

Shareholder Activism and HSR Collide: DOJ Obtains Record Fine from ValueAct

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The Department of Justice Antitrust Division announced on July 12 that ValueAct Capital agreed to pay a record \$11 million civil penalty to settle claims that ValueAct purchased over \$2.5 billion in Halliburton and Baker Hughes stock with the intention of influencing their proposed \$35 billion merger without complying with the HSR Act's notification requirements.

The settlement marks the second time in a year that the DOJ has brought an enforcement action that highlights the narrow boundaries of the HSR "solely for the purposes of investment" exemption. It also brings to an end a lawsuit that would have provided the judiciary with the rare opportunity to weigh in on the meaning and scope of this important HSR exemption.

The DOJ's enforcement action against ValueAct

On November 14, 2014, Baker Hughes and Halliburton – both US-based international providers of oilfield products and services – announced their intention to merge in a deal valued at \$35 billion.

Not long after the announcement, ValueAct Capital began purchasing stock in each company through its Master Fund and Co-Investor Fund and continued to make purchases in both companies for several months that eventually resulted in the acquisition of over \$2.5 billion of both companies' voting securities, making it one of the largest shareholders in the companies.

The DOJ's Complaint, which was filed in the US District Court for the Northern District of California on April 4, 2016, alleged that ValueAct acquired its holdings in Halliburton and Baker Hughes "with the intent to influence the companies' business decision as the merger process unfolded," making ValueAct's purchases ineligible for the "solely for the purpose of investment" exemption to HSR notification requirements, which is sometimes referred to as the "investment only" exemption. The DOJ's complaint included a number of specific examples of what it alleged to be ValueAct's "active role" in Halliburton and Baker Hughes, including the investor's use of its ownership position to meet with and influence management regarding the merger and other business activities of the two companies.

Following the filing of DOJ's Complaint, ValueAct announced plans to defend the suit, insisting that its actions did not violate the law. Had the lawsuit moved forward, it would have potentially allowed the court to shed light on what "solely for the purpose of investment" means, and also carried significant implications for investors' ability to avoid filing under HSR based on this exemption.

Investors beware: caution regarding "*Investment Intention*" is key to stay in bounds of the "solely for the purpose of investment" exemption

The key focus of the dispute between the DOJ and ValueAct was whether the investor's involvement in the Halliburton/Baker Hughes transaction disqualified it from using the "solely for the purpose of investment" exemption.

The HSR Act requires firms proposing to acquire voting securities in excess of specified thresholds to file a Notification and Report Form with the DOJ and FTC and to observe a waiting period before consummating the transaction. In certain instances, the HSR Act and implementing rules provide exemptions from the notification

and waiting period requirement, which include the acquisition of voting securities "solely for the purpose of investment," if, as a result of the acquisition, the securities held do not exceed 10 percent of the outstanding voting securities of the issuer. The HSR rules clarify that 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 participation in the formulation, determination or direction of the basic business decision of the issuer."

Similar to last year's enforcement action against Third Point LLC and its three affiliated hedge funds, the DOJ alleged that ValueAct's strategy to influence the business decisions of Halliburton and Baker Hughes took it outside the scope of the HSR exemption, imposing an obligation to notify the transaction and observe the applicable waiting period.

The DOJ highlighted the following actions in its Complaint against ValueAct:

- Sending a memorandum to fund investors which said that purchasing stakes in the two companies would "increase probability of the deal happening" and would allow ValueAct to be "a strong advocate for the deal to close"
- Communicating with investors that ValueAct would be positioned to help restructure the merger if "regulatory issues" threatened the deal
- Meeting and communicating with senior management at Baker Hughes and Halliburton to discuss the merger and both companies' business operations, and notifying shareholders that it might discuss "competitive and strategic matters."
- Meeting with Baker Hughes CEO to "plant the seed to seek alternative options with other buyers if the deal falls through" including selling off parts of the company
- Engaging with Halliburton regarding the company's plans for post-merger integration
- Urging Halliburton to purchase select pieces of Baker Hughes should the full merger fail to move forward and signaling willingness to facilitate such a deal by pressuring Baker Hughes

The negotiated Proposed Final Judgement includes an injunction against ValueAct to prevent the firm from relying on the "solely for the purpose of investment" exemption when engaging in a transaction that would otherwise require notification if it may make proposals to an officer or director of the issuer regarding:

- Mergers or acquisitions
- Corporate restructurings that require shareholder approval
- Strategies regarding pricing of products or services, production capacity or production output

ValueAct is also required to appoint a Compliance Officer who is tasked with making sure the company complies with the terms of the final judgement.

The right time to settle

The timing of the record \$11 million settlement is certainly not a coincidence. The antitrust agencies recently announced that the current maximum penalties for an HSR violation would increase from \$16,000 per day to \$40,000 per day effective August 1, 2016, with increases scheduled for each year to adjust for inflation.

ValueAct said in a statement that it disagreed with the DOJ's interpretation of its rules but this "sudden and unanticipated 150 percent increase in the potential penalties" left it "no choice but to resolve the case as quickly as possible." Had the company moved forward to defend the lawsuit, it risked paying an even higher fine than would have originally been applicable given that the suit would have undoubtedly continued past August 1.

ValueAct also faced an uphill battle given prior violations of the HSR Act. In 2003, ValueAct Capital Partners L.P. filed corrective notifications for three prior acquisitions of voting securities. In keeping with its informal "one bite at the apple" rule, the antitrust agencies did not take enforcement action at the time but required ValueAct to outline the steps it would take to avoid noncompliance in the future. Then in 2005, the ValueAct Master Fund again failed to make HSR filings with respect to three acquisitions. ValueAct agreed to pay a \$1.1 million civil penalty in 2007 to settle allegations it failed to make required HSR filings for those acquisitions in a case prosecuted by FTC attorneys.

Key takeaways

The settlement is a clear victory for the antitrust authorities, who have shown an increasing appetite for bringing enforcement actions aimed at protecting the HSR's notification and waiting period requirements and maintaining the narrow application of the "solely for the purpose of investment" exemption. In light of this and other recent actions, parties and their antitrust counsel should take heed when analyzing the applicability of the exemption and give careful consideration to an investor's planned activities and anticipated role in the operations of target companies.

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