



Brands and influencers in the spotlight as FTC focuses on civil penalties for deceptive advertising

[More than 700 warning letters sent in October](#)

4 November 2021

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Social media allows brand owners of all sizes to connect with customers in new, innovative ways. Many companies have come to rely heavily on online reviews and endorsements from social media influencers, average customers, and celebrities to reach consumers – but those forms of advertising are all facing increased scrutiny. Now, if not managed carefully, this popular form of advertising may lead to new civil penalties.

In mid-October, the Federal Trademark Commission sent letters to over 700 advertisers, many of whom are household names, placing them on notice that they could incur significant civil penalties, up to \$43,792 per violation, if they use endorsements or online reviews in a way that is deceptive.

The Notices were directed to a wide swath of large companies, top consumer product brands, major advertising agencies, and others, with a comment that “FTC staff is not singling out your company or suggesting that you have engaged in deceptive or unfair conduct.”

The letters identify several practices the FTC has determined to be unfair or deceptive:

- failing to disclose an unexpected material connection with an endorser
- falsely claiming an endorsement by a third party (for example, fake reviews)
- misrepresenting whether an endorser is an actual, current, or recent user
- continuing to use an endorsement without good reason to believe that the endorser continues to subscribe to the views presented
- misrepresenting that an endorsement represents the experience, views, or opinions of users or purported users
- using an endorsement to make deceptive performance claims and
- misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience.

This is not the first time the FTC has trained its focus on influencer marketing practices. In 2017 and 2020, the FTC sent warning letters to brand owners as well as influencers, indicating both have a responsibility to ensure material connections are disclosed and avoid deceptive advertising. With this latest round of letters, the FTC is again sending the message that it is closely monitoring advertising on social media and other platforms and will take action to stop practices that it views to be deceptive and unfair.

The Penalty Offense Authority

What is different this time is the authority the FTC is relying on and the public nature of its warning. In April 2021, the Supreme Court ruled in *AMG Cap. Mgmt., LLC v FTC* that the FTC could not rely on Section 13(b) of the FTC Act to obtain monetary restitution and disgorgement from companies found to have engaged in unfair or deceptive advertising practices. 141 S.Ct. 1341 (2021). In this recent round of letters, the FTC signals its intent to rely instead on the Penalty Offense Authority under 15 U.S.C. §45(m)(1)(B) of the FTC Act in order to reach defendants' wallets.

The Penalty Offense Authority authorizes the FTC to seek civil penalties, even for first time offenses, where (1) the FTC has issued a final cease and desist order following an administrative proceeding (whether or not the party was subject to such cease and desist order), (2) as part of that order the FTC has determined that a specific practice is unfair or deceptive and therefore unlawful, and (3) a party has engaged in that practice after the order became final with *actual knowledge* that the practice is unfair or deceptive.

Civil penalty actions are expected

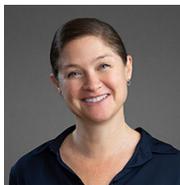
Since the FTC has previously determined in a final cease-and-desist order that each specific practice in bullet points above is unfair or deceptive (the first and second prongs under the Penalty Offense Authority), and the FTC's recent letter advised the recipients that the letter "puts your company on notice" (the third prong required under the Penalty Offense Authority), it is expected that the FTC will now take further steps toward seeking civil penalties for deceptive advertising of the types identified in the letter. In 1976, the Commission launched a similar pilot program under the Penalty Offense Authority. At that time, it also formally notified dozens of businesses about agency orders declaring that specific practices were unlawful, conducted follow-up investigations to determine whether the companies had continued to engage in unfair and deceptive practices, and then brought civil penalty actions.

No statute of limitations

Notably, there is no statute of limitations under the Penalty Offense Authority. Furthermore, the statute provides: "In the case of a violation through continuing failure to comply with a rule or [the statute], each day of continuance of such failure shall be treated as a separate violation In determining the amount of such a civil penalty, the court shall take into account the degree of culpability, any history of prior such conduct, ability to pay, effect on ability to continue to do business, and such other matters as justice may require." For this reason, companies will want to act promptly to review their practices and take steps to ensure their advertising complies with the FTC's requirements.

If you would like assistance in reviewing your advertising or to discuss best practices in setting up a holistic compliance program for endorsements, review, and influencers, please contact either of the authors or your usual DLA Piper relationship attorney.

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