

Advertising & Media Alert

April 2023

FTC Warns Nearly 700 Health Product Marketers to Avoid Unsubstantiated Claims

The Federal Trade Commission (FTC) warned nearly 700 health product marketers to steer clear of making unsubstantiated claims in product advertisements and endorsements. In an April 13 [statement](#), the FTC explained it is putting the companies on notice that deceptive marketing conduct can draw hefty penalties. But the agency also emphasized that it is not alleging any wrongdoing by any company that received a notice of penalty offenses.

The FTC sent notices of penalty offenses to 670 companies involved in the marketing of over-the-counter drugs, homeopathic products, dietary supplements and functional foods.

Notices of Penalty Offenses

Notices of penalty offenses are intended to deter businesses from engaging in unfair or deceptive conduct. More importantly, the notices also establish that businesses have actual knowledge of practices that violate the FTC Act.

A business that receives a notice of penalty offenses and engages in the unlawful advertising practices outlined in the notice can face civil penalties of up to \$50,120 per violation, the FTC explained in a [blog post](#). Notices of penalty offenses allow the FTC to bring actions for civil penalties in federal court under the Penalty Offense Authority once the agency has (1) determined that the business has committed unfair or deceptive practices and (2) issued a final cease-and-desist order.

Scientific Evidence

Under the FTC Act, businesses must be able to support their product claims with reliable evidence. Claims about a product's health or safety benefits must be based on scientific evidence. Illegal practices outlined in the notices of penalty offenses include:

- Failing to establish a reasonable basis for objective product claims consisting of competent and reliable evidence
- Lack of competent and reliable scientific evidence to support health or safety claims
- Failing to have at least one "well-controlled" human clinical trial to support claims that a product is effective in curing, mitigating or treating a serious disease
- Misrepresenting the level or type of substantiation for a claim
- Misrepresenting that a product claim has been scientifically or clinically proven

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The FTC also provided notice recipients with a copy of its [previous notice of penalty offenses on the use of endorsements and testimonials](#). In 2021, the FTC sent notices of penalty offenses to more than 700 companies in a wide range of industries warning about deceptive practices, including failing to disclose a material connection with an endorser; misrepresenting that an endorser’s experience represents consumers’ typical or ordinary experience; and misrepresenting whether an endorser is an actual, current or recent user.

Finally, the FTC recommends that recipients consult the agency’s [“Health Products Compliance Guidance,”](#) which updated and replaced the agency’s “Dietary Supplements: An Advertising Guide for Industry,” issued in 1998. The December 2022 document offers guidance on ensuring that claims about the benefits and safety of health-related products are truthful, not misleading and supported by science.

Commissioners’ Statements

The FTC Commissioners voted 3-1 on March 31 to approve the notices of penalty offenses on March 31. Commissioner Rebecca Kelly Slaughter issued a [statement](#), joined by Chair Lina M. Khan and Commissioner Alvaro Bedoya.

Unreliable claims “distort the health-product market in ways that favor cavalier or unscrupulous companies. It is impossible to evaluate competing products in a market with no baseline level of accuracy or truthfulness about the effectiveness of those claims,” said the commissioners. “Scrupulous companies with effective products can get crowded out of a market when compared to snake oil that promises the same benefits but better, faster, and cheaper. People suffer real physical, financial, and emotional harm when purported cures and treatments do not live up to their marketing promises.”

Then-Commissioner Christine S. Wilson issued a dissenting statement. “To show that the proposed defendant had knowledge that its conduct was unlawful, and therefore establish that the conduct is subject to civil penalties, the Commission must demonstrate that the conduct of the proposed defendant is sufficiently similar to the litigated cases cited in the Notice,” she said. “This showing will prove to be far more complex and uncertain for substantiation cases than for other areas in which Notices have been issued recently. Indeed, I anticipate that relatively few cases in this topic area will result in civil penalties.”

Wilson added, “I would note, however, that the practices described in this Notice present the framework the Commission has employed to evaluate substantiation for many years—an approach that has garnered wins at trial. Accordingly, I recommend that marketers review this Notice and the cases it cites, and tailor their claims accordingly.”

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