

Clients & Friends Memo

Lessons Learned from Recent Penalties for Failures to File HSR Notification

July 15, 2013

Two recent enforcement actions for failure to file notification under the Hart-Scott-Rodino Improvements Act of 1976, as amended (the “**HSR Act**”)—one against a corporate investor and one against an investment firm—along with a similar action brought against a company executive about 18 months earlier, serve as reminders to individual investors, companies, and their executives of the consequences of failing to comply with the HSR Act.

- Corporate investor [Barry Diller agreed on July 2, 2013, to pay a civil penalty of \\$480,000](#) to settle Federal Trade Commission (“**FTC**”) charges for failing to file HSR notification in connection with his acquisitions of Coca-Cola stock.
- The FTC settled [similar charges against investment firm MacAndrews & Forbes Holdings, Inc. \(“MacAndrews & Forbes”\)](#) on June 20, 2013, for failing to file HSR notification in connection with the firm’s acquisition of voting securities of Scientific Games. MacAndrews & Forbes, which is a wholly-owned holding company of billionaire Ronald Perelman, agreed to pay a civil penalty of \$720,000.
- About 18 months earlier, [the CEO of Comcast Corporation \(“Comcast”\) agreed to pay a civil penalty of \\$500,000](#) to settle a similar enforcement action in connection with his failure to file HSR notification for acquisitions of Comcast shares through a stock compensation program.

These enforcement actions highlight several important questions for both companies and individuals to consider. For example: When must HSR notification be filed? How long is HSR clearance good for? After clearance, can an acquirer continue to buy stock? Must executives file HSR for stock awarded as part of their compensation plans? What happens if a company or individual fails to file HSR notification?

The key takeaway from these enforcement actions, however, is that while the agencies likely will not impose civil penalties the first time an acquirer inadvertently fails to file HSR notification, they will expect the acquirer to implement measures to ensure future HSR compliance. A repeat offender

can expect to face substantial fines, even if those fines represent only a fraction of the civil penalties that can be levied under the HSR Act.

* * *

Background on HSR filings. Pursuant to the HSR Act, parties to certain large acquisitions that affect commerce in the United States, including acquisitions of voting stock, must file notifications with the FTC and the Antitrust Division of the U.S. Department of Justice (“DOJ”) and then observe a waiting period that must either expire (usually within 30 days) or be terminated before consummating their transactions. During the waiting period, one of the two agencies determines whether the transaction may result in a substantial lessening of competition. The government can impose significant civil penalties for noncompliance of up to \$16,000 per day from the date of the acquisition.

HSR notification thresholds and valuation rules. There are five successive “notification thresholds” for acquisitions of voting securities of an issuer that are adjusted annually based on changes in gross national product:

Original Threshold	Adjusted Threshold for 2013
\$50 million	\$70.9 million
\$100 million	\$141.8 million
\$500 million	\$709.1 million
25 percent, if value of voting securities to be held is greater than \$1 billion	25 percent, if value of voting securities to be held is greater than \$1.4181 billion
50 percent, if value of voting securities to be held is greater than \$50 million	50 percent, if value of voting securities to be held is greater than \$70.9 million

When filing HSR for the acquisition of voting stock, the buyer indicates the notification threshold that it intends to cross and then has one year from the end of the waiting period to cross that stated threshold. If within that year, the buyer crosses the threshold stated in its filing (or any lower threshold), the buyer may continue acquiring voting shares up to the next threshold for five years from the end of the waiting period. Unless otherwise exempt, a new HSR filing is required if the acquirer (1) will cross the next threshold or (2) wishes to acquire shares after the five-year period has expired and the value of the acquirer’s total holdings would cross any HSR threshold.

Note that the transaction value for HSR purposes is determined by valuing the voting securities that a buyer will hold as a result of the transaction, including the value of any voting securities it already holds. Thus, if the stock increases in value over time, a buyer may cross the next notification threshold even with the acquisition of a small amount of stock.

Failure to file by corporate investor. Diller, an investor with many media holdings, acquired 120,000 shares of Coca-Cola on November 1, 2010. Although the acquisition resulted in Diller holding Coca-Cola shares valued at more than \$63.4 million, the HSR premerger size-of-transaction reporting threshold at the time, Diller did not file HSR notification. Diller then acquired an additional 605,000 shares of Coca-Cola between November 1, 2010, and April 26, 2012, and an additional 264,000 shares on April 27, 2012, bringing his total stake to about \$136.4 million, again without submitting the requisite HSR filings. After being contacted by in-house counsel for Coca-Cola in May 2012 about HSR, Diller submitted corrective filings on May 23, 2012. The FTC alleged that Diller was not subject to any reportability exceptions. Diller thus was in violation of the HSR Act from November 1, 2010, to June 22, 2012, when the waiting period expired for the corrective filings.

Prior failure to file by Diller. In seeking the \$480,000 civil penalty, the US government noted that Diller previously had failed to file HSR in 1998 for his acquisition of CitySearch Inc. shares, when Diller controlled USA Networks and USA Networks acquired CitySearch Inc. After Diller made a corrective filing for that acquisition, the FTC declined to seek penalties at that time but informed Diller that he was responsible for establishing an effective HSR compliance program for future investments.

Failure to file by investment firm. MacAndrews & Forbes filed HSR on February 1, 2007, to acquire voting securities of Scientific Games, and the waiting period was terminated early on February 9, 2007. Accordingly, once MacAndrews & Forbes began acquiring shares within one year of February 9, 2007, the HSR rules allowed the firm to continue acquiring shares in Scientific Games until February 9, 2012, so long as the firm did not cross a threshold higher than the one stated in its HSR filing. MacAndrews & Forbes, however, acquired an additional 800,000 shares in June 2012, after the five-year period had elapsed. The value of the total shares in Scientific Games held by MacAndrews & Forbes exceeded the lowest filing threshold at that time. The firm realized its inadvertent failure to file and submitted a corrective filing on August 16, 2012.

Prior failure to file by MacAndrews & Forbes. Similar to the situation with Diller, in the case of MacAndrews & Forbes, the firm previously had failed to file HSR (also inadvertently according to the firm) for the acquisition of a different issuer's stock in June 2011. In that case, MacAndrews & Forbes had acquired shares of SIGA Technologies, Inc. ("**SIGA**") after filing HSR in 2010. Within the five-year period, the firm acquired additional shares in SIGA. However, the value of the SIGA shares already held by the firm (which had appreciated over time) combined with the value of the

newly-acquired shares pushed the value of the transaction above the notification threshold for which it had filed. MacAndrews & Forbes filed a corrective notification, noting that its failure to file was inadvertent, and no civil penalties were imposed.

Failure to file by company executive. It is important to note that HSR requirements for the acquisition of voting securities also apply to acquisitions by company executives through stock compensation programs. Similar to Diller and MacAndrews & Forbes, Roberts, the CEO of Comcast, agreed in December 2011 to pay a \$500,000 penalty to settle FTC charges that he violated the HSR Act in connection with his acquisitions of Comcast stock (through the vesting of restricted stock unit awards and the automatic reinvestment of dividends and short-term interest through his 401(k) account) after the five-year period had elapsed. As with Diller and MacAndrews & Forbes, Roberts also was a repeat offender having previously failed to file HSR on two other occasions (no civil penalties were assessed in either case).

Key Takeaways

- **Civil penalties likely for repeat failures to file HSR notification.** Civil penalties for an inadvertent failure to file HSR notification generally are mitigated by factors such as whether a prompt submission of a corrective filing was made, whether the acquirer gained any financial benefit, and whether safeguards have been implemented to prevent future HSR compliance issues. Accordingly, and as these recent enforcement actions make clear, repeat offenders can expect to face substantial fines.
- **Assess HSR reportability prior to any acquisitions.** The enforcement actions against Diller and MacAndrews & Forbes, following on the heels of the enforcement action against Roberts, are important reminders for individual investors, companies, and their officers and directors to be attentive and up-to-date on HSR reporting thresholds and requirements. One must assess reportability for the initial acquisition of voting stock (or assets or noncorporate interests), but must also regularly monitor HSR compliance for subsequent acquisitions (e.g., a new HSR filing may be required for subsequent acquisitions of voting securities if a new threshold is crossed or if shares are acquired after the five-year period elapses). In addition, companies should consider implementing HSR compliance programs for company stock acquired by its executives through stock compensation programs, etc.

- **HSR transaction value includes value of shares previously acquired.** The HSR size-of-transaction test for acquisitions of voting securities includes the current market value of voting shares already held and not otherwise exempt. Thus, even seemingly insignificant acquisitions of stock for dollar amounts below the HSR filing threshold may trigger a filing depending on the value of the stock already held.

* * * *

Please contact any of the following Cadwalader attorneys if you have any questions about this memorandum.

Charles F. (Rick) Rule	+1 202 862 2420	rick.rule@cwt.com
Jonathan S. Kanter	+1 202 862 2436	jonathan.kanter@cwt.com
Andrew J. Forman	+1 202 862 2243	andrew.forman@cwt.com
Ngoc Pham Hulbig	+1 704 348 5282	ngoc.hulbig@cwt.com
Christian J. Lorenz	+1 202 862 2357	christian.lorenz@cwt.com