

Alert

Hart-Scott-Rodino Update: Investor Fined for Violation Even Without a Stock ‘Purchase’

August 12, 2016

On Aug. 10, 2016, Caledonia Investments plc (“Caledonia”) agreed to settle Federal Trade Commission (“FTC”) charges that Caledonia violated the premerger reporting requirements of the Hart-Scott-Rodino Act (“HSR Act”) in connection with the vesting of restricted stock units (“RSUs”) in Bristow Group Inc. (“Bristow”). Pursuant to the settlement, Caledonia agreed to pay \$480,000 in civil penalties. According to the government’s complaint, the vesting of the Bristow RSUs was a reportable acquisition of voting securities for which a filing, and observance of the mandatory waiting period, was required.

The HSR Act requires parties to acquisitions of voting securities, non-corporate interests and assets meeting certain annually adjusted thresholds¹ to file notifications with the federal antitrust agencies and to observe a waiting period prior to consummation of the acquisition. Acquisitions of non-voting securities or convertible securities are considered exempt transactions.² However, the subsequent exercise, vesting or conversion into securities with the present right to vote for directors is a potentially reportable “acquisition” that may require that an HSR Act filing be made, and the waiting period observed, prior to such exercise, vesting or conversion. Failure to comply with the HSR Act’s filing and waiting requirements when required can result in injunctive relief as well as civil penalties of up to \$40,000 for each day during which any applicable person is in violation of the HSR Act.

When an HSR Act filing is made, the parties must indicate the “notification threshold”³ they are filing for and the applicable fee must be paid. However, once the waiting period has been observed, future acquisitions of the same issuer’s voting securities by the same acquiring person are exempt from the HSR Act’s filing and waiting requirements for a period of five years, as long as a higher notification threshold is not crossed and control is not acquired.⁴ A new filing and waiting period may be required prior to any subsequent acquisition that: (1) results in the acquiring person’s holdings in the issuer

¹The minimum threshold for reportability under the HSR Act, assuming the parties are of sufficient size, is currently \$78.2 million.

² 15 U.S.C. §18a(c)(2); 16 C.F.R. §802.31.

³The notification thresholds (current adjusted values) are as follows:

- \$78.2 million
- \$156.3 million
- \$781.5 million
- 25 percent if value of voting securities to be held is greater than \$1,563.0 billion
- 50 percent if value of voting securities to be held is greater than \$78.2 million

⁴ 16 C.F.R. §802.21(a).

exceeding a higher notification threshold; or (2) if the acquiring person's holdings will exceed *any* notification threshold (even a lower one), provided that the acquisition either confers control of the issuer upon the acquiring person or is consummated more than five years after the waiting period for the initial filing has ended.

Caledonia, an investment trust based in the United Kingdom, had previously failed to make a required HSR Act filing for a 1996 acquisition of voting securities of Offshore Logistics Inc. (Bristow's former name).⁵ After a corrective filing was made in 1997, no enforcement action was sought. Caledonia filed under the HSR Act again in June 2008 to acquire Bristow voting securities, and the waiting period expired shortly thereafter. Although the complaint did not allege that Caledonia ever crossed a higher notification threshold, the five-year period for the filing exemption lapsed on June 13, 2013. Through the vesting of RSUs in February 2014,⁶ Caledonia acquired 3,650 additional shares of Bristow voting securities, as a result of which its aggregate holdings (approximately \$111 million) exceeded the minimum notification threshold then in effect. The complaint alleges that Caledonia incorrectly assumed that its 2008 filing would cover the 2014 acquisition. Caledonia later learned of its obligation and submitted a corrective filing in 2015.

Investors should be reminded of their continuing obligations to monitor their holdings, even after an HSR Act filing has been made. Violations similar to Caledonia's have been an area in which the government has previously pursued enforcement actions and secured large civil penalties. The 2011 enforcement action against Brian L. Roberts (chairman and CEO of Comcast Corporation) also involved the vesting of RSUs, in addition to the reinvestment of dividends and short-term interest earned through his 401(k) account. Such acquisitions took place after the five-year exemption period following an earlier filing had lapsed, and Roberts agreed to a penalty of \$500,000.⁷

There are many complex and technical coverage requirements and exemptions under the HSR Act. Accordingly, the advice of counsel should be sought to determine the applicability of the HSR Act's filing requirements to particular situations.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

⁵ Although it appears that Caledonia's ownership at the time of the alleged violations took place did not exceed 10 percent of the issuer's outstanding voting securities, in the 1996 transaction Caledonia was granted the right to appoint two directors to the board.

⁶ Based on Form 4 filings made with the Securities and Exchange Commission on Feb. 4, 2014, Caledonia appears to have received the RSUs in connection with service by two of its employees on the Bristow board of directors.

⁷ See <https://www.ftc.gov/news-events/press-releases/2011/12/ftc-obtains-500000-penalty-pre-merger-reporting-act-violations>. Other recent enforcement actions involving the failure to make subsequent HSR Act filings following the end of the five-year exemption period included one against Berkshire Hathaway Inc. in 2014 and one against MacAndrews & Forbes Holdings Inc. in 2013. See <https://www.ftc.gov/news-events/press-releases/2014/08/berkshire-hathaway-inc-pay-896000-resolve-ftc-allegations-it>; <https://www.ftc.gov/news-events/press-releases/2013/06/investment-firm-macandrews-forbes-pay-720000-penalty-resolve-ftc>.

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