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The International Comparative Legal Guide to:

Mergers and Acquisitions 2015

9th Edition

A practical cross-border insight into mergers and acquisitions

Published by Global Legal Group, with contributions from:

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London SE1 3PL, UK
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Email: info@glgroup.co.uk
URL: www.glgroup.co.uk

GLG Cover Design
F&F Studio Design

GLG Cover Image Source
iStockphoto

Printed by
Ashford Colour Press Ltd.
March 2015

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ISBN 978-1-910083-35-2
ISSN 1752-3362

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Country Question and Answer Chapters:

EDITORIAL

Welcome to the ninth edition of *The International Comparative Legal Guide to: Mergers & Acquisitions*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of the laws and regulations of mergers and acquisitions.

It is divided into two main sections:

Four general chapters. These are designed to provide readers with an overview of key issues affecting mergers and acquisitions, particularly from the perspective of a multi-jurisdictional transaction.

Country question and answer chapters. These provide a broad overview of common issues in mergers and acquisitions in 55 jurisdictions.

All chapters are written by leading mergers and acquisitions lawyers and industry specialists and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Michael Hatchard of Skadden, Arps, Slate, Meagher & Flom (UK) LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The *International Comparative Legal Guide* series is also available online at www.iclg.co.uk.

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Activist-Strategic Buyer Tag-Teams: A New Hostile Takeover Template?

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To paraphrase the Roman philosophers: e*x Ackman semper aliquid novi*.[i] The innovative partnership formed last year between Bill Ackman's Pershing Square hedge fund and Valeant Pharmaceuticals to launch a hostile takeover bid for Allergan, the venerable manufacturer of Botox, stands to net the hedge fund around $2.6 billion (assuming it survives a pending insider trading challenge). Valeant will share in 15% of the profits. Not a bad way to lose a takeover battle! The heads-I-win-tails-I-still-win structure will doubtless have other activist funds salivating, but we do not expect many strategic partners to be lining up to launch a new wave of activist-corporate bidder tag teams. Mostly, this fascinating corporate battle (full disclosure: our firm represented Allergan) highlights the urgent need for reform of certain provisions of the U.S. federal securities laws, which are outdated and out of step with international norms, and leave loopholes that sharp short-term oriented financiers can exploit at the expense of long-term investors.[ii]

2014 saw the continuation, and even acceleration, of the rising tide of shareholder activism of the past 15 years. On the economic activism front, companies continue to face challenges to their business strategies from hedge funds and other short-term focused investors. On the corporate governance side, the drive to move away from the traditional board-centric governance regime and empower shareholder groups to dictate strategic, compensation and other vital decisions has not abated, even though it has largely already achieved its goals. The number of publicly announced activist campaigns has grown from 27 in 2000 to approximately 250 in 2014.[iii] In this environment, no company – regardless of its size, reputation, importance, profitability or success – can be considered immune from shareholder activism. Apple, PepsiCo, eBay, Sony, JPMorgan Chase, P&G and Microsoft have all been the targets of activists in recent years.

Activists have become increasingly more creative and aggressive in their tactics, as they have partnered with other hedge funds and institutional investors in staging their campaigns. Initiating a proxy fight is a conventional activist tactic. However, the manner in which informal groups of hedge funds (often referred to as "wolf packs") act in parallel – sometimes by tipping each other off in advance and other times by nimbly following a known pack leader in the expectation of a quick profit – to influence or control their target's strategic decision-making, is beyond the easy reach of the proxy solicitation rules and securities laws intended to provide early disclosure of sizeable positions. A public company and its shareholders can wake up one morning and read in the newspaper (as JCPenney did a few years ago) that control of the company's destiny has effectively passed to an individual or small cabal of money managers.

Hostile takeover bids are also not new, although traditionally they have not been the domain of hedge funds or shareholder activists, who typically do not have the resources, management ability or patience to actually buy and run companies. Their traditional *modus operandi* is to build a stake in a target company and then push to get it sold. (There are exceptions, such as Carl Icahn, who sometimes launches takeover bids – real or fake – to put a target company in play.) However the tactics being used by today's activist investors in their approaches to corporate targets are unprecedented, including the partnership between a strategic acquirer and an activist hedge fund that is the subject of this article.

After one-and-a-half decades of relentless governance activism, most major U.S. corporations have by now dismantled their takeover defences, including most importantly their classified boards, and are easy prey for raiders and activists. Historically, hostile bidders have prevailed about one-third of the time and acquired their targets (usually for a price far higher than their initial bid, as long as the target had takeover defences in place empowering them to resist and negotiate). Targets of hostile bids have historically been able to fend off the raid and remain independent about one-third of the time. And the other third of the time have had to sell themselves but have found a more desirable buyer than the raider – a proverbial "white knight". This delicate balance meant that a strategic acquirer had to think long and hard before launching a hostile takeover bid, not only because this method was the most expensive way to buy a company, but also because its likelihood of success was relatively low and there was an equal prospect of driving the quarry into the waiting hands of a competitor.

This balance has been upset in recent years. The wholesale dismantling of takeover defences, coupled with the power of proxy advisors like ISS, who favour takeover bids, and the growth in hedge funds with their creative techniques for accumulating stock positions, greatly reduce the prospect of a target remaining independent. It is against this backdrop that Valeant and Pershing Square hatched their plan. Valeant took virtually no risk and stood to either buy Allergan (presumably for a lower price than they would have had to pay had their partner not been able to amass its stake on the cheap), or reap a handsome profit if someone else did. As it turns out, Valeant suffered other forms of damage to its reputation and business model, but either did not consider these risks or thought them worth taking. Pershing Square, for its part, stood to make a fortune as long as Allergan was sold – whether to Valeant or to a "white knight" – which was highly likely in the current environment, especially with the prior acquisition of a sizable voting block, attracting a wolf pack of supporters, and lobbying aggressively for a deal. Pershing Square could only lose if Allergan remained independent. This was possible but very unlikely – the coin might not land on either heads or tails but on its edge – and the potential loss was disproportionately small relative to their likely

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gain given the quality of the asset in which they were investing. Corporate buyers accountable to shareholders would likely still be hesitant to risk billions in that way, especially with no due diligence beyond public filings. But a hedge fund investing other people's money (often people willing to indulge a considered gamble) is in a better position to take, and is in the business of taking, such a risk.

The takeover battle was acrimonious, as they usually are, with fight letters, threats, insults and, of course, litigation. Allergan and some of its shareholders accused Valeant and Pershing Square of violating the insider trading rules applicable to tender offers, and sought to block Pershing Square from voting its shares at a special meeting Pershing Square called to replace Allergan directors. A federal district court declined on procedural standing grounds to enjoin Pershing Square from voting, but agreed that "serious questions" existed as to the legality of the takeover partnership employed by Valeant and Pershing Square.

Ultimately, the Valeant-Pershing Square bid for Allergan came to an end in the most conventional of manners – a third party "white knight", Actavis Plc outbid them. Actavis, like Valeant, was a predominantly U.S.-oriented company that had moved its jurisdiction of incorporation offshore in an inversion transaction and so had favourable tax attributes to bring to the transaction. As of the time of writing, the Actavis-Allergan transaction has not yet closed and the litigation over whether Valeant and Pershing Square violated the law by engaging in tipping and insider-trading is still pending.

However these matters may be resolved, the saga highlights a new potential threat that companies need to prepare for, and puts a bright spotlight on a number of loopholes in the federal securities laws that allow activist investors to profit at the expense of ordinary shareholders, underscoring the urgent need for reforms we have been urging for years.

Synergistic Activism

In a sense it is surprising that an activist-strategic partnership has taken so long to emerge. This is likely attributable to the distrust and distaste that most public corporations have historically had for the fund managers who press them to run their businesses to drive short-term results. However, the synergistic effects of the partnership are undeniable. Each party has its own goals – the hedge fund wants to turn a profit on its trade as soon as possible and minimise the risk of loss; the strategic buyer wants to acquire its target at the lowest possible cost and not lose money in the process. Each also brings certain attributes to the table. Strategic buyers actually want to acquire and run other companies and have the wherewithal (including stock as currency) to do so, but may be limited or delayed by antitrust considerations and constrained in their behaviour by reputational concerns. Hedge funds do not want to buy companies, but are skilled in covertly accumulating sizable equity positions, are unhampered by antitrust considerations (unless they actually partner with strategic buyers), and are often willing to engage in highly aggressive public relations tactics. This cocktail of strengths and incentives creates a powerful combination that gives each a better chance of achieving its goals.

As noted, a favourite activist tactic is to build a stake in a company that could make an attractive takeover target and then to press for a sale of that company. Indeed, there is much research[iv] indicating that most if not all of what is sometimes described as activist "value-creation" is attributable to those cases where they succeed in getting a target sold. Of course all widely held companies have an inherent control premium – the additional amount above its trading price a buyer would pay to control the entire company – which would be "unlocked" when the company is sold. The activist who succeeds in forcing a company to sell itself is thus not "creating" anything but simply accelerating the timing of that event. In some cases, they may be correct that the time is right to sell, and the company's directors may be wrong if they disagree. In other cases, activists may be completely wrong, but that is usually irrelevant to them because of their outsize incentive to secure a near-term profit.

Acquiring a toehold stake in the stock of a target, although desirable, is a tricky business for strategic acquirers. A sizable block would certainly help them press their takeover bid, and would lower their overall cost of acquisition (or provide some upside if their target is sold to another party). However, because the amount a strategic buyer can acquire before having to clear the Hart-Scott-Rodino antitrust requirements (currently $76 million) is generally too low to have any significant influence over the outcome of a sizable takeover battle, and because it would likely (for understandable reasons) be regarded as a hostile act by the target, bidders have historically shied away from building significant pre-announcement stakes.

The partnership between an aggressive hedge-fund and a strategic-buyer solves this conundrum: the hedge fund (assured in advance that the company will be put "in play") builds the foothold stake, supports the hostile bid, takes the risk of the target staying independent and shares the upside with the bidder if a "white knight" wins the prize instead. Everyone benefits. Except, of course, the target shareholders who sold their shares to the hedge fund on the cheap when it – but not they – knew of the impending takeover bid. Of course all of the target's shareholders, and society in general, may be worse off if the board was correct and it was not the right time to sell, or if the bidder's strategy for short-term value-maximisation (in Valeant's case, to fire thousands of scientists and cut back dramatically on R&D expenditures) was suboptimal.

The Valeant-Pershing Square gambit has brought to the fore the possibility of more partnerships between hedge-funds and strategic-buyers. But it has also highlighted the risks inherent in the structure, both as they relate to litigation and potential securities law violations, and reputational concerns. Despite the obvious synergies, we do not expect this to be a widely adopted model, at least until the dust settles. This episode also highlights certain significant loopholes in our federal securities laws, and the urgent need for reform in order to protect the investing public.

The Blow-by-Blow[v]

According to public filings, in early February 2014, J. Michael Pearson, the CEO of Canadian-incorporated pharmaceutical company Valeant Pharmaceuticals, had a meeting with Bill Ackman of Pershing Square to discuss unsolicited bids in the pharmaceutical industry generally. A few days later, they signed a confidentiality agreement, and Valeant informed Ackman that Allergan was its intended target. It is notable that it was Valeant that approached Ackman with its interest in launching the takeover bid. Given the ultimate apparently lucrative outcome for Pershing Square and the less appealing results for Valeant, it is likely that in the future it is the activists who will be trying to interest strategic players in a tag-team arrangement.

On February 25, the two parties agreed upon the basic terms of their arrangement and entered into a "Relationship Agreement". Under the Relationship Agreement, Pershing Square formed a purchasing vehicle, PS Fund 1, LLC, in which Valeant invested $75.9 million (just under the Hart-Scott-Rodino Act threshold for which a filing is required). Beyond that amount, the vehicle was funded by Pershing Square. In the Relationship Agreement, Pershing Square agreed to the following: to support any Valeant business combination with Allergan (and oppose any proposals that would impair their

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combination); to elect to take all stock in any Valeant business combination; to retain at least $1.5 billion of Valeant stock received (about one-third of its prospective stake) for at least one year; and to pay Valeant 15% of Pershing Square's net profits resulting from any third-party acquisition of Allergan.

In addition, Pershing Square and Valeant sought to address directly Rule 14e-3 under the U.S. Securities Exchange Act of 1934, which provides that if any person has taken any substantial step to commence a tender offer, it shall "constitute a fraudulent, deceptive or manipulative act" for any other person (in this case, Pershing Square) who is in possession of material non-public information about that tender offer which they received from, among others, the potential offeror (Valeant, in this case) to purchase shares in the potential target (Allergan). Pershing Square and Valeant addressed this issue by representing to each other that no substantial steps had been taken towards a tender offer. As the federal district court later found, such self-serving declarations merely evidence the fact that the parties were aware of the rule to be avoided, not that they had not actually violated it.

Pershing Square then proceeded to build its stake in Allergan through PS Fund 1, first acquiring actual shares in late February, up to just below the Hart-Scott-Rodino Act filing threshold of $75.9 million, and then much more significant amounts of in-the-money options to acquire Allergan stock. Options were acquired rather than the underlying shares because the Hart-Scott-Rodino Act does not require an acquirer to obtain HSR clearance before purchasing options – only when exercising those options and acquiring the underlying voting shares. These options were exercisable at any time for 366 days, thus qualifying as beneficially owned by Pershing Square for Schedule 13D filing purposes.

Under current federal securities laws, a shareholder has a 10-calendar-day window between the time it crosses the 5% disclosure triggering level and the date it must file the Schedule 13D disclosing its interest. Pershing Square used this 10-day window to rapidly proceed from just under 5% to nearly 10% ownership of Allergan.

On April 21, at the end of this 10-calendar-day period, Pershing Square filed a Schedule 13D, reporting the 9.7% stake in Allergan which it had acquired at an average price of around $130 per share without attracting any publicity, and stated its intent to engage in discussions with the Allergan board regarding governance and strategic plans. The filing also announced that Valeant would be proposing a merger with Allergan. On April 22, Valeant publicly submitted a merger proposal to the Allergan board under which each Allergan share would be exchanged for $48.30 in cash and 0.83 shares of Valeant common stock, valued at $152.88 per share. On the same day, Pershing Square publicly voiced its support of this merger and agreed to elect only stock consideration in the transaction. Allergan promptly adopted a one-year shareholder rights plan (aka a "poison pill") with a 10% trigger, to ensure that Pershing Square and Valeant would not be able to continue acquiring shares and effectively creep (or race) to a control position without paying an appropriate control premium. Pershing Square filed an HSR notification, and the antitrust agencies granted early termination on May 1, allowing PS Fund 1 to exercise its options and hold the 9.7% stake in Allergan outright.

On May 12, Allergan announced its board's unanimous rejection of Valeant's unsolicited proposal, stating that the proposal undervalued the company and created significant risks and uncertainties for shareholders, and questioning how Valeant would achieve the level of cost cuts it was proposing without harming the long-term viability of the business. Over the next month, in addition to continued public relations activities, Valeant increased its cash-and-stock offer, first to around $163 per share, and then two days later to around $177, and Pershing Square announced it would forego all cash and accept 100% of its consideration in Valeant stock and cede some value to other Allergan shareholders. Valeant's CEO Pearson stated that he was willing to proceed on a hostile basis if Allergan was unwilling to negotiate.

On June 2, Pershing Square filed preliminary proxy materials for the calling of a special meeting of Allergan shareholders, to vote on proposals requesting the Allergan board to promptly engage in discussions with Valeant, and to replace six members of Allergan's board with six new nominees friendlier to Valeant and Pershing Square.

Allergan for its part continued to reject Valeant's increased offers and filed its own proxy materials to oppose the calling of the special meeting. Allegan criticised Valeant's business model and pointed out that Morgan Stanley, Valeant's own financial adviser in connection with the takeover bid, had in pitch materials when it was trying to get hired by Allergan, referred to Valeant as a "house of cards".

On June 18, Valeant launched an exchange offer (a tender offer in which part of the consideration is stock) for Allergan shares after Allergan's board of directors had again rebuffed its unsolicited merger proposal. On June 23, Allergan's board of directors recommended that Allergan shareholders reject Valeant's "grossly inadequate" offer.

On August 1, Allergan filed a lawsuit against Valeant and Pershing Square alleging violations of federal securities laws and insider trading in the U.S. District Court in Central California (Southern Division). In a press release, Allergan alleged that Valeant had taken steps towards the commencement of a tender offer for Allergan and had "tipped" Pershing Square about that information (which had of course not been publicly disclosed), and that Pershing Square then traded on that material, non-public information, "reaping more than $1 billion in paper profits from unsuspecting stockholders who were unaware of the upcoming offer".[vi]

At the much-publicised urging of Pershing Square, proxy advisory services ISS and Glass Lewis and other shareholders, Allergan announced on August 26 that it would hold a special shareholders meeting on December 18. Allergan argued however that Pershing Square should be enjoined from voting its shares at that special meeting because it had acquired them on the basis of inside information in violation of law.

On November 4, the U.S. District Court for the Central District of California ruled that Allergan did not have standing to prevent Pershing Square voting its Allergan shares at the scheduled shareholders meeting. The court stated that there were "serious questions" about whether Pershing Square had violated insider-trading rules by acquiring Allergan shares while preparing a bid with Valeant and enjoined Valeant and Pershing Square from voting their shares until certain corrective disclosures were made regarding their hostile acquisition plan.

On November 17, Allergan and Actavis announced that they had entered into a definitive merger agreement, pursuant to which Actavis would acquire Allergan for $219 per share in cash and stock. Pershing Square subsequently withdrew its request for a special meeting and confirmed support for the Actavis deal.

Although the partnership between Valeant and Pershing Square to bid for Allergan failed, Pershing Square still stands to recognise a gain of approximately $2.6 billion on the closing of the Allergan-Actavis merger (subject to the pending litigation), and Valeant will receive 15% of Pershing Square's net profit under their Relationship Agreement. Allergan shareholders at the time of the signing of the Actavis merger agreement will certainly benefit from the greatly

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increased consideration in that merger relative to Valeant's bid. Because of the transaction, one will never know if this was the optimal time for Allergan to be sold or whether, as was the case when Airgas was able to fend off a hostile bid from Air Products that seemed like an attractive premium at the time, a stand-alone strategy would have yielded much greater value. The big losers in this saga are of course those shareholders of Allergan who sold their shares to Pershing Square at a time when it knew of Valeant's intent to launch a bid for Allergan and they did not. As of time of writing this article, the litigation over whether or not Valeant and Pershing Square committed actionable insider trading is still pending.

Need for Reform

However the pending litigation is ultimately resolved, the Allergan situation has shone a bright light on some significant loopholes in the legal framework governing takeover bids in the U.S. that urgently need to be addressed.

Regulation 13D Must be Updated

Regulation 13D under the U.S. federal securities laws was intended to provide early warning to shareholders of a public company and the market in general of a threatened change of control, represented by accumulation of a non-passive 5% or greater stake. The Williams Act, adopted in 1968, required a statement on Schedule 13D to be filed within 10 days of crossing the 5% threshold. This rule is antiquated, having been implemented long before the advent of the internet, or the sophisticated types of derivatives and computerised trading techniques currently in use. Today, the requisite filing could be made in a matter of hours, and most other countries require such disclosures much more quickly, while the 10-day window allows the bidder to increase its stake dramatically, possibly even decisively (e.g., JCPenney), before having to make its first public disclosure. We have been urging the SEC to shorten this time period for several years.[vii] As we have noted before,[viii] the only argument that anyone has expressed against updating the 13D rules is that activist hedge funds need the ability to build blocks larger than 5% in secret to provide them the incentive to shake up corporate America. Even if this argument had any merit applied to activism designed to "improve" underperforming companies – which we believe it does not – it most certainly should not trump the need for fair and transparent securities markets, with full, prompt disclosure of large block accumulations, direct or derivative. Moreover it holds absolutely no water when the goal is to give hostile bidders a "leg up" as was the case with Allergan (where approximately $2.6 billion dollars in value will have been transferred from selling shareholders without knowledge of the pending bid to the hedge fund that had been tipped off, one billion dollars of which was made on the first day). Although not relevant in this particular case because Pershing Square acquired stock options rather than more exotic derivatives like total return swaps, Regulation 13D also needs updating to address the many forms of derivative securities that have been created since its promulgation.

The Insider Trading Rules Must Be Applied and Harmonised

Rule 14e-3 under the Securities Exchange Act restricts "any person who possesses material non-public information relating to a tender offer by another person from trading in target company securities if the bidder has commenced or has taken substantial steps towards commencement of the bid". Rule 14e-3 was adopted by the SEC in response to the growth of insider-trading activity in connection with the rise in merger and acquisition transactions, in particular hostile deals, during the 1980s. One of the objectives of adopting the rule, in addition to preventing insiders from unfairly profiting on non-public information, was to prevent the practice of "warehousing" target shares, that is, having them accumulated by arbitrageurs (people like Ivan Boesky) who would support a hostile bid, so as to increase its odds of success.

Valeant and Pershing Square were of course aware of this rule and knew that if Valeant simply told Pershing Square of its intention to commence a bid for Allergan, and Pershing Square then bought Allergan shares, they would both be violating the law. Valeant and Pershing Square therefore took express pains to sidestep Rule 14e-3. First they purported to style themselves as co-bidders (even though Pershing Square was never bidding for anything) because the rule expressly "does not prohibit the bidder from buying target shares or from telling its legal and financial advisors about its plans". Then, in the Relationship Agreement, they represented to each other that they had not (yet) taken substantial steps towards a tender offer. In the ensuing litigation, the District Court, however, recognised that just because Valeant and Pershing Square said that they had not yet taken "substantial steps" towards a tender offer did not mean that in fact they had not, and that they had thereby violated Rule 14e-3. Indeed, the Relationship Agreement itself explicitly contemplated a tender or exchange offer in stating that Valeant and Pershing Square would each be a "co-bidder" if a tender offer were launched for Allergan's shares.

Although Valeant only officially launched its exchange offer for Allergan shares on June 18, months after Pershing Square had acquired its stake, the question to be determined is whether the discussions, negotiations and other actions taken by Valeant and Pershing Square can, in the aggregate, be construed to amount to "substantial steps" towards a tender offer. If so, then Pershing Square's acquisition of Allergan shares between February and April 2014 would be the fruits of insider trading and would have to be disgorged, and Pershing Square and Valeant may be subject to further penalty.[ix]

However this issue is ultimately decided in court, regulators should harmonise the rules applicable to hostile takeovers. There is no logical reason why insider trading should be explicitly proscribed in connection with tender offers but not in connection with other hostile bids that do not involve a tender or exchange offer. The impact on unsuspecting selling shareholders is exactly the same. And the objectionable effect of warehousing target shares to tilt the playing field in favour of a hostile bidder is also the same. Perhaps in the late 1980s when Rule 14e-3 was promulgated, it was the case that a hostile bid without a tender offer had no chance of success. In today's market, however, with staggered boards all but eliminated and decisive voting power in the hands of concentrated shareholder groups and proxy advisors, a hostile bid can be successful without a tender offer. Valeant appears to have believed (perhaps not unreasonably based on historical precedent) that a tender offer was a necessary step in the hostile bid process, but the next activist-strategic tag-team may be more careful. But any manoeuvres future bidders may employ to enhance their litigating position may not fundamentally compromise their prospects for success in the current environment. With arbitrageur, hedge fund and ISS support, they could still replace the target company's directors with individuals incentivised and willing to negotiate a sale of the target company. In that situation, Rule 14e-3 would not be available to protect selling shareholders from insider trading by hedge funds colluding with the bidder. That seems to be an egregious and inappropriate result that could be easily remedied by broadening 14e-3 to apply to all hostile takeover bids.

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Hart-Scott-Rodino

In order to achieve their objectives, Valeant and Pershing Square also had to thread the needle under the Hart-Scott-Rodino Act, which requires that a party make certain filings and obtain clearance before buying more than $76 million of stock in another company. They achieved this by keeping Valeant's investment below the $76 million level, having PS Fund 1 acquire less than $76 million in voting stock and the rest of its 9.7% stake in the form of in-the-money options (which only require clearance to exercise not to acquire), and filing for HSR clearance to exercise those options only after Valeant had publicly disclosed its takeover proposal. In this instance, and despite Valeant's and Pershing Square's cooperation and profit-sharing arrangement, the antitrust regulators treated Pershing Square's HSR notification as they would any passive, non-strategic investment entity, and granted early termination of the HSR waiting period in a matter of days, rendering all 9.7% of Allergan shares held by Pershing Square available quickly for voting in support of Valeant's bid. It is not clear whether the regulators fully appreciated that Pershing Square was in a partnership with Valeant, a strategic player and competitor whose combination with Allergan raised real antitrust issues. We believe that the Federal Trade Commission should have treated the partnership as a strategic competitor and given PS Fund 1's HSR filing the same searching review they would have given to Valeant alone – rather than treat PS Fund 1 as a passive investor whose large stake in Allergan raised no competitive implications. We understand that ultimately Valeant would have had to clear the regulatory hurdle to complete a full acquisition, but in the case of a partnership like this, it is our view the regulators should have addressed potential anticompetitive implications as soon as Valeant's entanglement in the bidding partnership emerged.

Conclusion

The Pershing Square-Valeant partnership bid for Allergan scores points for creativity but is inconsistent with the policy of prevailing law. Companies need to be aware of this new takeover threat and be prepared to react on very short notice to dramatic changes in their shareholder base. While the model created by Pershing Square and Valeant may not be widely adopted by corporate acquirors, in the face of the legal challenges such structures will face, the potential upside of not only taking a stake and advocating for a change-in-control transaction, but actually teaming up with someone who is poised to propose a premium acquisition before even beginning to accumulate a stake, will certainly have activist investors licking their lips.

Regardless of whether the Valeant-Pershing Square example leads to a new wave of tag-team bids, we urge the SEC and other regulators to study this new tactic closely and recognise the degree to which it violates laws designed to protect investors, laws which are already sorely in need of updating and reform.

Endnotes

i. Pliny the Elder, Naturalis Historia 8.42 "*ex Africa semper aliquid novi*": "(There is) always something new (coming) out of Africa".

ii. See Martin Lipton, Adam O. Emmerich and Trevor S. Norwitz, "A New Takeover Threat: Symbiotic Activism", The Harvard Law School Forum on Corporate Governance and Financial Regulation (Apr. 25, 2014), available at http://blogs.law.harvard.edu/corpgov/2014/04/25/a-new-takeover-threat-symbiotic-activism/.

iii. Source: SharkRepellent.

iv. Robin M. Greenwood and Michael Schor, Investor Activism and Takeovers, J. Fin. Econ. 92, 362-375; Martin Lipton, "Empiricism and Experience; Activism and Short-Termism; the Real World of Business", The Harvard Law School Forum on Corporate Governance and Financial Regulation (Oct. 28, 2013), available at http://blogs.law.harvard.edu/corpgov/2013/10/28/empiricism-and-experience-activism-and-short-termism-the-real-world-of-business/.

v. See *Allergan v. Valeant Pharmaceuticals Int'l, Inc.*, Case No. SACV-1214 DOC at 1-8 (C.D. Cal. Nov. 4, 2014).

vi. "Allergan to Request California Federal Court Block Valeant and Pershing Square from Voting Shares Acquired in Violation of Insider Trading Laws", Allergan, Inc. Press Releases (Aug. 26, 2014), available at http://agn.client.shareholder.com/releasedetail.cfm?ReleaseID=867860.

vii. Letter from Wachtell, Lipton, Rosen & Katz to SEC ("Petition for Rulemaking Under Section 13 of the Securities Exchange Act of 1934") (Mar. 7, 2011).

viii. See Martin Lipton, Adam O. Emmerich and Trevor S. Norwitz, "A New Takeover Threat: Symbiotic Activism", The Harvard Law School Forum on Corporate Governance and Financial Regulation (Apr. 25, 2014), available at http://blogs.law.harvard.edu/corpgov/2014/04/25/a-new-takeover-threat-symbiotic-activism/.

ix. David Welch, "Ackman's Allergan Court Victory May Prove Costly Later", Bloomberg (Nov. 9, 2014), available at http://www.bloomberg.com/news/2014-11-08/ackman-s-allergan-court-victory-may-still-cause-legal-headaches.html.

Acknowledgment

The authors gratefully acknowledge the assistance of Stephanie H. Lee for her help in writing this article.

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