

ALERTS

Hart-Scott-Rodino Filing Update: Recent Settlement Interprets ‘Investment-Only’ Exemption Narrowly

September 3, 2015

Last week, the Federal Trade Commission (“FTC”) and U.S. Department of Justice filed a proposed settlement in federal court to settle charges that Third Point LLC and three of its affiliated funds (the “Third Point Funds” and, together with Third Point LLC, “Third Point”) violated the Hart-Scott-Rodino (“HSR”) Act’s premerger reporting requirements in connection with their 2011 acquisitions of stock in Yahoo! Inc. The government’s complaint alleges that Third Point improperly relied on the “investment-only” exemption to the HSR Act’s filing and waiting requirements while acquiring Yahoo! voting securities in excess of the HSR Act’s filing threshold. Third Point allegedly engaged in actions evidencing an “intent to acquire voting securities of Yahoo! other than solely for the purpose of investment,” including reaching out to potential candidates for Yahoo!’s board of directors and taking preliminary steps to launch a proxy contest for seats on Yahoo!’s board.

The settlement clarifies the FTC’s view that the HSR Act’s “investment-only” exemption applies only to purely passive acquisitions of voting securities. The exemption is not available if an acquiring person purchases voting securities with the intention of influencing basic business decisions or participating in the management of the issuer. Most importantly, the FTC has clarified its position that efforts by an investor to so much as *prepare* to launch a proxy battle or propose a change in corporate policy can render the exemption unavailable. Thus, prior to consummating a large acquisition, investors should seek advice of counsel regarding (1) whether the size of an acquisition triggers the HSR

Act's filing requirement; and (2) whether any of their actions, statements or intentions could be characterized as inconsistent with an intent to invest "solely for the purpose of investment."

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