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Consumer transparency

Robert Kritzman, partner at Watson Farley & Williams LLP, gives an update on fair trade practice legal trends in this expert commentary.

Recent changes in consumer protection/trade practice laws, regulations and enforcement practices have already affected the way cruise lines advertise cruise prices. Other enforcement trends and new regulations may require evaluation of other practices.

California passed new pricing legislation that took effect in July, and, in response, the cruise industry changed long-standing pricing practices on a national basis. Proposed US Federal Trade Commission regulations (primarily in response to mandatory resort fees and service charges in the hotel industry and other fees in the financial services and telecommunications industries) incorporate regulations similar to the California legislation and add additional disclosure requirements regarding voluntary fees add-ons.

On a worldwide basis, advertisements and representations regarding sustainability efforts are being closely scrutinised. The growth in regulations and enforcement actions will almost certainly continue and awareness of the current and prospective requirements can help avoid government enforcement actions and private class actions.

California's 'Honest Pricing Law'

In response to a new California law the legislature dubbed the 'Honest Pricing Law,' the major cruise lines have complied with

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its provisions on a national basis. This law, which became effective July 1, prohibits: '(A) advertising, displaying or offering a price for a good or service that does not include all mandatory fees or charges other than either of the following: (i) taxes or fees imposed by a government on the transaction …'

The only fees or taxes that can be excluded from the advertised price under this legislation are taxes imposed by a government on the 'transaction' such as sales taxes. Applied to the cruise industry this legislation requires that port charges or port taxes/fees charged by governmental or quasi-governmental agencies be included in the advertised price.

Although subject to some interpretation, the law requires that port fees that are not based on the individual passenger's 'transaction' be included in the advertised price.

The California legislation only applies to ads placed in California, however, for consistency and practical reasons most cruise lines now comply with the requirements on a national basis. Additionally, similar rules are likely to be implemented nationally.

Proposed FTC regulations

On November 9, 2023, the Federal Trade Commission published a proposed 'Rule on Unfair or Deceptive Fees.' Like the California legislation, the proposed FTC regulations 'prohibit unfair or deceptive practices relating to fees for goods or services, specifically, misrepresenting the total costs of goods and services by omitting mandatory fees from advertised prices and misrepresenting the nature and purpose of fees.' An informal hearing on the regulations was held in April 2024.

The first key element of the proposed regulations states 'it is an unfair and deceptive practice and a violation of this part for any business to offer, display or advertise an amount a consumer may pay without clearly and conspicuously disclosing the total price.' All mandatory charges, costs or expenses must be included in the advertised price and that total price must be displayed more prominently than any other pricing information including a breakdown of the total price.

In addition to the requirements in the

Companies face increased scrutiny about 'greenwashing'

California legislation and the total price requirements above, the proposed FTC regulations prohibit businesses from misrepresenting the nature and purpose of charges including voluntary charges. The proposed regulations state that when businesses obscure information about the nature and purpose of fees or provide false information to consumers, injury from the misrepresentations is not avoidable including voluntary fees or charges.

FTC enforcement actions

Under existing regulations, the FTC has brought enforcement actions for misrepresentations regarding voluntary charges or fees. In a complaint against Amazon, the FTC alleged that, in addition to telling drivers for its Amazon Flex service the drivers would receive 100% of their tips, Amazon also assured its customers that 100% of any tips they paid would go to the driver.

In an order issued in February 2021, the FTC found that Amazon shifted from paying drivers the promised base rate of $18–$25 per hour plus the full amount of customer tips to paying drivers a lower hourly rate, a shift that it did not disclose to drivers. Amazon used the customer tips to make up the difference between the new lower hourly rate and the promised rate. This resulted in drivers' being shorted more than $61.7m in tips.

Significantly, the FTC not only determined that Amazon misled its drivers and falsely advertised and represented their wages and eligibility for gratuities, but also concluded Amazon's actions were a deceptive trade practice inflicted on consumers misled by Amazon's characterization of charges as gratuities.

Greenwashing

Businesses are facing growing scrutiny of claims or representations made regarding sustainability or environmental benefits of products under fair trade practice regulations worldwide. 'Greenwashing' occurs when a business represents or implies that its products have sustainability or environmental merits that are exaggerated or not true. Because of public and government priorities regarding sustainability, the latitude normally permitted when 'puffing' a company's product will not apply to representations of sustainability and environmental benefits.

Regulators have begun analyzing advertisements and promotional materials of shipping companies outside the historically targeted oil and gas sectors of the shipping industry. The UK Advertising Standards Agency recently prohibited an ad by a non-energy-related shipping company. The European Commission and EU consumer protection authorities wrote to 20 European airlines in May this year notifying them of potentially misleading green claims being made about carbon offsetting or the use of sustainable jet fuel.

Greenwashing enforcement actions and lawsuits are also being pursued in the United States. Delta Air Lines faces a proposed class action lawsuit in a Los Angeles federal court over advertisements in which it touted itself as 'carbon neutral' based on carbon offset purchases. In advertisements, Delta claimed it is 'the world's first carbon-neutral airline.'

Greenwashing litigation brought by private plaintiffs is also on the rise. There has been a notable increase in greenwashing cases filed in California and New York. Keurig Green Mountain, Whole Foods Markets, Dasani waters and KLM Airlines have faced class actions alleging misrepresentations of sustainability and environmental stewardship practices.

In addition to private lawsuits in the US, the Federal Trade Commission has increased enforcement actions. In April 2022 the FTC entered into settlements in greenwashing lawsuits it filed against Walmart and Kohl's, alleging the retailers deceptively marketed rayon products as 'bamboo' and as 'eco-friendly.'

The FTC also recently announced it will be reviewing and revising its 'Green Guides' which provide companies voluntary guidelines on how to avoid deceptive environmental claims in advertising or marketing. This action is viewed by many as a precursor for increased enforcement.

Conclusion

Greenwashing claims can be avoided by awareness and discipline in representations regarding sustainability and emissions.

Changes to long-standing industry pricing and advertising practices are difficult to implement proactively. Individual businesses are generally not willing to act alone if put at a competitive disadvantage. Discussion of pricing practices and disclosure with competitors raises antitrust concerns. Because of the more all-inclusive nature of a cruise, the industry already faces greater sticker shock concerns than other vacations alternatives. When the government imposes new policies, the decision is easy (assuming the requirements are unambiguous).

As reported in recent articles in Seatrade Cruise News, cruise industry executives have indicated the recent pricing changes have not negatively affected bookings. Perhaps with simple presentation of full prices consistently enforced throughout the travel industry, the value of a cruise vacation will not be lost on consumers.

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