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FTC Issues Notice of Penalty Offenses Warning Companies to Comply with Endorsement Requirements



Key Takeaways:

- FTC sends Notice of Penalty Offenses to advertisers warning that unfair and deceptive acts and practices related to endorsements could trigger penalties of up to \$43,792 per violation.
- Advertisers should review and refresh their policies, trainings, and compliance programs for endorsements, influencers, and consumer reviews to ensure compliance with the FTC's Guides Concerning the Use of Endorsements and Testimonials in Advertising ([Endorsement Guides](#)) and related FTC [guidance](#) and notices.

Last week the FTC sent [letters](#) to more than 700 prominent companies attaching a [Notice of Penalty Offenses Concerning Deceptive or Unfair Conduct around Endorsements and Testimonials](#). The Notice establishes that unfair and deceptive acts and practices related to endorsements could trigger steep civil penalties. The recipients of the letters included top advertisers, leading retailers, well-known consumer product companies, and major ad agencies. A [Notice of Penalty Offense](#) is a decades-old tool that the FTC has dusted off recently to put companies on notice of certain practices that "the Commission has determined, in one or more administrative orders (other than a consent order), to be unfair or deceptive in violation of the FTC Act." Importantly, while not alleging any specific wrongdoing, the Notice allows the FTC to seek civil penalties for violations without a prior consent order. The FTC's use of this approach reflects its effort to bolster its ability to seek financial penalties after the Supreme Court [decision](#) in *AMG Capital Management v. FTC* earlier this year limited the FTC's ability to obtain monetary relief under Section 13(b) of the FTC Act. The Notice issued last week reminds advertisers to avoid the following acts that have been found to violate Section 5 of the FTC Act:

1. Directly or impliedly claiming that a third party has endorsed a product or its performance when that's not the case;
2. Misrepresenting that an endorsement reflects the experience, views, or opinions of users or purported users;

3. Misrepresenting an endorser as an actual, current, or recent user of a product;
4. Continuing to advertise an endorsement unless the advertiser has good reason to believe the endorser continues to subscribe to the views presented in the endorsement;
5. Using testimonials to make unsubstantiated or otherwise deceptive performance claims—even if the testimonial is genuine;
6. Failing to disclose a connection between an endorser and seller of a product if that connection might materially affect the weight or credibility of the endorsement or review and if consumers would not reasonably expect that connection; and
7. Misrepresenting—explicitly or implicitly—that the experience of an endorser represents the typical or ordinary experience of users of the product.

In light of the Notice, brands should review the FTC's Endorsement Guides and consult with knowledgeable counsel to refresh endorsement compliance practices (including those related to endorsements, influencers, and consumer review programs).

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