

Articles

Warning to Executives: Reinvestment of Dividends in your 401(k) and Vesting of Stock Awards May Trigger HSR Filing Requirements

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January 24, 2012

As the result of the automatic investment of dividends and short-term interest earned in his 401(k) account and through vesting of restricted stock units awarded as part of his compensation, Comcast CEO Brian Roberts was charged with and recently settled claims with the DOJ Antitrust Division for violations of the notification requirements in the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act"). Roberts paid a civil penalty of \$500,000 to settle claims that he was in continuing violation of the HSR Act from October 2007 through September 2009.

The HSR Act requires all persons contemplating mergers or acquisitions of voting securities, assets or noncorporate interests meeting specified size thresholds to notify the FTC and DOJ Antitrust Division about the transaction and observe a waiting period before closing the transaction. Currently, the minimum size-of-transaction threshold is \$66 million. The statutory civil penalty for failure to comply with the HSR filing notifications is currently \$16,000 per day. Absent the settlement, Roberts' penalty for the HSR would have exceeded \$7 million.

In 2002, Roberts received HSR clearance to acquire Comcast voting securities. This clearance exempted Roberts from the HSR Act's notice and waiting period requirements for five years. In October 2007, however, the five-year exemption had expired and Roberts violated the Act as a result of his acquisition of additional Comcast shares through the automatic investment of dividends and short-term interest earned in his 401(k) account and through vesting of stock awarded as part of his compensation. Though the later acquisitions were by themselves well below the HSR Act size-of-transaction threshold, Roberts violated the Act because the HSR regulations require aggregation of the value of voting shares already held (and not previously the subject of an HSR filing) and the shares to be acquired.

Historically the DOJ and FTC had not imposed penalties on individuals for an inadvertent first time failure to file so long as a corrective filing is made timely. However, Roberts had made two prior corrective HSR filings for acquisitions of Comcast securities while he was the controlling shareholder and asserted in both instances that the initial failures to file were inadvertent. The FTC did not seek civil penalties for the prior violations but notified Roberts that he would be accountable for implementing an HSR Act compliance program for future acquisitions.

Roberts' situation highlights the need for executives to be aware that their ongoing investments in their companies' stock may trigger HSR filing requirements and to implement a compliance program to avoid HSR violations.

Considerations in Preventing Inadvertent HSR Violations related to Executive Compensation

- Individuals who already have stock holdings of \$66 million or approaching that amount should seek legal counsel to avoid inadvertent HSR violations
- The following situations should be evaluated to determine if an HSR filing may be required:
 - Incremental investments, however small, that may cause an individual's holdings to cross an HSR threshold not previously reported;
 - 401(k) reinvestments
 - Exercising options or warrants
 - Vesting of restricted stock units
 - Additional investments after the five-year period following an initial HSR filing.

Andrews Kurth advises clients on antitrust matters and can provide current information on HSR reporting requirements and other FTC rules and guidelines. If you would like more information about the subject of this e-Alert or any other antitrust matter, please contact Jerry Beane, Kay Lynn Brumbaugh or John Tucker.