

## Google's \$22.5 Million FTC Fine: Why Should Cos. Care?

*Law360, New York (August 20, 2012, 1:14 PM ET)* -- The Federal Trade Commission (FTC) has levied a \$22.5-million penalty against Google Inc., the largest civil penalty by the FTC against a single defendant. The penalty stems from an FTC complaint alleging that Google violated “privacy promises” to which the company agreed as part of a 2011 consent order entered into with the FTC.

### What Are the Takeaways for the Business Community?

There are a few takeaways from the settlement announcement.

First, companies entering into a settlement agreement with the FTC regarding future conduct must ensure that they remain in compliance. The FTC takes the violation of a consent order very seriously.

Second, companies must be up front, open and honest with their consumers about the measures being taken to protect their privacy and the procedures they should follow to change their privacy settings.

Finally, those companies that make promises to consumers about how their information will be accessed, maintained or used must do their best to ensure that those promises are kept.

### How the Issues Teed Up

The FTC sued Google in 2011 after the company initially assured Gmail users that it would not use their information for any purpose other than to provide email service. The FTC claimed that Google did not honor that promise, so an order was entered requiring Google to adopt comprehensive privacy protections for consumers and civil penalties if Google did not abide by the agreement.

The settlement that gave rise to the \$22.5 million fine stems from an FTC allegation that Google subsequently misled consumers about the use of tracking cookies in an Internet browser. “Cookies” are small files stored on a computer that hold data specific to a particular user and website, so that when the user visits the website, that site delivers a page tailored to the user.

By placing a cookie on a person’s computer, an advertisement network can collect information about the person’s browsing habits and then use that information to display advertisements targeted to the person’s interests. In this case, Google used the “double-click advertising cookie” to collect information about users’ browsing activity.

Some people prefer to disable cookies from monitoring websites they visit. Increasingly, companies are giving consumers ways to control such monitoring.

The Safari browser, for one, generally blocks cookies in almost all situations; an exception would be when the user submits information in an online form on a website as, for example, when buying something online. In this situation, the program accepts the cookie and allows additional cookies from that same site.

### **What Happened Here?**

In this case, the FTC alleged that Google violated the portion of the 2011 consent order prohibiting Google from misrepresenting the purpose of which it collects and uses information from consumers, and the extent to which consumers may exercise control over the collection, use or disclosure of their information.

This portion of the order was violated here, alleged the FTC, by Google initially representing to consumers that it would not place tracking cookies or serve targeted ads based on those cookies, but then delivering tracking cookies and targeted ads to some users. Specifically, users would allow one cookie from Google's advertising cookie service, which opened the door for all cookies from that advertising cookie service to be accepted.

Google informed users that if they wanted to opt out of its system where Google's advertising cookies were automatically accepted, the users need not take any action due to Safari's default cookie-blocking settings.

According to the FTC, however, Google sidestepped Safari's default cookie-blocking settings by taking advantage of Safari's narrow exception for forms. Google allegedly "tricked" the user's browser into believing that the user was submitting information through a form, allowing Google to place a temporary cookie in the user's computer.

Once the temporary cookie was installed, the user's computer would then accept all cookies that Google had originally said would be blocked, which the FTC alleged was a violation of the consumer privacy protections imposed by the 2011 consent order.

As FTC Chairman Jon Leibowitz stated, "No matter how big or small, all companies must abide by FTC orders against them and keep their privacy promises to consumers, or they will end up paying many times what it would have cost to comply in the first place."

More importantly, the negative publicity that could follow from FTC action such as this has the potential to be as harmful to a company as the monetary penalty itself.

### **To Deny or Not To Deny?**

FTC Commissioner J. Thomas Rosch wrote a dissent in which he declined to join the consent decree because "it arguably cannot be concluded that the consent decree is in the public interest when it contains a denial of liability."

The issue arose again the following day when the FTC finalized its settlement with Facebook over allegations that Facebook violated its privacy policy by telling consumers that their personal information would be kept private while repeatedly allowing it to be shared and made public.

Facebook previously denied the FTC's allegations, and there was no admission of liability in the FTC's ultimate order, causing Rosch to dissent, observing that the FTC's rules of practice "do not provide for such a denial" of the allegations.

Rosch suggested that consent order language that the respondent “neither admits nor denies” a complaint’s allegations would be a more effective way to ensure that the public interest is served.

The majority wrote separately to disagree with Rosch’s view that if the commission were to allow a defendant to deny the allegations, the settlement would not be in the public’s interest.

Nevertheless, in an effort to avoid possible public misimpression that the commission obtains settlements when it lacks reason to believe that the alleged conduct occurred, the commission stated that “going forward, express denials will be strongly disfavored.”

Furthermore, the majority agreed that the commission “will consider in the coming months whether a modification to the commission rules of practice is warranted.”

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