

INSIGHTS

THE CORPORATE & SECURITIES LAW ADVISOR

ASPEN PUBLISHERS

Volume 26 Number 2, February 2012

EXECUTIVE COMPENSATION

CEO Fined for Failure to Make Premerger Notification

by Laurence T. Sorkin, Elai Katz,
and Lauren Rackow

Comcast Corp. Chief Executive Officer Brian L. Roberts agreed to pay \$500,000 to settle allegations that he violated premerger notification laws by failing to notify federal antitrust authorities prior to the vesting of restricted stock units (RSUs) that were part of his compensation plan. This enforcement action demonstrates that antitrust authorities may bring charges for technical violations of premerger regulations even though the transaction does not appear to raise substantive antitrust issues. Companies and their counsel and advisors should be aware that the acquisition of stock by officers and directors, either through the exercise of stock options or the receipt of stock as compensation, may trigger premerger notification reporting requirements.

Background

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act),¹ requires all persons contemplating mergers or

acquisitions of voting securities or assets that meet or exceed the size-of-transaction and size-of-person thresholds in the Act to notify the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (together the “antitrust agencies”) and observe a waiting period before completing those transactions. Once the agencies receive the required HSR forms and the filing fee, a 30-day waiting period will commence and the transaction cannot close until the expiration or early termination of the waiting period (or, in the event the waiting period is extended by issuance of a “Second Request” for additional materials when serious antitrust concerns exist, expiration of an additional 30-day waiting period following substantial compliance with the Second Request).

Officers and directors who receive compensation in the form of company stock may be required to submit notification, pay a filing fee of between \$45,000 and \$280,000 (based on the size of the transaction),² and observe the waiting period under the HSR Act before their shares vest or they exercise options, to the extent they will end up holding voting securities exceeding an HSR threshold³ and the transaction is not otherwise exempt. In addition, the rules require the aggregation of pre-acquisition holdings of voting securities and reporting of subsequent acquisitions when a secondary threshold is crossed. Holdings of spouses and minor children and some trusts holding voting securities of the issuer are included in the officer’s or director’s

Laurence T. Sorkin is senior counsel, Elai Katz is a partner, and Lauren Rackow is an associate at Cahill Gordon & Reindel LLP in New York, NY.

holdings. The civil penalties for premerger filing notification violations under the HSR Act are \$16,000 per day.⁴

The HSR rules include many exemptions and exceptions. They exempt acquisitions resulting in the buyer holding not more than 10 percent of outstanding voting securities if they are made solely for the purpose of investment (“investment only exemption”),⁵ but this exemption is unavailable for officers and directors of the issuer.⁶ Other exemptions, such as an exemption for certain acquisitions of foreign assets located outside the U.S. where the assets do not generate sales in or into the U.S. exceeding \$50 million (as adjusted) during the most recent fiscal year,⁷ are available too.⁸

Comcast CEO Fined for Failure to Make HSR Filings

Mr. Roberts agreed to pay \$500,000 to settle allegations that he violated premerger notification laws by failing to notify federal antitrust authorities prior to the vesting of RSUs received as part of his executive compensation plan, according to a complaint and proposed consent decree filed by the Department of Justice on December 16 and December 28, 2011, respectively, at the request of the FTC.⁹ The FTC noted that the amount of the fine was limited by a number of factors—such as that the violation was inadvertent and technical and that Mr. Roberts reported the violation promptly once it was discovered—indicating that even larger fines might be sought in the future.¹⁰

In 2008 and 2009, Mr. Roberts acquired approximately 335,000 Comcast voting securities through the vesting of restricted stock units Comcast issued to him as part of his compensation, and around the same period, Mr. Roberts acquired approximately 3,700 shares of Comcast voting securities through his 401(k) account, according to the complaint. Because over five years had passed since he made an HSR filing

in 2002, Mr. Roberts was required to file and observe the waiting period prior to completing these acquisitions, which resulted in Mr. Roberts holding more than \$126.2 million of Comcast’s stock, thereby crossing the HSR threshold.¹¹ The Department alleged that Mr. Roberts was in continuous violation of the HSR Act from the moment he exceeded the HSR threshold until the waiting period expired for his corrective HSR filing. The investment only exemption did not apply to Mr. Roberts’ acquisition of Comcast voting securities because he was an officer, as well as a director, of the company.

Preventative Action for Companies

This enforcement action serves as a reminder that exercises of stock options and other acquisitions by officers and directors that will result in any single individual holding more than \$68.2 million (\$50 million, adjusted annually, after the 2012 thresholds become effective) of an issuer’s presently voting stock are potentially reportable and should be reviewed by HSR counsel prior to completing such equity acquisitions. General counsel and officers may wish to keep track of pending acquisitions of voting stock by officers or directors that may trigger a filing requirement. Past acquisitions of these types may also need to be reviewed to determine if any corrective filings are advisable. In the case of mergers and other corporate transactions where officers or directors of the acquired firm will be acquiring shares of the acquiring firm, care should be taken to determine if any officer or director will be acquiring shares that will trigger an HSR filing, in which case HSR filings for the individuals should be made simultaneously with the filing for the merger itself.

Rule Does Not Achieve the Goals of the HSR Act

This action also demonstrates that, under the HSR Act and rules, the absence of apparent anti-competitive consequences does not excuse the failure to file. The HSR Act was meant to give

enforcers advance notice of potentially anticompetitive mergers and acquisitions, and it is hard to see how HSR filings notifying the antitrust agencies that an officer or director of a corporation has exercised options advance this purpose. An officer's or director's acquisition of voting stock as part of a compensation plan that enables him or her to hold less than 10 percent of the voting securities of the issuer is not inconsistent with investment intent. Although an officer or director typically is employed to make decisions regarding the company, this role is distinct from the acquisition of voting securities, and the officer or director is highly unlikely to be able to use the acquired shares to manipulate the issuer.

To address this unintended consequence, the FTC's Premerger Notification staff may wish to consider expanding the application of the investment only exemption to allow officers and directors who acquire stock as part of their compensation plans, as distinct from acquiring stock through open market purchases, to acquire up to 10 percent of the stock of their employer without reporting under the HSR Act. Such a modification would not require a revision of the statute itself, but merely a change in the interpretation of the Section 7A(c)(9) exemption. The language in the investment only exemption¹² and definition of "solely for the purpose of investment"¹³ is compatible with applying this exemption to officers and directors acquiring voting securities of a company as a part of compensation plans.

Notes

1. 15 U.S.C. § 18a.
2. The company may pay the filing fee for the officer or director, but doing so may be a taxable benefit.
3. The minimum size-of-transaction threshold will be \$68.2 million (\$50 million, adjusted annually); the next size-of-transaction threshold will be \$136.4 million (\$100 million, adjusted annually), effective February 27, 2012.
4. The civil penalties for premerger filing notification violations are \$11,000 per day for violations occurring before February 10, 2009, and on or after November 20, 1996.
5. Clayton Act, § 7A(c)(9), codified at 15 U.S.C. § 18a(c)(9); 16 C.F.R. 802.9.
6. The Premerger Notification Office opined on at least one occasion that officers of subsidiaries of the issuer are presumed to have an intention of participating in the basic business decisions of the issuer, but this presumption may be rebutted, and in some circumstances, officers of subsidiaries may be able to claim the investment only exemption when acquiring shares of the issuer. HSR Informal Interpretation Letters, #9906022 (June 25, 1999), at <http://www.ftc.gov/bcl/hsrlinformalopinions/9906022.htm>.
7. 16 C.F.R. 802.50(a).
8. 16 C.F.R. 802 provides a listing of the exemption rules.
9. *United States v. Roberts*, No. 11-cv-02240 (D.D.C. Dec. 28, 2011), available at <http://www.justice.gov/atr/cases/roberts.html>.
10. FTC Obtains \$500,000 Penalty For Pre-Merger Reporting Act Violations, at <http://www.ftc.gov/opa/2011/12/brianroberts.shtm>.
11. The Department of Justice noted that Mr. Roberts had made two other corrective HSR filings in the past when he controlled Comcast and received no fines in connection with those filings.
12. Clayton Act, § 7A(c)(9), codified at 15 U.S.C. § 18a(c)(9); 16 C.F.R. 802.9.
13. 16 C.F.R. 801.1(i)(1).

Copyright © 2012 CCH Incorporated. All Rights Reserved.
Reprinted from *Insights* February 2012, Volume 26, Number 2, pages 19-21,
with permission from Aspen Publishers, a Wolters Kluwer business, New York, NY,
1-800-638-8437, www.aspenpublishers.com.

