

ANTITRUST, MERGERS & ACQUISITIONS, ASSET MANAGEMENT | July 14, 2016

## ValueAct Settles for Record HSR Fine

On July 12, 2016, the US Department of Justice (“DOJ”) announced that activist investor ValueAct Capital agreed to pay a record \$11 million fine and also agreed to injunctive relief to settle allegations that ValueAct violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a (“the HSR Act”).

According to the DOJ complaint, ValueAct purchased over \$2.5 billion of voting securities of Halliburton and Baker Hughes after the two companies announced their merger in November 2014. While its stake represented less than 10% of each company’s voting share capital, according to the complaint, ValueAct purchased the shares with the intent to influence the companies’ business decisions in connection with the merger and therefore it could not rely on the HSR “investment-only” exemption, which the Federal Trade Commission (“FTC”) and DOJ interpret narrowly. This was is ValueAct’s third HSR violation and the second for which it was fined. The DOJ originally sought \$19 million in damages, the maximum then statutorily allowed (at the time the action was brought, the maximum daily civil penalty was \$16,000; as of August 1, 2016, it will be \$40,000 per day). This is DOJ’s second successful action in relation to the now abandoned Halliburton-Baker Hughes transaction. In May, Halliburton was forced to abandon the transaction after the DOJ rejected the parties’ remedy proposals and commenced litigation to enjoin the transaction.

Under the investment-only exemption, acquisitions of voting securities made solely for the purpose of investment, regardless of the dollar value of the securities, are exempt from the requirements of the HSR Act provided that the purchaser will not hold more than 10% of the issuer’s voting securities as a result of the transaction. Voting securities are held or acquired “solely for the purpose of investment” if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination or direction of the basic business decisions of the issuer. The mere voting of the stock will not be considered evidence of the absence of investment intent; however, any investor who anticipates seeking to influence management decisions is regarded by the DOJ and FTC as an “active investor” and is not entitled to rely on the investment exemption.

Unlike most investors facing HSR Act suits who choose to settle with the antitrust regulators in exchange for reduced fines, ValueAct initially contested the DOJ’s actions, arguing that its actions were in compliance with the law. ValueAct has not issued a statement as to why it chose to settle the DOJ.

### **Solely for the Purpose of Investment**

Drawing from the HSR Statement of Basis and Purpose (which is part of the rule making proceeding required to be filed with the promulgation of the HSR Rules and essentially serves a Congressional history for the Rules), the DOJ and FTC have always deemed certain types of conduct to be evidence of a lack of investment intent and therefore

inconsistent with the investment-only exemption. Such conduct includes: (1) nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or director of the issuer; (5) being a competitor of the issuer; and (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer.

Through enforcement actions, including the one against ValueAct, the agencies have demonstrated their view that the solely for the purpose of investment exemption is a narrow one and have added on to the list of proscribed conduct beyond the list of six activities. In a 2015 consent decree with hedge fund Third Point, the FTC added to the list, among other disallowed behavior, contacting third parties to gauge their interest in joining the board of a target company and communicating with a target company about proposed candidates for its board.

Under the ValueAct consent decree, ValueAct has agreed that they would not rely on the HSR Act's investment-only exemption if they intend to take, or their investment strategy identifies circumstances in which they may take, the following actions: (1) proposing a merger, acquisition or sale to which the issuer of the acquired voting securities is a party; (2) proposing to another person in which they have an ownership stake the potential terms for a merger, acquisition or sale between the person and the issuer; (3) proposing new or modified terms for a merger or acquisition to which the issuer is a party; (4) proposing an alternative to a merger or acquisition to which the issuer is a party, either before consummation or upon abandonment; (5) proposing changes to the issuer's corporate structure that require shareholder approval; or (6) proposing changes to the issuer's strategies regarding pricing, production capacity or production output of the issuer's products and services. While the injunctive relief only applies to ValueAct, other investors are now on notice that if they intend to take any such actions, the agencies likely would not consider them eligible for the solely for the purpose of investment exemption.

### **HSR Civil Penalty Maximums Raised to \$40,000 per Day**

While most parties settle with the agencies for a discount of the maximum allowable penalties, \$11 million may not be the record for long. The HSR Act provides that any person (including any officer, director or partner thereof) who fails to comply with any provision of the Act, such as by consummating a reportable transaction without observing the notification and waiting period requirements of the Act, may be subject to civil liability in an amount not to exceed \$10,000 for each day during which such person is in violation of the Act. This maximum is adjusted periodically for inflation and was \$16,000 for the time period covering ValueAct's violation. On June 29, 2016, the FTC announced that the maximum penalty was more than doubling to \$40,000 per day, effective August 1, 2016.

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