February 1, 2021

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

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

Dear Ms. Tabor:

The Asset Management Group of the Securities Industry and Financial Markets Association ("SIFMA AMG")[1] writes to offer comments on the publication by the Federal Trade Commission ("Commission"), with the concurrence of the Antitrust Division of the Department of Justice ("DOJ," and with the Commission, the "Agencies"), of a Notice of Proposed Rulemaking ("NPR") regarding proposed changes to the rules implementing the Hart-Scott-Rodino ("HSR") Antitrust Improvements Act.[2] SIFMA AMG also offers comments on portions of the Advanced Notice of Proposed Rulemaking ("ANPR").[3]

I. EXECUTIVE SUMMARY

With respect to the NPR, SIFMA AMG believes that the proposed change to the definition of "person" to include "associates" should be rejected in its entirety and that the *de minimis* exemption should be adopted without the disqualifying conditions relating to "common ownership" and vertical relationships.

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[1] SIFMA AMG brings the asset management community together to provide views on U.S. and global policy and to create industry best practices. SIFMA AMG's members represent U.S. and global asset management firms whose combined assets under management exceed $45 trillion. The clients of SIFMA AMG member firms include, among others, tens of millions of individual investors, registered investment companies, endowments, public and private pension funds, UCITS and private funds such as hedge funds and private equity funds. For more information, visit http://www.sifma.org/amg.

[2] Notice of Proposed Rulemaking, Premerger Notification, Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053 (Dec. 1, 2020), *available at* https://www.federalregister.gov/documents/2020/12/01/2020-21753/premerger-notification-reporting-and-waiting-period-requirements (hereinafter "NPR")

[3] Advanced Notice of Proposed Rulemaking, Premerger Notification, Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042 (Dec. 1, 2020), *available at* https://www.federalregister.gov/documents/2020/12/01/2020-21754/premerger-notification-reporting-and-waiting-period-requirements (hereinafter "ANPR").

With respect to the ANPR, SIFMA AMG believes that the term, "solely for the purpose of investment," should be harmonized with the Securities and Exchange Commission's ("SEC") guidance regarding beneficial ownership reporting to non-controlling investors that is based upon an intent to change or influence control of the issuer. To the extent that Commission does not do so, "solely for the purpose of investment" should be interpreted strictly in accordance with the Statement of Basis and Purpose ("SBP").[4] The meaning of "institutional investor" is adequate as currently defined in Rule 802.64.

A. The NPR Proposed Rule Changes

1. The Proposed Aggregation Rule

The NPR proposes to amend the definition of "person" to include (or "aggregate") all "associated" funds and the ultimate parent entity (the "aggregation rule"). The proposed "aggregation" rule would substantially expand the scope of the "acquiring person" (referred to below as the "aggregated acquiring person") to include all associated funds with the fund that is acquiring voting securities.

Under the aggregation rule, the acquiring person would more frequently exceed HSR filing thresholds and the share-ownership caps that limit use of the institutional-investor, investment-only, and the proposed *de minimis* exemptions. The aggregation rule also would cause investors to more frequently trigger other disqualifying conditions in those exemptions.

The aggregation rule would thus significantly increase the number of HSR filings within the asset management industry. The filing fees and delay on investors' acquisitions of securities would impair market efficiency and needlessly increase costs for retail investors, especially savers and retirees whose investments are their main source of income.

The Agencies have not demonstrated an antitrust need for the aggregation rule. Indeed, we know of no ordinary-course, non-controlling acquisition by an investor that has been challenged by an Agency or even received a second request.

In addition, a single or affiliated adviser that manages several mutual funds and other investment accounts in a fund complex typically does not as a practical matter, and legally does not have the inherent power to, control those funds and accounts as a corporate parent, practically and legally, controls its wholly owned subsidiaries. Such funds and accounts, by virtue of a common or affiliated adviser, should not be viewed as a single actor on the marketplace. Each fund has its own investment mandate, is typically managed in a decentralized manner by the portfolio manager, is legally controlled by its own board of directors (not the investment adviser), and should continue to be both its own ultimate parent entity and acquiring person.

[4] Statement of Basis and Purpose, Premerger Notification; Reporting and Waiting- Period Requirements, 43 Fed. Reg. 33450 (July 31, 1978), *available at* https://www.ftc.gov/sites/default/files/documents/hsr_statements/43-fr-33450/780731fr43fr33450.pdf (hereinafter "SBP").

We thus see no basis for a rule change that is designed to elicit more HSR filings from investors that will not further the Agencies' mission of protecting competition. The proposed aggregation rule should be rejected in its entirety.

2. *The Proposed* de Minimis *Exemption*

The NPR also proposed to adopt a *de minimis* exemption for all purchases of voting securities without regard to investment intent that would not cause the aggregated acquiring person to hold more than 10% of the outstanding voting securities of the issuer but that would be subject to important disqualifying conditions. The conditions on which we will comment relate to purportedly "competitively significant" relationships between the acquiring person and the issuer.

One such relationship is specified as arising when the aggregated acquiring person would hold more than one percent of the outstanding voting securities of a *competitor* of the issuer. As an initial matter, the proposed definition of "competitor" is overbroad. "Competitor" would be defined to include those entities that report in the same NAICS Industry Group or "compete" in the same line of commerce. That definition would capture many entities that do not compete in an antitrust (or any other) sense and would introduce more ambiguity that will allow Agency second-guessing of an investor's reliance on the *de minimis* exemption.

The common ownership theory of harm is highly disputed and, by its own description, lacks the causal relationship necessary to support a cause of action under Section 7 of the Clayton Act ("Section 7"). The theory should not be credited by inclusion in a federal regulation, especially given the burden that it would impose on those attempting to claim the *de minimis* exemption and the questions that it would pose for the ordinary-course investment strategies of many funds, including index, sector, and actively managed funds.

Another "competitively significant" relationship would arise if the aggregated acquiring person purchases from, or sells to, the issuer more than $10 million in goods or services that are not part of the ordinary course of business. Vertical relationships between operating companies and investors cannot pose the foreclosure concerns that have been identified as competitively significant,[5] as the investor and issuer are in different product markets (one in the supply of operating products or services and the other in investment products or services). The "ordinary course of business" caveat introduces only more ambiguity to the proposed exemption.

The common ownership and vertical "competitively significant" conditions on the *de minimis* exemption should be eliminated in their entirety.

B. The ANPR: The Definitions of Investment-Only and Institutional Investor

SIFMA AMG appreciates the Commission's request for comment on the numerous issues raised in the ANPR. We suggest that the Commission maintain an open line of communication with

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[5] *Vertical Merger Guidelines*, THE UNITED STATES DEPARTMENT OF JUSTICE & THE FEDERAL TRADE COMMISSION pp. 4-9 (Jun. 30, 2020), *available at* https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf.

the asset management community regarding the ANPR, as it asks many questions of high importance and responding to them in the detail that they may warrant during the comment period of the NPR is challenging.

We offer three primary points with respect to the ANPR:

1. The definition of "solely for the purpose of investment" should be aligned with the SEC's criteria that permit investors to file a Schedule 13(G) in lieu of a Schedule 13(D) when they are acquiring securities without the purpose or effect to change or influence control of the issuer.

2. To the extent that the Commission does not align its definition of "solely for the purpose of investment" with the SEC's Section 13 guidance, the Commission should revert to construing only the *actions* listed in the SBP[6] and their like as possible evidence of an intent that is not "solely for the purpose of investment."

3. The Commission should continue to afford the exemption set forth in Rule 802.64 on its current terms to entities listed in that rule. No changes to the institutional investor exemption are warranted and, to the extent that any are considered (as asked by the ANPR),[7] the 15% ownership cap should be raised to 20%, again to accord with the SEC's Section 13 guidance. Increasing that threshold, however, would not offset the serious harm that would result from the aggregation rule.

II. THE AGGREGATION RULE

A. The Proposed Rule Change to "Person" Would Aggregate Associates Within the Acquiring Person.

The HSR rules define "person" as "an ultimate parent entity and all entities which it controls directly or indirectly."[8] An "acquiring person," in turn, is "any person which, as a result of an acquisition, will hold voting securities or assets, either directly or indirectly, or through fiduciaries, agents, or other entities acting on behalf of such person."[9]

When no one person holds the right to 50% of the profits or assets upon dissolution of a non-corporate entity, that entity does not have a "controlling" interest holder and is considered its own ultimate parent entity ("UPE").[10] Investment funds often meet that criterion and, accordingly, are often their own UPE and constitute the "acquiring person."

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[6] SBP, 43 Fed. Reg. at 33465.
[7] ANPR, 85 Fed. Reg. at 77049.
[8] 16 C.F.R. § 801.1(a)(1).
[9] 16 C.F.R. § 801.2(a).
[10] *Id.*

The proposed rule would alter the definition of "person" to read: "[T]he term person means (a) an ultimate parent entity and all entities which it controls directly or indirectly; *and (b) all associates of the ultimate parent entity*."[11]

An "associate" of an acquiring person is now defined as "an entity that is not an affiliate of such person [i.e., controlled, directly or indirectly, by the ultimate parent entity of such person][12] but

(i) Has the right, directly or indirectly, to manage the operations or investment decisions of an acquiring entity (a "managing entity"); or

(ii) Has its operations or investment decisions, directly or indirectly, managed by the acquiring person; or

(iii) Directly or indirectly controls, is controlled by, or is under common control with a managing entity; or

(iv) Directly or indirectly manages, is managed by, or is under common operational or investment decision management with a managing entity."[13]

Even though an investment fund would remain its own UPE, its associates (essentially, the funds or accounts that are managed by the same or affiliated advisers, along with the managing entity) would be included with the fund acquiring the voting securities as the "aggregated" acquiring person. That aggregation would cause more investors to exceed the size-of-transaction filing threshold and require them to identify an exemption if they are to be relieved of a filing obligation and the associated costs and delays.

B. The Aggregation Rule Would Limit the Availability of Current Exemptions.

Investors typically rely on the institutional investor exemption in Rule 802.64 or the investment-only exemption in Rule 802.9. Both rules have percentage-ownership ceilings. An institutional investor may not claim the exemption if, as a result of the acquisition, it will hold more than 15% of the outstanding voting securities of the issuer.[14] An investor purchasing voting securities solely for the purpose of investment may not hold, as a result of the acquisition, more than 10% of the outstanding voting securities of the issuer.[15]

The proposed aggregation rule would likely cause numerous investors to exceed those ceilings particularly with respect to holdings in small to medium-sized issuers. SIFMA AMG estimates that, within just the first year following the implementation of the aggregation rule, the asset management industry would be obliged to file thousands of additional HSR notifications in the

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[11] NPR, 85 Fed. Reg. at 77056 (emphasis added).
[12] 16 C.F.R. § 801.1(d)(1).
[13] 16 C.F.R. § 801.1(d)(2). The proposed rule would also include associates in acquired persons. NPR, 85 Fed. Reg. at 77058.
[14] 16 C.F.R. § 802.64(b)(4).
[15] 16 C.F.R. § 802.9.

ordinary course of their investment activities. All such additional filings would notify transactions that, SIFMA AMG believes, would have no material competitive impact.

In addition, the institutional-investor exemption requires that the acquiring person not include any entity that is not an institutional investor and that holds securities of the issuer.[16] Most large investors offer their clients investment solutions through both institutional and non-institutional vehicles. The aggregation rule thus may preclude the acquiring fund from claiming the institutional-investor exemption for the reason that the aggregated acquiring person now includes an entity that is not an institutional investor and that holds securities of the issuer.

C. The Aggregation Rule Is Not Justified by the *Copperweld* Doctrine and Contradicts Investment Practice and the Legal Relationship Between Investment Funds and Advisers.

The definition of "associate" specifies that such status arises when the operations or investment decisions of an entity are managed by, or subject to common management with, those of the fund that is acquiring the voting securities. The Commission's proposal to include within the meaning of "person" all associated funds arises from the view that the holdings of the aggregated acquired person, and not those only of the acquiring fund, "represent the total economic stake being acquired in the same issuer":

> For instance, Investment Manager uses Fund Vehicle 1 to acquire 6% of Issuer D and Fund Vehicles 2 and 3 to each acquire 3% of Issuer D. Only Fund Vehicle 1's acquisition of 6% of Issuer D's voting securities is large enough to cross the $50 million (as adjusted) size of transaction threshold. Fund Vehicle 1 makes an HSR filing, but because it is its own UPE, it need not disclose the interests of Fund Vehicles 2 and 3 in Issuer D. ***As a result, the filing does not reflect the 12% aggregate interest in Issuer D of the fund vehicles under common investment management.***"[17]

The Commission assumes that funds under common management are commonly controlled:

> In the fund context, a fund vehicle typically has an entity that manages how that fund vehicle will invest, and this investment manager very often manages the investments of other fund vehicles within the same family of funds. As a result, Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 might well have the same Investment Manager and that Investment Manager can use Fund Vehicle 1, Fund Vehicle 2, and Fund Vehicle 3 to make separate investments in different issuers or the same issuer.[18]

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[16] 16 C.F.R. § 802.64(c)(2) ("No acquisition by an institutional investor shall be exempt under this section if any entity included within the acquiring person which is not an institutional investor holds any voting securities of the issuer whose voting securities are to be acquired.").
[17] NPR, 85 Fed. Reg. at 77056 (emphasis added).
[18] *Id.* at 77055 (footnotes omitted).

Although the Commission does not cite *Copperweld Corporation v. Independence Tube Corporation,*[19] the Commission appears to rely on Copperweld's aggregation of a parent and its wholly owned subsidiaries into a single economic "person" under the antitrust laws based upon their common control: "[A] parent and a wholly owned subsidiary *always* have a 'unity of purpose or a common design.' They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert full control at any moment if the subsidiary fails to act in the parent's best interests."[20]

The *Copperweld* concept of control does not apply to the operation or ownership of investment funds. As a matter of investment practice and operation, most funds are managed by portfolio managers on a decentralized basis. Investment advisers typically rely on individual portfolio managers to follow separate mandates for separate funds. Indeed, a variety of funds (*e.g.,* growth, technology, index funds) in the same complex may maintain holdings in the same issuer but manage those holdings differently.

To the extent that the Commission is concerned with the legal power, as in *Copperweld*, to exert control over the investment strategies and voting protocols of several funds, that legal power does not reside in the managing entity. The funds themselves are separate legal entities, with independent board structures, and are not actual or analogous subsidiaries of investment advisers under *Copperweld*. The legal control of the fund and its shareholdings lies in the separate investment company by which the fund is overseen. As recognized by the Supreme Court, the advisory entity that manages a given fund does so at the direction of the investment company.[21]

In addition, a fund complex often consists of separate investment companies whose funds are managed by a given investment adviser. To the extent that an investment adviser has the responsibility to dispose, acquire, or vote the shareholdings of the funds that it manages, that responsibility can be withdrawn or limited by the fund's shareholders and board of directors.

In short, the Commission's view that holdings in a given issuer should be aggregated, apparently pursuant to the *Copperweld* concept of control, across funds that are managed by the same investment adviser contradicts both the decentralized operational experience of many of our members and the legal relationship between funds and their investment advisers.

D. The Aggregation Rule Would Be Difficult to Apply to Complex Fund Structures.

Determining whether one fund is "associated" with another poses complex interpretive issues. As an initial matter, the boundaries of association for a fund manager with numerous lines of business are not obvious. Would an entity that manages investment funds, for example, be required to include its holdings as a dealer and for its own account with those of the acquiring person that seeks to purchase additional securities for a managed fund?

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[19] 467 U.S. 752 (1984).
[20] 467 U. S. 771-72 (footnote omitted).
[21] *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U. S. 135, 146-47 (2011) (Janus Investment Fund is a legal entity with its own board of directors, Janus Capital Group, Inc., and is independent of its investment adviser, Janus Capital Management); *Jones v. Harris Assoc. L. P.*, 559 U. S. 335, 339-40 (2010) (describing the independence of mutual fund boards of directors as the "cornerstone" of the Investment Company Act of 1940).

In some cases, the investment manager itself enters into a contract with a third party to perform the day-to-day management functions of a fund (called a "sub-adviser"). Sub-adviser contractual relationships among investment advisers and investment companies are not uncommon where the sub-adviser's experience may assist the performance of the fund. Questions will inevitably arise as to whether an association exists among funds managed by the investment adviser and the sub-adviser.

Distinguishing between sub-advisory relationships and third-party asset managers may also be difficult and may depend on such contractual terms as whether the adviser has the power to hire or fire the external manager. That determination, which may not be obvious in the day-to-day operation of a fund, may affect the application of the aggregation rule and complicate filing assessments.

Another example of uncertainty in aggregation under the proposed rule might involve a single investment vehicle that has multiple investment managers that each manages a portion of the vehicle's investment. The managers are not under the same managing entity but may be governed by the same investment protocol. In still another case, a third-party asset manager might choose the investment fund's allocation, but the investment adviser is responsible for determining the underlying securities.

Some investment advisers assist funds located in the United States, offshore, and in Europe, each of which may hold securities in a given issuer. In that event, aggregation would combine U.S. and non-U.S. funds, which should be independent UPEs and may be subject to different filing obligations.

SIFMA AMG asks the Agencies to consider the burden and expense involved in assessing which funds must be included within the acquiring person to determine if an exemption is available or a threshold met or crossed. At the same time, such transactions virtually never pose competitive concerns.

As discussed in the next section, such complexities are not only academic puzzles but affect serious legal obligations and significant costs. Also as discussed below, the increased burden on the asset management industry is not justified by competitive concerns.

E. The Aggregation Rule Would Increase Filings, Delay the Efficient Acquisition of Voting Securities, and Substantially Increase the Cost of Investment with No Competitive Justification.

As for burden, the Commission appears to assess the impact only on filings that are *already required to be made*:

> Non-corporate entity UPEs within families of funds and [master limited partnerships "MLPs"] would be required to provide significant additional information on behalf of their associates under the proposed change. These entities are, however, already accustomed to looking into the holdings of those associates for filings where they are acquiring persons as a result of the treatment of associates under the current Rules. *Given that*

> *these entities* ***already*** *conduct such inquiries, the Commission believes requiring additional information about entities that have already been identified should result in limited additional burden for filers*.[22]

The Commission does not appear to have made any assessment, as any proper rulemaking procedure requires, of the number of *additional* filings that the aggregation rule will require either by causing transactions to exceed filing thresholds or by depriving aggregated acquiring persons of exemptions that they would have had under the current rules.

As noted above, SIFMA AMG estimates that, in the first year following implementation of the aggregation rule, the asset management industry would be required to make thousands of additional filings. Those additional filings will carry a cost of HSR notification fees per filing of $45,000, $125,000, or $280,000, depending on the "transaction value," and are payable by the acquiring person (the investor). Legal fees and internal costs are added to the filing fee, making a reasonable estimate of the total cost of each additional investor filing in the hundreds of thousands of dollars. Simply multiplying thousands of additional filings by hundreds of thousands of dollars per filing demonstrates that investors, savers, and retirees would incur hundreds of millions of dollars of additional costs as a result of the aggregation rule.

For every additional filing, a delay in the purchase of securities until the HSR waiting period expires poses serious investment inefficiencies and costs. Fund purchases are typically time-sensitive, and the delay involved in assessing filing obligations, preparing the filing, and the running of the waiting period may alter the desirability or profitability of planned investments. Purchasing public securities at a later date and a different price from that originally intended may impose significant costs on retail investors.

Special issues may arise for funds that track indices in or close to real-time, maintain a balanced allocation in a given sector, or acquire securities as a result of the algorithmic assessment of information. Delays may cause index funds tracking errors relative to the indices that they seek to replicate.

The aggregation rule may also require funds to limit their acquisition of shares in a given issuer, which would restrict that issuer's access to capital and may harm the interests of investors. It may also divert investment from U.S. issuers to foreign issuers where delay or filing fees will not accompany share purchases (unless caught by the proposed aggregation rule).

Importantly, the above costs, investment burdens, and harm to savers and retirees have no competitive justification. Indeed, the Agencies acknowledge that their experience justifies *eliminating* the proposed aggregation rule. The NPR begins its discussion of the proposed rule changes by observing that "the Agencies regularly receive filings involving proposed acquisitions, not solely for the purpose of investment, that would result in the acquiring person holding 10% or less of an issuer. In the Agencies' experience, ***these filings almost never present competition concerns***."[23]

[22] NPR, 85 Fed. Reg. at 77065 (emphasis added).
[23] *Id*. at 77055 (emphasis added).

In an accompanying footnote, the Commission elaborates that, "[f]rom FY 2001 to FY 2017, the Agencies received a total of 26,856 HSR filings, including 1,804 for acquisitions of 10% of less of outstanding stock. During that same period, the Agencies did not challenge any acquisitions involving a stake of 10% or less."[24] While ignoring the burdens of the aggregation rule, the Agencies readily acknowledge that any benefits would be minimal at best.

Indeed, if filings of acquiring persons that hold 10% or less of the issuer that do *not* have an investment-only intent "almost never present competition concerns," such concerns are even less likely to arise from filings by investment funds and their associates that typically do not seek to change or influence the control of the issuer.

In addition, to the extent a rare incident were to arise in which an investment fund acquisition were found to present the probability of substantially lessening competition under Section 7, divestiture would be an easily available remedy. The HSR purpose of allowing the Agencies to review the probable competitive effects of a transaction before the "eggs are scrambled" in a manner that prevents or impedes divestiture has no application to investment funds.

In short, the aggregation rule is burdensome, unjustified, costly to ordinary investors, savers, and retirees, and should be rejected in its entirety.

III. THE *DE MINIMIS* EXEMPTION

A. The Conditions of the *de Minimis* Exemption

To avoid the ambiguities of the investment-only exemption, the Commission proposes to institute an exemption that does not rely on the intent of the investor. That proposal, as such, is welcomed.

The Commission, however, accompanies the exemption with the condition that the investor have no "competitively significant" relationship with the issuer. The proposed rule defines such a relationship to be present when the aggregated acquiring person (1) is a competitor of the issuer; (2) holds more than one percent of the outstanding voting securities of a competitor of the issuer; or (3) has a purchaser or seller relationship with the issuer that is valued at more than $10 million annually that is not "in the ordinary course of business."[25]

For (1) and (2), "competitor" is defined as an entity that reports in the same NAICS Industry Group or that "competes" in the same line of commerce.[26]

The first condition of the proposed *de minimis* exemption is acceptable if the acquiring person does not include associates, but the second and third conditions are not, and the definition of "competitor" is overbroad and unworkable.

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[24] *Id*. at 77055, n.1.
[25] *Id*. at 77062.
[26] *Id*. at 77056-67.

B. The Common Ownership Theory of Harm Is Speculative and Should Not Be Incorporated into an HSR Rule.

The common ownership disqualifying condition credits a disputed theory of antitrust harm that asserts that a single investor's ownership of minority shares in competitors' voting securities, without any action by the investor, causes incentives in the competing issuers to reduce competition between each other.[27] SIFMA AMG believes that the common ownership theory of harm is unduly speculative, lacks a causal mechanism that is necessary for a Section 7 violation, has never supported a challenge under Section 7, and, to our knowledge, has not supported even a second request. The common ownership disqualifying condition from the *de minimis* exemption should be entirely eliminated.

The Commission's inclusion of the common ownership disqualifying condition necessarily implies that the ownership of securities of more than one percent of the voting securities of competing issuers *alone* can reduce competition in violation of the Clayton Act. No action by the investor is necessary other than the acquisition of the shares. Such a theory calls into question, with no basis, the regular-course investment activities of many actively managed funds as well as index and sector funds. Those investment activities have been extraordinarily beneficial to savers and retirees, among other investors, as well as valuable sources of capital to emerging and growing industries.

Section 7 liability requires the share acquisition (i) to provide the ***shareholder,*** (ii) with a ***mechanism***, (iii) to lessen competition ***substantially***, (iv) in a relevant market, and (v) that the substantial lessening be ***probable***, not just ***possible***.[28] All elements are necessary. The common ownership theory of harm, by definition, asserts that no causal mechanism is necessary for the investor to be liable under Section 7 and, as such, imposes liability without basis. Indeed, the investor is not a participant in the relevant market in which the competition is presumably lessened substantially.

The anticompetitive incentives that are assumed to accompany the common ownership cannot constitute the necessary element of causation. Suppose A, a known premium-pricer, buys *non-competitor* B, a price cutter, and, further to A's premium-pricing strategy, A raises B's prices. C and D, which compete with B but not A, conclude that the coast is now clear to raise their respective prices, and they do. Company A is not liable for its *non-horizontal* acquisition under Section 7.[29]

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[27] *Compare* Hon. Douglas H. Ginsburg and Keith Klovers, *Common Sense About Common Ownership*, Concurrences Review N° 2-2018 (2018) (arguing against common ownership posing an antitrust risk) *with* Einer Elhauge, *Horizontal Shareholding*, 129 Harvard L. Rev. 1267 (Mar. 2016) (arguing that common ownership leads to higher prices and urging antitrust action against common ownership).

[28] *Brown Shoe Co. v. United States,* 370 U.S. 294, 323 (1962) (noting that Section 7 addressed probabilities, not possibilities, in the substantial lessening of competition); *United States v. Oracle Corp.,* 331 F. Supp. 2d 1098, 1113 (N.D. Cal. 2004) (discussing the economic conditions that a Section 7 claim requires for the merged entity to cause a substantial lessening of competition by virtue of its market position and the position of its competitors in the relevant market).

[29] Cross-ownership differs from common ownership. Competitor A acquires an ownership interest (typically greater than 10%) in competitor B. Competitor A *has a mechanism by its own conduct* to lessen competition with

Nor could the common owner's access to management provide the mechanism that establishes the necessary probability that the common owner will join the issuers in substantially lessening competition. Access alone – and even shareholder engagement – is itself competitively neutral, has been encouraged by the SEC and Congress, and has many confirmed benefits.

We understand that the Commission contends that the disqualifying condition in the proposed *de minimis* exemption does not favor one side of the common ownership debate or the other. Rather, the Agencies appear to contend, the common ownership disqualification is designed to ensure that the Agencies have an opportunity to review common ownership holdings for anticompetitive effects.

But such an interest is entirely theoretical, based upon a speculative theory of harm that has not been recognized in any antitrust case, and imposes a heavy compliance cost on the asset management industry. That burden includes implicating innumerable investment strategies, including those of actively managed funds that offer investors balanced exposure to leading firms in a given sector, index-tracking funds, and funds that focus most or all holdings on a particular business sector. In any given industry, fund managers often seek diversification to avoid the risk of attempting to "pick winners and losers." Many or all of those strategies would likely preclude access to the *de minimis* exemption due to the common ownership disqualifying condition.

To include the common ownership disqualifying condition in an HSR rule would thus credit the theory at great cost to investors when its *bona fides* have yet to be established and, in the experience of our members, cannot be established.

C. The Definition of "Competitor" Makes the Application of the Common Ownership Disqualifying Condition Unworkable.

From a practical standpoint, determining whether the common ownership disqualification would apply would be effectively impossible. An entity would be a "competitor" if (a) the entity has the same six-digit NAICS code[30] as the acquired person *or* (b) the entity competes with the acquired person "in any line of commerce."[31]

Regarding the first prong of the "competitor" definition, six-digit NAICS codes may encompass a broad range of activities that are not "competitive" in the antitrust sense. For example, the "software publishers" NAICS code covers all types of software businesses irrespective of subject matter and industry, many of which could not possibly compete either in the colloquial or antitrust sense.[32] The publishers of a video game and order-tracking software would be covered by the same NAICS code and thus would be deemed to compete under the proposed definition of competitor.

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competitor B to protect its B shares. The cross-owner, unlike the common owner, participates in, and therefore potentially can affect, competition in the relevant market.

[30] NPR, 85 Fed. Reg. at 77061.

[31] *Id.* at 77061-62.

[32] *NAICS Code 511210 Software Publishers*, CENSUS.GOV, *available at* https://www.census.gov/cgi-bin/sssd/naics/naicsrch?input=511210&search=2017+NAICS+Search&search=2017.

The practical burden of identifying NAICS codes would be substantial. Determining all of the NAICS codes of every entity in which the acquiring person has more than a one percent ownership interest would be challenging, if not impracticable. Many minority investors do not have access to the NAICS codes used by issuers. In the absence of an unusually open line of communication between the aggregated acquiring person and the many relevant issuers, the aggregated acquiring person could not compare the relevant NAICS codes of the prospective issuer and those of all of the holdings of more than one percent by associated funds.

As to the second prong of the definition of "competitor," determining whether an entity "competes" with the acquiring person "in any line of commerce" can be more difficult than assessing intent or investment purpose. Indeed, virtually every merger challenge arises from a dispute over the relevant "line of commerce."

Attempting to make that determination for every holding of more than one percent of every associated fund within the aggregated acquiring person would occupy a firm of antitrust lawyers who would provide investors with competitive assessments that still would be qualified by uncertainty. Finally, the definition of competitor omits any geographic component, which itself makes the definition overbroad.

The ambiguities arising from the "line of commerce" assessment, combined with the breadth of possible "competitor" holdings by an aggregated acquiring person, would leave the Agencies at least as much latitude to challenge claims of the proposed *de minimis* exemption as they have under the current investment-only exemption.

D. Many Investors Are Likely to Have Disqualifying Vertical Relationships with Issuers.

The *de minims* exemption also would not be available "if the acquiring person and the issuer are in a vertical relationship valued at $10 million or greater."[33] Ten million dollars annually is not a significant amount of commerce for investors of nontrivial size.

Investment funds can be consumers of business services from issuers whose voting securities they purchase, including services relating to real estate, insurance, travel, communication, information technology, water, and power. Funds also consume financial services such as product distribution, underwriting, accounting, banking, lending, trading, and custodial services. Furthermore, funds or advising entities provide numerous commercial services to issuers, including the provision of risk management services, investment solutions for corporate retirement plans, and cash management services for a company's corporate treasury.

Those relationships can exceed $10 million annually. Although the Commission "intends to exclude the purchase of ordinary course services and goods (*e.g.,* office supplies, financial services, etc.),"[34] determining what goods and services are purchased in the ordinary course of business is itself an exercise in ambiguity.

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[33] NPR, 85 Fed. Reg. at 77062.
[34] *Id.* at 77062.

Investment funds are not operating companies. An investment fund could not possibly be situated upstream or downstream in the same product market as an operating issuer that is typically necessary to present foreclosure concerns. The vertical-relationship disqualifying condition would thus make the exemption unavailable to many investors for no sound competitive reason and should be eliminated.

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The Commission may respond that, if the proposed *de minimis* exemption is not helpful to a given investor, the exemption may be helpful to others. But adopting the *de minimis* exemption with its current disqualifying conditions may harm the asset management community by crediting the speculative common ownership theory of harm, questioning the ordinary-course and capital-enhancing practices of actively managed, index, and sector funds, and identifying potential competitive concerns in a vertical relationship between an investor and an operating company.

In addition, the Commission has a duty to provide an adequate basis for each condition in the proposed *de minimis* exemption. The common ownership hypothesis, in particular, is unproven and speculative. SIFMA AMG believes that the conditions on which it has commented are not supported by sufficient justification to be properly included in the proposed *de minimis* exemption.

IV. THE ANPR: THE INVESTMENT-ONLY AND INSTITUTIONAL-INVESTOR EXEMPTONS

A. Redefining or Reinterpreting "Solely for the Purpose of Investment"

SIFMA AMG believes that the Commission and the SEC should align their guidance regarding non-controlling investors by conforming the Commission's definition of "solely for the purpose of investment" and the exemption under Rule 802.9 to the SEC's Section 13 guidance. That is, any investor that is purchasing voting securities for a purpose or with an effect other than to control, or influence the control of, the issuer should be able to avail itself of the Rule 802.9 exemption.

Such an alignment would facilitate compliance with SEC and HSR rules and would permit investors without ambiguity to engage with issuers on ESG and related stewardship matters that are increasingly important to investment funds and their shareholders. The NPR acknowledges the ambiguity relating to the application of the investment-only exemption,[35] which apparently has led to the proposed *de minimis* exemption.[36] Regardless of whether the *de minimis* exemption is adopted, the ambiguity regarding "solely for the purpose of investment" itself requires clarification. We agree that the Commission should consider an overhaul to the

[35] NPR, 85 Fed. Reg. at 77059 and nn. 23-26.
[36] NPR, 85 Fed. Reg. at 77059 -61.

definition of the term and strongly invite the Commission to align itself with the SEC's guidance on the similar issue of non-controlling shareholders' filing obligations.[37]

To the extent that the Commission decides not to adopt the SEC's guidance, then the Commission should revert to the clear act-based criteria in the SBP that may indicate an intent other than solely for the purpose of investment.[38] The acts listed in the SBP invoke the formal governance structure of the issuer and provide bight-line guidance to investors. One cannot mistake the nomination of a candidate for the board of directors, the solicitation of proxies, or the formal proposal to the issuer of a corporate action that requires shareholder approval under the issuer's bylaws. A subjective assessment of the state of mind of multiple personnel at the investor would become unnecessary.

Either the SEC or SBP position would rightly permit, from an antitrust perspective and without ambiguity, ESG and stewardship engagement with an issuer, as such engagement does not relate to the commercial decisions by which the issuer competes in the marketplace. Sound public policy encourages engagement by shareholders to exercise their voting power on a more informed basis. Such engagement often relates to governance and corporate responsibility, not to product selection and pricing.

B. Retain the Current 802.64 Exemption

The ANPR raises numerous questions regarding the current applicability of the institutional-investor exemption in Rule 802.64.[39] SIFMA AMG believes that the terms of the exemption remain applicable in the current investment landscape (assuming that the proposed aggregation rule is not adopted) and should not be changed in any respect. The maximum percentage ownership of 15% should be retained, and, if any change is considered (as asked by the ANPR),[40] that threshold should be raised to 20%, again to accord with the SEC Section 13 regulatory regime.[41] As noted above, however, increasing that threshold would not offset the serious harm that would result from the aggregation rule.

Finally, SIMFA AMG urges the Commission to remain open to dialogue with the asset management community on the important issues raised in the ANPR. Scheduling the ANPR comment period during the period in which comments on the NPR are due may have diverted some time and attention away from the issues discussed in the ANPR. Although we offer the brief comments above, some members may wish to engage with the Commission more deeply on ANPR issues.

V. CONCLUSION

With respect to the NPR, the proposed amendment to the definition of "person" and "acquiring person" should be rejected in its entirety. The *de minimis* exemption should be retained without

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[37] See ANPR, 85 Fed. Reg. at 77047-48.
[38] SBP, 43 Fed. Reg. at 33465.
[39] ANPR, 85 Fed. Reg. at 77048-49.
[40] ANPR, 85 Fed. Reg. at 77049.
[41] 17 CFR § 240.13d–1(c).

the disqualifying conditions of "common ownership" and vertical relationship and without the unduly broad definition of "competitor."

With respect to the ANPR, "solely for the purpose of investment" should be redefined to align with the SEC's Section 13 guidance or reinterpreted in accordance with the actions listed in the SBP. The institutional-investor exemption in Rule 802.64 should be retained on its current terms, and, if not, the 15% ownership cap should be raised to 20% in further accord with the SEC Section 13 regulatory regime.

SIFMA AMG sincerely appreciates the opportunity to comment and the Commission's consideration of our views. We stand ready to provide any additional information or assistance that the Commission might find useful. Please do not hesitate to contact either Timothy Cameron at 202.962.7447 or tcameron@sifma.org or Lindsey Keljo at 202.962.7312 or lkeljo@sifma.org with any questions.

Sincerely,

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