

Clients & Friends Memo

FTC Calls “Foul” on Dolan for HSR Violation No Free-Throw Allowed for Failure to File on Executive Equity Compensation

December 11, 2018

What happened?

James L. Dolan, owner of New York’s Knicks and Rangers and Executive Chairman of Madison Square Garden Company (“MSG”), [has agreed to pay \\$609,810 in civil penalties to settle Federal Trade Commission \(“FTC”\) allegations that Dolan violated the premerger notification and waiting period requirements of the Hart-Scott-Rodino \(“HSR”\) Act of 1976](#) when he acquired voting securities of MSG in 2017.

As the Executive Chairman and a Director of MSG, Dolan receives restricted stock units (“RSUs”) as part of his compensation. Dolan properly filed an HSR notification on August 16, 2016, for an acquisition of MSG voting securities due to vesting RSUs that would result in holdings exceeding the \$50 million threshold, as adjusted. Early termination of the HSR Act’s waiting period was granted on September 6, 2016, and Dolan completed his acquisition three days later. Until September 6, 2021, Dolan was permitted under the HSR Act to acquire additional MSG shares without filing HSR again so long as he did not exceed the \$100 million threshold, as adjusted. On September 11, 2017, without filing under the HSR Act or observing the HSR Act’s waiting period, Dolan acquired additional MSG shares due to vesting RSUs that resulted in Dolan holding voting securities of MSG valued in excess of the \$100 million threshold, as adjusted.

Dolan was in continuous violation of the HSR Act from his acquisition on September 11, 2017, until the HSR waiting period expired on his corrective filing on December 26, 2017. Based on the current maximum civil penalty of \$41,484 per day (adjusted annually) for an HSR violation, Dolan could have been fined over \$4 million. Dolan agreed to pay \$609,810 to settle the FTC’s lawsuit.

Why does this matter?

Under the HSR Act, companies and individuals must notify the FTC and the Department of Justice of proposed acquisitions that would result in the holding of voting securities above certain dollar thresholds and then observe a waiting period before completing their transactions.

Acquisitions of company shares by executives are potentially reportable if the value of the shares held by the executive will exceed the \$50 million threshold (adjusted to \$84.4 million for 2018), regardless of how the shares are acquired (e.g., open market purchases, delivery of shares pursuant to RSUs, exercise of options or warrants, reinvestment of dividends or interest earned in 401(k) plan accounts, etc.). The key inquiry is whether the executive acquires stock that confers the right to vote for the election of the company's directors. Thus, the mere vesting of options, not exercised, or grants of RSUs, without the present right to vote the underlying shares would not require an HSR filing. An HSR filing may be required before the delivery of shares pursuant to RSUs or the exercise of options or warrants if, as a result, the executive will hold company shares valued above the \$84.4 million threshold, unless the executive plans to sell the shares immediately upon settlement.

Companies and executives must ensure that, if required, an HSR filing is made and the HSR waiting period either expires without action or is terminated early by the agencies before an executive acquires company shares. Violations of the HSR Act can be costly, even if inadvertent. The failure to make a required HSR filing and observe the HSR waiting period can result in civil penalties of up to \$41,484 per day, and the FTC has imposed significant penalties in these circumstances (e.g., in 2016, Caledonia Investments agreed to pay a \$480,000 fine related to its failure to report its acquisition of voting shares as a result of the delivery of shares pursuant to RSUs in Bristow Group, Inc., and in 2011, Comcast CEO Brian Roberts agreed to pay a penalty of \$500,000 related to his failure to report his acquisition of company stock as the result of the delivery of shares pursuant to RSUs).

The FTC typically will give "one free bite at the apple," declining to seek civil penalties for the first inadvertent failure to file if the person self-reports the violation and makes a corrective filing. Like Caledonia Investments and Brian Roberts, Dolan had been given a "free bite at the apple" for previously violating the HSR Act.

What happens next?

Companies and executives should monitor holdings and equity compensation schedules in order to determine potential HSR filing requirements and avoid potential fines of up to \$41,484 (adjusted annually) per day. HSR rules and filing obligations can be complex and may change through amendments to the regulations or through formal and informal interpretations issued by the FTC. Experienced HSR counsel should be consulted to determine if an acquisition may trigger a filing requirement and, if so, if an exemption is available.

How can Cadwalader help?

Cadwalader's antitrust team is one of only a few to focus on the financial services sector. Located in key jurisdictions in the United States (New York, Washington, DC, Charlotte) and Europe (London, Brussels), we are specialists in offering 'end-to-end' advice on compliance, investigations

and related litigation in this sector. Our practitioners are experienced in implementing effective HSR compliance programs and conducting trainings on regulatory requirements.

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If you would like to discuss the issues arising in this alert, or how we can help you more generally, please contact:

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