

# KIRKLAND ALERT

December 2011

## Directors and Officers Beware: Compensatory Stock Awards Can Trip HSR Violations

On December 16, 2011, Brian L. Roberts, Chief Executive Officer and Chairman of the Board of Comcast, Inc., agreed to pay a civil penalty of \$500,000 for failing to observe the notification and waiting period requirements of the Hart-Scott-Rodino Antitrust Improvements Act (“HSR Act”) prior to his acquisition of voting securities of Comcast. This recent enforcement action is an important reminder for directors and officers of the need to “check first and check often” to ensure their stock acquisitions do not trip HSR thresholds.

An HSR filing is required for certain acquisitions of voting stock, assets, or non-corporate interests valued in excess of \$66 million where the parties meet certain assets and revenue thresholds and the transaction is not otherwise exempt. (The filing threshold is adjusted annually, and the regulations implementing the HSR Act contain certain additional size-of-transaction notification thresholds.<sup>1</sup>) In an acquisition of voting stock, the size-of-transaction assessment is based on the total value of the issuer’s voting stock that will be held by the purchaser after the pending acquisition, including, typically, the value of any voting stock of that issuer held by the purchaser prior to the pending acquisition.

In September 2002, Mr. Roberts received HSR Act clearance for an acquisition of Comcast voting securities. Additional acquisitions by Mr. Roberts that did not meet or exceed the next higher HSR notification threshold were exempt from the Act’s notice and waiting period requirements for a period of five years. However, starting in October 2007 — when the five year exemption was no longer applicable — and continuing through April 2009, Mr. Roberts acquired additional voting securities of Comcast without making the required HSR filing through:

- (1) *The automatic investment of dividends and short term interest earned in his 401(k) account.*
- (2) *The conversion — through vesting — of restricted stock units (“RSUs”), awarded as part of his compensation package, into Comcast voting securities.<sup>2</sup>*

Although these later acquisitions were for dollar amounts well below the HSR filing threshold, because the size-of-transaction test includes the value of voting shares already held and not otherwise exempt, they exceeded the applicable HSR filing threshold.

Mr. Roberts initially did not recognize that these transactions required an HSR filing. In June 2009, however, — contemporaneous with the announcement of a similar HSR enforcement action against John C. Malone of Discovery Holding Company<sup>3</sup> — Mr. Roberts’ counsel conducted a review of his acquisition history and identified these later transactions as subject to HSR reporting requirements. Shortly thereafter, Mr. Roberts made a corrective HSR filing. Mr. Roberts was in violation of the HSR Act for approximately 23 months — October 2007 through September 2009. The maximum civil penalty for the violation was approximately \$8.9 million, but the antitrust agencies sought and obtained a significantly lower penalty (\$500,000) because “the violation was inadvertent and technical ... was apparently due to faulty advice from outside counsel [and] Roberts did not gain financially from the violation,”<sup>4</sup> In addition, Mr. Roberts “reported the violation promptly once it was discovered.”<sup>5</sup> (Weighing against Mr. Roberts were two previous instances where he had failed to comply with the Act’s reporting obligations. No civil penalties were sought in those two matters.)

This case is an important reminder that officers and directors of public and private companies, who generally cannot rely on the “solely for the purpose of investment” exemption<sup>6</sup> to the HSR Act, need to remain vigilant and up-to-date on HSR Act reporting thresholds. This is especially true for those compensated through the award of options, warrants and restricted stock units, and those investing in company stock through their 401(k) retirement plan, at values that might exceed HSR Act thresholds. Officers and directors who identify one or more missed filings and quickly make any necessary corrective filings may benefit from the customary willingness of the Department of Justice and the Federal Trade Commission not to seek civil penalties, or to levy reduced penalties, for first-time, inadvertent, missed filings.

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- <sup>1</sup> The current notification thresholds are: (i) greater than \$66 million but less than \$131.9 million; (ii) \$131.9 million or greater but less than \$659.5 million; (iii) \$659.5 million or greater; (iv) 25% of the issuer’s voting securities if valued at greater than \$1,319 million; and (v) 50% of the issuer’s voting securities if valued at greater than \$66 million. (Both the dollar value and acquisition percentage includes voting securities already held and not otherwise exempt.)
- <sup>2</sup> The RSUs, which gave Mr. Roberts the right to receive Comcast voting securities at some point in the future, were not themselves voting securities, and therefore the initial award of RSUs was not an acquisition subject to the HSR Act. The subsequent vesting of the underlying voting securities, however, was an acquisition potentially subject to HSR reporting requirements.
- <sup>3</sup> In June 2009, John C. Malone, Chief Executive Officer and Chairman of the Board of Discovery Holding Company, agreed to pay a civil penalty of \$1,400,000 for the acquisition of voting securities of Discovery. Mr. Malone acquired these voting securities (without observing the notification and waiting period requirements of the HSR Act) by exercising options granted to him as part of his employment compensation.
- <sup>4</sup> FTC Obtains \$500,000 Penalty for Pre-Merger Reporting Act Violation (December 16, 2011), available at <http://www.ftc.gov/opa/2011/12/brianroberts.shtm>.
- <sup>5</sup> *Id.*
- <sup>6</sup> A person may acquire 10% or less of the voting securities of an issuer, if the acquisition is solely for the purpose of investment, and the acquiring person has no intention to participate in the basic business decisions of the issuer.

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Application of the HSR thresholds to a transaction involves detailed knowledge of the HSR Act and its implementing regulations. If you have questions regarding the HSR Act or this Kirkland Alert, please contact the following individuals or your regular Kirkland contact.

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