Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright
In the Matter of Third Point
File No. 121-0019
August 24, 2015

This matter involves the appropriate scope of the investment-only exemption to the Hart-Scot-Rodino Act (HSR Act), which exempts from the Act's notice and waiting requirements "acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer."[1] We respectfully dissent from the Commission's narrow interpretation of the exemption because it 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. Specifically, we dissent from the Commission's decision to accept for public comment a consent order that would, among other things, enjoin Third Point from relying upon the investment-only exemption when it engages in certain shareholder advocacy such as soliciting third parties for interest in becoming a board candidate, discussing with an issuer board its candidates, or assembling a board slate. We believe such a narrow interpretation of the investment-only exemption is not in the public interest.[2] We therefore would have closed this investigation without taking any action as a matter of prosecutorial discretion.

We support the HSR Act and the premerger notification system and believe that, if that system is to continue to serve the overall purposes of the substantive antitrust laws, it must adapt to allow antitrust agencies to focus on those proposed transactions that are most likely to result in a substantial lessening of competition. More specifically, given the over-inclusiveness of the HSR regime—for example, from 1979 to 2011, second requests issued in only 3.31% of all transactions reported[3]—we believe the antitrust agencies should reevaluate the scope of the exemption in light of the policies underlying the HSR framework and the purposes of the Clayton Act, as well as changes that have taken place since the HSR regime was established in 1976.

We do not contend the Commission has no reason to believe an HSR violation has occurred here. The Commission's interpretation of the investment-only exemption in the HSR Rules is neither unreasonable nor plainly contrary to the text of the statute and regulations at issue. Nor is it necessarily inconsistent with previous consent orders involving the exemption

[1] 15 U.S.C. § 18a(c)(9). Section 801.1(i)(1) of the HSR Rules, 16 C.F.R. § 801.1(i)(1), further provides that "[v]oting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer."

[2] Section 5(b) of the FTC Act requires the Commission, before issuing any complaint, to establish both "reason to believe" that a violation has occurred and that an enforcement action would "be to the interest of the public." 15 U.S.C. § 45(b).

[3] *See* Bilal Sayyed, *A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption*, ANTITRUST SOURCE at 3-4 (Apr. 2013). *See also* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, HART-SCOTT-RODINO ANNUAL REPORT, FISCAL YEAR 2014, at 6 (2015), *available* at https://www.ftc.gov/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-sco-4 (percentage of transactions resulting in second request ranged from 2.5% to 4.5% during fiscal years 2005-2014).

that the agencies have reached with parties. However, in our view, pursuing an enforcement action in this matter was not in the public interest because the stock acquisition at issue here presented absolutely no threat of competitive harm and the type of shareholder advocacy pursued by the respondent here often generates well-documented benefits to the market for corporate control.[4]

On the issue of the public interest, the majority misreads our dissenting statement. Our opposition to their narrow reading of the exemption does not hinge solely on the risk of competitive harm from Third Point's acquisitions of Yahoo! Stock. Rather, it is based on the lack of competitive harm from this transaction, the unlikelihood that transactions in this class generate harm overall, and the benefits to the market that would result from interpreting the exemption more broadly to allow the type of shareholder advocacy pursued in this matter. We thus believe it is not in the public interest to interpret the exemption as the majority does here.

Further, the relevant question is not whether the probability that shareholder advocacy produces harm is zero, but rather whether the probability is sufficiently low so as not to justify requiring an HSR filing and the costs associated with it, including deterring activity on the margin. Not only is shareholder advocacy unlikely to raise competitive concerns, even if it did, given that the transactions would not raise the unscrambling of assets concern that motivated the adoption of the HSR Act, any necessary remedies can be obtained post-consummation without imposing a substantial burden on either the agency or the parties. Finally, the majority asserts that the order imposed in this matter does not prevent Third Point from engaging in shareholder advocacy that may be beneficial. Our concern, however, is that this order, as well as the majority's interpretation of the investment-only exemption, will more generally chill such advocacy by the respondent and other similar firms.

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[4] The notion that the threat of takeover would induce current managers to improve firm performance to the benefit of shareholders was first developed by Henry Manne. Manne's pathbreaking work on the market for corporate control arose out of a concern that antitrust constraints on horizontal mergers would distort its functioning. *See* Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965). Activist investors, including in particular activist hedge funds, can serve an important role in corporate governance and capital markets by reducing agency costs resulting from the divergence of the interests of managers and shareholders. *See, e.g.*, Ronald J. Gilson & Jeffrey N. Gordon, *The Agency Costs of Agency Capitalism: Activist Investors and the Revaluation of Governance Rights*, 113 COLUM. L. REV. 863, 901 (2013) ("In effect, capital market evolution has broken up the ownership bundle between rationally reticent institutional investors and potentially activist shareholders. To support effective governance, the legal regime needs to foster conditions in which the bundle can be reassembled through the complementary capacities and engagement of both.").

A growing body of empirical work lends support to the proposition that hedge fund activism is beneficial to shareholders and the economy more generally – both in the short and long term. *See, e.g.*, *id.* at 901, 903 & n.138 (collecting studies); Nickolay Gantchev, *The Costs of Shareholder Activism: Evidence from a Sequential Decision Model*, 107 J. FIN. ECON. 610 (2013) (showing that hedge fund activism yields benefits net of the costs involved in pursuing such activism and that more confrontational activist tactics have higher success rates); Alon Brav, et al., *Hedge Fund Activism: A Review*, 4 FOUND. & TRENDS IN FIN. 185, 241 (2009) (finding in a review of the academic literature on hedge fund activism, that the evidence supports the conclusion that such activism generally "creates value for shareholders by effectively influencing the governance, capital structure decisions, and operating performance of target firms"); Alon Brav, et al., *Hedge Fund Activism, Corporate Governance, and Firm Performance*, 63 J. FIN. 1729 (2008) (finding that activist hedge funds yield increased payouts, operating performance, and a higher rate of CEO turnover in its target companies).

Beyond the issues presented in this specific matter, the antitrust agencies should again reconsider the parameters of the investment-only exemption. Although past efforts to modify the exemption have failed to come to fruition for a variety of reasons, including Congressional opposition,[5] it is time to reevaluate its proper scope. There have been significant changes in the markets for capital and for corporate governance since Congress passed the HSR Act nearly forty years ago.[6] In addition, there is significant evidence that transactions that require the investment-only exemption to avoid the requirement of filing under the HSR Act—that is, transactions in which the buyer acquires less than ten percent of the seller's voting securities—are highly unlikely to result in a substantive antitrust challenge under the Clayton Act.[7] We should hesitate to deter, through a merger review regime designed to prevent transactions that substantially lessen competition, beneficial conduct that appears to present little, if any, risk of anticompetitive harm. This approach has the additional, and significant, benefit of economizing on the antitrust agencies' limited resources to focus on the matters most likely to harm competition.

There are several possible options that the antitrust agencies ought to explore. One option would be an exemption from the HSR Act's notification and waiting period requirements for acquisitions that do not result in the acquiring person holding in excess of ten percent of the issuer's outstanding voting securities. Such transactions—much like those that qualify for the investment-only exemption—are unlikely to raise competitive concerns and, even if they did, any necessary remedies can be obtained post-consummation without imposing a substantial burden on either the agency or the parties.

Another more immediate option would be to interpret the investment-only exemption to preclude reliance on the exemption only where the acquirer has engaged in the specific types of conduct identified in the Statement of Basis and Purpose (SBP)[8] issued by the agencies in promulgating the HSR Rules. The SBP, after explaining that "merely voting" one's stock in the issuer is not inconsistent with an investment purpose, provides several examples of conduct that "could" be viewed as "evidence of an intent inconsistent with investment purpose."[9] Those include:

> (1) Nominating a candidate for the board of directors of the issuer; (2) proposing corporate action requiring shareholder approval; (3) soliciting proxies; (4) having a controlling shareholder, director, officer or employee simultaneously serving as an officer or

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[5] *See* Sayyed, *supra* note 3, at 8-12.

[6] *See, e.g.*, Gilson & Gordon, *supra* note 4, at 878-88, 915-16 (describing various changes in ownership and governance of U.S. public corporations since the mid-twentieth century).

[7] *See, e.g.*, Sayyed, *supra* note 3, at 5-8, 13-15; *see also id.* at 8 (noting that the FTC and DOJ did not allege a substantive violation of Section 7 in conjunction with any HSR enforcement action during the 2003-12 time period); Premerger Notification; Reporting and Waiting Period Requirements, 53 Fed. Reg. 36831, 36837 (Sept. 22, 1988) (request by FTC and DOJ for public comments on proposed flat ten-percent exemption from the HSR Rules) ("Available records indicate neither of the antitrust agencies has ever challenged an acquisition of 10 percent or less of an issuer's voting securities as a violation of section 7.").

[8] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33450, 33465 (July 31, 1978).

[9] *Id.* at 33465.

> director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer. The facts and circumstances of each case will be evaluated whenever any of *these actions* have been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act's requirements.[10]

An interpretation of the investment-only exemption that is tied to the specific examples included in the SBP—that is, investing in a competitor or invoking formal corporate governance mechanisms—would also be entirely consistent with previous HSR cases settled by the antitrust agencies. Each of the investment-only matters brought and settled by the agencies involved either: (1) an allegation grounded in the SBP, including in particular that the issuer and acquirer of stock were competitors;[11] (2) an acquirer whose holdings exceeded the ten percent share ownership limit found in the exemption;[12] and/or (3) an intent to acquire control of the issuer, which intent is obviously inconsistent with an investment-only purpose.[13]

In any case, we strongly encourage our colleagues on the Commission and at the Department of Justice's Antitrust Division to explore potential modifications to the HSR Rules or a legislative amendment to the HSR Act designed to eliminate filing requirements for a category of stock acquisitions that have proven unlikely after 40 years of experience to raise competitive concerns.

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[10] *Id.* (emphasis added).

[11] *See, e.g.*, Complaint ¶ 27, United States v. Diller, No. 13-cv-01002 (D.D.C. July 2, 2013) (acquirer was a member of the issuer's board of directors); Complaint ¶ 20, United States v. Biglari Holdings, Inc., No. 12-cv-01586 (D.D.C. Sept. 25, 2012) (acquirer requested seats on issuer's board of directors; although not mentioned in the complaint, this matter also involved competitors); Complaint ¶¶ 16, 19, United States v. ESL Partners, L.P., No. 08-cv-02175 (D.D.C. Dec. 15, 2008) (acquirer was a member of the issuer's board of directors; acquirer also held more than 10% of issuer); Complaint ¶ 20, United States v. Gates, No. 04-cv-00721 (D.D.C. May 3, 2004) (acquirer was a member of the issuer's board of directors); Complaint ¶ 20, United States v. Manulife Financial Corp., Inc., No. 04-cv-00722 (D.D.C. May 3, 2004) (involving competitors; acquirer and issuer taking steps to combine); Complaint ¶¶ 1, 18, 26, United States v. Smithfield Foods, Inc., No. 03-cv-00434 (D.D.C. Feb. 28, 2003) (involving competitors; acquirer and issuer also taking steps to combine); Complaint ¶ 16, United States v. Pennzoil Co., No. 94-cv-02077 (D.D.C. Sept. 26, 1994) (involving competitors); Complaint ¶¶ 10, 12, United States v. Farley, No. 92-cv-1071 (N.D. Ill. Feb. 12, 1992) (involving competitors); Complaint ¶¶ 4, 5, United States v. Aero L.P., No. 91-cv-1315 (D.D.C. May 30, 1991) (involving competitors); Complaint ¶¶ 4, 5, United States v. Cox Enterprises, Inc., No. 91-cv-505 (N.D. Ga. Mar. 8, 1991) (involving competitors); Complaint ¶¶ 4, 5, United States v. General Cinema Corp., No. 91-cv-0008 (D.D.C. Jan. 3, 1991) (involving competitors).

[12] *See, e.g.*, Complaint ¶¶ 33, 37, United States v. ValueAct Capital Partners, L.P., No. 07-cv-02267 (D.D.C. Aug. Dec. 19, 2007).

[13] *See, e.g.*, Complaint ¶ 16, United States v. Bell Resources Ltd., No. 85-cv-6202 (S.D.N.Y. Aug. 9, 1985); Complaint Attach. 2, at 2, United States v. Coastal Corp., No. 84-cv-2675 (D.D.C. Aug. 30, 1984). The complaint filed in *United States v. Reliance Group Holdings, Inc.*, No. 90-cv-2698 (D.D.C. Oct. 31, 1990), the only other enforcement matter addressing an acquirer's investment intent—there, under the institutional investor exemption provided in Rule 802.64—does not provide any information from which one could reasonably infer the Commission's basis for finding a lack of investment-only intent.