
Investment Fund Penalized \$1.1 Million for Late HSR Notifications

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The Department of Justice and the Federal Trade Commission announced yesterday that the investment fund ValueAct Capital Partners L.P. has agreed to pay \$1.1 million for failing to timely file Hart-Scott-Rodino Act (HSR Act) notifications for three separate stock purchases in 2005. The penalties amounted to more than \$3,500 per day for each late notification. This case serves as a reminder that the HSR Act's filing requirements and waiting periods apply not only to acquisitions of majority ownership in companies, but also to acquisitions of voting securities when certain thresholds are met and the purchaser intends to be anything other than a truly passive investor, regardless of whether the acquisition gives the buyer control of the issuer.

The HSR Act requires that all parties to transactions meeting certain size thresholds notify the FTC and DoJ and abide by certain waiting periods before consummating their transactions. The waiting period permits the agencies to investigate the proposed transaction before closing to determine whether it violates the antitrust laws. The HSR Act's notification requirements may be triggered when a person proposes to acquire voting securities in an issuer that would result in the acquiring person holding more than \$50 million (as adjusted) of the voting securities of such issuer. Additional notifications may need to be filed before that person acquires additional voting securities that bring its total holdings total to more than \$100 million (as adjusted) or \$500 million (as adjusted), more than 25% of the issuers' voting securities if the value of the post-acquisition holdings exceeds \$1 billion (as adjusted), or more than 50% of the issuers' voting securities if the value of the post-acquisition holdings exceeds \$50 million (as adjusted).[1] "Passive investments"--i.e., acquisitions made solely for the purpose of investment[2]--are exempt from the HSR Act, but only so long as the securities held by the acquiring person do not exceed 10% of the outstanding voting securities of the issuer.

In this case, ValueAct failed to timely file one notification for an acquisition that passed the \$100 million threshold and two notifications for investments that passed the \$50 million threshold. These failures occurred even though ValueAct had previously failed to make required filings in a timely fashion and had been allowed to make corrective filings without paying any penalties.

The HSR Act provides for civil penalties of up to \$11,000 per day for each violation. The FTC and

DOJ, however, have in many cases elected not to seek penalties for violations after considering why the violation occurred, when and how the violation was discovered, whether the party realized any advantage (e.g., tax, contractual, financial or regulatory) as a result of not filing and observing the waiting period, and the steps that the party has taken to prevent future violations. The agencies have yet publicly to issue a penalty when a party voluntarily came forward and made one or more late filings, except in cases where a party had previously received leniency for failing to file HSR notifications.

ValueAct had already benefited from of the agencies' leniency policy, when it made three "corrective" HSR filings in 2003, for acquisitions that had occurred in 2002 and 2003. The FTC and DoJ sought no penalties for those late filings. In its corrective filings, ValueAct outlined the steps it would take to prevent future violations of the HSR Act. Despite its promise to take corrective measures, however, ValueAct made multiple investments in early 2005 that exceeded the applicable HSR notification thresholds without filing HSR notification. ValueAct discovered its omissions and made three corrective filings in June 2005. The FTC and DoJ calculated ValueAct's potential civil penalty exposure from the dates of the acquisitions to the end of the HSR waiting periods for the corrective filings.

The agencies are expected to continue to pursue violations for of this kind. It is imperative that corporations, non-corporate entities, and individuals that may find themselves with holdings in individual issuers that exceed the thresholds discussed above have procedures in place to determine when and whether they trigger HSR reporting obligations.

[1] These dollar thresholds are revised annually; the \$50 million adjusted threshold currently is \$59.8 million; the \$100 million adjusted threshold currently is \$119.6 million, the \$500 million adjusted threshold currently is \$597.9 million and the \$1 billion adjusted threshold currently is \$1,195.8 million.

[2] The antitrust agencies take a narrow view of the passive investment exemption, and argue that it is not available to anyone who (a) is a direct competitor of the issuer, (b) holds a seat on the issuer's board of directors, or (c) has a present intention to acquire the issuer sometime in the future.