

# Investment Management Alert

October 2005

## Hedge Fund Manager Settles HSR Enforcement Action For \$350,000.00

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The FTC recently announced the \$350,000 settlement of an enforcement action against Scott R. Sacane, a fund manager, for violating the Hart-Scott-Rodino Antitrust Improvements Act of 1976 and, in the process, put the hedge fund industry on notice that hedge funds are not exempt from the application of the HSR Act.

Generally, the HSR Act requires a filing when voting securities or assets having a value in excess of \$53.1 million are acquired or are to be held (meaning consolidated with other pre-existing holdings) as a result of an acquisition. Certain size-of-party tests apply and certain exemptions may apply, including the "solely for investment purpose" exemption. This exemption applies if 10% or less of an issuer's voting securities will be held as a result of an acquisition and if the investment is truly passive. The FTC and the Antitrust Division have interpreted this exemption narrowly.

Mr. Sacane controlled certain funds, including Durus Life Science Master Fund Ltd. Master Fund, in multiple transactions, had acquired significant positions in Aksys, Ltd. and Esperion Therapeutics, Inc. The funds acquired more than 50% of Aksys' outstanding voting securities, which had a value in excess of \$85 million. In the case of Esperion, the acquired voting securities had a value in excess of \$102 million and apparently represented more than 10% of Esperion's outstanding voting securities. No

HSR filing was made prior to the acquisition of any of the securities. Subsequent to the acquisitions, corrective HSR filings (i.e. late filings) were made by Master Fund, but not by Mr. Sacane, individually, although he had the contractual power to name more than 50% of the Master Fund's directors. This control by Mr. Sacane made him an ultimate parent entity under the HSR Act, and imposed on him the obligation to make filings pursuant to the HSR Act. The FTC and the Antitrust Division of the Department of Justice brought an action against Mr. Sacane for his personal failure to comply with the HSR Act.

In the press release announcing the settlement, the FTC expressly put the hedge fund industry on notice. The press release stated:

"This significant penalty should put hedge funds, their managers, and securities traders on notice that they are not exempt from filing pre-merger notification forms when required to do so," said Susan Creighton, Director of the FTC's Bureau of Competition. "The defendant in this case is an experienced fund manager who should have known and fulfilled his obligations under the HSR Act." She noted that while the Commission took action only against the individual fund manager in this

case, future enforcement actions in other cases resulting from a failure to file could be brought against a fund as well.

For hedge fund managers, this case represents a warning and a reminder. Hedge funds are not exempt from the requirements of the HSR Act, and filings may need to be made prior to the acquisition of securities or assets in certain instances unless exemptions are available.

While hedge funds routinely manage SEC reporting obligations, it is important to note that significant substantive differences exist between the HSR Act rules and SEC rules with respect to definitions and calculations of beneficial ownership, aggregate holdings and value of holdings.

For hedge funds, which typically operate through a family of limited liability companies and partnerships, examination of the respective ownership positions, rights to profits and rights to assets upon dissolution is generally determinative in identifying the ultimate parent entity and the appropriate filing person. This determination involves a fact-sensitive analysis that can become particularly complicated where multiple layers of ownership or control exist.

The failure to comply with the HSR Act carries with it significant potential fines and other penalties (\$11,000 per day for each violation), making compliance with it critical.

*For more information about the enforcement action or other Hart-Scott-Rodino matters, please contact Jeffrey M. Shapiro, Member of the Firm, at (973) 597-2500.*