

MEMO# 33113

February 17, 2021

ICI Submits Comment Letter to FTC on Aggregation Rule

[33113]

February 17, 2021 TO: ICI Members
ICI Global Regulated Funds Committee
SEC Rules Committee SUBJECTS: Compliance
Investment Advisers RE: ICI Submits Comment Letter to FTC on Aggregation Rule

ICI submitted a comment letter on February 1 to the Federal Trade Commission (FTC or “Commission”) that strongly urges the Commission to abandon its proposed Aggregation Rule.[\[1\]](#) The rule would fundamentally amend the scope of a “person” for determining whether Hart-Scott-Rodino (HSR) premerger notification thresholds are met when the person acquires voting securities of an issuer company. As proposed, a “person” would comprise not only the holdings of an acquiring fund, but also the holdings of its “associates,” which would include all other funds under common management by an adviser and the adviser itself. This approach would increase the likelihood that a fund or its adviser must submit an HSR filing and limit the ability to qualify for an exemption from HSR filing requirements.

Aggregation Rule

The attached letter strongly urges the FTC to abandon the Aggregation Rule for the following reasons:

- The rule would impose massive burdens on regulated funds and their managers, including a dramatic increase in HSR filings and associated filing and compliance-related fees. Specifically, the HSR 30-day waiting period is untenable for portfolio management of funds and would potentially lead to the capping of investments and/or divestments of holdings.
- The rule would result in a massive expansion of the scope of an acquiring “person” and is fundamentally not administrable based on fund operating structures, investment management practices and fund regulation. The legislative history of the HSR Act and the Commission’s own past rulemaking record show that aggregation for funds and asset managers was considered and rejected for these reasons.
- The rule would effectively eliminate or significantly undermine the availability of relevant HSR exemptions, which include the 802.9 “Investment Only” exemption, the 802.51 “Foreign Issuer” exemption, and 802.64 “Institutional Investor” exemption.

- The additional information that funds would have to provide (via additional HSR filings) under the rule would not benefit antitrust enforcement. Further, HSR filings are not an appropriate or useful tool to screen a fund's acquisitions.

The letter further states, however, that if the Commission still believes that aggregation is necessary to address certain types of transactions carried out by certain types of entities, then it should consider ways to carve out institutional investors from the rule or carve out ordinary course transactions that are solely for the purpose of investment. The letter also suggests that if the Commission is concerned that its proposed De Minimis exemption will create competition concerns, then it could also simply limit aggregation for purposes of that exemption.^[2]

Solely for the Purposes of Investment

The Commission also sought comment in an Advanced Notice of Proposed Rulemaking on whether it should update its definition of "solely for the purposes of investment," among other issues. ICI's letter recommends that the Commission update that definition to align with the SEC's approach to "passive investors" pursuant to Section 13 of the Exchange Act.

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[Attachment](#)

endnotes

^[1] See ICI Memorandum No. 32778 (Sept. 24, 2020), *available at* https://www.ici.org/my_ici/memorandum/memo32778.

^[2] In addition to the Aggregation Rule, the FTC proposed a new 10% *de minimis* exemption that is separate from the existing HSR exemptions. This exemption would allow funds to engage in activities, which otherwise may not constitute "solely for the purposes of investment only" in nature, without being subject to HSR filing requirements. The exemption, however, is subject to several conditions, including a condition that the acquiring person does not hold more than 1% of the voting securities in a "competitor" of the target entity. The FTC acknowledges that this condition relates to common ownership concerns.