

August 25, 2015

Split FTC Charges Activist Hedge Fund with Violating the HSR Act

Yesterday, the Federal Trade Commission [announced](#) that Daniel Loeb's Third Point had settled a [complaint](#) charging violations of the notification and waiting period requirements of the Hart-Scott-Rodino Act in connection with purchases of Yahoo! stock in 2011.

The HSR Act requires that acquirors notify the federal antitrust agencies of transactions that meet applicable thresholds and observe a *pre-acquisition* waiting period. Acquisitions of up to 10% of a company's voting stock are exempt if made *solely* for the purpose of investment, and the acquirer "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." Buyers who intend to be involved in the management of the target company or to seek representation on its board of directors are not eligible for the exemption. HSR requirements have historically been enforced strictly and narrowly against public companies, officers, directors and investors, without deference or favor to any particular class of violator.

According to the FTC's complaint, funds affiliated with Third Point acquired voting securities of Yahoo! in excess of the HSR notification threshold in August 2011, and continued building a position through September 8, 2011, when Third Point filed a Form 13D with the SEC. Third Point did not file and observe the HSR waiting period prior to making those acquisitions, claiming they were made "solely for the purpose of investment." While engaged in the alleged "investment-only" stock purchases, Third Point "took actions that belied an investment-only intent," including contacting third parties to determine their interest in replacing the current CEO of Yahoo! or serving as a director of Yahoo!, internally deliberating the possible launch of a proxy fight to obtain board representation and making public statements regarding proposing an alternative board slate. The FTC accordingly concluded that Third Point was not eligible for the passive investment exemption and had failed to observe the HSR notification and waiting period requirements. The FTC did not assess civil penalties and instead sought only injunctive relief, prohibiting Third Point from improperly relying on the passive investment exemption when engaging in such conduct in the future.

Without questioning that the HSR Act had been violated, two of the five FTC Commissioners [dissented](#) from the FTC's enforcement action. The dissent suggested that the FTC should have "closed the investigation without taking any action as a matter of prosecutorial discretion," in part due to a belief that "shareholder advocacy" can benefit "the market for corporate control." The dissenting Commissioners — one of whom recently announced his resignation and is returning to academia — encouraged the antitrust agencies to reconsider the parameters of the investment-only exemption, including possibly expanding the scope of the exemption to cover all acquisitions that do not result in the buyer holding more than 10% of the target's stock, regardless of the buyer's intent — a proposal that the FTC formally considered and rejected in 1988. The dissenting Commissioners did not address the reality that shareholder activism, in all its forms, has been aggressively pursued for many years by funds which manage to comply with, rather than violate, applicable legal requirements.

As [noted](#) by the Director of the FTC's Bureau of Competition, the FTC has "long made clear that the investment-only exemption is a narrow exemption." In its [statement](#), the FTC also emphasized the "significant public interest in instilling respect for the HSR Act and deterring would-be violators from ignoring HSR rules and requirements" and upholding the "legitimate expectation of the business community, practitioners, and the general public that the antitrust agencies will act clearly, consistently, and transparently in their interpretation and enforcement of the HSR Act and rules." We concur in these sentiments and applaud the FTC's action to require compliance with applicable legal requirements, even by activist hedge funds, and regardless of any hypothetical (and, in this case, incorrect) theory that the HSR laws should not be enforced. To the contrary, protecting investors and ensuring the integrity and fairness of U.S. public securities markets depend on the rule of law, and would be enhanced not only by all acquirors properly complying with the HSR rules, but also by modernizing the beneficial ownership reporting rules under the federal securities laws, as we have long [advocated](#).

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