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Investment Fund Will Pay $1.1 Million Civil Penalty for Increasing its Stake in Portfolio Companies without First Complying with Hart-Scott-Rodino Act Pre-Merger Notification Requirements

ValueAct Capital Partners, L.P. and its affiliates ("ValueAct") will pay a civil penalty of $1.1 million pursuant to a complaint and stipulated judgment filed December 19, 2007, at the request of the Federal Trade Commission ("FTC"), by the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division"). The action filed in the U.S. District Court for the District of Columbia relates to three separate violations of the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (the "HSR Act" or the "Act") that occurred between February and July of 2005.

The HSR Act requires parties to acquisitions that meet certain thresholds to notify the FTC and the Antitrust Division (the "Agencies") of the transaction and to observe a waiting period before completing the transaction. The waiting period provides the Agencies an opportunity to investigate proposed transactions and to determine whether to seek injunctive relief if either of the Agencies concludes that the transaction may violate the antitrust laws.

The initial reporting threshold for most transactions is $59.8 million (adjusted annually to reflect changes in the Gross National Product), but the applicability of the HSR act to any particular transaction is governed by an intricate set of regulations that require careful analysis. Notification requirements can be triggered at various notification thresholds set forth in the implementing regulations to the HSR Act, even in the case where a prior filing was made.

ValueAct's alleged violations arose as a result of incremental investments by the fund in the voting securities of three portfolio companies in early 2005 -- increasing its existing holdings in Gartner, Inc., by 4.7 percent, in Catalina Marketing Corporation, by 1.6 percent, and in Acxiom Corporation by 1.0 percent. Notably, ValueAct had made previous acquisitions in violation of the HSR Act in 2002 and notified the FTC of the violations and submitted corrective HSR filings in October 2003, which included a statement of the steps ValueAct planned to take going forward to avoid further violations. The Agencies took no enforcement action against ValueAct at that time, as the Agencies often are more lenient with first time inadvertent violators. In announcing the FTC's current action to seek civil penalties, Jeffrey Schmidt, Director of the FTC's Bureau of Competition, explained: "While we are flexible and may forgive an inadvertent error, we are less so in cases where multiple errors have been made despite earlier promises of diligent oversight."

ValueAct's 2005 acquisition of stock in Gartner was subject to the HSR Act despite the fact that the fund had filed in 2003 an HSR notification that it would acquire voting securities of Gartner valued in excess of the $50 million notification threshold (as adjusted). That notification permitted ValueAct to acquire up to $100 million (as adjusted) of voting securities of the target company within five years following expiration of the HSR waiting period. If ValueAct exceeded the adjusted $100 million threshold in a subsequent, reportable transaction, a new HSR filing would be required. In October 2004 ValueAct increased its holdings of Gartner securities above the $100 million

threshold (as adjusted) in a non-reportable transaction in which ValueAct and other entities combined their holdings and formed a Master Fund. However, under the HSR Rules, all voting securities previously held are deemed to be held as a result of the acquisition at issue. Therefore, ValueAct's subsequent, incremental purchase of Gartner securities triggered a new reporting requirement because ValueAct would hold voting securities of Gartner valued in excess of the $100 million notification threshold (as adjusted) following the acquisition.

ValueAct's 2005 incremental acquisitions of stock in Catalina and Acxiom were subject to the HSR Act, because in each case ValueAct's holding in the target, following the incremental purchase, exceeded 10 percent of the companies' outstanding voting securities, eliminating ValueAct's ability to take advantage of the passive investor exemption under the HSR Act. The HSR Act and its implementing regulations provide an exemption for "acquisitions, solely for the purpose of investment, of voting securities, if, as a result of such acquisition, the securities acquired or held do not exceed 10 per centum of the outstanding voting securities of the issuer," commonly referred to as the "Passive Investor" exemption. A rule change is under consideration, by the FTC and the Antitrust Division, that would exempt all holdings of less than 10 percent, without regard to investment intent, though this change may still be some time away.

The Agencies' action against ValueAct was presaged by a similar action, filed by the Agencies in September 2005, in which the FTC and the Antitrust Division required a hedge fund manager to pay $350,000 for failure to comply with HSR notification requirements with respect to various acquisitions of securities.[1] In announcing that action, Susan Creighton, then the Director of the FTC's Bureau of Competition, cautioned: "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" and 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."

The ValueAct case serves as an important reminder of the importance of strict compliance with the HSR Act. Parties involved in potentially reportable transactions should always consult with experienced antitrust counsel and ensure that filings are made when required.

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[1] *See* U.S. v. Sacane, available at http://www.ftc.gov/os/caselist/0410068/050926comp0410068.pdf.