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FTC Complaint Against Activist Investor Highlights Narrow "Investment Only" HSR Act Exemption

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In a move that a minority of its commissioners saw as "not in the public interest," the Federal Trade Commission filed a complaint on Monday against hedge fund Third Point for failing to file a notification form under the Hart-Scott-Rodino ("HSR") Act when it acquired stock of Yahoo! in 2011. While the FTC did not seek a monetary penalty (noting that this was a first offense), it did seek injunctive relief requiring Third Point to make HSR filings if it engages in similar conduct in the future.

The FTC's complaint focuses on the so-called "investment only" exemption to the HSR Act's reporting requirements. This exemption provides that an HSR filing is not necessary for acquisitions of up to 10% of a company's stock that are made solely for purposes of investment. Under the HSR rules, an acquisition is solely for the purposes of investment if the acquirer "has no intention of participating in the formulation, determination, or direction of the basic business decisions" of the target company.[1] While the FTC has said that simply exercising voting rights for securities that are acquired is not inconsistent with an "investment only" intent, it provides examples of other actions that are presumptively inconsistent:

- Nominating a candidate for the issuer's board of directors
- Proposing corporate action requiring shareholder approval
- Soliciting proxies
- Having a shareholder, director, officer, or employee simultaneously serving as an officer or director of the issuer
- Being a competitor of the issuer
- Doing any of the above with respect to any entity that directly or indirectly controls the issuer[2]

In this case, the FTC determined that the acquisition did not qualify for the exemption because Third Point's post-acquisition actions made it clear that it did not have a passive investment intent. Specifically, the FTC found Third Point was communicating with Yahoo! and with third parties about

reshuffling Yahoo!'s board of directors, including by potentially joining the Yahoo! board or launching a proxy battle for Yahoo! directors.

The dissenting Commissioners noted a "lack of competitive harm from this transaction, the unlikelihood that transactions in this class generate harm overall, and the benefits to the market that would result from interpreting the exemption more broadly to allow the type of shareholder advocacy." However, the majority stated that the investment only exemption should be construed narrowly – a position reiterated by the FTC's Director of Competition, who stated that the exemption must be restricted to "those situations in which the investor has no intention to influence the management of the target firm."[3] The majority also disagreed with the dissent's view that enforcement in this case was not in the public interest, noting that the complaint would foster a "legitimate expectation of the business community, practitioners, and the general public that the antitrust agencies will act clearly, consistently, and transparently in their interpretation and enforcement."[4]

The FTC's statements regarding the Third Point complaint demonstrate a strong intention to send a message to the business community that acquisitions meeting the HSR Act's size of transaction threshold should be carefully scrutinized for whether they will trigger a filing. Among other things, parties cannot simply rely on the "less than 10%" standard for passive investment without considering whether they will in fact be treated as passive investors under the HSR rules. Even where the acquisition arguably has no possible anticompetitive potential, the FTC will seek remedies for noncompliance where it is discovered.

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[1] *See* 16 C.F.R. § 801.1(i)(1).

[2] *See* FTC Statement of Basis and Purpose, 43 Fed. Reg. 33450, 33465 (1978).

[3] Federal Trade Commission, Third Point Funds Agree to Settle FTC Charges that They Violated U.S. Premerger Notification Requirements, Press Release (Aug. 24, 2015).

[4] Statement of the Federal Trade Commission in the Matter of Third Point, FTC File No. 121-0019 (Aug. 24, 2015).