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Failure to Comply with the HSR Act: The Price is Going Up

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Failure to comply with the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act") is about to get a lot more expensive.

Effective August 1, 2016, the maximum civil penalty for noncompliance with the premerger notification requirements of the HSR Act will increase from $16,000 to $40,000 *per day* – a 150% increase. The prospect of increased fines should remind businesses and investors of the need to carefully evaluate whether proposed transactions may be subject to the Act.

The HSR Act requires that parties to certain mergers and acquisitions, including acquisitions of voting securities and assets, file notifications with the FTC and DOJ and observe a statutory waiting period if the acquisition meets specified "size of person" and "size of transaction" thresholds and does not fall within an exemption to the HSR Act. The thresholds are adjusted annually, based on the change in gross national product.

The HSR Act also requires notifying parties to provide information and documents to aid the reviewing agencies in their substantive antitrust analysis of the transaction. Failure to file, to provide required documents and information or to observe the waiting period are all violations of the HSR Act and can result in civil penalties.

The new maximum civil penalty applies to penalties assessed after August 1, 2016, regardless of whether the violation occurred before or after that date.

The significant increase is required by the Federal Civil Penalties Inflation Adjustment Improvements Act of 2015, signed into law last November. According to the Office of Management and Budget, the increase, based on inflation since passage of the HSR Act in 1976, but capped at a 150% increase, is intended "to improve the effectiveness of civil monetary penalties and to maintain their deterrent effect."

Going forward, the maximum civil penalty for noncompliance with the HSR Act will be adjusted for inflation every January, with the first adjustment occurring in January 2017.

While civil penalties actually paid are generally negotiated, there is no doubt that the new maximum will become the starting point for negotiations and lead to increased penalties.

The penalties, because they are assessed "per day" of violation, can quickly add up, now to $280,000 per week and $14.6 million for failure to file for one year.

Recent fines paid have been substantial, even before the penalty increase. Notable examples include:

- A civil penalty of $720,000 was paid by investment firm MacAndrews & Forbes in 2013 when it acquired shares in Scientific Games Corporation ("SGC"), but failed to file an HSR notification. Although it had filed a notification in connection with its earlier acquisition of SGC shares, and the new shares did not result in the transaction value crossing a higher filing threshold than the last filing, the acquisition was outside the five-year grace period following the previous HSR filing, and a new filing was therefore required.
- A civil penalty of $480,000 was paid, also in 2013, by corporate investor Barry Diller, who did not qualify for the "solely for the purpose of investment" exemption, and failed to file HSR notification when his acquisitions of Coca-Cola stock crossed the HSR "size of transaction" threshold.
- Flakeboard America Ltd. and SierraPine each agreed to pay $1.9 million in civil penalties in 2014 for failing to comply with waiting period requirements in connection with Flakeboard's acquisition of three Sierra Pine mills, by coordinating in the closure of a SierraPine mill before the HSR waiting period expired.

Most recently, in April 2016, the Department of Justice filed suit against investment firm ValueAct for improperly claiming the "solely for the purpose of investment" exemption applied to an investment. The DOJ suit seeks at least $19 million – and had the suit been brought applying the newly announced level of fines, at $40,000 per day, DOJ might be seeking $47.5 million.

Other civil penalties also increasing

The FTC will also be increasing penalties for other laws enforced by the agency. These include violations of FTC final orders and FTC rules concerning unfair and deceptive acts and practices, with the penalties in both instances increasing from $16,000 to $40,000 per day.

Penalties under the Medicare Prescription Drug Improvement and Modernization Act ("MMA"), which requires certain agreements between drug companies, including settlements of Hatch-Waxman litigation which may result in delayed entry of generic drugs, to be filed with the FTC and DOJ, are also being increased from $12,100 to $14,142 per day.

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