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# Alert

## Antitrust/ Competition

### Settlement of an HSR Act Violation Highlights Limits on the Applicability of the “Investment Only” Exemption

By *Laura A. Wilkinson,*  
*John M. Sipple, Jr., Vadim M. Brusser*

On September 25, 2012, the US Department of Justice (DOJ) announced a proposed settlement to a civil complaint against Biglari Holdings, Inc. (Biglari) related to alleged violations by Biglari of the Hart-Scott-Rodino Act (HSR).<sup>1</sup> The complaint, which the DOJ brought on behalf of the US Federal Trade Commission (FTC), alleged that Biglari had failed to comply with HSR premerger notification requirements when it acquired shares of Cracker Barrel Old Country Store, Inc. (Cracker Barrel) in 2011.<sup>2</sup> Biglari agreed to pay an \$850,000 fine to resolve the issues in the complaint.

#### Background

Biglari is an investment fund that has ownership interests in restaurant chains, including Steak n Shake and Western Sizzlin. Cracker Barrel operates a chain of country stores and restaurants.

According to the complaint, Biglari made multiple open market acquisitions of Cracker Barrel voting securities between May 24, 2011 and June 13, 2011. The complaint also alleged that on June 8, 2011 Biglari's acquisitions of Cracker Barrel shares exceeded \$66 million, which was the applicable HSR filing threshold at the time. However, Biglari did not submit an HSR premerger notification form for its acquisitions of Cracker Barrel shares prior to exceeding aggregate holdings totaling \$66 million. It appears that Biglari attempted to rely on the “investment only” exemption to the HSR filing requirement because the holdings were less than ten percent of Cracker Barrel's outstanding securities. On June 13, 2011, Biglari filed a Form 13 D with the US Securities Exchange Commission (SEC) with respect to its acquisition of Cracker Barrel voting securities. In the SEC filing, Biglari noted that its aggregate share acquisitions accounted for approximately 9.7% of the outstanding Cracker Barrel securities and that it planned “to communicate with the Issuer's management and members of the Board regarding the business, governance and future plans of the Issuer.”<sup>3</sup>

On August 26, 2011, Biglari filed an HSR premerger notification form for an additional acquisition of Cracker Barrel shares. The acquisition of shares once notified received early termination of the HSR waiting period on September 22, 2011, which indicates that the transaction did not raise substantive antitrust concerns.

## Analysis

The HSR Act and HSR rules provide certain filing exemptions to acquisitions of voting securities that otherwise meet the applicable thresholds. This includes an exemption for stock acquisitions made “solely for the purposes of investment,” as long as the acquirer does not hold over ten percent of the issuer’s voting securities as a result of the acquisition.<sup>4</sup> The HSR Rules further limit the exemption by making it available only if the acquirer has “no intention of participating in the formulation, determination, or direction of the basic business decisions of the issuer.”<sup>5</sup> Further, the government’s statements at the time the HSR Rules were implemented note that certain types of actions are inconsistent with holding securities solely for investment, including nominating a candidate for the board of directors, holding a board seat, proposing corporate action that requires shareholder approval, soliciting proxies, or being a competitor of the issuer.<sup>6</sup>

The FTC concluded that Biglari’s acquisitions of Cracker Barrel shares did not qualify for the investment only exemption because of direct evidence that Biglari intended to become actively involved in the management and direction of Cracker Barrel’s business. Specifically, the complaint alleged that, shortly after making the share acquisitions that exceeded the HSR threshold, Sardar Biglari, the CEO of Biglari, contacted

Cracker Barrel’s CEO to explain that he had ideas on how to improve Cracker Barrel’s business. More importantly, during a meeting with Cracker Barrel executives, Mr. Biglari requested seats on the Cracker Barrel board of directors for himself and another Biglari executive.

In light of these actions, the FTC alleged that Biglari violated the HSR Act by failing to submit an HSR notification form, and observe the HSR waiting period, before acquiring Cracker Barrel shares in excess of the \$66 million threshold. The penalties for HSR violations are civil penalties of up to \$16,000 for each day that an acquirer is in violation of the HSR Act. Therefore, Biglari’s fine could have been over \$1.6 million (\$16,000 per day for the period between June 8 and September 22, the day it received early termination of the HSR waiting period). However, per the stipulated settlement, the government determined that a civil penalty of \$850,000 was appropriate to address the seriousness of the violation and deter future violations.

The final judgment has to be approved by a district court judge; however, because the settlement involves only the payment of civil penalties the court’s entry of judgment should be straightforward.

## Commentary

- The government generally has taken the position that a discussion between investors and management regarding

the general direction of the company is not inconsistent with the investment only exemption absent other actions by the investor that show an intent to influence the issuer’s business. However, the agencies have been consistent in denying the investment only exemption where the acquirer of shares has sought a seat on the issuer’s board of directors or advocated actions requiring shareholder vote. Therefore, the case is a strong reminder that stock purchasers, including private equity firms and activist shareholders, intending to influence the direction of a business should keep in mind the HSR premerger notification thresholds and filing requirements.

- Although the DOJ’s complaint does not provide details about the government’s analysis of the investment only exemption, the case highlights the relatively high bar to claiming the investment only exemption.
- More generally, the case reaffirms the FTC’s position that exemptions to the HSR Act are to be applied appropriately and narrowly.
- Finally, the fact that Biglari received a relatively significant fine, even though it was a first time HSR violator, suggests that the FTC viewed this as a serious violation and perhaps intended to send a message to the investment community.

## Antitrust/Competition

- 1 See DOJ press release, "Biglari Holdings Inc. to Pay \$850,000 Civil Penalty for Violating Antitrust Premerger Notification Requirements," dated September 25, 2012, *available at* [http://www.justice.gov/atr/public/press\\_releases/2012/287345.pdf](http://www.justice.gov/atr/public/press_releases/2012/287345.pdf), as well as the complaint and related case filings, *available at* <http://www.justice.gov/atr/cases/biglari.html>.
- 2 See FTC press release, "Biglari Holdings, Inc., to Pay \$850,000 Penalty to Resolve FTC Allegations That it Violated US Premerger Notification Requirements," *available at* <http://www.ftc.gov/opa/2012/09/biglari.shtm>.
- 3 Biglari, SEC Form 13D, filed June 13, 2011.
- 4 See HSR Rule 802.9.
- 5 See Formal Interpretation No. 4, HSR Rules at n.3 (January 17, 1979), *available at* <http://www.ftc.gov/bc/hsr/frmlintrps/fi04.shtm>.
- 6 See Statement of Basis and Purpose, HSR Rules, 43 Fed. Reg. 147 at p. 33465 (July 31, 1978), *available at* <http://www.ftc.gov/os/fedreg/1978/july/780731fr43FR33450.pdf>.

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Laura A. Wilkinson	<a href="mailto:laura.wilkinson@weil.com">laura.wilkinson@weil.com</a>	+1 202 682 7260
John M. Sipple, Jr.	<a href="mailto:john.sipple@weil.com">john.sipple@weil.com</a>	+1 202 682 7082

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