Client Alert

How Much Could Violating a FTC Rule Cost You "$50,120 *Per Violation*"?

January 13, 2023

The Federal Trade Commission ("FTC" or "Commission") recently announced that it has adjusted the maximum civil penalty dollar amounts for violations of 16 provisions that the Commission enforces. The increase is required by the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, and is intended to account for inflation. The act directs agencies to implement annual inflation adjustments based on a prescribed formula. Given the uptick in FTC enforcement actions, companies are likely to begin feeling the impact of the increased penalties in the coming year.

As our readers likely recall, the Supreme Court's 2021 ruling in *AMG Capital Management LLC v. Federal Trade Commission* removed a powerful tool that the FTC had previously relied on to pursue monetary relief in federal court. The Supreme Court unanimously held that the Federal Trade Commission cannot obtain equitable monetary relief, such as disgorgement or restitution, when it pursues district court litigation directly under Section 13(b) of the Federal Trade Commission Act ("FTC Act" or "Act"). Rather, to obtain such relief, the FTC must first follow its administrative adjudication procedures under Section 5 of the Act.

With disgorgement and restitution off the table in federal court proceedings, we predicted in 2021 that the FTC would focus some of its enforcement resources on pursuing FTC rule violations because of the entitlement to seek civil penalties. Our prediction came true, and we expect this to be a continued focus of enforcement activity in 2023. With the recent increase, the Commission can now seek up to $50,120 in civil penalties ***per violation*** of a FTC rule (or per day for ongoing violations). Given how quickly these penalties can add up, now is likely a good time for companies to review their business practices to ensure compliance with FTC rules, including the following:

- **Restore Online Shoppers' Confidence Act** ("ROSCA"), which requires sellers to clearly and conspicuously disclose all "material terms of the transaction" before enrolling a consumer in a negative option plan online, obtain the consumer's express informed consent before charging their payment method, and providing an easy mechanism for cancelling the negative option plan.
- **Made in USA Labeling Rule** which requires that all significant parts, processing and labor that go into the product must be of U.S. origin in order for sellers to label their product as "Made in USA".
- The **Mail Order Rule**, which prohibits sellers from soliciting mail, Internet, or telephone order sales unless they reasonably expect that they can ship the ordered merchandise within the time stated on the solicitation or, if no time is stated, within 30 days. The Rule also requires a seller to seek the buyer's consent to the delayed shipment when the seller learns that it cannot ship within the time stated or, if no time is stated, within 30 days. If the buyer does not consent, the seller must promptly refund all money paid for the unshipped merchandise. The Rule includes specific requirements regarding how refunds must be provided and when.

- **Telemarketing Sales Rules** (“TSR”), which requires telemarketers to make specific disclosures of material information; prohibits misrepresentations; sets limits on the times telemarketers may call consumers; prohibits calls to a consumer who has asked not to be called again; and sets payment restrictions for the sale of certain goods and services.

In addition to focusing on enforcement of the above-referenced FTC rules, the FTC has also announced its intention to implement new FTC rules. Specifically, the FTC recently announced that it is exploring potential rulemaking that could crack down on junk fees, commercial surveillance and lax data security practices, and the use of reviews and endorsements.

Moreover, the FTC has been active in issuing “Notice of Penalty Offenses” in an effort to tee up an argument for entitlement to civil penalties for actions that would ordinarily simply constitute a violation of Section 5 of the FTC Act. The FTC’s Penalty Offense Authority is codified in Section 5(m)(1)(B) of the FTC Act, 15 U.S.C. Section 45(m)(1)(B). Under this authority, the Commission can seek civil penalties if it proves that (1) the company knew the conduct was unfair or deceptive in violation of the FTC Act and (2) the FTC had already issued a cease and desist order finding that such conduct is unfair or deceptive. If companies engage in the identified conduct after receipt of the “Notice of Penalty Offenses”, they could now face civil penalties of up to $50,120 per violation. Recent “Notice of Penalty Offenses” related to for-profit education, the use of testimonials and endorsements in advertising, and false money-making claims.

The Commission voted 4-0 to publish the Federal Register notice amending Commission Rule 1.98. The new maximum civil penalty amounts will take effect upon publication in the Federal Register. Once the new penalty amounts become effective, they will apply to violations that took place even before the effective date of the adjustment, so long as the assessment itself occurs after the effective date for the adjustment. The Federal Register notice can be found here.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Holly A. Melton
Partner – New York
Phone: +1.212.895.4258
Email: hmelton@crowell.com

Helen O. Ogunyanwo
Counsel – Washington, D.C.
Phone: +1.202.624.2585
Email: hogunyanwo@crowell.com

Tiffany Aguiar
Associate – Orange County
Phone: +1.949.798.1351
Email: taguiar@crowell.com