

HSR Reminder and Sporting News Update

by Michael A. Lindsay and Jaime Stilson

You know your area of law is hot when it makes the sports section. This past week several sports pages reported that James Dolan (owner of the New York Knicks and CEO of Madison Square Garden) had been fined \$609,810 for violating the Hart-Scott-Rodino (“HSR”) Act.¹ The HSR Act requires anyone (even a sports executive) who acquires voting securities or assets valued at more than \$84.4 million (annually adjusted) to notify the U.S. Department of Justice and the Federal Trade Commission and then observe a waiting period (typically 30 days) before completing the acquisition.

Here’s what happened. Dolan was periodically awarded restricted stock units (RSUs) of Madison Square Garden (MSG). Each time his RSUs vested, he was deemed to have acquired voting securities.² An HSR reporting obligation is triggered when an acquisition of voting securities cause a person’s total holdings in an issuer to cross a threshold. Dolan had filed an HSR notification for the first threshold (currently \$84.4 million) but not for the next threshold (currently \$168.8 million, but at the time, \$161.5 million). Then Dolan acquired 591 shares of MSG due to vesting of RSUs. The value of those incremental shares was about \$150,000, but that was enough to cause his total MSG holdings to cross the next threshold. When the error was discovered, he made a corrective filing, but he was in noncompliance for a period of about 105 days. The maximum penalty is currently \$41,484 for each day of noncompliance.³

The FTC describes this as one of two failure-to-file scenarios that it sees “very frequently.”⁴ For example, in January 2017, hedge fund founder Ahmet Okumus was fined \$180,000 for failing to report his purchases of voting securities in an internet services company; that same month, entrepreneur Mitchell P. Rales was fined \$720,000 for failing to report his purchases of shares in two different companies.⁵ Other notable failures to file by corporate executives or other investors over the years include Bill Gates (\$800,000 penalty in 2004), Coca-Cola board member Barry Diller (\$480,000 penalty in 2013), and Comcast CEO Brian Roberts (\$500,000 penalty in 2011).

The other common failure-to-file scenario is similar – someone who has taken advantage

Related People

- Michael A. Lindsay
- Jaime Stilson

Related Capabilities

- Antitrust & Competition Law
- Mergers & Acquisitions

of the “investment purposes only” exemption becomes an active investor and then buys additional shares. For example, in January 2017, investment firm founder Faye Sarofim was fined \$720,000 for several failures to file when he crossed reporting thresholds; for at least some of these acquisitions, he served on the issuer’s board of directors, and thus could not rely on the investment purpose exemption. Similarly, in 2013 McAndrews & Forbes paid a \$720,000 penalty for failure to file when it made an additional acquisition after its previous filing had expired.

What lessons can be drawn?

- **Know that there is an HSR Act.** In some cases, parties fail to file because they do not even know about the HSR Act – or at least do not think about it.
- **Have a compliance program in place.** A company should have a program for monitoring acquisitions by its executives and board members.
- **Know the thresholds.** An acquisition is not reportable unless it will result in the acquiring person’s holding more than \$84.4 million in an issuer’s voting securities. The next threshold is \$168.8 million. Both of these are adjusted annually (typically in January, with an effective date in February), and the relevant threshold is the one in effect at the time of the next acquisition.
- **Remember that the test is cumulative.** The test is not the value of the most recent acquisition, but the value of *all* of the issuer’s voting securities that the acquiring person will hold after the acquisition. The value of securities already held at the time of the next acquisition is the market value, not the original acquisition price.
- **Keep your filings current.** An acquiring person has one year from the end of a waiting period to cross the reported threshold. If the threshold is crossed, then the person can continue to make further acquisitions of the issuer’s shares for five years after the end of the waiting period – until the person would cross another threshold.⁶
- **Check your exemptions.** If you want to rely (or continue to rely) on an exemption, make sure you qualify. For example, if you have decided to take (or are deemed to have taken) an active role in an issuer’s affairs, you can no longer rely on the “investment purposes only” exemption.
- **If you learn of a failure to file, report it promptly.** Self-reporting is important, and one consideration in the FTC/DOJ determination of whether to seek a penalty is how promptly a corrective filing is made after the acquiring person discovers the failure to file.
- **Don’t do it again.** Repeated failures to file will likely result in a civil penalty.⁷ (The acquiring person should still make a prompt corrective filing, because the daily penalties will otherwise continue to accrue, and a delay in making a corrective filing may affect the FTC/DOJ’s view on how much of a penalty to seek.)

¹ Emily Baumgaertner, *Owner of Knicks Is Fined Over Securities Violation*, N.Y. TIMES (Dec. 6, 2018); Richard Morgan, *MSG’s James Dolan to Pay \$610K Fine for FTC Violation*, N.Y. POST (Dec. 6, 2018). Cf. Michael Lindsay, *Antitrust and Intellectual Property in a Neo-Populist Age*, ANTITRUST, Vol. 32, No. 3, Summer 2018 (citing authorities for proposition that “antitrust is both ‘cool’ and ‘sexy’ again”).

² FTC Premerger Notification Office staff, *You don’t have to write a check to acquire an HSR-reportable interest* (May 15, 2018). The acquisition date depends on when the acquiring person has the right to vote the shares.

³ Penalties are negotiated as part of the resolution of a failure-to-file case. Relative to

the maximum, Dolan's penalty was a bargain at about \$6800 per day.

⁴ FTC, Common Failure to File Scenarios.

⁵ FTC Press Release, In Two Separate Actions, FTC Charges Investors with Violations of U.S. Premerger Notification Requirements (Jan. 17, 2017).

⁶ FTC Premerger Notification Office Staff, HSR Threshold Adjustments and Reportability for 2018 (Feb. 8, 2018).

⁷ U.S. DEPARTMENT OF JUSTICE & FEDERAL TRADE COMMISSION, HART-SCOTT-RODINO ANNUAL REPORT (FY 2017) at p. 8 n.15 ("FTC/DOJ "generally will not seek penalties so long as the parties promptly submit corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the Act").