

Client Alert

June 24, 2013

Investment Firm Pays \$720,000 Civil Penalty for Purchasing Additional Shares without Filing HSR

By Jeff Jaeckel, Panagiotis Bayz and Robert Nichols

At the request of the Federal Trade Commission (FTC), the U.S. Department of Justice (DOJ) last week filed civil charges against MacAndrews & Forbes Holdings Inc. (MacAndrews) for failing to comply with the Hart-Scott-Rodino Act (HSR) antitrust reporting requirements regarding the acquisition of voting securities. The DOJ action against MacAndrews is only the latest example of the antitrust agencies obtaining civil penalties from an investor who has a track record of failing (albeit unwittingly) to make necessary HSR filings for the purchase of additional shares to grow their minority interest in existing holdings. This action and the sizable civil penalties reinforce the point that investors need to exercise care and diligence when purchasing additional shares to ensure they satisfy regulatory requirements.

An HSR filing to acquire a non-controlling interest in a company generally provides some flexibility to acquire additional voting shares, but the HSR rules substantially constrain that flexibility by (a) requiring an additional HSR filing if the subsequent acquisition would cross one of a series of incremental HSR reporting thresholds relating to the value and percentage holdings in the target company, and (b) imposing a five year limit on the effectiveness of the original HSR approval. In this instance, each of those limitations was an issue for MacAndrews.

This was not MacAndrews's first offense. MacAndrews had previously failed to make a necessary HSR filing in 2011, but the FTC and DOJ did not seek penalties for that failure because it was MacAndrews's first such offense. According to the DOJ Complaint, MacAndrews made its first error in connection with the acquisition of shares in SIGA Technologies Inc. ("SIGA"). MacAndrews had made an HSR filing in 2010 to acquire SIGA voting shares with a value above the lowest HSR threshold (which is indexed to GDP and is currently \$70.9 million, but at the time was \$63.4 million). MacAndrews received HSR approval and purchased the shares. Those shares appreciated in value over time and MacAndrews subsequently acquired additional shares, putting the value of MacAndrews's total holdings above the next HSR threshold of \$126.9 million. Because the subsequent acquisition resulted in MacAndrews owning shares above the next HSR threshold, MacAndrews was required to submit an HSR notification prior to acquiring the shares, but it failed to do so. MacAndrews later discovered its error and made a corrective filing. The FTC and DOJ did not seek penalties in 2011 because the failure relating to SIGA was MacAndrews's first such offense.

According to the Complaint, MacAndrews made a second similar error in 2012 relating to the acquisition of voting securities in a different company, Scientific Games Corp. ("SG"). As with SIGA, MacAndrews made its initial purchase of SG lawfully, pursuant to an HSR filing that MacAndrews made in February 2007. MacAndrews subsequently acquired additional voting securities of SG in June 2012. The supplemental acquisition did not cross any HSR thresholds (like the SIGA acquisition), but the HSR rules nonetheless required a new HSR filing

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because the protection afforded by MacAndrews's original HSR filing and approval is valid for only five years and the subsequent acquisition was outside of that five year period. MacAndrews did not make an HSR filing to acquire the supplemental shares, and this time the FTC and DOJ sought and obtained civil penalties in the amount of \$720,000.

The FTC and DOJ action underscore the agencies' commitment to ensuring that minority investors comply with the HSR Act, even the sometimes complex rules relating to subsequent, incremental acquisitions of shares in minority holdings. And this latest action demonstrates that while the FTC and DOJ may offer some benefit of the doubt to first time offenders, there is no grace for repeat offenders. A similar enforcement action occurred in December 2011 when Brian Roberts, the Chief Executive Officer of Comcast Corporation (Comcast), paid a \$500,000 penalty to settle a claim that he violated the HSR Act in connection with his acquisitions of Comcast stock valued above a previously notified HSR threshold.¹ To drive home the point, the Director of the FTC Bureau of Competition Director warned in the MacAndrews matter, "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."²

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Because of the generality of this update, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations. Prior results do not guarantee a similar outcome.

¹ See Federal Trade Commission, "FTC Obtains \$500,000 Penalty For Pre-Merger Reporting Act Violations," <http://www.ftc.gov/opa/2011/12/brianroberts.shtm>.

² Federal Trade Commission, "Investment Firm of MacAndrews & Forbes to Pay \$720,000 Penalty to Resolve FTC Allegations Related to Premerger Filing Requirements," <http://www.ftc.gov/opa/2013/06/macandrews.shtm>.