

FTC Commissioners Divided on Scope of Investment-Only Exemption to HSR Rules

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On August 24, 2015, the Federal Trade Commission (FTC) announced a consent settlement based on an application of the investment-only exemption to the Hart-Scott-Rodino Act's premerger notification requirements. The settlement relates to the 2011 acquisitions of shares of Yahoo!, Inc. by Third Point LLC and certain of its affiliated investment funds, led by activist shareholder Daniel Loeb.

All five commissioners agreed that under the FTC's traditionally narrow interpretation of the investment-only exemption, Third Point's shareholder activism exceeded the scope of the exemption, which applies only to purely passive investments where the acquiring person takes no steps to influence management of the target firm. However, the two dissenting Republican commissioners¹ nonetheless believed that enforcement was unwarranted here, where no harm to competition was implicated and where enforcement could "chill" beneficial shareholder activism. The two Republicans also signaled a willingness to significantly broaden the scope of the exemption.

With an election year looming, this split within the commission could foreshadow a widening FTC interpretation of the exemption. Such a shift could have implications for areas beyond activist investing, such as filing requirements for company officers and directors receiving substantial equity compensation.

Background

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act or the Act) and its implementing rules require parties to notify federal antitrust agencies and observe a statutory waiting period before consummating transactions valued above an annually adjusted threshold.² The objective of these requirements is to ensure that the agencies have an opportunity to review transactions that could substantially reduce competition before they are consummated.

However, there are limited circumstances in which the potential for competitive harm is so remote that the HSR Act and its implementing rules exempt parties from these requirements. One such circumstance is the investment-only exemption, by which acquisitions of voting securities of a target undertaken "solely for purposes of investment" are not subject to the Act's notification requirements if, as a result of the transaction, the buyer holds 10 percent or less of the outstanding securities of the target.³ In its statement of basis and purpose for HSR rulemaking, the FTC interprets an acquisition "solely for purposes of investment" as one in which the acquirer had "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."⁴

The FTC's Complaint

According to the FTC's complaint, in August and September 2011, the Third Point funds acquired Yahoo! shares in excess of the HSR statutory threshold without first making the required HSR filings.⁵ In the statement the majority of the commission issued

¹ Commissioner Joshua Wright announced earlier this month that he would be stepping down from his post at the FTC to return to academia. August 24, 2015, the day this action was taken, was his last day.

² 15 U.S.C. §§ 18a(a), 18a(b).

³ 16 C.F.R. § 802.9.

⁴ Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450 - 33,556 (July 31, 1978).

⁵ Pursuant to the Tunney Act, the FTC has referred its complaint to the Department of Justice, which filed the complaint on August 24, 2015, in U.S. District Court for the District of Columbia. A copy of the complaint may be found here: <https://www.ftc.gov/system/files/documents/cases/150824thirdpointcmt.pdf>.

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explaining its actions, Commissioners Edith Ramirez, Terrell McSweeney, and Julie Brill indicated that Third Point funds could not claim the investment-only exemption because they were not purely passive investors:

In this case we allege that Third Point was communicating with third parties to ascertain their interest in becoming a candidate for Yahoo!’s board of directors, taking other steps to assemble an alternate slate of board of directors, drafting correspondence to Yahoo! announcing Third Point’s interest in joining Yahoo!’s board, internally deliberating about the possible launch of a proxy battle for Yahoo! directors, and making public statements about proposing a slate of directors at Yahoo!’s next annual meeting. Given these actions by Third Point, we do not believe the investment-only exemption applies.⁶

The majority made clear its motivation was the “significant public interest in instilling respect for the HSR Act and deterring would-be violators from ignoring HSR rules and requirements” and that “the antitrust agencies will act clearly, consistently, and transparently in their interpretation and enforcement of the HSR Act and rules.”⁷ The commission did not seek civil penalties against Third Point, but rather, required it to make HSR filings when engaging in certain types of shareholder advocacy, implement an internal compliance program and provide periodic compliance reports to the FTC.⁸

⁶ Commission statement, <https://www.ftc.gov/public-statements/2015/08/statement-federal-trade-commission-matter-third-point>.

⁷ Commission statement, at 2.

⁸ Final judgment, <https://www.ftc.gov/system/files/documents/cases/158024thirdpointjudgment.pdf>, at 5-8.

Republican Commissioners Dissent

Although they conceded that Third Point’s conduct constituted a violation of the Act, the commission’s two Republican members, Joshua Wright and Maureen Ohlhausen, argued that this consent settlement was not in the public interest. Citing the benefits of shareholder activism and the lack of competitive harm, they argued in their dissenting statement that a narrow exemption available only to purely passive investors “is likely to chill valuable shareholder advocacy while subjecting transactions that are highly unlikely to raise substantive antitrust concerns to the notice and waiting requirements of the HSR Act.”⁹ Wright and Ohlhausen stated the commission should have exercised the prosecutorial discretion to not intervene against Third Point for these reasons, and that the scope of the investment-only exemption should be revisited.¹⁰

⁹ Ohlhausen and Wright statement, https://www.ftc.gov/system/files/documents/public_statements/777351/150824thirdpointohlhausen-wrightstmt.pdf.

¹⁰ Ohlhausen and Wright statement, at 4.