

## FTC Puts Businesses on Notice (Again) About Fake Reviews and Other Misleading Endorsements

November 30, 2021 | [Michael A. Goodman](#) and [Andrea S. Cottrell](#)

The Federal Trade Commission sounds like a broken record. We have repeatedly written about the trouble misleading endorsements and testimonials can cause. Endorsements, testimonials, and social media influencers currently sit near the top of the FTC's list of activities that have the potential to harm consumers. Back in 2019, the FTC said in a press release announcing a consent order against cosmetics company Sunday Riley Modern Skincare, LLC, that "[p]osting deceptive or inaccurate information online pollutes the e-commerce marketplace and prevents consumers from making informed purchasing decisions.... [T]he FTC makes it clear that it will take enforcement action against this type of illegal behavior." The FTC's most recent action sets the stage for enforcement actions with civil penalties attached against marketers engaging in certain behaviors related to endorsements and testimonials.

On October 13, the FTC announced a campaign to send notices to over 700 prominent businesses putting them on notice of legal standards regulating endorsements and testimonials. The notices summarize findings of unlawful conduct in prior FTC administrative orders, including:

- improperly claiming that a person has endorsed a product when that isn't the case;
- misrepresenting that an endorsement represents the experience, views, or opinions of a product's users;
- misrepresenting an endorser as an actual user, a current user, or a recent user of a product or service;
- continuing to advertise an endorsement unless the advertiser has good reason to believe that the endorser continues to subscribe to the views presented in the endorsement;
- using testimonials to make unsubstantiated or otherwise deceptive performance claims even if such testimonials are genuine;
- failing to disclose a connection between an endorser and the seller of an advertised product or service, if such a connection might materially affect the weight or credibility of the endorsement and if the connection would not be reasonably expected by consumers; and
- misrepresenting through the use of testimonials that the experience described by endorsers of a product or service represents the typical or ordinary experience of users of the product or

service.

These notices, in effect, summarize the formal guidance that the FTC has had in place for decades regarding marketing that uses endorsements and testimonials.

However, the FTC's new announcement is significant because the FTC is signaling that it intends to use its previously dormant authority to obtain civil penalties when a company commits an act or practice that has been determined to be unfair or deceptive in violation of the FTC Act. By putting companies on notice of practices that have been found to violate the FTC Act, the FTC is laying a foundation for imposing civil penalties of up to \$43,792 per violation if a company subsequently engages in similar conduct. The FTC issued a similar notice on October 6 targeting the for-profit education marketplace. On October 26, the FTC announced a related campaign regarding sales pitches for money-making ventures.

The new notice campaign is one way the FTC is responding to the U.S. Supreme Court's April 2021 decision in *AMG Capital Management, LLC v. FTC*. That decision drastically curtailed the FTC's ability to obtain monetary relief from defendants in its enforcement actions. The FTC's new Notice of Penalty Offenses campaigns will allow the FTC to argue that notice recipients had actual knowledge that practices identified in the notice were unlawful. With that showing, the FTC can pursue civil penalties in subsequent enforcement actions arising from similar allegations.

Even for companies that do not receive this notice from the FTC, this campaign makes now a great time to revisit compliance policies and procedures around endorsements and testimonials. Companies should assess their oversight of endorsements, testimonials, and other reviews. This assessment should include:

- making sure that reviews from third parties do not contain deceptive statements that the company could not make on its own;
- clearly and conspicuously disclosing any connections between the company and its reviewers, such as incentivizing customers to write favorable reviews; and
- ensuring that endorsements and testimonials either reflect the generally expected performance of a product or service or are accompanied by clear and conspicuous disclosure of the generally expected performance.

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