

The Federal Trade Commission (FTC) filed a proposed settlement in federal court this week that serves as a reminder of the broad application of the Hart-Scott-Rodino Act (HSR Act) and the limited circumstances under which investors may rely on a widely used exemption. Under the so-called “investment-only exemption,” the HSR Act exempts certain acquisitions of less than 10% of the voting securities of an issuer if made “solely for the purpose of investment,” which is defined as the investor having “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”

The settlement concerns the FTC’s claims that Third Point LLC and its affiliated hedge funds improperly relied on the investment-only exemption and failed to observe the filing and waiting requirements of the HSR Act before acquiring stock in Yahoo! Inc. The settlement demonstrates that the antitrust authorities will enforce the HSR Act even in transactions that do not pose competitive concerns, and that they continue to hold a narrow interpretation of the investment-only exemption.

## The Breadth of the HSR Act

The FTC’s interest in this transaction underscores the notion that the antitrust authorities will broadly enforce the HSR Act. In this case, Third Point, a New York-based financial investment firm encompassing a variety of funds, purchased voting securities in Yahoo, a multinational Internet company. Each of three Third Point hedge funds made potentially reportable acquisitions of Yahoo voting shares. The FTC’s enforcement action reinforces the following related principles:

- **The FTC Continues to Enforce the HSR Act Against Funds**

This is just the latest example of the FTC bringing an HSR enforcement action against a hedge fund or similar entity. These firms continue to be targets, necessitating careful HSR Act diligence. The FTC’s focus on fund acquisitions reflects, in part, its concern over the competitive implications of “partial ownership” investments and its desire not to allow such investments to escape antitrust review.

- **Antitrust Substance Does not Necessarily Matter**

In HSR matters, the FTC is not only focused on mergers and acquisitions that give rise to competitive overlaps. The Third Point case is an example of the FTC bringing an HSR enforcement matter with no allegations of a substantive competition concern. The Commission jealously guards its prerogatives under the HSR Act regardless of the substantive context.

## Narrow Scope of “Passive Investor”

The proposed settlement is in keeping with the FTC’s historical guidance on the decidedly narrow scope of the “investment-only” exemption. Despite the fact that the Third Point funds held less than 10% of Yahoo’s outstanding voting securities, the FTC’s complaint alleged that the funds engaged in certain conduct that was inconsistent with passive investment intent:

- soliciting individuals’ interest in becoming an officer or director of Yahoo;
- forming an alternate slate for the Yahoo Board;
- communicating to Yahoo that Third Point was poised to join the Yahoo Board;
- holding internal discussions about possibly waging a proxy battle for directors of Yahoo; and
- publicizing the prospect of proposing a slate of directors at Yahoo’s next annual meeting.

The proposed settlement prohibits Third Point from invoking the investment-only exemption with regard to future acquisitions in which it engages in similar conduct. Though the terms of the settlement enhance current guidance, the FTC emphasized that the challenged conduct is not an exhaustive list of actions that can be held to negate passive investment intent. The Statement of Basis and Purpose supporting the HSR regulations states that “merely voting the stock will not be considered evidence of an intent inconsistent with investment purpose.” But given the FTC’s narrow interpretation of the exemption, any action beyond “merely voting” raises substantial risks and warrants consultation with experienced HSR counsel before proceeding.

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