



## Mergers & Acquisitions/Antitrust ADVISORY ■

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### FTC Announces Substantial Increase to Maximum Civil Penalty for Premerger Violations

On June 29, 2016, the Federal Trade Commission (FTC) [announced increases](#) to the maximum daily civil penalties under several antitrust statutes. As a result, the maximum daily penalty for violations of premerger filing notification requirements under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) will more than double from \$16,000 per day to \$40,000, effective August 1, 2016.

The HSR Act requires companies contemplating mergers or acquisitions of voting securities or assets that meet or exceed [certain monetary thresholds](#) to file notification forms with the FTC and Department of Justice (DOJ) and to wait a designated period of time before consummating the contemplated transaction. The FTC does not typically pursue the maximum penalty for HSR Act violations – the most common of which is a failure to file the required submissions prior to closing – and takes factors such as degree of culpability and past violations into account. Moreover, the FTC has a civil penalty leniency program for small businesses, and it generally does not seek civil penalties against first-time violators as long as they self-report and make corrective filings.

Nonetheless, HSR Act violations can be costly because they are calculated based on the number of days until a company comes into compliance with the HSR Act (meaning a penalty could theoretically be assessed for every day between when a deal closed in violation of the Act and when the new filing is made and the waiting period ends, which might be months or even years later). In 2009, John C. Malone, CEO and chairman of Discovery Holding Company, agreed to pay a [\\$1.4 million civil penalty](#) to settle FTC charges that he violated the HSR Act in connection with acquisitions of shares in 2005 and 2008. In 2014, the DOJ reached a [\\$5 million settlement](#) with Flakeboard for its alleged HSR violations. And just this year, the DOJ filed suit against certain ValueAct Capital entities, seeking at least [\\$19 million in civil penalties](#) as well as an injunction from any future violations of the HSR Act.

This 250 percent increase in the daily fine level will vastly expand the leverage of the agency to obtain higher settlements. The HSR Act and its rules can be technical and complicated. Buyers, sellers and investors should, therefore, work diligently with counsel to ensure adequate compliance with the law.

The authority for the penalty increase comes from the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, which requires federal agencies to implement a “catch-up adjustment” in 2016 in order to address inflation. They are also directed to make further adjustments for inflation every January going forward.

In addition to the increases to maximum penalties for HSR Act violations, the changes announced last week also will lead to higher penalties for violations of 15 other legal provisions, including Section 11(l) of the Clayton Act, 15 U.S.C. 21(l) (violations of cease and desist orders issued under Clayton Act Section 11(b)) and Section 5(l) of the FTC Act, 15 U.S.C. 45(l) (violations of final FTC orders issued under Section 5(b) of the FTC Act).

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