

ALERT

FTC Broadly Issues Notices on Endorsements and Testimonials to National Advertisers, Signaling a New Enforcement Approach

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On October 13, 2021, the Federal Trade Commission (FTC) announced that it had sent form Notices to over 700 national retailers, ad agencies, consumer product companies, and others across the United States, outlining conduct in endorsements and testimonials that it considers deceptive or misleading. Each Notice – which the FTC calls a “Notice of Penalty Offenses” – does not suggest that the companies have engaged in any unlawful practices, but warns the companies that the misleading use of endorsements or testimonials could lead to large financial penalties.

The Notice outlines guidelines that companies must follow in endorsements and testimonials, and signals priority areas in which the FTC may consider enforcement. It directly impacts how companies should approach social media and other consumer endorsements, among other areas.

The form Notice lists the following endorsement and testimonial practices that the FTC has determined to violate Section 5 of the FTC Act:

- Making claims which represent, expressly or by implication, that a third party has endorsed a product or its performance when such third party has not in fact endorsed such product or its performance.
- Misrepresenting that an endorsement represents the experience, views, or opinions of users or purported users of the product.

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Practice Areas

FTC and Consumer Protection
Telecom, Media & Technology

- Misrepresenting an endorser as an actual user, a current user, or a recent user of a product or service.
- Continuing to advertise an endorsement unless the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the endorsement.
- Using testimonials to make unsubstantiated or otherwise deceptive performance claims even if such testimonials are genuine.
- 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.
- Misrepresenting explicitly or implicitly through the use of 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.

In connection with issuing the Notices, the FTC cites its enforcement authority under a part of the FTC Act that has been rarely used in recent years, 15 U.S.C. § 45(m)(1)(B). That Section permits the agency to bring an enforcement action against companies that have actual knowledge that certain acts or practices have been found in administrative proceedings to be deceptive or unfair. Once companies receive the notice, they are deemed by the FTC to have actual knowledge that those practices violate the FTC Act. The FTC has indicated that, if it later finds that the companies engaged in those acts or practices after receiving the notice, then the agency can seek civil monetary penalties against the companies.

The issuance of the Notices represents the FTC's latest efforts to find ways to seek monetary penalties for FTC Act violations. Earlier this year, the U.S. Supreme Court held that the FTC could not seek monetary relief through one part of the FTC Act (Section 13) that it used in federal court cases. As noted above, the agency is attempting to use another part of the statute, Section 5(m), to seek money for violations, based on a company having received prior notice that certain acts are unlawful. If the FTC finds a violation by a company that receives a notice, it intends to seek penalties, which can be up to \$43,792 per violation.

The announcement comes just one week after the FTC sent a Notice of Penalty Offenses to for-profit educational institutions, and the vote to authorize the Notices and their distribution was 5-0. While this use of Penalty Offense Notices is relatively untested and may be subject to challenge in certain cases, companies that received the notice – and others engaged in covered marketing practices – should look closely at the practices that the FTC has outlined.

Wiley's FTC Regulation Practice counsels clients on FTC compliance, investigations, enforcement, and rulemaking, and regularly advocates before the agency. Contact the authors for additional information.