INVESTMENT ADVISER ASSOCIATION

February 1, 2021

Via Electronic Submission (https://www.regulations.gov)

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 Adviser Association ("IAA")[1] appreciates the opportunity to comment on the Federal Trade Commission's ("FTC's" or "Commission's") notice of proposed rulemaking[2] under the Hart-Scott-Rodino Antitrust Improvements Act of 1976[3] ("HSR Act"). Investment managers registered with the SEC as investment advisers under the Investment Advisers Act of 1940, as amended ("Advisers Act"), would be impacted by the Proposal. These investment managers play a critically important role in helping more than 42 million individual and institutional investors meet their financial goals, managing their clients' investments pursuant to investment strategies described in their investment management contracts with their clients. Investment managers are subject to a robust and overarching fiduciary duty under the Advisers

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[1] The IAA is the largest organization dedicated to advancing the interests of investment advisers registered with the Securities and Exchange Commission ("SEC"). For more than 80 years, the IAA has been advocating for advisers before Congress and U.S. and global regulators, promoting best practices and providing education and resources to empower advisers to effectively serve their clients, the capital markets, and the U.S. economy. The IAA's member firms manage more than $25 trillion in assets for a wide variety of individual and institutional clients, including pension plans, trusts, mutual funds, private funds, endowments, foundations, and corporations. For more information, please visit www.investmentadviser.org.

[2] *See* Premerger Notification; Reporting and Waiting Period Requirements; RIN 3084-AB46 – Notice of Proposed Rulemaking, 85 Fed. Reg. 77053 (Dec. 1, 2020) ("Proposal or Proposed Amendments"), available at https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21753.pdf. The FTC simultaneously issued Premerger Notification; Reporting and Waiting Period Requirements; RIN 3084-AB46 – Advance Notice of Proposed Rulemaking, 85 Fed. Reg. 77042 (Dec. 1, 2020) ("Advance Notice of Proposed Rulemaking" or "ANPR"), available at https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21754.pdf, seeking comments on whether to amend the definitions of, among others: "solely for the purpose of investment" in Rules 801.1 and 802.9; and "institutional investor" in Rule 802.64.

[3] 15 U.S.C. § 18a (§ 7A of the Clayton Act).

Act, which requires that they act in the best interest of each of their clients at all times and that they not put their own interests ahead of those of their clients.

The FTC proposes to amend the definition of "person" in Rule 801.1(a)(1) of its Premerger Notification Rules[4] to include a person's "associates," which would require investment managers to aggregate acquisitions in the same issuer across all their separate clients[5] when determining whether a premerger notification filing under the HSR Act is required, and to provide additional substantive information to the FTC on associates. The Commission also proposes a new limited exemption for filings for acquisitions by an acquiring person of 10 percent or less of an issuer, regardless of intent and subject to certain conditions, including that the "acquiring person" (which would include its associates) does not hold more than one percent of the outstanding voting securities of any "competitor" of the issuer.[6] "Competitor" would be defined extremely broadly to include both objective and subjective measures.

We have grave concerns about the impact of the proposed changes on the investment management process and the ability of managers to follow clients' mandates and create value for clients. These changes would significantly impair an investor's ability to invest – including by restricting its access to the markets during the 30-day HSR waiting period – and would make it exceedingly difficult for an investment manager to meet its fiduciary duty to each of its clients. We are also concerned about the costs and compliance burdens investment managers are likely to face, both of which we believe are significantly underestimated by the Commission. These proposed changes represent a significant departure from the way in which investment managers currently assess the application of the HSR premerger notification filing requirements and reflect a fundamental misunderstanding about the role of investment managers in the management of their clients' investments and their impact on competition. They would, we believe inadvertently, effectively eliminate the existing exemptions from HSR filings on which investment managers currently rely and would make it virtually impossible for many larger investment managers and fund families to invest efficiently and effectively on behalf of their clients without meaningfully furthering the FTC's policy goal of preventing anticompetitive transactions.

Accordingly, we strongly object to the overbroad definition of "person" proposed by the Commission because it would lead to inappropriate and unworkable aggregation. We also object to the one percent exclusion from the proposed 10 percent exemption and the overly broad definition of "competitor" included in the proposed *de minimis* exemption because the exemption's conditions would make it virtually useless for investment managers. We thus respectfully urge the Commission to withdraw the Proposal. To the extent that the Commission

[4] 16 C.F.R. Parts 801, 802 and 803 ("Rules").

[5] These non-corporate entities could include registered funds, private funds, and separately managed accounts, each of which may currently be its own ultimate parent entity ("UPE").

[6] Proposal at 77055.

deems it necessary to obtain information relating to acquisitions by clients of investment managers for purposes of an antitrust analysis, we urge it to work more closely with the SEC to share information obtained through beneficial ownership filings.[7]

I. The Commission Should Not Broaden the Aggregation Rules by Amending the Definition of "Person" to Include "Associates"

The HSR Act and Rules require the parties to proposed acquisitions of voting securities over a certain threshold to file a premerger notification ("HSR filing") with the FTC and the Antitrust Division of the Department of Justice ("DOJ", together the "Agencies"), and to wait a specified period of time before completing the transactions, unless there is an available exemption. Two exemptions are relevant to investment managers. Under the current investment-only exemption, the HSR Act exempts from its notice and waiting period requirements acquisitions "solely for the purpose of investment" of voting securities, if, as a result of such acquisitions, "the securities acquired or held do not exceed 10 percent of the outstanding voting securities of the issuer." An investment manager must assess the acquisition at the UPE level, which under current law typically is the investment fund or client account, rather than at the level of the investment manager. Thus, the Agencies currently do not receive a filing when the investment manager's client is making acquisitions for investment only purposes and remains below the filing threshold. Similarly, under the current institutional investor exemption, certain defined institutional investors – including funds regulated under the Investment Company Act of 1940, as amended ("Investment Company Act" and "regulated funds") – may acquire up to 15 percent of the voting securities of an issuer without filing under the HSR Act if the acquisition is made directly by an institutional investor, in the ordinary course of business, and solely for the purpose of investment, among other conditions. Thus, the Agencies also do not receive a filing when the holdings of an institutional investor client remain below the 15 percent threshold. These exemptions have generally worked well for investment managers and their institutional clients.

However, the Commission appears to believe that these exemptions prevent it from getting a sufficient view to be able to adequately evaluate the real competitive impact of an acquisition. The Commission thus proposes to expand the definition of an acquiring "person" to include its "associates," a term already defined in the Rules, for purposes of triggering an HSR filing. For investment managers, this would require aggregating holdings across a fund family

[7] Our comments throughout this letter also generally apply to the questions in the ANPR related to the definitions of "solely for the purpose of investment" in Rules 801.1 and 802.9 and "institutional investor" in Rule 802.64. In the ANPR, the Commission seeks comment on whether it could harmonize its definition of "solely for the purpose on investment" with the SEC's approach to "passive" investors in Rule 13d–1(c) of the Securities Exchange Act of 1934, as amended. The SEC rule relies on a "control purpose" test to identify "passive" investments (*i.e.*, beneficial owners that acquired shares "not with the purpose nor with the effect of changing or influencing the control of the issuer"). We recommend that the Commission harmonize the definition because (i) applying the SEC's definition would prevent the use of the HSR exemptions by entities that seek to influence control of an issuer, or how the issuer competes, and (ii) such an approach would provide certainty and avoid unnecessary duplication in compliance efforts.

and other clients managed by the same investment manager or affiliates of that manager. This aggregation makes it far more likely that a "person" will meet the current "size of transaction" test (where a transaction is valued at more than $94 million) and the "size of person" test (where the parties to the transaction have sales or assets of at least $188 million and $18.8 million, respectively), and makes it substantially more difficult to satisfy the conditions of the current exemptions.[8] If a filing is required, the proposed change would also require a filer to submit significantly more information about its associates.

Expanding the definition of "person" to include legally distinct clients of an investment manager would as a practical matter virtually eliminate the availability of the two exemptions discussed above – because fewer transactions will likely fall below the thresholds needed to rely on the investment only exemptions and, separately, the size of transaction and size of person tests will be far more easily met. Not only will this lead to significantly higher numbers of HSR filings with significant additional costs and burdens imposed on funds, fund shareholders, and other clients of investment managers, but these filings will not achieve any intended goal due to the extremely low threshold of investment activity that would trigger the filing. Indeed, investment managers are likely either to submit unnecessary filings prophylactically or limit their clients' investments so that HSR thresholds will not be triggered. Either of these results will significantly harm clients, either because clients will ultimately bear the costs of unnecessary filings or be unable to invest according to their objectives. These additional filings will also cause a significant drain on the Agencies' resources while not providing meaningful additional information to help the Agencies analyze anticompetitive issues.

a. Aggregating the Holdings of Clients of Investment Managers Will Likely Not Help the Agencies Identify Anticompetitive Behavior but will Impose Enormous Costs and Burdens on Investors and Investment Managers

In considering the proposed changes, we urge the Commission to evaluate the investment management landscape and the current regulatory regime that has governed investment managers and their regulated fund clients for decades under the Advisers Act and the Investment Company Act, respectively. Investment managers play a critically important role in helping millions of individual and institutional investors meet their financial goals.[9] They invest on behalf of their clients as fiduciaries to each of their clients.[10] As part of its fiduciary duty, an investment

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[8] The size of person test is not applicable where the transaction is valued at more than $376 million.

[9] Under the Advisers Act, an investment adviser includes a person who, for compensation, engages in the business of advising others, as to the value of securities or as to the advisability of investing in, purchasing, or selling securities.

[10] *See* IAA Letter to SEC on Proposed Commission Interpretation Regarding Standard of Conduct for Investment Advisers; Request for Comment on Enhancing Investment Adviser Regulation (SEC Rel. No. IA-4889) (Aug. 6, 2018), available at https://higherlogicdownload.s3.amazonaws.com/INVESTMENTADVISER/aa03843e-7981-46b2-aa49-c572f2ddb7e8/UploadedImages/publications/IAA_Comment_Letter_to_SEC_Re_Standard_of_Conduct_Proposals.

manager has a duty of care "to provide investment advice in the best interest of its client, based on the client's objectives,"[11] which are typically contained in investment management agreements, registered investment company prospectuses,[12] and private fund private placement memoranda that define the scope of a manager's services and include limitations on its authority with substantial specificity. Investment managers must follow the different investment strategies and objectives of each of their clients in the best interest of each client.

Accordingly, while investment managers may make recommendations to more than one client to invest in a particular company, that investment recommendation is made because it comports with each client's specific investment strategies and objectives and is determined by the manager to be in each client's best interest. Investment managers must fully disclose and manage conflicts of interest and should not make investment decisions for one client based on their own interests or the investments of their other clients. Moreover, each client account gains or loses value based on the totality of its investments. Each account exercises its own governance rights, independent of other affiliated accounts that may also own the issuer. All of this is important to understand that investment decisions of an investment manager are not coordinated across clients and, unlike the examples provided in the Proposal, multiple client accounts or investment pools are not used by a manager to accumulate a position. By way of example, each investment fund managed by a particular investment manager is a separate legal entity with its own investors or shareholders and its own investment strategy and objectives. While there may be overlap in permitted investments among affiliated funds, each investment manager manages to each particular fund's mandate. We thus believe that the Commission vastly overstates the risk of concerted action across an investment manager's accounts (and the accounts managed by affiliates of the investment manager), because the "complete economic stake" rests in each account or fund, not with the investment manager. Aggregating accounts managed by the same investment manager thus would not constructively inform an antitrust analysis.

In addition, the substantially increased costs and burdens of collecting the information to complete HSR filings will far outweigh any perceived benefit. Under the proposed changes, in addition to triggering a filing requirement far more easily, HSR filings will also require investment managers to collect additional information on many different entities that could be considered "associates." This additional information about associates likely will have little relevance to the acquisition at issue since each associate is following its own investment strategy

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pdf; *see also* SEC Interpretation Regarding Standard of Conduct for Investment Advisers (SEC Rel. No. IA-5248) (June 5, 2019) ("SEC Interpretation"), available at https://www.sec.gov/rules/interp/2019/ia-5248.pdf. SEC-registered investment advisers to institutional clients are referred to as investment managers, and we use these terms interchangeably.

[11] SEC Interpretation at 8.

[12] *See e.g.,* Form N-1A adopted under the Investment Company Act, available at https://www.sec.gov/about/forms/formn-1a.pdf (Item 9 disclosure of Investment Objectives, Principal Investment Strategies, Related Risks, and Disclosure of Portfolio Holdings).

and objectives independently from the acquiring person, making an anticompetitive intention quite unlikely. Moreover, the costs of the expected additional HSR filings would significantly harm shareholders. The additional filing costs, including monitoring the aggregation thresholds across small investment amounts and potentially the very high numbers of affected investment manager clients will likely be borne in large part by investors, many of which are individuals investing for retirement or other lifecycle events through regulated funds.

And these costs are not limited to filing and compliance costs. As noted above, we have grave concerns that the more widely applicable 30-day HSR waiting period would severely impair an investor's ability to invest, with negative consequences for a portfolio's ability to achieve its investment goals and performance objectives. At the core of an investment manager's ability to meet its clients' investment goals is its ability to engage in time-sensitive securities transactions in the ordinary course. Investment managers must be able to enter the markets quickly and efficiently to meet their clients' investment objectives at the then current market price. The proposed changes would impair the most routine of investment manager transactions, such as, for example, regular rebalancing of a client's portfolio. Constraining these ordinary course investment activities would call into serious question whether an investment manager could continue to meet its fiduciary duty to affected clients. On the one hand, to avoid being included as an associate in an HSR filing, an investment manager could consider not investing in certain issuers. But we question whether that would be acting in a client's best interest where investment in those issuers is consistent with the client's investment objectives and would be in the client's best interest. On the other hand, the client that holds the issuer being acquired could be included as an associate of the acquirer, but the manager would then face the 30-day waiting period and be unable to trade for that client at market price. Both of these situations would make it exceedingly difficult for the investment manager to determine how to act in the client's best interest. In our view, this is an enormous cost of the Proposal.

For these reasons, we strongly urge the Commission to withdraw the proposed aggregation rules. We recommend that the Commission should consider other ways to obtain the information, rather than applying a fundamental, broad new definition of acquiring "person" that has overbroad implications.

b. There Should Be No Disparate Treatment of Investment Management Clients Based on Whether they Follow an Index Strategy

In noting that some non-corporate entity UPEs and their associates may be structured as index funds or exchange-traded funds (ETFs), the release suggests that, "[s]ince these entities base their investments on an index, it is possible that it is not appropriate to apply the proposed change to [Rule] 801.1(a)(1) to these entities."[13] The Commission seeks comment on whether index funds, ETFs, or the like should be differentiated under the proposed rule.

[13] Proposal at 77058.

Some regulated funds (including some ETFs) follow an index while other funds (including some ETFs) follow an active strategy and others do both.[14] Regulated funds more broadly, however, whether based on an index or not, offer a wide variety of investment objectives and strategies for investors, including active and passive strategies and everything in between. Investment managers of all strategies are interested in the issuers in which they invest improving their value for fund clients. This is a key element of acting in a client's best interest under the Advisers Act fiduciary framework. While we strongly oppose the proposed aggregation amendment for all types of investment management clients, in our view, there is no sound policy basis for differentiating among those clients and imposing stricter burdensome requirements on one type of client while exempting another. We do not believe that the Commission should distinguish between index funds, ETFs, or any other types of funds (or other investment management clients) with respect to whether they should be required to make HSR filings. Government policies should not explicitly or implicitly favor one type of investment management strategy over another or make other policy choices that bring with them negative unintended consequences. Doing so in this instance would provide an unfair competitive advantage to index funds and ETFs over other types of funds even where each fund is managed to its own separate investment strategy and all have primarily retail, *i.e.*, "Main Street" investors. We believe that it would be unfair and without a policy justification to impose unnecessary burdens and costs on one segment of the asset management industry when the nature of the activity is the same: the purpose of making an acquisition of a company's shares for a client's account is based on the specific needs, goals, and preferences of that client, whether it takes the form of an index fund or actively managed fund.[15]

II. The Proposed New Exemption for *De Minimis* Acquisitions is Too Limited to Be Useful

The Proposal would add a new exemption in Rule 802.15 that would exempt "*de minimis*" acquisitions of 10 percent or less of an issuer's voting securities, but only if the acquiring entity does not already have a "competitively significant" relationship with the issuer, *i.e.*, it and its associates do not hold more than one percent of any entity that is a "competitor" of the issuer. The proposed exemption is too limited to be of use to most larger investment managers and, under the aggregation requirements, investment managers that may be affiliated with other investment managers.

[14] We refer to "active" management as active decision making as to the companies in which the fund invests based on the fund's investment strategy and guidelines, whereas index managed funds purchase investments based upon the composition of the particular index that the fund has undertaken to track.

[15] We have urged other regulators, including the SEC and the Department of Labor, not to explicitly or implicitly favor one type of investment management over the other in any rulemaking. *See* IAA Letter to Department of Labor re: Financial Factors in Selecting Plan Investments (RIN 1210-AB95) (July 30, 2020), available here.

We appreciate the Commission's recognition that a *de minimis* investment amount would generally not implicate the antitrust concerns of the HSR Act and commend the Commission for proposing an exemption for low risk transactions that is not based on intent. However, for the same reasons we discuss above, the proposed changes to the definition of "person" would severely limit the availability of the new exemption to clients of investment managers. First, because the acquiring person would need to include holdings of associates, it would be far more likely to exceed the 10 percent cap. In addition, the proposed aggregation would result in the exceedingly low one percent exclusion being regularly reached. Finally, the proposed new definition of "competitor" is subjective, overly broad, and will be difficult to implement, likely resulting in including the routine holdings of many clients where such holdings do not raise any competition concerns. The proposed definition of "competitor" has two prongs, one purportedly objective, *i.e.*, based on the North American Industry Classification System ("NAICS") codes, and the other subjective, *i.e*., based on a filing party's "good faith assessment to determine whether any part of the acquiring person competes with or holds interests in entities that compete with the issuer, in any line of commerce." We understand that it may not be easy to ascertain the appropriate NAICS code based on publicly available information. We also understand that terms such as "line of commerce" are challenging to determine. Thus, both the proposed one percent exclusion and the proposed definition of "competitor" will likely require so much judgment by investment managers that they may err on the side of submitting HSR filings prophylactically, to avoid inadvertent violations. This is an outcome that would not only be unnecessarily costly for investment managers but would also strain the Agencies' resources. Because of its limited availability to investment managers, we oppose the proposed exclusion from the new exemption.

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We appreciate the Commission's consideration of our comments and would be happy to provide any additional information that may be helpful. Please contact Monique Botkin, IAA Associate General Counsel, or the undersigned at (202) 293-4222 if we can be of further assistance.

Respectfully Submitted,

/s/
Gail C. Bernstein
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

Sarah ten Siethoff, Acting Director, Division of Investment Management, Securities and Exchange Commission