clients would not be able to purchase even a single share without triggering the HSR waiting period and filing requirements. To be able to achieve such buffers, these asset managers may have to force their clients to divest potentially billions in holdings. For example, to reduce aggregated holdings below the 15% cap for the 802.64 Institutional Investor exemption, survey respondents estimated that the funds and other clients they advise would collectively have to divest at least $100 billion in voting securities.

Capping and potentially divesting fund investments is a highly negative outcome in many evident ways. Asset managers would have difficulty managing cash inflows effectively, rebalancing portfolios to manage risk and allocations or otherwise ensuring that the investments held continue to serve the fund's or client's stated investment strategy or objectives. For index-based funds, this approach would impact how the fund's performance tracks the performance of the referenced index, which reduces the value of index investing to investors. Actively-managed funds would also be harmed by being constrained with fewer investment options to achieve their investment objectives and strategies, forcing them to divert capital to suboptimal investment choices and thus harming investors. Further, adopting this approach across aggregated entities that are not under common control could also create exceptional complexities and difficulties around how such burdens are allocated, likely posing very difficult contractual and fiduciary questions.

The capping strategy that might be required as a result of the proposed Aggregation Rule could also harm issuers by denying the best performing issuers access to capital and diverting capital to issuers with suboptimal performance. In addition, investors may be forced to steer capital to larger issuers, where it is less likely that HSR limits will be exceeded on an aggregated basis. This could harm or distort competition by preferencing larger incumbents over new market entrants. Thus, a procedural statute such as the HSR Act could adversely interfere with capital flows in the United States, harm

[28] Although investments may be capped today for other reasons, such caps are generally intended to protect investors from risk. Here, the caps would not be made in the interest of investors absent the compliance burdens imposed by the Proposed Rules.

competition, and result in dead weight economic loss as capital would not be put to its best and highest value use.

D. The Proposed Aggregation Rule is Unnecessary and Not Administrable

While we are greatly concerned that the Aggregation Rule would impose significant costs on funds and adversely impact portfolio management, we also want to point out that the problems with the Commission's approach are even more fundamental. These problems include the difficulty at the outset of precisely determining which entities must be included in an expanded definition of acquiring person. We detail those problems here and explain why the rule is unnecessary when applied to regulated funds and other clients of common investment advisers.

1. The Aggregation Rule results in a massive expansion of the acquiring person

The definition of "person" is central to the HSR rules. It determines which entities are responsible for a filing, what holdings of voting securities and other information are relevant for determining thresholds and exemption criteria, and what information is required in the HSR filing. When adopting the HSR rules in 1978, the Commission deliberately decided to limit an acquiring "person" to only those entities under common control with the entity that proposes to make the relevant acquisition. Second, the Commission defined "control" to exist only when one entity holds majority governance rights in another entity. The Commission explicitly rejected proposals that would require aggregation with entities not under common control because such proposals would not be administrable.[29] The Commission further rejected concepts of control that were based on contractual rights to manage another entity's investments. In both cases, the Commission explicitly contemplated and rejected rules that would aggregate regulated funds with other funds managed by the same investment adviser.[30]

Accordingly, existing HSR rules limit an acquiring person to only entities under common control. The acquiring person includes (i) the entity that proposes to acquire the voting securities in the transaction; (ii) its "ultimate parent entity";[31] and (iii) any entity controlled by the ultimate parent entity, *i.e.*, "affiliates." Therefore, the only entities that are responsible for an HSR filing are entities

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[29] *See* Premerger Notifications Reporting and Waiting Period Requirements: Final Rule, 43 Fed. Reg. 33450, 33460 (July 31, 1978) ("The concept of affiliation arising from a less-than-control relationship has been entirely deleted. The final rules thus incorporate a suggestion made by several comments that affiliation be defined no more broadly than the concept of control. The final rules make this change because of what appeared to be potential administrative problems involved in any definition of affiliation that included less-than-control relationships.").

[30] *See id.* at 33457 (rejecting a definition of "control" that would "regard an investment adviser that advises several separate mutual funds as controlling the funds."); *id.* at 33460 (rejecting definitions of "affiliate" that would "aggregate the holdings of mutual funds, investment companies, or other institutions that are clients of the same investment adviser."). As detailed below, the Commission recognized at the time that such aggregation in the asset management context would be inconsistent with Congressional intent in passing the HSR Act. *See infra* Section I(F).

[31] The term "ultimate parent entity" means an entity which is not controlled by any other entity.

controlled by the single ultimate parent entity of the acquiring entity. This is a relatively administrable rule.

The Aggregation Rule, however, would massively expand the definition of the acquiring person to also include additional entities *not under the control* of the ultimate parent entity. Such "associates" would include (i) any entity that manages the investments of the acquiring entity (the "managing entity"); (ii) any other entity whose investments are managed by the managing entity; and (iii) any other entity that is under common control with the managing entity. The proposed Aggregation Rule would treat such non-controlled "associates" as if they were equal to controlled "affiliates."

In the regulated fund and asset management context, such a change in the definition of an acquiring person would be extensive. The tentacles of such an approach are far-reaching. Under the current HSR rules, the acquiring person is typically a single regulated fund or perhaps multiple regulated funds that are organized as series of a common trust. In contrast, the acquiring person under the Aggregation Rule would include:

- The fund that intends to engage in the transaction;
- The investment adviser (or in some cases, multiple investment advisers) that the fund contracts with to manage the investments of the fund;
- The ultimate parent entity of the investment adviser;
- Any other entity controlled by the ultimate parent entity of the investment adviser, which can include yet other investment advisers, affiliated banks, affiliated broker-dealers, affiliated insurance companies, or other operating companies;
- All other funds and clients managed by the same investment adviser(s), which could number in the thousands.[32]

Instead of a single ultimate parent entity, the acquiring person would instead lump together hundreds, and in many instances thousands, of independent entities, that would be collectively responsible for the filing. There no longer would be a single "ultimate parent entity" that can control every entity responsible for the filing. Rather, there would be potentially thousands of entities within a single acquiring person that meet the definition of an "ultimate parent entity." Therefore, the proposed Aggregation Rule renders the Commission's own legal concept of "ultimate parent entity" a farce.

[32] ICI does not read the "associate" definition to include regulated funds and other clients whose investments are managed by entities under common control with the "managing entity" such as the clients of other affiliated advisers. Such an interpretation is inconsistent with the plain language of the "associate" definition. If, however, the Commission were to adopt such an interpretation of "associate," this would result in yet hundreds more entities being aggregated with the acquiring "person."

2. There is no principled reason to treat all clients of the same investment adviser as the same "person"

Unfortunately, the Commission's disregard for the "ultimate parent entity" concept appears to be based on the notion that a common investment adviser uses multiple separate funds and other client entities that it manages as acquisition vehicles to serve its own purposes. This is not how investment advisers operate, nor regulated funds.

As we have explained at length in previous letters to the Commission, an adviser often serves hundreds or thousands of separate client relationships.[33] This range of clients is diverse and may include, among others, individuals, funds, corporations, pension and profit-sharing plans, endowments, charitable organizations, other investment advisers, and government entities. The adviser does not control these entities under the HSR definition of "control" and does not otherwise control these entities as a practical matter.

Rather, the adviser acts as a fiduciary agent and manages the assets owned by its clients, each of which represent a distinct set of shareholders. The adviser has a contractual duty to manage each of its client's assets pursuant to separate investment management agreements and other ancillary documents, *e.g.*, the fund prospectus, that set forth each client's distinct investment objectives, strategies, guidelines, and policies that the adviser must follow. Importantly, the adviser also has a fiduciary duty to its clients and owes each of them duties of loyalty and care in carrying out these responsibilities. Therefore, it should be evident that aggregating a fund's "associates" into the same acquiring person would artificially and incorrectly treat thousands of separate entities not under common control as if they were a single monolithic entity.

Nor are regulated funds or other clients of the adviser working together for a common purpose. Each regulated fund is subject to robust governance and an extensive regulatory framework that ensure that they act in the best interests of their respective shareholders. Section 17 of the 1940 Act prohibits and restricts transactions with affiliates, including joint transactions. Regulated funds have boards of directors with extensive oversight responsibilities, independent directors, a prospectus (and liability therefor), periodic SEC and public reporting obligations, and audited financial statements. These funds and their managers also are subject to regular inspection and oversight by the SEC. Thus, they are highly regulated and supervised vehicles for investment.

3. Substantial ambiguities make the Aggregation Rule inadministrable

The Aggregation Rule ultimately cannot be administered because of the significant ambiguities that it creates for regulated funds and their asset managers. These ambiguities make it difficult for asset

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[33] *See* Letter from ICI, to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201) (Aug. 20, 2018); Letter from ICI, to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings, Hearing Number Eight (Docket ID: FTC-2018-0107) (Jan. 15, 2019).

managers to identify, with any certainty, the outer bounds of which entities must be included in an acquiring person and to determine the aggregate holdings in any issuer.[34] Adopting the most inclusive approach to aggregating entities further reveals the operational challenges that render the Commission's approach as impracticable.

For example, the definition of "associate" implicitly assumes that for any entity, there is only one entity that manages its investments (the "managing entity"). Regulated funds and other entities in the asset management industry, however, may employ other investment advisers that each manage a portion of the entity's investments, *i.e.*, a sleeve of a fund. For example, there are manager of manager arrangements or instances where one manager may recommend engaging another manager based on that manager's expertise. This happens because different investment advisers may specialize in a particular type of investment or investment strategy. Therefore, there can be multiple "managing entities" for any given fund or other investment entity or client. The proposed Aggregation Rule, however, would potentially define the acquiring person to include all such managing entities *and all other entities* whose investments are managed by those managing entities. This would result in an expansive acquiring person involving multiple independent advisers *and* their respective client pools.

This would require coordination and information sharing between advisers that is problematic in several aspects. Investment advisers that would not ordinarily share any information with another, much less competitively sensitive real-time information about respective clients' holdings, would be collectively responsible for the HSR filing.[35] Issues also would be raised as to the sensitivity of such information and the ability to share such information under the federal securities laws. Determining whether an HSR filing is even required and preparing that filing would require substantial coordination between wholly independent compliance programs. This is simply not practicable, and the sharing of such information necessary for such activities may create compliance risks and collisions among competing contractual obligations and applicable laws that may limit or prohibit such sharing.

Sub-adviser relationships raise similar ambiguity problems. Investment advisers may outsource the management of certain funds or fund sleeves to third-party advisers and may themselves provide such sub-adviser services to other regulated funds (managed by other third parties).[36] Again, these arrangements occur because different advisers may have comparative advantages on certain types of

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[34] Indeed, ICI's survey respondents encountered great difficulty with estimating aggregate positions due to this uncertainty and often had to rely on assumptions about which entities would or would not be included within an acquiring person.

[35] This practice of using multiple investment advisers for a single entity also raises aggregation questions for other entities managed by those advisers. For example, assume that Fund A is advised by Adviser B, which also manages a portion of Endowment C's investments. If Fund A seeks to acquire a voting security, would Fund A's holdings be aggregated with all of Endowment C's holdings, or only that portion of Endowment C's holdings managed by Adviser B? Because "associate" is defined based on an "entity," the rules suggest that all of Endowment C is within the same acquiring person as Fund A, even though Adviser B only manages a small portion of Endowment C's investments, and likely has no access to information about the other holdings of Endowment C.

[36] Our survey data reveal that 69% of respondents employ third-party sub-advisers and 89% of respondents provide sub-adviser services to third parties.

investments or investment strategies. The Aggregation Rule would create substantial ambiguities as to how to treat sub-adviser relationships. In particular, would the sub-advised entity be aggregated with the investment adviser's own fund complex, the sub-adviser's own fund complex, or both? To the extent that the use of sub-advisers expands the definition of the acquiring person, this could dissuade the use of sub-advisers, denying investors the benefits of asset manager specialization. Likewise, the proposed Aggregation Rule could create market distortions by forcing asset managers to examine and weigh sub-advisers based on the size of their client base—an odd outcome.

Coordination challenges, however, are not merely confined to situations with multiple managing entities and sub-advisers. Even within the pool of clients served by a single investment adviser, investment advisers often erect firewalls that prevent parts of their operations serving one group of clients from interacting with other parts of their operations that serve different groups of clients. These firewalls may be established for commercial reasons, but they are often also created to comply with certain SEC regulations.

In many cases, where a fund's adviser is part of a broader corporate group that includes other investment firms, the group has already invested very significant resources to avoid precisely this type of "aggregation" scenario under existing securities laws. For example, firms have invested resources to establish, document, maintain, and test (including, for some firms, through costly external audit procedures) strict "information barriers" or "information walls" with their independent affiliates, so that non-public holdings information or investment plans are not shared by investment professionals in different parts of the group. These barriers have been constructed over a multi-year period based on clear SEC guidance with respect to funds' and advisers' Section 13 filing obligations. If the Aggregation Rule is adopted as proposed, then these barriers would have "no value" for HSR purposes, and otherwise independent affiliates would be forced to share and collate information that they otherwise would guard carefully, and may be required to do so under securities law, within each independent organization, with no clear policy benefit. This places managers in an untenable position between conflicting and different regulatory requirements.

Further, the expansive implications of the Aggregation Rule raise thorny contractual and legal questions concerning which entity or entities within the "acquiring person" would bear the costs of HSR filings. For example, a fund engaging in a $1 million acquisition of voting securities in an issuer could trigger an HSR filing with a $125,000 filing fee, plus preparation costs, simply because of what multiple other unrelated funds or other entities advised by the same investment adviser hold in the same issuer. Which entity would incur these costs among the thousands of entities within the acquiring person? Would it be only the entity that engages in the transaction that exceeds the threshold and triggers the HSR filing obligation? Would it be all entities within the acquiring person that hold voting securities of the subject issuer? Or would costs be allocated to all entities within the Commission's definition of the acquiring person, even those such clients that may hold few or no shares in the issuer?[37] Making these determinations would be difficult because the adviser would likely need to obtain contractual approval for any such allocations with each of those funds and clients that it expects to assume share in those costs. Given the broad range of non-affiliated entities within the acquiring person, it is also not entirely clear who would exercise the authority to make those decisions. More importantly, determining which funds or clients must share in those costs would raise difficult legal questions about whether those determinations are consistent with the adviser's fiduciary duty to act in each of their best interests.

Similar questions would be raised by a compliance strategy to cap investments and possibly divest shares so that HSR exemptions thresholds are not exceeded. This approach creates equally difficult questions. For example, an acquisition by Client A today limits the investment opportunities that Client B can engage in tomorrow without triggering an HSR filing. Even for contemporaneous transactions, an adviser would have to consider the impact of one client's acquisitions on the HSR obligations of another client. Similarly, how should an investment adviser take on a new client if that client's holdings would require the investment adviser to cap holdings of its existing clients?

E. The Aggregation Rule Effectively Eliminates Key Exemptions Built into the HSR Act and HSR Rules

In addition to being inadministrable, the proposed Aggregation Rule would effectively eliminate important HSR Act exemptions that effectuate Congress's intent to exempt ordinary course acquisitions made solely for the purpose of investment. It would also create substantial ambiguity regarding when the 802.51 Foreign Issuer exemption applies, which could lead to more HSR filings for purely foreign-to-foreign transactions that would not benefit antitrust enforcement in the United States.

1. The Aggregation Rule effectively eliminates the 802.64 Institutional Investor exemption

The 802.64 Institutional Investor exemption applies to a limited set of entities defined as "Institutional Investors" and allows holdings up to 15% of the outstanding voting securities of the issuer for ordinary course transactions made solely for the purpose of investment. Investment companies regulated by the SEC under the 1940 Act, *e.g.*, mutual funds and exchange-traded funds, are among the entities that are "institutional investors" and, therefore, qualify for the exemption. The exemption, however, has an important "exception to the exemption" under 802.64(c)(2), such that "no acquisition by an institutional investor shall be exempt . . . if any entity included within the acquiring

[37] A related question is whether other entities advised by the same investment adviser that acquire voting securities of the same issuer later in time should reimburse some of the costs because they benefit by operation of the 802.21 exemption from the earlier filing.

person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired."[38]

The Aggregation Rule would expansively redefine an acquiring person from a single fund to hundreds and potentially thousands of entities advised by the same investment adviser, and in some instances, multiple investment advisers and their respective pools of clients. The effect of aggregation alone would cause 63% of the survey respondents to exceed the 15% limit of the 802.64 Institutional Investor exemption for at least one issuer.[39]

But this is only the tip of the iceberg. The more concerning impact of the Aggregation Rule is that it would result in the aggregation of a fund with many entities that are not institutional investors within the same expanded acquiring person. The same investment advisers that serve mutual funds and exchange traded funds often also provide asset management services to endowments, retirement plans, natural person accounts, UCITS and other non-US regulated funds, private funds, 529 plans, collective investment trusts, and other entities that may not be considered institutional investors under the HSR rules. Therefore, the Aggregation Rule would likely trigger the exception to the exemption because not all entities meet the "institutional investor" definition.

Likewise, as noted above, a regulated fund's investment adviser, which would not be considered an "institutional investor" under the HSR rules, would also be included within the acquiring person. The investment adviser may have its own affiliated investment accounts that may at times, on a temporary basis, hold shares of issuers that are also held by client funds.[40] One practice that may make this scenario likely is that investment advisers may test investment strategies on a pilot basis in their own accounts before those strategies are later adopted by the regulated funds that it manages. Another common practice is the use of seed capital to launch new funds in which the investment adviser may have a controlling position in the seed fund for a short period of time.[41] Investment advisers may also be under common control with a bank or insurance company that holds investments,[42] or other affiliate investment advisers,[43] and some of these entities may not qualify as institutional investors. If any of these entities within the aggregated acquiring person holds even a single voting security in the same

[38] 16 C.F.R. § 802.64(c)(2) (2020).

[39] As noted in the discussion of additional HSR filing burdens, this would result in the members having to make over 350 HSR filings to comply with the changes in the HSR Rules. *See supra* Section I(A).

[40] Nearly three-quarters (74%) of survey respondents specified that their presumptive aggregated "acquiring person" would include investments advisers that directly hold shares in issuers that are also held by registered funds that the advisers manage.

[41] *See* 15 U.S.C. § 80a–14 (2018). For example, it is common for a fund's manager to provide the minimum required initial seed capital for a new fund at or prior to the public offering of the fund's securities.

[42] Seventy percent of survey respondents specified that their presumptive aggregated "acquiring person" would include an additional adviser that is under common HSR "control."

[43] Eighty-nine percent of survey respondents specified that their presumptive aggregated "acquiring person" would include multiple investment advisers under common HSR "control" that each manage a different set of investment products.

issuer, then the exception to the exemption would be triggered and the mutual fund or exchange-traded fund, which are institutional investors, would not be able to rely on the exemption.

Moreover, the frequent presence of non-US publicly offered, substantively regulated funds ("non-US retail funds") in the asset management industry makes the loss of the 802.64 Institutional Investor exemption highly likely. Some survey respondents disclosed that their advisers also manage investments for non-US retail funds, which include UCITS, Canadian mutual funds, and Japanese investment trusts. Because these types of funds are not registered with the SEC under the 1940 Act, they do not meet the definition of an "institutional investor" under the HSR Rules and it is not clear under existing informal guidance which of such entities would nonetheless be deemed an "institutional investor" by Commission staff.[44] Yet they—particularly in the case of UCITS—hold securities that often mirror the portfolios of US-regulated funds managed by the same investment adviser. Therefore, under the Aggregation Rule, these funds are likely to be included in the same acquiring person with US-regulated funds, and because they often hold the same securities as the US-regulated funds, they are likely to trigger the 802.64(c)(2) exception to the Institutional Investor exemption, thus making it unavailable to any regulated fund advised by the same investment adviser. As discussed above, this could result in regulated funds and their managers making over one thousand filings on the effective date, if the Commission adopts the proposed Aggregation Rule.

2. The Aggregation Rule could also effectively eliminate the 802.9 "Investment Only" exemption

Regulated funds that could not rely on the 802.64 Institutional Investor Exemption would need to consider whether they could instead rely on the 802.9 Investment Only Exemption. In contrast to the 802.64 Institutional Investor exemption, the 802.9 Investment Only Exemption applies to any type of acquiring entity, but limits holdings to only 10% of the outstanding voting securities of the issuer, and, like the 802.64 Institutional Investor exemption, requires that such acquisitions be made "solely for purpose of investment." For the reasons discussed below, the proposed Aggregation Rule could further severely limit the availability of the 802.9 Investment Only exemption, resulting in significantly more HSR filings than the number of incremental HSR filings that survey respondents already anticipate.[45]

Specifically, the Commission has previously taken the informal position that there should be a rebuttable presumption that an acquiring person does not make an acquisition "solely for the purpose of investment" if it holds 10% of the outstanding voting securities of a competitor of the issuer.[46] This

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[44] The FTC's Informal Interpretation 9803014 (Mar. 1998) addresses this issue but does not specify clearly which entities do or do not satisfy the required levels of similarity ("in all other respects") set out in the interpretation." *See* Fed. Trade Comm'n, Premerger Notification Program: Informal Interpretation 9803014 of Rule 802.64 (Mar. 1998).

[45] *See supra* Section I(A).

[46] *See* Fed. Trade Comm'n, Premerger Notification Program: Informal Interpretation 18010003 of Rule 802.9 (Jan. 29, 2018).

position was made in the context of the existing HSR rules, in which the acquiring person and its holdings are defined far less expansively.

The Aggregation Rule, however, raises two important issues. First, would the Commission still find the 10% figure meaningful if holdings in the competitor to the issuer are measured on an aggregated basis across an expanded acquiring person that would include thousands of "associates"? If so, it is more likely that the requisite showing of "solely for the purpose of investment" would not be satisfied for either the 802.9 Investment Only exemption or 802.64 Institutional Investor exemption. This could leave regulated funds without any of the exemptions that Congress intended and could easily double the total number of HSR filings that the Commission receives on an annual basis. This problem is acute for broadly diversified funds with holdings in thousands of different issuers that could be deemed competitors. Some members have estimated that applying this prior guidance on the aggregated levels required by the Proposed Rules would cause their *own respective* HSR filing and cost burdens to far outpace our total estimates across all survey respondents—specifically, the guidance would require *each* of them to further submit hundreds of additional HSR filings and associated HSR filing fees in the upwards range of hundreds of millions of dollars.

Second, the definition of "competitor" adopted in the proposed De Minimis exemption suggests that the Commission might adopt a similar definition of "competitor" with respect to its interpretation of "solely for the purpose of investment."[47] The proposed definition of "competitor" in the De Minimis exemption is overbroad because it relies on NAICS codes that are far broader than properly defined antitrust markets. Further, that definition is not administrable because the ability to determine which NAICS codes apply to a particular issuer's revenues and which entities are competitors, notwithstanding the lack of a NAICS overlap, require fact-intensive judgments. This exercise would require examining information not in the possession of the acquiring person and would allow reasonable minds to differ about which entities are competitors.[48] In addition, the increase in compliance costs to make such determinations for potentially thousands of investments would be prohibitive.

If the Commission were to apply the same 10% presumption despite expanding the acquiring person so extensively, and were to apply the same overly broad and ambiguous definition of "competitor" to its interpretation of "solely for purpose of investment," this would create substantial uncertainty as to whether regulated funds and asset managers would be left with any reliable exemptions for their ordinary course transactions.[49]

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[47] As proposed, "the term competitor means any person that (1) reports revenues in the same NAICS Industry Group as the issuer, or (2) competes in any line of commerce with the issuer." NPRM, 85 Fed. Reg. 77053, 77061.

[48] *See Todd v. Exxon Corp.*, 275 F.3d 191, 199–200 (2d Cir. 2001) (holding that market definition is a highly fact-intensive inquiry that cannot be determined as a matter of law).

[49] For these same reasons, ICI does not believe that the proposed De Mininis rule will have any practical utility and is unlikely to be relied upon by asset managers.

3. The Aggregation Rule could negate the 802.51 Foreign Issuer exemption

Not only would the Aggregation Rule effectively eliminate or severely limit the 802.64 Institutional Investor exemption and 802.9 Investment Only exemptions, but it also would potentially negate another significant HSR exemption—the 802.51 Foreign Issuer exemption.

The 802.51 Foreign Issuer exemption exists to exempt certain transactions in non-US issuers from HSR requirements. The criteria for the exemption depend on whether the acquiring person is a "U.S. person" or a "foreign person." Importantly, if the acquiring person is the latter, then any acquisition of voting securities short of control is exempt from HSR obligations. If the definition of the acquiring person is expanded to include all "associates," however, then foreign funds that are managed by US investment advisers are likely to be part of an acquiring person that includes US entities and, thus, will be deemed a "U.S. person" under the HSR rules. As such, even minority investments by a non-US fund in a foreign issuer could require an HSR filing in the United States depending on the foreign issuer's jurisdictional connection to the United States, which is not easily ascertainable from public information and would in any event require a manual process.[50]

As a result, the Aggregation Rule would likely capture purely "foreign-to-foreign" transactions (an acquisition of a security in a foreign issuer by a foreign fund) within the scope of the HSR Act, thereby limiting the availability of the 802.51 Foreign Issuer exemption and mandating incremental HSR filings for transactions that present no meaningful risk of any violation of US antitrust law. Our survey data shows that this impact may be quite significant for asset managers—nearly all of our survey respondents (89%) reported that they manage the investments of entities that currently meet the definition of "foreign person."

F. The Proposed Aggregation Rule Would be Inconsistent with Congressional Intent and the Commission's Prior Rejection of Similar Aggregation Concepts

In considering the HSR Act, members of Congress recognized that while the Act was primarily intended to screen for acquisitions of control, it would also apply to any acquisition of voting securities of corporations that exceed the filing thresholds.[51] After ICI and other industry members raised substantial concerns about imposing the HSR waiting period on ordinary course transactions, Congress included several exemptions into the Act to address these concerns.[52] Importantly, one of these exemptions applies to "acquisitions, solely for the purpose of investment, of voting securities if, as a

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[50] 16 C.F.R. § 802.51(b) (2020). If the acquiring person is a "U.S. person" even acquisitions of minority positions can be subject to HSR obligations depending on the foreign issuer's presence in the United States.

[51] See *Merger Oversight and H.R. 13131, Providing Premerger Notification and Stay Requirements: Hearings on H.R. 13131 Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 94th Cong., 2d Sess. (1976) (statement of the Honorable Thomas E. Kauper).

[52] *See, e.g.*, Exhibit A, Letter from Investment Company Institute to Sen. Philip A. Hart (Nov. 21, 1975); Exhibit B, Letter from Association of Closed-End Investment Companies to Sen. Philip A. Hart (Nov. 21, 1975).

result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer."[53]

The trade associations, however, also expressed concern that this particular exemption would be undermined if the 10 per centum limit were calculated on an aggregated basis across funds that were advised by a common investment adviser and, accordingly, asked that Congress specify that the implementing rules should not engage in such aggregation.[54] In response to these concerns, HSR Act co-sponsor Senator Philip Hart explained in the Congressional record that it was Congress's intent that holdings not be aggregated across funds for the purposes of determining eligibility for this exemption. Senator Hart specifically explained that the FTC should not define an "affiliate"[55] to include other funds advised by the same investment adviser. Thus, "if a person (or persons) acquires or holds voting securities solely for the purpose of investment and not to exercise or obtain control of the issuer, then it was not the intention that such person or persons be deemed an 'affiliate' of another person (or persons) who are similarly situated, only because such persons receive investment management services or advice from the same or affiliated investment advisers or managers."[56]

The Commission developed its definitions of "person," "control," and "affiliate" in the HSR rules in 1978 consistent with this Congressional intent. The Commission considered and explicitly rejected proposals that would have required aggregation of holdings across funds managed by the same investment advisers, recognizing that such aggregation would create administrative problems and would not be consistent with the legislative history of the Act.[57] These decisions were made after the Commission's consideration of comments submitted by ICI demonstrating the "devastating impact of aggregation on the normal investment programs of mutual funds and other persons who acquire securities solely for investment and not for the purpose of acquiring control."[58] As discussed in this submission, the reasons for rejecting aggregation remain as compelling today as they did in 1978. The

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[53] 15 U.S.C. § 18a(c)(9) (2018); *see also id.* § 18a(c)(11).

[54] See Exhibit B, Letter from Association of Closed-End Investment Companies to Sen. Philip A. Hart (Nov. 21, 1975) ("We also enclose for your consideration, a discussion of the problem relating to the determination of ten percent ownership which we believe should be mentioned in the Committee Report as requiring resolution by administrative rule-making.").

[55] The HSR Act instructs how to determine aggregate amounts or percentage of voting securities held and bases such aggregation on the concept of "affiliates" (not "associates"). 15 U.S.C. § 18a(b)(3)(B) (2018).

[56] 122 CONG. REC. S15,417 (1976).

[57] *See* Premerger Notifications Reporting and Waiting Period Requirements: Final Rule, 43 Fed. Reg. 33450, 33457 (July 31, 1978) (rejecting a definition of "control" that would "regard an investment adviser that advises several separate mutual funds as controlling the funds."); *id.* at 33460 (rejecting definitions of "affiliate" that would "aggregate the holdings of mutual funds, investment companies, or other institutions that are clients of the same investment adviser.").

[58] *See* Exhibit C, ICI Memorandum to SEC Rules Committee No. 46-77 (Aug. 4, 1977) (describing ICI's submissions to the FTC).

Commission should not now make the same mistakes that it so carefully avoided in the past.[59]

II. Applying Aggregation to the Asset Management Industry Will Not Benefit Antitrust Enforcement

Not only has the Commission underestimated the extensive and real costs of the Aggregation Rule to regulated funds, but the Commission has also substantially overestimated the benefits to antitrust enforcement. The Commission has not identified an antitrust problem that would necessitate the screening of a fund's acquisitions made in the ordinary course of business and solely for the purpose of investment, which are precisely the types of transactions that would be captured by the Aggregation Rule. To that point, the Commission should not base the Proposed Rules on unsubstantiated antitrust hypotheses such as "Common Ownership."

Even if there were an antitrust problem to address with respect to such transactions, an HSR filing would not provide a useful or efficient way to screen for such concerns. If the ultimate goal of the Commission is to understand the aggregated holdings of all entities served by a single investment adviser, then that information could be obtained in much less burdensome ways, without an untenable HSR 30-day waiting period, and in ways that would provide the Commission with more complete and regularly updated data than what is received on an intermittent HSR filing made only when an HSR filing obligation is triggered. In addition, as our survey data suggests, adopting the Aggregation Rule in any event would not improve the Commission's ability to screen for antitrust concerns, given that many funds may cap their investments to avert HSR cost and administrative disruptions and burdens.

A. There is No Antitrust Problem That Requires Screening of Ordinary Course Regulated Fund Transactions Made Solely for the Purpose of Investment

The Commission has not clearly identified any antitrust problem posed by regulated fund activity that would be captured by operation of the Aggregation Rule. The primary effect of the rule would be to require hundreds of—and potentially over a thousand—incremental HSR filings for portfolio transactions made in the ordinary course of business and solely for the purpose of investment. Such minority investments are not intended to influence how an issuer competes and, therefore, do not raise any meaningful risk of an antitrust violation.

Even in instances where the Commission has reviewed minority investments for antitrust concerns, the lack of investigatory or enforcement follow-up further emphasizes this point. In the

[59] The Commission's introduction of the "associate" concept in 2011 does not change this conclusion. Indeed, the Commission acknowledged the administrative problems caused by the "associate" definition and thus adopted a "knowledge and belief" standard and alternative ways of reporting information to deal with the uncertainties inherent in the definition. *See* Premerger Notifications Reporting and Waiting Period Requirements, 76 Fed. Reg. 42471, 42473-74 (Aug. 18, 2011). To the extent such fixes resolve problems with information to be provided in the filing, they would not, however, solve problems in the core definition of the acquiring "person."

Proposal, the Commission admits that since the HSR rules were promulgated in 1978, neither it nor the Antitrust Division of the US Department of Justice ("the Agencies") have challenged a standalone acquisition of 10% or less of an issuer and have rarely engaged in a substantive initial review of a proposed acquisition of 10% or less of an issuer.[60] Given that this is the case when the 10% is measured on a single fund level, why would this outcome not also be true in an expanded definition of acquiring person, *i.e.*, where each fund would have to hold much lower than 10% for the acquiring person to have a 10% position on aggregate?

In addition, the 10% or less minority transactions that the Commission previously reviewed were presumably made with an intent to influence the issuer or they otherwise would have been exempt from the HSR Act.[61] If such minority acquisitions that were intended to influence the issuer raise no antitrust problem, then there is no point to capturing similar minority transactions made solely for the purpose of investment where there is no intent to influence how the issuer competes.

Moreover, we submit that the Commission should conduct the same retrospective analysis with respect to the additional transactions that would be captured by the proposed Aggregation Rule. In particular, the Commission should analyze whether the Agencies have ever challenged or even engaged in a substantial initial review of any of the following transactions since 1978:

- Any acquisition of a minority position that is up to 15% of an issuer's outstanding voting securities by an institutional investor, made in the ordinary course of business and solely for the purpose of investment;

- Any acquisition of a minority position that is up to 15% of an issuer's outstanding voting securities by an institutional investor in *any context*;

- Any acquisition of a minority position by *any entity* that was not a competitor or did not hold at least a *controlling* position in a competitor of the issuer; and

- Any acquisition of a foreign issuer by a foreign regulated fund.[62]

The Commission is likely to find that, even on a non-aggregated basis, such acquisitions of minority interests have not resulted in any substantive antitrust enforcement actions.

[60] NPRM, 85 Fed. Reg. 77053, 77062.
[61] Transactions of 10% or less of an issuer made solely for the purpose of investment would have been exempt from the HSR Act pursuant to the 802.9 Investment Only exemption, and Section (c)(9) of the HSR Act.
[62] As discussed further above, the Aggregation Rule would also be likely to capture these purely foreign-to-foreign transactions.

B. The Commission's Uncertainty about the Common Ownership Hypothesis does not Justify the Aggregation Rule

The Commission has not identified any substantiated antitrust harm arising from the ordinary course investments of regulated funds. The cost-benefit analysis required for a rulemaking to be "necessary and appropriate" cannot be satisfied by citing speculative or uncertain benefits provided by unproven hypotheses.[63]

We note that the Proposed Rules reference, but take no position, on the "Common Ownership" hypothesis and that the Commission does so with respect to the proposed De Minimis exemption and the Advance Notice of Proposed Rulemaking, but not with respect to the proposed Aggregation Rule.[64] In light of that reference, however, we request that the Commission refer to our prior submissions that explain the flaws of the hypothesis with respect to (i) the purported observation of a correlation between levels of common ownership and price or output effects; (ii) the proponents' assumptions about the incentives and ability of asset managers to influence how issuers compete; and (iii) the proponents' theories about passive effects on issuer management's incentives.

Even assuming hypothetically that Common Ownership represents some antitrust concern, we emphasize that ordinary course transactions made by regulated funds solely for the purpose of investment do not implicate the version of the Common Ownership hypothesis in which it is assumed that asset managers are actively influencing how issuer management competes. Transactions intended to influence how an issuer competes already do not qualify for the 802.64 Institutional Investor exemption or 802.9 Investment Only exemption because they are not made solely for the purpose of investment. Accordingly, the Aggregation Rule is not necessary to capture such transactions.

The only conceivable relevance of ordinary course, solely for purpose of investment transactions to the Common Ownership hypothesis rests on an alternative and unrealistic theoretical underpinning that issuer managements will naturally change their behaviors to maximize portfolio returns of common owners, instead of their own companies' performance. As we have previously pointed out, company management does not have access to the information that would be required to even identify what strategies would optimize portfolio returns for common owners, given their heterogenous holdings within the same industry and across related industries.[65] A company's management can no doubt do this kind of analysis for a simple cross ownership or joint venture scenario. But the notion is untenable that the company's management could undertake such analysis when the stock of the firm's competitors is held by thousands of different funds with very heterogeneous holdings, while those

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[63] *See, e.g., Chemical Manufacturers Assn. v. EPA*, 217 F.3d 861, 865 (D.C. Cir. 2000) (vacating a rule where the EPA failed to specify what the benefits would be or how the proposed rule would achieve those benefits).

[64] NPRM, 85 Fed. Reg. 77053, 77061 (stating only that the "debate is not yet settled").

[65] The proponents' empty retort that "a rising tide lifts all boats" is inaccurate. As ICI has demonstrated, such an argument relies on an erroneous assumption that price increases or output effects in one industry will have no impact on other securities held by the investor in adjacent industries. *See* Letter from ICI to Bilal Sayyed, FTC Office of Policy Planning (Nov. 4, 2019).

funds are in turn owned by potentially millions of underlying shareholders whose portfolios cannot be observed.

Moreover, there is no real-world evidence that company managers are influenced by such considerations. The Commission has reviewed millions of company plans in the course of HSR and other investigations. Has the Commission seen a single document in which company management considers how its business plans will impact the *other* investments of institutional investors? Has the Commission ever seen company management attempt to calculate profit weights it should place on a rival due to having common owners? Has the Commission ever seen a company decline to win a sale from a rival, or to build a new plant, or to introduce a new product because of management's concerns about the impact on portfolio returns of institutional investors or any other type of common owner? The silence should be deafening.[66]

These unproven and inapplicable hypotheses[67] do not justify imposing such massive burdens on regulated funds, their investors, asset managers, and issuers. The Commission's position that the "debate is not yet settled," is reason for the Commission to *refrain* from imposing these burdens, not a reason to impose them.

This is especially concerning in light of our survey data, which shows that more than half of survey respondents would be likely to cap investments to avoid triggering the new HSR obligations. While the benefits of the rule will be purely theoretical at best, it would also lead to a perverse result—the proponents of the Common Ownership hypothesis will have effectively used the Aggregation Rule as a backdoor to obtain their desired caps on investments without going through Congress, without having proved their hypothesis to the satisfaction of the Commission or any court, and without due process of a proposed rulemaking that clearly and directly addresses the Common Ownership hypothesis.[68]

C. HSR Filings are Not a Useful or Efficient Tool for Screening Fund Transactions

Even if the Commission could identify a legitimate antitrust concern that applies to ordinary course fund transactions made solely for the purpose of investment, there nevertheless is little utility to requiring HSR filings for such transactions. As a threshold matter, such transactions do not "scramble

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[66] The Commission's notice of proposed rulemaking also refers, without taking a position, to the opposite theory that institutional investors may harm competition by being too passive in their governance of issuers. NPRM, 85 Fed. Reg. 77053, 77061. Even if this theory were valid, it is not a proper basis for finding an antitrust violation. There is no precedent for finding antitrust liability on the basis that the owner of a company, much less a minority owner, is too passive in its management of the company.

[67] As discussed above, the hypothesis that asset managers are actively influencing issuers to reduce competition would not even apply in the first instance to the ordinary course, solely for purpose of investment transactions captured by the proposed Aggregation Rule.

[68] For all the same reasons discussed in this section, the unsubstantiated Common Ownership hypothesis should not be a basis for proposing the conditions included in the De Minimis exemption.

the eggs" which is the core problem for which the HSR Act was enacted. If the Commission were ever to find an antitrust violation associated with such transactions, then it would be possible to unwind the transaction through divestitures of the acquired voting securities. Thus, there would be no need to untangle any integration between competing companies as in a merger or control acquisition. These transactions are also made solely for the purpose of investment, so there is no appreciable risk that such acquisitions would have any impact on competition in the period prior to the divestiture. Therefore, screening such transactions prior to consummation is unnecessary.

Moreover, HSR filings for such transactions are also unlikely to contain the type of useful information that the Premerger Notification Office typically relies on to screen a transaction for antitrust concerns. For example, it is highly unlikely that any Item 4 documents, which require an acquiring person to disclose studies, surveys, analyses and documents discussing its rationale for the transaction and the expected impact on competition, would be produced with the HSR filing.[69] An asset manager will not have created a document that analyzes the competitive impact of an ordinary course portfolio management transaction. Transactions made solely for the purpose of investment are not the type of transactions that generate Item 4 documents. Nor will much of the information required in the HSR form be useful. The only conceivably relevant information would be the data in Item 6 on aggregate holdings.

The Commission, however, neglects to explain what the exact utility would be of this information. As a practical matter, how would the Commission use this information to screen for a potential investigation? These filings will not provide the Commission useful information to screen for Common Ownership hypothesis concerns. First, there is no established analytical framework, for example, to determine what levels of common ownership do or do not raise antitrust concerns.[70]

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[69] Item 4 documents typically address the acquiring person's evaluation of a reportable transaction with respect to competition-related topics such as markets, market shares, competition, competitors, potential for growth or expansion, or synergies. Therefore, it is unlikely that an ordinary course, incremental acquisition of securities by a regulated fund is likely to have any associated Item 4 documents. Even an internal research analyst's report, to the extent that it is relied upon to analyze an ordinary course transaction, is unlikely to provide the agencies with any information that would be relevant to the competitive assessment of the transaction because it would unlikely focus on how the transaction impacts any of these factors.

[70] This is precisely why the proponents of the theory have proposed arbitrary regulatory limits on the investments instead of developing a coherent Section 7 framework that could be used to analyze individual transaction on a case-by-case basis. *See generally*, Eric A. Posner, Fiona Scott-Morton, and Glen Weyl, *A Proposal to Limit the Anti-Competitive Power of Institutional Investors*, ANTITRUST L.J. (working paper) (Mar. 22, 2017) (suggesting use of modified Herfindahl-Hirschman Index (mHHI) to identify violations of Clayton Act Section 7). The flaws of using mHHI as an accurate predictor of anticompetitive effects is well documented. *See, e.g.*, Backus, Matthew, Christopher Conlon and Michael Sinkinson, *Theory and Measurement of Common Ownership*, 110 AEA PAPERS AND PROCEEDINGS (working paper) (May 2020); O'Brien & Waehrer, *The Competitive Effects of Common Ownership: We Know Less than we Think*, 81 ANTITRUST L.J. 729 (2017). The mHHI calculation is also grossly overinclusive. *See* COMMITTEE ON CAPITAL MARKETS REGULATION, AN ANALYSIS OF PROPOSALS TO RESTRICT INSTITUTIONAL OWNERSHIP 5-6 (Apr. 2019), https://www.capmktsreg.org/wp-content/uploads/2019/03/CCMR-Analysis-of-Common-Ownership-Proposals.pdf (demonstrating that 97% of US

Second, the HSR filings generated by the proposed rules will not provide data that the Commission can use to assess Common Ownership. For example, putting aside the well-documented flaws with using modified Herfindahl-Hirschman Index (mHHI) calculations to screen for Common Ownership concerns, an HSR filing would not even enable the Commission to calculate mHHIs.[71] Nor could the Commission calculate profit weights from the data in an HSR filing.[72]

If the entire utility of requiring HSR filings for these transactions is to collect the information in Item 6, then the Commission could instead work with the SEC to obtain that information in a much more targeted and less burdensome way. The Commission could access information that is reported on a more regular basis, as opposed to through intermittent HSR filings, which, if made at all, will be made on a pre-emptive basis up to five years prior to an acquisition.

III. Conclusion – the Aggregation Rule and Possible Alternatives

As we have described, the administrative problems and associated costs of applying the Aggregation Rule to regulated funds and their managers are extensive and real, and the benefits to antitrust enforcement are at best speculative and will be of no meaningful utility in practice. Regulated funds and their managers would be forced to undertake expensive changes to compliance programs, coordinate with third parties not under control of the filing party, and among other hard issues, wrestle with difficult questions about the allocation of HSR costs among disparate entities served by the investment adviser. Such coordination could also lead to breaches of information firewalls, which could jeopardize compliance or raise conflicts with SEC regulations. Moreover, the rule would impose excessive and unnecessary costs on investors, change portfolio and investing to the detriment of funds and their investors, and potentially interfere with and distort markets and capital flows in the United States.

Therefore, we urge the Commission to abandon the proposed Aggregation Rule in its entirety. The Commission recognized in 1978 that defining an acquiring person to include entities not controlled by the ultimate parent entity would not be an administrable rule, and that conclusion remains as accurate today as it was in 1978. The proposed Aggregation Rule should be relegated to the list of problematic proposals that the Commission has wisely rejected in the past.

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industries have mHHI's above 2500 and that even an unconcentrated industry in which all common owners are limited to having 1% ownership in issuers would still result in an mHHI of 10,000). It is not surprising then that Posner et al. are unable to identify a workable or predictable framework for analyzing Common Ownership concerns as a matter of Section 7 enforcement and instead fall back on a purported "safe harbor" approach that actually would work to condemn all common ownership that exceeds 1% of an issuer's shares. *See* Posner et al. at 19-35.

[71] To calculate mHHIs, the Commission would need to define the relevant market and then identify the level of common ownership in all participants in the market, not just the holding of one acquiring person in one issuer.

[72] To calculate profit weights, the Commission would also need to know information about every other common owners' holdings in the industry and it would further need to have data on profitability of every issuer in the industry. The HSR filing does not contain the necessary information on product prices, costs or profits.

If the Commission nonetheless concludes that some level of aggregation is necessary to address competition concerns about the application of the proposed new De Minimis exemption, then the Commission could simply apply the Aggregation Rule to determine the availability of the proposed exemption. The Commission could require that the criteria for the proposed exemption be determined on the basis of the holdings of both the acquiring person (as currently defined) and its associates. There would be no need to change the definition of "person" for the entirety of the HSR rules, which, as discussed above, would impose new or additional threshold HSR filing requirements for ordinary course transactions intended for investment purposes only.

If the Commission, however, believes that aggregation is necessary in other parts of the HSR rules to capture transactions made by entities other than those of regulated funds and their advisers, then the Commission should incorporate a carve out in the rules to prevent such aggregation from being applied to regulated funds and their advisers and to the ordinary course, solely for the purpose of investment, portfolio management transactions discussed in this submission.

IV. "Solely for the Purpose of Investment" Definition

We appreciate the Commission's willingness through the Proposal to take a "fresh look" at the definition of "solely for the purpose of investment" and recommend that any potential future amendments align with the SEC's approach to "passive investors" pursuant to Section 13 of the Securities Exchange Act of 1934 ("Exchange Act"). Section 13(d) of the Exchange Act requires any person who, after acquiring directly or indirectly the beneficial ownership of an equity security registered under the Exchange Act, is the beneficial owner of more than five percent of such class of securities, to file with the SEC certain information on Schedule 13D. A "passive investor," however, is permitted to file the less onerous Schedule 13G, *provided that* the investor acquired the securities with no purpose or effect of changing or influencing the control of the issuer, and not in connection with or as a participant in any transaction having such purpose or effect. The SEC has long specified the types of shareholder engagement activities that would not convey the purpose or effect of changing or influencing control of the company, which include (i) most solicitations regarding social or public interest issues (*e.g.*, environmental policies) and (ii) proposals and soliciting activity related to general corporate governance matters such as executive compensation, director pensions, and confidential voting.[73] SEC staff has subsequently provided similar guidance, in identifying forms of engagement, *e.g.*, executive compensation and social or public interest issues and corporate governance topics, that, without more, generally would not preclude a shareholder from filing on Schedule 13G.[74]

[73] Amendments to Beneficial Ownership Reporting Requirements, Exchange Act Release No. 34-39538 (Jan. 12, 1998), https://www.sec.gov/rules/final/34-39538.txt.

[74] *See* SEC Division of Corporation Finance, Compliance and Disclosure Interpretations, Exchange Act Sections 13(d) and 13(g) and Regulation 13D-G Beneficial Ownership Reporting, Question 103.11 (July 14, 2016), https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

Applying a similar approach with "solely for the purpose of investment" under the HSR rules would be appropriate as applied to regulated funds, investors, and asset managers. We have previously noted that asset managers typically undertake these types of engagements to enhance value for clients and not with the intent to "participat[e] in the formulation, determination or direction of the basic business decisions of the issuer."[75] A similar approach would provide better regulatory certainty, which promotes operational efficiencies and fewer burdens. The SEC's approach, for example, has helped to shape managers' views regarding permissible subject matter for engagement. Harmonization would ensure that the update to the HSR rules would properly account for fund and asset manager practices taken on behalf of investors that should not raise competition concerns.

* * *

We appreciate the opportunity to comment on this significant proposal. If you have any questions, please contact me at solson@ici.org, Nhan Nguyen, Counsel at nhan.nguyen@ici.org, or our counsel, Craig Falls at craig.falls@dechert.com at Dechert LLP.

Regards,

/s/ Susan M. Olson

Susan M. Olson
General Counsel

cc: The Honorable Rebecca Kelly Slaughter, Acting Chair
The Honorable Noah Joshua Phillips, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Christine S. Wilson, Commissioner

[75] See 16 C.F.R. § 801.1(i)(1) (definition of "solely for the purpose of investment"); *see also* Letter from ICI, to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings (Project Number P181201) (Aug. 20, 2018); Letter from ICI, to the Federal Trade Commission regarding Competition and Consumer Protection in the 21st Century Hearings, Hearing Number Eight (Docket ID: FTC-2018-0107) (Jan. 15, 2019).

EXHIBIT A

Investment Company Institute

1775 K STREET N. W., WASHINGTON, D C 20006
(202) 293-7700

November 21, 1975

Honorable Philip A. Hart, Chairman
Subcommittee on Antitrust & Monopoly
Senate Committee on the Judiciary
127 C Street, N. E.
Washington, D. C. 20515

Re: Title V of S. 1284

Dear Senator Hart:

On Friday, October 31, 1975, I met with Bernard Nash, Esq., Assistant Counsel to the Subcommittee to discuss various amendments to Title V of S. 1284. Attached hereto are copies of: (1) our proposed amendments; (2) a summary of these proposed amendments; and (3) our suggested language for the Committee report.

We believe that if Title V is amended as suggested and if the Committee report sets forth the suggested language, Title V would not adversely affect the investment programs of mutual funds in the capital markets.

We greatly appreciate the consideration you and your staff have given this matter. Please do not hesitate to contact us if we may be of further assistance.

Very truly yours,

Matthew P. Fink
Associate Counsel

Attachments

EXHIBIT B

HILL, CHRISTOPHER AND PHILLIPS, P. C.
2000 L STREET, N. W.
WASHINGTON, D. C. 20036

DUMOND PECK HILL
GEORGE L. CHRISTOPHER
RICHARD M. PHILLIPS
GILBERT C. MILLER
ALAN ROY DYNNER
JOSEPH J. BRIGATI
JUAN A. DEL REAL
ALAN J. BERKELEY
JAMES C. VAUGHTER
CHARLES LEE EISEN
ELINOR W. GAMMON
ROBERT A. WITTIE
CHERIF SEDKY
THEODORE L. PRESS
RONALD W. STEVENS
STEPHEN W. GRAFMAN
CHARLES S. LEVY
EDWARD B. CROSLAND, JR.
LAWRENCE COE LANPHER

FRANCIS THORNTON GREENE
HERBERT H. BROWN
COUNSEL

TELEPHONE (202) 452-7000
CABLE: HIPHI
TELEX 440209 HIPH UI
WU 89-421
WRITER'S DIRECT DIAL NUMBER
(202) 452-7040

DEC 2 1975

November 25, 1975

The Honorable Philip A. Hart
Chairman
Subcommittee on Antitrust and
Monopoly
Senate Committee on the Judiciary
United States Senate
Washington, D. C. 20515

Re: S.1284

Dear Senator Hart:

We are writing on behalf of our client, the Association of Closed-End Investment Companies ("Association"), with respect to the provisions of Title V of S.1284.

The Association is a group of 23 investment companies with assets of over $3 billion. All of the companies are registered with the Securities and Exchange Commission under the Investment Company Act of 1940. A list of the Association membership is attached hereto.

Closed-end investment companies, like open-end investment companies (commonly called "mutual funds"), provide investors with an opportunity to invest in the securities markets through professional management of diversified portfolios. Closed-end companies, however, unlike mutual funds, neither continuously offer nor redeem their shares. Instead, their securities are bought and sold in the various trading markets.

Closed-end investment companies, like other institutional investors, also buy and sell securities in the nation's trading markets on a regular basis. Indeed, such portfolio trading operations lie at the heart of the investment company business, and any interference with these activities could seriously affect the public shareholders of these companies. For this reason, the

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November 25, 1975
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Association has had discussions with Bernard Nash, Esquire, Assistant Counsel to your Subcommittee on Antitrust and Monopoly, concerning the need for certain amendments to Title V of S.1284.

The Association believes amendments are necessary to avoid a drastic and entirely unintended effect of the bill on the routine portfolio trading operations of closed-end investment companies and other institutional investors. Since such investors generally do not invest for the purposes of control, their portfolio transactions do not raise the underlying antitrust problems to which Title V is directed. Nevertheless, Title V of S.1284, as reported by the Subcommittee to the full Committee, does not contain a statutory exemption for those transactions and requires a number of other clarifying changes.

We enclose herewith a draft of proposed amendments which would effect the necessary changes to Title V for these limited purposes. The proposed amendments are similar to those discussed with Mr. Nash, except that we have added to the proposed definition of "voting securities" the phrase:

> "or, with respect to unincorporated issuers, persons exercising similar functions"

We also enclose, for your consideration, a discussion of a problem relating to the determination of ten percent ownership which we believe should be mentioned in the Committee Report as requiring resolution by administrative rule-making.

We believe that if Title V of S.1284 were amended as proposed, and the suggested administrative action were taken by the Federal Trade Commission, the bill would not adversely affect the portfolio operations of closed-end investment companies and other institutional investors similarly situated. In that event, the Association of Closed-End Investment Companies would have no objection to Title V of the bill.

The Association appreciates the thoughtful consideration given by Mr. Nash to the problems raised by Title V

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To: The Honorable Philip A. Hart
November 25, 1975
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of S.1284. If you or your staff have any questions concerning this matter please do not hesitate to call upon us.

Sincerely yours,

Richard M. Phillips

Richard M. Phillips

Enclosures

material as the Federal Trade Commission shall by general regulation prescribe, after consultation with the Assistant Attorney General, and after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(4)(A) The Federal Trade Commission, after consultation with the Assistant Attorney General, is authorized and directed to define the terms used in this section, prescribe the content and form of reports, by general regulation except classes of persons and transactions from the notification requirements thereunder, and to promulgate rules of general or special applicability as may be necessary or proper to the administration of this section, insofar as such action is not inconsistent with the purposes of this section, after notice and submission of views, pursuant to section 553 of title 5, United States Code.

"(B) The ~~regulations excepting~~ following classes of ~~persons and~~ transactions ~~shall include, but need not be limited to, the following exceptions—~~ are exempt from the notification requirements of this section:

"(A) goods or realty transferred in the ordinary course of business;

"(B) bonds, mortgages, deeds of trust, or other obligations ~~without voting rights;~~ which are not voting securities;

"(C) interests in a corporation at least 50 per centum of the stock of which is already owned by the acquiring person or a wholly-owned subsidiary thereof;

"(D) transfers to or from a Federal agency or a State or political subdivision thereof;

"(E) transactions exempted from collateral attack under section 7 of this Act if approved by a Federal administrative or regulatory agency: Provided, That duplicate originals of the information and documentary material filed with such agency shall be contemporaneously filed with the Federal Trade Commission and the Assistant Attorney General;

"(F) transactions which require agency approval under section 18(c) of the Federal Deposit Insurance Act (12 U.S.C. 1828(c)), as amended, or section 3 of the Bank Holding Company Act of 1956 (12 U.S.C. 1842), as amended;

"(G) acquisitions, solely for the purpose of investment, of voting securities, if at the time of such acquisition, the securiti ~~stock when the stock~~ acquired or held do~~es~~ not exceed 10 per centum of the ~~voting rights;~~ outstanding voting securities of the issuer;

"(H) acquisitions of voting securities if, at the time of such acquisition, ~~stock when~~ the securities ~~stock~~ acquired do ~~does~~ not increase, directly or indirectly, the acquiring person's ~~or persons'~~ share of outstanding voting securities of the issuer; ~~voting rights; and~~

"(I) acquisitions, solely for the purpose of investment, of voting securities pursuant to a plan of reorganization or dissolut assets, other than voting securities ~~stock~~ or other voting share capital, by any bank, banking association, trust company, investment company or insurance company, in the ordinary course of its business.

"(C) For the purpose of subsection (b)(4)(B) of this section 'voting security' means any security presently entitling the owner or holder thereof to vote for the election of directors of a company or with respect to unincorporated issuers, persons exercising similar functions.

AMERICAN
LIFE INSURANCE
ASSOCIATION

1730 PENNSYLVANIA AVENUE, N.W. WASHINGTON, D.C. 20006
(202) 872-8750

WILLIAM B. HARMAN, JR.
EXECUTIVE VICE PRESIDENT

December 3, 1975

DEC 5 1975

The Honorable Philip A. Hart
Chairman, Subcommittee on Antitrust
and Monopoly
Committee on the Judiciary
United States Senate
Washington DC 20510

Dear Mr. Chairman:

In accordance with your request, we have reviewed the exemptive amendments to Title V of S.1284 included in the bill as reported on July 28 by the Antitrust and Monopoly Subcommittee. We also have reviewed the additional exemptive provisions proposed by the Investment Company Institute on behalf of the mutual fund industry and by an association of closed-end funds.

Our Association represents 379 companies, with assets of $254 billion, including at year-end 1974 $96.6 billion in corporate debt securities and $21.9 billion in corporate equity securities. On behalf of our membership, we very much appreciate the consideration and cooperation afforded by the Subcommittee and its staff in evaluating our concerns about the impact of Title V on capital formation by industry in general and, specifically, on our investment function. We are satisfied that inclusion in Title V of the exemptions reported by the Subcommittee coupled with those proposed by the mutual fund industry will assure that Title V does not adversely affect the capital markets or the ability of the life insurance industry to continue its investment function in the capital markets.

Again, our appreciation for the Subcommittee's effort in understanding our concerns.

Sincerely yours,

William B. Harman, Jr.

William B. Harman, Jr.

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EXHIBIT C

MEMO

Investment Company Institute
1775 K Street, N.W., Washington, D.C. 20006 □ (202) 293-7700

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August 4, 1977

TO: SEC RULES COMMITTEE - NO. 46-77

RE: REPROPOSED REGULATIONS ON THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 (THE ACT)

The Act, which amended the Clayton Act, requires persons contemplating certain direct or indirect mergers or acquisitions to give the Federal Trade Commission (the Commission) and the Justice Department advance notice and to wait certain designated periods before consummation of such plans. The Act contains a provision suggested by the Institute which exempts acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer.

On December 20, 1976, the Commission published proposed rules and a proposed notification form in the Federal Register and invited comments. (See Institute Memo to SEC Rules Committee No. 31-76, dated December 21, 1976).

The Institute submitted a comment letter on February 16, 1977, which set forth our basic concern that the proposed rules were drafted in such a way as to have a devastating impact on the normal investment programs of mutual funds and other persons who acquire securities solely for investment and not for the purpose of acquiring control. (See Institute Memo to SEC Rules Committee No. 5-77, dated February 17, 1977). Further, we detailed the four sections of the proposed rules which would cause this impact and recommended certain corrective revisions.

1. Definitions of "Person" and "Control"

We pointed out that the definitions of "person" and "control" might be interpreted to require aggregation of the securities holdings of two or more mutual funds or other persons who acquire securities solely for investment purposes, simply because such persons receive investment management services or advice from the same investment adviser. We noted that this result would be contrary to the legislative history of the Act.

2. Acquisition for investment purposes

Subsection (c)(9) of the Act exempts acquisitions of voting securities "solely for the purpose of investment" if, as a result of such acquisition, the securities acquired or held do not exceed 10 percent of the outstanding voting securities of the issuer. The proposed rule provided not only a "solely for investment purpose" test, but added that after such investment the acquiring person could not "control" the issuer. We commented that the proposed definition of control was vague, thus making determinations difficult. We therefore urged deletion of the "control" test.

3. Institutional investors

One of the proposed rules would have exempted acquisitions of voting securities by brokers and dealers. We urged the Commission to extend that proposed exemption to investment companies and other institutional investors.

4. Mutual fund mergers

Subsection (c)(11) of the Act exempts acquisitions, solely for the purpose of investment, by certain types of institutions (including mutual funds) of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of business. The Commission requested information and suggestions as to the meaning of this subsection. We commented that it appeared that the intent of Congress was to exempt combinations of two or more investment companies. We urged that the Commission clarify this matter in the final rules.

After reviewing the Institute's comments, as well as many others, the Commission decided to repropose the regulations. Attached hereto are the proposed regulations and forms.

The following parts of the reproposed regulations appear to be relevant to our comments.

1. Definitions of "Person", "Control" and "Affiliate"

The term "person" now means "...an entity together with any and all other entities controlled by, controlling, or under common control (by an entity) with, such entity". (See section 801.1(a)(1)). The term "control" now means "...either (A) holding (excluding any holdings of affiliates) 50 percent or more of the outstanding voting securities of an issuer; or (B) contractual power to presently designate a majority of the directors or trustees of an entity." (See section 801.1(b)). A person is an "affiliate" of another person if either "(1) the entities included within such person hold an aggregate total of at least 25 but less than 50 percent of the outstanding voting securities of the ultimate parent entity of such other person; or (2) the entities included within such other person hold an aggregate total of at least 25 but less than 50 percent of the outstanding voting securities of the ultimate parent entity of such person." (See section 801.1(d)).

Thus, it appears that these new proposed definitions favorably dispose of our first comment.

2. <u>Acquisitions for investment purposes</u>

As stated previously, section (c)(9) of the Act provides an exemption from the reporting requirements for the acquisition of voting securities solely for the purpose of investment if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer. The regulations define "solely for investment purposes" to be "...if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer." (See section 801.1(i)). The example given under this section states, "If a person holds stock 'solely for investment purposes' and thereafter decides to influence or participate in management of the issuer of that stock, the stock is no longer held solely for investment purposes.'" A question seems to arise as to what happens at this point; must the person file retroactively or is it in violation of the law?

The Commission has invited comments concerning the circumstances under which a person who holds securities solely for investment purposes may nevertheless vote for the election of directors. Further, the Commission has invited comments on the desirability of exempting from the reporting requirements all acquisitions of voting securities which do not result in the acquiring person holding more than 10 percent of the outstanding voting securities of the issuer regardless of the acquiring person's intent.

3-4. <u>Institutional investors and mutual fund mergers</u>

Section (c)(12) of the Act exempts from the requirements of the Act such other acquisitions, transfers, or transactions which are not likely to violate the antitrust laws. The Commission has stated that it does not have sufficient information to systematically identify the transactions unlikely to pose any potential significant antitrust problems. The Commission believes that some type of exemption for organizations which regularly buy and sell securities in the ordinary course of business, usually for investment purposes, may be appropriate. Thus, comments have been invited on problems which remain unsolved:

(a) the specific types of investors which ought to be able to take advantage of the exemption;

(b) appropriate limits of such an exemption where it applies; and

(c) appropriate exceptions where the exemption should not apply.

In order to stimulate comments, the Commission has proposed two alternate rules. (See sections 802.64 and 802.64a of the regulations). Both alternative rules have three limitations:

(1) the acquisition must be made in the ordinary course of business;

(2) the acquisition must be made solely for investment purposes; and

(3) the acquiring company must not control the issuer as a result of the acquisition.

Both alternative rules have two exceptions:

(1) the acquiring entity can not be an institutional investor which is controlled by another entity which is not an institutional investor; and

(2) the acquisition can not be of the voting securities of another institutional investor whether directly or through a person who controls another institutional investor.1/

1/ It appears that this exception would have the effect of making mutual fund mergers subject to the Act.

The alternative rules are:

(1) section 802.64 which exempts such transactions unless they result in the acquiring person's holding both 15 percent and $25 million of the voting securities of the issuer; or

(2) section 802.64a which exempts all acquisitions by an institutional investor on the condition that such investor files an annual report summarizing the transactions as to which the exemption has been claimed during the previous year.

The Commission has asked for comments on the possibility of changing the 15 percent figure in section 802.64 to 10 percent. Also, comments are invited concerning whether the $25 million figure should be changed.

Comment must be received by the Commission on or before August 31, 1977. Therefore, please send me your comments by August 19, 1977. We would particularly be interested in knowing which of the alternative rules you prefer and why.

William M. Tartikoff
Assistant Counsel

Attachment