

June 1, 2018

VIA EMAIL AND UNITED STATES MAIL

The Honorable Joseph J. Simons
Chairman
Federal Trade Commission
600 Pennsylvania Avenue
Washington, D.C., 20005

RE: HSR *DE MINIMIS* EXEMPTION TO PERMIT ORDINARY COURSE SHAREHOLDER
ENGAGEMENT

Dear Chairman Simons:

On behalf of the Council of Institutional Investors (“CII”)¹ and the Managed Funds Association (“MFA”),² please accept our congratulations on becoming the new Chairman of the Federal Trade Commission (the “Commission”). CII and MFA also extend their congratulations to Commissioners Phillips, Chopra, and Slaughter and compliment Commissioner Ohlhausen on her leadership of the Commission as Acting Chairman. CII and MFA look forward to continuing a constructive and cooperative relationship with the Commission under its new leadership.

¹ CII is a nonprofit, nonpartisan association. It has over 130 General Members (asset owners, mostly pension funds) and over 130 Associate Members, the latter including more than 50 asset managers. CII’s website can be accessed here: <https://www.cii.org/>.

² 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/>.

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The purpose of this letter is to communicate concerns by the memberships of CII and MFA regarding increased uncertainty and filing burdens for investment firms under the Hart-Scott-Rodino Antitrust Improvements Act of 1976. The HSR uncertainty and filing burdens chill important shareholder-management communications.

To address those concerns, CII and MFA strongly urge the Commission to adopt a 5% “*de minimis* exemption” from the HSR filing and waiting-period requirements. We understand that the staff of the Commission and the Antitrust Division of the Department of Justice (“Antitrust Division”) are considering such an exemption. This exemption would be available to holders of no more than 5% of an issuer’s voting securities and, we believe, is consistent with the objectives of the HSR Act.

The *de minimis* exemption would reduce the number of unnecessary and costly filings that do not implicate antitrust concerns and would facilitate the free flow of ideas and value-enhancing communications between shareholders and management that are essential to the vitality of U.S. capital markets. The introduction of a 5% *de minimis* exemption would complement the existing investment-only exemption (which would remain applicable to investments that are greater than 5% but no more than 10% of an issuer’s voting securities) by providing a bright-line threshold under which HSR Act reporting and waiting-period requirements do not apply.

We understand that both the Bureau of Competition and the Antitrust Division have begun to consider a 5% *de minimis* exemption, but may have deferred completing that consideration until the arrival of new leadership at the Commission. We hope that staff’s consideration of the 5% *de minimis* exemption can now become a priority.

We respectfully propose that you request the Bureau, in collaboration with the Antitrust Division, to report expeditiously on the merits of a 5% *de minimis* exemption. We believe this exemption would assist substantially in resolving the current ambiguity relating to the investment-only exemption while preserving the effectiveness of the HSR Act’s core requirements. In that regard, we are not aware of any consent decree that has been entered, or even a second request that has been issued, on a transaction in which the filing party held 5% or less of an issuer’s voting securities.

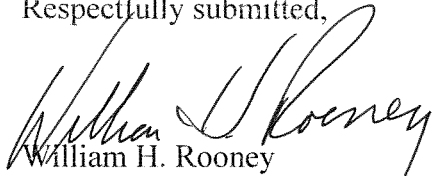
As background, CII and MFA have been engaging for approximately 18 months with the Commission and the Antitrust Division to address increasing ambiguity in the application of the investment-only exemption and have separately proposed language to clarify its scope. We recognize, however, that such clarification may be better undertaken after first assessing the 5% *de minimis* exemption.

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CII and MFA would welcome the opportunity to meet with you and your fellow Commissioners to provide the perspectives of their respective memberships on both the 5% *de minimis* exemption and the application of the investment-only exemption.

Thank you for your kind consideration.

Respectfully submitted,



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Counsel for Council of Institutional Investors and
Managed Funds Association

cc via email:

The Honorable Maureen K. Ohlhausen
Commissioner
Federal Trade Commission

The Honorable Noah Joshua Phillips
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The Honorable Rohit Chopra
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