

August 21, 2014

Hart-Scott-Rodino Act

Berkshire Hathaway Inc. Agrees to Pay Civil Penalty of \$896,000 to Resolve FTC Allegations That it Violated the Reporting Requirements of the HSR Act

SUMMARY

Berkshire Hathaway Inc. has agreed to pay a civil penalty of \$896,000 concerning its conversion of notes into voting securities of USG Corporation in December 2013, which was more than five years after Berkshire's HSR Act filing to acquire an initial USG stock position and thus past the expiration date of the original HSR. In addition, Berkshire previously had made a corrective filing in July 2013 concerning the acquisition of voting securities of a different issuer and was, therefore, treated as a repeat offender by the Federal Trade Commission.

DISCUSSION

On Wednesday, August 20, the Federal Trade Commission ("FTC") announced that Berkshire Hathaway Inc. ("Berkshire") had agreed to pay a civil penalty of \$896,000, the maximum civil penalty that could have been imposed, for its alleged violation of the premerger notification and filing requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") in connection with its 2013 acquisition of voting securities of USG Corporation.

As background, according to the FTC's complaint, Berkshire had made a corrective filing in July 2013 concerning an acquisition of voting securities of Symetra Financial Corporation. The FTC took no action against Berkshire following that violation but sent Berkshire a letter on December 5, 2013, including its standard language cautioning that Berkshire "is accountable for instituting an effective program to ensure full compliance with the [HSR] Act's requirements."

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Under Rule 802.21(a) of the HSR Act Rules, once an acquiring person submits an HSR Act filing and observes the waiting period, subsequent acquisitions of voting securities of the same issuer are exempt from the HSR Act's reporting requirements for a period of five years from the expiration of the waiting period, provided the acquisitions do not cross a higher notification threshold. Once that five year period expires, however, the protection provided by the initial filing no longer exists.

The Berkshire Complaint alleges that in January 2006, Berkshire properly submitted an HSR Act filing concerning its acquisition of 19% of the voting securities of USG Corporation. On December 9, 2013, five days after it received the FTC letter concerning its corrective filing in Symetra - - and more than five years after the waiting period applicable to its initial HSR Act filing relating to USG had expired - - Berkshire, without first submitting an HSR Act filing, converted certain USG notes that it owned into USG voting securities. As a result of this acquisition, Berkshire held approximately 28% of USG's voting securities, valued at more than \$950 million. Berkshire submitted a corrective filing concerning this conversion/acquisition on January 3, 2014.

In the FTC's press release concerning this matter, Deborah Feinstein, the Director of the FTC's Bureau of Competition, stated:

“Although we may not seek penalties for every inadvertent error, we will enforce the rules when the same party makes additional mistakes after promises of improved oversight. Companies and individual investors alike should ensure that they have an effective program in place to monitor compliance with HSR filing requirements.”

This proceeding highlights the fact that parties that have already submitted corrective filings for an HSR Act violation must successfully establish and monitor effective compliance programs to avoid future violations and significant civil penalties. In addition, it also serves as a reminder that the conversion of notes into voting securities is treated as an acquisition of voting securities that may be subject to the HSR Act and that the benefits of an HSR Act filing expire within five years. Once that period expires, even the proposed acquisition of a single additional share of voting securities can require the submission of a new HSR Act filing.

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