

Client Alert

Antitrust Practice Group

August 25, 2014

DOJ Fines Berkshire Hathaway \$896,000 for Failure to Comply with Premerger Notification Requirements

On August 20, 2014, Berkshire Hathaway Inc. (“Berkshire Hathaway”) settled with the Department of Justice, Antitrust Division (DOJ) and the Federal Trade Commission (FTC) for its failure to comply with the premerger notification requirements and waiting requirements in the Hart-Scott-Rodino (“HSR”) Act of 1976 (“the Act”). As part of the settlement, Berkshire Hathaway agreed to pay \$896,000 for failing to report the conversion of notes it owned in building products company USG Corp. (“USG”) into voting securities in December 2013. As a result of the transaction, Berkshire Hathaway’s voting securities in USG were valued at more than \$950 million, well above the \$283.6 million HSR reporting threshold in effect at the time of the conversion. The swap was therefore subject to the HSR Act’s reporting requirements. According to DOJ’s complaint, this marks the second time in the past two years that Berkshire Hathaway failed to comply with the premerger notification requirements when acquiring voting securities.

The HSR Act requires reporting of non-exempt acquisitions of voting securities or assets that meet certain value thresholds. Failure to comply with the Act’s requirements can result in a maximum civil penalty of \$16,000 for each day of the ongoing violation.

According to the Complaint, Berkshire Hathaway owned approximately 19% of outstanding voting securities of USG in 2006. In 2008 it then purchased contingent convertible notes in USG in aggregate principal amount of \$300 million. When USG sought to redeem the notes in November 2013, Berkshire Hathaway converted its notes into voting securities, resulting in an approximate 28% ownership of USG voting securities valued at more than \$950 million. Berkshire Hathaway eventually corrected its mistake and filed HSR on January 3, 2014, resulting in a continuous violation of the Act until the February 3, 2014 expiration of the waiting period.

This was not the first time Berkshire Hathaway did not comply with the HSR premerger notification and waiting requirements. On June 25, 2013, Berkshire Hathaway failed to notify its acquisition of voting securities of financial services company Symetra, resulting in ownership exceeding the HSR reporting threshold. In that case, Berkshire Hathaway made a

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corrective HSR filing on July 2, 2013 and characterized its failure to comply with HSR rules as “inadvertent.” In response, the Federal Trade Commission’s Premerger Notification Office sent a letter to Berkshire Hathaway indicating that it was not going to recommend a civil penalty, but required Berkshire Hathaway to “institut[e] an effective program to ensure full compliance with the Act’s requirements.”

This Complaint and settlement highlight the need for any company contemplating a transaction to seek legal advice to determine if the transaction triggers an HSR filing obligation; even relatively small transactions can be subject to HSR reporting requirements. The FTC and DOJ pay close attention to transactions—reported and not—and will take swift action to investigate and litigate violations of the federal antitrust laws and HSR Act. When a company does not take steps to ensure antitrust compliance, it could result in costly fees and negative publicity, even for inadvertent failures to report.

Documents

The DOJ press release (August 20, 2014) is available at <http://www.justice.gov/opa/pr/2014/August/14-at-880.html>. The DOJ complaint (August 20, 2014) is available at <http://www.justice.gov/atr/cases/f308100/308150.pdf>.

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