Antitrust Alert

Activist Investor to Pay Record Fine for Violating HSR Reporting Requirements

BY BRUCE D. SOKLER, ROBERT G. KIDWELL AND FARRAH SHORT

The Department of Justice ("DOJ") announced this week that an activist investment manager has agreed to pay a record $11 million to settle allegations that it violated the requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act" or "Act") by improperly relying on the "investment-only" exemption to avoid reporting the transaction and observing the appropriate waiting period. The settlement stems from ValueAct’s purchases in 2014 and 2015 of stock in two direct competitors, with the intent to participate in those companies’ business decisions, without first complying with the HSR Act’s requirements. As part of the settlement, ValueAct also agreed to injunctive relief designed to prevent future violations.

This matter provides further concrete guidance regarding the scope of the investment-only exemption to the HSR Act’s reporting requirements. A settlement last year with another investment fund also provided a discussion of circumstances where use of the exemption may be precluded. The substantial fine against ValueAct serves as a clear reminder of the importance of vigorous HSR compliance programs for investment funds.

HSR Act

The HSR Act requires parties engaged in certain transactions—including certain minority investments—to file a notification with the Federal Trade Commission and the Antitrust Division of the DOJ, and to observe a statutorily prescribed waiting period (usually 30 days) prior to closing, if the jurisdictional size thresholds are met. The purpose of the HSR Act is to maintain the competitive status quo during the waiting period while the federal antitrust agencies investigate whether the proposed transaction may substantially lessen competition in any relevant market in violation of the antitrust laws.

Because the HSR Act is a procedural requirement that applies regardless of the likely competitive impact of a transaction, exemptions to the Act are designed to eliminate the reporting requirement for those transactions that are most unlikely to have competitive significance. One such exemption is the "investment-only" exemption. The HSR Act exempts acquisitions of voting securities if made "solely for the purpose of investment." The HSR rules state that acquisitions of less than 10% are exempt if the investor has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." The FTC’s Statement of Basis and Purpose provides the following examples of conduct inconsistent with an investment-only intent:

- nominating a candidate for the board of directors;
- holding a board seat or being an officer;
- proposing corporate action that requires shareholder approval;
- soliciting proxies; or
- being a competitor of the issuer.

Civil penalties for violating the HSR Act’s requirements can be up to $16,000 per day. In August, the maximum penalty will increase significantly to $40,000 per day.

ValueAct’s Violation

ValueAct is well-known as an activist investor. Its website describes its strategy as “active, constructive involvement” with a goal “to work constructively with management and/or the company’s board to implement a strategy or strategies that maximize returns for all shareholders.”

In 2014, Baker Hughes and Halliburton announced a plan to merge. (The merger was ultimately abandoned after the DOJ sued to block it as anticompetitive.) After the announcement of the proposed merger, ValueAct purchased over $2.5 billion of Halliburton and Baker Hughes voting shares without filing an HSR notification. Through its investments, ValueAct became one of the largest shareholders of both Halliburton and Baker Hughes. The DOJ alleged in its complaint that ValueAct purchased the shares with the intent to influence the companies’ business decisions—including decisions related to the proposed merger—and therefore did not meet requirements for the limited “investment-only” exemption.

The complaint details how ValueAct used its access to senior executives of both Halliburton and Baker Hughes to attempt to influence the companies’ proposed merger and other aspects of their businesses. For example, ValueAct executives met frequently with the top executives of the companies and sent numerous e-mails to the executives on a variety of business issues. During these meetings, ValueAct identified specific business areas for improvement and made presentations on post-merger integration. The DOJ emphasized that this HSR violation risked harming competition, given that the investments resulted in ValueAct becoming one of the largest shareholders in two direct competitors that were pursuing what was ultimately determined to be an anticompetitive merger.
ValueAct has previously been found to violate the HSR Act by acquiring voting securities without making the required notifications. In 2003, a ValueAct entity filed corrective notifications for three prior acquisitions of voting securities. No enforcement action was taken at that time. In 2005, another ValueAct entity failed to make required filings with respect to three acquisitions. ValueAct agreed to pay a $1.1 million civil penalty for that violation.

Proposed Settlement

The settlement prohibits ValueAct from making acquisitions without filing an HSR notification in reliance on the investment-only exemption if at the time of such acquisition (i) ValueAct intends to take any of the below actions, or (ii) ValueAct’s investment strategy specific to such acquisition identifies circumstances in which it may take any of the below actions:

- propose to an officer or director of the target that it merge with, acquire, or sell itself to another entity;
- propose to an officer or director of any other entity in which ValueAct holds an interest the potential terms on which that other entity might merge with, acquire, or sell itself to the target;
- propose to an officer or director of the target new or modified terms for any publicly announced merger or acquisition to which the target is a party;
- propose to an officer or director of the target an alternative to a publicly announced merger or acquisition to which the target is a party, either before consummation of the publicly announced merger or acquisition or upon its abandonment;
- propose to an officer or director of the target changes to the target’s corporate structure that require shareholder approval; or,
- propose to an officer or director of the target changes to the target’s strategies regarding the pricing of the target’s product(s) or service(s), its production capacity, or its production output.

ValueAct is also required under the settlement to establish a compliance program to avoid future violations of the HSR Act.

Pursuant to the Antitrust Procedures and Penalties Act (also known as the “Tunney Act”), the DOJ will publish the proposed settlement and a Competitive Impact Statement in the Federal Register at least 60 days prior to entry of the settlement. This provides an opportunity for comments to be filed by the public. At the end of the 60-day period, the court may enter the settlement as the final judgment upon a finding that it serves the public interest.