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DECEMBER 20, 2007

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Investing a Little Time to Consider Whether the Premerger Notification Rules Apply to Your Transaction Is Worth Its Weight in Gold

On December 19, 2007, an investment company was forced to pay the Federal Trade Commission ("FTC") $1.1 million in civil penalties for repeatedly failing to observe the Hart-Scott-Rodino Premerger Notification Act ("HSR Act") premerger filing requirements. The decision is not surprising, as investment companies can sometimes forget that their activities are subject to premerger filing rules. The FTC's action this week is a million-dollar reminder.

In the transactions at issue here, ValueAct Capital Partners acquired voting securities of Gartner, Inc., Catalina Marketing Group, and Acxiom Corp. without first making the required HSR Act premerger filing. Instead, ValueAct made corrective HSR Act filings *after* the acquisitions had been completed. While the FTC will occasionally forgive such an oversight, ValueAct was a repeat offender, having made this very mistake just a few years earlier when it acquired shares of Martha Stewart Living OmniMedia and other companies. The FTC had given ValueAct a free pass the first time around based on its claim of ignorance of the rules, but after the second round of failures, the

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FTC was not in a forgiving mood.

The violations of the HSR Act in this case arose when ValueAct and other entities formed Master Fund, which resulted in ValueAct's holding of more than $100 million of Gartner's shares. ValueAct already held more than $50 million in Gartner shares, the acquisition of which had been subject to the HSR Act and for which Value Act had appropriately sought FTC approval. Value Act's acquisition of a greater interest in Gartner through Master Fund, however, required separate HSR Act approval. In April 2005, Master fund also made separate purchases that resulted in it holding more than a 10% interest in Catalina and Acxiom's voting securities.

Under the HSR rules, a purchaser who meets the thresholds of the HSR Act and who has filed the required notifications and observed the premerger waiting period before acquiring more than $50 million of another entity's voting securities must file an additional notification and observe another waiting period before acquiring more than $100 million of the voting securities of that entity. Also under the HSR rules, even acquisitions made solely for the purpose of investment must comply with the HSR premerger notification requirement (and waiting period) if the shares held or acquired will exceed 10% of the target's outstanding voting securities. The FTC contends that ValueAct did not follow these procedures, resulting in three separate violations of the HSR rules.

The FTC's charges were settled with ValueAct agreeing to pay a civil penalty of $1.1 million within 30 days of the court's entry of final judgment.

ValueAct's failure to comply with the premerger rules prior to completing its transaction was an expensive oversight. This serves as a good reminder that premerger notification to the FTC and the Department of Justice is required when any entity—including an investment entity—acquires an *aggregate* total amount of voting securities greater than $59.8 million (as adjusted annually), and that acquisitions of additional securities in that same entity may require an additional notification. The fact that there may not be any substantive antitrust issue raised by the transaction is neither an excuse nor a

defense.

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If you have any questions regarding this or any related issue, please contact

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