



National Investor Relations Institute

225 Reinekers Lane, Suite 560, Alexandria, VA 22314
(703) 562-7700 FAX (703) 562-7701
Website: www.niri.org

February 1, 2021

U.S. 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

To Whom It May Concern:

The National Investor Relations Institute (“NIRI”) and the undersigned public companies and NIRI chapters submit this comment letter on the Federal Trade Commission’s Notice of Proposed Rulemaking on the Hart-Scott-Rodino Coverage, Exemption, and Transmittal Rules.

Founded in 1969, NIRI is the professional association of corporate officers and investor relations consultants responsible for communication among corporate management, shareholders, securities analysts, and other financial community constituents. NIRI’s more than 2,800 members represent over 1,600 publicly held companies and \$9 trillion in stock market capitalization. Through its collaborative community, NIRI advances engagement in the capital markets and drives best practices in corporate disclosures, governance, and informed investing. Our members engage frequently with activist investors, including fund managers who are required under the Hart-Scott-Rodino (HSR) Act rules to provide notification before acquiring significant stakes in public companies.

We are writing to express concern about the FTC’s proposal (§ 802.15) to replace its “solely for the purpose of investment” *de minimis* exemption with broader language that would exempt hedge funds and other activist investors funds from HSR notification. To take advantage of this proposed loophole, the activist would have to refrain from purchasing more than 10 percent of the issuer's voting securities and not have a “competitively significant relationship” with the target company, two conditions that fund managers can meet in most activist situations.¹

¹ NIRI supports the FTC’s proposal to require investors to aggregate their holdings to determine whether an HSR threshold will be met.

The FTC's proposed expansion of its exemption would have a negative impact on mid-size and large issuers, which can now learn through the HSR notification process about an activist fund manager's plans to acquire a significant stake well before the activist crosses the 5 percent ownership threshold and triggers the reporting requirements under the Securities and Exchange Commission's Schedule 13D rules. Under the FTC's proposed "size of transaction" threshold, a planned purchase of \$94 million in shares would trigger HSR notification obligations, which means that an issuer with a market cap above \$1.88 billion could learn of activist activity through the HSR notification process prior to a 13D filing.

The FTC's proposal and the loss of this early-warning mechanism for companies is especially troubling, given the unfortunate reality that the 13D rules, which have not been updated in more than 40 years, contain numerous loopholes that enable activists to use derivatives to conceal their positions and avoid triggering the 13D threshold.² Through cash-settled swaps and other financial instruments, these activists are able to accumulate large positions (often significantly more than 5 percent) without alerting the company or other investors. Even after crossing the 5 percent threshold under 13D, an activist can continue to secretly acquire a company's shares for another 10 days before providing disclosure, which allows the activist to further expand its stake at the expense of other shareholders.

After going public, these activist funds often pressure corporate executives and directors to agree to plant closings, job cuts, reduced research spending, and other concessions that may not be in the long-term interests of shareholders, employees, or other stakeholders. In many cases, target companies decide to give into activists' demands rather than incur the expense and distraction of a proxy fight, even in those cases when the activist may hold less than a 10 percent stake. Had the company learned earlier about this activity, it could have had more time to rally support from long-term investors to resist the activist's demands.

² In 2011, the law firm of Wachtell, Lipton, Rosen & Katz petitioned the SEC to reduce the 13D reporting period to one business day and to update the SEC's definition of beneficial ownership. See Wachtell, Lipton, Rosen & Katz, Petition for Rulemaking Under Section 13 of the Securities and Exchange Act, Petition No. 4-624, March 7, 2011, available at: <https://www.sec.gov/rules/petitions/2011/petn4-624.pdf>. While this petition made a compelling case for modernizing 13D rules, the SEC has taken no action to improve transparency. As Wachtell Lipton argued, "there is no valid policy-based pragmatic reason that purchasers of significant ownership stakes in public companies should be permitted to hide their actions from other shareholders, the investment community, and the issuer: indeed, the need for transparency, fairness and equality of information in our financial markets has never been higher."

NIRI has endorsed U.S. Senator Tammy Baldwin’s bipartisan “Brokaw Act” legislation to modernize the 13D rules by reducing the 10-day filing period to four business days and by closing the loopholes for derivative transactions and “wolf pack” tactics.^{3 4}

NIRI, along with the NYSE Group, also has petitioned the SEC to modernize its 13F disclosure rules, which now require institutional investment managers (who hold more than \$100 million in equities under management) to report their equity holdings 45 days after the end of each quarter.⁵ Despite the need for greater transparency, the SEC proposed in July 2020 to exempt nearly 90 percent of current 13F filers (including two-thirds of hedge fund filers) from quarterly disclosure, but later abandoned that proposal in the face of nearly universal opposition from investors and issuers.⁶

Until the SEC acts to modernize the 13D and 13F rules, NIRI urges the FTC to refrain from exempting activist funds from the HSR notice rules. While the FTC may not view activist share purchases as a core antitrust issue, we urge the Commission to be mindful of the unintended consequences of its regulatory actions and not inadvertently increase the activist pressures on public companies as they struggle to cope with the devastating economic consequences of the pandemic. Many market observers expect to see a surge in proxy contests and other activism after the global pandemic finally recedes in 2021 or 2022.

In an October 2020 letter in opposition to the SEC’s 13F proposal, Senator Baldwin, along with Senators Sherrod Brown, Chris Van Hollen, and Jack Reed, mentioned their concern about the FTC’s HSR proposal and the risk of increased activism after the pandemic. “This concern becomes particularly acute amid predictions for increasing activist investor activity in 2021 given the difficult market conditions caused by the coronavirus pandemic. Companies focused on surviving the economic slowdown could be forced to navigate a regulatory landscape that

³ See NIRI Statement to the Senate Banking Committee on “Legislative Proposals to Examine Corporate Governance,” July 2018, at 7-10, available at: https://www.niri.org/NIRI/media/NIRI/Advocacy/NIRI-Senate-Banking-Committee-Statement-final_1.pdf.

⁴ In an August 2018 survey of NIRI members, 95 percent of respondents said they “agree” or “strongly agree” that the 13D rules should be modernized.

⁵ See NYSE Group, NIRI, and the Society for Corporate Governance, Request for Rulemaking Concerning Amendment of Beneficial Ownership Reporting Rules Under Section 13(f) of the Securities Exchange Act of 1934 in Order to Shorten the Reporting Deadline under Paragraph (a)(1) of Rule 13f-1, Petition No. 4-659, February 4, 2013, available at: <https://www.sec.gov/rules/petitions/2013/petn4-659.pdf>.

⁶ See Benjamin Bain and Robert Schmidt, Bloomberg News, “Hedge Funds’ Shot at Keeping Stock Investments Secret Fades,” October 27, 2020, available at: <https://www.bloombergquint.com/business/hedge-funds-shot-at-stock-secrecy-fades-as-sec-shelves-revamp>.

leaves them even more vulnerable and more likely unaware of unwanted activist interest,” the four senators wrote.⁷

We urge the FTC not to proceed with replacing the current “solely for the purpose of investment” exemption for passive investors with a broader exemption for activist fund managers. If the SEC eventually acts to modernize the 13D and 13F rules and improves ownership transparency, it may be appropriate for the Federal Trade Commission to revisit the “solely for the purpose of investment” exemption at that time.

Sincerely,



Gary A. LaBranche, FASAE, CAE
President & CEO
National Investor Relations Institute

Public Companies

Campbell Soup Company
Cedar Fair Entertainment Company
FedEx Corporation
Ionis Pharmaceuticals, Inc.
Masonite International
Quanta Services, Inc.
Tutor Perini Corporation

NIRI Chapters

NIRI Capital Area
NIRI Los Angeles
NIRI Philadelphia
NIRI Virtual Chapter

⁷ See U.S. Senators Sherrod Brown, Tammy Baldwin, *et al.*, Letter re Reporting Threshold for Institutional Investment Managers, Release No. 34-89290, October 21, 2020, available at: [https://www.niri.org/NIRI/media/NIRI/Advocacy/Ltr to Chair Clayton Form13F 10212020.pdf](https://www.niri.org/NIRI/media/NIRI/Advocacy/Ltr%20to%20Chair%20Clayton%20Form13F%2010212020.pdf).

CC:

Rebecca Kelly Slaughter

Noah Joshua Phillips

Rohit Chopra

Christine S. Wilson