

Antitrust Alert

June 30, 2016

If you read one thing...

- Maximum daily potential civil penalties for Hart-Scott-Rodino violations have been increased from \$16,000 to \$40,000 per day.
- The new maximums apply to all post-August 1, 2016, penalties assessments, even where the Hart-Scott-Rodino violation period predates August 1.
- The increased penalties, along with recent vigorous FTC Hart-Scott enforcement activities, should strongly signal to parties contemplating potentially reportable acquisitions the importance of securing proper Hart-Scott-Rodino advice before proceeding.



FTC Raises Maximum Potential Hart-Scott-Rodino Civil Penalties to \$40,000 per Day, an Increase of 150 percent

On June 29, 2016, the Federal Trade Commission (FTC) announced new maximum potential civil penalties for violations of various competition and other laws enforced by the FTC,¹ including the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended, Section 7A of the Clayton Act, 15 U.S.C. § 18a (the “HSR Act”).² The new maximum HSR Act civil penalty is \$40,000 per day, a 150 percent increase from the current \$16,000.

The HSR Act established a “file and wait” regime. For covered transactions, the acquiring and acquired persons must file premerger notification forms with both the FTC and the Department of Justice Antitrust Division (DOJ)—and they must delay consummating the acquisition until the waiting period expires or is early-terminated. The HSR Act is violated if the acquisition takes place prior to completion of this clearance process. A separate violation is deemed to occur each day the buyer continues to hold what was illegally acquired. Thus, for example, for a “violation period” lasting one year, the new maximum \$40,000 per day civil penalty would amount to \$14.6 million in potential maximum penalties.

The FTC and DOJ have enforcement discretion with respect to what level of penalties to seek for any given alleged violation. Historically all completed civil penalty actions have resulted in settlements,

¹ FTC Press Release, “[FTC Raises Civil Penalty Maximums to Adjust for Inflation](#),” June 29, 2016.

² The maximum penalty increase—to account for years of inflation since the current \$16,000 per day maximum was instituted—was required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, Pub. L. No. 114-74, sec. 701, 129 Stat. 599 (2015).

including some settlements with no penalties and others with a significant “discount” from the potential maximum.³ However, in a material number of instances, the enforcement agencies have both sought and received settlements that, from the sometimes limited public information available, appear to be at or near the maximum amounts that could have been assessed if the matter had been fully litigated.

The FTC and DOJ have very actively enforced the HSR Act over the past year, particularly against so-called “activist investors” who have allegedly improperly relied on the passive investment exemption.⁴ Most notably, in the DOJ’s multiple violation passive investment case against ValueAct, brought in April 2016, the complaint seeks civil penalties of at least \$19 million.⁵ This active enforcement environment, coupled with the 150 percent increase in maximum civil penalties, should strongly signal to parties contemplating potentially reportable acquisitions the importance of securing Hart-Scott-Rodino advice from legal counsel before proceeding.

Pursuant to the Federal Civil Penalties Inflation Adjustment Act Improvements Act, maximum civil penalty amounts will now be adjusted for inflation annually beginning in January 2017.

³ The FTC recently listed the factors that may govern the exercise of its discretion to seek no penalties, or at least less than the maximum: “(1) the violation was the result of understandable or simple negligence; (2) the parties make corrective filings promptly after discovering the mistake; (3) they did not benefit from the violation; (4) they submit an acceptable explanation for the failure to file and explain what they will do to prevent another violation; and (5) they have not previously violated the HSR Act.” See “[Have a Good Plan for HSR Compliance](#),” Aug. 21, 2014, available [here](#).

⁴ DOJ Press Release, “[Justice Department Sues ValueAct for Violating Premerger Notification Requirements](#),” Apr. 4, 2016 (alleged improper reliance on passive investment exemption; complaint seeks more than \$19 million in civil penalties); FTC Press Release, “[Investor Len Blavatnik to Pay \\$656,000 to Settle FTC Charges That He Violated U.S. Premerger Notification Requirements](#),” Oct. 6, 2015 (purported “second” inadvertent failure to file); FTC Press Release, “[Leucadia National Corporation to Pay \\$240,000 to Settle FTC Charges It Violated U.S. Premerger Notification Requirements](#),” Sept. 22, 2015 (alleged improper reliance on the passive investment institutional investor exemption; the agreed civil penalty settlement reflected only approximately \$500 per day of violation; FTC noted that in not filing Leucadia had obtained and followed legal advice, albeit faulty; FTC Press Release, “[Third Point Funds Agree to Settle FTC Charges that They Violated U.S. Premerger Notification Requirements](#),” Aug. 24, 2015 (alleged improper reliance on passive investment exemption; settlement for this first time violation included particularly strong injunctive relief, but no civil penalties).

⁵ Complaint, *U.S. v. VA Partners I, LLC, et al.*, No. 16-cv-01272 (N.D. Cal. 2016). Litigation in this case is ongoing. A final court decision could provide important guidance on the scope of the passive investment exemption and the extent to which the new \$40,000 per day penalty maximum can be applied to pre-August 1 penalty periods.

Contact Information

If you have any questions regarding this alert, please contact:

Paul B. Hewitt

phewitt@akingump.com

202.887.4120

Washington, D.C.

Stacy R. Kobrick

skobrick@akingump.com

202.416.5398

Washington, D.C.