February 1, 2021

Federal Trade Commission
Office of the Secretary
600 Pennsylvania Avenue NW, Suite CC-5610 (Annex J)
Washington, D.C. 20850

Re: Premerger Notification: Reporting and Waiting Period Requirements; 16 CFR Parts 801-803: Hart-Scott-Rodino Coverage, Exemption and Transmittal Rules; Project No. P110014 and Hart-Scott-Rodino Rules ANPRM, Project No. P110014

Dear Acting Secretary Tabor,

The Institutional Limited Partners Association (ILPA)[1] is pleased to submit comments on the Federal Trade Commission's ("FTC") Notice of Proposed Rulemaking ("NPRM") [2] and Advanced Notice of Proposed Rulemaking ("ANPRM", together with NPRM the "Proposed HSR Rules")[3], which proposed amendments to and raised questions regarding the premerger notification rules that implement the Hart-Scott-Rodino Antitrust Improvements Act ("HSR"). We appreciate the FTC's interest in expanding the HSR framework to capture a broader segment of the marketplace, however, we encourage the FTC to balance the HSR reporting requirements against the burden for filers and the

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[1]ILPA is the voice of the institutional investors invested in private funds, colloquially known as Limited Partners or LPs. Our 550+ member institutions represent over USD 2 trillion in private equity assets under management globally and include public and private pension funds, insurance companies, university endowments, charitable foundations, family offices and sovereign wealth funds, all of which invest in the U.S. alternative investment market. LPs provide the capital that fuels private equity and venture capital investment, generating economic growth and job creation, across America and around the world.

In addition to providing this critical capital for economic growth, LPs are the trusted financial stewards investing the assets of millions of Americans. Limited partner beneficiaries include teachers, first responders, students receiving university scholarships, charity recipients and insurance policyholders, among others. ILPA is headquartered in Washington, D.C. with additional offices in Toronto, Ontario. For more information on ILPA's members, please visit: http://www.ilpa.org/members.

[2] Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77053, RIN 3084-AB46, Federal Trade Commission (December 1, 2020).

[3] Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042, RIN 3084-AB46, Federal Trade Commission (December 1, 2020).

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costs to the people they represent. As limited partners (“LPs”) that typically invest passively in private funds, we are most concerned about the expansion of the definition of “person” to include “associates” and the impact of those proposed changes and others in the Proposed HSR Rules on the state actor, passive and institutional investor exemptions. The Proposed HSR Rules pose significant ramifications, including the following:

First, most regulatory compliance costs in private funds, including those for current HSR filing requirements, are routinely passed along to LPs. The dramatic expansion of reporting requirements in the Proposed HSR Rules that apply to the funds in which LPs invest would have significant indirect impacts on LPs, notably through higher investment costs passed on from the external private fund managers (“General Partners” or “GPs”)[4]. The expected end result is a reduction in the resources available to the retirees, students, researchers and other beneficiaries that rely on the investment returns of our LP members.[5] We request the FTC seek to narrow the requirements for filings under the Proposed HSR Rules, have them tailored to identity truly potentially anti-competitive behavior, and consider existing options in the private sector or through SEC filings to collect this information on mergers and acquisitions. We also encourage the FTC to quantify the expected impact on passive fund investors – not just fund managers – before proceeding with any changes to the rules.

Second, LPs that invest through certain structures managed by GPs where the LPs are entitled to more than 50% of an investment vehicle’s returns (such as in “managed account “ or “fund-of-one” structures[6]), would more likely have to file directly and on their own behalf with the FTC as the Ultimate Parent Entity (“UPE”), despite having delegated management of the investments in the applicable structure. In such structures, the GP typically retains full investment discretion and is not obligated to disclose the underlying

[4] This letter refers to GPs and managers interchangeably (in a typical structure, the General Partner and manager are often controlled by the same persons, and such persons are typically not affiliated with the LPs).

[5] For clarity, a substantial amount of our members’ capital is managed by external investment managers. Put differently, our members often focus on the selection of external managers, not the selection of specific companies to invest in (in these scenarios, the selection of companies to invest in is fully outsourced to the external manager).

[6] For clarity, a managed account structure is a separate account that is established for an investor to be managed by an external manager without the creation of a new legal entity for that purpose. A fund-of-one is typically a separate legal entity in which an investor owns the majority of the economic interests even though the entity is managed by an external manager. In both structures, the investor is typically the UPE even though the investor has no investment discretion over the fund or account. Accordingly, while such structures are different, they pose similar issues under HSR.

investments of the structure to the LP (and to the extent underlying investments are disclosed to the LP, that disclosure usually occurs after the investment is consummated, not before). This makes compliance for a LP deemed to be the UPE difficult under existing rules. Under the proposed expansion of the aggregation rules, compliance may become impossible for LPs invested in such structures: LPs will have to try to complete HSR filings considering holdings across the entire platform of ‘associates’ managed by the General Partner (and potentially its affiliates) – vehicles with which an LP has no relation – without access to the required information. We encourage the FTC to focus on investment discretion, rather than ownership, when considering HSR filing responsibilities in the Proposed HSR Rules.

Third, there is insufficient clarity regarding the state actor exemption for HSR. We encourage the FTC to explicitly carve out U.S. public pensions, U.S. sovereign wealth funds and U.S. public endowments, including those using investment company structures, in the state actor exemption.

Fourth, the questions in the ANPRM suggest that the FTC may lower the 15% threshold of the institutional investor exemption. We encourage the FTC to maintain (and ideally increase) this threshold and provide relief to passive investors with externally managed investments.

I. The FTC Should Consider Ways to Limit the Indirect Burden and Cost on LPs in the Proposed HSR Rules

ILPA encourages the FTC to consider ways in which it can help balance its relevant need for information to protect against anti-competitive behavior against the cost and burden to produce that information. Our members, as LPs in funds managed by U.S. domiciled GPs, will likely be forced to absorb the cost of the enhanced reporting, and resulting compliance costs. Our members invest as a limited partner in various types of private investment structures to provide their end-clients with access to a diverse array of investment options, as part of prudent portfolio construction.

The limited partnership agreements that are typically negotiated in the current private fund market, which set out the obligations for fees and expenses charged, often pass along regulatory compliance costs as fund expenses to LPs. (in a not dissimilar manner to how investment funds registered under the Investment Company Act of 1940, as amended, pass valid fund expenses along to investors). Further, any effort to amend thousands of in force limited partnership agreements to reallocate this economic burden to accommodate the Proposed HSR Rules would itself impose costs and disrupt economic modeling on the part of limited partners and fund sponsors alike. This results in higher fees and expenses absorbed by investors, and ultimately, reduced returns in an already expensive asset class. These lower returns have a direct impact on our members' ability to generate the performance necessary to fulfill their obligations to beneficiaries, including retirees, students, and researchers. As a result, we would encourage the FTC to look to publicly available filings and sources wherever possible to access the information they need and adopt a rule that is as narrowly tailored as possible, particularly regarding aggregation. In addition, we encourage the FTC to quantify the expected adverse impact of the Proposed HSR Rules on passive investors before proceeding with any changes.

A. <u>The FTC Should Consider Accessing Currently Public SEC Filings on Acquisitions</u>

One suggestion to gather the information with minimal impact on LPs is to request investor disclosure as to whether any portion of its investment is managed by a third party (and disclose such manager on a confidential basis to protect the proprietary asset allocation decisions of institutional investors) at the time an LP acquires an issuer in its SEC filings. If the FTC or DOJ is interested, it may pull the relevant SEC filings of the applicable GP using such disclosure. Alternatively, we may suggest that the HSR rules require that the filer links to such GP's publicly available Section 13 filing for the issuer and its most recent Section 13 holdings report, if any, much like an investor links to certain other public reports. Further, filings under Section 16 of the Securities Exchange Act of 1934 (where 10% holders of an issuer are captured) can also serve as a method to monitor concentration in an industry. We acknowledge that this approach would require cooperation with the SEC by the FTC, but providing additional transparency under the existing SEC filing requirements that institutional investors are already complying with would be an effective and cost efficient way to get the FTC the transparency it is seeking into the activities of market participants.

B. <u>The FTC Should Consider Private Sector Solutions to Access Information about Acquisitions to Fulfill its Role Under HSR</u>

The FTC may not be aware that there are certain products available in the private market that track the acquisition and merger of various public and private companies. Pitchbook and Preqin are companies that offer publicly available databases that track information on private market deal flow, with a significant focus on private equity investments. While the reporting to these platforms is in some ways voluntary, many market participants rely on these platforms for industry intelligence and information on pending mergers and acquisitions, and the owners of these issuers. We would encourage the FTC to explore to potential usage of these market-based tools whenever and wherever possible to collect the desired information. Use of these existing platforms could give the FTC a more flexible and technology-enabled way to access information on deals in the private market in lieu of direct HSR reporting.

II. The FTC Should Focus on Investment Discretion Rather than Ownership regarding HSR Filing Obligations

The Proposed HSR Rules propose changing the definition of "person" to include the "associates" of that person. The stated intent of the proposal is to grant the antitrust agencies sufficient information to conduct a preliminary antitrust assessment given changes in how investments are structured and since HSR was enacted. Practically speaking, the Proposed HSR Rules require private fund managers to aggregate funds under common management, which may include the aggregation of the manager's managed accounts and funds-of-one (i.e., special vehicles managed for individual passive/institutional investors). Funds under common management do not function as a single actor when making investment decisions; rather, each fund has its own Limited Partner Advisory Committee (LPAC), governing documents, controls, and investment strategies, and invests independently. This makes it unlikely that investment advisers are regularly dividing large investments in a single issuer among multiple funds for purposes of circumventing the HSR notification filing requirements. The Proposed HSR Rules may require certain LPs to be the primary filers for HSR purposes over fund complexes with which they only have minimal involvement, which they are not equipped to do, and in which they do not have access to the information to complete the filing. We encourage the FTC to consider in the final rule tying the Ultimate Parent Entity definition to investment discretion, rather than ownership in fund structures.[7]

A. The Proposed HSR Rules Are Particularly Problematic for LPs Invested in Fund-of-One or Managed Account Structures.

We believe the Proposed HSR Rules do not sufficiently account for commonly used investment structures outside of traditional private commingled funds. An LP in a managed account/fund-of-one may be required to aggregate its holdings in such

[7] As noted above, this is already an issue for passive investors in fund-of-one/managed account structures under existing rules. The proposed changes significantly compound the issue.

accounts/funds with all other accounts/funds that are managed by the manager in order to comply with HSR, even if the institutional investor has no interests in such other accounts (since the investor and the manager are "associates"). Through the resulting wider aggregation, even smaller passive investors could trigger the HSR size-of-transaction/size-of-person thresholds and lose the ability to rely on certain exemptions, ultimately requiring new HSR filing obligations that are *for all practical purposes impossible to comply with* given the confidentiality restrictions in private fund investment contracts and common practice. In these scenarios, the Proposed HSR Rules essentially deem an LP, such as a pension or university endowment, to be the common manager of the capital managed by its external managers, which we assume is not the intent of the FTC.

For example, suppose a passive investor has a fund-of-one structured as a limited partnership that is managed by an external fund manager. The passive investor is deemed the UPE of that fund under HSR because it holds a majority of the economic interests in such fund. As the UPE, the passive investor is responsible for the fund's HSR compliance even though it does not have ability to purchase and sell the underlying investments of that fund. Under the current HSR rules, the passive investor may be required to submit an HSR filing if the manager intends to acquire interests, through the fund-of-one, in excess of $94 million (inclusive of any interests in the same issuer that the investor passively holds through all other accounts/funds over which it acts as UPE, even if such other accounts/funds are managed by different managers).

The Proposed HSR Rules would require the LP to aggregate the interests in its fund-of-one (and interests in any other accounts where it is the UPE) with any interests in the same issuer/investment that are being acquired by the GP for unrelated funds accounts; so if the manager is or has previously acquired $20 million of a company for the investor's fund-of-one, but the manager is also now acquiring more than $74 million of the same company on behalf of other funds of the manager, the LP would potentially be required to complete an HSR filing since its interests together with the interests being acquired by the GP's other accounts would collectively be in excess of $94 million. This filing could be required even though no additional purchases are being made into the LP's fund-of-one and even though the LP has no visibility as to actions pending with respect to other accounts managed by a manager.

It is challenging enough for the LP to comply with HSR under the current rules in this example since the LP does not have investment discretion over the fund-of-one and may not even have full visibility into the purchase/sale decisions that the GP is making on its behalf (compounded by the fact that that the investor has to aggregate all of its accounts/funds over which it is the UPE even if such accounts/funds are managed by separate managers). The Proposed HSR Rules make this even more difficult, and perhaps impossible since a GP is unlikely to share the portfolio level information of all of its accounts under management with the investor for a number of reasons (including the desire to protect such information from competitors and that it has not contractually committed to doing so). Neither the existing HSR rules nor the proposed changes seem to account for the following basic fact: When a LP invests in a managed account or a fund-of-one, it has no control over the underlying investment decisions that are made on its behalf by a GP.

B. The Passive Investor Exemption may be Rendered Unusable With the New Aggregation Requirements

Many LPs rely on the passive investor exemption, which permits them to avoid an HSR filing if they are acquiring less than 10% of the outstanding voting securities of a company and they otherwise have passive investment intent (the threshold is 15% for a narrowly defined set of institutional investors).[8] This aggregation requirement makes it less likely that a passive investor would be able to use the exemption since they would be required to aggregate their holdings with unrelated holdings of all their GPs that manage managed accounts or funds-of-one on their behalf for purposes of determining whether they have met the 10% (or 15%) threshold (and possibly whether they have the requisite investment intent).

Separately, the FTC should clarify that the proposed de minimis exemption and "competitor" definition are not intended to modify or replace the application of the 10% passive-investor exemption (or 15% exemption in the case of institutional investors). The Proposed HSR Rule, if applied as constructed, would further impair large LPs allocation to diversified portfolios of operating businesses. Otherwise passive investors that feature one or more affiliates holding as little as a 1% equity stake in a deemed competitor should not be forced to weigh the benefits of maintaining such a diversified portfolio against the cost, burden and overall regulatory risk that would be incurred by

[8] Note that investors that are currently able to rely on the institutional investor exemption, such as certain non-profits, may no longer be able to do so under the proposed rule change since they would potentially be required to aggregate their holdings with investors that do not qualify as institutional investors (e.g., the commingled funds managed by their external managers). As a result, such institutional investors would only be able to potentially rely on the standard passive investor exemption, reducing the maximum number of voting securities that can be acquired without an HSR filing from 15% to 10% for the applicable group of UPEs and HSR associates.

participating in a filing by falling out of one of these exemptions. LPs owe robust fiduciary duties to their clients that strictly guides their behavior and decision-making thereby making it extremely unlikely they would seek to achieve an anticompetitive control position in a particular industry. The Proposed HSR rules would effectively remove the benefit of the exemptions that recognize this distinction, which appears contrary to the original intent of HSR. In sum, although the FTC intends to preserve the language of the existing investment-only exemption it would be helpful to clarify that the proposed changes do not impact its application.

C. LPs Are Unable to Access the Information to Complete HSR Filings from Unrelated Third-Party Entities (i.e., Private Fund Managers).

GPs only provide LPs with underlying portfolio information concerning the funds or accounts managed for such LP, not the underlying portfolio information of other funds or accounts. Indeed, as noted above, GPs often only provide limited disclosure of underlying portfolio information even with respect to funds or accounts managed for a LP. Underlying portfolio information is closely guarded by GPs, who wish to protect such information from competitors. Under the Proposed HSR Rules, a person making a HSR filing must disclose financial information about the holdings of its associates, even if those associates are wholly unrelated third-party entities (e.g., external investors in the case of GPs, and external managers in the case of LPs). Moreover, an LP would be required to disclose confidential information about its holdings to such associate if that associate must file a HSR notification (even if the holdings are managed by other investment managers). The Proposed HSR Rules do not address these types of relationships and privacy concerns – including the potential anti-competitive effects of requiring the sharing of information among unaffiliated parties that are HSR “associates” solely by virtue of investment management relationships (i.e., where the associates are not related to each other and do not otherwise share information about their respective holdings).

If a GP is exercising investment discretion over a number of different client assets and a filing is triggered by the manager’s investment on behalf of a client, we recommend that only the investment manager have the obligation to report on behalf of accounts for which it exercises investment discretion and that an unaffiliated LP should have no obligation to report (since the client does not have investment discretion and often has limited or no visibility into the individual purchase/sale decisions of the investment manager). On a related point, such GPs and LPs should not have to disclose information to one another regarding investments that are not managed by the applicable GP. This approach has the benefit of putting the compliance burden on the market actors that hold the investment discretion to purchase interests that may require pre-clearance.

III. The FTC Should Clarify the Application of the State Actor Exemption in regard to Public Pensions, Public Endowments, and Sovereign Wealth Funds

Under 16 CFR 801.1(2), certain governmental entities are carved out from the definition of "entity" for the purposes of compliance with HSR.[9] This states that "any foreign state, foreign government or agency thereof (other than a corporation or unincorporated entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporate or unincorporated entity engaged in commerce)", is not an entity under HSR. Public pensions, public university endowments, and sovereign wealth funds invest through a variety of legal structures that then invest in funds that are required to comply with HSR. For example, some public university endowments have formed investment management companies to access the private funds market, which requires an extensive legal analysis to determine if they are covered by the exemption under 16 CFR 801.1(2). Given the potential impact of the Proposed HSR Rules, we encourage the FTC to issue guidance to clarify more directly that public pensions, university endowments, sovereign wealth funds and their affiliated entities and structures are exempt from HSR, especially since these entities present no antitrust risk in their investment activities.

IV. The FTC Should Consider Expanding Access to the Institutional Investor Exemption and Providing Relief to Passive Investors with Externally Managed Investments

For the reasons cited above, compliance with HSR is difficult for passive and institutional investors in certain structures even under the existing rules. The ANPRM poses several questions regarding the activities of institutional investors. The questions do not address the fact that some institutional investors employ independent, external managers who have full discretion over the applicable portfolio (and as to which the investor does not exercise investment discretion) via managed account or fund-of-one

[9] 16 CFR 801.1 (2) "*Provided, however,* that the term entity shall not include any foreign state, foreign government, or agency thereof (other than a corporation or unincorporated entity engaged in commerce), nor the United States, any of the States thereof, or any political subdivision or agency of either (other than a corporation or unincorporated entity engaged in commerce)."

structures. This creates a scenario in which institutional investors are dependent on the cooperation of potentially multiple external investment managers to comply with the investor's HSR obligations; this burden would be compounded by the implementation of the "associate" aggregation under the Proposed HSR Rules.

The FTC should consider providing relief to passive and institutional investors in cases where the fund or account in question is managed by an external investment manager (i.e., if an investor is passive and does not have the ability to control the purchase and sale decisions of its external managers, the investor should not be responsible for monitoring the applicable externally-managed fund/account's HSR compliance). As noted above, the compliance burden should fall on the entities that have investment discretion over the applicable funds or accounts, not passive investors that are entitled to investment returns.[10] At a minimum, we suggest that the 15% limit of the institutional investor exemption not be lowered (or ideally the threshold be increased) given how few transactions through the years of applying the 15% threshold have posed substantive issues.

We thank the FTC for considering our comments. We support the FTC's desire to better understand the marketplace and believe that the underlying goals of HSR can be accomplished without placing undue costs or burdens on the retirees, students, researchers, and other beneficiaries that rely on the investment efforts of our members.

Sincerely,

Steve Nelson
Chief Executive Officer
Institutional Limited Partners Association (ILPA)

[10] Specifically, in funds or accounts in which a passive or an institutional investor has no investment discretion and an unaffiliated entity has full investment discretion, the party with the investment discretion should be responsible for HSR filings in connection with such funds our accounts, even in instances in which the passive or institutional investor is the UPE of the applicable fund or account.