

Insights

THE FTC STEPS UP ITS GAME ON ENDORSEMENT ENFORCEMENT

Oct 15, 2021

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As noted in this press release issued earlier this week, the Federal Trade Commission (“FTC”) has sent a Notice of Penalty Offenses to over 700 companies, in which the FTC cites a handful of past cases it has successfully brought as proof that certain marketing tactics involving endorsements and product reviews violated Section 5 of the FTC Act. While the Notice does not accuse any of the recipients of wrongdoing, its distribution to all of these companies is a critical development because it means that going forward, should the FTC determine that any company who received this Notice is engaged in any of the listed practices, the FTC may sue that company in federal court and seek penalties of up to \$43,792 per violation. What prompted such an action by the FTC? Let’s look at the path that brought us here.

The Impact of AMG Capital Management

Many of us have been watching the FTC closely as it continues to reshape itself under the Biden administration and as it reels from the blow dealt by the Supreme Court earlier this year in the [AMG Capital Management](#) case. The AMG case took away a significant enforcement tool the Commission had been using for four decades – the ability to sue companies in federal court for money damages under Section 13(b) of the FTC Act. In that case, the Supreme Court unanimously overturned longstanding precedent, finding that the plain reading of the FTC Act indicates that Section 13(b) only allows for the FTC to obtain injunctive relief. Part of that case’s reasoning included the ability of the FTC to pursue established administrative procedures to seek financial damages or penalties in cases that don’t allege violation of a specific rule, binding cease and desist order, or consent order.

It’s fair to say that much of the uncertainty faced by the FTC stems directly from Section 5 of the FTC Act, in that Section 5 defines unlawful activities with a broad brush – *Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful*. Congress wanted to put safeguards in place to ensure

that businesses understood what this means before anyone was fined for violating this amorphous prohibition; to that end, Congress crafted a set of procedures that it believed would require the FTC to explain what actions violated Section 5. As part of this process, the FTC would require an appropriate investigation, and activities that were found to be unfair or deceptive would be identified and explained by the FTC to give the world a fair notice.

But, the FTC had relied on Section 13(b) as a way to skip the administrative process and go straight to court to obtain monetary penalties. In the wake of the AMG decision, speculation has been rampant as to how the Commission will fill this gap in its arsenal (including in this [article](#) we wrote). So far, the Commission has taken a multi-pronged approach. For example, the FTC has centralized its rulemaking group and streamlined its rulemaking process, which could lead to the promulgation of more rules that could serve as the basis for civil suits under Sections 5 and 19 of the FTC Act. There has simultaneously been pressure applied to Congress to “fix” Section 13(b), such as the pending [Consumer Protection and Recovery Act](#). We are also likely to see more collaboration between the FTC and State Attorneys General to bring alleged offenders to account.

The Endorsement Guides and the Penalty Enforcement Authority

One area in flux, and somewhat misunderstood to this point, has been the FTC’s [Endorsement Guides](#). The Endorsement Guides are not formal rules, but they do represent the Commission’s view on what sorts of activities it views as unfair or deceptive with respect to endorsements and testimonials. The Endorsement Guides focus on three primary elements when working with endorsers/influencers (which overlap with the items flagged in the Notice sent out by the FTC):

- Transparency: Ensuring that audiences know that a relationship exists between the endorser/influencer and a brand they promote (i.e., that the endorser’s/influencer’s statements are not independent, unbiased editorial commentary).
- Truthfulness: Any seemingly objective statements made by endorsers/influencers engaged by a brand must be truthful and not misleading, and the brand must have substantiation to support such statements in its files *at the time the statements are made*. Any statements of opinion should reflect the endorser’s/influencer’s honest experiences and beliefs.
- Typicality: Benefits of a product or service that are unusual should not be presented by an endorser/influencer in a way that implies that the average user would achieve the same results.

However, with all of the guidance, FAQs, workshops, and supplemental materials the FTC has issued in connection with the Endorsement Guides, they are not law nor are they formal rules. This means that the FTC must bring actions seeking monetary penalties for violations of Section 5 either through its administrative procedures or under Section 13(b), the latter of which has largely been gutted by the AMG case.

The FTC sought public comments on the Endorsement Guides in 2020, with over 110 comments submitted prior to the deadline. There has not been any significant public activity or announcement concerning the status of the Endorsement Guides since the comment period closed, but in the wake of the AMG case, it is entirely possible – and I would say probable – that the FTC will seek to codify certain elements of the Endorsement Guides so that they are promulgated as formal rules; this is something that past Commissioner Chopra called for in his separate statement regarding the request for public comments and would fit with the Commission’s enforcement priorities.

However, unless and until the Endorsement Guides (or portions of them) are turned into formal rules – which would allow the FTC to sue in federal court for violations – what the FTC has done with the Notice of Penalty Offenses is highlight a handful of cease and desist orders from 1941 through 1984 (all pre-internet) and give the recipients of this Notice knowledge that those past cases will be considered a basis for invoking the FTC’s Penalty Offense Authority under Section 5(m)(1)(B) of the FTC Act, a power it has not exercised in decades.

What This Means for Businesses

Regardless of what follow up actions the FTC takes, there has never been a better time for companies to take a good look at their marketing programs and identify not only what they are doing in the areas of endorsements, but also to look at how they are doing it – what tools, guidelines, contracts, and other resources are they bringing to bear on the process to minimize the possibility of bad or rogue behaviour? Further, as evidenced by the FTC’s case against Teami last year, the Commission is putting more and more focus on the downstream portion of the influencer marketing supply chain – regardless of how well your policies are written and how tightly your influencer contracts are drafted, are you monitoring your influencers’ behaviour to ensure compliance and taking corrective action as appropriate?

The influencer marketing ecosphere is vast and consists of many stakeholders and levers, and the FTC just made your “Check Engine” light come on; it’s high time to invest in some diagnostics and a tune-up before you break down. This means assessing your social media policy, how effectively it is being implemented, your influencer contracts, and where and how you are working with third parties to promote your brand; each of these presents an opportunity for the ball to be dropped if proper attention isn’t given to them.

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