

FTC Fines Acquirer \$896,000 for Failure to File Under HSR Act for Incremental Acquisitions of a Public Issuer by Conversion of Notes

August 21, 2014

The Federal Trade Commission ("**FTC**") yesterday fined Berkshire Hathaway Inc. \$896,000 to settle allegations that it violated the Hart-Scott-Rodino Antitrust Improvements Act (the "**HSR Act**") in connection with acquisitions of shares of USG Corporation ("**USG**") in December of 2013 by way of conversion of notes originally acquired in 2008. The FTC alleged that Berkshire Hathaway's incremental acquisition of USG stock resulted in Berkshire Hathaway's aggregate holdings of USG exceeding the \$200 million, as adjusted, size-of-transaction threshold (then \$283.6 million), and no exemption from submitting a filing under the HSR Act and observing a waiting period was available.

The HSR Act requires parties to mergers and acquisitions that exceed certain jurisdictional thresholds to make filings with the FTC and the Department of Justice ("**DOJ**") and to observe a waiting period before closing.

According to the [FTC's complaint](#), Berkshire Hathaway, on December 9, 2013, converted notes it owned in USG, originally purchased in November of 2008, into 21.4 million voting securities. As a result, its USG holdings were valued at more than \$950 million and amounted to approximately 28% of the company. Berkshire Hathaway made a filing to acquire voting securities of USG in 2006 and accumulated approximately 19% of the company following the expiration of the waiting period applicable at that time. However, as it was made over five years ago, the prior filing no longer exempted the 2013 conversion.

The HSR Rules provide that where an acquirer acquires voting securities of an issuer after filing under the HSR Act and observing the waiting period, subsequent acquisitions are exempt for a period of five years from the expiration of the waiting period, provided that the acquirer does not accumulate holdings which meet or exceed a higher notification threshold.

Berkshire Hathaway made a corrective filing for the conversion on January 3, 2014.

Also according to the complaint, Berkshire Hathaway made a corrective filing in July 2013 in connection with a June 2013 acquisition of \$41 million of voting securities of Symetra Financial Corporation, a transaction that resulted in Berkshire Hathaway holding Symetra voting securities valued at approximately \$310 million. Berkshire Hathaway apparently did not make any prior filing for acquisitions of Symetra stock.

The key points of this case are:

- Acquirers should keep careful record of when prior HSR filings were submitted for acquisitions of issuers to ensure that they are "up-to-date" with HSR compliance with respect to transactions involving that issuer.
- Conversions of notes into voting stock are "acquisitions" which are potentially reportable under the HSR Act, regardless of when the notes were originally acquired.

The \$896,000 fine for the USG acquisition was the maximum possible fine. The HSR Act provides for a maximum civil penalty of \$16,000 per day for each day during which a party is in violation of the Act. Berkshire Hathaway was deemed to have been in violation of the HSR Act from December 9, 2013, the day of the conversion of USG notes into voting securities, through February 3, 2014, the day on which the waiting period applicable to the corrective filing submitted on January 3, 2014 expired.

The FTC's press release reads "[a]lthough we may not seek penalties for every inadvertent error, we will enforce the rules when the same party makes additional mistakes after promises of improved oversight." The maximum fine may have been imposed here because Berkshire Hathaway so recently submitted a corrective filing for the Symetra transaction and received a letter from the FTC on December 5, 2013, just four days before the conversion at issue, stating that the agency would not seek penalties for the Symetra transaction.

If you have any questions regarding the matters covered in this publication, please contact any of the lawyers listed below or your regular Davis Polk contact.

Arthur J. Burke	212 450 4352	arthur.burke@davispolk.com
Joel M. Cohen	212 450 4592	joel.cohen@davispolk.com
Ronan P. Harty	212 450 4870	ronan.harty@davispolk.com
Christopher B. Hockett	650 752 2009	chris.hockett@davispolk.com
Jon Leibowitz	202 962 7050	jon.leibowitz@davispolk.com
Stephen M. Pepper	212 450 4108	stephen.pepper@davispolk.com
Michael N. Sohn	202 962 7145	michael.sohn@davispolk.com

© 2014 Davis Polk & Wardwell LLP | 450 Lexington Avenue | New York, NY 10017

Notice: This publication, which we believe may be of interest to our clients and friends of the firm, is for general information only. It is not a full analysis of the matters presented and should not be relied upon as legal advice. If you have received this email in error, please notify the sender immediately and destroy the original message, any attachments thereto and all copies. Refer to the firm's [privacy policy](#) located at davispolk.com for important information on this policy. Please consider adding Davis Polk to your Safe Senders list or adding dpwmail@davispolk.com to your address book.

Unsubscribe: If you would rather not receive these publications, please respond to this email and indicate that you would like to be removed from our distribution list.