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Client Alert

Antitrust & Litigation Practice Group

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Third Point Settles FTC Charges That They Violated U.S. Premerger Notification Requirements

On August 24, 2015, the FTC announced that Third Point Funds ("Third Point"), which includes three affiliated hedge funds commonly managed, agreed to settle FTC charges that it violated premerger reporting requirements in connection with its 2011 acquisition of voting securities of Yahoo! Inc. According to the FTC's complaint, Third Point claimed that it was exempt from reporting because of the "investment-only" exemption to the Hart-Scott-Rodino ("HSR") Act premerger filing requirements.

The HSR Act requires that companies and individuals notify the FTC and the Department of Justice, Antitrust Division, of most large transactions that affect commerce in the United States. Filing parties must observe a waiting period before closing their transaction while one of the two agencies determines whether the transaction would substantially lessen competition.

The HSR Act exempts acquisitions of up to 10 percent of voting securities if they are made solely for investment purposes. Section 801.1 of the HSR rules defines "solely for the purpose of investment" to mean "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 an issuer."

The FTC's complaint states that at the time of the purchases, Third Point was taking actions inconsistent with an investment-only intent, including (1) communicating with third parties to determine their interest in becoming the CEO of Yahoo or a potential board member, and taking other steps to assemble an alternate slate of board of directors for Yahoo; (2) drafting correspondence to Yahoo to announce that Third Point LLC was prepared to join the board of Yahoo; (3) internally deliberating the possible launch of a proxy battle for directors of Yahoo; and (4) making public statements that they were prepared to propose a slate of directors at Yahoo's next annual meeting.

The settlement is effectuated pursuant to an FTC consent order that will be filed by the Department of Justice in federal court. The consent order, which lasts five years, prohibits Third Point from relying on the investment-only exemption under certain conditions, including if they have contacted third

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parties to gauge their interest in joining the board of a target company, communicated with the target company about proposed candidates for its board, or engaged in other specified conduct in the four months prior to acquiring voting securities above the HSR Act threshold. Interestingly, the FTC stated that it declined to seek civil penalties because the violation was inadvertent and short-lived, and it was the defendant's first violation.

The FTC vote supporting the enforcement action was along party lines, with the two Republican commissioners, Maureen Ohlhausen and Josh Wright, issuing a dissenting statement in which they opposed the narrow reading of the exemption because "it is likely to chill valuable shareholder advocacy while subjecting transactions that are highly unlikely to raise substantive antitrust concerns to the notice and waiting requirements of the HSR Act." Although Commissioners Ohlhausen and Wright did not argue that a violation did not occur, they opposed the FTC's pursuing an enforcement action in this instance because it is not in the public interest due to the lack of any threat of competitive harm and the benefits to the market of shareholder advocacy. Moreover, the dissenting FTC commissioners advocated for the antitrust agencies to explore potential modifications of the HSR Rules, including an exemption for acquisitions that do not result in the acquiring person's holding in excess of 10 percent of the issuer's outstanding voting securities.

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Although the FTC's enforcement action against Third Point provides additional guidance on when companies can avail themselves of the investment-only exemption to the HSR rules, it will be interesting to see whether the public interest concerns raised by Commissioners Ohlhausen and Wright will spur the antitrust agencies to discuss potential changes to the HSR filing process to allow for beneficial conduct such as shareholder advocacy.

Documents

The FTC's Enforcement Action and Dissenting Statements are available here: https://www.ftc.gov/news-events/press-releases/2015/08/third-point-funds-agree-settle-ftc-charges-they-violated-us.