Statement of the Federal Trade Commission[1]
In the Matter of Third Point
File No. 121-0019
August 24, 2015

At the request of the Federal Trade Commission, the Department of Justice has filed a complaint charging Third Point LLC and three affiliated hedge funds under its management and control (collectively, "Third Point") with violations of the Hart-Scott-Rodino Act.[2] In the FTC and DOJ's complaint, we allege that Third Point failed to observe the filing and waiting period requirements of the HSR Act in connection with its purchase of voting securities in Yahoo! Inc. during August and September 2011. We further allege that the funds were not exempt from the HSR Act's reporting obligations under the "investment-only" exemption because Third Point took actions that belied an investment-only intent while making the purchases.[3] We write to explain our charges, which we have resolved with a stipulation and proposed judgment.

The HSR Act codified a premerger notification program to enhance the ability of the FTC and DOJ to stop anticompetitive mergers before they are consummated.[4] As one court of appeals has observed, the program "reflects a congressional judgment that divestiture and other post-acquisition remedies were difficult, expensive and sometimes futile."[5] In particular, the HSR Act embodies "a careful balancing of the need to detect and prevent illegal mergers and acquisitions prior to consummation without unduly burdening business with unnecessary paperwork or delays."[6] To achieve this careful balance, the Act includes a number of statutory exemptions, including two directed at acquisitions of voting securities "solely for the purpose of investment."[7] Congress delegated to the antitrust agencies the authority to determine "[t]he precise breadth and particulars" of the exemptions through the rulemaking process.[8]

Since 1978, the Commission has consistently and narrowly defined the phrase "solely for the purpose of investment" to mean that an acquiring person must "not intend to participate in the formulation of the basic business decisions of an issuer."[9] To illustrate this definition, the Commission has set forth various actions inconsistent with an investment-only purpose such as "[n]ominating a candidate for the board of directors of the issuer."[10] In this case, we allege that Third Point was communicating with third parties to ascertain their interest in becoming a

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[1] This statement reflects the views of Chairwoman Ramirez and Commissioners Brill and McSweeny.
[2] The three Third Point hedge funds involved are Third Point Offshore Fund, Ltd., Third Point Ultra, Ltd., and Third Point Partners Qualified, L.P. Third Point LLC acted as the investment manager for the hedge funds.
[3] 16 C.F.R. § 802.9 (2015).
[4] S. Rep. No. 94-803, at 7 (1976).
[5] Mattox v. FTC, 752 F.2d 116, 119 (5th Cir. 1985).
[6] S. Rep. No. 94-803, at 65.
[7] Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 201, 90 Stat. 1383, 1391−92 (1976).
[8] S. Rep. No. 94-803, at 68.
[9] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,465 (July 31, 1978) (codified at 16 C.F.R. § 801.1(i)(1)).
[10] *Id.*

candidate for Yahoo!'s board of directors, taking other steps to assemble an alternate slate of board of directors, drafting correspondence to Yahoo! announcing Third Point's interest in joining Yahoo!'s board, internally deliberating about the possible launch of a proxy battle for Yahoo! directors, and making public statements about proposing a slate of directors at Yahoo!'s next annual meeting. Given these actions by Third Point, we do not believe the investment-only exemption applies.

In their dissent, Commissioners Ohlhausen and Wright do not take issue with our conclusion that there is reason to believe that an HSR violation occurred, but they do question whether the public interest supports a referral of this matter for enforcement.[11] We conclude that it does.

First, there is a significant public interest in instilling respect for the HSR Act and deterring would-be violators from ignoring HSR rules and requirements.[12] There is also a public interest associated with the 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 of the HSR Act and rules.[13] The Commission's enforcement action promotes both aspects of the public interest.

Contrary to what Commissioners Ohlhausen and Wright suggest, the public interest does not hinge on whether Third Point's acquisitions of Yahoo! stock were likely to produce any competitive harm.[14] The vast majority of the acquisitions subject to the premerger notification program do not result in challenges by the FTC or DOJ. That is to be expected because the HSR Act is procedural; it does not "change the standards by which the legality of mergers is judged."[15] If the FTC's referrals to DOJ depended on whether the underlying transaction is likely to cause any competitive harm, it would undermine our ability to enforce compliance with the HSR Act's notification and waiting period requirements.

Nor should the public interest rest on the purported benefits of shareholder advocacy to capital and corporate governance markets.[16] The investment-only exemption already reflects Congress's considered judgment that "*de minimis* non-control" stock acquisitions may be safely

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[11] Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright at 1−2.

[12] *See, e.g.*, Press Release, Thomas O. Barnett, Asst. Atty. Gen., Antitrust Div., Iconix Brand Group to Pay $550,000 Civil Penalty for Violating Antitrust Pre-Merger Notification Requirements (Oct. 15, 2007) ("Compliance with Hart-Scott-Rodino Act filing obligations is fundamental to the agencies' ability quickly and accurately to evaluate a transaction's competitive impact. Filing parties must understand that the Division will vigorously enforce filing requirements even if we conclude that the transaction poses no threat to competition or consumers."), http://www.justice.gov/archive/atr/public/press_releases/2007/226778.pdf.

[13] *See* S. Rep. No. 94-803, at 65 ("Pre-merger notification will also advance the legitimate interests of the business community in planning and predictability."); H.R. Rep. No. 94-1373, at 11 (1976) (observing same).

[14] Dissenting Statement at 2.

[15] S. Rep. No. 94-803, at 8 & 62.

[16] Dissenting Statement at 2 & n.4.

excepted from the notification requirements.[17] Neither the legislative nor the rulemaking record supports an added conclusion that shareholder advocacy, even if beneficial, will almost never produce anticompetitive consequences.[18] In any event, the Commission's enforcement action does not prevent Third Point from engaging in shareholder advocacy that may be beneficial or procompetitive. In our view, Third Point—like any other minority shareholder that chooses to influence the business decisions of the issuer—must observe the notification and waiting period requirements if its holdings cross the reporting thresholds under the HSR Act.

For the reasons stated above, we conclude that our enforcement action promotes the public interest and the referral of the complaint and proposed judgment to DOJ was appropriate.

[17] S. Rep. No. 94-803, at 8; *see also* H. Rep. No. 94-1373, at 23 (additional views of Rep. John F. Seiberling).

[18] In its initial rulemaking, the Commission rejected a similar argument about the beneficial effects of arbitrage transactions. *See* Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. at 33,519 (rejecting argument that arbitrage transactions "are competitively irrelevant and serve only a market-stabilizing function" and noting that "[t]here is no assurance, when an arbitrageur makes a purchase of stock, that it will not hold the shares for a longer period than it anticipates or that it will not act to influence or control management").