BlackRock.

February 1, 2021

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

Submitted online via http://www.regulations.gov

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

Dear Madam Secretary,

BlackRock welcomes the opportunity to respond to the Notice of Proposed Rulemaking (the "NPRM") issued by the Federal Trade Commission (the "FTC") proposing changes to the premerger notifications rules (the "HSR Rules") that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").[1] As an asset manager investing on behalf of diverse clients spanning the investing community, we support a regulatory regime that increases transparency, protects investors and facilitates responsible growth of US capital markets.

The HSR Rules are intended to ensure that US product markets and capital markets remain fair and competitive. Competitive markets are in the best interests of investors, and BlackRock fully supports this objective. BlackRock agrees with the FTC on the need to modernize the HSR Rules. We are, however, concerned that the proposed changes to the HSR Rules' position calculation methodology are not warranted and would severely impact end investors. BlackRock welcomes the FTC's intention to enhance the proportionality of the HSR Rules by enacting a new exemption for transactions that are unlikely to harm competition. We are, however, similarly concerned that carve-outs based on speculative theories drastically narrow the new exemption's availability. We believe that any changes to existing rules must consider their potential impacts on savers, retirees and other end investors, and also ensure the efficient functioning of the equity markets.

In this letter, we provide an asset manager's perspective in response to the proposals in the NPRM and make several recommendations to safeguard the continued effectiveness of the HSR Rules, in line with the FTC's objectives, while seeking to mitigate the risk of unintended consequences. We will continue to engage with the FTC on the HSR Rules and welcome further discussion on any of the points that we raise in this letter.

[1] Federal Trade Commission, Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR 77053 (Dec. 1, 2020) ("NPRM").

Introduction

At BlackRock, we help millions of people build savings that serve them throughout their lives. The money we manage is not our own; it belongs to people who rely on us to act in their best interests. Our clients include pension plans, foundations, charities, official institutions, insurance companies, corporations, and millions of individuals who are largely saving for long-term goals. Their money is allocated and managed according to the terms of an investment management or trust agreement or the governing documents of a fund.[2]

When BlackRock's clients have assigned us voting rights, we vote on their behalf with the aim of long-term value creation. BlackRock's investment stewardship activities, including proxy voting and issuer engagement, focus on issues that support sustainable long-term performance, such as board composition and effectiveness, governance, and management of environmental impacts. BlackRock does not engage in investment stewardship activities with the aim of dictating issuers' day to day business decisions, which we believe is the responsibility of the issuer's board and management. We also do not seek to use interventional tools to advance our stewardship goals, such as submitting shareholder proposals, nominating directors or soliciting proxies.

BlackRock is a global leader in index investing solutions, offering clients a wide range of index strategies managed against over 1,000 benchmarks. Index investing has profoundly changed the way investors seek returns, manage risk and build portfolios. For nearly 50 years, index investment vehicles have lowered costs and simplified access to diversified investments for all investors, from individual savers to sophisticated institutions. Investors can use index funds to construct diversified portfolios or to take tactical views on certain sectors or geographies. Index strategies are also often used as low-cost building blocks in actively managed portfolio allocation strategies. Index funds help more people build wealth, fund retirement and achieve other key financial goals with more convenience and transparency than ever before.

Executive Summary – Impact of Proposals & Key Recommendations

i. Impact of the HSR Rules on Asset Managers

Under the HSR Rules, certain transactions – including minority acquisitions of voting securities above a certain dollar threshold – require a premerger notification filing to the FTC and the Antitrust Division of the Department of Justice ("DOJ," and together with the FTC, "antitrust agencies") by the acquiror (such as an asset manager, on behalf of its clients) and a responsive filing by the issuer of the securities. A notification filing initiates an initial review period of up to 30-days, during which the filer may not purchase additional shares. Each filing incurs a fee ranging from $45,000 to $280,000, depending on the size of the proposed transaction.

The HSR Rules today include two important exemptions that are available to asset managers that acquire public equity securities on behalf of their clients. An exemption from filing HSR notifications for holdings of up to 15% of a company's stock is available to funds registered under the Investment Company Act of 1940 ("'40 Act funds"), among others (the "institutional

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[2] In this letter we use the term "fund" to refer broadly to the various types of investment vehicles through which asset managers offers their clients investment management solutions globally, including registered funds, unregistered funds and the banks and trust companies that manage and maintain collective trust funds.

investor exemption"),[3] and an exemption for holdings of up to 10% is available to other entity types (the "investment-only exemption").[4] The availability of both exemptions depends on an investor having "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."[5] This includes a restriction on nominating candidates to the issuer's board, proposing actions requiring shareholder approval, or soliciting proxies.[6] These exemptions are widely used by traditional asset managers, which typically hold securities on behalf of their clients solely for the purpose of investment, allowing them to offer their clients a broad range of investment solutions, including index funds, without having to make premerger notification filings.

ii. Proposed Changes in the NPRM

The NPRM highlights two challenges the antitrust agencies face today and suggests changes to the HSR Rules to address them. First, the NPRM notes that the current ultimate parent entity ("UPE") rules do not require investment entities filing HSR notifications to disclose substantive information regarding their complete organizational structure and the total economic stake of the issuer being acquired. To close this information gap, the FTC proposes broadening the definition of "person" under the HSR Rules to include a UPE's "associates." This change ("associates aggregation") would require investment entities filing HSRs to disclose information about associated entities and their holdings. As drafted, the proposal would also require the aggregation of holdings across funds under common management when monitoring against the filing and exemption thresholds, including open-end mutual funds, closed-end mutual funds, exchange-traded funds ("ETFs"), hedge funds and collective trust funds ("CTFs") that share common or affiliated managers.

Second, the NPRM notes that HSR filings for 10% or smaller positions are a drain on the antitrust agencies' resources and a distraction from transactions that are more likely to present competition concerns. From 2001 through 2017, the antitrust agencies did not challenge any acquisition of 10% or less of a company's voting securities, out of over 1,800 such filings received. In order to reduce the number of HSR filings received for transactions that "almost never present competition concerns,"[7] the FTC proposes adopting a new exemption for acquisitions of 10% or less, regardless of the investor's intent (the "de minimis exemption"). The de minimis exemption would be unavailable when the investor is deemed under the proposed rule to have a "competitively significant relationship"[8] with the issuer, including when the acquiring person holds more than 1% of the outstanding voting securities of a competitor of the acquired entity or when the acquiring person has a commercial relationship with the acquired entity valued at more than $10 million annually.

iii. Impact of the Proposed Changes

Associates aggregation would cause the ordinary course investing activities of traditional asset managers to more frequently exceed the HSR exemption thresholds, triggering an exponential increase in the number of HSR filings they file. Becoming subject to an HSR reporting obligation would impair funds' ability to operate, severely impacting the ability of underlying

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[3] 16 CFR 802.64.

[4] 16 CFR 801.1.

[5] Id.

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

[7] NPRM at 77055.

[8] NPRM at 77061.

investors to meet their investment objectives. These investors would essentially have their stock positions frozen while their HSR filings are pending review by the antitrust agencies, generating significant tracking error and cash drag for index funds and opportunity costs for actively managed funds. This would diminish returns for underlying investors, including pension plans and individuals saving for retirement, and impair the efficiency and attractiveness of US capital markets. Associates aggregation would also undermine the availability of critical exemptions from HSR reporting that play an important role in asset managers' ability to meet the needs of their clients.

We do not believe the FTC has articulated a harm that associates aggregation effectively addresses, nor has the FTC explained how the data it would receive in newly-triggered HSR filings would be used. To the contrary, the FTC has stated that small acquisitions of public securities do not present competition concerns. Associates aggregation artificially combines such acquisitions based on common management, ignoring the fact that funds within one diversified asset manager are each managed in accordance with their own individual investment guidelines. Furthermore, it is difficult to see how acquisitions through index strategies, which are contractually mandated to track an underlying index, could create competition concerns that necessitate such significant filing burdens.

The FTC's proposal to enact a new 10% de minimis exemption that does not require compliance with passivity restrictions correctly recognizes how unlikely it is for most minority stock acquisitions to present competition concerns – indeed, under the FTC proposal, this is even so when an investor seeks to influence an issuer's basic business decisions. [9] We support the FTC's aim in proposing this new exemption, which has the potential to introduce a meaningful degree of proportionality on the application of the HSR Rules without impacting their effectiveness in protecting competition. We are, however, concerned that proposed carve-outs would narrow the exemption's availability to asset managers like BlackRock that invest broadly across markets for the benefit of unrelated end investors, each with their own individual investment objectives. We do not believe that a sound basis exists for determining that the scenarios addressed in the carve-outs are competitively sensitive and should form the basis for exclusions from the new exception.

iv. Key Recommendations

We believe that the FTC's stated objectives in the NPRM can be achieved in a manner that mitigates the risk of unintended, but potentially far-reaching, harm to investors, companies and the US capital markets. Below are our key recommendations, which are discussed in more detail in this letter:

1. **Consider a single set of amendments to the HSR Rules that are also responsive to comments received in response to the Advanced Notice of Proposed Rulemaking ("ANPRM").**[10] A single set of amendments would provide the best opportunity to address the well-recognized need for modernization of the HSR Rules to account for changes in investment management and stewardship roles, while providing consistency and certainty to investors, issuers and the capital markets. We address the opportunities for modernization of the HSR Rules and other issues raised in the ANPRM in a supplemental letter we have submitted to the comment file, also included as Appendix A to this letter.

[9] NPRM at 77093.

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

2. **Withdraw or refine the associates aggregation proposal, which has not been justified, would not produce actionable data and would severely impact end investors.** The FTC has not demonstrated that investment funds holding minority positions in voting stock present competition concerns that would be addressed through associates aggregation. The FTC has further not demonstrated how data collected from aggregated HSR filings from these types of shareholders will be of use. Freezing purchases during the waiting period would lead to increased risk and diminished returns for underlying investors, the asset owners, and decrease the efficiency and competitiveness of the US capital markets. We urge the FTC to withdraw the aggregation proposal in its entirety.

   In the alternative, we suggest three possible ways that the FTC could achieve the stated objective of this measure while minimizing collateral impact:

   a) **Exempt institutional investors from aggregation.** The managers of these funds are required by law and applicable fiduciary duties to act solely in the best interest of the specific investors in each fund and not the investors of other funds that may also be managed by the same investment adviser or its affiliates. Aggregating the positions held by institutional investors has not been justified and would impose substantial burdens on end investors that the HSR Rules today explicitly protect.

   b) **Exempt index funds from aggregation.** Index funds, by definition, are rules-based investors, tracking the investment results of an underlying benchmark by investing in the benchmark's constituents at the indicated weightings. They do not make trading decisions accounting for the holdings of any other funds, whether or not they are under common management. Subjecting index funds to aggregation would cripple their ability to accurately track benchmarks and eliminate the core benefit that index investing is designed to deliver. This would directly harm the individuals and institutions that rely on index funds for low cost portfolio construction solutions.

   c) **Tailor the application of aggregation.** Applying associates aggregation selectively to certain areas of the HSR Rules would provide the antitrust agencies with the information they seek on HSR filings, while limiting the impact on ordinary course investment activities. Among other suggestions we make in this letter, the FTC could apply aggregation to filing thresholds but not exemption thresholds.

3. **Confirm the continued availability of existing exemptions that are critical to asset managers.** If adopted as proposed, associates aggregation would effectively gut several existing exemptions that are critical to asset managers without providing any rationale as to why they should no longer be available for use. The 15% institutional investor exemption may no longer be available to asset managers that hold securities across funds that do (e.g. '40 Act funds) and do not (e.g. UCITS funds) qualify as institutional investors. Further, the exemption for non-US funds' minority acquisitions of non-US issuers' voting securities may no longer be available to US asset managers whose subsidiaries manage non-US funds. This would unfairly advantage managers whose funds are exclusively institutional investors as well as non-US funds that are a part of a non-US asset management organization. Revisions to these exemptions and clarification of how they would be impacted by associates aggregation are required in order to mitigate the risk of these consequences.

4. **Remove the common ownership carve-out from the de minimis exemption, which is based on a nascent theory that does not provide an adequate basis for rulemaking, does not serve the objectives of the NPRM and adds an element of uncertainty for investors.** While BlackRock supports the creation of a new exemption that is not conditioned on compliance with activity restrictions, the de minimis exemption adopts the common ownership theory – a disputed theory in the academic literature that has been subject to criticism on practical, theoretical and empirical grounds. As currently formulated, the proposal adopts the theory in an extreme form without empirical or theoretical basis: by implementing the extraordinarily low ownership threshold of 1%, not requiring a showing of any attempt by an investor to influence a company and not requiring a finding of concentration or anticompetitive effects in a particular sector.

   As proposed, the de minimis exemption would be available only to shareholder activists, hostile bidders and other managers of concentrated portfolios that seek to influence issuers' basic business decisions – the very types of investors that the FTC has frequently found to violate existing HSR Rules. The new exemption would be unavailable to traditional asset managers who manage funds holding broadly diversified portfolios and engage in traditional stewardship activities. Retaining the de minimis exemption while eliminating the common ownership carve-out would support the stated objectives of the NPRM and provide investors with much-needed clarity around their investment stewardship activities.

Detailed Analysis of Changes Proposed Under the NPRM

i. Associates Aggregation

In attempting to solve for one problem identified in the NPRM (incomplete information in certain HSR filings), associates aggregation would exacerbate the other problem identified in the NPRM (unnecessary filings for transactions unlikely to raise competition concerns). As drafted, the associates aggregation proposal would subject end investors, asset managers, companies issuing shares and the antitrust agencies to significant costs and operational burdens.

Under the current rules, the UPE aggregation methodology provides for the disaggregation of certain types of funds that are deemed to be their own UPE. This allows asset managers to monitor against the applicable HSR filing and exemption thresholds separately for each UPE. The UPE methodology reflects the decentralized fiduciary duties that asset managers owe to their many clients. Asset managers offer their clients a wide range of investment solutions through a variety of investment platforms and vehicles, responding to client needs around investment strategies, legal and regulatory requirements and time horizons. Asset managers manage each of these products independently in accordance with the terms of an investment management or trust agreement or the governing documents of a fund.

At BlackRock, securities of a single issuer are commonly held across multiple UPEs in order to meet the needs of our diverse and global client base. This is driven by clients exercising choice around investment strategy, product type and location, and not by a desire to structure investments to remain below filing or exemption thresholds. Requiring the aggregation of positions held across multiple UPEs simply because they are under common management does not reflect the fact that the positions held across multiple UPEs do not represent a unitary position. These positions are not held on behalf of a single client, do not follow a single set of investment guidelines and are not held in furtherance of a single investment objective.

Given the decentralized nature of the ownership and management of positions held across the funds and accounts of a large asset manager, we do not believe that acquisitions of public equities held across multiple UPEs, when considered in the aggregate, raise competition concerns. To the contrary, they represent a collection of small positions, the review of which the FTC has acknowledged are a drain on the antitrust agencies' resources and divert FTC resources and attention from transactions that are more likely to present competition concerns.

In particular, it is difficult to see how acquisitions of public equity securities by multiple index funds under common management raise competition concerns that would be addressed by aggregation. Index funds have captured a growing share of global investible assets over the last decade and represent a significant portion of the public equity securities BlackRock holds on behalf of its clients. Requiring the aggregation of positions held across multiple index funds simply because they are under common management does not reflect the fact that each index fund has a separate contractual duty under its governing documents to track the relevant benchmark. Index funds, by definition, do not make investment decisions accounting for the holdings of any other fund under common management. Given that index funds are inherently indifferent to the investment activities of other funds under common management and do not have control over the inclusion or weighting of an issuer in an index, we do not believe that acquisitions of public equities across multiple index funds, when considered in the aggregate, present competition concerns.

Requiring aggregation across associates would lead to the filing of an exponentially higher number of HSR reports than are filed today, the impact and cost of which would be borne by end investors, which include pension plans and individuals saving for retirement. Large asset managers would be required to file HSR reports for a substantial portion of their portfolio holdings, the companies issuing shares would face the burden of submitting responsive filings, and the antitrust agencies would be tasked with reviewing and opining on each filing. We estimate that BlackRock alone would be immediately required to file 400-500 HSR filings should associates aggregation be adopted in its current form. Trade associations estimate that that the asset management industry as a whole may be required to file in excess of 1,000 day-one HSR filings. This would account for an approximately 40% increase over the total number of HSR filings the FTC received in 2020.[11] Many more filings would be required on an ongoing basis as investments in affected funds are rebalanced and clients continue to deploy cash in their investment portfolios. The massive volume of filings that would be triggered by the associates aggregation proposal almost certainly outweighs any reduction in filings by the small number of investors who will be eligible to rely on the de minimis exemption.

With an average reporting burden of 47-52 hours per filing according to the FTC's estimate,[12] compliance with the associates aggregation rule would cause asset managers to incur large new expenses, including hiring additional compliance personnel, building new compliance systems, counsel fees and filing fees ranging from $45,000 to $280,000 per issuer per filing.[13]

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[11] https://www.ftc.gov/enforcement/premerger-notification-program.

[12] The Paperwork Reduction Act section of the NPRM notes that the Office of Management and Budget estimated burden for HSR filings under the existing rules is 37 hours, and that associates aggregation is estimated to increase the burden by 10-15 hours per filing. This estimate is a considerable understatement and does not reflect the increased burden on issuers who would be required to submit responsive filings. 85 FR 77053, 77065.

[13] The NPRM asserts that asset managers are "already accustomed to looking into the holdings of those associates," so "requiring additional information about entities that have already been identified should be manageable." While this may be the case for a

These expenses would result in higher investment management fees for investors, further diminishing expected returns for asset owners in a low yield environment. Management fees across the investment management industry, particularly for index funds, have been consistently declining over the years due to technological innovation and robust competition. Today, individuals and institutions can assemble a diversified, global portfolio of assets with a management fee in the single-digit basis points. The very significant costs of regularly making HSR filings would fall directly on end investors, endangering a positive trend that has given more and more savers access to affordable investment solutions.

Furthermore, the requirement to delay an acquisition for up to 30 days while a filing is pending would negatively impact end investors in the form of increased portfolio risk and decreased investment returns. The mandatory delay would generate significant opportunity costs for actively managed funds and both tracking error and cash drag for index funds. Index providers regularly update or "rebalance" their indexes to ensure that the composition of an index adequately reflects its stated methodology. Index funds must expeditiously reconfigure portfolio holdings to match the rebalanced index in order to continue to achieve their index-tracking objective. For context, in 2020, BlackRock traded 5,500 rebalances across its global equity index portfolios. Limiting an index fund's ability to participate in these time-sensitive index change events could harm a fund's performance and ability to achieve its investment objectives. This would lead to increased risk for underlying investors – pension plans and individuals saving for retirement – and decrease the efficiency of US capital markets in channeling capital to companies.

Finally, the technical operation and application of associates aggregation would significantly narrow the availability of two additional important exemptions:

Associates aggregation would make the 15% institutional investor exemption unavailable to asset managers offering a variety of investment vehicles, unfairly advantaging those few asset managers whose sole product offerings are through vehicles qualifying as institutional investors. Under the current HSR Rules, the institutional investor exemption is not available when "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."[14] Because asset managers commonly hold shares in a single issuer across entities that 802.64(a) considers to be institutional investors (e.g. '40 Act funds) as well as entities that are not institutional investors (e.g. UCITS funds), in all but the rarest of circumstances asset managers would no longer be able to avail themselves of the institutional investor exemption. As a result, unless the exception in 802.64(c)(2) is eliminated, associates aggregation would serve as a penalty on asset managers who offer a product suite that includes vehicles other than those listed in 802.64(a). Substantially narrowing the availability of the institutional investor exemption would also contravene Congress' intent in exempting these entities from HSR reporting in the HSR Act.[15]

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narrow class of activist investors and private equity firms, this does not accurately reflect how asset managers' compliance and technology systems operate and significantly understates the impact this operational and financial burden would have on end investors who invest in products offered by the large class of asset managers that do not today routinely make HSR filings in connection with their ordinary course investments.

[14] 16 CFR 802.64(c)(2).

[15] 15 USC 18a(c)(11). "The following classes of transaction are exempt from the requirements of this section [. . . .] acquisitions, solely for the purpose of investment, by any bank, banking association, trust company, investment company, or insurance company, of (A) voting securities pursuant to a plan of reorganization or dissolution; or (B) assets in the ordinary course of its business."

Associates aggregation would make the foreign-to-foreign exemption unavailable to funds managed by US asset managers, unfairly advantaging non-US funds that are a part of a non-US asset management organization. US asset managers whose non-US funds today rely on the HSR exemption in 802.51(b)(1) for minority acquisitions of a non-US issuer's voting securities may no longer be able to use that exemption at all if the UPE concept is eliminated from the definition of foreign person under 801.1(e)(2). If non-US funds ultimately managed by US asset managers could no longer rely on the exemption in 802.51(b)(1), they would have limited ability to avail themselves of an exemption for acquisition of non-US issuers. This is because meeting the requirements of 802.51(a) - establishing that the non-US issuer does not hold US assets with an aggregate total market value exceeding $94 million and that its aggregate sales in or into the US did not exceed $94 million in the most recent fiscal year - is nearly impossible on the basis of publicly available information. As a result, associates aggregation would serve as a penalty on non-US funds that are part of a US asset management organization.

ii. De Minimis Exemption – Common Ownership Carve-out

BlackRock supports the enactment of the de minimis exemption. We believe this exemption is grounded in a reasoned determination that minority acquisitions of voting stock are unlikely to present competition concerns. The de minimis exemption has potential to provide asset managers with additional certainty around their investment stewardship activities. We are, however, concerned that the proposed carve-outs for relationships that are deemed under the NPRM to be competitively sensitive would have the effect of making the de minimis exemption unavailable to asset managers like BlackRock that invest broadly across markets on behalf of their clients. We do not believe that a sound basis exists for determining that these relationships create competition concerns that warrant exclusion from the proposed exception.

Managers of both index and actively managed funds commonly hold positions in competing issuers, either in a single fund or in multiple funds under common management. The carve-out for acquirors holding 1% or greater positions in competing firms is therefore expected to make the proposed de minimis exemption unavailable to large asset managers who invest broadly across capital markets. Ironically, the de minimis exemption will remain available to the small subset of investors who typically hold a small number of concentrated positions, including hedge funds and the activist investors that the FTC has repeatedly found to have violated the HSR Act.[16] When the HSR Statement of Basis and Purpose defined the contours of the 802.9 and 802.64 exemptions, it identified the types of conduct that shareholders use to exert influence over an issuer that may give rise to competition concerns. These actions include nominating a candidate to an issuer's board, proposing action requiring shareholder approval and soliciting proxies.[17] The de minimis proposal now rejects this concept and advances the contradictory proposition that the most activist of shareholders, whose core investment strategy involves seeking to influence firms' basic business decisions, pose less of a competition concern than shareholders who take none of these actions but simply manage diversified portfolios that invest broadly across markets.

[16] *See, e.g.*, United States v. VA Partners I, LLC, Case 3:16-cv-01672 (2016); United States v. Third Point Offshore Fund, Ltd., Case 1:15-cv-01366 (2015).

[17] Premerger Notification; Reporting and Waiting Period Requirements, 43 FR 33450, 33465 (Jul. 31, 1978).

In explaining the rationale for this carve-out, the FTC acknowledged that the academic debate around the common ownership theory remains ongoing.[18] Far from being settled, the common ownership theory remains hotly contested in the economics, finance and legal literature. Major issues have been identified in the common ownership literature to date, and no plausible causal mechanism has been established. Basing a major rulemaking with far-reaching implications for end investors on an implausible theory that is unsupported by evidence is inappropriate. Putting these concerns aside, there is simply no basis under current US antitrust law for enforcement against a common owner, and, as a result there is no corresponding basis for the common ownership theory to be reflected in the HSR Rules.[19]

The manner in which the NPRM incorporates the common ownership theory reflects a particularly extreme and unsubstantiated view of the theory – that overlapping ownership itself, across all industries and without any affirmative intervention by a shareholder, causes an anticompetitive effect. The ownership level at which the NPRM carves-out common holdings – a mere 1% of an issuer's outstanding voting shares – fails to reflect the very limited influence that a 1% shareholder has over an issuer. There is absolutely no basis to conclude that a 1% shareholder could exert any degree of anticompetitive influence over an issuer even if it were motivated to do so. The NPRM further applies the carve-out to firms across all industries, both concentrated and non-concentrated, without considering whether ownership interests as low as 1% in these scenarios could even theoretically result the kind of harm to competition that would support a finding of a violation under Section 7 of the Clayton Act. This aggressive interpretation of the common ownership theory is not supported by the nascent academic literature on the theory, and we do not believe that this extreme version of the theory forms a sound basis for a reasoned rulemaking.

Indeed, given that the FTC itself has acknowledged that the common ownership debate is unsettled, and there currently is no established framework for the antitrust agencies to analyze such acquisitions and holdings, it is unclear what utility an HSR filing would serve when a shareholder is rendered ineligible to rely on the de minimis exemption in this context. Considering that the HSR form instructions themselves would not require disclosure of 1% holdings in competing entities (or entities reporting in the same NAICS code), an investor that is not able to rely on the new de minimis exemption because it holds a 1% interest in a competitor of the acquired entity would not even be required to disclose that interest in its HSR filing.

HSR reporting is not the appropriate tool for the FTC to use to assess the impact of the common ownership theory, and it is poorly suited for this purpose. HSR was enacted to allow the antitrust agencies to review and potentially challenge mergers and acquisitions before they are consummated, after which assets may be integrated and it becomes difficult in practice to "unscramble the eggs." If the antitrust agencies were to determine that common

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[18] NPRM at 77061 and 77091. This point was reiterated in the FTC staff's Q&A session on the de minimis exemption on November 10, 2020.

[19] Thomas A. Lambert, Mere Common Ownership and the Antitrust Laws, 61 B.C. L. Rev. 2913 (2020). The goal of the HSR premerger notification regime is to give the antitrust agencies an opportunity to review transactions that have potential to violate antitrust laws before their consummation. Liability under Section 7 of the Clayton Act requires a showing that a share acquisition provided a shareholder with a probable mechanism of action to substantially lessen competition. Merely holding 1% of an issuer's outstanding voting shares without more simply does not meet this standard. If there is no basis under current antitrust law for enforcement on this permutation of the common ownership theory, 1% ownership alone should not disqualify a shareholder from eligibility for the de minimis exemption.

ownership posed competitive concerns, minority stakes in public companies could quickly be divested on the open market. Further, information regarding diversified shareholders' ownership positions in competing entities is already disclosed under Securities and Exchange Commission ("SEC") reporting rules that require 5% beneficial owners to file reports on Schedule 13D or 13G and institutional investors with investment discretion over $100 million in listed equities to file reports on Form 13F. Imposing a 30-day waiting period and filing fees on ordinary course investment activity where no integration of assets occurs to account for the common ownership theory is unwarranted and places unnecessary burdens on end investors, market participants and the antitrust agencies. If the FTC requires ownership data in a format or at a time that differs from current SEC disclosure rules, a memorandum of understanding between the FTC and the SEC could facilitate enhancements.[20] Likewise, if the FTC would require the augmentation of existing filings with additional data or clarifications, the two agencies could cooperate on a joint project to modernize these SEC filings.

iii. De Minimis Exemption – Vendor/Vendee Carve-out

As proposed, the de minimis exemption would also be unavailable when an acquiring person and an acquired entity have a commercial relationship resulting in $10 million in annual sales in either direction. This is a novel and unproven theory of harm that should not form the basis for rulemaking. We are not aware of any enforcement action brought on a vertical theory of harm where the investment in a vendor or vendee firm was less than 10%. The DOJ/FTC Vertical Merger Guidelines issued in June 2020 and the Commentary on Vertical Merger Enforcement issued in December 2020 do not even mention the concept of competitive concerns arising from minority investments in vertically related firms. We therefore do not believe that a basis has been established to consider vendor/vendee relationships of this size to be competitively sensitive, and do not believe that HSR reporting is the appropriate tool for the FTC to use to assess the impact of these relationships.

Further, the $10 million threshold proposed in the NPRM is arbitrary and does not account for the commercial significance this size of a relationship has on companies of varied sizes. Large asset managers are consumers of a vast array of commercial services from companies they invest in on behalf of their clients, including leased office space, technology services, water and power. They are also providers of a vast array of commercial services to companies they invest in on behalf of their clients, including risk management services, investment solutions for corporate retirement plans and cash management services for a company's corporate treasury. While the NPRM notes that a final rule may exclude ordinary course goods and services, it's difficult to envision how the FTC could position such an exemption in a way that captures the myriad relationship types that are typical in today's interconnected economy. We strongly recommend that the FTC eliminate the vendor/vendee carve-out from the final rule because the FTC has not demonstrated that such a relationship affects competition.

BlackRock's Recommendations

Below, we provide our recommendations for achieving the objectives of the NPRM while also seeking to mitigate unintended impacts on investors, companies, and the efficiency of US capital markets.

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[20] Similar to the Interagency Memorandum of Understanding entered into between the SEC and the DOJ on June 22, 2020 with the aim to "foster cooperation and communication between the agencies."

1. **Consider a single set of amendments to the HSR Rules that are also responsive to comments received in response to the ANPRM.**

The topics covered in the NPRM and the investment-only exemptions are intrinsically intertwined, and the unavailability of the de minimis exemption to most asset managers makes the need for clarity on the parameters of the 802.9 and 802.64 exemptions more pressing than ever. After 44 years of reporting requirements assessed on a UPE-by-UPE basis, fundamental changes to the aggregation methodology for HSR reporting must be done in tandem with a clarification and broadening of the 802.9 and 802.64 exemptions. A single set of amendments to the HSR Rules would provide the best opportunity to address the well-recognized need for modernization, while preserving consistency and certainty for investors. We address the opportunities for modernization of the 802.9 and 802.64 exemptions and other issues raised in the ANPRM in a supplemental letter we have submitted to the comment file, also included as Appendix A to this letter.

2. **Ensure that the changes to the position calculation methodology under the HSR Rules do not trigger a substantial number of HSR filings for investments that are unlikely to raise competition concerns.**

   a) **Withdraw the associates aggregation proposal**

The FTC has not articulated what benefit is served or harm avoided by requiring the aggregation of equity positions held by associates in monitoring to the various HSR exemption thresholds. They likewise have not explained what utility the data disclosed on the HSR filings of aggregated entities would have in helping the FTC evaluate the impact these minority acquisitions of securities have on competition. Considering the lack of justification for the associates aggregation proposal and the significant impact on end investors described above, we urge the FTC to withdraw the aggregation proposal in its entirety.

   b) **Exempt acquisitions by institutional investors, which the FTC has determined are unlikely to impact competition**

In the alternative, the FTC should only move forward with a final rulemaking on associates aggregation in a manner that lessens the burden on investors who invest through funds that are considered institutional investors. To achieve this, the FTC should carve out institutional investors from aggregation in any final rulemaking and explicitly clarify that these entities do not have associates. Carving-out institutional investors would be a simple-to-implement solution to the myriad challenges that associates aggregation presents to end investors and asset managers, especially considering that "institutional investors" is already a defined term under the HSR Act, which includes '40 Act funds, banks and trust companies. '40 Act funds and CTFs maintained and managed by banks and trust companies are commonly used by individuals and institutions investing to achieve their long-term goals.

In requiring the aggregation of positions held by '40 Act-registered mutual funds and ETFs under common management, the associates aggregation proposal ignores the strict regulatory requirements imposing fiduciary duties on their managers. '40 Act funds are subject to oversight by boards of directors or trustees, which are typically composed of a majority of independent directors or trustees. These boards engage investment advisers to manage a fund's day-to-day investment activities. The advisers of these funds are required by law and fiduciary duties to act at all times in the best interests of their investors, not the investors of other funds that may also be managed by the same investment adviser or its affiliates. A fund board is empowered to terminate an adviser and appoint a new adviser if they believe doing so is in the fund's investors' best interest. The impact of the associates aggregation proposal on savers who invest through mutual funds and ETFs would be substantial. These funds managed $26 trillion of assets in 2019 and made up 23% of households' financial assets, 58% of defined contribution retirement plan ("DC plan") assets, and 44% of IRA assets.[21]

Similarly, in requiring the aggregation of positions held by CTFs, the associates aggregation proposal ignores the strict requirements imposing fiduciary duties on bank trustees and managers. Bank-maintained and managed CTFs are subject to oversight by either the U.S. Office of the Comptroller of the Currency (in the case of a bank trustee and manager that is nationally chartered) or the applicable state banking regulator (in the case of a bank trustee and manager that is state chartered), and each CTF is organized as a trust that is legally separate from any other CTF and from the bank trustee and manager. Unlike '40 Act-registered mutual funds and ETFs, a CTF is also subject to oversight by the U.S. Department of Labor and to the terms of the U.S. Employee Retirement Income Security Act of 1974, as amended ("ERISA"), if ERISA plan assets are invested in the CTF. To invest in a CTF, a client, such as a defined benefit or DC plan, must have a direct fiduciary relationship with the bank trustee and manager under either an investment management or trust agreement. Like the advisers that manage '40 Act-registered mutual funds and ETFs, a bank that administers and manages a CTF is required by applicable law, including ERISA, to act at all times in the best interests of its fiduciary clients whose assets are invested in that CTF, without regard to any other fiduciary clients whose assets may be invested in other CTFs maintained and managed by the bank or any funds under common management by affiliated advisers. The impact of the associates aggregation proposal on savers, such as DC plan participants, who invest through CTFs would also be substantial. CTFs managed $3.8 trillion of assets in 2019 and made up over 30% of 401(k) plan assets.[22]

Distinct treatment for '40 Act funds as well as bank- and trust company-managed CTFs is supported by the original HSR Statement of Basis and Purpose,[23] which justified the enactment of the institutional investor exemption on three primary grounds: (i) acquisitions by institutional investors are likely to have an insubstantial effect on competition; (ii) ordinary course investments by institutional investors frequently exceed 10%; and (iii) imposing a waiting period on institutional investors could disrupt the securities markets. Existing FTC guidance also supports distinct treatment for '40 Act funds that are organized as series of statutory trusts, a common fund structure for mutual funds and ETFs. The FTC staff has previously recognized that trusts do not have associates, and therefore the holdings of '40 Act funds organized as series of a trust would not have to be aggregated with other investment entities under common management.[24] Applying the new aggregation rules to institutional investors would result in harms to end investors that Congress intended to protect through the enactment of the institutional investor exemption, and runs counter to the principles articulated in the Statement of Basis and Purpose that still hold true today.

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

22 Cerulli Associates, The Cerulli Report: U.S. Defined Contribution Distribution 2020 and U.S. Retirement Markets 2020.

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

24 FTC Premerger Notification Office Informal Interpretation 16110001 https://www.ftc.gov/enforcement/premerger-notification-program/informal-interpretations/16110001.

c) **Exempt index investment products, such as index mutual funds, ETFs and CTFs, as their sole aim is to track a benchmark and they are inherently indifferent to the holdings and investment activities of associated funds**

In the alternative, and as proposed in the NPRM,[25] the FTC should carve out funds that seek to deliver the performance of an underlying index, including index mutual funds, ETFs and CTFs, from associates aggregation and explicitly clarify that these types of funds do not have associates.

Index funds hold voting securities solely as a means of achieving a financial return that mimics the return of the fund's underlying benchmark, which is generally developed and maintained by an independent third-party index provider. Index providers use rules-based methodologies to define the scope of each index, such as which securities or financial instruments are included and their respective weightings. In order to comply with their governing documents, index funds' holdings in an issuer are dictated by the weight of the issuer in the index developed by the index provider and the amount of assets held by the fund. Index funds, by definition, do not make trading decisions accounting for the holdings of any other fund under common management. Because they are inherently indifferent to the investment activities of other funds under common management and do not have control over the inclusion or weighting of an issuer in an index, the FTC should recognize that common management of index funds is irrelevant to a competition analysis and exempt index funds from associates aggregation.

Investors in index funds are particularly sensitive to the impact of the financial burdens of HSR reporting. Index funds allow end investors, including pension plans and individuals saving for retirement, to construct diversified portfolios at an extraordinarily low cost. These cost savings are driven in part by the scale of large, diversified asset managers – the same managers that would be most impacted by associates aggregation. The ultimate result of associates aggregation will be to increase the cost of saving for retirement and other long-term financial goals for millions of individuals, especially those investing through index strategies.

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

d) **Tailor the aggregation requirements to provide the antitrust agencies with better information on HSR filings, while limiting the impact on ordinary course investment activities that have been recognized as not presenting competition concerns**

The FTC's stated concerns that associates aggregation aims to address could be remedied by more narrowly tailored rule changes. The following alternative approaches to implementing associates aggregation would provide the FTC with the filings that they believe the current

[25] NPRM at 77058.

HSR Rules do not capture and the information regarding competitors that current filings do not provide, while limiting the impact on ordinary course operations of asset managers and lessening the burden of HSR filings on entities that are not relevant to a substantive antitrust analysis. These approaches are not all mutually exclusive, and some could be adopted in parallel to address the FTC's stated goals.

- **The FTC could apply associates aggregation to the size-of-transaction threshold and other HSR thresholds, but not the exemption thresholds under 802.9 and 802.64.** Doing so would address the FTC's concerns around structuring investments across multiple funds to avoid a reporting obligation, such as the example described in the NPRM. Under this approach, a manager that divides an acquisition of voting securities across multiple funds for purposes of evading reporting or in connection with an investment involving seeking to influence an issuer's basic business decisions would still trigger an HSR filing if the value of the securities held across those funds exceeds the size-of-transaction threshold. At the same time, a mutual fund, ETF or bank or trust company that manages and maintains CTFs that does not have evasive intent and does not seek to influence an issuer's basic business decisions could continue to rely on the investment-only exemptions with thresholds measured on a UPE level. The investment-only exemption thresholds should be treated differently from other HSR thresholds, such as the size-of-transaction test, because investors that rely on the investment-only exemptions do not have an intent to participate in issuers' basic business decisions and their trading activity is therefore less likely to impact competition. Continuing to measure the investment-only thresholds at a UPE level would resolve the issues for institutional investors and index funds described above.

- **The FTC could apply associates aggregation only for the purposes of determining whether an investor qualifies for the new de minimis exemption.** It is logical that in order to take advantage of the new de minimis exemption, all holdings under common management should be aggregated to determine if the 10% threshold is met; otherwise, an activist investor would be able to use the exemption to acquire control of an issuer by dividing holdings across multiple funds. The information gaps the FTC seeks to address through associates aggregation will also be most pronounced in the case of activist investors and hostile bidders who could avail themselves of the new de minimis exemption. These types of investors routinely structure investments across funds in the manner described in the NPRM to avoid a reporting obligation, and their behavior is more likely to give rise to competition concerns than investors that comply with the activity restrictions of the investment-only and institutional investor exemptions.

- **The FTC could apply associates aggregation to Items 4 through 8 of HSR filings, but not to HSR filing thresholds.** Should an HSR filing be triggered, the FTC would require the filing person to disclose information regarding all of their associates. Doing so would satisfy the stated goal of the NPRM of ensuring that the antitrust agencies are provided with more substantive information about an actual HSR filer, the structure of their funds and the complete analysis of the investor's holdings of the acquired entity. At the same time, this approach would avoid myriad additional filings that the FTC could expect to receive if associates aggregation were applied to HSR filing and exemption thresholds as proposed in the NPRM.

3. **Confirm the continued availability of existing exemptions that are critical to asset managers, to mitigate the risk of prolonged investor uncertainty.**

If the FTC adopts the associate aggregation rule as proposed without any adjustments, exceptions, or exclusions, we believe that the FTC should, at the very minimum, provide guidance to resolve inconsistencies that this approach would create relating to other elements of the HSR Rules. Specifically, we recommend that the FTC:

- **Eliminate the exception in 802.64(c)(2) so that asset managers can continue to use the institutional investor exemption for acquisitions by an eligible entity of an issuer's securities,** even if their associated non-institutional investor funds also hold an interest in the same issuer's securities, as described above.

- **Clarify that even where holdings of associates must be aggregated, institutional investors can continue to hold up to 15% across all associated institutional investors and that associate entities that are not institutional investors can hold up to 10% across all non-institutional investor entities, as long as the acquiring person in the aggregate does not exceed 15%.** This clarification is necessary to address a situation where, for example, an institutional investor mutual fund and an associated non-institutional investor fund each hold 5% of an issuer. In this case, the non-institutional investor fund would not be able to acquire any additional shares because the acquiring person would hold 10% in the aggregate, but the mutual fund could still acquire up to an additional 5%.

- **Ensure that the definition of foreign person under 801.1(e)(2) continues to be based on the UPE concept** so that non-US funds that are part of a US asset management complex could continue to rely on the foreign issuer exemption in 802.51(b)(1) for minority investments in non-US issuers.

- **Provide practical guidance on how to apply the associates analysis across various complex fund structures**. While the NPRM states that investors are already accustomed to conducting the associates analysis and looking into holdings of associates, that is correct for only a small subset of investors: private equity firms whose core business involves completing M&A transactions and activist investors whose core business involves influencing the basic business decisions of issuers. In contrast, traditional asset managers historically have infrequently filed HSRs for their ordinary course investment activities because of their ability to avail themselves of the investment-only and institutional investor exemptions applied on a UPE-by-UPE basis. If the FTC issues the proposed aggregation rule, it should offer investors the opportunity to submit questions regarding various fund structures and provide guidance on how those fund structures should be analyzed for purposes of aggregation, similar to the Virtual Q&A Sessions that the FTC held in November 2020 on the NPRM and ANPRM.

- **Release the language of any aggregation rules well in advance of their taking effect**, so that investors can appropriately prepare their compliance monitoring systems and make applicable filings in order to ensure that their funds are not locked out of the markets when the rules ultimately take effect.

4. Remove the common ownership carve-out from the de minimis exemption, which is based on a nascent theory that does not provide an adequate basis for rulemaking, does not serve the objectives of the NPRM and adds an element of uncertainty for investors.

As proposed, the de minimis exemption would only be available in practice to shareholder activists, hostile bidders and other managers of concentrated portfolios that seek to influence issuers' basic business decisions, but would be unavailable to traditional asset managers with broadly diversified portfolios. The exemption is therefore unlikely to be effective in supporting the stated objectives of the NPRM and adds an element of uncertainty for investors.

The proposed carve-out takes as its foundation the academic theory of common ownership. As the NPRM itself and the statement from Commissioner Phillips accompanying the NPRM [26] both note, the common ownership debate is far from settled. Basing a major rulemaking on an implausible theory that is unsupported by evidence is inappropriate and premature. The growing body of literature finding flaws in the empirical methodology of the foundational common ownership papers has continued to develop, and recent papers have criticized the legal and theoretical framework upon which the common ownership proponents have relied to advocate for regulatory remedies. The de minimis exemption adopts the common ownership theory in its most extreme form - without an adequate basis - by implementing the extraordinarily low ownership threshold of 1%, not requiring a showing of any attempt by an investor to influence a company, not requiring a showing of harm to consumers and not confining the carve-out to issuers operating in a concentrated industry.

As described above, HSR form instructions do not require disclosures of competing investments of this small size in recognition of the fact that they are very unlikely to present competition concerns. As a result, an investor that is disqualified from using the de minimis exemption because it holds a 1% interest in a competitor would not disclose that interest in its HSR filing, creating a significant inconsistency. We urge the FTC to eliminate the common ownership carve-out in its entirety.

5. **Remove the vendor/vendee carve-out from the de minimis exemption, which sets an arbitrary cap on ordinary course commercial relationships.**

We further urge FTC to eliminate the carve-out from eligibility to rely on the de minimis exemption for vendor/vendee relationships. The competition impact of a vendor/vendee relationship has never been established, nor has it formed the basis of regulatory action in the HSR space. Even the narrowly interpreted investment-only exemptions do not consider a vendor/vendee relationship between an investor and issuer. We are not aware of any enforcement action brought on a vertical theory of harm involving a lower than 10% investment in a vendor or vendee firm. The recently issued DOJ/FTC Vertical Merger Guidelines do not even address the concept of competitive concerns arising from minority investments in vertically related firms. We therefore do not believe that a basis has been established to consider vendor/vendee relationships of this size to be competitively sensitive. The proposed carve-out seeks to ensure that the FTC receives HSR filings for transactions that, based on our understanding, have never been challenged. Prior to incorporating this novel theory of potential harm in a new exemption, we believe that the FTC should first solicit feedback on the types and sizes of vendor/vendee relationships that could have an impact on competition.

In the alternative, we recommend replacing the dollar threshold in the vendor/vendee carve-out with a percentage threshold. This approach would allow the FTC to evaluate materiality on

[26] Statement of Commissioner Noah Joshua Phillips, Hart-Scott-Rodino Act Premerger Notification, Notice of Proposed Rulemaking & Advanced Notice of Proposed Rulemaking (Sep. 18, 2020).

the basis of the relative significance a commercial relationship has as a percentage of a vendor's total annual revenue or a vendee's total annual expenses to determine materiality. We further recommend enacting a broad exemption for ordinary course commercial relationships that have been entered into on arms' length terms and conditions in order to protect shareholders' ability to enter into commercial dealings without being concerned that those relationships would jeopardize their ability to remain eligible for critical HSR exemptions.

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We thank the FTC for providing the opportunity to comment on the NPRM, and we welcome the opportunity to further discuss any of the information or recommendations we have provided.

Sincerely,

Sandra Boss
Senior Managing Director, Global Head of Investment Stewardship

Christopher J. Meade
Senior Managing Director, General Counsel & Chief Legal Officer

Kathryn Fulton
Managing Director, Co-Head of Global Public Policy Group

Appendix A

Response to Advance Notice of Proposed Rulemaking

BlackRock.

February 1, 2021

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

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

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

Dear Madam Secretary,

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

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

Executive summary

As an asset management firm[2], BlackRock's business is providing investment solutions to institutional and individual clients worldwide. Our clients include pension plans, foundations, charities, official institutions, insurance companies, corporations, and millions of individuals who are largely saving for long-term goals, such as retirement or their children's education. Simply put, BlackRock's purpose is to help more and more individuals experience financial well-being. BlackRock considers itself a "traditional asset manager" in that we manage primarily long-term investment strategies. Two-thirds of the assets we manage relate to retirement – often with time horizons of several decades. This drives our own long-term perspective.

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

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

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

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

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

Key recommendations

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

    a) **Current informal interpretations of the investment-only exemption extend beyond the original stated objective.** Increasingly narrow interpretations of the investment-only exemption by a series of FTC senior staff statements and informal interpretations extend beyond the original Statement of Basis and Purpose (the "SBP")[3] and have created confusion for investors.

    b) **Recognize that investment stewardship is an intrinsic aspect of modern investing, serving to protect and enhance long-term value.** Addressing the uncertainty in interpreting the investment-only exemption benefits investors and issuers as corporate governance practices evolve in a way that is conducive to long term value.

    c) **Align the investment-only exemption with SEC non-control standard.** Harmonization with the Securities and Exchange Commission's (the "SEC") Section 13 non-control standards would reduce regulatory ambiguity for investors without posing a threat to competition.

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

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

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

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

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

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

[5] 16 CFR 802.9.

[6] 16 CFR 801.1(i)(1).

[7] 16 CFR 802.64.

investor faces substantial penalties (currently $43,792 maximum amount per day per issuer[8]) for failing to file HSR if they incorrectly rely on either exemption.

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

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

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

BlackRock welcomes and supports the FTC's long-standing practice to provide informal guidance on HSR reportability questions. However, the investment-only exemption under 802.9 has been progressively interpreted in an increasingly narrow manner in speeches and public comments by FTC staff[9] when compared to the SBP. In the SBP, the FTC identified certain enumerated activities that will almost always disqualify an investor from relying on the investment-only exemption. These actions were listed in the SBP as examples of conduct that could be viewed as evidence of an intent inconsistent with the investment-only and include:

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

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

FTC statements[10] related to compliance with the investment-only exemption have created uncertainty for traditional asset managers around engagement with an issuer's management or board, regardless of reason for the engagement or topics discussed. If the FTC staff proceeds to continuously narrow the interpretation, BlackRock is concerned that any type of communication with an issuer's management or board – including contact that traditionally is not activist, contact confined to environmental, social and governance ("ESG") and other topics that promote sustainable business practices (collectively, "investment stewardship

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[8] 16 CFR 1.98(a).

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

[10] Id.

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

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

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

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

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

[11] Id.

i) Investment stewardship has changed since 1978

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

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

ii) Investors and issuers benefit from investment stewardship

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

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

[13] https://www.governanceprinciples.org/.

[14] https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

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

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

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

iii) Investment stewardship fundamentally differs from shareholder activism

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

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

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

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

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

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

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

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

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

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

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

[19] 17 CFR 240.13d-1(b)-(c).

[20] https://www.sec.gov/divisions/corpfin/guidance/reg13d-interp.htm.

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

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

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

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

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

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

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

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[22] Id.

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

[24] 16 CFR 802.64.

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

Rules were enacted, '40 Act Funds today have a "relatively insubstantial effect on competition." [26]

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

'40 Act Funds are a critical component in the retirement, education and financial planning of millions of Americans. American households are the largest group of '40 Act Fund investors.[27] '40 Act Funds managed 23% of household financial assets at year-end 2019.[28] Specifically, mutual funds made up a significant portion of defined contribution retirement plan assets (58%) and individual retirement accounts (44%) at year-end 2019.[29] From a policy perspective, it is critical that '40 Act Funds remain eligible for the higher exemption available to institutional investors because the lower exemption threshold for non-institutional investors increases the likelihood that '40 Act Funds will trigger HSR reporting and attendant waiting periods, creating significant burdens preventing them from fulfilling their investment objectives and strategies. The result could be diminished investment returns for countless households across the US due the increased tracking error for index funds and opportunity costs for active funds associated with a 30-day waiting period on acquisitions. The removal of '40 Act Funds from the institutional investor exemption would contravene the purpose of this exemption, which is to "reduce the disruption of the securities markets that could result from requiring [institutional investors] to report and observe the waiting period before such acquisitions."[30]

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

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

[26] Id.

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

[28] Id.

[29] Id.

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

[31] Id.

[32] 17 CFR 240.13d-1(b).

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

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

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

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

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

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

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[33] Id.

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

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

Conclusion

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

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

Sincerely,

Sandra Boss
Senior Managing Director, Global Head of Investment Stewardship

Christopher J. Meade
Senior Managing Director, General Counsel & Chief Legal Officer

Kathryn Fulton
Managing Director, Co-Head of Global Public Policy Group

BlackRock.

November 30, 2021

Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580

Submitted online via http://www.regulations.gov

Re: Comment on FTC's Draft Strategic Plan for Fiscal Years 2022-2026

To the Federal Trade Commission:

BlackRock welcomes the opportunity to respond to the Federal Trade Commission's ("FTC") Draft Strategic Plan for Fiscal Years 2022-2026.[1] Specifically, we address Objective 2.1, pursuant to which the FTC seeks to "[i]dentify, investigate, and take actions against anticompetitive mergers and practices."[2]

Competitive markets are in the best interest of investors. BlackRock welcomes efforts to modernize the rules implementing the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Rules") to ensure that product and capital markets remain fair and competitive. We are, however, concerned that changes proposed in a recent Notice of Proposed Rulemaking ("NPRM")[3] would have unintended consequences that would reduce investment returns for end investors, including hardworking Americans saving for retirement. This submission supplements the comment letter that BlackRock submitted in response to the NPRM in February 2021.[4]

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

Sincerely,

Dalia Blass
Senior Managing Director,
Head of External Affairs

[1] Federal Trade Commission, Draft Strategic Plan for Fiscal Years 2022-2026.
[2] Id. at 16.
[3] Federal Trade Commission, Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR 77053 (Dec. 1, 2020).
[4] BlackRock, Inc. Comment Letter, 16 CFR parts 801-803: Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules; Project No. P110014 (Feb. 1, 2021).

The Benefits of Scale in Asset Management†

November 30, 2021

Abstract

Scale economies in asset management, coupled with strong competitive forces and the growing adoption of index investing, have benefitted investors through greater market access and lower costs. Analyzing data on asset managers of different scale, we find that proposed changes to the premerger notification rules (the "HSR Rules") that implement the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act") would introduce performance and portfolio management risks and increased fund expenses for investors in both active and index funds. The potential reversal of nearly three decades of progress by the asset management industry to deliver lower prices for investors would impact cost efficient and simplified market access for over 100 million Americans (about 60 million U.S. households) who own mutual funds and ETFs, nearly 50% of whom own at least one type of index-tracking fund.

† All authors are employees of BlackRock, Inc and its affiliates ("BlackRock"). The views here are those of the authors alone and do not reflect those of the officers or directors of BlackRock. This material is not intended as the basis of investment advice or recommendations.

1. Introduction

We examine the benefits to investors from scale economies in asset management. The past few decades have seen a dramatic increase in household assets invested in funds coupled with an equally dramatic reduction in fund expenses and trading costs across the U.S. asset management industry.[1] Indeed, 2020 marked the lowest average expense ratios across all U.S. open-end funds paid by investors ever.[2] As more investors seek cost efficient and simplified ways to invest for long-term financial goals and participate in markets, economies of scale in asset management have evolved as well. Benefits of scale, as defined by the growth of asset management as an industry, has led to simplified market access, greater liquidity, and lower prices for all investors, particularly retail investors and those using index–tracking vehicles such as exchange-traded funds ("ETFs"). Economies of scope – meaning that the creation of one type of fund reduces the costs of creating related funds – have also expanded in lockstep along with economies of scale. Specifically, the breadth of fund options available to investors, particularly in low-cost index investing, has grown exponentially. In 2000, there were just 80 U.S. – registered ETFs available for purchase. By year-end 2020, there were around 2,300 U.S. – registered ETFs across a diverse range of asset classes and exposures.[3]

We utilize a framework focused on the strong negative relationship between expense ratios and fund size[4] to empirically gauge how economies of scale in asset management could be impacted by the proposed changes by the Federal Trade Commission (the "FTC") to the premerger notification rules (the "HSR Rules") that implement the Hart-Scott-Rodino Antitrust

[1] A fund's expense ratio is its total annual operating expenses including management fees, distribution fees, and other expenses (such as auditing, legal, custodial and transfer agency fees), expressed as a percentage of net assets. The specific methodology for calculating and presenting is determined by Federal Securities Laws. Expense ratios are included in both a fund's prospectus and its annual report. The latter reflects actual fees charged during a particular fiscal year while the prospectus expense ratio reflects material changes to the expense structure during the current period. See Item 3 to Form N-1A, 17 CFR 239.15A and 17 CFR 274.11A.

[2] Fund expense ratios have gone down across all U.S. active and index open-end funds. The average open-end expense ratio paid by U.S. fund investors is half of what it was three decades ago. The average asset weighted expense ratio across all U.S. open-end funds in 1990, the oldest set of complete U.S. open-end fund data available in Morningstar, was 0.72%. The average asset weighted expense ratio across all U.S. open-end funds in 2020 was 0.42%. Expense ratios did not drop lower than 0.42% between 1990 and 2020. All U.S. fund universe includes all U.S. open-end mutual funds and exchange-traded funds (excluding money market and fund of funds), as of December 31, 2020. Source: Morningstar. For Morningstar attribution information, please see references.

[3] Source: 2021 ICI Factbook. See references for source report. Data includes ETFs that invest in other ETFs.

[4] Fund size is defined as total assets under management. See Exhibits 3 and 4 for an illustration of the inverse relationship between AUM and (asset weighted) expense ratios across all U.S. open-end active and index funds.

Improvements Act of 1976 (the "HSR Act").[5] These changes, if enacted, will likely require large asset managers to more frequently seek FTC approval to take positions above a certain threshold, including in index funds.

We show that this would negatively impact fund performance, especially for index funds (by increasing tracking error[6]), and increase prices for end investors, particularly for retail investors, by reducing fund size and limiting scale operations at the fund complex level.[7] We also illustrate the potential effects on transparency and predictability in portfolio management and capital markets such as increased portfolio risk, reduced liquidity, and distorted trading dynamics. And finally, we highlight how proposed changes could ultimately translate to a reduction in the flow of stable, long-term oriented growth capital to companies, especially small and mid-size issuers.

Before we explore the role of scale in more detail, it is worth noting how widely investors have adopted professionally managed funds offered by asset managers and how much they have benefitted from efficient market access and lower expenses. Broadly, the share of U.S. household financial assets invested in funds has grown roughly eight-fold[8] since the 1980s as more Americans allocate their savings through managed funds to invest for long-term financial goals such as retirement. More than 100 million Americans (about 60 million U.S. households) participate in the equity and bond markets via mutual funds, institutional funds, and index-tracking funds. Since the inception of the index mutual fund by Vanguard in the mid-1970s and the first ETF in the U.S. in

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[5] Under the current rules, HSR thresholds are applied to funds under common management on a disaggregated basis as long as they are their own ultimate parent entity ("UPE"). The FTC proposes broadening the definition of "person" under the HSR Rules to include a UPE's "associates" in order to ensure that HSR filings provide a more comprehensive picture of positions that are managed by related entities. This change ("associates aggregation") would require investment entities filing HSRs to disclose information about associated entities and their holdings. As drafted, the proposal would also require the aggregation of holdings across funds under common management when monitoring against the filing and exemption thresholds, including open-end mutual funds, closed-end mutual funds, ETFs, hedge funds and collective trust funds that share common or affiliated managers.

[6] Tracking error is the divergence between the returns of an index fund and the returns of its underlying benchmark index. The stated prospectus investment objective of an index-tracking fund is to replicate the performance of its underlying benchmark index, so increased tracking error translates to increased portfolio risk and could result in diminished fund performance. Diminished fund performance for an investor, especially a long-term investor, may mean that they cannot achieve the financial goals they set based on the risk return profile and projected performance of the investment.

[7] Fund complex level is defined as the aggregate asset manager level. It is important to note that each fund has a distinct investment objective and is managed separately from other funds in the complex.

[8] As stated by ICI, U.S. household financial assets held in 'funds' defined as registered investment companies including holdings of mutual funds, ETFs, closed-end funds, and UITs grew from 3% to 23% at year-end 2020. Pg. 43. All statistics can be found in the 2021 ICI Factbook. See references for source report.

1993 that seeks to track the S&P 500® index, the share of household participation in index funds has grown exponentially. In 2020, of the 60 million U.S. households that owned mutual funds, 43 percent owned at least one equity index mutual fund and an estimated 17 percent also owned ETFs.[9,10]

Funds offered by asset managers, such as mutual funds and ETFs, simplify investment in capital markets, which, coupled with lower expenses, makes planning for financial goals like retirement more accessible and achievable. A recent Broadridge study of U.S. investors highlights this expansion in asset ownership and greater willingness to invest in capital markets by so-called 'mass market' households who have less than $100,000 in investable assets; these households are starting to represent a growing share of asset ownership—a trend that we believe is a result of index investing.[11] The appeal of efficient diversification in a single fund can also be illustrated by the rapid adoption of low-cost index investing in retirement plans and solutions. From target date strategies that utilize ETFs to efficiently manage asset allocation over long-time horizons to defined contribution plans that utilize index products to help employees transform more of their contributions into savings, the use cases are widespread. For example, in just defined contribution plans, index assets have grown nearly five times over the past decade and are now around 36% of total defined contribution assets overall with a growth rate nearly twice that of the total industry.[12] Many corporate 401(k) and academic 403(b) retirement plans also heavily feature index funds, highlighting the expanding range of investors benefitting from index investing.

Many financial professionals including registered investment advisers ("RIAs") and broker-dealers also use index funds to create portfolios for their clients; this includes the fast-growing use of ETFs in model portfolios, such as those offered by asset managers, investment

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[9] Percentages are not mutually exclusive and may account for overlap where a household owns both an ETF and an index mutual fund and is counted twice. All statistics can be found in the 2021 ICI Factbook. See references for source report.

[10] Of households that owned mutual funds, 31 percent owned at least one index mutual fund in 2010. Of households that owned mutual funds, an estimated 5 percent owned ETFs. All statistics can be found in the 2011 ICI Factbook. See references for source report.

[11] "Despite being only 10% of the overall assets studied (given category's lower household assets under management), mass market households gained 3% in asset ownership share since 2017." See Broadridge 'Insights on U.S. Investors' Study for full definitions of terms such as investable assets and wealth segments (i.e., mass market, mass affluent, high net worth). As of April 2021. See references for source report.

[12] Index assets are growing at a 16% compound annual growth rate while total industry assets are growing at only 9% compound annual growth rate. Source: P&I 2020 Money Managers Survey. Excluding multi-asset products such as target date funds and allocation funds. As of December 31, 2020. See references for source report.

advisers, and digital investment advisory programs, like Wealthfront and Betterment, which offer algorithmic-based investment solutions exclusively through electronic platforms.

The popularity of index investing is therefore a clear reflection of the ease of access to the markets provided by such products as well as the benefits that investors, particularly retail investors, have reaped since the mid-1970s. These benefits include lower fund expense ratios (and hence higher returns net of expenses), greater diversification (which generally reduces unsystematic risk), and for ETFs, generally daily transparency into holdings combined with tax efficiency[13] for the fund and its investors. It is important to understand that the proliferation of index products has also reduced costs not just for users of index products, but across the entire investment industry. This is because competition among index and active managers for flow/assets drives down expenses. Increasing use of ETFs by active managers for a range of portfolio management applications, such as gaining broad market exposures at lower costs than purchasing individual securities or simply more efficient investment strategies has contributed to decreasing expense ratios in active funds. Therefore, the widespread impact of indexing on the decrease in U.S. expense ratios across the investment industry in recent decades cannot be understated.[14] For example, had expenses remained static just over the past ten years, the estimated additional expenses paid by investors would have been over $200 billion.[15] We argue that scale in indexing and growth of ETF usage by institutional and retail investors, together with strong competitive forces and rapid technology innovation in asset management, lie behind this trend.

The paper proceeds as follows: In Section 2, we discuss the current state of the asset management industry, highlighting its competitiveness. We also discuss the nature and extent of scale economies and show how competition has translated these economies into lower costs for all investors. Section 3 discusses the impacts of associates aggregation under HSR Rules as proposed – based on the empirical relation between scale and expense documented in Section 2 – and

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[13] Unlike mutual funds, most ETF investors don't interact directly with the fund when buying or selling ETF shares; instead, ETF buyers and sellers transact in the secondary market. This means investors are generally insulated from the buying or selling activities of other shareholders which would otherwise result in increased transaction costs and portfolio turnover. ETF investors still pay capital gains taxes when they sell shares at a profit, similar to other investments including stocks, bonds and real estate.

[14] Ibid, footnote 1, page 1.

[15] Source: Morningstar. Data as of December 31, 2020. Asset weighted expense ratio calculated using all share classes of ETFs and mutual funds, excluding fund-of-funds and money market funds. Total expenses calculated by multiplying weighted average expense ratio by average of beginning and end of year assets for calendar year. For Morningstar attribution information, please see references.

highlights the range of potential negative effects on expense ratios and fund performance as well as other tangential but important aspects of asset management such as portfolio management and capital markets dynamics. Finally, Section 4 concludes with some recommended changes to the proposal to achieve the FTC's goal without disrupting the benefits of scale in asset management.

2. The Asset Management Industry

Competitive Environment

The global asset management industry is highly competitive and fragmented.[16] Even among the top ten U.S. asset managers by assets, expense ratios continue to be a driver of competition and influence on organic growth (see **Exhibit 1**). This highlights that vibrant competitive behaviors persist even in an environment of historically low expense ratios across the industry. As technology and product innovation continue to evolve, competition in asset management thrives on multiple dimensions such as:

- Competition for flow / assets among active and index managers and other investors, such as hedge funds
- Competition from sophisticated institutional investors like Sovereign Wealth Funds, who may have the time and resources to manage their own portfolios in-house, rather than relying on an external manager
- Competition from direct indexing where managers (such as Aperio[17]) design bespoke "index" portfolios for their clients that seek to meet clients' objectives while harvesting losses that offset gains, producing tax alpha
- Competition from new product types (e.g., bond portfolio trades vs. bond ETFs) and from traditional active managers converting mutual funds to ETFs

[16] As stated by a report on 'Global Asset Managers,' by Morgan Stanley Research, asset management is the second most fragmented industry after capital goods, as evidenced by the combined number of companies that make up 75% of sales. Capital Goods has approximately 96 companies that make up 75% of industry sales. Asset management follows closely with around 81 companies that make up 75% of sales, where sales is measured by AUM. Interestingly, these two industries are significantly more fragmented than many others as the next industry, Materials, has only around 58 companies that make up 75% of industry sales. See references for source report.

[17] In February 2020, BlackRock acquired Aperio, a pioneer in customizing tax-optimized index equity separately managed accounts ("SMAs").

Exhibit 1: Cost pressures persist across the top ten asset managers by AUM in the U.S.[18]

	Asset weighted average expense ratios (%)			2020			
Asset Manager	**2015**	**2020**	**% change**	**Year-end AUM ($B)**	**Market share (%)**	**Asset Growth (%)**	**Organic Growth Rate (%)**
Vanguard	0.12	0.09	-28	6,150	25.97	15.49	1.52
BlackRock/iShares	0.40	0.26	-36	2,342	9.89	17.90	7.00
Fidelity	0.71	0.37	-48	2,161	9.13	21.33	0.58
American Funds	0.68	0.57	-15	2,032	8.58	14.67	-1.83
State Street	0.19	0.16	-12	870	3.67	17.49	4.67
T. Rowe Price	0.71	0.52	-27	771	3.26	16.03	-4.96
Invesco	0.84	0.61	-27	620	2.62	15.90	-3.52
Franklin Templeton	0.82	0.67	-18	574	2.42	4.21	-4.83
JPMorgan	0.78	0.57	-27	437	1.85	24.43	12.9
PIMCO	0.64	0.94	47	403	1.70	3.32	-1.71

Source: Morningstar. As of December 31, 2020. Data includes all U.S. open-end funds, excluding money market funds and fund of fund products. Market share is based on asset manager assets. Asset growth is change in asset manager assets from year-end 2019 to year-end 2020. Organic growth rate measures 2020 annual asset manager net flows as a percentage of year-end 2019 assets. For Morningstar attribution information, please see references.

New entrants represent a major source of competition in the asset management industry as price competition coupled with product innovation open niche opportunities and new market segments. While larger asset managers captured initial asset growth as early entrants in the index and ETF marketplace (e.g., SSGA, Vanguard, BlackRock), there is a constant stream of new entrants (e.g., Ark Investment Management[19]) who develop relative competitive advantages through a range of strategies and capture new and existing assets at exponential rates of growth.[20] This drives vibrant competition and innovation across many dimensions such as:

- New geographic, thematic, and sub-asset class exposures (e.g., ESG, sectoral fixed income);
- New investment strategies (e.g., target date and target risk funds)

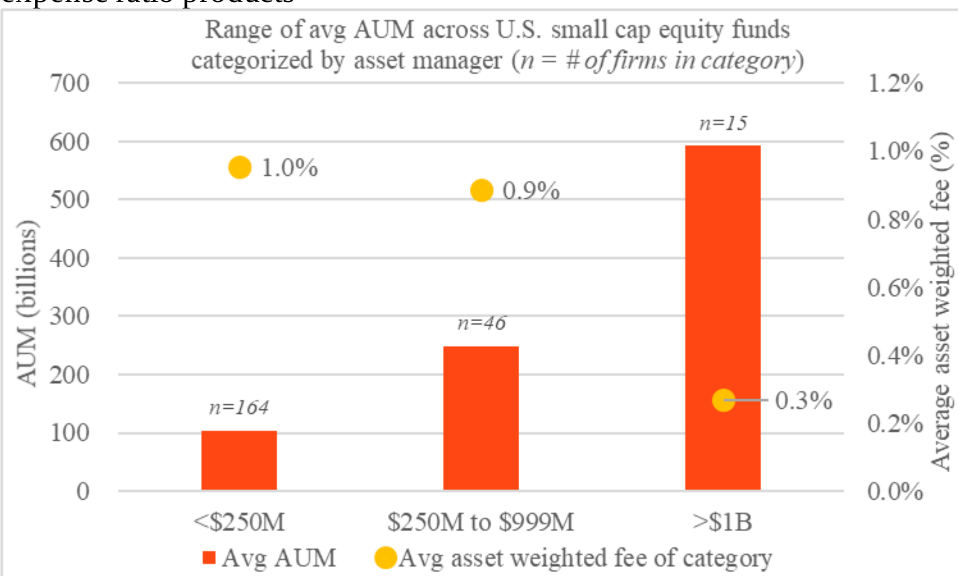
[18] Asset weighted basis is a more realistic measure than an equal weighted approach as it represents actual expenses paid by investors in relation to asset growth. Asset weighted average fee is calculated as sum of funds' annual report net expense ratios multiplied by year-end assets divided by year-end assets.

[19] Despite the breadth of thematic index and active fund strategies focused on technology innovation that already existed in the U.S. fund industry, ARK Investment Management launched in 2014 with four ETFs and year-end AUM of $26 million. Over the course of six years, they experienced exponential asset growth and flows, with year-end 2020 AUM at $35 billion across just 8 ETFs. Sources: Morningstar. As of December 31, 2020; See also Ark Investment Management website for more information on the firm and products. Available at: https://ark-funds.com/; See also "ARK's Cathie Wood Disrupted Investment Management. She's Not Done Yet." As of March 8, 2021. Source: Barron's. Available at: https://www.barrons.com/articles/arks-cathie-wood-disrupted-investment-management-shes-not-done-yet-51614992508.

[20] "While there are clear benefits of scale in passive, especially ETFs, new entrants are competing largely on price for market share." (Morgan Stanley Research and Oliver Wyman Blue Paper, 2019) See references for source report.

As an example of how competition drives choice for investors, we can observe the scope and diversity of product type and range of expenses from which an end investor can choose from in just one of the many market categories available to them. To date, there are nearly 1,700 open-end mutual funds and ETFs with investment strategies specifically focused on investing in U.S. Small-Cap equities[21] offered by 225 different fund providers. Expense ratios across these funds range from 0.01% to over 1% and assets are dispersed across the various funds. Despite the range of choices, investor assets still tend to concentrate in the lowest expense ratio products (see **Exhibit 2**), providing the impetus for continued competition on expenses.

Exhibit 2: Across 1,699 U.S. Small-Cap equity strategies, investor assets gravitate to lowest expense ratio products



Source: Morningstar. Data as of December 31, 2020. Categorization is based on aggregation of asset manager average U.S. Small-Cap equity fund AUM, bucketed by AUM ranges. For Morningstar attribution information, please see references.

Leveraging Scale Economies in Index Investing

Scale economies in index investing are enabled by the strategy of spreading fixed costs methodically (e.g., data, technology systems/platforms, personnel etc.) and the presence of efficient distribution channels with fewer intermediaries (e.g., directly buying ETFs on zero-commission brokerage platforms). Large asset managers who offer a wide range of products—

[21] Stocks in the bottom 10% of the capitalization of the U.S. equity market are defined as Small-Cap. Fund universe is based on all open-end funds (active and index) in the Morningstar 'Small-Cap Equities' category. Source: Morningstar.com. For Morningstar attribution information, please see references.

from core index exposures, such as the S&P 500®, to niche and thematic exposures, like ESG—can leverage additional scale operations including a broad range of trading and portfolio management resources to further reduce costs.

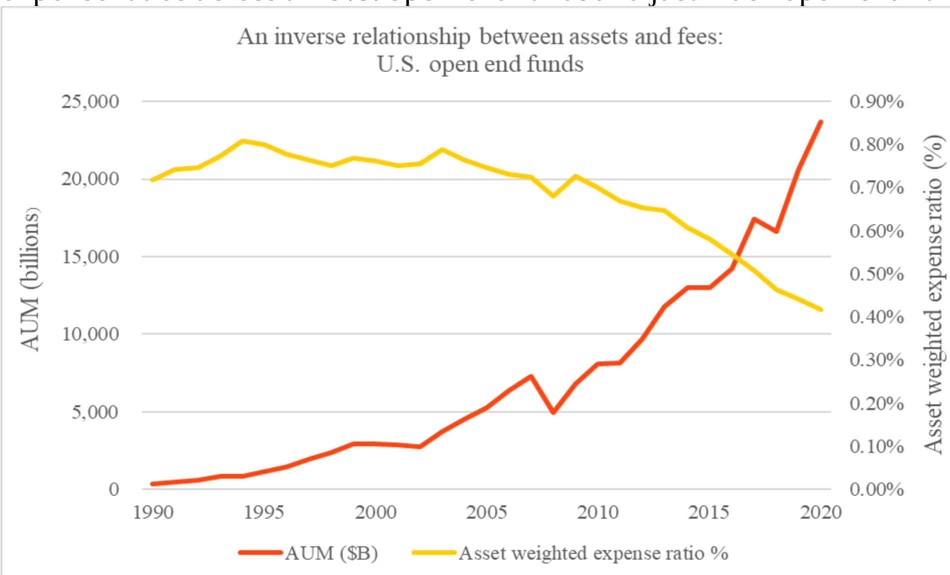
Increasing ease of access to global capital markets through index funds is also facilitated by asset managers' advanced trading and operational platforms. For example, periodic rebalancing or index reconstitutions require considerable investment skill and coordinated oversight (due to the time sensitivity and high degree of accuracy required) to keep a fund aligned with the revised index composition. Scale offers mechanisms to reduce costs and increase operational efficiency during these events, in addition to during normal course trading activities. For example, larger asset managers can use multiple brokers/venues, trade in local time zones using regional trading desks, and invest in advanced trading systems/platforms, algorithms, and data to efficiently implement trading strategies. The ability to be dynamic in a cost efficient manner is driven in part by diversity and breadth of operations, dedicated teams and designated resources for different functions and processes, and access to a wide range of stakeholders – all of which are also features of efficient scale operations. Similarly, larger asset managers can employ dedicated securities lending traders and systems to enhance securities lending revenue for the fund, resulting in better returns for investors. For these and other factors, scale is especially beneficial for index fund managers to deliver efficient outcomes for investors and as previously mentioned has helped drive down fund expense ratios across the industry.

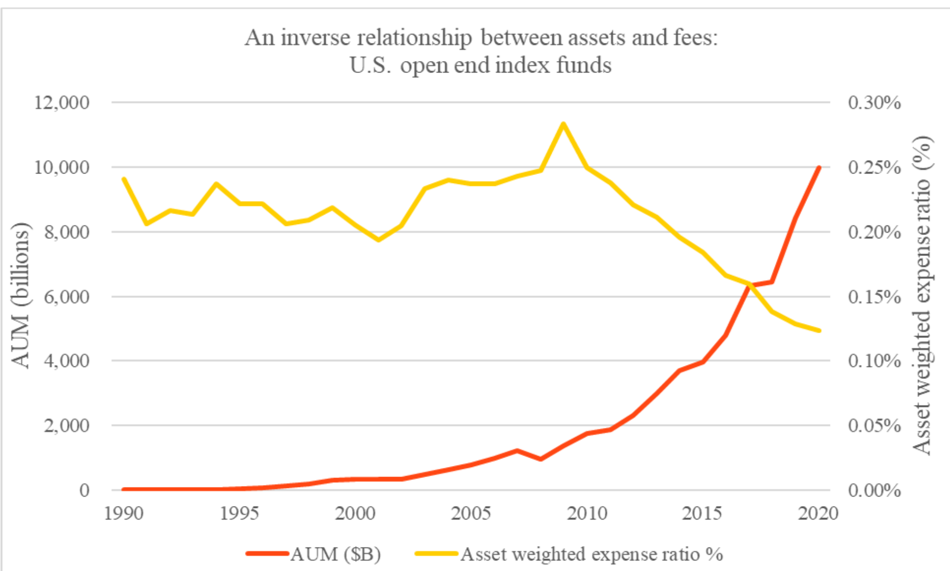
The benefits of coupling scale with strong competition across asset managers are passed on to investors in the form of lower expense ratios. We quantify this effect for all funds and within index funds only in **Exhibits 3 and 4**. We observe that the average asset weighted expense ratios across all U.S. open-end funds (active and index) have steadily declined since the 1990s. Just in the past decade, expense ratios dropped nearly 40%. To reinforce our point about the beneficial effect for active investors, the cost differentials continue to compress, although active fund expense ratios are generally higher on average.[22] Furthermore, within just the index fund universe where overall fee compression is extreme, competition continues to drive fund expense ratios even lower

[22] Scale economies in active fund management may be different because of capacity constraints, but they still benefit from the same underlying economics for index funds.

– thereby strongly illustrating the negative correlation between AUM and expense ratios and, as a result, the benefits of scale.

Exhibits 3 and 4: There is a clear inverse relationship between AUM and (asset weighted) expense ratios across all U.S. open-end funds and just index open-end funds.





Source: Morningstar. Data as of December 31, 2020. All U.S. fund universe includes all U.S. open-end mutual funds and ETFs (excluding money market funds and fund of funds). For Morningstar attribution information, please see references.

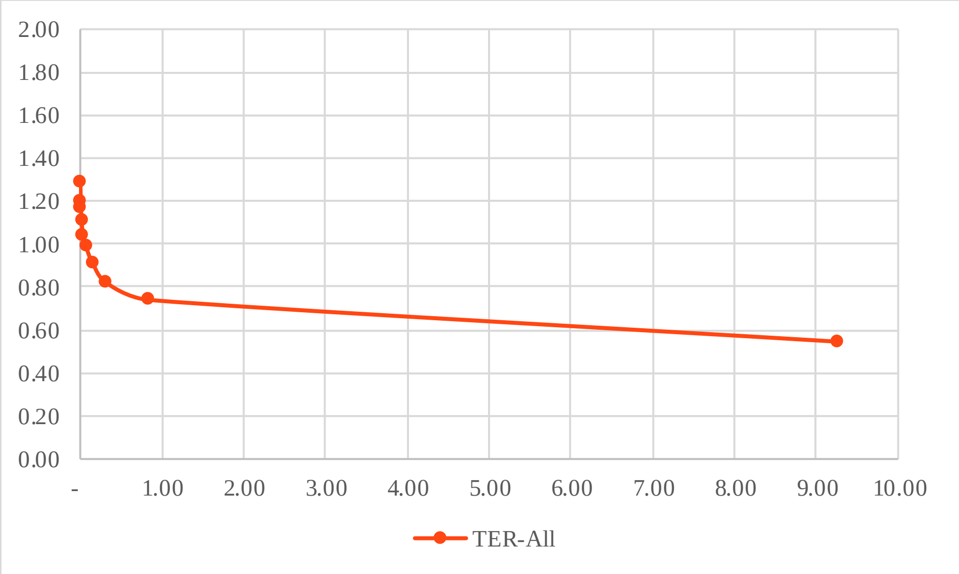
Quantifying Scale Economies

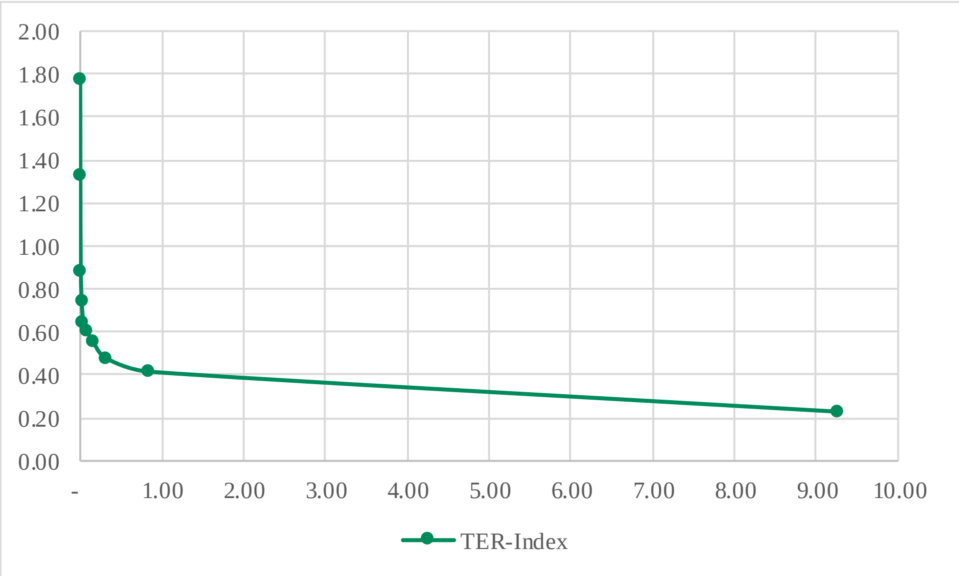
The next step is to further quantify the relationship among fund assets, expense ratios, and the impact of scale economics at the fund complex level. We began with a universe of all 26,788 U.S. open-end funds[23] – which includes equity, fixed income, alternative, and commodity active and index funds – after we eliminated those funds with missing observations for AUM or expense ratio. We then grouped these funds by deciles of AUM (of roughly 2,679 funds each) to reduce some of the noise in expenses associated with differences in asset class, focus, etc. As shown in **Exhibit 5**, the larger the funds (as measured by AUM), the lower the total expense ratios ("TERs") of funds offered for all funds and for index funds only.

Exhibit 5 provides strong evidence that scale translates to lower expenses paid by investors for individual funds. Applying the simple logic of the example, we see that the top decile of AUM has the smallest expense ratio – were funds in this category to move just to the next decile of AUM, total expense ratios would go from approximately 0.55% to 0.74%, a significant increase. If regulations are implemented that hamstring the ordinary course of asset managers' portfolio management processes, their operations at scale will be limited; this translates to higher fund expenses for end investors. Specifically, the burden of compliance with the proposed HSR changes may require fund managers to impose caps on ownership in certain securities or close funds to new investors, skewing fund sizes smaller. As the analysis illustrates, even a one decile shift in average AUM could increase total expense ratios by at least 26% or more as fund size continues to get smaller. The same dynamic is true even if actively managed funds are removed. Within the U.S. index fund universe only, a one decile shift in average AUM moves total expense ratios from approximately 0.23% to 0.42%.

[23] Source: Morningstar. As of: September 30, 2021. For Morningstar attribution information, please see references.

Exhibit 5: The relationship between fund AUM and TER[24] is strongly negative when comparing average TERs across all U.S. open-end funds and all U.S. index funds only, smallest (1) to largest (10) by average fund level AUM deciles.





Source: Authors' estimates based on data from Morningstar as of September 30, 2021. All U.S. fund universe includes all U.S. open-end mutual funds and ETFs (excluding money market funds and fund of funds). Index universe includes all U.S. open-end, index-tracking mutual funds and ETFs (excluding money market funds and fund of funds). For Morningstar attribution information, please see references.

A multivariate analysis can help quantify the benefits of scale at the fund complex level and shed light on other drivers of fund expenses beyond just individual fund size. Accordingly, we

[24] TER is defined as total expense ratio and synonymous with references to expense ratio.

estimated a multiple regression model for the universe of all U.S. open-end funds: The dependent (left-hand side) variable is the fund's TER (in percentage terms) and the independent (right-hand side) variables are the (natural) log of AUM, fund age[25], and indicator (zero-one) variables for index (strategy), ETF (fund type), fixed income (asset class), and whether the fund is a part of a 'top five fund complex' (by aggregate AUM) from **Exhibit 1**.[26,27] We use the log of AUM to capture the non-linearity that is clearly evident in **Exhibit 5**. Since the indicator variables are either zero or one depending on whether the fund is a member of that category (e.g., if a fund is an ETF, the value of ETF=1, otherwise if it is a conventional mutual fund, ETF=0), the coefficients simply shift the smoothed curve shown in the top panel of **Exhibit 5** up or down for each category. Essentially, the use of indicator variables allows us to estimate separate intercepts for strategy, fund type, asset class, and top five membership. The results are summarized in **Exhibit 6** below:

Exhibit 6: Multiple Regression Estimates of Fund TER

Independent Variables	Coefficient Estimate	Standard Error
(Intercept)	2.016	0.018
log (AUM)	-0.061	0.001
Age (years)	0.014	0.000
Index (strategy)	-0.159	0.013
ETF (fund type)	-0.206	0.014
Fixed Income (asset class)	-0.250	0.007
Top five fund complex (by aggregate AUM)	-0.235	0.009

Source: Authors' estimates based on Morningstar. Data as of September 30, 2021 for all U.S. open-end mutual funds and ETFs (excluding money market funds and fund of funds). For Morningstar attribution information, please see references.

The summary results (interpreted by direction and size of coefficient estimates)[28] are consistent with our intuition about the benefits of scale economies both at the fund and fund complex level. The coefficient on the log of AUM term captures the non-linear effect of scale (following **Exhibit**

[25] Age is measured in years, computed as the number of months since inception divided by 12.

[26] Per Exhibit 1, the top five fund managers used were Vanguard, BlackRock/iShares, Fidelity, American Funds, and State Street. This enables us to assess economies of scale at the fund complex level, which, as previously defined, is the aggregate asset manager level. A fund manager has a fiduciary duty to their clients and act independently.

[27] The asset class, index (as a strategy vs. active), and ETF (whether the fund is an ETF or not) are defined as indicator variables where the data takes the value 1 if the fund is in the category and zero otherwise.

[28] The adjusted R-squared is 0.241 and all estimates are statistically significant at the 1% level.

5) and is significant both economically and statistically. The coefficient on Age is positive, consistent with our earlier comments about newer entrants cutting expenses to attract flows. We see that index-tracking funds and ETFs have lower expense ratios at all fund sizes relative to active mutual funds with the same characteristics. This result is expected since, unlike active managers, these funds typically do not incur the costs associated with alpha generation. Similarly, the coefficient on Fixed Income is -0.25 which indicates that bond funds are about 0.25% lower in expense ratios than an equivalent non-bond (i.e., equity/commodity/alternative) fund, reflecting the lower costs of managing bond funds. Interestingly, all other factors equal, (i.e., keeping constant fund size, age, asset class, etc.) a fund that is a part of a 'top five fund complex' (by aggregate AUM) is estimated to have a lower expense ratio by around 0.24%. This directly illustrates how asset managers leveraging scale economies can positively influence reduction in fund expenses for end-investors. At the fund complex level, economies can include common technology systems and platforms, breadth of data, and specialized teams.

It is also not only fund expenses that have fallen due to scale economies. Trading costs for investors (as measured by historical average bid-ask spreads for U.S. equities) have also decreased by over 0.5% over the past three decades,[29] in part due to scaled technology innovation in capital markets broadly driving tighter markets. This trend is particularly relevant for ETF investors because they typically trade on-exchange to buy or sell shares of an ETF (like buying or selling a stock).[30] **Exhibit 7** shows decreasing ETF trading costs, defined by tighter average bid-ask spreads in basis points[31] across the largest 500 U.S. domiciled ETFs by assets over the past five years. Tighter average bid-ask spreads are a direct reflection of trading volume, increased liquidity, competitive markets, and ultimately greater access to capital markets.[32]

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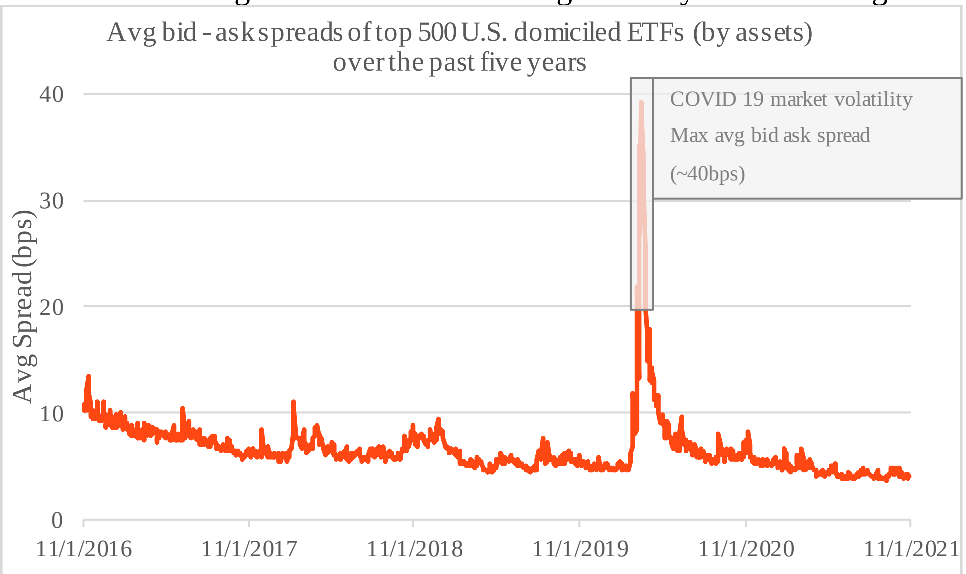
[29] See Modern Markets Initiative, "A Report on Market Automation and Democratizing Markets: Lowered Bid-Ask Spreads and Investor Savings" for commentary and academic studies on the drivers of decreasing trading costs and resulting savings for investors. As of: June 2021. See references for source report.

[30] Most ETF trading activity occurs in the secondary market, where ETF shares change hands between buyers and sellers. When demand cannot be met in the secondary market, large institutions (authorized participants) can transact with ETF issuers to create or redeem ETF shares in a separate, "primary" market.

[31] One basis point is equivalent to 0.01% (1/100th of a percent).

[32] It is often cheaper for investors to access segments of the market in a diversified manner via an ETF than by trading the basket of underlying securities. ETFs also help provide price discovery, even when underlying markets are closed or hard to trade.

Exhibit 7: Trading costs have decreased significantly across the largest 500 U.S. equity ETFs[33]



Source: TAQ, NYSE. As of November 30, 2021.

Similar to evidence that shows that scale benefits are passed on to investors in the form of lower expenses, investor flows have also been trending towards the lowest cost funds for the past two decades. As stated by Morningstar, this is not a new phenomenon as "investors have favored cheaper, higher-quality funds". Since 2000, net flows into funds charging expense ratios that rank within the lowest 20% of their Morningstar category group have trended higher. Even within active funds, flows predominantly go to the lowest expense ratio quintile of funds.[34] Furthermore, the lowest cost actively managed funds succeeded in beating their benchmark by about twice as often as the most expensive ones (a 34% success rate versus a 17% success rate) over a 10-year period. Not only does this illustrate the relationship between fund expense ratios, performance and, ultimately, cost savings for investors, it is also an indication of whether a fund will continue to operate over the long-term. For example, Morningstar observes that over the 10-year period ending 2020, 63% of the lowest cost U.S. open-end funds survived, whereas only 49% of the most

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[33] As stated by ICI, "during stressed markets, when selling pressure is intensified and volatility is elevated, bid-ask spreads on both ETFs and their underlying securities widen. Whether ETF bid-ask spreads remain narrower than those on their underlying securities during these times of stress will depend, in part, on the willingness of dealers to remain in the secondary market and provide competitive two-sided quotes for ETF shares relative to their underlying securities. During the market turmoil in March 2020, bid-ask spreads on large ETFs widened, but often remained narrower than those on their underlying securities." Source: ICI, 'Experiences of US Exchange – Traded Funds During the COVID – 19 Crisis'. As of: October 2020. See references for source report.
[34] See Exhibits 7 and 8 in Morningstar's '2020 Morningstar Fund Fee Study'. Pgs. 7-8. Source: Morningstar, '2020 Morningstar Fund Fee Study'. Data as of December 31, 2020. For source report and Morningstar attribution information, please see references.

expensive did so.[35] These results highlight how the scale efficiencies in fund operations (which support asset growth and drive lower fund expense ratios) contribute to consistent returns over time. This is most important for Americans focused on growing their savings for long-term financial goals, such as retirement.

Looking simply at the magnitude of savings for end investors in terms of lower fund expense ratios and generally better performance net of expenses illustrates the benefits of competitive markets and scale-driven innovation in making investing accessible for all investors. The average asset weighted expense ratios of all U.S. open-end mutual funds and ETFs in 2011 was approximately 0.68%, compared to roughly 0.42% in 2020. Had the asset management industry been static and non-competitive, with fund expense ratios staying at 0.68% as a result, the estimated additional expenses paid by investors would have been around $214 billion over the last decade alone.[36] As fund expenses continue to decrease and broadly, the price to invest, continues to go down, Americans will continue to see the resulting savings, enabling more first-time savers, middle income investors, and retirement savers to reach their financial goals without sacrificing growth of returns. Conversely, limiting scale operations, which impacts the ability for asset managers to efficiently deliver low-cost, efficient fund diversification, will raise expense ratios and the cost to invest and diminish returns for end investors going forward.

3. Impact of associates aggregation under HSR

Proposed HSR rule changes

Under the current HSR Rules, certain transactions—including minority acquisitions of voting securities above a certain dollar threshold—require a premerger notification filing to the FTC and the Antitrust Division of the Department of Justice ("DOJ," and together with the FTC, "antitrust agencies") by the acquiror (such as an asset manager, on behalf of its clients) and a responsive

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[35] See Morningstar's 'Active Passive Barometer' for study details. As of: March 2021. Data evaluated over a 10-year period ending December 31, 2020. Survivorship or survival rate is defined as the number of distinct funds that started and ended the period in question by the total number of funds that existed at the onset of the period in question. For source report and Morningstar attribution information, please see references.

[36] Source: Morningstar. Asset weighted expense ratio calculated using all share classes of ETFs and mutual funds, excluding fund-of-funds and money market funds. Total expenses calculated by multiplying weighted average expense ratio by average of beginning and end of year assets for calendar year. Expense ratio used is 'annual report net expense ratio,' as defined by the SEC. *See* supra footnote 1. in. Data as of December 31, 2020. For Morningstar attribution information, please see references.

filing by the issuer of the securities. A notification filing triggers an initial review period of up to 30 days, during which the filer may not purchase additional shares.[37] Each filing incurs a fee ranging from $45,000 to $280,000, depending on the size of the proposed transaction.

The HSR Rules today include two important exemptions that are available to asset managers that acquire public equity securities on behalf of their clients:

- An "investment only" exemption where the acquisition of 10% or less of an issuer's outstanding shares is made for investment purposes (e.g., passive); and
- An "institutional investor" exemption where the acquisition of 15% or less of an issuer's outstanding shares is made by an institutional investor as defined in the HSR Act (e.g., funds regulated under the Investment Company Act of 1940 as amended ("'40 Act funds")) for investment purposes.

These exemptions are widely used by asset managers, which typically hold securities on behalf of their clients solely for the purpose of investment, allowing them to offer their clients a broad range of investment solutions, including index funds, without having to make premerger notification filings.

The Notice of Proposed Rulemaking ("NPRM") issued by the FTC on September 21, 2020 highlights the challenges antitrust agencies face today and suggests changes to the HSR Rules to address them.[38] One challenge identified in the NPRM is that current ultimate parent entity ("UPE") rules do not require investment entities filing HSR notifications to disclose substantive information regarding their complete organizational structure and the total economic stake of the issuer being acquired by associated entities. To close this perceived information gap, the FTC proposes broadening the definition of "person" under the HSR Rules to include a UPE's "associates." This change ("associates aggregation") would require investment entities filing HSRs to disclose information about associated entities and their holdings. As drafted, the proposal would also require the aggregation of holdings across funds under common management when monitoring against the filing and exemption thresholds, including open-end mutual funds, closed-

[37] While the HSR statute limits the initial review period to 30 days, the FTC can review transactions after the initial review period expires. The FTC announced on August 30, 2021 that the "tidal wave" of HSR filings received in 2021 has led to an inability for their staff to adhere to the 30-day window, and that the FTC would begin sending warning letter to applicants at the conclusion of the review period notifying them that the review remains open and warning applicants to close transactions at their own risk. Source: https://www.ftc.gov/news-events/blogs/competition-matters/2021/08/adjusting-merger-review-deal-surge-merger-filings
[38] See official notice of proposed rulemaking here: https://www.federalregister.gov/documents/2020/12/01/2020-21753/premerger-notification-reporting-and-waiting-period-requirements?form=MY01SV&OCID=MY01SV

end mutual funds, ETFs, hedge funds and collective trust funds that share common or affiliated managers.

Associates aggregation would severely disrupt the ordinary course investing activities of traditional asset managers as they would more frequently exceed the HSR exemption thresholds, triggering an exponential increase in the number of required HSR filings. An asset manager becoming subject to an HSR reporting obligation for a particular issuer's securities would impair funds holding that security's ability to operate, as the funds would be prohibited from acquiring additional holdings in that security while HSR filings are pending review by the antitrust agencies. This could generate significant tracking error (which impacts performance and increases risk)[39] and cash drag for index funds and opportunity costs for actively managed funds, ultimately affecting the ability of end investors to meet their investment objectives.

The ability for asset managers to manage risks, costs, and returns, and dynamically make changes to a fund's investment portfolio (while maintaining diversification) according to a fund's investment strategy is a critical feature of the role asset managers play as fiduciaries of investors' assets; as proposed, the Rules fundamentally undermine the ability of asset managers ability to satisfy their fiduciary obligations. We provide greater detail and quantification of the downstream impact to investors below.

Possible Negative Consequences

Implementation of the HSR Rules as proposed could adversely impact all asset managers and investors, irrespective of size and scale. As we discuss below, larger managers may face challenges arising from increased opportunity costs and tracking error, but even smaller, niche managers may face significant challenges. For example, many new entrants offer thematic ETFs that are highly concentrated in particular industries or sectors, so investment thresholds may therefore limit the feasibility of offering these types of strategies efficiently. Additionally, categories that are made up of small to mid-sized issuers such as U.S. Small-Cap equities (e.g., S&P Small-Cap 600® &

[39] As stated above, *see* supra Footnote 6, index fund performance is defined by how well the fund "tracks" or replicates its underlying index. If a fund is forced to freeze acquisitions of certain securities, the fund could hold those securities in a smaller proportion relative to its benchmark over time. This will not only increase the amount of cash in the fund's portfolio, which will earn less than if it were invested in the market (e.g., "cash drag"), but also increased turnover from trading activity to realign the fund with its benchmark, resulting in higher trading costs. Both diminish investors' returns over time.

Russell 2000® indexes) and U.S. Mid-Cap equities (e.g., S&P Mid-Cap 400® index) would be especially impacted by increased HSR filings, as even moderate positions could trigger filings (the smaller market capitalization of these issuers would result in higher ownership percentages). This could hinder fund managers' ability to efficiently provide their clients with exposure to these market segments.

There are several other possible negative consequences of the proposal. First, and most importantly, by reducing the benefits offered by scaled asset management, the proposal would raise expenses for all investors, as we have quantified throughout this paper. Second, it also raises the operational complexity of portfolio management, again increasing costs and risks, for investors in both actively managed and index-tracking funds:

- Managing best execution trading strategies around securities subject to HSR review periods could be challenging, as fund managers face the uncertainty of approval likelihood and timing, and interim market movements could impact security pricing and liquidity;
- Given the potential length of the review period, corporate actions and dynamic market conditions impacting specific securities could change portfolio-level risk and return profiles; delayed integration could potentially lead to securities being mismatched with index composition and investment strategy for active funds; and
- Given the complexity and breadth of securities held in portfolios, especially funds with highly diversified holdings there is a higher possibility of costly operating errors associated with more frequent filings as managing security allocations of different exposures in a portfolio is both correlated and time sensitive.

Third, amending the HSR rules would present significant impediments for fund managers to adhere to the stated prospectus objectives. As mentioned before, for index funds the proposed changes would likely translate to increased tracking error because fund managers may have to wait up to 30 days or more for approval to increase their positions. Index providers regularly update or "rebalance" their indexes to ensure that the composition of an index adequately reflects its stated methodology. Index funds must expeditiously reconfigure portfolio holdings to match the rebalanced index to continue to achieve their index-tracking objective; this remark also applies to active funds, which generally seek to beat a related index benchmark.

Limiting an index fund's ability to efficiently participate in these time-sensitive index change events could harm a fund's performance and ability to achieve its investment objective. Beyond fund performance, there are other capital markets ecosystem impacts that would make it extremely difficult to maintain lower costs and better returns for investors. Index rebalancing would become less predictable and less transparent, increasing risk for liquidity providers and therefore challenging their ability to efficiently and reliably provide liquidity for the large pools of assets being traded during index rebalances. This increased risk would likely result in higher costs for investors, compounded by the fact that liquidity providers will likely have less appetite to provide liquidity for future rebalances given the potential for higher levels of uncertainty. Furthermore, the potential delay in a fund manager's ability to trade index change events could result in unexpected large liquidity needs outside of normal rebalance periods, resulting in potentially increased volatility; this could adversely affect price discovery in markets and lead to temporary supply and demand imbalances. Amendments to HSR rules would reverse the significant investment and progress made by the capital market ecosystem broadly, including liquidity providers, asset managers, index providers, and exchanges, to enable greater transparency, predictability, and process oversight for events such as index rebalances.

For actively managed funds, as their stated investment objective is generally to beat a related index benchmark through stock picking/security selection, time sensitivity is paramount to accurate execution and alpha generation. An unpredictable delay in this process would produce significant opportunity costs for fund managers, as acquisition freezes during the review period limit the ability of managers to generate alpha from security selection and timing and as a result, reduce return potential for investors in the fund.

Whether due to higher expenses or operational inefficiencies, diminishing fund performance means increased risks for all fund investors, from pensions managing retirement plans to individuals directly saving for retirement. Potential tracking error considerations may also push Sovereign Wealth Funds and other international institutional investors to consider funds in domiciles outside the U.S.

Fourth, efficient portfolio management is highly interdependent and relies on many other entities in the capital markets ecosystem beyond the asset manager as we describe earlier with liquidity providers. As such, in addition to asset managers and end investors, the proposed rules may negatively impact other parts of the ecosystem including index providers, stock exchanges, and broker-dealers. For example, many investors use options to manage risk in their portfolios. An investor may hold a put option on an ETF that they hold as part of a core portfolio to mitigate downside risk. Since options are typically offered on the largest and most liquid ETFs, the proposal – by increasing tracking error on these funds – would have negative consequences for investors using the options market to hedge risk.

Finally, more stable capital bases benefit not only asset managers, but also the companies that issue stock. More stability allows a company to issue stocks and bonds with a lower required rate of return, reducing the weighted average cost of capital and helping in future fund raising for investment. Broadly speaking, index funds are a critical source of stable, long-term capital for companies as they remain invested in a stock for as long as it remains in its underlying index. The S&P 500® index, for example, holds companies for an average of approximately 25 years, while active mutual funds typically hold a stock for an average of 18 months.[40] The long-term nature of index capital encourages companies in an index to make strategic investments that focus on their industry competitiveness and maximization of long-term enterprise value rather than shorter-term financial targets. Limiting the ability of index fund managers to manage diversified products like ETFs in an operationally and expense efficient manner and from creating new products at scale to meet investor appetite for low-expense and long-term index investing could result in reduced stable, long-term oriented flows into these types of funds. This translates directly to less capital supporting long-termism for companies broadly. More specifically, if small- to mid-size issuers (such as U.S. Small-Cap equities and U.S. Mid-Cap equities) are disproportionally impacted by ownership percentage limits, this could translate to an unfair playing field among companies raising growth capital, dampen incentives for companies to continue seeking capital from public markets and potentially skew the overall composition of companies participating in public capital markets.

4. Conclusions

Millions of Americans access financial markets through professionally managed funds provided by asset managers to help them achieve their financial goals. Strong industry competitiveness, scale economies, and widespread adoption of index investing drive constant innovation in product choice and steadily decreasing fund expense ratios. This in turn translates to greater access to capital markets, expanded investment opportunities and growth of savings for end-investors.

[40] S&P Dow Jones Indices (received as of December 17, 2020), Morningstar. Average derived from S&P 500® index one-way annual turnover, historical data 1992 – 2019 was 3.9%, which equates to average holding period of 25 years. Morningstar turnover ratio for U.S.-focused equity funds was 65%, which equates to approximately 1.5 years (as of December 31, 2020). For Morningstar attribution information, please see references.

We show that fund expenses are strongly negatively related to fund size. Further, we find that large fund complexes that can leverage scale operations and drive down fund expense ratios (their own and, subsequently, across the industry), translating to greater lifetime savings as lower expenses enable greater compounding growth over the long-term.

Dynamic industry competitiveness is a key driver of scale economies in asset management, and we agree that competitive markets are in the best interests of investors. As such, we believe that modernizing HSR rules to ensure that product and capital markets in the U.S. remain fair and competitive is important. However, the changes being proposed by the FTC in the NPRM would instead negatively impact savers, retirees, and other end investors, and impede the efficient functioning of the equity markets. We believe the same objectives can be achieved while also seeking to mitigate unintended impacts on investors, companies, and the efficiency of U.S. capital markets.

Some recommended alternatives include exempting institutional investors and index funds from aggregation and tailoring its application to specific areas of HSR Rules that provide the information the FTC seeks without impacting ordinary course investment activities.[41] The sole aim of index funds, such as index mutual funds and ETFs, is to track a benchmark. They are inherently indifferent to the holdings and investment activities of associated funds. For institutional clients such as pensions and endowments, the use of low-cost index products has generated considerable value for their end-investors (e.g., firefighters and teachers) through the effect of compound growth in long-term oriented solutions.

We appreciate the goals of the rulemaking and believe in the importance of transparency and greater informational clarity. However, the new aggregation rules for institutional funds and index funds violate the principles articulated when the investment only/institutional investor exemptions were put in place that still apply today. Most importantly, the rationale is untenable relative to the magnitude of harm that the proposed changes will pose to Americans and to our capital markets.

More comprehensive research is needed around the impact of the changes on returns and expenses of professionally managed funds including index investments, end investors such as

[41] A full description of key recommendations is detailed in the BlackRock comment letter submitted February 1, 2021: https://www.blackrock.com/corporate/literature/publication/ftc-hsr-coverage-exemption-transmittal-rules-020121.pdf

retirement funds, and the dynamics of capital markets broadly. This should include thorough economic analysis and solicitation of views from a wide range of stakeholders both within asset management and the capital markets more broadly, including companies that rely on investment, as there are potentially both upstream and downstream impacts.

In conclusion, we recommend that the FTC withdraw or refine the associates aggregation proposal. As the FTC acknowledges[42], it may not be appropriate to apply the proposed changes to entities "such as index funds, exchange-traded funds ("ETFs") or the like…since these entities base their investments on an index." We agree and believe that the FTC's rationale in questioning whether the changes are appropriate for index funds applies equally to institutional investors, such as '40 Act funds. It is critically important that the FTC formally identify and assess the impacts of the proposed amendments prior to moving forward with a final rulemaking. This must include efforts to quantify negative short-term and long-term consequences for all the relevant stakeholders potentially involved. As we illustrate, a lack of robustness in academic research and quantitative impact analysis supporting the intended goals and outcomes of proposed aggregation of associates and HSR rule changes could result in severely damaging impacts to end investors and markets if adopted as proposed.

[42] "Finally, the Commission also acknowledges that certain non-corporate entity UPEs within families of funds and MLPs and their associates may be structured as index funds, exchange traded funds (ETFs) or the like. Since these entities base their investments on an index, it is possible that it is not appropriate to apply the proposed change to § 801.1(a)(1) to these entities. The Commission invites comments on whether index funds, ETFs or the like should be differentiated under the proposed rule." Federal Trade Commission, Notice of Proposed Rulemaking: Premerger Notification; Reporting and Waiting Period Requirements, 85 FR 77058 (Dec. 1, 2020) ("NPRM").

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