

## Alert

### Hart-Scott-Rodino Act: US Levies \$720K Civil Penalty for Failure to Re-File for Additional Stock Acquisitions

June 25, 2013

On June 20, 2013, the Antitrust Division of the U.S. Department of Justice (the "Antitrust Division") and the Federal Trade Commission (the "FTC" and, together with the Antitrust Division, the "Agencies") announced that MacAndrews & Forbes Holdings Inc. ("MacAndrews & Forbes") agreed to the payment of a \$720,000 civil penalty in order to settle charges that it violated the premerger reporting and waiting period requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (the "HSR Act").<sup>1</sup> According to the complaint filed by the Antitrust Division (at the FTC's request), MacAndrews & Forbes, a firm owned by Ronald O. Perelman, did not make the required *subsequent* filing under the HSR Act for acquisitions of voting securities of Scientific Games Corporation ("SG") made in June 2012, more than five years after it had made an initial HSR Act filing to acquire voting securities of the same issuer.

The HSR Act requires parties to certain transactions<sup>2</sup> to file a notification with the Agencies, and to observe a waiting period prior to effecting such transactions. The waiting period allows the Agencies time to determine whether a reportable transaction may result in a substantial lessening of competition, and therefore whether it should be investigated or challenged. A party that fails to comply with the requirements of the HSR Act (including officers, directors, or partners thereof) may be liable for up to \$16,000 per day that such party is deemed to be in violation.

In an HSR Act filing, parties are required to indicate the notification threshold that will be crossed as a result of the reported acquisition(s), which includes the value of any existing holdings<sup>3</sup> in the same issuer as well as the value of the voting securities to be acquired. After such notification has been filed, and the applicable waiting period has expired or been terminated, any additional acquisitions by the same acquiring person of same issuer's voting securities will be exempt from notification, as long as:

- The acquiring person's holdings crossed the notification threshold with respect to which the premerger notification was made within one year of the expiration or early termination of the HSR Act waiting period; AND

<sup>1</sup> See <http://www.ftc.gov/opa/2013/06/macandrews.shtm> and <http://www.justice.gov/opa/pr/2013/June/13-at-693.html>. Complaint available at <http://www.ftc.gov/os/caselist/1210203/130620macandrewsforbescmpt.pdf>.

<sup>2</sup> The HSR Act applies to acquisitions of voting securities, interests in unincorporated entities and assets valued in excess of \$70.9 million (the "size-of-transaction" test). Furthermore, transactions valued at \$283.6 million or less are only reportable to the extent that the parties also satisfy the "size-of-person" test (currently, either the acquiring or acquired person must have annual net sales or total assets of \$14.2 million or more, and the other person must have annual net sales or total assets of \$141.8 million or more). The dollar thresholds are adjusted annually, based on changes in the gross national product for the preceding fiscal year.

<sup>3</sup> Existing holdings of publicly traded voting securities are valued at the lowest closing quotation price within the 45 calendar days prior to the acquisition. Existing holdings of voting securities that are not publicly traded, as well as existing holdings of interests in unincorporated entities (such as limited liability companies and limited partnerships), are valued at "fair market value" as determined in good faith by the board of directors of the acquirer's ultimate parent entity.

- The subsequent acquisition is consummated within five years following the expiration or early termination of the HSR Act waiting period; UNLESS
- A higher notification threshold is met or exceeded. The various notification thresholds are set forth below:

Original Statutory Threshold	2013 Adjusted Threshold
\$50 million	\$70.9 million
\$100 million	\$141.8 million
\$500 million	\$709.1 million
25 percent if value of voting securities to be held is greater than \$1 billion	25 percent if value of voting securities to be held is greater than \$1.4181 billion
50 percent if value of voting securities to be held is greater than \$50 million	50 percent if value of voting securities to be held is greater than \$70.9 million

Any subsequent acquisition will be subject to the adjusted thresholds in effect when such subsequent acquisition is consummated. However, if the subsequent acquisition falls outside of the five-year period permitted by the exemption and the value of the acquiring person's then-existing holdings exceed the applicable size-of-transaction test, *any* incremental acquisition may trigger the requirement to re-file.

According to the complaint, MacAndrews & Forbes made an HSR Act filing in February 2007 to acquire voting securities of SG, and early termination of the waiting period was granted in the same month. During the five-year period after early termination was granted, MacAndrews & Forbes made additional acquisitions of SG voting securities without needing to make additional HSR Act filings. Then, in June 2012, MacAndrews & Forbes purchased additional SG voting securities for approximately \$6.5 million, also without re-filing. When combined with its existing holdings of SG voting securities, MacAndrews & Forbes held SG voting securities valued in excess of the applicable size-of-transaction threshold. MacAndrews & Forbes then realized that it was no longer covered by the five-year exemption (asserting that the failure to file was inadvertent) and made a corrective HSR Act filing on Aug. 16, 2012 with respect to the June 2012 acquisitions. The Agencies deemed MacAndrews & Forbes to be in continuous violation of the HSR Act from June 4, 2012 through Sept. 17, 2012 (the date on which the waiting period for the corrective filing expired).

The June 2012 acquisitions of SG voting securities were not the first instances in which MacAndrews & Forbes failed to file a required notification under the HSR Act. The government's complaint noted that MacAndrews & Forbes had acquired additional voting securities of SIGA Technologies Inc. ("SIGA") in January 2011 without re-filing (notably, via a cashless exchange of warrants). Although MacAndrews & Forbes had previously made an HSR Act filing in 2010 with respect to SIGA voting securities, due to the appreciation in value of its existing holdings of SIGA, the subsequent acquisition crossed a higher notification threshold, which necessitated a second filing. MacAndrews & Forbes made a corrective filing on May 13, 2011, but the Agencies did not pursue a fine for the violation. In its June 20, 2013 press release, the FTC quoted Richard Feinstein, director of the FTC's Bureau of Competition: "Although we may, in our discretion, not seek penalties for a first-time inadvertent violation, we will not hesitate to seek appropriate penalties where we believe individuals and companies subsequently failed to comply with their filing obligations."

This action by the Agencies serves as a reminder that HSR Act filers must continue to monitor closely their acquisition activity post-filing, especially when they still hold voting securities of the same issuer more than five years following an initial HSR Act filing. There are many other complex and technical aspects of the HSR Act's requirements and exemptions. Accordingly, the advice of counsel should be sought as early as possible in order to determine whether the HSR Act's filing requirements may apply to particular situations.

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