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February 1, 2021

April J. Tabor, Acting Secretary
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 Rules ANPRM, Project No. P110014

Dear Ms. Tabor:

Vanguard, on behalf of the Vanguard Funds,[1] appreciates the opportunity to comment on the advance notice of proposed rulemaking (the "ANPR") issued by the Federal Trade Commission (the "Commission") that seeks information on potential revisions to the Commission's rules implementing the Hart-Scott-Rodino Act (the "HSR Act") in respect of, among other things, whether the activities of mutual funds continue to meet the definition of "solely for the purpose of investment" in light of changing investor engagement with issuers on matters of corporate governance.[2] We believe that they do.

Vanguard is the world's only mutually owned mutual fund company. Rather than being publicly traded or owned by a small group of individuals, Vanguard is owned by its U.S. funds, which in turn are owned by their investors. This unique structure aligns our interests with those of our investors—more than 30 million clients who rely on Vanguard Funds to secure a better retirement, pay for college, and achieve financial peace of mind. Our ownership structure drives our long-term perspective and disciplined approach to investing as well as our global investment stewardship program.

While investment stewardship activities (such as proxy voting and engagement) may differ among our index and actively managed funds, our fiduciary duty to manage investments in the best interest of clients compels us to advocate, engage and vote for good corporate governance practices at the companies in which our funds invest to preserve and ideally enhance the long-

[1] The Vanguard Funds or "our funds" are the investment companies registered under the Investment Company Act of 1940 that are sponsored, managed, or advised by The Vanguard Group, Inc. ("Vanguard"), its subsidiaries or affiliates.

Vanguard is a leading global investment management organization that offers a large selection of low-cost mutual funds, exchange-traded funds, investment advice, and related services to individual investors, financial professionals, and institutional investors. As of December 31, 2020, Vanguard managed approximately $7.1 trillion in assets globally on behalf of more than 30 million investors, including acting as investment adviser to more than 200 U.S. mutual funds registered under the Investment Company Act of 1940.

[2] Premerger Notification; Reporting and Waiting Period Requirements, 85 Fed. Reg. 77042 (December 1, 2020), *available at* https://www.govinfo.gov/content/pkg/FR-2020-12-01/pdf/2020-21754.pdf.

term investment returns of our funds' shareholders.[3] We undertake these activities, not on our own behalf, but on behalf of our funds and the millions of investors we serve.

The Commission accurately describes a changing governance landscape. In fact, the first two decades of the 21st century— punctuated early on by governance failures at companies such as Enron and Worldcom and later by the global financial crisis—have brought a sea change in governance practices across most developed markets. At the heart of the change has been better communication between investors and the management and boards of directors of the companies in which they invest. Asset managers have been forthcoming with their expectations of portfolio companies—moving beyond merely publishing their proxy voting guidelines.[4] At the same time, companies and corporate boards have increasingly used disclosure to explain their approach to governance. The past decade also gave rise to the now-widespread practice of shareholder engagement, with independent board members and/or leadership teams meeting with investors to discuss governance matters.

Our funds' investment stewardship program also has matured significantly over the years. While our activities have increased, our commitment to a key set of principles anchored in the protection of long-term shareholder value has been consistent over time. Likewise, our commitment to abstain from inserting ourselves into matters of day-to-day management has remained resolute. Our key principles focus on the following:

- **Board composition.** We believe good governance begins with a great board of directors. Our primary interest is to ensure that the individuals who represent the interests of all shareholders are independent, committed, capable, and appropriately experienced and diverse. We seek to understand, through disclosure, a board's mix of experience, professional expertise, tenure, and personal characteristics and how that aligns with the company's strategy.

- **Board oversight of strategy and risk.** Boards are responsible for effective oversight of a company's long-term strategy and any relevant and material risks and should ensure that investors receive the appropriate disclosures thereon. Investors benefit when the market has better visibility into significant risks to the long-term sustainability of a company's business. Evaluation and disclosure of significant risks to a business results in a more accurate valuation of the company. These business risks arise from a variety of factors, including competitive forces, regulation, government action, consumer demand and preferences, and environmental considerations, among other things.

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[3] The investment stewardship activities for our index funds and actively-managed in-house funds are provided by Vanguard's Investment Stewardship team under the supervision of the funds' Boards of Trustees while the funds' external managers provide these services to the actively managed funds they advise, creating a greater alignment of investment management and investment stewardship on a fund-by-fund basis. References in this letter to "Vanguard funds" or "our funds" encompass funds managed by Vanguard as well as those managed by external advisors notwithstanding the differences in proxy voting delegation and administration. *See* note 1, *infra*.

[4] Mutual funds have been required to file their proxy voting records with the SEC since 2003. *See* Item 17(f) of Form N-1A.

- **Executive compensation.** We believe that performance-linked compensation policies and practices are fundamental drivers of sustainable, long-term value and align management's interest with that of shareholders. As such, we advocate for pay plans that incentivize relative performance to promote a competitive market.

- **Governance structures.** We believe companies should have governance structures, such as shareholder-rights and accountability measures, to ensure that boards and management serve in the best interest of the shareholders they represent. We view this as a safety valve to protect shareholder rights.

In each of these cases, our activities – including direct engagement discussions with directors and management – remain squarely focused on promoting well-established market norms for good governance that are relevant to long-term value. In addition, because our index funds are practically permanent owners of portfolio companies, we seek to ensure that companies provide consistently comparable disclosure of their long-term strategy and the associated material risks to long-term value. This process enables us to understand a company's corporate governance practices and monitor progress of those governance practices over time. We view each engagement and proxy vote as an opportunity to improve long-term investment outcomes for our fund shareholders and to mitigate risks associated with owning stock in public companies.

The engagement and voting efforts of investors such as Vanguard have contributed to improved governance practices across developed financial markets over time. These improvements range from the increasing adoption of basic governance provisions such as the annual election of directors by majority vote, to increasing independence and diversity on corporate boards, and to the increasing adoption of corporate risk disclosure through evolving frameworks. In each of these cases, there is market consensus that these matters – regardless of a company's sector or strategy – serve investors' long-term interests.[5] In fact, if Vanguard did not speak on behalf of its more than 30 million investors, the voices of activists, company management, and proxy advisors (the latter of which have little to no economic interest in outcomes) would be elevated disproportionately compared to institutional investors, like the Vanguard Funds, which have very long-term interests in the value of the issuers whose securities index funds are required to hold.[6]

All Vanguard Funds, whether index or actively managed funds, are passive investors in the companies in which they invest, meaning that they make investments exclusively for investment purposes. The activities described above do not implicate the Vanguard Funds as "participating in the formulation, determination, or direction of the basic business decisions" of portfolio

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[5] For example, asset managers with more than $32 trillion in assets under management are signatories to the Investor Stewardship Group Framework for U.S. Stewardship and Governance (https://isgframework.org), which includes these basic governance expectations of U.S. listed companies.

[6] In 2020, institutional investors, including mutual funds, collectively held 71% of public company shares in the United States and voted 92% of the shares they held. Individual investors that directly held stocks accounted for the remaining 29% of share ownership, yet they voted only 28% of the shared they held. *See* Broadridge and PwC, *Proxy Pulse: 2020 Proxy Season Review*, *available at* https://www.broadridge.com/_assets/pdf/broadridge-proxypulse-2020-review.pdf.

companies.[7] The Vanguard Funds support good corporate governance at portfolio companies because good governance promotes long-term shareholder value.

Our stewardship principles—and associated activities—do not seek to set or alter company strategy, intrude on the day-to-day management of a company, affect "basic business decisions" and/or "ordinary business operations"[8], or "chang[e]… or influenc[e]… the control of the issuer."[9] This contrasts with activities of some other investors whose ownership is not "solely for the purpose of investment" or who are required to file Securities and Exchange Commission Form 13D due to "changing or influencing the control of the issuer."[10] Specifically:

- **Strategy.** We do not seek to effectuate a change in company strategy. We seek to understand a company's strategy in order to evaluate the alignment of its board composition and incentive compensation with that strategy.

- **Board composition.** We do not nominate directors or seek board positions and/or changes in management.

- **Executive compensation.** We do not attempt to impose specific types or amounts of compensation; that remains exclusively within the purview of the company's board. When Vanguard considers how a fund will exercise its SEC-imposed advisory vote on executive compensation ("Say on Pay"), we focus on the alignment between executives' pay and the company's performance relative to the market.

Moreover, our proxy voting policies are not issuer specific and the Vanguard Funds have no interest in, or incentive to, influence any particular day-to-day or managerial decision. The publicly-filed registration statements for the Vanguard Funds, including index funds and actively managed funds, further support this fact. [11] Each fund's prospectus states that the fund does not seek to acquire, individually or collectively with any other Vanguard Funds, a company's

[7] The institutional investor exemption from the HSR reporting requirements is only available to acquisitions of voting securities "made solely for the purpose of investment." 16 C.F.R. § 802.64(b)(3). The HSR regulations define this concept as meaning that the acquirer "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1).

[8] Shareholder proposals drafted as recommendations or suggestions are generally proper and allowed under state law but proposals to affirmatively set or alter company strategy or operations may be excluded. *See* 17 C.F.R. § 240.14a-8(i)(7).

[9] The Vanguard Funds disclose their holding on Securities and Exchange Commission Form 13G. SEC Schedule 13G is a short-form ownership disclosure form that is reserved principally for passive investors. A person is only permitted to file an SEC Schedule 13G if, among other things, the person has acquired securities "in the ordinary course of his business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect…." *See* 17 C.F.R. § 240.13d-1(b)(1)(i).

[10] *See id.*

[11] Vanguard's most recent 13F filing is publicly *available at* https://www.sec.gov/cgi-bin/browse-edgar?CIK=102909.

outstanding voting stock to have control over management decisions.[12] Our stewardship activities—advocacy, engagement, or voting—comport with this policy.

During the initial HSR rulemaking in 1978, investment companies were identified as institutional investors, acquisitions by which were "likely to have a relatively insubstantial effect on competition," because although they "frequently engage in acquisitions that may meet the criteria of the act … *they generally have no interest in affecting the management of the companies whose stock they buy*. The rule thus attempts to reduce the disruption of the securities markets that could result from requiring them to report and observe a waiting period before such acquisitions."[13] The Vanguard Funds' lack of interest in affecting the management of the companies whose stock they buy, as well as the consequences that would result from requiring them to report and observe a waiting period before making acquisitions, are no less true today than they were in 1978. If the Vanguard Funds were unable to rely on the institutional investor exemption from HSR reporting, it would raise the costs of investing and reduce investment returns for everyday investors, including the millions of investors who rely on Vanguard for their retirement savings, without any corresponding benefits to competition.[14]

All of Vanguard's stewardship activities, including advocacy, engagement, and voting are to promote good governance practices that will help protect our clients' investments and build long-term value, not to cause Vanguard to participate in the "formulation, determination, or direction of the basic business decisions" of any company. As described above, the investment stewardship activities of the Vanguard Funds are aimed at maximizing investment value and therefore should not deprive the funds from relying on the institutional investor exemption to the HSR reporting rules. To put it another way, the activities of the Vanguard Funds are in line with a finding that the Vanguard Funds invest "solely for the purpose of investment."

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[12] *See* Vanguard Index Funds Statement of Additional Information, at B-13 (April 28, 2020), *available at* https://www.vanguard.com/pub/Pdf/sai040.pdf. In addition, each U.S. mutual fund's prospectus states that the fund "does not invest for the purpose of controlling a company's management." *Id*.

[13] 43 Fed. Reg. 33450, 33503 (July 31, 1978) (emphasis added).

[14] *See* Letter from Gregory Davis, Managing Director and Chief Investment Officer, Vanguard, and Anne Robinson, Managing Director and General Counsel, Vanguard, to April J. Tabor, Acting Secretary, Commission, dated February 1, 2021.

We appreciate the opportunity to provide these comments and would welcome the opportunity to discuss them further with you. If you have any questions, please contact Tara R. Buckley, Principal, at (610) 669-1955 or George Gilbert, Senior Policy Advisor and Counsel, at (202) 824-1293.

Sincerely,

/s/ John Galloway

John Galloway
Investment Stewardship Officer
The Vanguard Funds