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DOJ Settles ValueAct Case with Largest-Ever Penalty for an HSR Act Violation

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Antitrust Transactions

Yesterday, the Antitrust Division of the Department of Justice ("DOJ") announced that it has settled its lawsuit against ValueAct Capital Management L.P. ("ValueAct") for violating the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act"). The settlement is noteworthy for two principal reasons: (i) the size of the civil penalty ($11 million); and (ii) the scope of the injunctive relief, which may signal an increasingly restrictive approach to the availability of the "investment-only" HSR exemption for certain investment firms.

The HSR Act requires pre-notification of acquisitions of voting securities, assets, or non-corporate interests that exceed certain thresholds. There are several exemptions from this requirement, including the "investment-only" exemption, under which an acquisition need not be notified if the acquiring person will hold no more than 10 percent of the issuer's voting securities and the acquisition is made "solely for the purpose of investment," which means having "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). The Statement of Basis & Purpose ("SBP") that was issued when the HSR Rules were promulgated identifies specific actions that are presumed to be inconsistent with an "investment only" intent, such as nominating a candidate for the board of directors, holding a board seat or being an officer, proposing corporate action that requires shareholding approval, soliciting proxies, or being a competitor of the issuer.

In April 2016, DOJ sued ValueAct, alleging that it violated the HSR Act when it acquired over $2.5 billion of voting securities of Halliburton and Baker Hughes while their proposed merger was under review by DOJ. DOJ alleged that ValueAct had used its access to senior executives of both Halliburton and Baker Hughes to discuss merger and other business strategies with the companies. It asserted that these post-acquisition discussions, as well as the company's post-acquisition communications with investors about how its holdings increased the probability that the merger would close and enabled it to be a "strong advocate for the deal," confirmed that ValueAct did not possess the requisite "investment only" intent when it acquired shares of the two companies.

The settlement that the DOJ and ValueAct have agreed to is significant in two primary respects:

- The size of the civil penalty. ValueAct has agreed to pay an $11 million civil penalty, which is the largest penalty ever assessed for a violation of the HSR Act and nearly double the highest previous fine. The company has stated that it decided to settle the matter because of the FTC's recent announcement of a 150 percent increase in the maximum daily penalty for HSR Act violations, which becomes effective on August 1, 2016 but which is applicable to violations that occurred prior to that date. That FTC announcement, yesterday's DOJ settlement, and the FTC's own enforcement action

against Third Point LLC in 2015 for improper reliance on the investment-only exemption, all underscore the potential risks of failing to observe the requirements of the HSR Act.

- The Scope of the Injunctive Relief. As the DOJ notes in yesterday's press release, the settlement enjoins ValueAct from "relying on the 'investment-only' exemption when it intends to influence, *or is considering influencing*, certain basic business decisions, including those relating to merger and acquisition strategy, corporate restructuring, and the company's pricing, production capacity, or production output." (Emphasis added.) The scope of that relief indicates that the DOJ interprets the exemption to be narrower than either the HSR Rules or the SBP may suggest or investment firms have assumed. That is, in addition to being unavailable if the acquiring person has the intention at the time of its acquisition of participating in the business decisions of the issuer, the exemption may be unavailable if prior to buying the shares the acquiring person has considered the possibility of taking a more activist role at some point in the future.

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