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Client Alert

Antitrust & Trade Regulation

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Maximum Civil Penalties for HSR Violations Increased to $43,280 per Day

By Jeffrey Blumenfeld and Jack Sidorov

On January 13, 2020, the Federal Trade Commission announced that it had raised[1] the maximum civil penalty for violations of the Hart-Scott-Rodino (HSR) Act to $43,280 per day, an increase of about 1.8 percent from 2019 levels. The new maximum penalty amount will apply beginning on the date the notice is published in the Federal Register, expected to be within the next week or two.[2]

Because the fines are imposed for each day of a violation[3], mistakes can be very expensive. Civil penalties as high as $11 million have been imposed for HSR violations.

The rather technical HSR filing requirements are challenging and parties can violate them at various stages of the process:

- By consummating a transaction without making the required HSR filing(s)
- By consummating a transaction having made a noncompliant HSR filing
- By having the buyer assume operational control of the seller's business before the expiration of the HSR waiting period

A party can fail to make a required filing for a number of reasons such as being unaware of some of HSR's technical requirements or by incorrectly relying on an exemption such as the HSR Act's "solely for the purpose of investment" exemption.

A party can also violate HSR intentionally, for example by structuring a transaction, or using a device, for the purpose of avoiding HSR's requirements.

Even where the parties have made their HSR filings, they may violate the Act by consummating the transaction without having filed all the information and documents that should have been submitted with the HSR notification, including:

- Documents prepared by or for upper management to help them evaluate the deal with respect to competition-related subjects (4(c) documents)
- Confidential information memoranda as well as documents analyzing the transaction prepared by third-party consultants (4(d) documents)

This kind of violation generally results from not having a sufficiently broad initial screen for potential 4(c) and 4(d) documents.

Parties can also violate the HSR Act through "gun jumping" if the buyer exercises control over the seller's business decisions before the expiration of the HSR waiting period (normally 30 days, but possibly longer). Such gun-jumping problems can arise from an agreement's interim operating covenants ceding control of some ordinary-course-of-business decisions to the buyer as well as from the parties' day-to-day conduct during the waiting period.

As a practical matter, even problems with HSR filings that fall short of triggering civil

[1] This annual revision is mandated by statute.
[2] There is at least some anecdotal evidence that the agencies may seek the higher daily penalties, once they are in effect, for HSR violations that occurred prior to the effective date.
[3] Although the FTC and DOJ cannot themselves impose civil penalties for HSR violations but seek them from federal district courts, to date, all HSR civil penalty cases have been settled.

penalty enforcement actions can significantly delay the HSR review process. Further, and in addition to exposing themselves to substantial civil penalties, parties will experience adverse reputational effects with the agencies and the public from HSR violations that are challenged by the agencies.

The new, higher maximum fines are a strong reminder that parties doing a deal need to be thoughtful and careful about their conduct throughout the process, from drafting the agreement to making the HSR filing to closing.

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