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DEPARTMENT OF JUSTICE

Antitrust Division

United States v. VA Partners I, LLC, et al.

Public Comment and Response on Proposed Final Judgment

Pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C. 16(b)-(h), the United States hereby publishes below the comment received on the proposed Final Judgment in *United States v. VA Partners I, LLC, et al.*, Case No. 16-cv-01672 (WHA) (N.D. Cal.), together with the Response of the United States to Public Comment.

Copies of the comment and the United States' Response are available for inspection at the Department of Justice Antitrust Division, 450 Fifth Street, NW, Suite 1010, Washington, DC 20530 (telephone: 202-514-2481), on the Department of Justice's website at https://www.justice.gov/atr/case/us-v-va-partners-i-llc-et-al, and at the Office of the Clerk of the United States District Court for the North District of California, 450 Golden Gate Avenue, San Francisco, CA 94102. Copies of any of these materials may also be obtained upon request and payment of a copying fee.

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. VA PARTNERS I, LLC, et al., Defendants.	Case No. 16-cv-01672 (WHA) **PLAINTIFF'S RESPONSE TO PUBLIC COMMENT**

RESPONSE OF THE UNITED STATES TO
PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Pursuant to the Antitrust Procedures and Penalties Act ("APPA"), 15 U.S.C. § 16(b)-(h), the United States hereby files the single public comment received concerning the proposed Final Judgment in this case and responds to this comment. After careful consideration of the comment, the United States continues to believe that the proposed Final Judgment provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint. The United States will move the Court for entry of the proposed Final Judgment after the public comment and this response have been published in the *Federal Register* pursuant to 15 U.S.C. § 16(d).

I. PROCEDURAL HISTORY

On April 4, 2016, the United States filed a civil antitrust Complaint against VA Partners I, LLC, ("VA Partners I"), ValueAct Capital Master Fund, L.P. ("Master Fund"), and ValueAct Co-Invest International, L.P. ("Co-Invest Fund") (collectively, "ValueAct" or "Defendants"), to remedy violations of Section 7A of the Clayton Act, 15 U.S.C. § 18a, commonly known as the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").

Following the filing of the Complaint, the parties engaged in settlement discussions that culminated in a consensual resolution of this matter. On July 12, 2016, the United States filed a proposed Final Judgment, a Stipulation and Proposed Order, and a Competitive Impact Statement ("CIS") that explains how the proposed Final Judgment is designed to apply an appropriate penalty for, and adequately restrain, Defendants' HSR Act violations. (ECF No. 38, 39.) As required by the APPA, the United States published the proposed Final Judgment and CIS in the *Federal Register* on July 25, 2016. *See* 81 Fed. Reg. 48,450 (July 25, 2016). In addition, the United States ensured that a summary of the terms of the proposed Final Judgment and the CIS, together with directions for the submission of written comments, were published in *The Washington Post* and the *San Francisco Chronicle* on seven different days during the period of July 18, 2016 to July 24, 2016. *See* 15 U.S.C. § 16(c). The 60-day waiting period for public comments ended on September 23, 2016. One comment was received and is described below and attached as Exhibit 1.

II. THE COMPLAINT AND PROPOSED SETTLEMENT

The Complaint alleges that ValueAct violated the HSR Act by failing to comply with the Act's premerger notification and reporting requirements in connection with its acquisition of voting securities of Halliburton Co. ("Halliburton") and Baker Hughes Inc. ("Baker Hughes") in 2014 and 2015.

The HSR Act states that "no person shall acquire, directly or indirectly, any voting securities of any person" exceeding certain thresholds until that person has filed pre-acquisition notification and report forms with the Antitrust Division of the Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") (collectively, the "Agencies") and the post-filing waiting period has expired. 15 U.S.C. § 18a. A key purpose of the notification and waiting period is to protect consumers and competition from potentially anticompetitive transactions by providing the Agencies an opportunity to conduct an antitrust review of proposed acquisitions of voting securities exceeding certain thresholds before they are consummated.

As alleged in the Complaint and described further in the CIS, ValueAct made substantial purchases of stock in two direct competitors with the intent to participate in those companies' business decisions, without first complying with the notification and waiting period requirements of the HSR Act. Through these purchases, ValueAct simultaneously became one of the largest shareholders of both Halliburton and Baker Hughes. ValueAct established these positions as Halliburton and Baker Hughes – the second- and third-largest providers of oilfield services in the world – were being investigated for agreeing to a merger that threatened to substantially lessen competition in over twenty product markets in the United States. The United States filed a lawsuit to challenge the merger on April 6, 2016, and Halliburton and Baker Hughes abandoned the transaction a few weeks later. ValueAct's failure to comply with the HSR Act risked the government's ability to protect competition because it prevented the United States from reviewing in advance ValueAct's stock acquisitions, which were made with the intent of participating in the companies' business decisions and intervening with the management of each firm as necessary to increase the probability of the Halliburton-Baker Hughes merger being completed.

The Complaint alleges that Defendants could not excuse their failure to file the necessary notification and reporting forms by relying on the HSR Act's limited exemption for acquisitions made "solely for the purposes of investment" (the "investment-only exemption"). Section 18a(c)(9) of the HSR Act exempts "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." As explained in the regulations implementing the HSR Act, voting securities are held "solely for the purpose of investment" if the acquirer has "no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." 16 C.F.R. § 801.1(i)(1) ("HSR Rule 801.1(i)(1)").

As alleged in the Complaint, ValueAct did not qualify for the investment-only exemption because it intended from the time it purchased stock in these companies to participate in the business decisions of both companies. Specifically, ValueAct intended to use its position as a major shareholder of both Halliburton and Baker Hughes to obtain access to management; to learn information about the companies and the merger in private conversations with senior executives; to influence the decisions of these senior executives in a manner that increased the likelihood that Halliburton and Baker Hughes would be able to complete their anticompetitive merger; and ultimately to influence other business decisions regardless of whether the merger was consummated. The totality of the evidence, as described further in the Complaint, demonstrates that ValueAct was not entitled to claim the investment-only exemption.

The proposed Final Judgment provides for injunctive relief and the payment of civil penalties, which are designed to prevent future violations of the HSR Act. Specifically, the proposed Final Judgment prohibits Defendants from relying on the investment-only exemption if they intend to take, or their investment strategy identifies circumstances in which they may take, any of several specifically enumerated actions that reflect active participation in the company in which they are investing. The prohibited conduct provisions are aimed at deterring future HSR violations of the sort alleged in the Complaint. While this provision does not represent a comprehensive list of all conduct that would disqualify an acquirer of voting securities from relying on the investment-only exemption, it is aimed at deterring conduct that poses the greatest threat to competition. The proposed Final Judgment also provides for compliance, access, and inspection procedures to promote Defendants' compliance with the proposed Final Judgment and to enable the United States to monitor such compliance. Finally, the proposed Final Judgment imposes an $11 million civil penalty for Defendants' HSR Act violation. This penalty reflects the gravity of the conduct at issue and will adequately deter ValueAct and other companies from future HSR Act violations.

III. STANDARD OF JUDICIAL REVIEW

The APPA requires that proposed consent judgments in antitrust cases brought by the United States be subject to a sixty (60) day comment period, after which the court shall determine whether entry of the proposed Final Judgment is "in the public interest." 15 U.S.C. § 16(e)(1). In making this public interest determination, the Court is required to consider:

> (A) the competitive impact of such judgment, including termination of alleged violations, provisions for enforcement and modification, duration of relief sought, anticipated effects of alternative remedies actually considered, whether its terms are ambiguous, and any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest; and
>
> (B) the impact of entry of such judgment upon competition in the relevant market or markets, upon the public generally and individuals alleging specific injury from the violations set forth in the complaint including consideration of the public benefit, if any, to be derived from a determination of the issues at trial.

15 U.S.C. § 16(e)(1)(A) & (B).

The public interest inquiry is necessarily a limited one, as the United States is entitled to deference in crafting its antitrust settlements, especially with respect to the scope of its complaint and the adequacy of its remedy. *See generally United States v. Microsoft Corp.*, 56 F.3d 1448, 1461 (D.C. Cir. 1995) (holding that government is entitled to "broad discretion to settle with the defendant within the reaches of the public interest"); *United States v. SBC Commc'ns, Inc.*, 489 F. Supp. 2d 1, 10-11 (D.D.C. 2007) (assessing public interest standard under the Tunney Act); *United States v. US Airways Group, Inc.*, 38 F. Supp. 3d 69, 75 (D.D.C. 2014) (noting that the court's "inquiry is limited" because the government has "broad discretion" to determine the adequacy of the relief secured through a settlement); *United States v. InBev N.V./S.A.*, No. 08-1965 (JR), 2009-2 Trade Cas. (CCH) ¶ 76,736, 2009 U.S. Dist. LEXIS 84787, at *3, (D.D.C. Aug. 11, 2009) (noting that the court's review of a consent judgment is limited and only inquires "into whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism to enforce the final judgment are clear and manageable").

Under the APPA, a court considers, among other things, the relationship between the remedy secured and the specific allegations set forth in the government's complaint, whether the decree is sufficiently clear, whether enforcement mechanisms are sufficient, and whether the decree may positively harm third parties. *See Microsoft*, 56 F.3d at 1458-62. With respect to the adequacy of the relief secured by the decree, a court may not "'engage in an unrestricted evaluation of what relief would best serve the public.'" *United States v. BNS, Inc.*, 858 F.2d 456, 462 (9th Cir. 1988) (quoting *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir. 1981)); *see also Microsoft*, 56 F.3d at 1460-62; *United States v. Alcoa, Inc.*, 152 F. Supp. 2d 37, 40 (D.D.C. 2001); *InBev*, 2009 U.S. Dist. LEXIS 84787, at *3. Courts have held that:

> [t]he balancing of competing social and political interests affected by a proposed antitrust consent decree must be left, in the first instance, to the discretion of the Attorney General. The court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree. The court is required to determine not whether a particular decree is the one that will best serve society, but whether the settlement is "*within the reaches of the public interest*." More elaborate requirements might undermine the effectiveness of antitrust enforcement by consent decree.

Bechtel, 648 F.2d at 666 (emphasis added) (citations omitted).

Courts "may not require that the remedies perfectly match the alleged violations." *SBC Commc'ns*, 489 F. Supp. 2d at 17. Rather, the ultimate question is whether "the remedies [obtained in the decree are] so inconsonant with the allegations charged as to fall outside of the 'reaches of the public interest.'" *Microsoft*, 56 F.3d at 1461. Accordingly, the United States "need only provide a factual basis for concluding that the settlements are reasonably adequate remedies for the alleged harms." *SBC Commc'ns*, 489 F. Supp. 2d at 17; *see also United States* *v. Apple, Inc.*, 889 F. Supp. 2d 623, 631 (S.D.N.Y. 2012). And, a "proposed decree must be approved even if it falls short of the remedy the court would impose on its own, as long as it falls within the range of acceptability or is within the reaches of the public interest." *United States v. Am. Tel. & Tel. Co.*, 552 F. Supp. 131, 151 (D.D.C.1982) (citations and internal quotations omitted); *see also United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 622 (W.D. Ky. 1985) (approving the consent decree even though the court would have imposed a greater remedy).

In its 2004 amendments to the APPA,[1] Congress made clear its intent to preserve the practical benefits of utilizing consent decrees in antitrust enforcement by adding the unambiguous instruction that "[n]othing in this section shall be construed to require the court to conduct an evidentiary hearing or to require the court to permit anyone to intervene." 15 U.S.C. § 16(e)(2). The procedure for the public interest determination is left to the discretion of the court, with the recognition that the court's "scope of review remains sharply proscribed by precedent and the nature of Tunney Act proceedings." *SBC Commc'ns,* 489 F. Supp. 2d at 11; *see also United States v. Enova Corp.*, 107 F. Supp. 2d 10, 17 (D.D.C. 2000) ("[T]he Tunney Act expressly allows the court to make its public interest determination based on the basis of the competitive impact statement and response to public comments alone."); *US Airways,* 38 F. Supp. 3d at 76 (same).

IV. SUMMARY OF PUBLIC COMMENT AND RESPONSE OF THE UNITED STATES

During the 60-day comment period, the United States received one comment, from Phillip Goldstein, manager of activist hedge fund Bulldog Investors. Mr. Goldstein does not argue that the relief set forth in the proposed Final Judgment is inadequate to address the allegations in the Complaint, nor does he assert that the terms of the decree should be altered in any particular way. Instead, Mr. Goldstein claims that it "appears" that ValueAct settled this

[1] The 2004 amendments substituted "shall" for "may" when setting forth the relevant factors for courts to consider and amended the list of factors to focus on competitive considerations and to address potentially ambiguous judgment terms. *Compare* 15 U.S.C. § 16(e) (2004), *with* 15 U.S.C. § 16(e)(1) (2006); *see also SBC Commc'ns,* 489 F. Supp. 2d at 11 (concluding that the 2004 amendments "effected minimal changes" to Tunney Act review).

matter because the FTC increased the civil penalties for HSR violations and took the position that such increases could apply retroactively. Mr. Goldstein also claims that HSR Rule 801.1(i)(1) – the FTC's 1978 rule explaining the meaning of the "investment only" exemption – "irrationally" draws a distinction between passive and active investors and thus should be revised. Mr. Goldstein further claims that HSR Rule 801.1(i)(1) is unconstitutional because it violates the First Amendment. In light of these arguments, Mr. Goldstein urges the United States to seek a stay of this enforcement action until this rule is revised. As explained below, none of Mr. Goldstein's arguments warrant delaying entry of the proposed Final Judgment.

First, as fully detailed in the CIS, the United States settled this case because it determined that the injunction and $11 million penalty imposed on ValueAct was in the public interest because this relief adequately addresses and reflects the gravity of ValueAct's wrongful conduct and will strongly deter ValueAct and other companies from violating the HSR Act. None of Mr. Goldstein's arguments provide a basis for questioning, let alone, overruling the United States' broad discretion in reaching this determination.

Second, Mr. Goldstein's passing reference to ValueAct's supposed "coerced capitulation" in agreeing to settle this action misses the mark because the sole purpose of the Tunney Act review process is to determine why the Agencies – rather than a defendant – decided to settle a civil antitrust enforcement action and whether doing so was in the public interest. *Bechtel*, 648 F.2d at 666 ("The court's role in [the Tunney Act review process] is one of insuring that the government has not breached its duty to the public in consenting to the decree . . . [and] to determine . . . whether the settlement is 'within the reaches of the public interest.'"); *Inbev*, 2009 U.S. Dist. LEXIS 84787, at *3 (noting that the relevant inquiry during the Tunney Act review process is "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable"). In any event, Mr. Goldstein's assertion that ValueAct was purportedly forced to settle because the FTC increased the potential fines during the pendency of this action ignores the fact that the $11 million fine that ValueAct agreed to pay was within the fine amount that the United States sought when it filed this action and that this amount was based on the penalties in effect *prior to* publication of the FTC's interim final rule on June 30, 2016. *See* Cmplt. ¶ 6 & Request for Relief.

Third, Mr. Goldstein's lengthy argument that the distinction drawn in HSR Rule 801.1(i)(1) between passive and active investors is "irrational" and should be revised is similarly outside the scope of this proceeding. As noted above, the court's inquiry in a Tunney Act proceeding is limited to "whether the government's determination that the proposed remedies will cure the antitrust violations alleged in the complaint was reasonable, and whether the mechanism[s] to enforce the final judgment are clear and manageable." *InBev,* 2009 U.S. Dist. LEXIS 84787, at *3. Mr. Goldstein's assertions that HSR Rule 801.1(i)(1) – a rule that has been in effect for nearly thirty years – is "irrational" and should be revised are wholly irrelevant to the sole question before the Court: whether the proposed Final Judgment adequately addresses the harms alleged in the Complaint. In other words, Mr. Goldstein's assertions are plainly outside the scope of the limited review that Congress established under the Tunney Act. To the extent Mr. Goldstein wishes to dispute the appropriateness of HSR Rule 801.1(i)(1) and how it is applied, he can direct his suggestions to the FTC (or could have commented when the rule was originally passed[2]). He cannot, however, use his general opposition to HSR Rule 801.1(i)(1) as a basis to reject or delay entry of the proposed Final Judgment.

Finally, Mr. Goldstein's suggestion that this Court should reject the proposed Final Judgment because HSR Rule 801.1(i)(1) is "unconstitutional" has no merit. To the extent that this assertion – which has no bearing on whether the proposed Final Judgment adequately addresses the antitrust violations alleged in the Complaint – is properly before the Court, HSR Rule 801.1(i)(1) is content neutral and does not violate the First Amendment. Even if the rule implicated First Amendment interests, it would readily withstand review. *See Cableamerica Corp. v. FTC*, 795 F. Supp. 1082, 1093 (N.D. Ala. 1992) (dismissing claim that the FTC's enforcement of the HSR Act's reporting requirements violated the plaintiff's First Amendment rights).

[2] Contrary to Mr. Goldstein's comment, the original revised HSR rules, including 16 C.F.R. § 801.1(i)(1), were subject to public comment prior to being adopted. *See* 42 Fed. Reg. 39040, 39047 (Aug. 1, 1977).

For all of these reasons, Mr. Goldstein's public comment provides no basis to deny or delay entry of the proposed Final Judgment.

V. CONCLUSION

After reviewing the public comment, the United States continues to believe that the proposed Final Judgment, as drafted, provides an effective and appropriate remedy for the antitrust violations alleged in the Complaint, and is therefore in the public interest. The United States will move this Court to enter the proposed Final Judgment after the comment and this response are published in the *Federal Register*.

Date: October 17, 2016

Respectfully submitted,

/s/ Kathleen S. O'Neill

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July 27, 2016

United States of America v. VA Partners I, LLC, et al., Case No. 16-cv-01672 (WHA)

Dear Ms. O'Neill,

The announced settlement of the referenced matter appears to be a product of coerced capitulation rather than of the parties' relative assessments of the merits. It appears that ValueAct, in response to the FTC's post-litigation decision to dramatically increase the penalties for violations of the Hart-Scott-Rodino Antitrust Improvements Act (the "HSR Act") and to apply them retroactively, made a rational decision to settle.[1] As a result, the settlement avoids judicial scrutiny of, and perpetuates (by virtue of its *in terrorem* effect) a rule that, as explained below, should never have been adopted. For those reasons, the settlement is not in the public interest.

First, the enforcement action that the settlement resolves is based on a dubious premise, i.e., that the statutory phrase "solely for the purposes of investment" in connection with reporting and waiting period requirements of HSR Act means "solely for the purposes of passive investment." (Emphasis added.) While the FTC has long held that position, to my knowledge, the rule adopting it has never been subjected to judicial review to determine whether the FTC's addition of the word "passive" (which is absent in the statute) is reasonable. As explained below, it is not only unreasonable, it is irrational.

Rule 801.1(i)(1), which was apparently adopted without public comment in 1978, states: "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer." However, in the context

[1] In a statement issued to news media, ValueAct explained why it settled:

> ValueAct Capital fundamentally disagrees with DOJ's interpretation of the facts in connection with our investments in Halliburton and Baker Hughes. However, due to the sudden and unanticipated 150 percent increase in the potential penalties associated with alleged Hart Scott Rodino violations effective August 1, we felt we had no choice but to resolve this case as quickly as possible. We are pleased to have come to a resolution to this litigation that will not impact our business or strategy going forward.

the HSR Act, the purpose of which is to permit the FTC to analyze potential anticompetitive effects of business combinations before they occur, any distinction between an acquisition of stock by a passive investor and an investor that seeks to influence management (in contrast to an acquisition by a competitor, or a significant customer, supplier, or service provider[2]) is irrational as the facts in this case illustrate.

According to the DOJ's Competitive Impact statement ("CIS"):

> ValueAct intended from the time it made these stock purchases to use its position as a major shareholder of both Halliburton and Baker Hughes to obtain access to management, to learn information about the companies and the merger in private conversations with senior executives, to influence those executives to improve the chances that the Halliburton-Baker Hughes merger would be completed, and ultimately influence other business decisions regardless of whether the merger was consummated. ValueAct executives met frequently with the top executives of the companies (both in person and by teleconference), and sent numerous e-mails to these the top executives on a variety of business issues. During these meetings, ValueAct identified specific business areas for improvement. ValueAct also made presentations to each company's senior executives, including presentations on post- merger integration. The totality of the evidence described in the Complaint makes clear that ValueAct could not claim the limited HSR exemption for passive investment.

In other words, ValueAct did what a company's legal counsel or an investment bank might do, i.e., provide advice to management to increase the chances that a merger would be successfully completed, the only difference being that, rather than being paid for its advice, ValueAct hoped to profit through an increase in the value of its investment if the merger succeeded. Yet, attorneys and consultants are not required to make a filing with the FTC or pay a fee of $45,000 or more before they can speak with management. There is no good reason to discriminate against any stockholder, let alone a stockholder that owns less than 10% of a company's stock, that seeks only to profit from its investment by requiring it to cease trading for a period of time or to pay a large fee before it can exercise its right to communicate with management (nor, as explained below, could a law or regulation do so without violating the First Amendment).

There has been no allegation that ValueAct has ever contemplated merging with any company in which it owned stock including Halliburton or Baker Hughes. Nor was ValueAct a competitor, or a significant supplier, service provider, or customer of either company. The FTC and the DOJ do not seem to understand that active and passive investors have the same exact objective, i.e., to see the value of their investment increase. When a firm like ValueAct seeks to

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[2] For example, a large acquisition of FedEx stock by Amazon would clearly raise concerns about a possible effect on competition in the package delivery business. The same acquisition by ValueAct, regardless of whether it was a passive or active investor, would raise no similar concern.

influence management of a company, that is merely a means to achieve that objective -- not a separate objective.[3]

Indeed, DOJ's Competitive Impact Statement ("CIS"), in conclusory and circular fashion, alleges only one actual risk of harm caused by ValueAct: "ValueAct's failure to file the necessary notifications prevented the Department from timely reviewing ValueAct's stock acquisitions, which risked harming competition given that they resulted in ValueAct's becoming one of the largest shareholders in two direct competitors that were pursuing an anticompetitive merger." But, the CIS is silent about precisely how ValueAct's failure to file caused (or could cause) any real harm to competition or impaired the FTC or DOJ from determining whether to challenge the merger between Halliburton and Baker Hughes.[4] If the FTC and DOJ cannot cite an example of harm that resulted from the acquisition of stock by an activist investor, that suggests that Rule 801.1(i)(1) is irrational – and regulators should not be perpetuating irrational regulations.

In short, for 38 years the FTC has wrongly interpreted the HSR's "investment only" exemption and it should stop treating activist investors like bogeymen. Notably, the SEC, which has extensive experience in regulating investors and investments, has adopted proxy rules that properly reflect the difference between actions intended for investment and non-investment purposes. Thus, SEC Rule 14a-2(b)(ix) excludes certain solicitations from the technical

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3 In the film, *Terms of Endearment*, after Emma's funeral, Garrett, her neighbor (played by Jack Nicholson) supportively pays special attention to Tommy, Emma's long-neglected son:

> Garrett: I understand you're a swimmer. Me too.
> Tommy: But you're an astronaut, right?
> Garrett: I'm an astronaut and a swimmer

Similarly, an activist and an investor are not mutually exclusive things as the FTC would have it.

4 According to the DOJ's announcement of the settlement:

> "ValueAct acquired substantial stakes in Halliburton and Baker Hughes in the midst of our antitrust review of the companies' proposed merger, and used its position to try to influence the outcome of that process and certain other business decisions," said Principal Deputy Assistant Attorney General Renata Hesse, head of the Justice Department's Antitrust Division. "ValueAct was not entitled to avoid the HSR requirements by claiming to be a passive investor, while at the same time injecting itself in this manner. The HSR notification requirements are the backbone of the government's merger review process, and crucial to our ability to prevent anticompetitive mergers and acquisitions."

OK but where's the beef? As Matt Levine of *Bloomberg* pointed out: "Hesse's last sentence, about the HSR notification being 'crucial to our ability to prevent anticompetitive mergers and acquisitions,' might be true in general, but it has nothing to do with this case. The Justice Department could -- and did -- prevent the Baker Hughes- Halliburton merger without ever giving any thought to ValueAct." (http://www.bloomberg.com/view/articles/2016- 07-13/sometimes-it-s-hard-for-owners-to-talk-to-companies) requirements of the proxy rules provided they are not made by or on behalf of "[a]ny person who, because of a substantial interest in the subject matter of the solicitation, is likely to receive a benefit from a successful solicitation that would not be shared pro rata by all other holders of the same class of securities…." Similarly, SEC Rule 14a-8(i)(4) allows a company to exclude a shareholder proposal from its proxy statement "[i]f the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large."

The FTC should apply the same distinguishing principle to revise Rule 801.1(i)(1) to read as follows: "Voting securities are held or acquired 'solely for the purpose of investment' if the person holding or acquiring such voting securities has no intention of receiving a benefit that will not be shared pro rata by all other holders of the same securities." Unlike the current rule, such a rule is consistent with, and faithful to, the purpose of the HSR Act.

Additionally, Rule 801.1(i)(1) violates the First Amendment because it requires a stockholder to pay a sizeable fee and to temporarily refrain from additional stock purchases in order to exercise his or her right to communicate with management about the company. Worse, it is content-based[5] and thus, presumptively unconstitutional.[6]

To conclude, the DOJ should seek a stay of its enforcement action until Rule 801.1(i)(1) is revised to conform to the intent of the HSR Act. Even though ValueAct has agreed to the proposed settlement it would be morally wrong for an agency that is supposed use reason and pursue justice to finalize a settlement of an enforcement action which is based upon, and perpetuates, a regulation that is unconstitutional, irrational, and inconsistent with the HSR Act.

Very truly yours,

/s/

Phillip Goldstein

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5 See *Statement of the Federal Trade Commission In the Matter of Third Point*, File No. 121-0019, (August 24, 2015), (After enumerating Third Point's activist oriented communications in connection with its investment in Yahoo! Stock, the Commission concluded: "Given these actions by Third Point, we do not believe the investment-only exemption applies." In responding to the statement of the dissenting Commissioners, it defensively added: "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 other words, "We won't bring an enforcement action against a stockholder if we agree with it." That is a content-based regulation, plain and simple.

6 To save a content-based restriction on speech, the government must show that the restriction is narrowly drawn to achieve a compelling governmental interest. Application of this standard almost always leads to invalidating the challenged restriction.

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