

FTC Raising Civil Penalty to \$40,000 per Day for Violations of Premerger Filing Obligations under the HSR Act

The Federal Trade Commission (“FTC”) will raise the maximum civil penalty amount for violations of premerger filing notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended (“HSR Act”)¹ to \$40,000 per day from \$16,000 per day of the violation, effective August 1, 2016.² The FTC last adjusted these penalties effective in January 2009.³ The FTC implemented this increase as required by the Federal Civil Penalty Inflation Adjustment Act Improvements Act of 2015 (“Adjustment Improvements Act”),⁴ which requires federal agencies to implement a “catch-up adjustment” in 2016 to account for inflation since the civil penalties within their jurisdiction were last set or adjusted. After this initial adjustment, the Adjustment Improvements Act directs the FTC and other agencies to adjust their civil penalties for inflation each following year in January. The FTC will also raise the civil penalties for violations of 15 other provisions.⁵

The HSR Act requires all persons contemplating mergers or acquisitions of voting securities or assets that satisfy the size-of-transaction and size-of-person thresholds in the Act, to notify the FTC and the Antitrust Division of the Department of Justice, pay a filing fee of \$45,000 to \$280,000 (depending on the size of the transaction) and observe a waiting period before completing those transactions. Once the agencies receive the required HSR forms and the filing fee, a 30-day waiting period commences (in most cases) and the transaction cannot close until the expiration or early termination of the waiting period—or, in the event the waiting period is extended by issuance of a “Second Request” for additional materials when significant antitrust concerns exist, expiration of an additional 30-day waiting period or a negotiated schedule following substantial compliance with the Second Request.

The HSR rules include many exemptions and exceptions and at times require the aggregation of pre-acquisition holdings and reporting of subsequent acquisitions when a secondary threshold is crossed. Therefore, the rules should be carefully reviewed with respect to any particular transaction, especially given the pending and subsequent increases in civil penalties for even an inadvertent violation.

* * *

If you have any questions about the issues addressed in this memorandum or if you would like a copy of any of the materials mentioned, please do not hesitate to call or email Elai Katz at 212.701.3039 or ekatz@cahill.com; or Lauren Rackow at 212.701.3725 or lrackow@cahill.com.

¹ 15 U.S.C. § 18a.

² 81 Fed. Reg. 42476 (Jun. 30, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-30/pdf/2016-15302.pdf>.

³ 74 Fed. Reg. 857 (Jan. 9, 2009), available at <https://www.gpo.gov/fdsys/pkg/FR-2009-01-09/pdf/E9-210.pdf>.

⁴ Pub. L. No. 114-74, sec. 701, 129 Stat. 599 (2015). The Act amends the Federal Civil Penalties Inflation Adjustment Act, Pub. L. No. 101-410, 104 Stat. 890 (codified at 28 U.S.C. 2461 note).

⁵ 81 Fed. Reg. 42476 (Jun. 30, 2016), available at <https://www.gpo.gov/fdsys/pkg/FR-2016-06-30/pdf/2016-15302.pdf>.