

December 19, 2011

Hart-Scott-Rodino Act

DOJ Enforcement Action Serves As a Reminder that Stock Received as Executive Compensation Can Trigger an HSR Act Filing

SUMMARY

The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") have extracted their first publicized penalty for a corporate executive's failure to make a Hart-Scott-Rodino Act filing before receiving stock of his employer as part of his compensation.

Although the historical background of the enforcement proceeding is somewhat unusual, the proceeding makes clear that the DOJ and FTC will, in appropriate cases, seek penalties against executives who fail to comply with the HSR Act's filing requirements when they receive stock as part of their executive compensation.

DISCUSSION

On December 16, 2011, the Department of Justice ("DOJ"), at the request of the Federal Trade Commission, filed a civil antitrust action against Brian L. Roberts, the Chairman of the Board and Chief Executive Officer of Comcast Corporation ("Comcast"), for violating the notification and waiting requirements of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") primarily by receiving stock of Comcast as executive compensation without first submitting a filing under the HSR Act. The action was simultaneously settled with Mr. Roberts paying a \$500,000 civil penalty.

The allegations of the complaint make clear that Mr. Roberts' violation resulted from his failure to realize that an HSR Act filing permits the acquisition of stock for at most a five-year period following an initial filing. Mr. Roberts had correctly made an HSR Act filing in 2002 for the acquisition of Comcast stock in connection with a corporate transaction between Comcast and AT&T. However, that filing only permitted Mr. Roberts to acquire additional shares of Comcast (so long as he did not exceed the next notification threshold) for a five-year period after the expiration of the waiting period on that filing, which was

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September 16, 2007. Mr. Roberts failed to submit a new filing before he acquired Comcast voting securities the following month in October 2007 and on various additional occasions through the end of April 2009.

The acquisitions by Mr. Roberts took two forms. The primary form consisted of a total of 339,560 Comcast shares that Mr. Roberts received between March 2008 and April 2009 upon the vesting of restricted stock units ("RSUs") that he had been granted as a part of his compensation. Mr. Roberts' filing obligations were also triggered when his 401(k) plan acquired a total of 3,700 shares of Comcast voting securities on various occasions between October 2007 and April 2009 through reinvestment in Comcast voting securities of dividends and short-term interest earned in the 401(k) account.

The levying of this first penalty for failure to file for securities received as executive compensation may have been partially influenced by Comcast's failure to make two other HSR filings for corporate transactions when Mr. Roberts was the ultimate parent entity of Comcast for a period of time ending on November 15, 2002, presumably because he held over 50% of Comcast's voting securities at the time. These two prior failures to comply with the HSR Act were attributed to Mr. Roberts. On July 30, 1999 Mr. Roberts submitted a corrective filing related to an acquisition by Comcast of voting securities of Internet Capital Group, Inc. resulting from its reorganization from an LLC to a corporation. On February 23, 2000, Mr. Roberts submitted another corrective filing for a "secondary acquisition" that had occurred when Comcast filed for the acquisition of Lenfest Communications, Inc., but failed to file for the resulting indirect acquisition of Lenfest's minority holding in Susquehanna Cable Co. and certain of its subsidiaries. In both corrective filings, Mr. Roberts asserted that the failures to file were inadvertent and, in both cases, following an investigation, the Federal Trade Commission notified Mr. Roberts that they would not seek civil penalties for the violation, although Mr. Roberts was told he was accountable for creating a program to insure future HSR compliance.

It is hard to judge whether this enforcement action, following a two-year investigation, would have been brought in the absence of the two prior corrective filings by Mr. Roberts. Nevertheless, the proceeding serves as a reminder that executives who acquire stock of their employer, through vesting of RSUs or other means, must take appropriate steps to comply with the notification and waiting period requirements of the HSR Act prior to their receipt of such shares.

While the \$500,000 fine is not insignificant, it is far less than the maximum fine (of over \$7 million) that could have been levied. The lower fine is likely attributable both to the fact that Mr. Roberts brought all of these violations to the regulators' attention and that the earlier violations and corrective filings, while attributable to Mr. Roberts, were generated by corporate transactions rather than more personal acquisitions, such as those in his own compensation and 401(k).

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