MANAGED FUNDS ASSOCIATION
The Voice of the Global Alternative Investment Industry
WASHINGTON, DC | NEW YORK

October 2, 2019

Via Email and United States Mail

The Honorable Makan Delrahim
Assistant Attorney General
Antitrust Division, Department of Justice
950 Pennsylvania Avenue NW
Washington, DC 20530

Re: **Updated HSR Reform Proposal**

Dear Mr. Delrahim:

Managed Funds Association[1] ("MFA") greatly appreciates the time that Andrew Finch and several other senior staff members of the Antitrust Division of the Department of Justice ("Antitrust Division") spent with our members discussing MFA's proposed reforms to the Hart-Scott-Rodino Antitrust Improvements Act ("HSR Act") filing regime. As you know, we also met with Commissioner Noah Phillips at the Federal Trade Commission ("FTC") and senior staff in the FTC Bureau of Competition. We are writing to respond to questions Mr. Finch and other senior Antitrust Division staff raised about our proposal, as well as questions from FTC Commissioner Phillips and senior FTC staff.

As we discussed in our meetings, current HSR Act filing requirements are over-inclusive for investments of 10% or less of an issuer's voting securities because such investments pose no threat to competition. Institutional investors, such as pension funds, charitable foundations and university endowments—whose investments are managed by MFA members—bear the burden of HSR Act filing costs, which reduces their investment returns. The requirement of these unnecessary or *pro forma* (from an antitrust perspective) filings also decreases efficiencies in the public markets, as funds are prohibited from buying voting securities above the threshold until the waiting period has expired. This undue burden not only imposes significant and unnecessary costs on such institutional investors, but it also undermines the strong public policy in favor of management-shareholder communications. In short, the mission of the Antitrust Division

[1] MFA represents the global alternative investment industry and its investors by advocating for sound industry practices and public policies that foster efficient, transparent, and fair capital markets. MFA members help pension plans, university endowments, charitable organizations, qualified individuals and other institutional investors to diversify their investments, manage risk, and generate attractive returns. MFA has over 3,000 members from firms engaged in many alternative investment strategies all over the world. MFA's website can be accessed here: https://www.managedfunds.org/.

and FTC (together, the "federal antitrust agencies") to protect economic competition is not advanced by these continuing harms.[2]

De Minimis Exemption

We continue to recommend that the federal antitrust agencies commence rulemaking for a 10% *de minimis* exemption. As observed by the dissenting FTC Commissioners in the *Third Point* matter, substantive antitrust concerns are "highly unlikely" to arise under Section 7 of the Clayton Act with respect to an acquisition of 10% or less of an issuer's voting securities.[3] The majority statement did not rebut that conclusion; in fact, the majority explicitly recognized "Congress's considered judgment that '*de minimis* non-control' stock acquisitions may be safely excepted from the notification requirements."[4] Indeed, a 33-year survey of HSR filings revealed only a handful of investigations involving acquisitions of 10% or less.[5]

In our June 18, 2019 meeting with Antitrust Division staff, we recommended a 10% *de minimis* exemption for both its bright-line simplicity and the fact that there is ample historical data at the federal antitrust agencies on HSR Act enforcement actions and second requests that evidence low antitrust risk. We continue to believe that this solution is narrowly tailored to avoid competition concerns. However, we acknowledge that senior staff in the Antitrust Division and the FTC Bureau of Competition raised questions as to whether a *de minimis* exemption without aggregation of funds under common management ("Manager-Level Aggregation") might be a potential means of accumulating a controlling ownership stake in an issuer. Antitrust Division staff likewise asked whether common ownership by a fund or group of affiliated funds of voting securities of competing issuers ("Common Ownership") raises anti-competitive concerns such that a Common Ownership exception would be appropriate.

We appreciate that Manager-Level Aggregation may be necessary to advance a proposal for a 10% *de minimis* exemption, but continue to believe that it is unnecessary and inappropriate to place special limits on the *de minimis* acquisition of shares from

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[2] As FTC Commissioner Phillips noted in his recent speech on the market for corporate control: "To be most effective, Hart-Scott-Rodino needs to be tailored to identifying and addressing competition issues only. Beyond that, it loses its purpose and distorts the market for corporate control." *See* Opening Keynote of FTC Commissioner Noah Joshua Phillips, "Competing for Companies: How M&A Drives Competition and Consumer Welfare," The Global Antitrust Economics Conference, May 31, 2019, at p.18.

[3] FEDERAL TRADE COMM'N, FILE NO. 121-0019, DISSENTING STATEMENT OF COMMISSIONERS MAUREEN K. OHLHAUSEN AND JOSHUA D. WRIGHT at 3 (Aug. 24, 2015).

[4] FEDERAL TRADE COMM'N, FILE NO. 121-0019, STATEMENT OF THE FEDERAL TRADE COMMISSION at 2-3 (Aug. 24, 2015).

[5] *See* Bilal Sayyed, A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption, ANTITRUST SOURCE, Apr. 2013, at 1, 14 & n.75. *See also* https://www.ftc.gov/policy/reports/policy-reports/annual-competition-reports (review of ANNUAL REPORTS TO CONGRESS PURSUANT TO THE HART-SCOTT-RODINO ANTITRUST IMPROVEMENTS ACT OF 1976 through 2017 shows that only about 3% of all transactions reported of any size have received second requests through 2017).

competing issuers in order to address Common Ownership concerns. Based on the historical data of the federal antitrust agencies and longstanding experience without Manager-Level Aggregation under the existing investment-only exemption, we believe the risk of a firm accumulating a controlling position is more theoretical than real or practical. More importantly, we do not believe that Common Ownership raises legitimate competition concerns. (We do not refer to cases in which one competitor invests in another, for which normal HSR rules would continue to apply.) First, we are aware of no theoretical or empirical evidence that shareholdings of 10% or less reduce either the intensity of competition between the issuers or the incentives to compete.[6] Second, to the extent that a less-than-10% holder in Company X becomes a less-than-10% holder in Company Y, a competitor to Company X, Section 1 of the Sherman Act and Section 5 of the FTC Act provide ample and sufficient enforcement remedies to the extent that such holder behaved in a manner that violates antitrust laws. In addition, in such circumstances the federal antitrust agencies could require a simple divestiture as an after-the-fact remedy, and need not rely on pre-notification in order to address complications related to the difficulty of "unscrambling the egg."

To summarize, we recommend that the federal antitrust agencies proceed with issuing a proposed rule limited to a 10% *de minimis* exemption, with Manager-Level Aggregation, if viewed as necessary. The federal antitrust agencies can then assess the merits of public comments, if any, from those who may advocate for a potential Common Ownership exception. We believe this approach would be most consistent with sound rulemaking.

We thank you for the opportunity to meet with Mr. Finch and other senior staff in the Antitrust Division and engage constructively on prioritizing needed reforms of the current HSR Act investment-only regime. We would welcome the opportunity to meet with you to discuss our updated reform proposal in greater detail. Please do not hesitate to contact the undersigned at 202-730-2600, or William E. Moschella, Esq. of Brownstein Hyatt Farber Schreck, LLP at 202-652-2346 with any questions you or Antitrust Division staff might have regarding this letter.

Respectfully submitted,

/s/ Mark D. Epley

Mark D. Epley
Executive Vice-President & Managing Director, General Counsel

/s/ Laura Harper Powell

Laura Harper Powell
Associate General Counsel

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[6] Sayyed at 17 (stating that "history has demonstrated that in practice these concerns arise infrequently, if ever.").