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## FTC and DOJ Continue HSR Enforcement, Announce Penalties for Violation of “Institutional Investor” Exemption

Leucadia National Corporation has agreed to pay \$240,000 to settle charges that it violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the “Act”) for acquiring shares of KCG Holdings, Inc. (“KCG”) in 2013 without obtaining HSR Act clearance, relying erroneously on the “institutional investor” exemption. According to the Federal Trade Commission and the Department of Justice (collectively, the “Agencies”), Leucadia failed to satisfy all of the exemption’s conditions, noting that a broker-dealer acquired voting securities in another broker-dealer, which is prohibited by the exemption. Following on the heels of the Agencies’ recent settlement with Third Point LLC for improper reliance on the investment-only exemption, this action demonstrates that enforcement is on the rise. Clearly, even acquisitions of minority interests will draw scrutiny to ensure strict compliance with the highly technical parameters of the Act’s exemptions.

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HSR Act reporting is generally required where an acquisition of voting equity would result in an investor holding in excess of the \$50 million (as adjusted) “size of transaction” threshold (currently \$76.3 million) of the Act. Under the institutional investor exemption, however, certain institutional investors, including banks, investment companies and broker-dealers, may not need to file a notification. To qualify for the exemption, the acquisition must:

- a. be made directly by the institutional investor,
- b. be made in the ordinary course of business,
- c. be made “solely for the purposes of investment,” and
- d. result in the acquiring person holding 15% or less of the outstanding voting securities of the issuer.

Under an exception to the exemption, however, a) acquisitions by an institutional investor of voting securities of the same type of institutional investor are *not* exempt; and b) if any entity within the acquiring person that is not an institutional investor holds any of the voting securities of the issuer whose shares are being acquired, the use of the exemption is precluded.

The transaction at issue occurred in July 2013 when Leucadia acquired, through a controlled investment banking firm and broker-dealer, approximately 16 million shares of KCG, representing approximately 13.5% of KCG’s total outstanding securities valued at approximately \$173 million. As the acquisition was made by a broker-dealer, in the ordinary course of business, solely for the purposes of investment, and resulted in holdings of less than 15% in the issuer, Leucadia relied on the institutional investor exemption and did not file a notification. However, as both Leucadia’s subsidiary and KCG qualified as broker-dealers, the exemption was unavailable.

After Leucadia made a corrective filing in September 2014, the DOJ promptly filed the present action at the request of the FTC as this was Leucadia's second alleged violation of the Act. The first stemmed from an acquisition of control of a non-corporate entity in 2007 for which a corrective filing was later made. The FTC sought a fine in this case, consistent with other cases of repeat offenders. Under the Act, fines for non-compliance can amount to as much as \$16,000 per day for every day of non-compliance.

If you have any questions, please contact [Deidre Johnson](#), [Simone Waterbury](#), [Adam Eckart](#), or another member of Ropes & Gray's [antitrust practice group](#).