

FTC Sends Notices of Penalty Offense to More Than 700 Companies

The Bottom Line

- As the FTC continues to explore its broader enforcement agenda, brands and marketers should ensure that their practices are lawful.
- While a response to a Notice of Penalty Offenses is not required by the FTC, any entity receiving such notice should conduct a review of their marketing practices, including their use of endorsements and testimonials.

The FTC continues to explore its myriad of enforcement options, most recently by using its Penalty Offense Authority under Section 5 of the Federal Trade Commission Act (FTC Act) to put more than 700 companies on notice that they could incur significant civil penalties (up to \$43,792 per violation) for misleading endorsements, including in online reviews and on social media. These companies range from large brands to retail platforms. This wave of notices follows an earlier wave of notices to for-profit higher educational institutions, concerning misrepresentations about programs, and job and earnings prospects.

What Is A Notice of Penalty Offenses?

A Notice of Penalty Offenses allows the FTC to seek civil penalties against a company that engages in conduct that it knows has been found unlawful in a previous FTC administrative order, other than a consent order.

Cited unlawful acts and practices include:

- Falsely claiming an endorsement by a third party;
- Misrepresenting that an endorser is an actual user, a current user or a 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;
- Failing to disclose an unexpected material connection with an endorser; and
- Misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience.

What This Means for Companies

Notably, the fact that a company has received a Notice of Penalty Offenses is not an indication that the company has engaged in any wrongdoing. The Notice of Penalty Offense further does not create any new obligations or requirements for recipients. However, if a recipient nonetheless engages in conduct that the FTC has previously found unlawful under Section 5 of the FTC Act, the recipient may be subject to substantial civil penalties.

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