

**Chris Netram**

Vice President,  
Tax and Domestic Economic Policy

February 1, 2021

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

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

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

To whom it may concern:

The National Association of Manufacturers (“NAM”) appreciates the opportunity to provide comment to the Federal Trade Commission (“FTC”) and the Department of Justice (“DOJ”) on the FTC’s proposed amendments (“the NPRM”) to the premerger notification rules (“the Rules”) that implement the Hart-Scott-Rodino Antitrust Improvements Act (“HSR”)<sup>1</sup> and its advance notice of proposed rulemaking (“the ANPRM”) to gather information to determine the path for future amendments to the Rules.<sup>2</sup>

The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. It is the largest U.S. manufacturing association, representing small and large manufacturers in every industrial sector and in all 50 states.

The HSR Rules have a significant impact on manufacturers in the United States. Transactions that undergo antitrust review by the FTC and the DOJ—from mergers to acquisitions to significant capital investments—are critical to the growth of manufacturing businesses across the country. The NAM appreciates that the FTC and the DOJ are taking steps to modernize the HSR Rules, and we appreciate your attention to our comments on both the proposed amendments to the Rules and the ANPRM’s requests for comment to guide potential future amendments.

**I. Mergers, acquisitions, and capital investments are critical to the growth of manufacturing in America, and the HSR Rules can provide clarity and predictability for businesses considering these important transactions.**

Mergers and acquisitions allow companies of all sizes to evolve and grow, leading to downstream effects that benefit all Americans, including job creation, investment in research and development, and economies of scale and scope that produce lower prices and create greater choice for consumers. Moreover, when struggling businesses are acquired, the capital infusion can help

---

<sup>1</sup> *NPRM: Premerger Notification; Reporting and Waiting Period Requirements*, 85 Fed. Reg. 77053 (1 December 2020). RIN 3084-AB46, available at <https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21753.pdf>.

<sup>2</sup> *ANPRM: Premerger Notification; Reporting and Waiting Period Requirements*, 85 Fed. Reg. 77042 (1 December 2020). RIN 3084-AB46, available at <https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21754.pdf>.

protect existing jobs. Indeed, as we noted in our recent comments on the Agencies' vertical merger guidelines, most mergers "are rooted in pro-competitive strategies."<sup>3</sup>

Clear regulatory guardrails governing these important transactions, if applied consistently by the FTC and the DOJ,<sup>4</sup> will give manufacturers the confidence to engage in pro-competitive mergers, acquisitions, and financings and potentially grow their businesses. Similarly, predictability around the Agencies' review and enforcement priorities will help manufacturers plan for potential transactions by enhancing businesses' understanding of how the FTC and the DOJ will evaluate proposed deals, allowing transactions to be consummated without fear of uncertainty and delay.<sup>5</sup>

As with mergers and acquisitions, capital formation driven by private sector investment in growing businesses is crucial to the success of manufacturing in America. Manufacturing is a capital-intensive industry, requiring significant funding for equipment purchases and groundbreaking research. Manufacturers often seek financing for these pro-growth activities, which set the stage for economic expansion, innovation, and job creation. More than 90% of the NAM's members are small and medium-sized manufacturers, and they depend on a predictable regulatory environment governing these important investments.

The NAM appreciates the Agencies' work to update the HSR Rules so that they continue to protect consumers from anticompetitive behavior while also allowing for pro-competitive transactions that benefit manufacturers, workers, and customers throughout the economy.

**II. The NAM supports the Agencies' proposed amendments to the definition of "person" and agrees that HSR filings should provide transparency into transactions by entities operating within a so-called "family of funds."**

The proposed amendments to the HSR Rules would amend the definition of "person" to require certain acquiring persons to (A) disclose additional information about their associates in their HSR filings and (B) aggregate their acquisitions and holdings in a given issuer across said associates for purposes of determining the applicability of the HSR Rules and for making HSR filings. In effect, the proposed rule would expand the HSR filing requirements to include commonly managed groups of funds and to ensure that the FTC and the DOJ have a full understanding of the holdings (and therefore the potential anticompetitive impact) of these fund families.

As the NPRM notes, treating funds within a single family as wholly separate entities under HSR is "often at odds with the realities of how fund families and [master limited partnerships] are managed."<sup>6</sup> By requiring fund families to aggregate their holdings and disclose information about their intra-family affiliates, the proposed amendments will grant the Agencies significant insights into funds with common management and common interests—both important factors for understanding a transaction's potential anticompetitive effects. As such, the NAM supports the proposed

---

<sup>3</sup> NAM Comments on Draft Vertical Merger Guidelines, 25 February 2020. Available at [http://documents.nam.org/lrp/FINAL\\_NAM\\_Vert\\_Merger\\_Comments\\_2.25.20.pdf](http://documents.nam.org/lrp/FINAL_NAM_Vert_Merger_Comments_2.25.20.pdf).

<sup>4</sup> Though the text and purpose of the HSR Rules are identical whether being applied by the FTC or the DOJ, in practice companies sometimes find that the premerger review process can vary depending on which agency is taking the lead.

<sup>5</sup> Expedient review and approval of transactions before they are consummated—based on standards that are well-understood and fairly applied—can prevent retrospective review and guard against the possibility of merging companies being forced to unwind a transaction years after their businesses have been combined and their business functions integrated.

<sup>6</sup> FTC NPRM, *supra* note 1, at 77055.

amendments to the definition of “person,” and we applaud the FTC and the DOJ for taking steps to enhance transparency into transactions by entities within these “family of funds” arrangements.

**III. The proposed *de minimis* filing exemption for acquisitions of 10% or less of an issuer’s voting securities could have the unintended consequence of reducing transparency into significant equity acquisitions of publicly traded issuers.**

While increasing transparency into some transactions by requiring enhanced disclosures of fund families, the proposed amendments would reduce transparency into other transactions by providing a greatly expanded exemption from HSR filings for acquisitions of 10% or less of an issuer’s voting securities. The HSR Act already includes an exemption for acquisitions of 10% or less of an issuer’s voting securities made “solely for the purpose of investment;” the proposed rule would expand this exemption by defining as *de minimis* a much broader range of up-to-10% acquisitions provided that the acquirer is not a competitor of the issuer and does not propose to put a director on the issuer’s board.

The NAM appreciates the efforts of the FTC and the DOJ to focus HSR review on only those transactions most likely to have an anticompetitive impact. However, the proposed amendments would create a *de minimis* exemption so broad as to deprive businesses of vital information about acquirers and investors. In so doing, the proposed change could have the significant unintended consequence of expanding the ability of activist investors to acquire significant stakes in public issuers without making HSR filings.

The NPRM notes that voting securities held or acquired “solely for the purpose of investment” are only eligible for the HSR Rules’ existing filing exemption if the person holding or acquiring the securities “has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>7</sup> The NPRM later highlights the Statement of Basis and Purpose for the original 1978 HSR Rules, which specifies both “proposing corporate action requiring shareholder approval” and “soliciting proxies” as actions consistent with an intent to participate in the business decisions of the issuer—and inconsistent with an intent to hold securities solely for the purpose of investment.<sup>8</sup> These actions are precisely the sort that activist investors often take after acquiring a significant stake in a public company.

By their very nature, activist investors intend to actively participate in the “formulation, determination, or direction of the basic business decisions” of the issuers in which they invest. Yet under the proposed rule, acquisitions by these activists could be exempt from the HSR Rules’ filing requirements if they remain under the proposed 10% *de minimis* threshold. Given the Agencies’ interest in transparency when an acquirer intends to participate in an issuer’s business decisions, the NAM respectfully encourages the FTC and the DOJ to consider the significant unintended impact that allowing activist investors to evade disclosure under the HSR Rules could have.

The NAM recently wrote to the Securities and Exchange Commission (“SEC”) about the importance of businesses understanding who owns their securities, noting that the SEC’s proposal to exempt a wide swath of investors from the Exchange Act’s public disclosure requirements would “drastically limit[ ] publicly traded manufacturers’ visibility into their shareholder base and undercut[ ] vital shareholder outreach, communication, and education efforts”—including efforts to understand and respond to activists.<sup>9</sup> As with the SEC’s proposal, we are concerned that the Agencies’ proposed

---

<sup>7</sup> FTC NPRM, *supra* note 1, at 77058.

<sup>8</sup> FTC NPRM, *supra* note 1, at 77059.

<sup>9</sup> NAM Comments on File No. S7-08-20, 29 September 2020. Available at <https://www.sec.gov/comments/s7-08-20/s70820-7860405-223965.pdf>.

amendments to the HSR Rules' filing exemption could lead to reduced information availability for issuers when investors, including activists, take significant positions in their stock.

As the FTC and the DOJ work to finalize the proposed rule, we respectfully encourage the Agencies to remain mindful of the HSR Act's emphasis on "solely for the purpose of investment" as the critical arbiter of eligibility for a filing exemption. We support efforts to streamline the Agencies' review processes, but issuers rely on information found in HSR filings and could be negatively impacted by the reduction in transparency were a much greater proportion of up-to-10% acquisitions to be fully exempted from HSR review.

**IV. Equity compensation earned by issuers' officers and directors should not trigger HSR scrutiny; instead, these passive acquisitions should qualify for the existing "solely for the purpose of investment" filing exemption and the proposed 10% *de minimis* filing exemption.**

Both the NPRM and the ANPRM solicit comments on the definition of "solely for the purpose of investment," an important discussion both for the existing filing exemption and the proposed *de minimis* exemption. The NAM strongly believes that passive acquisitions related to compensation agreements for issuers' officers and directors should qualify as transactions "solely for the purpose of investment," notwithstanding these individuals' participation in the "basic business decisions" of the issuer. Similarly, these transactions should not be excluded from the proposed *de minimis* exemption provided they remain under the proposed 10% threshold.

For many manufacturers, equity compensation is a critical feature of employee pay packages. There are strict rules around stock compensation for officers and directors, including regulations that govern the timing of these transactions, prohibit purchases or sales based on insider information, and require disclosure of officers' and directors' holdings. Equity compensation ties executive performance to the performance of the business itself, benefitting everyday investors and consumers by incentivizing decision-making oriented around the success of the company. These stock options and/or stock grants are passive holdings that are in most cases not actively managed by the officer or director in question. As such, officer and director stock positions are taken "solely for the purpose of investment" and do not present anticompetitive concerns worthy of HSR scrutiny.<sup>10</sup>

Though these individuals "participate in the formulation, determination, or direction of basic business decisions of the issuer," such decisions are attendant to their ordinary job responsibilities and exist independent of their passive acquisitions of the issuer's securities. While the NPRM observes that "[o]fficers make the issuer's day-to-day business decisions, and directors determine the overall direction of the issuer,"<sup>11</sup> these functions derive from such individuals' roles as officers and directors and would exist even if they held no securities.

Because officers and directors fulfill their responsibilities irrespective of whether or not they hold any issuer securities, any acquisitions of an issuer's securities by its own officers and directors are very unlikely to create a power or ability for the officer or director to engage in conduct that could violate the antitrust laws. As such, these transactions do not justify HSR review. The NAM believes that acquisitions by an issuer's officers and directors should qualify for the "solely for the purpose of investment" exemption and for the proposed 10% *de minimis* exemption.

Allowing passive securities acquisitions by officers and directors of an issuer to qualify for the HSR Rules' "solely for the purpose of investment" filing exemption and the proposed rule's 10% *de*

---

<sup>10</sup> See, e.g., FTC NPRM, *supra* note 1, at 77059, clarifying that the "solely for the purpose of investment" exemption "is clearly available if the acquiring person plans to do nothing but hold the stock."

<sup>11</sup> FTC NPRM, *supra* note 1, at 77062.

*minimis* exemption would allow companies to hire and compensate executives that will grow the business for the benefit of investors and consumers alike. Competitive compensation packages are important for companies of all sizes—including small and start-up businesses, which utilize equity grants and options to access a larger pool of qualified employees than they might otherwise be able to recruit. The FTC and the DOJ should acknowledge that these commonplace compensation practices do not raise anticompetitive concerns.

**V. The Agencies should maintain their current interpretation of the methodology for determining a transaction’s Acquisition Price by continuing to exclude buyers’ payments toward targets’ existing debt from the HSR Rules’ Size of Transaction calculations.**

The ANPRM solicits comments on the HSR Rules’ Size of Transaction test, including a specific request for information on how filing parties determine the Acquisition Price for purposes of reporting a transaction. The NAM strongly encourages the FTC and the DOJ to maintain their current interpretation of the Acquisition Price methodology, which excludes payments made by a buyer to pay off the debt of a target. As the ANPRM notes, the Agencies have excluded such payments from a transaction’s Acquisition Price since the late 1970s—and the NAM would oppose any changes to this longstanding interpretation.

From an economic perspective, it is immaterial whether an acquisition target’s debt is paid off by the buyer at the time of the acquisition or simply assumed by the buyer when the target is acquired. There are any number of reasons why a buyer might pay off a target’s debt as part of an acquisition or, instead, assume the debt and hold off a decision on such a payment until the transaction has closed—but the timing of these debt payments does not affect the value of the underlying transaction. As such, the Acquisition Price (which can trigger HSR review) should not be impacted by a buyer’s decision to pay off a target’s debt. The Agencies’ current interpretation rightly excludes these debt payments from the Acquisition Price calculation, and the NAM strongly encourages the FTC and the DOJ to maintain this interpretation.

The ANPRM appears to suggest that the Agencies are considering adopting for some transactions an “enterprise value” Acquisition Price standard, which would incorporate debt payments made by a buyer. Such a change would apply different rules to economically indistinct transactions, making the HSR Rules harder to apply and potentially complicating competitive bidding situations. The choice between assuming a target’s debt and paying it off does not carry any economic weight nor raise any anticompetitive concerns, so determining a transaction’s Acquisition Price (and potentially making a given transaction reportable or non-reportable, depending on the structure of the deal) based on that choice would be an unfortunate and unnecessary departure from the Agencies’ longstanding interpretation of the Acquisition Price methodology. The NAM encourages the FTC and the DOJ to maintain their current Acquisition Price standard based on market capitalization rather than enterprise value, and to resist any potential pressure to incorporate debt payments into the Acquisition Price calculation.

\* \* \* \*

The NAM appreciates the efforts by the FTC and the DOJ to update the HSR Rules and provide clarity and predictability to businesses and their investors. Clear premerger notification and review standards, applied consistently by both the FTC and the DOJ, are critical to protecting consumers while enabling the pro-competitive transactions necessary for business growth.

On behalf of the NAM and the millions of women and men who make things in America, thank you for your attention to our comments as you work to finalize the proposed rule and consider potential future amendments based on responses to the ANPRM.

Sincerely,

A handwritten signature in black ink, appearing to read "Chris Netram". The signature is fluid and cursive, with a prominent loop at the end.

Chris Netram  
Vice President, Tax and Domestic Economic Policy