FTC Announces Substantial Increases to Civil Penalties

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On Wednesday, June 29, the Federal Trade Commission (FTC) announced substantial increases to the maximum civil penalties for 16 distinct violations of certain laws enforced by the FTC. Notable increases were announced for violations of the Hart-Scott-Rodino Improvements (HSR) Act and the Medicare Prescription Drug Improvement and Modernization Act (MMA).

These new maximum civil penalty amounts will apply to penalties assessed on or after August 1, 2016, but will apply to conduct occurring before August 1, 2016. The sharpest increase is for HSR premerger filing notification violations: the new penalty is $40,000 per day, up from $16,000 per day. MMA penalties will increase from $12,100 per day to $14,142 per day. These increases are the initial "catch-up adjustments" prescribed by the Federal Civil Penalty Inflation Act Improvements Act of 2015 (Adjustment Improvements Act or Act), which also directs agencies to adjust their civil penalties for inflation every January hereafter.

HSR Violations

Even before the catch-up increase to $40,000 per day of violation, HSR penalties have been substantial. Under the HSR Act, the failure to make a required HSR filing, or the failure to include certain required information, can lead to daily assessed penalties for each day of violation. These penalties add up, even at the previous fine level of $16,000 per day. Recent penalties have amounted to as much as $896,000, the fine paid in 2014 by Berkshire Hathaway for failure to make an HSR filing for the conversion of notes in USG Corporation to voting securities. That conversion pushed the total value of USG securities Berkshire Hathaway held over an HSR reporting threshold.

To illustrate the impact of the increases, under the new fines, a failure to make an HSR filing until 30 days after closing would be subject to a maximum $1.2 million, up from $480,000 under the current penalties. In practice, failures to file often are not caught for a year or more. Although settlements are often negotiated, failure to file an HSR for a year could expose a violator to a potential fine of $14.6 million.

MMA Violations

Brand name drug companies and generic drug applicants may violate MMA filing requirements when they fail to report agreements that relate to an ANDA. Certain agreements between generic drug companies may also be subject to MMA filing requirements. These agreements are to be filed within 10 business days to the FTC and DOJ. Each day that the entity is in violation may constitute an additional violation. Civil penalties for failing to make an MMA filing can also be substantial.

Why the Increase Now?

The Adjustment Improvements Act, as the name suggests, amended the Inflation Adjustment Act (1990), which capped penalty adjustments at 10%. Under the Act, agencies are now required to apply a catch-up adjustment. To calculate the catch-up adjustment, agencies must identify the year when each penalty range was established, or the last time the penalty was updated. The catch-up adjustment is then calculated as the percentage by which the US Department of Labor’s Consumer Price Index for all-urban consumers (CPI-U) for the month of October 2015 exceeds the CPI-U for the month of October in the year when the penalty was set or last adjusted. The adjustments must be rounded to the nearest dollar, with a cap of 150% of the amount of the civil penalty in effect November 2, 2015. The catch-up adjustment to the HSR violation fines is at the maximum 150% cap (from $16,000 to $40,000), but the catch-up adjustment for the MMA filing violation penalty falls well short of the cap.

Use Caution

Companies should be aware that HSR filings are sometimes required even outside of everyday share acquisitions or mergers. As noted above, conversion of notes, options or non-voting securities to voting securities may trigger an HSR filing obligation. Other transactions requiring close examination of HSR applicability include acquisitions in reliance on the “passive investor” exemption; small acquisitions of voting securities that, when aggregated with existing holdings, may trip an HSR threshold; and grants of shares to executives as compensation. Similarly, MMA filings can be triggered by multiple types of agreements among pharmaceutical companies. Counsel should be consulted in any situation where an HSR or MMA filing may be required, as the stakes have become even higher for violations.

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