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C H A N C E

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U.S. Federal Trade Commission Announces Revised (and Much Higher!) Civil Penalties

The U.S. Federal Trade Commission ("FTC") announced yesterday that it is raising the maximum civil penalties for violations of the laws that the FTC is tasked with enforcing. These laws include, among others, the Hart-Scott-Rodino Antitrust Improvements Act of 1976, as amended ("HSR Act"). Violations of the HSR Act will jump from a maximum of $16,000 to $40,000. All changes to the FTC's civil fines will take affect for any penalties assessed after August 1, 2016.

Under the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 ("Federal Civil Penalties Inflation Adjustment Act"), U.S. federal agencies are charged with adjusting the civil penalties for violations of any acts that such agencies enforce. These adjustments are made pursuant to a pre-determined "catch-up adjustment" calculation to account for inflation. After this initial adjustment for 2016, the agencies must adjust their civil penalties every January.

The maximum civil penalties that the FTC may seek for violations of the laws enforced by the FTC are prescribed in Commission Rule 1.98, 16 C.F.R. 1.98. Here are the highlights of some of the adjustments that were made pursuant to the requirements of the Federal Civil Penalties Inflation Adjustment Act:

Law Enforced by the FTC	Previous Maximum Fine	Revised Maximum Fine
Section 7A(g)(1) of the Clayton Act, 15 U.S.C. §18a(g)(1) –violations of the HSR Act	$16,000	$40,000
Section 11(l) of the Clayton Act, 15 U.S.C. §21(l) – violations of cease and desist orders under the Clayton act	$8,500	$21,250
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	$16,000	$40,000
Section 5(m)(1)(A) of the FTC Act, 15 U.S.C. §45(m)(1)(A) – unfair or deceptive acts or practices	$16,000	$40,000
Section 621(a)(2) of the Fair Credit Reporting Act, 15 U.S.C. §1681s(a)(2) – knowing violations of the Fair Credit Reporting Act	$3,500	$3,765
Section 814(a) of the Energy Independence and Security Act of 2007 §17304 – violations regarding market manipulation and providing false information to federal agencies	$1,100,000	$1,138,330

Although these adjustments increase the maximum civil fines, the FTC will still consider a number of factors when ultimately determining a fine amount. As prescribed by statute, the FTC shall consider "the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require."

Regarding violations of the HSR Act, it is worth highlighting that fines are calculated for each day of the violation. For example, if a party fails to make a necessary premerger notification filing and closes a transaction, the fine may accrue from the date of closing until a corrective filing is made. What is more, the fine applies to more than just failures to file. It also includes, for example, neglecting to provide all so-called Item 4 documents – (*e.g.*, documents prepared by or for an officer or director for the purpose of analyzing or evaluating the transaction with respect to markets, market shares, competition, competitors, or expansion into new products or geographies).

Given the drastic increase in the adjusted fines, companies should be even more mindful of potential violations of those laws enforced by the FTC.

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