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## FTC Imposes Substantial Fine for Decree Violation

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Last week, the Federal Trade Commission (FTC) imposed on Toys "R" Us a \$1.3 million civil penalty<sup>1</sup> for violating a 13-year-old antitrust order. This fine highlights that FTC orders can stay in force for 20 years—and potentially indefinitely if they are obtained in district court<sup>2</sup>—and that the FTC actively monitors old orders and consent decrees. As a result, it is important for companies to be aware of all relevant outstanding FTC orders to ensure that compliance policies remain in place for the life of the order.

Back in 1998, Toys "R" Us was found to have violated Section 5 of the FTC Act by using its dominant position in toy retail to prevent manufacturers from selling to "toy discounters"—mostly warehouse clubs like Costco and Sam's Club. As a remedy, the company was ordered, among other things, not to pressure suppliers to limit the supplies of toys to other retailers, not to solicit information about sales to other retailers from suppliers, and to keep records of certain contacts with its suppliers.

According to the FTC's recent complaint, Toys "R" Us violated all of these terms—it complained to manufacturers about retail sale prices offered by its competitors, asked about sales to discounters, and failed to comply with the order's record-keeping requirements. The complaint alleged that Toys "R" Us "did not adopt any specific program or procedure to assure compliance

with and did not comply with" the record-keeping obligation. Further, the company failed to exempt these records from ordinary document destruction procedures, including by deleting the emails of relevant employees when they left the company. Toys "R" Us agreed to a consent judgment for the \$1.3 million penalty.

Critically, Richard Feinstein (Director of the Bureau of Competition) noted in the FTC's press release that "[a]lthough we did not find evidence that Toys "R" Us entered into agreements with the suppliers that violated the order, the penalty here underscores the importance of parties complying fully with all of their order obligations." That is, the FTC took action to enforce the order even though the complaint did not allege that the violations actually resulted in anticompetitive effects.

The magnitude of potential penalties stemming from failures to comply with FTC orders—\$16,000 per day<sup>3</sup>—even for simple mistakes like the failure to preserve records, demonstrates that internal compliance mechanisms need to be effective when initially put in place and must be maintained for the entirety of the order's term, no matter its length. This advice is not unique to the FTC: the Department of Justice's Antitrust Division obtains orders in federal court where they are enforceable in contempt actions that can result in serious financial and other penalties.<sup>4</sup>

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<sup>1</sup>See [www.ftc.gov/os/caselist/9410040/index.shtm](http://www.ftc.gov/os/caselist/9410040/index.shtm) for all documents related to the matter.

<sup>2</sup>See 60 Fed. Reg. 42569 (Aug. 16, 1995). Even orders subject to the 20-year expiration period are automatically extended if the FTC or DOJ files a

complaint alleging violations of the order. *See* 60 Fed. Reg. 58514 (Nov. 28, 1995).

<sup>3</sup>*See* 74 Fed. Reg. 857 (Jan. 9, 2009). For violations before February 10, 2009, the penalty is \$11,000 per day.

<sup>4</sup> Generally, the Antitrust Division seeks a finding of civil contempt for order violations in civil matters. However, in at least one case, the Division sought and obtained an order of criminal contempt. *See U.S. v. Schlumberger*, Civ. Action No. 93-2621, (D.D.C. Dec. 10, 1999).

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