

Client Alert

December 2018

Not Just a Merger Issue — Compensatory Equity Awards Can Trigger HSR Filing Requirements

The requirements of the Hart-Scott-Rodino Act are well-known in the M&A world, but a recent FTC settlement highlights the serious—and costly—HSR implications for individuals receiving compensatory equity awards.

On December 6, 2018, [James Dolan](#), the CEO of Madison Square Garden Co. (MSG), owner of the New York Knicks and Rangers, agreed to pay \$609,810 in civil penalties to resolve [allegations](#) by the Federal Trade Commission (FTC) that Mr. Dolan violated the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (HSR Act). The FTC alleged that Mr. Dolan failed to properly notify the FTC and Antitrust Division of the Department of Justice (DOJ), and failed to observe the statutory 30-day waiting period prior to acquiring certain MSG shares granted to him by MSG pursuant to restricted stock unit (RSU) awards.

The HSR Act requires 30 days' notice prior to acquisitions that would result in the acquiring party holding voting securities of an issuer in excess of certain thresholds (currently starting at \$84.4 million), among other requirements. Violations of the HSR Act can result in maximum civil penalty fines in excess of \$41,000 per day per violation.

In Mr. Dolan's case, due to the vesting of RSUs, Mr. Dolan acquired MSG voting securities which, when combined with his other equity ownership of MSG, caused him to exceed the applicable HSR threshold. The FTC alleged that Mr. Dolan's HSR violation started on September 11, 2017 (when he acquired the additional MSG voting securities) and ended on December 26, 2017 (when the HSR waiting period expired, i.e., the date he submitted a corrective filing). This alleged 105-day violation period generated a maximum potential civil penalty fine of over \$4.3 million.

Mr. Dolan's story serves as a reminder to publicly traded issuers that HSR issues can apply to their compensatory equity award arrangements, and that HSR compliance should be incorporated into an issuer's insider trading policy and pre-clearance procedures.

The timing of required HSR filings depends upon the type of equity award. For example, with respect to:

- **Restricted stock awards**, the analysis of the HSR trigger applies prior to the date the shares are granted (the reason is that the right to vote the shares exists on the date the shares are granted, and this is true even if the award is subject to a vesting schedule);
- **Stock option awards**, the analysis of the HSR trigger applies immediately before the stock option can be exercised (the reason is that an optionee has no right to vote the shares subject to the option until the option is exercised);
- **Restricted stock units**, the analysis of the HSR trigger applies immediately before the RSU can be settled into shares (the reason is that until settlement, an RSU is only a contractual right to

equity, and as a result, the participant has no right to vote the shares subject to the RSU until the award is settled);

- **Open market share acquisitions**, the analysis of the HSR trigger applies prior to the trade date of such acquisition; and
- **Cashless exercises and net withholdings**, the portion of the equity awarded sold in the open market or netted to the issuer for withholding would not trigger the HSR analysis (the reason is that no “acquisition” of shares occurred with respect to the portion of the award that was sold in the cashless exercise, or were never issued by the issuer in the net withholding situation).

Although HSR liability for failure to file and observe the statutory waiting periods falls on the individuals acquiring the shares and not on the issuer, companies offering executives or board members equity-based compensation, particularly securities which will vest over a period of time, should ask their compensation committee to forecast and monitor how these offerings will affect the holder’s total voting securities.

Our competition and consumer protection practice group and our compensation practice group regularly provide comprehensive guidance to both companies and individuals on HSR compliance strategies.

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