

Publications

The FTC Says “You’re On Notice” of Penalty Offenses

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Last week, the Federal Trade Commission (FTC) issued notices to over 700 companies warning against fake reviews, misleading endorsements, and other business advertising practices that run counter to past administrative case decisions. These companies included well-known retailers, advertising agencies, and other similar businesses. The [letters](#) and attached [Notice of Penalty Offenses](#) did not specifically accuse such companies of engaging in unlawful practices, but were generally distributed to companies with a large online and social media presence.

The FTC determined that the following acts or practices are unlawful under Section 5 of the FTC Act:

- Falsely claiming (expressly or by implication) endorsement by a third party
- Misrepresenting the experience, views, or opinions of users or purported users of a product
- Misrepresenting an endorser as an actual, current or recent user of a product or service
- Continuing to advertise a past endorsement unless there is good reason to believe the endorser continues to subscribe to the views in the endorsement
- Using testimonials to make unsubstantiated or deceptive performance claims (even if the testimonials are genuine)
- Failing to disclose a connection between an endorser and the company if the connection might materially affect the weight or credibility of the endorsement and the connection would not be reasonably expected by consumers
- Misrepresenting (explicitly or implicitly) that the experience of endorsers represents consumers’ typical or ordinary experience

In issuing this letter and subsequent Notice of Penalty Offenses, the FTC is utilizing its “Penalty Offense Authority” under 45 U.S.C. § 45(m)(1) (B) of the FTC Act. Penalty Offense Authority allows the FTC to pursue civil penalties in federal court if: (1) a company is aware its conduct

violates the FTC Act and (2) the FTC has issued a written decision that such conduct is unfair or deceptive. By sending these Notices of Penalty Offenses, the FTC is hoping to create the requisite knowledge to seek civil penalties should a company commit an offense listed in the notice.

Takeaways

Although companies receiving the letter and notice were not singled out as having existing business practices that constitute penalty offenses, the letter and notice indicate that the FTC is seriously looking to regulate false and misleading endorsements. Businesses seeking to avoid the FTC's scrutiny can take a few steps:

1. **Review business practices as concerning endorsements and testimonials.** Revise endorsement contracts as necessary to assure that any paid endorsements comply with the FTC's guidance.
2. **Upkeep websites.** As mentioned above, if there is reason to believe an endorser no longer subscribes to the views in an endorsement, any advertisement containing such old endorsement should be taken down.
3. **Check disclosures.** Make sure all reviews, endorsements, or testimonials made online or in social media adequately disclose any material connections between company and endorser.

For further information about the FTC's letter and notice, or about advertising laws in general, please contact Jim Wilson, Gretchen Rutz, or your Vorys attorney.