



February 1, 2021

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

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

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

Dear Madam Secretary,

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

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

Executive summary

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

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

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

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

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

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

Key recommendations

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

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

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

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

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

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

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

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

⁵ 16 CFR 802.9.

⁶ 16 CFR 801.1(i)(1).

⁷ 16 CFR 802.64.

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

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

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

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

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

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

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

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

⁸ 16 CFR 1.98(a).

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

¹⁰ Id.

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

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

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

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

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

¹¹ Id.

i) Investment stewardship has changed since 1978

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

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

ii) Investors and issuers benefit from investment stewardship

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

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

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

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

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

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

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

iii) Investment stewardship fundamentally differs from shareholder activism

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

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

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

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

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

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

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

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

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

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

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

¹⁹ 17 CFR 240.13d-1(b)-(c).

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

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

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

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

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

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

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

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

²²Id.

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

²⁴ 16 CFR 802.64.

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

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

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

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

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

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

²⁶ Id.

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

²⁸ Id.

²⁹ Id.

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

³¹ Id.

³² 17 CFR 240.13d-1(b).

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

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

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

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

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

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

³³ Id.

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

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

Conclusion

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

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

Sincerely,

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