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Insights: Alerts

FTC Issues Notice of Penalty Offenses to Over 700 Companies Warning of Steep Penalties for Deceptive Endorsements

OCTOBER 21, 2021 Written by Laura C. Miller, Tywanda Harris Lord, Bryan J. Wolin

The Federal Trade Commission is getting even more serious about fake reviews and misleading endorsements. While in recent years the FTC has brought a few enforcement proceedings that resulted in settlements, on October 13, 2021, the agency issued a Notice of Penalty Offenses to over 700 of the most well-known consumer products companies, retailers, technology platforms, and ad agencies.

Wait, what is a "Notice of Penalty Offense" you ask? Good question. These Notices are intended to act as a predicate giving recipients "actual knowledge" of the FTC's order, so that if the recipient later engages in the detailed prohibited conduct, the FTC could recover monetary penalties. These Notices are one of the FTC's responses to the Supreme Court's 2021 decision in *AMG Capital Management LLC v. FTC*, where in a dispute over the statutory language of the agency's regulatory authority, the Court stripped the FTC of its ability to recover monetary relief in certain types of proceedings in federal court. Because recipients of a Notice of Penalty Offenses are deemed to have actual knowledge of the conduct prohibited by the FTC's Endorsement Guides and further detailed in the Notice, if they engage in such prohibited activity, it is subject to paying civil monetary penalties in a federal court action brought by the FTC. The monetary penalty authority is significant - over $43,000 per violation.

What have the 700 companies done to warrant being on the receiving end of a Notice of Penalty Offenses? Absolutely nothing. The FTC admits that it has not reviewed the companies' advertising for any potential violations. It is just a mechanism to lay the groundwork to obtain monetary penalties in a future FTC enforcement action. Nevertheless, all advertisers, whether a recipient of a Notice or otherwise, must take note of the FTC's more aggressive posture. Marketers must make sure to strictly comply with the FTC's Endorsement Guides, when dealing with influencers, soliciting product reviews, or giving out free stuff. An "endorser," per the FTC, is anyone who has any material connection with the company, whether through a formal paid endorsement deal, having received free products, or any other benefit such as free discounts or promotional goods or services. Pay specific attention to the practices the FTC identified as ones that must be avoided:

1. Failing to disclose an unexpected material connection with an endorser/influencer;
2. Falsely claiming an endorsement by a third party;
3. Misrepresenting that an endorser is an actual, current, or recent user;
4. Continuing to use an endorsement without good reason to believe that the endorser continues to subscribe to the views presented;
5. Misrepresenting that an endorsement represents the experience, views, or opinions of users or purported users;
6. Using an endorsement to make deceptive performance claims; and

7. Misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience

None of this is new – the FTC's Endorsement Guides were updated in 2009. It is fairly obvious that the delineated prohibited practices are not kosher, and could subject any company to liability that engages in them. It is a good time, however, for the marketing department to conduct a thorough review of its practices, including how the company and its agencies work to promote the company, work with influencers, attempt to generate product reviews, and otherwise advertise and market the company's products and services.

Whether your company was on the FTC's list or not, the FTC is clearly signaling that it will be more aggressive when it comes to these advertising practices. It is also likely that the FTC is now on the hunt for target companies that it can bring and publicize enforcement proceedings against to better police the marketplace. If you have not already implemented a “Best Practices” program for compliance with the Endorsement Guides, influencers, agencies, and reviews, there is no better time than the present.

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