Third Point Funds Fined for HSR Violation

August 30, 2019

The Federal Trade Commission ("**FTC**") recently obtained a fine from Third Point LLC and three of its funds ("**Third Point**") for alleged violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "**HSR Act**"). The violation arose in connection with the merger of Dow Inc. and E.I. du Pont de Nemours & Company. Prior to the merger, Third Point held shares of Dow Inc. and, as a result of the merger, Third Point received shares of the new company, DowDuPont Inc. In this case, it is notable that the HSR violation did not arise from the open market purchase of voting securities. Instead, the violation arose as a result of the "passive" conversion of voting securities of one issuer into voting securities of another issuer.

This enforcement action by the FTC serves as a reminder to investors to remain cognizant of any changes to their voting security holdings, as HSR reporting obligations can be triggered by passive acquisitions of shares even where an investor did not cause the merger or control either party involved.

Third Point's Recent Violation

In April 2014, Third Point filed under the HSR Act and observed the necessary waiting period to acquire voting securities of Dow Inc. According to a complaint filed by the FTC, following the merger of Dow Inc. and E.I. du Pont de Nemours & Company into DowDuPont Inc. in August 2017, voting securities held by Third Point in Dow Inc. converted to voting securities of DowDuPont Inc. As a result of this conversion, each Third Point fund received voting securities of the newly formed company valued in excess of the HSR jurisdictional amount.

An HSR exemption exists that would have permitted Third Point to acquire additional shares of Dow Inc. without filing another HSR notification for a period of five years following its 2014 filing. The FTC has stated that this exemption did not apply, however, because DowDuPont Inc. is not the same issuer as Dow Inc. within the meaning of the HSR Rules. As a result, because each Third Point fund was its own ultimate parent entity within the meaning of the HSR rules, each fund was required to file an HSR notification and observe the waiting period prior to acquiring DowDuPont Inc. voting securities. The funds each filed a corrective notification and report form under the HSR Act on November 8, 2017 and the waiting period for those notifications expired on December 8, 2017. Under the stipulated proposed order filed on behalf of the FTC, the Third Point funds have agreed to collectively pay $609,810 in civil penalties for violations of the HSR Act between August 2017 and December 2017.

In many cases, parties like Third Point who receive new shares in connection with mergers might be able to take advantage of the "passive investment" exemption to the HSR Act. This exemption allows a firm to acquire up to ten percent of the voting securities of an issuer if the acquisition is "solely for the purpose of investment." In 2015, however, Third Point settled allegations that it violated the HSR Act in connection with its acquisitions of voting securities of Yahoo! Inc., and, as part of that settlement, agreed to make HSR filings for all transactions exceeding the HSR threshold rather than relying on the investment-only exemption. The FTC did not claim that Third Point's recent alleged conduct violated the 2015 order but did specifically note the prior violation in the recent complaint.

Similar Actions by the FTC

This is not the first time that the FTC has alleged violations of the premerger notification and waiting period requirements of the HSR Act where companies or individuals have acquired voting securities in

entities related to ones for which they had already observed the HSR Act's reporting and waiting period requirements.

In June 2009, an executive agreed to settle a lawsuit with the FTC for failing to comply with the HSR Act's reporting and waiting period requirements in connection with purchases of voting securities of a recently spun-off subsidiary of a company for which he had already filed HSR.[1] As the Chairman of the Board of the parent company ("**Parent**"), and CEO and Chairman of the Board of the spun-off subsidiary ("**Subsidiary**"), the executive already held voting securities of Parent. He made a premerger filing to acquire additional voting securities of Parent, and shortly thereafter Subsidiary was spun off from Parent. The executive then acquired voting securities in the newly spun-off entity in excess of the HSR Act's reportability level, and continued to make acquisitions of Subsidiary voting securities through April 2008. The executive stated that his failure to adhere to the relevant notification and waiting requirements was based on the mistaken belief that a filing for the acquisition of a noncontrolling amount of voting securities of a parent corporation could cover acquisitions of voting securities of a subsidiary of that parent corporation.

Similarly, in August 2016, an investor agreed to settle FTC charges that it had violated the premerger reporting requirements of the HSR Act as a result of the vesting of restricted stock units ("**RSUs**").[2] The investor had previously filed to acquire the issuer's voting securities, but as a result of the vesting of RSUs in February 2014, after the five-year period exemption for its prior filing had lapsed, the investor acquired additional voting securities which resulted in its aggregate holdings exceeding the minimum notification threshold then in effect.

Key Takeaways

These enforcement actions and resulting fines and settlements are a continuation of a trend that investors should be mindful of. The HSR Act's premerger notification and waiting period requirements clearly are not limited to situations where companies are actively acquiring controlling interests in a business through open market purchases. Rather, the salient issue is whether the voting securities acquired, either passively or actively, are valued in excess of the HSR Act's jurisdictional threshold. Investors must be vigilant in evaluating all changes in their security holdings for potential HSR Act reporting triggers, even if they are acquiring minority positions in entities related to an entity for which they had previously observed the HSR Act's requirements.

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[1] ***United States v. John C. Malone***, 2009 U.S. Dist. LEXIS 63200, 2009-1 Trade Cas. (CCH) ¶76,659 (D.D.C. 2009)

[2] ***United States v. Caledonia Investments PLC***, Civil No. 1:16-cv-01620 (D.D.C. filed Aug. 10, 2016)

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