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ALERT MEMORANDUM

Don’t Let Your Executives Fall Into an HSR Trap

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Executives are receiving growing stock awards in this market—has your company ruled out required HSR filings?

The Hart-Scott-Rodino Antitrust Improvements Act or “HSR” is best known as a notification regime for large corporate transactions. But it also applies to executive compensation paid in the form of stock awards, including restricted stock units (RSUs)—an obligation that companies and their officers and directors frequently overlook.

The obligation can attach to even small awards. Why? Because the individual’s *existing* holdings must be combined with the new shares that will be awarded to determine if the *total* holdings will exceed the “size-of-transaction” threshold, which is currently $133.9 million. If it does, an HSR filing is probably required. And, note, this obligation exists *regardless* of the percentage that will be held.

Failure to make a required filing and observe the 30-day waiting period *before* the award is granted can, in the extreme case, result in fines of up to $53,088 *per day* from the day of the acquisition to the day HSR clearance is ultimately obtained via a corrective filing. There are several examples of enforcement actions where multi-million dollar fines were paid by executives that failed to make required filings.

Recent stock-price jumps have made this issue even more relevant. Officers and directors who were previously well below the $133.9 million threshold may now exceed it, with additional awards already built into their compensation. Because the rules are arcane, the risk of missed filings—and the resulting fines and reputational harm—is growing.

Although the filing obligation falls on the individual officer or director first, HR, compliance, and in-house counsel should actively monitor these issues to avoid costly surprises.

This memorandum details the applicable requirements and outlines practical steps to prevent your officers or directors from falling into this trap—and to address any issues discovered along the way.

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Background

The HSR Act and the rules promulgated by the Federal Trade Commission (FTC) require pre-merger notification filings for certain transactions. Although most commonly associated with M&A, the HSR Act's filing requirements extend to an individual's acquisition of securities or assets above specified thresholds—including stock options received as part of an executive compensation plan.

HSR Filing Requirements

Any transaction that meets the size-of-transaction test, the size-of-person test, and is not otherwise exempt must be reported under the HSR Act. For executive compensation awards, the filing obligation typically arises when the total value of voting securities to be held exceeds $133.9 million.[1]

To determine whether the threshold will be exceeded, the value of the individual's existing voting securities in the issuer must be aggregated with the value of the voting securities to be acquired. Publicly traded securities are generally valued at the lowest closing price during the 45 days before the acquisition (or filing, if a filing is made). Non-publicly traded securities are valued at fair market value.

When HSR reporting is required, both the officer or director *and* the company must submit separate filings. The company's filing is usually due within 15 days of the officer's or director's filing.

Example. A CEO holds 5 million shares and is set to receive an additional 3 million shares in 90 days. If the lowest closing price in the 45 days before the acquisition is $10, the 8 million total shares are valued at $80 million—below the $133.9 million threshold, so no filing is required. If the lowest 45-day closing price is $20, the shares are valued at $160 million, potentially triggering a filing. However, if a lower 45-day closing price is later established before filing, the valuation may be reassessed.

If a filing is required, the officer or director files first, together with the filing fee. The company then has 15 days to make its filing.

Potential "Safe Harbor" For Prior Filings

Once an HSR filing is made, the HSR rules may permit certain additional acquisitions without a new filing. The rules are complex and depend on the timing of later acquisitions and the elections made with the original filing, but coverage can extend for up to five years. Proper planning of elections is critical to maximize this safe harbor.

What You Should Consider Doing Now

The most important step is to assess whether any upcoming award will cause an officer's or director's total holdings of company voting securities to exceed $133.9 million. If so, experienced HSR counsel should be consulted to determine whether a filing is required and to select the elections that will provide maximum future coverage.

Longer term, companies should establish an HSR monitoring program that tracks each relevant officer's and director's holdings, anticipated awards, and prior filings. The program should flag potential filing obligations well in advance of deadlines. Experienced HSR counsel can assist with setup.

If, during the review, it emerges that an officer or director has already fallen into the trap, counsel experienced with addressing such issues with the Federal Trade Commission should be engaged to help mitigate any consequences, including any civil penalties.

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[1] In certain circumstances that usually do not apply in executive compensation situations, application of a "size-of-persons test" may increase the size-of-transaction threshold to $535.4 million.