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The Outlook For Hart-Scott-Rodino Under President Trump

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With the arrival of the Trump administration and the domestic and foreign policy shifts that may ensue, few eyes (and only the most narrowly focused) have looked at what changes may lie ahead with regard to Hart-Scott-Rodino antitrust premerger notification law and policy. Yet there are two reasons to believe that significant changes may be in store.


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First, President Donald Trump will be the first president with personal experience with HSR, having been sued for allegedly violating the HSR Act and having settled the case for $750,000. Carl Icahn, who is to be a special adviser on regulatory reform, has also encountered HSR, from the vantage point of an activist investor.

Second, and probably of greater importance to the specific changes that may occur, two individuals likely to play significant roles in antitrust policy in the new administration — FTC Commissioner Maureen Olhausen and former FTC Commissioner Joshua Wright — are on record suggesting the rationale and direction of changes toward additional or expanded HSR exemptions.

United States v. Donald J. Trump

In April of 1998, Donald Trump agreed to pay a $750,000 civil penalty settling government charges that he violated HSR premerger notification requirements when he acquired stock of Holiday Corp. and Bally Manufacturing Corp. through Bear Stearns without first making HSR filings.[1]

The case was one of three so-called "put call" cases brought following a December 1986 press release by the director of the Federal Trade Commission's Bureau of Competition stating that FTC staff had discovered several instances in which a client had arranged for an investment banking firm to purchase voting securities on a client's behalf, with neither the client nor the investment bank making an HSR filing for the acquisition. "In the transactions being examined by the Commission staff, the client has agreed that if the investment banking firm makes the initial purchase of securities, the client will either purchase the securities from the firm at a stated price in the future or reimburse the firm if it has to sell the shares at a loss." The investment bank was apparently not making an HSR filing because it viewed its acquisition as being covered by the HSR Act exemption for acquisitions "solely for the purpose of investment" that result in holding 10 percent or less of an issuer's stock, and the client was apparently not making a filing because it viewed it as acquiring only an option.[2]

The complaint against Trump that was filed by the U.S. Department of Justice at the request of the FTC provides no details regarding Trump's arrangement with Bear Stearns beyond the allegation that Bear Stearns was "acting as the agent of Trump" in making the acquisitions at issue and that Trump (and not Bear Stearns) thus held the voting securities.

At the time that the complaint and settlement were filed, it was reported that Trump issued a statement saying "I firmly believe I was in full compliance with [HSR]," having received advice from "the most respected lawyers in the business," that "Bear, Stearns also gave me the same assurance" and that he "assume[d] Bear, Stearns will reimburse me for the expense."[3] A redacted version of an internal FTC memo recommending that the commission accept Trump's settlement offer that was recently obtained by the Wall Street Journal cited as an example of his "forthrightness and cooperation during our investigation" that Trump had "waived attorney-client privilege to enable us to evaluate his claim of reliance on advice of counsel."[4]

Interestingly, it is impossible to determine — due to the limited factual allegations in the complaint — whether Trump's failure to make an HSR filing would today be viewed as an HSR violation. The most recent (2015) edition of the American Bar Association Antitrust Section's Premerger Notification Practice Manual discusses "stock purchases under a forward sales contract with an investment bank or put-call option agreements" and states: "Generally, such transactions are not reportable under HSR unless the investor takes delivery of the voting stock upon settlement of the contract or exercise of the call option and the value exceeds [the HSR threshold]." It cautions, however: "Forward contracts and put-call arrangements must be analyzed on a case-by-case basis, and informal consultation with the [FTC Premerger Notification Office] is advisable."[5]

In addition to Trump's own experience with HSR, Carl Icahn, who is to be a special adviser on regulatory reform in the new administration, has at least 25 years of experience with HSR. In 1991, Icahn's Aero Limited Partnership, which was the parent of Trans World Airlines, was sued for failing to file HSR in connection with acquisitions of stock of USAir resulting in holdings in excess of the HSR threshold and settled (paying a $1.125 million civil penalty).[6] The complaint alleged that the acquisitions were not made solely for the purpose of investment. Since 1999, Icahn (or entities with "Icahn" in their name) made at least 87 HSR filings.[7]

Exempting Additional Transactions From HSR: The Dissenting Statement of Commissioners Ohlhausen and Wright in Third Point

FTC Commissioner Maureen Ohlhausen is the lone Republican currently on the commission and is considered a likely choice to become chairwoman (or at least acting chairwoman pending confirmation of new Republican appointee) in the Trump administration. Former FTC Commissioner Josh Wright heads the transition team for the FTC. Thus, their views on HSR are likely to be particularly influential in shaping the direction of HSR law and policy.

In August 2015, when the Department of Justice, at the request of the FTC, sued (and settled with) three affiliated hedge funds and their management company for an HSR Act violation (U.S. v. Third Point Offshore Fund Ltd.),[8] Commissioner Ohlhausen and Wright took the rare (and possibly unprecedented within the narrow confines of HSR enforcement cases[9]) step of issuing a dissenting statement explaining their vote against referring the complaint and proposed settlement to DOJ for filing.[10]

The Third Point case focused on the HSR Act's exemption for acquisitions of voting securities "solely for the purpose of investment" that result in holding 10 percent or less of the voting securities of the issuer.

The complaint alleged that the defendants, at the time of making the acquisitions of Yahoo voting securities at issue, could not rely on this exemption because they had taken various steps indicating a more active intent, including contacting individuals to gauge their interest and willingness to become CEO of Yahoo or a candidate for its Board.[11] Commissioners Ohlhausen and Wright dissented because they viewed the commission's "narrow interpretation of the exemption ... as likely to chill valuable shareholder advocacy while subjecting transactions that are highly unlikely to raise substantive antitrust concerns to the notice and waiting requirements of the HSR Act."

Beyond suggesting that they would exercise prosecutorial discretion not to bring such cases, the dissenting statement is most interesting in its urging the antitrust agencies to "again reconsider the parameters of the investment-only exemption."[12] Noting empirical evidence that transactions resulting in holding of less than 10 percent of an issuer are highly unlikely to result in antitrust challenge, Ohlhausen and Wright encouraged the commission and the DOJ "to explore potential modifications to the HSR rules or a legislative amendment to the HSR Act designed to eliminate filing requirements for a category of stock acquisitions that have proven unlikely after 40 years of experience to raise competitive concerns. This approach has the additional, and significant, benefit of economizing on the antitrust agencies' limited resources to focus on the matters most likely to harm competition."

What kind of HSR rule changes with regard to the investment-only exemption may be in store via the agencies' statutory authority to exempt classes of transactions that "are not likely to violate the antitrust laws" (15 U.S.C. 18a(d)(2))?[13] Ohlhausen and Wright suggest two possibilities. One option would be simply to exempt all acquisitions resulting in holding of 10 percent or less of an issuer's voting securities, without regard to intent, as the agencies had proposed in 1988. The other option that they put forth, focused more narrowly on the type of activist hedge fund conduct present in Third Point, would be to preclude reliance on the exemption only where the acquirer had already engaged in the specific types of conduct identified in the statement of basis and purpose accompanying the HSR rules, such as having nominated a candidate for the board, proposed corporate action requiring shareholder approval, solicited proxies, or being a competitor of the issuer.[14]

There are, of course, other ways that the "investment only" exemption could be expanded aside from the two approaches put forth in the dissenting statement in Third Point.

For example, one commentator has suggested eliminating the intent-based test and replacing it with an exemption for de minimis (perhaps up to 15 percent) investments in issuers that are not competitors of the acquiring person, the acquiring person's "associates" (as currently defined in the HSR rules) or of entities in which the acquiring person or its associates have substantial holdings.[15]

Alternatively, the exemption could be expanded so as to include within it acquisitions made by officers or directors of stock of their companies resulting in holding of 10 percent or less. Under HSR Rule 801.1(i)(1), voting securities are held or acquired "solely for the purpose of investment" if the holder/acquirer "has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer," and the agencies view officers and directors as inherently not meeting that test with regard to voting securities of the companies they serve. After-the-fact corrective filings by officers and directors are likely the most common type of corrective filings, these transactions are very unlikely to raise antitrust issues, and the agencies have in several instances sought and obtained civil penalties from violators, particularly where not a first violation.[16]

Beyond rulemaking efforts to expand the "investment only" exemption, the dissenting statement of Commissioners Ohlhausen and Wright suggests an inclination to look at empirical data suggesting "over-

inclusiveness of the HSR regime" in an effort eliminate filing requirements for categories of transactions that experience has shown are unlikely to raise competitive concerns. They cite as evidence of HSR's over-inclusiveness data indicating that from 1979 to 2011, second requests were issued in only 3.3 percent of all transactions reported.[17]

Similarly, although not cited in the dissenting statement, clearance to investigate a transaction (an indication of preliminary antitrust interest in a transaction) was granted by one agency to the other in each of the last 10 years for which data is available in percentages ranging from 14 percent to 22.5 percent of HSR transactions: thus, more than 80 percent of HSR transactions were allowed to proceed without the agencies seeking any information beyond what is in the HSR filings or is publicly available.

Therefore, if some other subset (in addition to transactions resulting in holdings of 10 percent or less) of those 80 percent of transactions that have generated little or no antitrust interest could be identified and exempted from HSR, it would reduce the burden on the business community (the cost of filing, including filing fees, attorneys' fees, and time of executives, as well as delay in closing) without adversely affecting antitrust enforcement. As one FTC official has observed over the years, the ideal scope of a premerger notification system would cover only those transactions that would interest antitrust enforcers. But it is hard to imagine a system in the real world that would operate effectively by asking parties to file only if they thought that their transaction would be viewed the agencies as raising substantive antitrust issues.

The agencies in the past have been able to exempt classes of transactions that they have concluded are not likely to violate the antitrust laws. In particular, in 1995 the agencies proposed — and in 1996 adopted — several new exemptions for certain types of acquisitions of realty and carbon-based mineral reserves.[18] "These proposed rules are designed to reduce the compliance burden on the business community by eliminating the application of the notification and waiting requirements to a significant number of transactions that, in most cases, are unlikely to violate the antitrust laws. They will also allow the enforcement agencies to focus their resources more effectively on those transactions that present the potential for competitive harm." The task of finding some proverbial bath water to dispose of without disposing of the baby (little Clayton or Sherman) is no doubt difficult, but one that the agencies may attempt, particularly if new agency appointees view HSR as overinclusive and the agencies fear that legislation could limit HSR more severely than carefully crafted rulemaking.

While it is difficult to predict areas outside of small stock acquisitions that could be targets for additional HSR exemptions, one area to focus on might be relaxing hypertechnical HSR filing requirements that have resulted in fairly frequent violations yet serve little antitrust importance — in other words, HSR speed traps. For example, HSR rules on when HSR notification expires effectively exempt — once HSR has been observed with regard to a minority stock acquisition — certain additional acquisitions of the issuer's stock for a total of 5 years, but can require a new HSR filing for the acquisition of even $1 worth of stock thereafter. The agencies have in recent years obtained civil penalties in several cases for such technical violations involving small, minority acquisitions beyond the five-year deadline (at least in instances where it was not the party's first technical violation).[19] Although instances in which relatively small additional minority acquisitions beyond five years of initial HSR review of the minority investment, could conceivably be of antitrust interest (times change, and the parties and their other holdings and business and markets may have changed over time), such acquisitions do seem to meet the statutory criteria of being of a class not likely to violate the antitrust laws. Requiring filing only if a higher HSR notification threshold was to be crossed might be a balanced and sensible approach that would eliminate an HSR speed trap.

Commissioners Ohlausen and Wright in their dissenting statement in Third Point stated that they "support the HSR Act and the premerger notification system and believe that, if that system is to continue to serve the overall purposes of the substantive antitrust laws, it must adapt to allow antitrust agencies to focus on those proposed transactions that are most likely to result in a substantial lessening of competition."

Although that is perhaps not a clarion call to make HSR great again, it does signal a view that HSR can be improved and better-targeted by expanding exemptions or creating new ones. There may be good reason to believe that this view may be shared both by new political appointees at the FTC and the Antitrust Division and by the career staffs at the agencies with deep expertise in the coverage and operations of HSR.

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[1] 1988 U.S. Dist. LEXIS 9763, 1988-1 Trade Cas. (CCH) ¶67,968 (D.D.C. 1988). https://www.ftc.gov/enforcement/cases-proceedings/861-0148/trump-donald-j-us.

[2] FTC News Release, FTC Bureau Director Warns of Premerger Act Violations, December 23, 1986 (on file with author).

[3] http://www.apnewsarchive.com/1988/Trump-Agrees-To-Pay-$750-000-Penalty-To-Settle-Antitrust-Lawsuit/id-54ea0dc590fc97d9e9e86c65336649a1

[4] http://online.wsj.com/public/resources/documents/FTCstaffmemo.pdf

[5] ABA Section of Antitrust Law, Premerger Notification Practice Manual, 5th Edition (2015), Interpretation 32. In a 2006, letter to the editor of The Daily Deal regarding a Daily Deal article that had stated that what it called "put-call combos" no longer required HSR notification, the Director of the FTC Bureau of Competition and the head of FTC's Premerger Notification Office stated that the FTC and the Antitrust Division had not changed their position regarding the reportability of put-call arrangements and that whether a particular transaction requires a filing depends on the specific facts involved in the arrangement. https://www.ftc.gov/sites/default/files/attachments/pno-news-archive/060629deallettertoeditor.final1_.pdf

[6] https://www.ftc.gov/enforcement/cases-proceedings/aero-limited-partnership-united-states-america-ftc.

[7] A January 11, 2017 search for "Icahn" in the FTC's online database of early termination notices turned up 87 transactions that were granted early termination, going back to 1999 when the database begins. There may be additional transactions involving Icahn that did not receive early termination, but those would not be publicly disclosed by the FTC due to statutory confidentiality constraints.

[8] https://www.ftc.gov/enforcement/cases-proceedings/121-0019/third-point-llc.

[9] These narrow confines are not to be confused with the much more appealing Friendly Confines. See https://en.wikipedia.org/wiki/Wrigley_Field

[10] https://www.ftc.gov/public-statements/2015/08/dissenting-statement-commissioners-maureen-k-ohlhausen-joshua-d-wright

[11] https://www.ftc.gov/system/files/documents/cases/150824thirdpointcmpt.pdf , par. 30.

[12] In a 1988 Notice of Proposed Rulemaking, the FTC (with DOJ concurrence) had proposed exempting all acquisitions resulting in holdings of 10% or less of an issuer's voting securities, without regard to intent. After Congressional reaction, which although limited, was negative, and public comment, the Commission took no action on the proposal. See Bilal Sayyed, A "Sound Basis" Exists for Revising the HSR Act's Investment-Only Exemption, Antitrust Source at 9-12 (April 2013).

[13] The Agencies would no doubt prefer rulemaking to legislation, as they could control the former but not the latter, with the result that in their view inappropriate exemptions would not be created (and that if rulemaking created exemptions that proved too broad, those exemptions could be narrowed or eliminated without the need for legislation).

[14] 43 Fed. Reg. 33450, 33465 (July 31, 1978).

[15] See Sayyed, supra n. 12.

[16] See, e.g., cases brought against Barry Diller, https://www.ftc.gov/enforcement/cases-proceedings/121-0179/diller-barry-us , and Bill Gates, https://www.ftc.gov/enforcement/cases-proceedings/031-0258/gates-iii-william-h-us .

[17] For FY 2012-2015, the annual second request percentage has ranged from a high of 3.7% in FY 2013 to a low of 2.7% in FY 2015.

[18] https://www.ftc.gov/sites/default/files/documents/hsr_statements/60-fr-38930/950728premergernotification.pdf; https://www.ftc.gov/sites/default/files/documents/hsr_statements/61-fr-13666/960328premergernotification.pdf.

[19] See, e.g., cases brought against Caledonia Investments PLC (2016), https://www.ftc.gov/enforcement/cases-proceedings/151-0123/caledonia-investments-plc, Berkshire Hathaway, Inc. (2014), https://www.ftc.gov/enforcement/cases-proceedings/141-0095/berkshire-hathaway-inc, MacAndrews & Forbes Holdings Inc. (2013), https://www.ftc.gov/enforcement/cases-proceedings/121-0203/macandrews-forbes-holdings-inc, and Brian Roberts (2011), https://www.ftc.gov/system/files/attachments/hsr-resources/enforcement_actions_-_dec_2016.pdf.