Fine Imposed for Failure to Make HSR Filing for Executive Compensation Plan Acquisition

A recent enforcement action demonstrates that antitrust authorities can and do fine individuals for failure to comply with U.S. antitrust premerger notification rules due to the vesting of company stock and crossing sequential reporting thresholds. James L. Dolan, Executive Chairman of Madison Square Garden Company ("MSG"), agreed to pay over $600,000 in civil penalties[1] to resolve allegations by the Federal Trade Commission ("FTC") and the Antitrust Division of the U.S. Department of Justice ("DOJ" and together with the FTC, the "antitrust authorities") that he violated premerger filing rules by failing to report in a timely manner an acquisition of voting securities of MSG.[2]

The Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"),[3] requires persons contemplating mergers or acquisitions of voting securities or assets that satisfy the size-of-transaction and size-of-person thresholds to notify the FTC and the DOJ and observe a waiting period before completing those transactions. Minority acquisitions of stock on the open market, for example, would be covered if they satisfied these thresholds, unless exempted.[4] Even acquisitions of voting securities as part of executive or director compensation plans, such as the vesting of an executive's restricted stock units ("RSUs") or exercising options, would be covered unless exempted.[5] Acquisitions that meet the relevant thresholds and are not exempt require notification under the HSR Act not only for crossing the minimum size-of-transaction threshold – currently $84.4 million ($50 million, adjusted annually) – but also when subsequent thresholds – currently $168.8 million ($100 million, adjusted annually) and then $843.9 million ($500 million, adjusted annually)[6] – are crossed.[7]

The antitrust authorities stated in the complaint that, in September 2016, Mr. Dolan acquired voting securities of MSG through the vesting of RSUs that would result in him holding MSG voting securities in excess of the minimum threshold. Mr. Dolan did make an HSR Act filing for this transaction on August 16, 2016 and received early termination of the HSR Act waiting period prior to the vesting of these RSUs. Subsequently, on September 11, 2017, Mr. Dolan acquired, through the vesting of RSUs, voting securities of MSG in excess of the

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[1] *United States v. James L. Dolan*, Competitive Impact Statement, 1:18-cv-02858 (D.D.C. Dec. 06, 2018).

[2] *United States v. James L. Dolan*, Complaint for Civil Penalties for Failure to Comply with the Premerger Reporting Requirements of the Hart-Scott-Rodino Act, 1:18-cv-02858 (D.D.C. Dec. 06, 2018).

[3] 15 U.S.C. § 18a.

[4] The HSR Act rules exempt acquisitions resulting in the buyer holding not more than 10% of outstanding voting securities of an issuer if they are made solely for the purpose of investment ("investment only exemption"). 16 C.F.R. § 802.9. However, the antitrust authorities interpret this exemption narrowly and interpret "solely for the purpose of investment" to mean an acquisition when "the person holding or acquiring such voting securities has no intention of participating in the formation, determination, or direction of the basic business decisions of the issuer" (16 C.F.R. § 801.1(i)(1)), and the issuer is not a competitor. This exemption is not available for directors or officers of the issuer.

[5] We have argued that requiring notification for acquisitions arising from compensation plans does not achieve the goals of the HSR Act and that the FTC may wish to consider expanding the application of the investment only exemption to these situations. Laurence T. Sorkin, Elai Katz, & Lauren Rackow, *CEO Fined for Failure to Make Premerger Notification*, Insights: The Corporate & Securities Law Advisor, Vol. 26 No. 2 (Feb. 2012). But unless the rules change (and we believe they are unlikely to do so), companies, directors and executives must closely monitor acquisitions to avoid HSR Act violations.

[6] Acquirers of minority voting securities may also need to make a notification pursuant to the HSR Act for acquiring more than 25% of the voting securities of an issuer (if the value of voting securities to be held is greater than $1 billion, as adjusted – currently $1.6878 billion).

[7] 83 Fed. Reg. 4051 (Jan. 29, 2018), *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-01-29/pdf/2018-01579.pdf.

subsequent threshold, but did not notify the antitrust authorities prior to this acquisition in violation of the HSR Act. Mr. Dolan filed a corrective notification for this acquisition on November 24, 2017, and the applicable waiting period expired on December 26, 2017. Mr. Dolan then agreed to pay a $609,810 fine to settle the antitrust authorities' allegations that Mr. Dolan was in violation of the HSR Act from September 11, 2017 through December 26, 2017.

Prior to these transactions, Mr. Dolan had made two acquisitions of voting securities of Cablevision Systems Corporation in 2010 – one which exceeded the minimum threshold, and the other which exceeded the subsequent threshold – and did not submit the required HSR Act notification for either acquisition. The antitrust authorities did not fine Mr. Dolan after his corrective filing for those acquisitions.

The penalties here for a technical violation of the HSR Act illustrate that the antitrust authorities will not hesitate to fine individuals and entities who violate the HSR Act even when there are no substantive antitrust concerns. The holdings of voting securities, RSUs, options, and other instruments by executives and directors of issuers should be carefully monitored to determine whether exercising, granting or vesting of such instruments crosses an HSR Act threshold and requires a notification. It should be noted that the antitrust authorities are more likely to bring charges against entities that have prior violations than first-time offenders. The HSR Act and rules, including exemptions to filing requirements, should be carefully reviewed whenever equity transactions – which can include the vesting of RSUs or the exercise of options – are contemplated. The rules are complex and include many exemptions and exceptions and at times require the aggregation of pre-acquisition holdings and reporting of subsequent acquisitions when a secondary threshold is crossed. Therefore, counsel should be consulted with respect to any particular transaction.

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If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Helene R. Banks at 212.701.3439 or hbanks@cahill.com; Bradley J. Bondi at 202.862.8910 or bbondi@cahill.com; Charles A. Gilman at 212.701.3403 or cgilman@cahill.com; Geoffrey E. Liebmann at 212.701.3313 or gliebmann@cahill.com; Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.