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FTC Hikes Penalties for Law Violators

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In a little-noticed press release issued on June 29, the Federal Trade Commission announced that it had dramatically increased the cost of violating the law, more than doubling the maximum civil penalties it can seek against violators. This increase took effect on August 1. For dealers, finance companies, and others of you who are assessing your compliance risks, this change should be factored into the equation.

Previously, the maximum penalty the FTC could obtain from a court was $16,000 per violation. It is now $40,000 per violation. But, the responsibility for this increase lies with Congress, not the FTC. A law enacted last year, the Federal Civil Penalties Inflation Adjustment Act Improvements Act, requires federal agencies like the FTC to implement "catch-up" inflation adjustments every year. (FYI - The Consumer Financial Protection Bureau also recently adjusted its civil penalty amounts, but for reasons too complex to explain, the adjustments were much smaller, e.g., from $5,000 to $5,437 per violation for "Tier 1" penalties. The penalty maximums are tiered based on whether the violations were unintentional, reckless, or intentional.) While inflation obviously hasn't increased 2 ½ times in the past year, the Improvements Act establishes a complex formula that the agencies must apply, which in this case led to the huge increases for the FTC's civil penalties.

Unlike the CFPB, the FTC's ability to obtain civil penalties in its enforcement actions is limited to certain situations, most importantly in cases against companies or individuals who violate an existing FTC administrative order against them (for example, last year, a West Virginia auto dealer paid an $80,000 penalty to settle FTC charges that the dealer's advertisements violated a 2012 consent order prohibiting deceptive advertising) or who violate certain FTC trade regulation rules. These rules include some that are relevant to auto sellers and finance companies:

- The Used Car Rule (requiring used car sellers to post a Buyers Guide on the window that includes information about the condition of the vehicle and any warranties).
- The Telemarketing Sales Rule (regulating the use of telephone calls or texts to communicate with consumers, including prohibiting calls to consumers on the Do Not Call list).
- The CAN-SPAM Act (regulating the use of emails to market to consumers).

Now, it is important to understand that FTC civil penalty orders rarely, if ever, impose the maximum possible penalty. At least in theory, the FTC and courts must consider several factors in calculating the penalty, including the extent of harm to the public from the alleged violations, the good or bad faith of the violator, its history of prior violations, and its financial condition. Nevertheless, FTC staff often begin settlement negotiations at the maximum possible number - calculated as the number of violations (for example, each dissemination of a deceptive advertisement) times the maximum penalty per violation - before bargaining down from there. As a result of the FTC's new adjustment, we can expect to see negotiations beginning at a much higher number - and the FTC insisting on higher penalties - than was the case before.

Hopefully, you have always integrated compliance into your company's operations. With the new, enhanced penalties available to the FTC, it has become even more critical to do so.

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