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The Hart-Scott-Rodino (HSR) Act requires individuals, as well as companies, to disclose acquisitions that exceed specified thresholds to the Federal Trade Commission (FTC) and Department of Justice (DOJ). Failure to comply can result in civil fines of up to \$16,000 per day.

The HSR Act is highly technical, laying traps for the unwary. Recent enforcement should remind individuals who have stock holdings valued at \$66 million or more, or are nearing that level, to seek advice to avoid inadvertent HSR violations.

Comcast CEO Fined for Failure to File Under HSR

Last week, the FTC and DOJ announced that Brian L. Roberts, CEO of Comcast Corporation, agreed to pay \$500,000 for his failure to comply with the HSR Act's notification requirements.

Roberts' failure to file was based on two different events, neither of which he initiated.

According to the government's complaint, beginning in October 2007, Roberts acquired shares of Comcast through his 401(k) account via reinvestment of dividends and short term interest. His 401(k) plan continued to acquire shares through April 2009.

Roberts also received restricted stock units (RSUs) as part of his compensation, which gave him the right to receive voting securities in the future, conditional on continued employment with the company and/or meeting certain performance targets. The acquisition of the RSUs was not itself reportable under HSR. However, when those units vested in 2008 and 2009, Roberts obtained voting stock, which triggered a filing obligation.

Roberts' HSR violation is likely to be particularly perplexing to executives because he filed under HSR in 2002 to report the acquisition of Comcast stock, and the additional acquisitions during 2007-2009 were small. While many are aware of the need to file under HSR for acquisitions valued at \$66 million (adjusted annually for changes in GNP), the HSR Act also requires additional filings at "higher" thresholds—including \$131.9 million and \$659.5 million, as adjusted—or 50% control.

Moreover, HSR filings only cover acquisitions up to the next filing threshold, made within five years of the filing, and only if the threshold originally filed for was crossed within one year. Because Roberts' acquisitions took place more than five years after his last HSR filing, he was required to file again before any additional voting securities were acquired (no matter how small those additional acquisitions were).

Roberts made a corrective HSR filing in August 2009 after his lawyers discovered the error. He was therefore alleged to be "in continuous violation of the HSR Act...beginning on October 22, 2007 and ending when the waiting period [for the corrective filing] expired." The maximum fine that could have been assessed for the violation was in excess of \$8 million.

According to the FTC, the amount of the fine was "limited" to \$500,000 because the violation was inadvertent and technical, Roberts promptly disclosed the violation once discovered, the violation was not to Roberts' financial benefit, and Roberts had received faulty advice from counsel.

Roberts' failure to file was not his first HSR lapse. He earlier ran afoul of the HSR notification requirements for failing to report acquisitions of voting securities by Comcast, when he met the HSR definition for controlling the company. FTC practice is to give parties who inadvertently fail to file "one free bite at the apple" to encourage compliance. That is, the FTC will typically not seek civil

penalties if an individual voluntarily reports an earlier failure to file. It will, however, generally seek penalties for subsequent mistakes.

Individuals Are Regularly Fined for HSR Violations

Roberts is not the first individual fined for overlooking the HSR filing requirements when acquiring securities. Significant fines have been assessed against other individuals who failed to comply with the HSR notification requirements:

John C. Malone (2010). John Malone, CEO and Chairman of Discovery Holding Company, agreed to pay a \$1.4 million civil penalty for failing to report acquisitions of Discovery voting securities. In 2005, Malone filed notification before acquiring voting securities of Discovery's parent at the time. However, when Malone later acquired Discovery voting securities after Discovery's spin-off from the parent, Discovery was its own, independently-controlled issuer and therefore required a separate filing. In addition, two days after making a corrective filing in 2008, Malone exercised options to acquire additional Discovery voting securities, contravening the waiting requirements of the HSR Act which were still in place from his just-submitted corrective filing.

James D. Dondero (2007). Hedge fund parent James Dondero agreed to pay \$250,000 for his failure to file before exercising an option to acquire stock in Motient Corporation. The shares acquired in exercising the option alone were under the HSR threshold, but when combined with shares owned by the hedge fund Dondero controlled, which had increased in value, they brought the total value of the shares he controlled above the HSR threshold.

William ("Bill") H. Gates (2004). In 2001, Bill Gates acquired shares of Republic Services, Inc. without filing under HSR, relying on an exemption from reporting for acquisitions "solely for the purpose of investment." The exemption did not apply, however, because his investment put him over 10% of Republic's outstanding securities. The FTC let him off the hook, based on its "one free bite" policy. Gates agreed to pay \$800,000 in 2004, however, for failing to report his acquisition of securities in ICOS Corporation six months later. Gates again erroneously believed that his acquisition fell within the "solely for the purpose of investment" exemption. Because Gates served on the Board of Directors of ICOS, however, the exemption was not available.

HSR Filing Requirements Not Always Obvious, Especially for Individuals

These examples highlight situations triggering HSR filings that may not be top of mind to individual investors:

- Small, incremental investments that cause an individual's holdings to cross an HSR threshold not previously reported;
- Any incremental investments, no matter how small, where the value of existing holdings have already increased above a threshold;
- Exercising options or warrants;
- Vesting of restricted stock units;
- 401(k) reinvestments; and
- Additional investments after the five-year period following an initial HSR filing.

Even if HSR thresholds are triggered, other exemptions may apply, allowing parties to avoid the often expensive and time-consuming process of submitting an HSR filing. Of particular relevance to individuals, an investor who is not an officer or director of the issuer may be exempt if he or she holds 10% or less of the issuer's shares and the shares are held "solely for the purpose of investment."

Investors with large holdings should consult with counsel before making additional investments to determine if an HSR filing may be required, and bring possible violations to counsel's attention so a corrective filing can be made, if necessary, to minimize potential fines.

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