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Our File No.	69459
Date	February 1, 2021

Submitted Electronically via www.regulations.gov

Donald S. Clark, Secretary
Federal Trade Commission
600 Pennsylvania Avenue NW
Suite CC-5610 (Annex J)
Washington, DC 20580

Dear Sir:

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

We write on behalf of the Merger Streamlining Group ("MSG" or the "Group"), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.[1] The Group writes to provide comments on the Notice of Proposed Rulemaking (the "NPRM") dated December 1, 2020,[2] which proposes amendments to the premerger notification rules that implement the *Hart-Scott-Rodino Antitrust Improvements Act* (the "HSR"). More specifically, this submission focuses on the proposed rule that would exempt *de minimis* acquisitions of 10% or less of an issuer's voting securities unless the acquiror already has a competitively significant relationship with the issuer (the "Proposed Exemption").

The Group works with competition agencies and governments to help implement international best practices in merger control, with particular focus on the *Recommended Practices for Merger Notification Procedures* ("Recommended Practices") of the International

[1] Accenture, BHP, Chevron, Cisco Systems, Danaher, Oracle, Procter & Gamble, Siemens, and United Technologies Corporation.

[2] FTC, Notice of proposed rulemaking, December 1, 2020 (the "NPRM:), available at < https://www.federalregister.gov/documents/2020/12/01/2020-21753/premerger-notification-reporting-and-waiting-period-requirements>.

Competition Network ("ICN").[3] As you know, the U.S. Federal Trade Commission ("FTC") and the Department of Justice Antitrust Division (collectively, the "Agencies") are longstanding and active members of the ICN.

The MSG was founded in 2001. The cornerstone of the Group's activity has been to work with competition agencies and governments to help implement international best practices in merger control. Its work to date has included submissions to competition agencies and governments in more than twenty other jurisdictions (*e.g.*, Australia, Brazil, Canada, Chile, China, European Union, France, Italy, Japan, Korea, Russia, Spain, the United Kingdom, the United States, and many others).

1. General Comments

The Group applauds the Agencies for their interest in eliminating pre-merger filings for categories of transactions that are unlikely to create competitive concerns, such as acquisitions of small minority shareholdings. Indeed, the Recommended Practices encourage jurisdictions to "consider using exemptions to exclude from merger review transactions that, because of their nature, are unlikely to have durable effects on competition."[4] Well-designed filing exemptions reduce the burden on merging parties from having to make filings on transactions where enforcement action is unlikely and allows antitrust agencies to focus their resources more effectively on those transactions that present the potential for competitive harm.

Under the Proposed Exemption, a *de minimis* acquisition of voting securities will be exempt from the HSR premerger notification requirements. A *de minimis* acquisition of voting shares is defined as an acquisition where the acquiror will not hold more than 10% of the outstanding voting securities of the issuer as a result of the acquisition. However, the exemption is not available if the acquiror already has a competitively significant relationship with the issuer, including the following situations (collectively the "CSR Exceptions"):

(i) the acquiror is a competitor of the issuer (or any entity within the issuer);

(ii) the acquiror holds more than 1% of the outstanding voting securities (or, in the case of a non-corporate entity, in excess of 1% of the non-corporate interests) of any entity that is a competitor of the issuer (or any entity within the issuer);

(iii) any individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiror, is a director or officer of or the issuer (or of an entity within the issuer);

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[3] International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf >.

[4] Recommended Practice I.A, Comment 4.

(iv) any individual who is employed by, a principal of, an agent of, or otherwise acting on behalf of the acquiror, is a director or officer of a competitor of the issuer (or of an entity within the issuer); or

(v) there is a vendor-vendee relationship between the acquiror and the issuer (or any entity within the issuer), where the value of sales between the acquiror and the issuer in the most recently completed fiscal year is greater than $10 million in the aggregate.

The Group understands that in 1988 the FTC proposed a *de minimis* acquisition exemption, which would have exempted all acquisitions of 10% or less of an issuer's voting securities regardless of investment intent. However, the exemption ultimately was not adopted in the face of certain concerns raised during the public comment process.[5]

Since then, the Agencies have gained more than 30 years of additional experience reviewing acquisitions of 10% or less of an issuer. This experience confirms that the rationale for the 1988 exemption proposal was sound. Since the implementation of the HSR premerger notification rules in 1978, the Agencies have never challenged a stand-alone acquisition of 10% or less of an issuer, and have rarely engaged in a substantive initial review of a proposed acquisition of 10% or less of an issuer.[6] Presumably, many such acquisitions would have involved an acquiror that had a "competitively significant relationship" with the issuer, as broadly defined in the Proposed Exemption. Nevertheless, few such acquisitions raised potential competitive concerns that led to a substantial initial review and none led to a challenge by either Agency.

More than four decades of enforcement experience provide powerful evidence that acquisitions of 10% or less of an issuer, as a category of transactions, are highly unlikely to give rise to competitive concerns. Therefore, the Group respectfully submits that it is appropriate to enact a full *de minimis* exemption for all acquisitions of 10% or less of an issuer, regardless of whether there is any relationship between the acquiror and issuer.

A full *de minimis* exemption has the important advantage of reducing burdensome filings, as well as burdensome size-ups regarding the applicability of the CSR Exceptions, which may be complex and uncertain in many situations. At the same time, it avoids consuming the Agencies' scarce resources, both in considering the CSR Exceptions to the Proposed Exemption and analyzing the filings arising in respect of acquisitons of small minority interests, which are unlikely to lead to enforcement action.

A simple, objective and meaningful *de minimis* exemption is especially appropriate in an antitrust regime where the Agencies (and private parties) have the ability to challenge mergers falling below the filing thresholds prior to or at any time after closing. If a transaction is allowing, or is likely to allow, market power to be exercised, market particpants

[5] NPRM, p 77059.

[6] NPRM, p 77061.

have the abilty and incentive to bring those concerns to the attention of the Agencies. Moreover, the Agencies have both stated and demonstrated their ability to detect and take effective enforcement action against non-reportable mergers that have anti-competitive effects.

The Group notes that the Proposed Exemption sets the *de minimis* acquisition threshold at 10% of the issuer's voting shares, which is lower than the level at which other major jurisdictions review minority shareholding investments. For example, the European Union, under its "decisive influence" test, generally does not review acquisitions of less than 20% of a target's voting shares, except for unsual circumstances where they are significant enough to confer decisive influence; in Japan, notification is not required if the acquiror will hold no more than 20% of the target's voting shares after the acquisition; in Canada, notification is not required where the acquirer would own less than 20% of the target's voting shares in the case of a public company or less than 35% of the target's voting shares in the case of a private company. The Group suggests that the FTC may consider adopting a *de minimis* acquisition threshold that is higher than the proposed 10% level.

If exceptions to the Proposed Exemption are to be created, contrary to the suggested approach above, such exceptions should be structured clearly and narrowly in order to maximize the benefit of the exemption in reducing the burden on merging parties and focusing Agencies' resources on those transactions that present significant potential for competitive harm.

In the remainder of this submission, the Group briefly comments on the CSR Exceptions contained in the Proposed Exemption.

2. Definition of "competitor" in exceptions (i), (ii) and (iv)

The Proposed Exemption defines "competitor" as any person that (1) reports revenues in the same six-digit NAICS Industry Group as the issuer, or (2) competes in any line of commerce with the issuer.

The ICN Recommended Practices emphasize that premerger notification criteria should be based on objective criteria in order to maximize legal certainty and predictability for all stakeholders.[7]

The first prong of the proposed definition would require an acquiror to look at the six-digit NAICS codes of entities it controls and compare them with the NAICS codes the issuer reports. The acquiror already does this in order to prepare HSR filing forms. While NAICS codes tend to be overbroad compared to relevant antitrust markets, the Group agrees that this first prong of the "competitor" definition uses objective criteria with which merging parties and their advisors are already familiar. An exception defined on this basis would be relatively straightforward to administer and not overly burdensome.

However, the second prong of the proposed definition would "rely on filing parties to conduct a good faith assessment to determine whether any part of the acquiring person

[7] See Recommended Practices 1.B. and 2.E.

competes with or holds interests in entities that compete with the issuer, in any line of commerce".[8] This broad requirement appears to be motivated by a theoretical desire to avoid ever missing any potential competition concern. However, this requirement can be uncertain, onerous and difficult for many large companies with diverse affiliates and products or services to apply. For the reasons noted above, such an onerous requirement is not necessary or desirable in a regime where the Agencies have residual jurisdiction to take enforcement action against non-reportable mergers.

The assessment of potentially competing lines of commerce and identification of competitors is not a straightforward exercise based only on objective criteria, which could make the CSR Exception difficult and burdensome to administer. Where the merging parties reach a good-faith conclusion that the entities at issues are not competitors, they would still face the uncertainty that the Agencies may disagree with the parties' conclusion and require that an HSR filing be made. This would lead to unnecessary filings, and the related burdens on merging parties and the Agencies' resources.

Therefore, if exceptions (i), (ii) and (iv) are to be retained as part of the Proposed Exemption, the Group suggests that the second prong of the proposed definition of "competitor" should be removed.

3. 1% shareholding of a competitor of the issuer

Under exception (ii), the Proposed Exemption is not available to an acquiror who holds more than 1% of a competitor of the issuer. The Group understands that this exception is intended as a response to the ongoing debate about the competitive effect of "common ownership" (i.e., multiple entities holding small but significant percentages of voting securities in most of the major competitors within a conccentrated industry).[9]

While the Group understands that the FTC does not wish to take a position on the merits of the common ownership debate at this time, setting the shareholding threshold of this CSR Exception at a 1% voting interest in one competitor does not reflect even the alleged competitive harm being discussed by the academics who are propounding common ownership theories of harm. The academic literature raising concerns about common ownership generally focuses on concentrated industries in which multiple institutional investors have minority but significant shareholdings in multiple major competitors.[10]

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[8] NPRM, p 77062.

[9] NPRM, p 77061.

[10] For example, E. Elhauge, "Horizontal Shareholding", 129 *Harvard Law Review* 1267 (2016); E. Elhauge, "The Growing Problem of Horizontal Shareholding", *CPI Antitrust Chronicle* (June 2017); E. Posner, F. Scott-Morton and E.G. Weyl, "A Proposal to Limit the Anticompetitive Power of Institutional Investors", 81 *Antitrust Law Journal* 669 (2017); J. Azar, M.C. Schmalz & I. Tecu, "Anticompetitive Effects of Common Ownership", Journal of Finance, 2018, vol. 73, issue 4, 1513-1565. There has been significant debate and criticism of the common ownership literature. Indeed, most recently, a study did not find common ownership effects in the ready-to-eat cereal industry. See M. Backus, C. Conlon & M. Sinkinson, "Common Ownership and Competition in the Ready-to-Eat Cereal Industry", NBER Working Paper 28350 (January 2021), https://www.nber.org/papers/w28350.

Therefore, if some form of exception (ii) is to be retained as part of the Proposed Exemption, the Group suggests that the 1% threshold should be raised substantially (e.g. to 5%) and be required to exist across multiple competitors in concentrated industries to avoid overreaching beyond the theory of harm in the common ownership literature.

4. Vendor-vendee relationship exceeding $10 million in value

Under exception (v), the Proposed Exemption is not available to an acquiror who is in a vendor-vendee relationship where the annual value of sales between the acquiror and the issuer exceeds $10 million in the aggregate.

It is well established over the past three decades that vertical mergers only occasionally give rise to concerns that warrant remedial action. In a system where the Agencies have residual jurisdiction, a cost-benefit analysis favors exempting small vertical minority shareholding relationships from HSR filings to avoid the associated resource burdens to private parties and the Agencies.

The Group understands that the $10 million threshold is intended to screen out ordinary course sales and purchases of services and goods, and identify competitive significantly vertical relationships. If some exception to the Proposed Exemption is going to be applied for vertical transactions, a $10 million threshold would make some contribution towards such an objective. However, the Group expects that it would still capture situations where the vertical relationship is not competitively significant.

Large international businesses could easily have vendor-vendee relationships with annual commerce exceeding $10 million, without such relationships being competitively significant for antitrust purposes. In addition, exception (v) requires merging parties to aggregate purchase and sales values across all corporate entities. This will be burdensome for large businesses, especially those that carry on multiple lines of business, have multiple affiliated entities and/or have significant operations in multiple countries, and it heightens the risk that the vendor-vendee relationships caught by the screen would not be competitively significant for the analysis of antitrust concerns. Moreover, to the extent that the vendor-vendee relationship between the acquiror and issuer arises between their non-US operations, exception (v) as drafted requires the value of such vertical relationship to be added towards the $10 million threshold, even though such commerce would likely has limited if any relevance to the competitive effects of the transaction in the US.

Therefore, if exception (v) is to be retained as a part of the Proposed Exemption, the Group suggests that the screen for competitively significant vertical relationships should also include a measure that would screen for the risk that vertical foreclosure would be a concern that could arise – e.g. by considering the proportion of the acquiror's and issuer's purchases or sales in the US for each entity that has US purchases or sales. In other words, the Group suggests that the Proposed Exemption could be unavailable to an acquiror if the acquiror (or any individual entity controlled by the acquiror) had sales or purchases in the US with the issuer (or any individual entity controlled by the issuer), where the value of such sales or purchases exceeds

$10 million and represents more than 30% of total US sales or purchases for each individual entity involved in such vendor-vendee relationships.

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Thank you for considering these submissions. We would be pleased to respond to any questions or discuss this submission with the FTC at your convenience.

Yours very truly,

Neil Campbell William Wu

Copy to: Members of the Merger Streamlining Group