

FTC Takes Hard Line on Premerger Filing Requirements

A cautionary tale for companies acquiring even relatively small quantities of voting securities

On June 20, 2013, the Federal Trade Commission announced that a closely-held diversified holding company will pay a fine of \$720,000 for failure to comply with the Hart-Scott-Rodino Act in connection with certain acquisitions of voting securities. This enforcement action and settlement underscore the importance of complying with HSR filing requirements and exemptions when acquiring voting securities — even relatively small, incremental acquisitions that do not give control of the company.

The HSR Act requires a person to make a filing with the FTC and the Department of Justice and to observe a waiting period before acquiring voting securities when, as a result of the acquisition, the person will hold voting securities valued at more than one or more HSR Act thresholds. The current HSR thresholds are \$70.9 million; \$141.8 million; \$709.1 million; 25 percent or more valued in excess of \$1,418.1 million, and 50 percent or more. HSR thresholds are adjusted annually based on gross national product.

In this case, the holding company first acquired the target's voting securities and appropriately made its HSR filing in February 2007. The HSR Rules exempted additional purchases of the target's voting securities for five years. In June 2012, shortly after that five year period expired, the holding company acquired an additional 800,000 shares of the target, but without making a new filing. This purchase increased the holding company's ownership in the target's voting securities from 34.2 percent to 35 percent, or an increase of only 0.8 percent of the outstanding voting securities. The holding company made a corrective HSR filing on August 16, 2012, and asserted that it had inadvertently failed to file.

The FTC enforces the HSR Act and is permitted to assess fines for failure to comply with any of its provisions (at a maximum of \$16,000 per day). The FTC has stated that “[w]hen the parties inadvertently fail to file, the enforcement agencies generally do not seek penalties if the parties promptly make corrective filings after discovering the failure to file, submit an acceptable explanation of their failure to file, and have not previously violated the act.”¹ In the past, where the FTC has imposed fines, they have ranged from a small percentage of the maximum total fine, to more than half the value of the maximum total fine, depending on circumstances.

Here the \$720,000 fine (imposed for a delay of approximately two months) is more than 40 percent of the maximum possible fine (~\$1.696 million). The holding company had violated the HSR Act previously — failing to make a required HSR filing in 2011 in connection with a separate acquisition of a pharmaceutical company. In the earlier case, the holding company likewise had asserted that its failure to file was inadvertent.

This case serves as an important reminder that acquirers should accurately assess all filing requirements, thresholds, and exemptions under the HSR Act. In addition, target companies faced with an unsolicited accumulation of stock by an acquiring person should keep in mind the acquiring person's HSR compliance history. The FTC's press release, which includes a link to the complaint, can be found [here](#).

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Endnotes

¹ Federal Trade Commission and Department of Justice, Hart-Scott-Rodino Annual Report at 8 n. 15 (2012), available at <http://www.ftc.gov/os/2013/04/130430hrsreport.pdf>.