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January 29, 2021

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

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

Dear Ms. Tabor:

On behalf of the National Association of College and University Business Officers (NACUBO) and the undersigned associations, I write today to offer comments on proposed amendments to the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act), which as drafted would create significant operational and compliance challenges for the endowments of nonprofit higher education institutions across the country.

NACUBO is a nonprofit professional organization representing chief administrative and financial officers at more than 1,700 colleges and universities. We work to advance the economic vitality, business practices, and support of higher education institutions in pursuit of their missions.

Our members would be dramatically impacted by the Federal Trade Commission's (FTC) recent Notice of Proposed Rulemaking (NPRM) with proposed amendments to the HSR Act and corresponding regulations (the HSR rules), as well as the Advanced Notice of Proposed Rulemaking (ANPRM) with questions to determine future amendments.

Annually, we co-author the NACUBO-TIAA Study of Endowments (NTSE), the preeminent analysis of the financial, investment, and governance policies and practices of U.S. higher education endowments and affiliated foundations. In FY19, the median college and university endowment size, of the 774 member institutions we studied, was approximately \$144.4 million.

These institutions' endowments vary significantly in size—and each would face a variety of issues under these proposals. In the 2019 NTSE, 50 percent of institutions reported using an outsourced chief investment officer to manage their endowment assets. Some of our members are relatively small investors that do not currently engage in transactions that are above the current thresholds but would be drawn into HSR reporting as a result of the significant expansion of the aggregation

requirements. Some of our members with larger investment assets already face compliance challenges with the current rules in certain investment structures, even when acting as passive investors. The proposed rules would not only impose a greater financial and regulatory burden on an already heavily regulated area but would make it nearly impossible to provide accurate information to the FTC and the Antitrust Division of the Department of Justice (DOJ) for required HSR filings.

A. The Proposed Definition of “Person”

The NPRM proposes to expand the definition of “person” to include the “associates” of the acquiring person. The NPRM states that the antitrust agencies’ intent is to obtain sufficient information to conduct a preliminary antitrust assessment given the evolution of the investment landscape since the HSR rules were enacted. As the FTC has recognized, the proposed rules would require a filing person to aggregate holdings under common investment management. As currently drafted, the proposed rules would require an institutional investor (such as a university endowment), whose investments are managed by a third-party investment manager, to aggregate its holdings with all other investors that share a common investment manager. This would seemingly include managed accounts and funds-of-one (i.e., special vehicles managed for individual passive/institutional investors).

The expansion of the definition of “person” and the resulting aggregation requirements present three main issues to our members: 1) Much of the information required to accurately complete an HSR Notification and Report Form is unavailable to the institutional investor; 2) exemptions typically available to such institutional investors, namely those under 16 CFR §802.9 and §802.64, would become almost impossible to utilize; and 3) both the financial and opportunity cost required by the inevitable increase in HSR Filings would be damaging to our members.

- a. Much of the information required to accurately complete an HSR Notification and Report Form is unavailable to the institutional investor

Suppose a passive, institutional investor (“Investor A”) is the Ultimate Parent Entity (“UPE”) of a partnership fund that is managed by a third-party manager (“LP 1”). As the UPE, Investor A is responsible for HSR filings for acquisitions made by LP 1 even though the third-party investment manager has sole investment discretion over the purchase and sale of the underlying investments of that fund. Under the current rules, Investor A may be required to submit an HSR filing if the third-party manager intends to acquire voting securities of an issuer, through LP 1, in excess of the \$50 million (as adjusted) threshold (inclusive of any interests in the same issuer that Investor A holds through all other accounts/funds for which it is the UPE, even if such other accounts/funds are managed by different third-party managers). It is an extremely onerous task for Investor A to access all of the required information to aggregate its holdings.

The proposed rules would make it even more difficult, if not impossible, for Investor A to collect information required to comply with the HSR rules. The proposed rules would require Investor A to aggregate the interests in LP 1, the interests in any other accounts for which it is the UPE, *and* any interests in the same issuer that are held by any other investor that share a third-party manager with Investor A. As such, if the third-party manager is or has previously acquired \$65 million

worth of voting securities of an issuer on behalf of other, unrelated investors, and that same manager now acquires \$30 million worth of voting securities in the same issuer on behalf of Investor A, Investor A would potentially be required to submit an HSR filing since its interests, together with the interests in the other manager's accounts, would technically exceed the \$50 million (as adjusted) threshold.

To take it one step further, assume that Investor A holds \$65 million worth of voting securities of an issuer and a common manager acquires \$30 million worth of voting securities for another investor. It is possible that Investor A would be required to submit an HSR filing, despite the fact that no additional purchases have been made into Investor A's LP 1 and Investor A has no visibility into the other accounts managed by the third-party manager. The HSR filing would require Investor A to include information from other, unrelated investors, despite the fact that its only nexus to those other investors is a common third-party manager. In all likelihood, Investor A may not even know who the other investors are, let alone have access to their proprietary and confidential investment information. Under the current HSR rules, it's already quite difficult for an institutional investor to provide timely, complete, and accurate information to the FTC. Typically, the investor does not have investment discretion over the fund-of-one and may not even have full visibility into the purchase or sale decisions that the third-party manager is making on its behalf, which is exacerbated by the fact that the investor must aggregate all holdings in its accounts over which it is the UPE even if such accounts are managed by separate managers. The proposed rules would make compliance even more difficult, since a third-party manager is extremely unlikely to share portfolio-level information for its other clients' accounts with an investor. The proposed rules do not account for the fact that an investor of a managed account often has virtually no control over the investment decisions or the issuers of investments that are made on its behalf by a third-party manager.

Even if the principal investor was able to obtain the relevant information required by the proposed rules, it is important to note that much of the information would come from wholly unrelated third-party entities. Moreover, investors and third-party investment managers would be required to disclose sensitive financial information about their holdings to associates, some of whom may be competitors or actors in similar markets. The proposed rules do not address the potential privacy and competition issues related to information sharing among HSR "associates" whose only relationship is a common investment manager. While the myriad effects such disclosures may have on markets and capital formation are unknown, it would be difficult to argue that these disclosures would fall in line with current antitrust policies and jurisprudence.

b. Exemptions typically available to institutional investors would become almost impossible to utilize

As described above, the proposed rules would require the aggregation of holdings across associates. A notable consequence of such aggregation would be the significant narrowing of the "solely for purpose of investment" and "institutional investor" exemptions, codified in 16 CFR 802.9 and 802.64, respectively. Many of our members rely on the "institutional investor" exemption as it allows passive institutional investors to acquire up to 15 percent of the voting securities of an issuer without triggering an HSR filing. Aggregating the holdings of many institutional investors with a common third-party manager, as the proposed rules would require,

would regularly result in holdings exceeding 15 percent. Even when the 15 percent threshold is not met, it is exceedingly likely that the exemption would be unavailable because third-party managers frequently manage accounts for non-institutional investors as well, which would preclude the use of the exemption even before assessing total holdings of an issuer.

In the same vein, the “solely for the purpose of investment” exemption only applies if the investor and all associates will collectively hold 10 percent or less of the voting securities of the issuer. The aggregation requirement makes it exceedingly less likely that our members would be able to use the exemption, as the 10 percent threshold is low for a single institutional investor, let alone many combined. Moreover, as third-party managers have a range of clients, it is possible that one associate of the principal investor may have a board seat or other rights that indicate active intent. Should that be the case, our members would potentially be precluded from using the exemption because of a wholly unrelated third party. Under either scenario, both the “solely for purpose of investment” and “institutional investor” exemptions would become effectively eliminated under the proposed rules.

- c. The financial and opportunity cost imposed by the inevitable increase in HSR filings would be damaging to our members and will have a substantial impact on the U.S. capital markets

The issues created by the proposed rules, as described above, are likely to stymie investments and influence investment decisions, given the significant resources that our members (and other institutional investors) would be required to spend to collect HSR-required information from the various constituencies and the sheer cost of making many more HSR filings than would be required under the current HSR rules. We anticipate this would reduce efficiency of markets for a limited benefit. As we understand it, competitive concerns rarely, if ever, arise with the investors like our members—passive investors that utilize a third-party manager for funds/accounts, are unable to control the decisions of those managers, usually do not have visibility into investment decisions, and cannot control the issuer. Nonetheless, managers may begin making investment decisions based on avoiding HSR filings. Managers will have to wrestle with whether a slightly less suitable investment that would not require an HSR filing or a more suitable investment that will require an HSR filing would run afoul of their fiduciary duties. While this may ultimately be an issue of more importance to the Securities and Exchange Commission (SEC), we believe the issues created by the proposed rules would not facilitate fairness in the markets.

Like others who have commented, we recognize that it may be useful for the FTC and DOJ to understand when a filing person does utilize a third-party manager. We agree with the proposal of some other commenters that the Notification and Report Form could include a new section where the filer indicates whether the investment is managed and provides website links to that manager’s publicly available Section 13 filing for the issuer and its most recent Section 13 holdings report, if any. The Notification and Report Form already allows investors to list links to other SEC filings, so this would be a simple and familiar solution. We do note that more significant changes may require coordination with the SEC or other agencies, but it seems much of the information the FTC seeks is currently available. Requiring managers to disclose this information would be a more efficient way for the FTC and DOJ to collect information on institutional investors who are unlikely to engage in anti-competitive behavior.

In addition, we suggest that the third-party manager should be responsible for any HSR filings related to the accounts over which it exercises investment discretion. Given the passive nature of their investor clients, the third-party manager is the only party in a position to potentially impact competition as a market actor. Moreover, the manager already has access to information for each investor's account, making it much more efficient for that manager to submit the notification, rather than the actual investor whose accounts are being managed. Perhaps most importantly, if managers bear the filing responsibility, investors would be protected from sharing proprietary and sensitive information with unrelated parties.

B. The De Minimis Exemption

The NPRM includes a proposal to add a new "de minimis" exemption, which would exempt certain acquisitions from the HSR filing requirements if the acquiring person will not, among other things, hold 10 percent or more of the voting securities of the issuer and does not hold 1 percent or more of the voting securities of a "competitor" of the issuer (or is not a competitor themselves). The NPRM proposes to define "competitor" as any person that reports revenues in the same six-digit NAICS Industry Group of the issuer or competes in any line of commerce with the issuer.

We applaud the FTC's proposal to include a de minimis exemption in the proposed rules, but we take issue with its implementation. In addition to the aforementioned issue that most institutional investors that utilize third-party managers will exceed the 10 percent threshold as a result of the expanded definition of "person," the definition of "competitor" is far too broad to be useful.

As a simple example, issuers that conduct any commerce on the internet and report under the NAICS code 424210 Drugs and Druggists' Sundries and Merchant Wholesalers would be deemed to be competitors under this definition, even if, for example, one issuer sells antibiotics in Florida and another sells dental care products in Alaska. Similarly, any issuer that reports revenues under 523910 Miscellaneous Intermediation (which is typically used to report investment, dividend, and interest income) would be deemed a competitor, thus precluding the use of the proposed exemption.

To construct a more reasonable definition of "competitor," the FTC could keep the majority of the proposed definition and simply replace "or" with "and." Under this construction, the FTC still could preclude use of the exemption where issuers report in the same NAICS codes but would have the flexibility to ensure that the definition only captures those issuers that derive revenue in the same markets. Some additional analyses may be necessary to determine whether it is possible for two issuers to compete in the same lines of commerce and report in different NAICS codes.

C. Proposed Questions Regarding Institutional Investors in the ANPRM

The ANPRM poses a number of questions regarding the activities of institutional investors. The ANPRM identifies a paradigm by which the FTC first determined which entities would be an institutional investor. That criteria is whether the investor is 1. constrained by law; 2. constrained by fiduciary duty; or 3. uninterested in affecting management of the companies whose stock they buy.

Some of the aggregation issues may be avoided, particularly for institutional investors such as university endowments, if the definition of institutional investor includes any passive investor that utilizes a third-party manager such that the investor does not exercise investment discretion. This could resolve the problematic scenario outlined above, where the institutional investor exemption is unavailable because multiple types of investors share a common manager.

These types of arrangements should qualify for institutional investor treatment as they meet all three of the criteria set forth by the FTC in the ANPRM. The third-party managers are constrained by a fiduciary duty and by other laws; the investors are similarly constrained by other laws (many are 501(c)(3) entities) and are interested only in preserving and passively growing their accounts. Additionally, they do not control investment decisions, let alone decisions of the issuers.

The ANPRM also questions whether the 15 percent threshold is still appropriate. Even without accounting for the drastic changes to aggregation that would result from the proposed rules, we suggest that the institutional investor exemption threshold should be increased to 20 percent. We understand that the agencies rarely, if ever, challenge an acquisition of 20 percent or less without the indicia of control of both the issuer and a competitor. As the current exemption is only available for passive (i.e., non-controlling) investments where no competitive holdings exist, acquisitions of 20 percent or less pose minimal competitive risk. This change would allow institutional investors to continue their passive investment strategies without having to burden the agencies with HSR filings for transactions that pose no antitrust risk.

We thank you for the opportunity to comment on the NPRM and ANPRM. We appreciate the difficulty associated with accounting for every conceivable industry and scenario when drafting new rules for the ever-changing market landscape. We hope our comments provide useful insight into how the new rules may impact the nonprofit higher education sector as investors in the U.S. capital markets. We are happy to provide any further information that may be useful.

Sincerely yours,



Susan Whealler Johnston, Ph.D.
NACUBO President and CEO

On behalf of:

American Council on Education
Association of Governing Boards of Universities and Colleges
National Association of College and University Business Officers