

Stay out of the penalty box: Important reminders about HSR Act compliance for officers and directors

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A public company executive [recently entered into a consent decree](#) with the Federal Trade Commission (FTC) pursuant to which he agreed to pay US\$609,810 in fines for acquiring additional voting shares in violation of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the HSR Act), as amended. The HSR Act applies to acquisitions of voting shares, controlling interests in non-corporate entities, and assets if HSR threshold tests, which are [adjusted annually](#), are satisfied as a result and no exemption applies. If the HSR Act applies, the parties to the acquisition must file HSR notifications with the FTC and the Antitrust Division of the Department of Justice (DOJ) and observe a waiting period before they may close on the acquisition. Penalties for failure to comply with these requirements are currently up to US\$41,484 a day for each day of the violation.

This case serves as a strong reminder of two key points. First, the FTC is strict in applying penalties for second missed filing obligations even if the mistake was inadvertent. Second, the HSR Act's filing and waiting period requirements can apply even to officers and directors who receive restricted stock units (RSUs) or other stock-based compensation from their companies.

Background and allegations

On 16 August 2016, James Dolan, Executive Chairman and CEO of Madison Square Garden Company (MSG), which owns the New York Knicks and New York Rangers, filed an HSR form to report the upcoming vesting of RSUs he received from MSG due to his role there. His HSR waiting period was terminated by the FTC and DOJ on 6 September 2016, and three days later he acquired MSG shares that caused him to satisfy the US\$50 million (as adjusted) HSR size of transaction threshold. Under the HSR rules, he therefore could acquire additional MSG voting shares until 6 September 2021, without filing another HSR form unless he were to acquire and hold as a result in excess of US\$100 million (as adjusted) of MSG voting shares or 50 percent of MSG voting shares.

On 11 September 2017, Mr. Dolan acquired 591 MSG voting shares through the vesting of RSUs and, as a result, he held MSG voting shares valued in excess of the US\$100 million (as adjusted) HSR size of transaction threshold. He did not file an HSR notification in advance of this acquisition and did not observe the applicable HSR waiting period. On 24 November 2017, he made a corrective HSR filing to report his acquisition of MSG voting shares on 11 September

2017, and his HSR waiting period expired on 26 December 2017. As a result, he was in continuous violation of the HSR Act from 11 September 2017 until 26 December 2017.

As the DOJ pointed out in the complaint, this was not the first time Mr. Dolan had missed an HSR filing obligation. On 10 March 2010, without filing an HSR notification and observing the HSR waiting period, he acquired voting shares of Cablevision Systems Corporation (CSC), which caused him to hold in excess of the US\$50 million (as adjusted) HSR size of transaction threshold. He continued to acquire additional voting shares of CSC and, as a result of an acquisition on 30 November 2010, he acquired and held over US\$100 million (as adjusted) of CSC voting shares, thus crossing the next HSR notification threshold. He did not make a corrective HSR filing for having crossed the HSR notification thresholds on 10 March 2010, and again on 30 November 2010, until 24 February 2012. The government did not require him to pay a fine for these two missed filing obligations because they were inadvertent. The DOJ did notify Mr. Dolan, however, that he "still must bear responsibility for compliance with the Act" and he was still "accountable for instituting an effective program to ensure full compliance with the Act's requirements." Complaint para. 16.

Key takeaways

There are several important reminders from this latest HSR enforcement action:

- *You only get one bite at the apple without civil penalties.* The FTC typically follows a "one bite at the apple" policy and does not impose fines on parties who inadvertently missed an HSR filings obligation so long as the parties took certain steps such as self-reporting the violation upon discovery and making a correcting HSR filing shortly thereafter. Here, because Mr. Dolan had already missed two prior filing obligations for which the FTC did not pursue monetary penalties, he had used up his "one bite" – though the monetary penalty imposed here was substantially less than the maximum available under the HSR Act. Parties that miss a filing obligation should submit a corrective filing promptly – even if the agencies have previously alleged violations of the HSR Act – since penalties accrue for every day in which parties are in violation. Civil penalties may be reduced for prompt submission of corrective filings. Here, the penalty was reduced from more than US\$4 million to US\$609,810 because the government determined the violation was inadvertent, Mr. Dolan promptly self-reported after discovering the violation and was willing to enter into a consent decree.
- *The HSR Act applies even to stock-based compensation awards.* The HSR Act applies to acquisitions of voting securities through any means, including when officers and directors acquire voting securities of their employers through stock-based compensation awards such as the vesting of RSUs or the exercise of stock options. The HSR Act's "passive investor" exemption does not apply to a company's officers and directors since to be passive, one cannot have the intent to influence a company's business decisions or participate in the management of the company. Officers and directors should carefully consider whether a filing is required prior to taking beneficial ownership of company stock and allow sufficient time for the 30-calendar-day waiting period to expire. Companies should consider establishing an HSR compliance program to monitor whether cumulative acquisitions by their officers and directors cross the HSR reporting thresholds.
- *The HSR reporting thresholds are revised annually and voting securities are valued cumulatively.* Acquiring parties should remain continually aware of the HSR notification thresholds, which are adjusted annually – currently US\$84.4 million, US\$168.8 million, US\$843.9 million, 25 percent of the company's voting shares if the value to be held is greater than US\$1,687.8 million, and 50 percent or more of the voting securities. When determining whether an HSR filing is required, the acquiring person must aggregate the value of the voting

securities currently held with the value of the voting securities previously acquired and compare against the current applicable thresholds. Although parties have one year from the expiration of the waiting period to close on the reported acquisition, and then five years from the same date to acquire additional voting securities up to the next reporting threshold, any additional acquisitions during those time periods that cross the next reporting threshold will likely trigger a new filing requirement. Here, Mr. Dolan's additional acquisition of shares valued at around US\$150,000 was sufficient to push his MSG holdings across the next threshold and trigger the filing obligation that prompted this enforcement action.

Given the U.S. antitrust agencies' continued vigorous enforcement actions against violators of the HSR Act, acquiring and acquired parties – including officers and directors who receive stock-based compensation – should consult with experienced HSR counsel well in advance of potentially reportable acquisitions and should set up HSR compliance programs to help them timely identify potentially reportable acquisitions.

Contacts



Michele S. Harrington
Partner, Northern Virginia
T +1 703 610 6173
michele.harrington@hoganlovells.com



Robert F. Baldwin III
Senior Associate, Washington, D.C.
T +1 202 637 2092
robert.baldwin@hoganlovells.com



Tracy Penfield
Senior Associate, Washington, D.C.
T +1 202 637 5593
tracy.penfield@hoganlovells.com

www.hoganlovells.com

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