

# CLIENT ALERT



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## **Applicability of ‘Investment Purpose’ Exemption to HSR Reportability Focuses on Intent of Equity Purchasers**

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**IF A PURCHASER’S GOALS SHIFT TO INCLUDE INFLUENCE ON THE BUSINESS  
MANAGEMENT OR BOARD COMPOSITION OF THE TARGET ISSUER, AN HSR FILING  
MUST BE CONSIDERED.**

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The Federal Trade Commission (FTC or Commission) has once again reminded equity investors and purchasers of the importance of continuing to review reportability requirements under the Hart-Scott-Rodino Act (the HSR Act). The FTC entered into a consent decree with certain Third Point LLC entities as a result of their failure to make the requisite timely HSR filings and their improper reliance on one of the exceptions to the HSR Act, known as the “investment purposes only” exemption. The facts underlying the FTC’s decision to take action against Third Point demonstrate the need for equity investors and their counsel to carefully monitor the timing of equity acquisitions and updated information regarding their intent with respect to the target company when determining whether a filing is necessary under the investment purposes only exemption. Specifically, if the purchaser’s intent shifts to include influence on the composition of the board or senior management of the target, then the purchase likely is not exempted from reportability as an investment purpose only, and an HSR filing must be considered.

## **Background**

The FTC announced that, at its request, the Department of Justice’s Antitrust Division filed a complaint against four Third Point entities regarding their purchase of voting securities of Yahoo.<sup>1</sup> Commissioners Ohlhausen and Wright dissented from the Commission’s decision based on their concern that the FTC’s interpretation of the investment purposes only exemption could chill certain shareholder advocacy, such as soliciting third parties for interest in becoming a board candidate, assembling a board slate or speaking about proposed candidates with an issuer’s current board.<sup>2</sup>

The complaint alleges that Third Point violated the HSR Act by failing to report purchases of Yahoo voting securities between August 8 and September 8, 2011.<sup>3</sup> According to the government, Third Point made incremental open-market purchases through the NASDAQ Stock Market beginning on August 8, 2011. Specifically, the government alleges that three separate Third Point investment funds, on August 10, August 17 and August 30, 2011, respectively, held Yahoo stock with an aggregate value in excess of the then-applicable HSR Act size-of-transaction threshold — \$66 million.<sup>4</sup>

On September 16, 2011, a little more than one month after Third Point’s earliest HSR Act violation or a little more than two months after it should have made the filing for its August 10 acquisition of Yahoo shares, Third Point made its HSR filings.<sup>5</sup> According to the FTC, Third Point had not filed before making its stock purchases because it incorrectly believed that the investment purposes only exemption applied.<sup>6</sup>

### **Third Point's HSR Act Violations**

The HSR Act provides that notification is not required if an acquisition is “solely for the purpose of investment” and does not total more than 10 percent of a target’s outstanding voting securities.<sup>7</sup> Under the HSR Act regulations, for a purchase of voting securities to be covered by the investment purposes only exemption, the buyer must have “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>8</sup>

Here, after beginning to purchase Yahoo shares, Third Point “engag[ed] in conduct inconsistent with a claim of investment purpose.”<sup>9</sup> The acts deemed inconsistent included the following:

- contacting individuals to gauge their interest and willingness to become the CEO or potential board candidates of Yahoo
- taking steps to assemble an alternative board slate
- drafting correspondence to Yahoo announcing that it was prepared to join the Yahoo board
- deliberating internally regarding the potential launch of a proxy battle for Yahoo directors
- making public statements that they were prepared to propose a slate of directors.

There are no allegations that Third Point involved itself in Yahoo’s operations or that any one from or related to Third Point was actually named to Yahoo’s board of directors.

Despite the fact that the HSR Act provides for a fine of up to \$16,000 per day, Third Point was not required to pay a fine. The FTC concluded that no fine was needed because the HSR Act filings were made “soon” after they should have been, Third Point observed the required waiting periods for subsequent purchases of Yahoo voting securities, and this series of failed filings included Third Point’s first violation of the HSR Act.

The focus of the FTC's concerns is the intent of the purchaser, not the actual effect. In addition to attempts to influence the composition of senior management and the board, the consent decree makes it clear that the investment purposes only exemption does not apply to any purchase triggering the HSR Act thresholds made by a competitor or by a firm seeking to place a representative as an officer at the target issuer (or its subsidiaries).

Further, although the dissenting commissioners argued that the lack of a negative effect on competition should have been a factor that weighed against the enforcement action, the majority of the commissioners rejected that position.<sup>10</sup>

To the extent parties seek to rely on the investment purposes only exemption, it is important that the business team is educated by counsel on its narrow scope. If the purchaser's goals shift over time to include influence on the business management or board composition of the target issuer, an HSR filing must be considered.

## Endnotes

1. Press Release, FTC, Third Point Funds Agree to Settle FTC Charges that They Violated U.S. Premerger Notification Requirements (Aug. 24, 2015), *available at* <https://www.ftc.gov/news-events/press-releases/2015/08/third-point-funds-agree-settle-ftc-charges-they-violated-us>.
2. *In re Third Point*, No. 121-0019, Dissenting Statement of Commissioners Maureen K. Ohlhausen and Joshua B. Wright (Aug. 24, 2015), *available at* [https://www.ftc.gov/system/files/documents/public\\_statements/777351/150824thirdpointohlhausen-wrightstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/777351/150824thirdpointohlhausen-wrightstmt.pdf).
3. *United States v. Third Point Offshore Fund, Ltd.*, No. 1:15-cv-01366, at ¶¶23-27 (D.D.C. Aug. 24, 2015), *available at* <http://www.justice.gov/opa/file/763496/download>.
4. *Id.* The current threshold for the HSR Act size-of-transaction test is \$76.3 million. See Revised Jurisdictional Thresholds for Section 7a of the Clayton Act (Jan. 21, 2015), *available at* [https://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2015/01/150121hsrthresholds7a.pdf](https://www.ftc.gov/system/files/documents/federal_register_notices/2015/01/150121hsrthresholds7a.pdf).

5. The applicable waiting period under the HSR Act for the transactions at issue was 30 days.
6. D. Feinstein, K. Libby, & J. Lee, “Investment-only” means just that (Aug. 24, 2015), <https://www.ftc.gov/news-events/blogs/competition-matters/2015/08/investment-only-means-just>; see also *In re Third Point*, No. 121-0019, Statement of the Federal Trade Commission (Aug. 24, 2015), available at [https://www.ftc.gov/system/files/documents/public\\_statements/777341/150824thirdpointcommstmt.pdf](https://www.ftc.gov/system/files/documents/public_statements/777341/150824thirdpointcommstmt.pdf).
7. 15 U.S.C. § 18a(c)(9).
8. 16 C.F.R. § 801.1(i)(1).
9. Feinstein, *supra* n.6, at 2.
10. Dissenting Statement, *supra* n.2, at 2.