

HSR Violation Penalties More Than Doubled by FTC

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On June 29, 2016, the Federal Trade Commission (“FTC”) announced an increase in the maximum civil penalties it may impose for violations of the Hart-Scott-Rodino Act (“HSR Act”) and various other rules and orders governed by the FTC. The maximum civil penalty for HSR violations has increased from a daily fine of \$16,000 per day, to a much larger fine of \$40,000 per day. While these higher maximum civil fines will apply to any penalties assessed after August 1, 2016, they will also apply to violations that *predate* the effective date.

This recent announcement and significant penalty increase stems from the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 (“IAAI Act”), which requires federal agencies to adjust civil penalties for violations of any acts that those agencies are tasked to enforce. The practical effect of the IAAI Act is that the agencies must adjust the statutory civil penalties they impose to account for inflation using a prescribed “catch-up adjustment” formula.

Maximum civil penalty increases for violating the HSR Act and other FTC rules and orders have undergone similar periodic increases in the past. The last civil fine increase was imposed in 2009, when it increased from \$11,000 per day to \$16,000 per day. However, unlike those periodic increases, following this initial adjustment for 2016, the agencies are now required to annually adjust for inflation their maximum civil penalty threshold every January. Such annual inflation adjustments for maximum fines follows the trend of annual adjustments for HSR filing thresholds.

The HSR Act requires most acquisitions of voting securities and assets valued in excess of \$78.2 million to be notified to the FTC and the Department of Justice prior to closing, even if no competition concerns are at issue. Failure to notify the agencies when required to do so, or the violation of other rules related to the HSR process, can lead to substantial civil penalties, especially as each day of non-compliance is deemed as a separate violation and will incur a distinct fine. However, while the civil penalty adjustments announced by the FTC more than double the maximum daily fine that could be imposed for HSR Act or other FTC order violations, the FTC does consider a number of factors on a case-by-case basis when determining the actual fine to be imposed and whether the fine should be lower than the maximum prescribed by statute.

Nonetheless, the increase in the maximum civil penalty and requirement to adjust annually is significant, and is expected to impose substantial additional costs on a company should it be determined that an HSR Act or other FTC rule violation has occurred, particularly if the violation were to happen over a prolonged period of time. It is very important that companies ensure that their compliance policies and practices are current, effective, and understood by all employees.

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