$850,000 Fine for HSR Violation for Failure to File Based on Improper Reliance on Investment Only Exemption

Biglari Holdings, Inc. ("Biglari"), owner of restaurant chain Steak 'n Shake, will pay $850,000 to resolve allegations that it violated premerger notification laws due to its improper invocation of the investment only exemption. Biglari failed to notify federal antitrust authorities prior to acquiring approximately 8.7% of the outstanding voting securities of restaurant operator, Cracker Barrel Old Country Store, Inc. ("Cracker Barrel"), according to a complaint and proposed settlement filed by the Department of Justice on September 25, 2012, at the request of the Federal Trade Commission ("FTC").

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"), requires persons contemplating mergers or acquisitions of voting securities or assets that meet or exceed the size-of-transaction and size-of-person thresholds[1] to notify the agencies and observe a waiting period before completing those transactions. The HSR rules include many exemptions and exceptions and at times require the aggregation of preacquisition holdings and reporting of subsequent acquisitions when a secondary threshold is crossed.

The HSR rules exempt acquisitions resulting in the buyer holding not more than 10% of outstanding voting securities of an issuer if they are made solely for the purpose of investment ("investment only exemption").[2] However, the federal antitrust authorities interpret this exemption narrowly and define "solely for the purpose of investment" as when "the person holding or acquiring such voting securities has no intention of participating in the formation, determination, or direction of the basic business decisions of the issuer."[3]

Biglari acquired voting securities of Cracker Barrel between May 24, 2011 and June 13, 2011 that resulted in Biglari holding in excess of $66 million of Cracker Barrel voting securities, thereby crossing the HSR threshold.[4] The Department alleged that the investment only exemption did not apply to this acquisition because immediately after June 13, 2011 Sardar Biglari, Chairman and CEO of Biglari, contacted executives at Cracker Barrel to set up a meeting and requested two seats on Cracker Barrel's board for himself and a Vice President of Biglari at that meeting. Mr. Biglari also discussed ideas to improve shareholder value. On August 26, 2011, Biglari made a filing under the HSR Act to acquire additional voting securities of Cracker Barrel and received early termination of the waiting period on September 22, 2011. The Department alleged that Biglari was in continuous violation of the HSR Act from the moment it exceeded the HSR threshold on June 8, 2011 until September 22, 2011.[5]

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[1] The minimum size-of-transaction threshold is currently $68.2 million ($50 million, adjusted annually); the next size-of-transaction threshold is $136.4 million ($100 million, adjusted annually).

[2] 16 C.F.R. § 802.9.

[3] *United States v. Biglari Holdings, Inc.*, Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting Requirements of the Hart-Scott-Rodino Act, 1:12-cv-01586 (D.D.C. Sept. 25, 2012) (quoting 16 C.F.R. § 801.1(i)(1)), available at http://www.ftc.gov/os/caselist/1110224/120925biglaricmpt.pdf.

[4] The minimum size-of-transaction threshold at the time of this acquisition was $66 million (as adjusted). *See* note 1, *supra*, for the current thresholds.

[5] The civil penalties for premerger filing notification violations under the HSR Act are $16,000 per day (for violations occurring on or after February 10, 2009).

This enforcement action illustrates that the federal antitrust authorities may consider post-transaction behavior to determine the pre-transaction intent of the acquiring entity and the applicability of the investment only exemption. Although post-acquisition a party is entitled to decide to change a passive investment to an active one, the near simultaneous request for two board seats likely led the FTC to conclude that the investment was not passive here. Some discussion with management about shareholder value may not necessarily be inconsistent with passive intent. Although not mentioned in the complaint, the FTC has stated that acquiring voting securities of a competitor is likely to be viewed as evidencing intent inconsistent with investment purpose.[6] This action also demonstrates that the antitrust authorities rigorously apply the technical requirements of the HSR Act even in acquisitions lacking apparent anticompetitive consequences. Therefore, the Act and rules should be carefully reviewed with respect to any particular transaction.

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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 Elai Katz at 212.701.3039 or ekatz@cahill.com; or Laurence T. Sorkin at 212.701.3209 or lsorkin@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

[6] Premerger Notification; Reporting and Waiting Period Requirements, 43 Fed. Reg. 33,450, 33,465 (Jul. 31, 1978).