

## Advertising & Media Alert

October 2021

# FTC Finds Path to Obtain Civil Penalties in Federal Court; Puts 700 Companies on 'Notice' of Risks Related to Endorsements and Testimonials

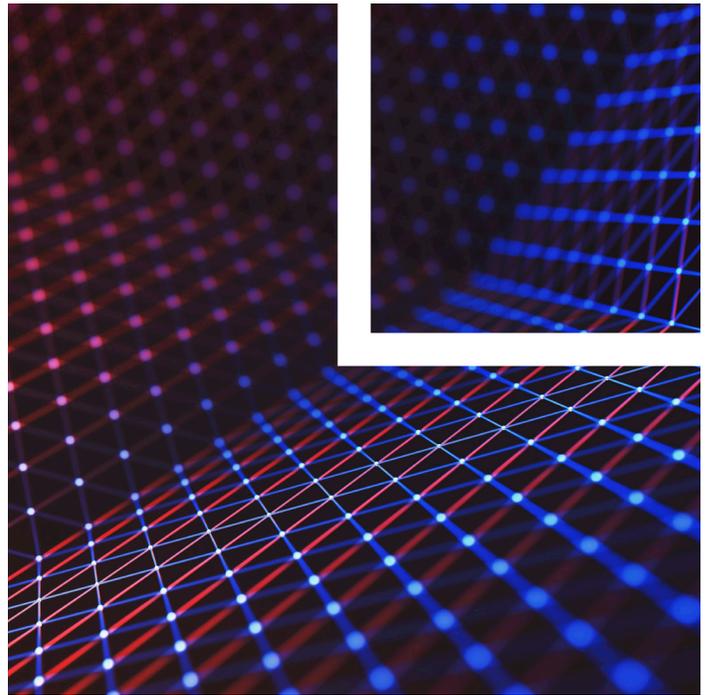
More than 700 companies received a "Notice of Penalty Offense" from the Federal Trade Commission (FTC) this week. The [list of recipients](#) reads like a "Who's Who" of consumer products companies, including many household names across a wide range of market sectors, from pharma to fast food, as well as large online and brick-and-mortar retailers, leading technology platforms, media and gaming companies, and advertising agencies.

What did all these companies do to earn this foreboding form notice from the FTC? Nothing—at least as far as the FTC knows. According to the announcement, the agency has not yet reviewed the advertising of the recipient companies for violations.

The notices warn the companies against engaging in deceptive and unfair practices related to endorsements, testimonials and reviews, and enumerate broad categories of prohibited activities including marketing practices involving influencers and consumer reviews—all without specifically accusing these companies of engaging in any of them.

## Everything Old Is New Again—FTC Plans On Using 'Penalty Offense' Authority

While the receipt of a Notice of Penalty Offense is not an indication that the FTC has identified any particular problems with the recipient company, the notices serve an important role in allowing the FTC to proceed with actions for civil penalties in federal court—and a work-



around to the U.S. Supreme Court's decision earlier this year in *AMG Capital Management LLC v. FTC*, holding that the agency cannot seek monetary relief in federal court under Section 13 of the FTC Act. (Read our alert on the Court's decision [here](#).)

Leveraging a part of Section 5 of the FTC Act that has not been the basis for an action in federal court since the 1980s, the Penalty Offense Authority applies when the FTC, in administrative law proceedings, has determined that an act or practice is unfair or deceptive and has officially issued a final cease and desist order.

Once that has occurred, **any party** that has "actual knowledge" of the FTC's order and then engages in that act or practice, "whether or not such person, partnership, or corporation was subject to such cease and desist order," may be found liable for a civil penalty in U.S. district court.

This means, effectively, that the Notice of Penalty Offense is the step the FTC is taking to ensure that all recipient companies have actual knowledge of the unfair or deceptive act or practice. If the FTC alleges endorsement or testimonial violations against the recipient companies

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in the future, it can demonstrate that the companies had actual knowledge and engaged in unlawful conduct thereafter. The agency can then go straight to federal court to seek civil penalties to redress the unlawful conduct.

## Deceptive or Unfair Acts and Practices to Watch Out For

Culled from a set of administrative law cease and desist orders, most of which are at least a half-century old, the notice lists seven distinct sets of actions or practices in the use of endorsements and testimonials that the FTC has determined “are deceptive or unfair and are unlawful under Section 5 of the Federal Trade Commission Act.”

1. Making claims that represent, expressly or by implication, that a third party has endorsed a product or its performance when the third party has not endorsed the product or its performance.
2. Misrepresenting that an endorsement “represents the experience, views or opinions of users or purported users of the product.”
3. Misrepresenting that an endorser is an actual, current or recent user of a product or service.
4. Continuing to use an endorsement “unless the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the endorsement.”
5. Using testimonials “to make unsubstantiated or otherwise deceptive performance claims even if [the] testimonials are genuine.”
6. Failing “to disclose a connection between an endorser and the seller of an advertised product or service, if such a connection might materially affect the weight or credibility of the endorsement and if the connection would not be reasonably expected by consumers.”
7. Misrepresenting explicitly or implicitly in testimonials that “the experience described by endorsers of a product or service represents the typical or ordinary experience of users of the product or service.”

None of these unfair or deceptive actions or practices are new. That these activities are both prohibited and on the FTC’s enforcement radar is likewise not new. All are discussed in the FTC Endorsement Guides and in multiple other business resources published by the FTC.

## What To Do Now?

If your company **was on the list** of those notified, the best course of action is to assess your risk for concerns related to endorsements and testimonials as soon as possible. You may consider conducting an audit of your practices, sampling advertising that includes endorsements and testimonials, and compiling a list of key partnerships and agreements that involve endorsement and testimonial relationships. Understanding all the ways in which this issue could impact your company is the best way to protect the company from potential future inquiries from the FTC.

If your company **was not on the list**, this does not mean that there is no cause for concern. By issuing the Notices of Penalty Offenses, the FTC is clearly signaling its interest in addressing these types of issues in the marketplace generally. The recommendations above are still good steps to consider.

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