

Third Point to pay monetary penalty to settle allegations of HSR Act violations

4 September 2019

On 28 August 2019 investment advisor Third Point LLC (Third Point) and three funds under its control – Third Point Partners Qualified L.P., Third Point Ultra, Ltd., and Third Point Offshore Fund Ltd. (collectively, the Third Point Funds) – entered into a settlement agreement and agreed to pay US\$609,810 in civil penalties based on the Federal Trade Commission's (FTC) allegations that the Third Point Funds violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act). The HSR Act applies to acquisitions of voting shares, controlling interests in noncorporate entities, and assets if HSR threshold tests, which are adjusted annually, are satisfied as a result and no exemption applies. If the HSR Act applies, the parties to the acquisition must file HSR notifications with the FTC and the Antitrust Division of the Department of Justice (DOJ) and observe a waiting period before they may close on the acquisition. Penalties for failure to comply with these requirements are currently up to US\$42,530 per day for each day in which the parties are in violation of the HSR Act.

Conversion of shares following 2017 Dow/DuPont merger triggered HSR filing requirement

According to a complaint filed by the DOJ on behalf of the FTC on 28 August 2019 in the District Court for the District of Columbia, the 31 August 2017 merger of Dow Chemical Company (Dow) and E.I. du Pont de Nemours and Company (DuPont) to form DowDuPont Inc. (DowDuPont) resulted in the conversion of the Dow shares held by each of the Third Point Funds into shares of the merged entity. See Compl., *U.S. v. Third Point Offshore Fund, Ltd. et al.*, No. 1:19-cv-02593 (28 August 2019). The complaint acknowledged that the Third Point Funds had properly filed under the HSR Act when they had initially acquired voting securities of Dow in 2014. Therefore, under 16 C.F.R. Section 802.21, each could acquire additional shares of Dow for a five-year period without filing another HSR notification so long as each would not as a result cross a higher filing notification threshold. The government alleged, however, that the Section 802.21 exemption did not apply to the conversion of Dow shares held by the Third Point Funds since DowDuPont is not the same issuer as Dow within the meaning of the HSR Act because, among other things, it "competes in additional lines of business from those in which Dow competed." Compl. ¶ 33. Accordingly, each of the Third Point Funds – as its own HSR ultimate parent entity – was required to file a notification and report form with the DOJ and FTC, as well as observe a waiting period, because each acquired voting securities of DowDuPont following the completion of the

Dow/DuPont merger on 31 August 2017, and satisfied applicable notification thresholds as a result.

The Third Point Funds ultimately filed corrective HSR notifications on 8 November 2017. Since the waiting period related to these filings expired on 8 December 2017, the complaint alleged that each of the Third Point Funds was in violation of the HSR Act from the date that the Dow/DuPont merger closed (31 August 2017) until the date the waiting period on their corrective filings expired (8 December 2017).

Third Point already had one bite at the apple

This is not the first time that Third Point faced allegations from the FTC concerning HSR Act violations. The complaint noted that Third Point and the Third Point Funds previously violated the HSR Act when they failed to observe the HSR Act's notification and waiting period requirements before acquiring voting securities of Yahoo! Inc. in 2011. Four years later, on 24 August 2015, the United States filed a complaint alleging that Third Point and the Third Point Funds had violated the HSR Act. In a stipulation filed the same day, Third Point consented to a five-year agreement imposing certain injunctive relief, including a requirement to maintain an HSR compliance program.

Lessons to be learned

The consent decree serves as an important reminder of the following:

1. Parties acquiring even minority voting shares in the context of mergers, conversions, or other acquisitions – even acquisitions that do not require payment – should consider in advance whether the HSR Act's filing and waiting period requirements could apply to their acquisitions.
2. The HSR exemptions (such as the Section 802.21 exemption described above) are technical and often narrowly construed. Moreover, the FTC occasionally amends its interpretation and application of exemptions. Therefore, parties should consult with HSR counsel before concluding that their acquisition of voting shares, noncorporate interests, or assets is exempt from filing requirements.
3. The FTC continues to apply a one bite at the apple policy, seeking civil penalties for inadvertent failures to file HSR only when a party has missed an HSR filing obligation in the past as the Third Point Funds had done in this case. However, the penalty the Third Point Funds agreed to pay was significantly less than the total fines that the government could have imposed (over US\$4 million for each of the Third Point Funds). The government "adjusted the penalty downward from the maximum permitted under the HSR Act because the violation was inadvertent, Defendants promptly self-reported the violation after discovery, and Defendants are willing to resolve the matter by consent decree and avoid prolonged investigation and litigation." *Competitive Impact Stmt., U.S. v. Third Point Offshore Fund Ltd. et al.*, No. 1:19-cv-02593, Sec. III (28 August 2019).

Anyone who acquires voting shares, noncorporate interests, or assets (even if through automatic conversions or exchanges) should consult with experienced HSR counsel regarding adoption of an HSR compliance program to ensure that HSR filings are not inadvertently missed. An ounce of prevention in this area can prevent future headaches, costs, and fines.

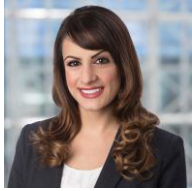
Contacts



Michele S. Harrington
Partner, Northern Virginia
T +1 703 610 6173
michele.harrington@hoganlovells.com



Robert F. Baldwin, III
Senior Associate, Washington, D.C.
T +1 202 637 2092
robert.baldwin@hoganlovells.com



Tracy Penfield
Senior Associate, Washington, D.C.
T +1 202 637 5593
tracy.penfield@hoganlovells.com

www.hoganlovells.com

"Hogan Lovells" or the "firm" is an international legal practice that includes Hogan Lovells International LLP, Hogan Lovells US LLP and their affiliated businesses. The word "partner" is used to describe a partner or member of Hogan Lovells International LLP, Hogan Lovells US LLP or any of their affiliated entities or any employee or consultant with equivalent standing. Certain individuals, who are designated as partners, but who are not members of Hogan Lovells International LLP, do not hold qualifications equivalent to members. For more information about Hogan Lovells, the partners and their qualifications, see www.hoganlovells.com. Where case studies are included, results achieved do not guarantee similar outcomes for other clients. Attorney advertising. Images of people may feature current or former lawyers and employees at Hogan Lovells or models not connected with the firm.
© Hogan Lovells 2019. All rights reserved.