July 14, 2016

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Record Setting Fine for Violation of HSR Reporting Requirements

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On July 12, 2016, the U.S. Department of Justice Antitrust Division (Antitrust Division) announced that it reached a settlement with ValueAct, and its related companies (ValueAct), of alleged violations of the Hart-Scott-Rodino Act (HSR or the Act), 15 U.S.C. § 18a, with a payment of an $11 million fine and an agreed-upon injunction prohibiting Value Act from relying upon the "investment-only" exemption to HSR reporting when it intends to influence business decisions of companies in which ValueAct is investing. The $11 million fine is the largest fine to date for a failure to report HSR violation (as opposed to gun jumping), with the prior high water mark being $1.4 million.

In a complaint filed on April 4, 2016, attorneys for the Antitrust Division alleged that ValueAct had purchased in excess of $2.5 billion of the outstanding voting shares of Halliburton Co. (Halliburton) and Baker Hughes Incorporated (Baker Hughes) which had announced their intention to merge. These share purchases caused ValueAct to become the single largest shareholder in both Halliburton and Baker Hughes.

The Act requires that "no person shall acquire, directly or indirectly, any voting securities or assets of any other person" valued in excess of certain thresholds (*e.g.*, the current size of transaction threshold is $78.2 million) mandated by the Act unless the parties to the transaction make filings under the Act with the Federal Trade Commission and the Antitrust Division, and wait a designated time period before consummating the transaction. An exemption to filing under the Act is available to those persons whose acquisition is less than ten percent of the outstanding voting shares and is purely for investment-only purposes.

ValueAct, an activist investor with a history of involvement in the management of companies in which it invests, was alleged in the complaint to have purchased Halliburton and Baker Hughes voting shares with the intent "to influence the companies' business decisions, including decisions regarding the merger." While ValueAct publicly announced that it would oppose the Antitrust Division's complaint, the facts alleged presented a fairly steep hurdle to overcome. ValueAct made its investments in Baker Hughes and Halliburton stock in the middle of the Antitrust Division's investigation of the transaction. It sent memoranda to its investors outlining its plan to work cooperatively with management to advocate for a deal close, and in the alternative to "help develop new terms." ValueAct executives held internal conversations about selling off Baker Hughes assets if the transaction were blocked. ValueAct allegedly used its stockholdings to gain access to the companies' senior management. From December 2014 until January 2016, ValueAct executives allegedly met with Baker Hughes or Halliburton senior management, either in person or by telephone, on more than fifteen occasions to discuss the status of the merger and ongoing operations of the companies.

Despite acquiring outstanding voting stock well in excess of the HSR size of transaction threshold, ValueAct did not make an HSR filing with the federal antitrust agencies (it did make a Schedule 13D filing with the Securities Exchange Commission disclosing its acquisition of Baker Hughes' voting stock). Instead it relied on the "investment-only" exemption to HSR. This is a narrow exemption which permits the acquisition of less than ten percent of a company's outstanding voting shares if, and only if, the acquisition is made "solely for purposes of investment" with no intention of involvement in the company's ongoing business. The Antitrust Division's complaint alleged at

length facts supporting the conclusion that ValueAct had every intention to involve itself with the ongoing business operations of Baker Hughes and Halliburton. Assuming the credibility of the facts alleged, claiming to act under the "investment-only" exemption was a serious and dangerous reach.

This was not ValueAct's first contretemps with HSR. In 2002 ValueAct made voting stock acquisitions in three different companies without the necessary HSR report. These violations were reported to the FTC in 2003, and the agencies took no enforcement action. In 2007, ValueAct paid a fine of $1.1 million for three separate violations of the HSR reporting requirements.

For the three-time violator of the Act, the $11 million fine could be considered fortuitous. The original demand in DOJ's complaint was for $19 million based on the statutory penalty of $16,000 per day. If the complaint had been filed after August 1, 2016, the statutory penalty would have been increased to $40,000 per day, a 250% increase.

The most recent ValueAct HSR violation fine marks the zenith in fine amounts. Starting in 2007, these illustrative HSR fines reflect a mixed enforcement bag:

12/19/20007	ValueAct	$1.1 million
5/21/2007	Highland Capital	$250,000
12/15/2008	ESL/Partners/Zam Holdings	$800,000 (combined fine)
6/23/2009	John Malone (Liberty Media)	$1.4 million
12/16/2011	Brian Roberts (Comcast Corp.)	$500.000 (individual)
9/25/2012	Biglari Holdings, Inc.	$850,000
6/19/2013	McAndrew & Forbes	$720,000
8/21/2014	Berkshire Hathaway	$896,000
10/08/2015	Len Blavatnik	$656,000 (individual)
9/22/2015	Leucadia National Corp.	$240,000
6/29/2016	ValueAct	$11 million

With the fast approaching increase in HSR daily fines and the DOJ's success in exacting a substantial fine from ValueAct, companies faced with potential HSR filing obligations need to exercise great care in evaluating exemptions to reporting, particularly the "investment-only" exemption. Given the current enforcement environment, erring on the side of reporting in close situations is the prudent tack.

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