Does the ValueAct Lawsuit Have Implications for Institutional Shareholders and the Larger Shareholder Activism and Engagement Landscape?

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Yesterday, the U.S. Department of Justice brought a civil action against ValueAct for failing to comply with the waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "**HSR Act**") with respect to its purchases of shares of Halliburton Company and Baker Hughes Incorporated. The DOJ's suit seeks a civil penalty of at least $19 million from ValueAct. (In November 2014, Halliburton entered into an agreement to purchase Baker Hughes; the transaction is pending.)

The DOJ claims that ValueAct's purchases of Halliburton and Baker Hughes shares "did not qualify for the narrow exemption from the requirements of the HSR Act for acquisitions made solely for the purpose of investment" because ValueAct "planned from the outset to take steps to influence the business decisions of both companies, and met frequently with executives of both companies to execute those plans."

We believe that this case will be important to watch because of the types of statements and actions by ValueAct that are cited by the DOJ as evidence of an intent to influence the business decisions of both companies. For example, the complaint identifies internal discussions at ValueAct regarding proposing changes to Halliburton's executive compensation plan, and a meeting between ValueAct and Halliburton's CEO during which ValueAct detailed its preferred approach to executive compensation, commented on Halliburton's current compensation plan and proposed specific changes to the plan, as evidence of an intent to influence the business decisions of Halliburton. While this may have been part of a broader demonstration of lack of investment intent, it does seem to be (by itself) a typical subject of discussion with investors who do not seek to influence management or major corporate actions.

Although the ValueAct complaint will cause those shareholder activists who buy shares with an intention to engage with management and other shareholders to consider more carefully whether they are required to file for HSR clearance rather than rely upon the protection of the "passive investment" exemption,[1] the practical impact of this may be limited. Some shareholder activists do not rely on the investment intent exemption but instead structure their investments so as to be made by a special purpose entity that would not exceed the "size of person" threshold (thus enabling the entity to buy up to $312.6 million of shares before a filing would be required) and split their investments across multiple special purpose entities to avoid an HSR filing while they acquire large stakes in the target company.

But, the ValueAct complaint should serve as a reminder to institutional investors that have traditionally considered themselves to be passive investors for HSR purposes. In the past, we have **noted** how institutional investors, which have typically engaged in quiet outreach, are taking an increasingly active and public role on corporate governance matters, and we have observed that the line between shareholder activists and institutional investors is blurring. Once an institutional or similar traditionally passive investor crosses the line—either by cooperating with shareholder activists in certain situations or by taking an increasingly assertive role with its portfolio companies—such an institution will have to examine whether it can claim to have a truly "passive" intent at the time of any future share purchases. It

[1] The ValueAct complaint is also consistent with the DOJ/FTC enforcement action against Dan Loeb's Third Point fund **last year**.

is important to note that this determination is often not a "one time" consideration given the frequent portfolio rebalancing and other holding changes of traditional institutional investors. For example, if the investor loses its "investment intent," the subsequent acquisition of any additional shares may require a filing if the investor's total holdings will exceed the applicable HSR threshold. Although an HSR filing, in the absence of substantive antitrust issues, is unlikely to significantly delay the strategy of a shareholder activist or a traditional institutional investor, it does involve notification of the target company, could chill cooperation among shareholder activists and institutional investors somewhat and certainly adds an important compliance component to their planning.

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Arthur F. Golden, Thomas J. Reid and Laura C. Turano were the contributing editors to the recently published, inaugural edition of **Getting the Deal Through: Shareholder Activism & Engagement 2016**, a volume that provides an overview of the rapidly evolving global shareholder activism and engagement landscape. Their **editors' introduction** to the volume includes a further discussion on shareholder activism engagement trends and speculates on the area's future direction.

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