

February 1, 2021

Rebecca Slaughter
Acting Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Suite CC-5610 (Annex J)
Washington, DC 20580

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

Dear Acting Chair Slaughter,

The Principles for Responsible Investment (“PRI”) welcomes the opportunity to comment on the notice of proposed rulemaking amending the premerger notification rules (“the Rules”) that implement the Hart-Scott-Rodino Antitrust Improvements Act (“the Act” or “HSR”) and the advanced notice of proposed rulemaking to gather information related to the Rules.¹ If adopted, the proposed exemption in the NPRM will not address the concerns of broader market participants regarding the relevance of HSR notification requirements to their engagement with issuers on Environmental, Social and Governance (ESG) issues. Instead, the NPRM creates the opportunity for market participants focusing on short-term results to take advantage of the proposed exemption. The PRI believes the Commission should clarify that efforts to engage with public companies on ESG matters do not fall under premerger notification obligations under the Act.

The PRI is the world’s leading initiative on responsible investment.² It works to understand the investment implications of ESG factors and to support its international network of 3,600 investor signatories in incorporating these factors into their investment and ownership decisions. Launched in New York in 2006, the PRI’s signatories manage over \$103 trillion in AUM. The US is the PRI’s largest market, with over 600 signatories.³

SYSTEMATIC GROWTH OF ESG ENGAGEMENT

As both the rulemakings rightly highlight, capital markets have changed significantly since the Act was enacted 45 years ago, with the growth in institutional investors’ ownership, diversification, and communication between investors and their investees, among other changes. More recently, there has been growing interest among institutional investors to incorporate material ESG issues into their

¹ See Appendix A for more information about the PRI

² <https://www.unpri.org/pri/an-introduction-to-responsible-investment/what-are-the-principles-for-responsible-investment>

³ As of January 2021

investment process in order to create long-term value for clients and beneficiaries. In seeking to incorporate and address material ESG risks, it is now common practice for institutional investors to engage with investee companies on these issues.⁴ This engagement by institutional investors is embedded within the investment process⁵ and in the United States, much of this is client driven.⁶

A robust and growing body of academic and industry analysis continues to show that ESG factors are material considerations for investment decisions, and their incorporation into investment decisions helps mitigate systemic and idiosyncratic risk, support long-term investment goals, and help advance issues like racial equity and climate action that President Biden has made central to his administration’s goals to “Build Back Better.”⁷ This expanding field of evidence supports the growing chorus of public sentiment that calls on asset managers and companies to integrate ESG into investment decisions.⁸

HSR PRESENTS A BARRIER TO ESG ENGAGEMENT

The PRI has become aware that some market participants have been advised that efforts to engage with public companies on ESG matters may go beyond the definition of “solely for the purpose of investment” and therefore require premerger notification obligations under the Act when planning to engage only on these issues, and not other active ownership activities. The Commission’s enforcement actions involving *Third Point* and *ValueAct* have raised specific concerns about potential obligations under HSR. These actions, combined with official statements and acknowledgement that the investment-only rules are open to interpretation – as put forth plainly in this NPRM and ANPRM - have had a chilling effect on the effectiveness of engagement in addressing material ESG risks and promoting long-term value.⁹ Further, discrepancies in the definition of “solely for the purpose of investment” and the Statement of Basis and Purpose for the original 1978 Rules have created a broad gray area of investor engagement.

The definition of “solely for the purpose of investment” precludes exemption for those entities, broadly, “participating in the formulation, determination, or direction of the basic business decisions of the issuer.” The Statement of Basis and Purpose cites more specific actions, though, that do not necessarily include all actions that could fall under the broad definition above, including: “(1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer; (5) being a

⁴ PRI signatories report on their responsible investment activities on an annual basis. Data from 2017 shows that 89% of signatories holding listed equity engage with companies on ESG issues. In the US, with 700 signatories, 78% engaged with companies on ESG issues.

⁵ See Becht et al. 2019. [Corporate governance through voice and exit](#) for a detailed case study of how engagement activities are linked to investment decisions. See PRI. 2018. [A practical guide to active ownership in listed equity](#) for more practical guidance on engagement and how this is integrated into investment decisions.

⁶ PRI and CFA Institute. 2018. [ESG Integration in the Americas: Markets, Practices, and Data](#)

⁷ PRI Academic Resources Hub. <https://www.unpri.org/academic-research/top-academic-resources-on-responsible-investment/4417.article>

⁸ CFA Institute. *Future of Sustainability in Investment Management*. 2020. <https://www.cfainstitute.org/en/research/survey-reports/future-of-sustainability>

⁹ FTC. “Investment-only” means just that. 2015. <https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/investment-only-means-just>

competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.”¹⁰ Countless daily interactions between an investor and issuer fall between the interpretation of these two definitions, creating confusion over the need for HSR notification.

FTC’S NOTICE OF PROPOSED RULEMAKING DOES NOT REMOVE THE BARRIER TO ESG ENGAGEMENT

The Commission’s Notice of Proposed Rulemaking seeks to elicit more information about filer’s associates and to aggregate acquisitions in the same issuer across those entities. It also proposed a new exemption from HSR notification for any acquisition of securities that is below a 10% threshold of the issuer’s entire pool of voting securities, unless the acquiring person already has a competitively significant relationship with the issuer. The PRI believes this exemption may relieve some of the concerns of groups that have seen engagement on ESG issues as requiring HSR notification even under this 10% acquisition threshold. We are concerned, however, that a 10% exemption could be abused by investors that regularly engage in more activist ownership at the expense of ESG issues. Traditionally, hedge funds follow a different set of incentives than large institutional investors, such as short-term profit-making at the expense of long-term success. Further, the additional condition excluding from this new exemption investors that also hold 1% of voting securities in a competitor would prevent large, diversified investors from engaging on material ESG issues. While continuing to limit ESG engagement by institutional investors, smaller investors with more concentrated portfolios, such as hedge funds, would be allowed to engage in more activist ownership without HSR notification. As such, the PRI does not believe that the NPRM as written would help to alleviate the barriers to effective ESG engagement currently presented by the Act and may further exacerbate issues by creating an environment where more activist engagement falls outside of HSR notification, while ESG engagement remains.

Instead, to address the uncertainty caused by the “investment-only exemption”, the PRI recommends that the FTC and Department of Justice issue a policy statement clarifying that the interpretation of the definition of “solely for the purpose of investment” is not intended to prevent communications between institutional investors and issuers designed to raise legitimate considerations related to ESG issues that promote long-term value for their clients and beneficiaries. This clarification around ESG engagement has precedent and can take a similar form as the SEC’s “significant social policy issue” exemption.¹¹

Activist Investors vs. ESG Engagement

As the Commission seeks to gain more insight into how to update the Act to better reflect the changes that have taken place in capital markets since its inception, it is important to elaborate on institutional investors’ engagement with investee companies. First, it is important to note the difference in both the

¹⁰ Federal Register. Federal Trade Commission. 1978.

https://s3.amazonaws.com/archives.federalregister.gov/issue_slice/1978/7/31/33364-33483.pdf#page=87

¹¹ SEC. Final Rule: Amendments to Rules on Shareholders Proposals. <https://www.sec.gov/rules/final/34-40018.htm>

activities conducted and the intention of those activities between encouraging ESG consideration and more traditional forms of ‘activist’ engagement. Stewardship and engagement by institutional investors on ESG issues often involves sending letters to, and engaging in dialogue with, companies regarding their public disclosure and management of ESG issues. This is in contrast to more activist engagement which traditionally involves efforts to obtain Board positions or control of the company, and proxy contests, among other activities. Not only are the actions different, but so are the intentions; institutional investor engagement on ESG issues does not seek to control an issuer or reduce competition, rather, it involves addressing material sustainability issues that affect long-term performance. Currently, though, this group of latter activities falls within the gray area created by uncertainty over the ‘investment-only’ exemption and the interpretation of “solely for the purpose of investment”.

GLOBAL SUPPORT FOR REMOVING BARRIERS TO ESG ENGAGEMENT

As it considers appropriate action in clarifying investment activities, we encourage the Commission to take into account the growing consensus within academia, securities regulators worldwide, and even comments by SEC Commissioners, on the importance of fostering engagement on ESG issues in long-term value creation. A growing body of academic evidence shows that engagement by institutional investors with investee companies on ESG issues is value enhancing.¹² At the same time, there is an understanding that institutional investors underinvest in their engagement and monitoring of investee companies compared to what would be optimal for their beneficiaries.¹³

International Regulators

Regulators globally have sought to address regulatory barriers to investors’ engagement, while also actively promoting effective regulation to foster engagement and communication with issuers to promote long-term value. This has primarily been through a growing suite of stewardship codes.¹⁴ In the European Union, the recent amendments to the Shareholder Rights Directive are designed to foster increased engagement and communication between investors and issuers, and promote greater transparency of these activities.¹⁵ In the U.K., regulators are actively pursuing ways to create a regulatory system to improve the effectiveness of investor stewardship.¹⁶ In the U.S., the Investor Stewardship Group, an investor-led group of over 70 US-based institutional investors with over US \$30 trillion in assets under management, has developed a stewardship framework to encourage investor oversight and engagement with investee companies where it is in the long-term interests of their clients and beneficiaries.¹⁷

¹² See Dimson et al. 2015. [Active Ownership](#); Becht et al. 2009. [Returns to shareholder activism: evidence from a clinical study of the Hermes UK Focus Fund](#); Carleton et al. 2002. [The influence of institutions on corporate governance through private negotiations: evidence from TIAA-CREF](#); and Hoepner et al. 2020. [ESG Shareholder Engagement and Downside Risk](#).

¹³ Bebchuk et al. 2017. [The agency problems of institutional investors](#)

¹⁴ ECGI Global Stewardship Codes. <https://ecgi.global/content/codes-stewardship>

¹⁵ Directive (EU) 2017/828 of the European Parliament and of the Council. 2017.

<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017L0828>

¹⁶ FCA and FRC, 2019. [Discussion paper on building a regulatory framework for effective stewardship](#)

¹⁷ ISG Framework for U.S. Stewardship and Governance. <https://isgframework.org/>

SEC Commissioners

Current and recent SEC Commissioners from both parties have gone on the record supporting investor engagement, including on ESG issues that are proven to provide long-term benefits to both parties. Commissioner Roisman and former Chairs White and Shapiro have all spoken to the benefits of shareholders being able to communicate and engage with management.¹⁸ And Commissioners Stein and Herren Lee have discussed the importance the rules set out by the Commission and other regulatory bodies play in either facilitating, or hampering, the ability of investors to communicate and work with issuers for the benefit of both parties.¹⁹

While we recognise the different regulatory objectives of the FTC compared to the SEC and other securities regulators, we feel it is important that HSR does not act as an additional barrier to valuable investor engagement with investee companies on ESG issues. We therefore reiterate our asks for the FTC and DoJ to issue a policy statement clarifying that the interpretation of the definition of “solely for the purpose of investment” is not intended to prevent communications between institutional investors and issuers designed to raise legitimate considerations related to material ESG issues that promote long-term value for their clients and beneficiaries.

Thank you for the opportunity to share our views on both the Notice of Proposed Rulemaking and the Advanced Notice of Proposed Rulemaking. While we have submitted these comments in response to the Notice of Proposed Rulemaking, we hope that they will also be useful in informing any future amendments to the Act and in answering some of the questions posed in the Advanced Notice of Proposed Rulemaking.

For further conversation and follow up, please feel free to contact:

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cc. The Honorable Richard Powers, Acting Assistant Attorney General, Department of Justice
Antitrust Division
The Honorable Noah Phillips, Commissioner
The Honorable Rohit Chopra, Commissioner
The Honorable Christine Wilson, Commissioner

¹⁸ For example, see Elad Roisman in 2019 [‘I do believe that the ability of a shareholder to communicate with a company and the other shareholders fosters good corporate governance.’](#); Mary Jo White in 2013 [‘it is important that the board and management listen to what their shareholders have to say and adjust their governance practices when warranted.’](#); and Mary L. Shapiro in 2011 [‘Shareholders should have a voice and a straightforward and transparent process for engaging with companies on issues that are important to them. Shareholders and boards should have clear conversations about how the company is governed — and why and how decisions are made. As a general rule, interested, aware and active shareholders are good for public companies, and I believe that more shareholder engagement is better.’](#)

¹⁹ For example, see Kara Stein in 2018 [‘The Commission can do more, too. While we have issued rules that shape the means by which a company communicates with its shareholders, we should continue to be ready to help fortify the corporation-shareholder relationship as we move forward.’](#); and Allison Herren Lee in 2020 [‘...such an outcome—a reduction of investor engagement with the companies that they own—is clearly not in the best interest of investors.’](#)