

FTC Serves Notice of Enforcement Approach on Endorsements and Testimonials

Following recent setbacks, the FTC seeks a foothold for monetary remedies in the online advertising space.

On October 13, 2021, the Federal Trade Commission (FTC) sent a [Notice of Penalty Offenses Concerning Endorsements and Testimonials](#) to more than 700 businesses (the Notice). The Notice does not identify any alleged violations of law. Rather, it reminds recipients that fake online reviews and misleading endorsements are unlawful and highlights that the FTC intends to seek monetary relief if any of those 700 companies engages in conduct outlined in the Notice.

In citing past administrative cases, several of which date back to the 1940s and 1950s, the FTC warns brands and advertising agencies that using endorsements or testimonials in ways that run counter to these cases may expose them to civil penalties of up to US\$43,792 per violation. The Notice follows on the heels of a similar [warning](#) regarding deceptive or unfair practices that was issued earlier in October to 70 for-profit higher education institutions.

Background

While the Notice explicitly states that recipients are not suspected of engaging in unlawful conduct and that the FTC is not singling out any brands or agencies, the Notice is consistent with the agency's recent, aggressive search for enhanced powers.

In April 2021, a US Supreme Court decision in *AMG Capital v. FTC*¹ effectively stripped the FTC of equitable monetary remedies (e.g., consumer refunds) that were historically leveraged in federal court pursuant to the agency's statutory injunction powers. Post-*AMG*, the FTC can obtain civil penalties only if a company (a) violates a rule that was promulgated through formal administrative Notice & Rulemaking procedures, (b) violates an existing Consent Order, or (c) is ordered by a federal court to pay consumer redress following a final administrative cease-and-desist order. (Accordingly, some FTC Commissioners have called on Congress for a legislative fix that would give the FTC upfront penalty powers to back its broad "unfair or deceptive acts or practices" mandate. To date, those efforts have failed.)

In partial response to *AMG*, recently appointed FTC Chair Lina M. Kahn circulated an [internal memorandum in September 2021](#), pressing the agency to embrace the "full set of tools and authorities" at its disposal to support the FTC's investigative and enforcement activities. The memorandum concluded with Chair Kahn announcing the appointment of Samuel Levine as Director of the Bureau of Consumer Protection.

As perhaps a harbinger of future enforcement positioning, in 2020, then-Attorney Advisor Levine together with FTC Commissioner Rohit Chopra co-authored a [paper](#) that specifically called for “resurrecting” the agency’s Penalty Offense Authority. Citing the Supreme Court’s move to curtail the FTC’s monetary relief authority, Mr. Levine and Commissioner Chopra urged using the Penalty Offense Authority to “increase deterrence and reduce litigation risk” for the agency by “exposing violators to significant civil penalties, while helping to ensure fairness for honest firms.”

The Penalty Offense Authority does not impose an automatic or strict liability regime on businesses. To obtain civil penalties under this provision, the [FTC must still establish](#) in federal district court that (i) its cited cases from the 1940s, 1950s, 1970s and 1980s actually involved unfair or deceptive acts,² (ii) the company at issue is, in fact, engaged in unlawful conduct,³ and (iii) the company has “actual knowledge” it is engaged in unlawful conduct.⁴ But certainly, with the Notice the FTC has signaled that investigations in the online reviews, endorsements, and testimonials space may move more quickly to demands for monetary remedies and relief.

Takeaways

From a compliance perspective, the Notice does not signal a major shift or change in the marketplace. As always, brands and ad agencies should carefully review their controls — e.g., “influencer” policies, practices, and partners — and avoid misleading endorsements or testimonials and unsubstantiated product claims. Further, businesses should disclose non-obvious and material connections between a brand and an endorser and accurately reflect typical or ordinary experiences when marketing the performance characteristics of a product or service. Sound documentation of the foregoing is critical.

Importantly, the fact that both brands and ad agencies received the Notice highlights the shared nature of both liability exposure and compliance obligations. Under longstanding FTC precedent, both brands and ad agencies may be investigated for misleading or deceptive advertisements: brands, based on the well-established principles of reasonable consumer expectations and vendor management; and agencies if they are active participants in ad design, and if they knew or should have known that ads were deceptive. Accordingly, while the Notice creates no new or different requirements, businesses are well advised to pay close attention as potential FTC enforcement activities in the online advertising arena unfold in the coming months.

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Endnotes

¹ https://www.supremecourt.gov/opinions/20pdf/19-508_l6gn.pdf.

² 15 U.S.C. § 45(m)(2) (“If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the [company at issue] . . . the court shall also review the determination of law made by the Commission in the proceeding [] that the act or practice which was the subject of such proceeding constituted an unfair or deceptive act or practice”).

³ *Id.* at (m)(2) (“If the cease and desist order establishing that the act or practice is unfair or deceptive was not issued against the [company at issue] . . . the issues of fact in such action against such [company] shall be tried de novo”).

⁴ *Id.* at (m)(1)(B)(2) (civil penalty action may be commenced against any company “. . . with actual knowledge that such act or practice is unfair or deceptive and is unlawful . . .”).