

ALERTS

HSR Act Update: 150-Percent Increase in Maximum Civil Penalties for Violations; Yearly Increases to Follow

July 7, 2016

On June 29, 2016, the Federal Trade Commission (“FTC”) announced that the maximum civil penalty that can be assessed for violations of the premerger notification requirement of the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (as amended, the “HSR Act”) will increase from \$16,000 per day to \$40,000 per day. The increase applies to all transactions covered by the HSR Act, including securities purchases, mergers, and other acquisitions of voting securities, assets or non-corporate interests, and may be applied to any penalties assessed on or after the Aug. 1, 2016 effective date (including for violations that occurred prior to such date).

The HSR Act requires parties to acquisitions meeting certain thresholds to: (1) make a premerger notification to the FTC and the Antitrust Division of the Department of Justice (“DOJ” and, together with the FTC, the “Antitrust Agencies”); and (2) observe a waiting period prior to consummating such acquisitions. Failure to comply with any provision of the HSR Act subjects violators to penalties that may be recovered in a civil action brought by the United States.^[1]

The magnitude of the latest increase is unprecedented in the history of HSR Act civil penalties. To date, the maximum civil penalty provided for under the HSR Act has only been increased twice, from \$10,000 per day to \$11,000 per day in 1996, and from \$11,000 per day to \$16,000 per day in 2009. The new change is being made pursuant to legislation enacted last year, which requires federal agencies to adjust penalty amounts using a

“catch-up” inflation adjustment. Going forward, the maximum penalty amount will be adjusted for inflation every January.

Each day of non-compliance with the HSR Act is deemed to be a separate violation, which can cause substantial fines to accumulate over time (in some cases, undetected by the parties) until a corrective HSR Act filing is made with the Antitrust Agencies. It is, therefore, more crucial than ever that parties remain cognizant of their HSR Act reporting obligations. In the past, HSR Act enforcement actions have often been settled with penalties far below the maximum permitted by law. Mitigating factors that the courts (and, historically, the Antitrust Agencies) consider in determining the amount of the civil penalty to be imposed include: “the good or bad faith of the respondent; the injury to the public; the respondent’s ability to pay; the desire to eliminate the benefits derived from the violations; and the necessity of vindicating the [FTC]’s authority.”^[2] In light of the increasingly active enforcement by the Antitrust Agencies in recent years,^[3] and in light of the new maximum penalties, it is possible that we will soon see a marked increase in the fines actually imposed on parties that fail to comply with the HSR Act.

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

Authored by Peter Jonathan Halasz and Beverly J. Ang.

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

[1] The FTC shares its enforcement authority under the HSR Act with DOJ. Although only the DOJ can seek civil penalties for HSR violations, investigations are often initiated by the FTC and then referred to DOJ for enforcement on the FTC’s behalf.

[2] 81 Fed Reg. 42,476 (June 30, 2016).

[3] See SRZ *Client Alerts*: “Activist Investing Update: DOJ’s HSR Action Against ValueAct Highlights Uncertainties Regarding the ‘Investment-Only’ Exemption;” “Hart-Scott-Rodino Filing Update: Recent Settlement Interprets ‘Investment-Only’ Exemption Narrowly;” “Hart-Scott-Rodino Act: US Levies \$720K Civil Penalty for Failure to Re-File for Additional

Stock Acquisitions;" "Investor Fined for Alleged Misuse of HSR Act
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Halasz**

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