EXHIBIT 1 TO THE RESPONSE OF THE UNITED STATES TO PUBLIC COMMENT ON THE PROPOSED FINAL JUDGMENT

Case No. 3:16-cv-01672-WHA

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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

[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

[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,

Phillip Goldstein