



Guidelines for Executives Receiving Company Shares in Light of Recent HSR Act Enforcement Action

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SUMMARY

The Department of Justice (“DOJ”) and the Federal Trade Commission (“FTC”) recently imposed a penalty under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (“HSR Act”) on Comcast’s CEO for his failure to make an HSR filing prior to the acquisition of shares Comcast granted to him as part of his compensation.

While the HSR Act was adopted to give the federal antitrust enforcement agencies advance notice of transactions that could harm competition, compensation-related transfers of voting shares from a corporation to its officers or directors can technically trigger HSR filings if the holdings of voting shares by the executive exceed certain size-of-transaction thresholds and that executive’s investment assets or revenues exceed certain size-of-person thresholds. Although the FTC has publicly indicated in the past on an informal basis that the issuance of company shares to executives as part of their compensation can trigger an HSR filing, this appears to be the first time that the agencies have imposed a penalty on an executive for failure to file before receiving shares as part of his or her compensation.

CIVIL PENALTY IMPOSED ON COMCAST CEO UNDER HSR ACT

Last month, the FTC and DOJ announced that Comcast CEO Brian L. Roberts agreed to pay a \$500,000 penalty for his failure to make a filing under the HSR Act.

Mr. Roberts had correctly filed under the HSR Act in 2002 for the acquisition of Comcast shares in a transaction that was not in the context of his compensation. Pursuant to the HSR rules, Mr. Roberts was then able to acquire shares of Comcast up to the next notification threshold for five years after the expiration of the HSR waiting period, or until September 16, 2007. Mr. Roberts then acquired additional shares in October 2007 and on various other occasions ending in April 2009, all in violation of the HSR Act. Mr. Roberts received additional shares of Comcast both through the vesting of restricted stock units (“RSUs”) granted to him as part of his compensation and through the reinvestment into Comcast shares of dividends and interest earned in his 401(k) account.

The FTC and DOJ will typically not impose penalties on an individual for an inadvertent first-time failure to file as long as the requisite corrective filings are made in a timely fashion. In the case of Mr. Roberts, the decision by the agencies to impose a penalty may have been influenced by the fact that Mr. Roberts previously made two corrective filings for acquisitions by Comcast at times when Mr. Roberts was the controlling shareholder of Comcast. On the

other hand, the \$500,000 penalty imposed was a small share of the maximum fine of over \$8 million that the agencies could have imposed under the HSR Act, and likely the agencies were influenced in part by the fact that Mr. Roberts brought this violation to the attention of the agencies. Current maximum penalties under the HSR Act are set at \$16,000 per day.

CONSIDERATIONS IN ASSESSING FILINGS RELATED TO EXECUTIVE COMPENSATION

- Officers and directors generally do not qualify for the passive investment exemption to HSR filing requirements. Many acquisitions involving individuals are exempt from HSR filing under the passive investor exemption, which exempts acquisitions of voting securities made solely for the purpose of investment if, as a result of the acquisition, the acquiring person would hold ten percent or less of the outstanding voting securities of the issuer and has no intention of participating in the basic business decisions of the company. However, the FTC's position is that the passive investor exemption is not available to officers and directors of an issuer or subsidiaries of that issuer.
- Acquisitions of voting securities are subject to HSR filing requirements if certain size-of-transaction and size-of-person thresholds are met. These thresholds adjust annually for inflation. Under current size-of-transaction thresholds, an acquisition of shares could trigger an HSR filing if the executive acquiring shares would hold shares after the acquisition valued at more than \$66.0 million. Additional HSR filings may be required for acquisitions of additional voting securities from the same issuer crossing each of the following thresholds: \$131.9 million, \$659.5 million; 25% of the voting shares if their value is at or above \$1,319.0 million, and 50% of the voting shares if their value is above \$66.0 million.
- Holdings valued above \$66.0 million but less than \$263.8 million will trigger an HSR filing only if the executive also exceeds the size-of-person threshold. Under the current size-of-person threshold, the executive must have annual revenue or total assets in excess of \$13.2 million. Typically, this threshold only applies to investment income and assets.
- Corrective filings may be required for failures to file back to the effective date of the HSR Act, September 5, 1978. An individual executive (along with his or her company) may have to make multiple corrective filings for inadvertent failures to file over this period. However, for each corrective filing beginning with the earliest in time, acquisitions of additional voting securities are exempt from filing for a period of five years from the date of the transaction triggering the corrective filing as long as the next filing threshold is not met or exceeded by those additional acquisitions. Past thresholds have varied from the current thresholds noted above. The initial size-of-transaction threshold was as low as \$15.0 million prior to February 2001, at which time it was raised to \$50.0 million.
- A number of exemptions may apply when assessing filing obligations. For example, an executive who exercises stock options and immediately sells the acquired shares and arranges for that resale ahead of time will not be deemed to hold those shares. In addition, an executive is typically not deemed to hold phantom shares or RSUs until

vested or exercised. As another example, executives holding interests in companies organized as a partnership or LLC cannot trigger HSR filings if their interest in the company is less than 50%. Other exemptions may apply and need to be assessed under the particular circumstances.

Executives with significant holdings of shares of their company should consult with counsel to assess whether additional acquisitions of shares, through compensation grants or otherwise, may trigger an HSR filing, or whether corrective filings may be necessary for past transactions.

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