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### **Hedge Fund Fined For Violating HSR Act**

The managing partner of a hedge fund agreed to pay a \$250,000 fine to settle charges by the Federal Trade Commission (“FTC”) that he failed to comply with the HSR Act’s reporting obligations. The FTC enforcement action serves as a reminder that substantial fines may be imposed for failure to comply with pre-merger notification regulations, even if inadvertent, and regardless of the lack of any apparent impact on competition. In addition, this action provides yet another indication of the federal antitrust agencies’ continued scrutiny of investment firms such as hedge funds and private equity firms.

Under the HSR Act,<sup>1</sup> certain transactions cannot be closed unless the parties have notified the FTC and the Department of Justice and observed the statutory waiting period. Parties to a proposed acquisition of voting securities that results in the buyer holding over \$59.8 million (adjusted annually) of the acquired person’s voting securities must comply with HSR report and wait obligations before closing the transaction, unless one of the various exemptions applies.<sup>2</sup> The buyer’s anticipated post-closing holding must be aggregated to include pre-closing holdings and holdings by all entities within the same “ultimate parent entity.” Thus, for example, an acquisition of \$12 million of Company A’s voting securities by itself would not be reportable, but if the buyer, or an entity controlled by the buyer, already holds \$49 million of Company A’s voting securities the transaction would likely be reportable, unless it is subject to one of the various exemptions.

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<sup>1</sup> The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, 15 U.S.C. § 18a.

<sup>2</sup> The HSR Act also applies to certain acquisitions of assets and interests in non-corporate entities, such as partnerships or limited liability companies.

In its May 21, 2007 announcement of this enforcement action,<sup>3</sup> the FTC stated that the managing partner of a hedge fund (the hedge fund's "ultimate parent entity" in HSR parlance, according to the FTC) exercised an option to acquire stock in a corporation when the hedge fund already held a substantial amount of that corporation's stock. The complaint (filed by the Department of Justice on behalf of the FTC) alleged that as a result of exercising the option, the hedge fund's ultimate parent held, in the aggregate, over \$90 million of the corporation's voting securities and that such a transaction should not have been consummated without making an HSR filing and observing the waiting period. The government also alleged that the hedge fund had previously failed to make a timely HSR filing for another transaction.<sup>4</sup>

One may question whether the purposes of the HSR Act — to provide antitrust regulators with advance notice of mergers and acquisitions that may tend to lessen competition in violation of Section 7 of the Clayton Act— are served by the filing requirement and enforcement action in this particular case. Nevertheless, individuals and businesses should consider the applicability of the HSR Act to their investments and other acquisitions, even if the acquisition is of a minority position or the amount paid, on its face, does not exceed the HSR threshold.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or e-mail Laurence T. Sorkin at (212) 701-3209 or [lsorkin@cahill.com](mailto:lsorkin@cahill.com) or Elai Katz at (212) 701-3039 or [ekatz@cahill.com](mailto:ekatz@cahill.com).

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<sup>3</sup> "FTC Obtains \$250,000 Civil Penalty for Pre-Merger Filing Violations" (May 21, 2007), available at [www.ftc.gov](http://www.ftc.gov) and "Texas Hedge Fund Manager Will Pay Civil Penalty for Violating Antitrust Pre-merger Notification Requirements" (May 21, 2007), available at [www.usdoj.gov/atr](http://www.usdoj.gov/atr).

<sup>4</sup> *United States v. James D. Dondero*, Civil Action No. 07-0931 (D.D.C. May 21, 2007), available at [www.ftc.gov](http://www.ftc.gov) and [www.usdoj.gov/atr](http://www.usdoj.gov/atr).