

Interpretation of Antitrust Exemption at Heart of DOJ Action Against ValueAct

Skadden

04/08/16

If you have any questions regarding the matters discussed in this memorandum, please contact the following attorneys or call your regular Skadden contact.

Matthew P. Hendrickson

New York
212.735.2066
matthew.hendrickson@skadden.com

Clifford H. Aronson

New York
212.735.2644
clifford.aronson@skadden.com

Maria Raptis

212.735.2425
New York
maria.raptis@skadden.com

Kenneth B. Schwartz

New York
212.735.2731
ken.schwartz@skadden.com

This memorandum is provided by Skadden, Arps, Slate, Meagher & Flom LLP and its affiliates for educational and informational purposes only and is not intended and should not be construed as legal advice. This memorandum is considered advertising under applicable state laws.

Four Times Square
New York, NY 10036
212.735.3000

skadden.com

On April 4, 2016, the U.S. Department of Justice, Antitrust Division (DOJ) filed a complaint against activist investor ValueAct Capital in California federal court, requesting a \$19 million fine for violations of the Hart-Scott-Rodino (HSR) Act's notification provisions.¹ The DOJ's complaint alleged that ValueAct's purchase of over \$2.5 billion in voting securities of Halliburton Co. and Baker Hughes Inc. after they had announced a merger was not a passive investment eligible for the "investment only" HSR exemption. While the Federal Trade Commission (FTC) has consistently stated that this exemption is very narrow, its position has never been challenged in court.² This case could be a significant development with far-reaching implications for a key HSR exemption under the HSR rules.

Background

Halliburton and Baker Hughes, competitors in the provision of oil field products and services, announced their intention to merge in November 2014. From December 2014 to June 2015, two ValueAct funds, ValueAct Master Capital Fund, L.P. (Master Fund) and ValueAct Co-Invest International, L.P. (Co-Invest Fund), purchased voting securities in Halliburton that exceeded \$1.4 billion and \$138 million, respectively. In addition, from November 2014 to January 2015, Master Fund also acquired Baker Hughes voting securities exceeding \$1.2 billion. These acquisitions exceeded the HSR reportability thresholds of \$75.9 million in 2014 and \$76.3 million in 2015.

Investment-Only Exemption

Under the investment-only exemption to the HSR Act and HSR rules, an entity can buy up to 10 percent of the shares of an issuer without making a filing under the HSR Act if it does so "solely for the purpose of investment" with "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."³ Merely voting the shares is not considered inconsistent with an investment-only intent. The Statement of Basis and Purpose issued at the time the HSR rules were promulgated identified a number of potential actions considered inconsistent with an investment-only purpose, including nominating a candidate for the board of directors of the issuer, proposing corporate action requiring shareholder approval and soliciting proxies.⁴ The FTC's long-standing view is that these examples of actions inconsistent with a "passive investment" purpose are not exhaustive, and that the exemption is not available if the acquirer intends to attempt to have any influence over management.⁵

DOJ Allegations

In its complaint, the DOJ alleged that ValueAct violated the HSR Act by failing to file a notification after it purchased shares in both Halliburton and Baker Hughes that exceeded the HSR threshold. The DOJ mentioned ValueAct's similar previous violations of the Act and requested a civil penalty of at least \$19 million "to address ValueAct's

¹ Complaint, *United States v. VA Partners I LLC*, 3:16-cv-01672 (N.D. Cal. 2016).

² Although the FTC Premerger Notification Office addresses questions of reportability under the HSR Act, the DOJ brings enforcement actions under the Act.

³ 15 U.S.C. §18a(c)(9); Rules 801.1(i)(1), 802.9.

⁴ FTC Proposed Rulemaking No. 245, 41 Fed. Reg. 55488 (Dec. 20, 1976).

⁵ Debbie Feinstein, Ken Libby and Jennifer Lee, "Investment-Only Means Just That," *ftc.gov* (Aug. 24, 2015).

Interpretation of Antitrust Exemption at Heart of DOJ Action Against ValueAct

violations of the HSR Act, and ... restrain ValueAct from further violations.”⁶ Throughout its complaint, the DOJ cited internal ValueAct documents, including drafts, investor presentations and Securities and Exchange Commission (SEC) filings, arguing that these documents evidenced an intent to influence the companies and help complete the merger. The DOJ also cited ValueAct’s Schedule 13D filing with the SEC, which publicly disclosed ValueAct’s stake in Baker Hughes and reported that ValueAct would discuss “competitive and strategic matters” with and “prop[os] changes in ... operations” to Baker Hughes’ management. The complaint described the 13D disclosures as “inconsistent with an intent to purchase voting securities ‘solely for the purpose of investment.’” ValueAct also allegedly discussed contingency plans with both Baker Hughes and Halliburton

⁶ Given the civil penalty allowable under the HSR Act — \$16,000 for each day an acquirer is in violation — the date on which a violation began is an important benchmark for the imposition of any fines. For the purposes of calculating the DOJ’s requested \$19 million penalty in *ValueAct*, each ValueAct fund was considered a “separate person,” and fines for the three investments at issue ran from the date an investment exceeded the HSR’s reportability threshold to the date that the fund sold a sufficient amount of securities to be under the threshold, if any.

in the event the merger failed, urging Baker Hughes to sell off parts of the company and assuring Halliburton that it would put pressure on Baker Hughes to sell selected pieces of its business in the absence of a full merger.

The FTC’s narrow interpretation of the investment-only exemption has been a significant restriction for activist investors because they cannot both move quickly to gain a substantial position in an issuer (by availing themselves of an HSR exemption) and attempt to influence the issuer’s behavior. ValueAct has yet to respond formally to the DOJ’s complaint but appears to be taking the position that its actions constitute the normal exercise of shareholder rights — more akin to voting the shares than seeking control over the issuer by proposing corporate action requiring shareholder approval or soliciting proxies — and therefore should fall within the scope of the exemption. Because the FTC’s interpretation of the exemption has never been tested in court, the *ValueAct* case may have significant implications on how it will be interpreted in the future and the extent to which activist investors may be allowed to influence management and operations of their investments.

Additional Contacts

Simon Baxter

Brussels
32.2.639.0310
simon.baxter@skadden.com

C. Benjamin Crisman, Jr.

Washington, D.C.
202.371.7330
benjamin.crisman@skadden.com

Frederic Depoortere

Brussels
32.2.639.0334
frederic.depoortere@skadden.com

Paul M. Eckles

New York
212.735.2578
paul.eckles@skadden.com

Shepard Goldfein

New York
212.735.3610
shepard.goldfein@skadden.com

Peter E. Greene

New York
212.735.3620
peter.greene@skadden.com

James A. Keyte

New York
212.735.2583
james.keyte@skadden.com

Karen Hoffman Lent

New York
212.735.3276
karen.lent@skadden.com

John H. Lyons

Washington, D.C.
202.371.7333
john.h.lyons@skadden.com

Matthew M. Martino

New York
212.735.2402
matthew.martino@skadden.com

Jeffrey A. Mishkin

New York
212.735.3230
jeffrey.mishkin@skadden.com

John M. Nannes

Washington, D.C.
202.371.7500
john.nannes@skadden.com

Neal R. Stoll

New York
212.735.3660
neal.stoll@skadden.com

Steven C. Sunshine

Washington, D.C.
202.371.7860
steve.sunshine@skadden.com

Ingrid Vandenborre

Brussels
32.2.639.0336
ingrid.vandenborre@skadden.com

James S. Venit

Brussels
32.2.639.0300
james.venit@skadden.com