Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua D. Wright
In the Matter of Third Point
File No. 121-0019
August 24, 2015

This matter involves the appropriate scope of the investment-only exemption to the Hart-Scott-Rodino Act (HSR Act), which exempts from the Act's notice and waiting requirements "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."[1] We respectfully dissent from the Commission's narrow interpretation of the exemption because it is 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. Specifically, we dissent from the Commission's decision to accept for public comment a consent order that would, among other things, enjoin Third Point from relying upon the investment-only exemption when it engages in certain shareholder advocacy such as soliciting third parties for interest in becoming a board candidate, discussing with an issuer board its candidates, or assembling a board slate. We believe such a narrow interpretation of the investment-only exemption is not in the public interest.[2] We therefore would have closed this investigation without taking any action as a matter of prosecutorial discretion.

We 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. More specifically, given the over-inclusiveness of the HSR regime—for example, from 1979 to 2011, second requests issued in only 3.31% of all transactions reported[3]—we believe the antitrust agencies should reevaluate the scope of the exemption in light of the policies underlying the HSR framework and the purposes of the Clayton Act, as well as changes that have taken place since the HSR

that the agencies have reached with parties. However, in our view, pursuing an enforcement action in this matter was not in the public interest because the stock acquisition at issue here presented absolutely no threat of competitive harm and the type of shareholder advocacy pursued by the respondent here often generates well-documented benefits to the market for corporate control.[4]

On the issue of the public interest, the majority misreads our dissenting statement. Our opposition to their narrow reading of the exemption does not hinge solely on the risk of competitive harm from Third Point's acquisitions of Yahoo! Stock. Rather, it is based on the 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 pursued in this matter. We thus believe it is not in the public interest to interpret the exemption as the majority does here.

Further, the relevant question is not whether the probability that shareholder advocacy produces harm is zero, but rather whether the probability is sufficiently low so as not to justify requiring an HSR filing and the costs associated with it, including deterring activity on the margin. Not only is shareholder advocacy unlikely to raise competitive concerns, even if it did, given that the transactions would not raise the unscrambling of assets concern that motivated the adoption of the HSR Act, any necessary remedies can be obtained post-consummation without imposing a substantial burden on either the agency or the parties. Finally, the majority asserts that the order imposed in this matter does not prevent Third Po(s)-1(dm)2(t(>d -23.0n-2(e)4u2ga)4(g)10(i)-

> director of the issuer; (5) being a competitor of the issuer; or (6) doing any of the foregoing with respect to any entity directly or indirectly controlling the issuer. The facts and circumstances of each case will be evaluated whenever any of these actions has been taken by a person claiming that voting securities are held or acquired solely for the purpose of investment and thus not subject to the act's requirements.[10]

An interpretation of the investment-only exemption that is tied to the specific examples included in the SBP—that is, investing in a competitor or invoking formal corporate governance mechanisms—would also be entirely consistent with previous HSR cases settled by the antitrust agencies. Each of the investment-only matters brought and settled by the agencies involved either: (1) an allegation grounded in the SBP, including in particular that the issuer and acquirer of stock were competitors;[11] (2) an acquirer whose holdings exceeded the ten percent ownership limit found in the exemption;[12] and/or (3) an intent to acquire control of the issuer, which intent is obviously inconsistent with an investment-only purpose.[13]

In any case, we strongly encourage our colleagues on the Commission and at the Department of Justice's Antitrust Division 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.

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[10] Id. (emphasis added).

[11] See, e.g., Complaint ¶ 27, United States v. Diller, No. 13-cv-01002 (D.D.C. July 2, 2013) (acquirer was a member of the issuer's board of directors); Complaint ¶ 20, United States v. Biglari Holdings, Inc., No. 12-cv-01286 (D.D.C. Sept. 25, 2012) (acquirer requested seats on issuer's board of directors; although not mentioned in the complaint, this matter also involved competitors); Complaint ¶¶ 16, 19, United States v. ESL Partners, L.P., No. 08-cv-02078 (D.D.C. Dec. 15, 2008) (acquirer was a member of the issuer's board of directors; acquirer held more than 10% of issuer); Complaint ¶ 20, United States v. Gates, No. 04-cv-00721 (D.D.C. May 3, 2004) (acquirer was a member of the issuer's board of directors); Complaint ¶ 20, United States v. Manulife Financial Corp., Inc., No. 04-cv-00722 (D.D.C. May 3, 2004) (involving competitors; acquirer and issuer taking steps to combine); Complaint ¶¶ 1, 18, 26, United States v. Smithfield Foods, Inc., No. 03-cv-00434 (D.D.C. Feb. 28, 2003) (involving competitors; acquirer and issuer also taking steps to combine); Complaint ¶ 16, United States v. Pennzoil Co., No. 94-cv-02077 (D.D.C. Sept. 26, 1994) (involving competitors); Complaint ¶¶ 10, 12, United States v. Farley, No. 92-cv-1071 (N.D. Ill. Feb. 12, 1992) (involving competitors); Complaint ¶¶ 4, 5, United States v. Aero L.P., No. 91-cv-1315 (D.D.C. May 30, 1991) (involving competitors); Complaint ¶¶ 4, 5, United States v. Cox Enterprises, Inc., No. 91-cv-0951 (N.D. Ga. Mar. 8, 1991) (involving competitors); Complaint ¶¶ 4, 5, United States v. General Corp., No. 91-cv-0008 (D.D.C. Jan. 3, 1991) (involving competitors).

[12] See, e.g., Complaint ¶¶ 33, 37, United States v. ValueAct Capital Partners, L.P., No. 07-cv-02267 (D.D.C. Aug. Dec. 19, 2007).

[13] See, e.g., Complaint ¶ 16, United States v. Bell Resources Ltd., No. 85-cv-8202 (S.D.N.Y. Aug. 9, 1985); Complaint Attach. 2, at 2, United States v. Coastal Corp., No. 84-cv-2675 (D.D.C. Aug. 30, 1984). The complaint filed in United States v. Reliance Group Holdings, Inc., No. 90-cv-2698 (D.D.C. Oct. 31, 1990), the only other enforcement matter addressing an acquirer's investment intent, under the institutional investor exemption provided in Rule 802.64—does not provide any information from which one could reasonably infer the Commission's basis for finding a lack of investment-only intent.