

CLIENT ALERT

DOJ Suit Highlights Agencies' Narrow Interpretation of HSR "Investment Only" Exemption

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On April 4th, the Department of Justice filed a civil antitrust suit alleging that ValueAct Capital violated the Hart-Scott-Rodino (HSR) Act, setting in motion a potential trial that could provide greater clarity regarding the proper scope of the "investment only" exemption to the HSR Act and its application to certain shareholder activities.

ValueAct's Alleged Conduct

In its complaint, the DOJ alleges that ValueAct acquired "significant holdings of [Halliburton and Baker Hughes] on the heels of the Halliburton/Baker Hughes merger announcement." ValueAct allegedly made these investments in order to use its position "to obtain access to management, to learn information about the merger and the companies' strategies ... to influence those executives to improve the chances that the merger would be completed, and to influence other business decisions whether or not the merger went forward." The DOJ complaint cites internal ValueAct documents and correspondence between ValueAct and its investors regarding the company's strategy. While ValueAct's investments represented less than 10 percent of each company's voting securities, the DOJ alleges that ValueAct's attempt to influence the companies' activities rendered the "investment only" exemption inapplicable and, as a result, that ValueAct's failure to notify the agencies of its investments violated the HSR Act.

The "Investment Only" Exemption

Under the HSR rules and regulations, acquisitions of voting securities are exempt from the HSR reporting requirement, even if they exceed the applicable size of transaction threshold, so long as they do not exceed 10 percent of the outstanding voting securities of an issuer and are acquired for "investment purposes only." To qualify for that exemption, the acquirer must not intend to participate in the "formulation, determination, or direction of the basic business decisions of the issuer."

The agencies have previously identified certain conduct as inconsistent with the investment only requirement, including: nominating board members, proposing corporate action requiring shareholder approval, soliciting proxies, and being a competitor of the issuer. As with many HSR Act issues, however, the courts have never ruled on the proper scope of the exemption. The DOJ's action against ValueAct may provide further clarity about the proper scope of the exemption and the degree to which activist and institutional investors alike can engage with and influence management, while still availing themselves of the passive investor exemption. ValueAct reportedly plans to contest the DOJ's lawsuit.

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