

## Antitrust Advisory: Hedge Funds Fined \$800,000 for Acquiring Additional Stock in AutoZone without Filing New HSR Notifications

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On December 15, 2008, the Federal Trade Commission (FTC) and the Department of Justice (DOJ) announced a final judgment under which ESL Partners, L.P. ("ESL") and ZAM Holdings, L.P. ("ZAM") will pay civil penalties of \$525,000 and \$275,000 respectively for failure to make timely filings under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, (the "HSR Act") for their acquisitions of stock in AutoZone, Inc. ("AutoZone").<sup>1</sup> Both companies were already owners of AutoZone securities; the deals for which the fines were levied were follow-on acquisitions.

### Why This Case Is Important

Investment funds, no less than other businesses, should be mindful of the HSR reporting obligations that may result from multiple investments in any single target and from investments made by related or subsidiary entities. Furthermore, any party attempting to use the HSR Rule 802.9 "acquisitions solely for the purpose of investment" exemption should be sure to understand its strict limitations.

This case serves as a reminder that the FTC is vigilant in its enforcement of the filing requirements under the HSR Act. "The Commission takes the premerger notification requirements of the HSR Act very seriously and will not hesitate to take action when companies or individuals shirk their filing responsibilities," said Acting FTC Bureau of Competition Director David Wales. Pursuant to the HSR Act, parties to a merger or acquisition (of voting securities, non-corporate interests, or assets), where certain size thresholds are met and no exemption applies, must submit an HSR notification to the FTC and the DOJ, and then must wait for the expiration of a statutory waiting period (usually 30 days) before consummating the transaction. Failure to comply with the HSR Act's notification and waiting-period requirements can result in civil penalties of up to \$11,000 per day of violation.

### ESL's Subsequent Investment Results in Violations

ESL had filed an HSR notification in August 1999 for the acquisition of AutoZone stock. ESL received early termination of the HSR waiting period for that initial investment, which remained effective for some additional acquisitions through September 1, 2004. After September 1, 2004 (from September 28, 2004 through October 14, 2004), ESL made additional acquisitions of AutoZone stock that met the HSR filing thresholds and that were no longer covered by the prior filing. ESL failed to submit the required HSR notifications for the subsequent acquisitions until the FTC initiated an inquiry into the transactions. By the time ESL filed the required notification and the waiting period expired, it had been in continuous violation of the HSR Act for nearly six months.

### ZAM's Investments with Intent to Participate in Management Results in Violations

ZAM similarly had made some previous acquisitions of AutoZone stock. Those prior acquisitions, pursuant to the HSR rules in effect at the time, had not required an HSR filing. In October 2004, through an investment company for which ZAM was the ultimate parent entity, ZAM made additional acquisitions of AutoZone stock that met the HSR filing thresholds. Additionally, those acquisitions did not qualify for the HSR "acquisitions solely for the purpose of investment" exemption because the investor intended to participate in the formulation, determination, or direction of the basic business decisions of AutoZone through representation on the board of directors. ZAM failed to submit the required HSR notifications for the additional acquisitions until the FTC initiated an inquiry into the transactions. By the time ZAM filed the required notification and the waiting period expired, it had been in continuous violation of the HSR Act from October 12, 2004 (when the first acquisition occurred after the prior non-reportable acquisitions) until March 2, 2005 (when the waiting period expired).

Please feel free to contact us if you wish to receive a copy of the DOJ's complaint or final judgment, or if you have questions about the HSR reporting requirements.

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### Endnotes

<sup>1</sup> FTC File No. 0510091.

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