

# Investment Firm to Pay Record \$11 Million Fine for Violation of Hart-Scott-Rodino Act

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On July 12, 2016, the **Department of Justice (“DOJ”)** announced that investment firm **ValueAct Capital (“ValueAct”)** agreed to pay a record \$11 million fine to settle charges that it and its affiliates violated the reporting and waiting period requirements of the **Hart-Scott-Rodino Antitrust Improvements Act of 1976** (the “HSR Act”). The highest fine previously paid for an HSR Act violation was \$5.67 million. As part of the settlement, ValueAct is also prohibited from relying on the so-called “investment-only” or “passive investment” exemption to the HSR Act in situations where ValueAct intends to influence, or is considering influencing, basic business decisions of a company, including decisions relating to merger and acquisition strategy or other competitively significant business strategies.

The HSR Act requires that parties acquiring interests (including minority positions) in companies that are valued above certain dollar thresholds must file a notification form and observe a waiting period prior to closing the transaction. One exemption to the HSR Act requirements allows for an acquisition of up to 10 percent of the outstanding voting securities of an issuer, regardless of dollar value, provided the investor makes the acquisition “solely for the purpose of investment.” As explained in the regulations implementing the HSR Act, this means that an acquirer must have “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.” Since the availability of the “passive investment” exemption turns on the intent of the acquirer, which can change over

time, acquirers must separately consider whether the exemption applies each time a purchase of voting securities is made.

In 2014 and continuing into 2015, ValueAct purchased shares of two oilfield services companies after the companies had announced their intention to merge. ValueAct's purchases ultimately accumulated to over \$2.5 billion worth of stock in the two entities. ValueAct did not make any HSR filings or observe any waiting periods prior to its acquisitions.

According to the DOJ, ValueAct acquired the shares with the intent to influence the companies' proposed merger, as well as other business decisions. ValueAct executives met often with and sent numerous emails to top executives of both companies, sharing ideas for improvement in specific business areas, as well as ideas regarding post-merger integration of the companies. Together, these actions prohibited ValueAct from lawfully relying on the investment-only exemption, and instead, ValueAct was obliged to notify the federal antitrust agencies and observe the statutory waiting period before completing its purchases. The DOJ's [Competitive Impact Statement](#) also cites to ValueAct's website as evidence that the investment firm does not typically take passive stakes in companies but rather is an activist investor.

The settlement is noteworthy in that outlines specific actions that the DOJ views as attempting to influence basic business decisions of a company and therefore would prohibit an acquirer from relying on the investment-only exemption. According to the DOJ, an investor who is considering influencing merger and acquisition strategy, corporate restructuring, and other competitively significant business strategies is not passive. More specifically, the settlement enjoins ValueAct from relying on the investment-only exemption if it intends to take the following actions:

(1) proposing a merger, acquisition, or sale to which the issuer of the acquired voting securities is a party; (2) proposing to another person in which the Defendant has an ownership stake the potential terms for a merger, acquisition, or sale between the person and the issuer; (3) proposing new or modified terms for a merger or acquisition to which the issuer is a party; (4) proposing an alternative to a merger or acquisition to which the issuer is a party, either before consummation or upon abandonment; (5) proposing changes to the issuer's corporate structure that require shareholder approval; or (6) proposing changes to the issuer's strategies regarding pricing, production capacity, or production output of the issuer's products and services.

This case is the second government action brought in the past year relating to improper reliance on the passive investment exemption. In August 2015, the Federal Trade Commission alleged that hedge fund manager Third Point could not use the exemption in connection with acquisitions of stock in Yahoo! Inc. because at the time of the stock purchases, Third Point was taking actions inconsistent with an investment-only intent, such as communicating with third parties to determine their interest in becoming the CEO or a board candidate of Yahoo!.

The ValueAct and Third Point cases suggest that the government is paying close attention to the actions of minority investors. This has important implications for investment funds:

- Conduct that may not previously have been viewed by investment firms as seeking to influence “basic business decisions” may now disqualify investors from relying on the passive investment exemption. Investment funds may find themselves in a position of having to disclose their acquisitions of stock to target companies earlier than they are used to, or may want to.
- Investors should carefully consider the HSR Act implications of public statements on their websites and in SEC filings regarding their investment strategies and goals.
- Investors cannot assume that the availability, or lack thereof, of the HSR Act’s passive investment exemption will be determinative of their SEC reporting requirements, such as whether they can report beneficial ownership on Schedule 13G, which requires less information than Schedule 13D. The SEC recently updated its [Compliance and Disclosure Interpretations](#) (Question 103.11) to address this issue.
- The government has also raised the financial stakes for failing to make an HSR filing when required; as of August 1, 2016, the maximum civil penalty for an HSR Act violation will increase from \$16,000 per day to \$40,000 per day for each day a party is in violation of the HSR Act.

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