

FTC Resurrects Penalty Offense Authority as Possible Civil Penalty Vehicle

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Following the U.S. Supreme Court's April 22, 2021 decision in [*AMG Capital Management, LLC v. Federal Trade Commission*](#), which put the brakes on the ability of the Federal Trade Commission (FTC or Commission) to use its Section 13(b) authority to seek monetary penalties for violations of the FTC Act, the Commission has sought another route to possibly recover civil penalties: it revived the agency's long-dormant Penalty Offense Authority under Section 5(m)(1)(B) of the FTC Act (45 U.S.C. § 45(m)(1)(B)). Section 5(m)(1)(B) allows the Commission to pursue civil penalties in federal court if it satisfies two requirements. First, the FTC must prove that a company knew its conduct violated the FTC Act. To establish actual knowledge, the Commission sends a business a Notice of Penalty Offenses (also referred to as a "Section 205 Synopsis") that outlines conduct the FTC has determined violates the FTC Act. Second, the FTC must have issued a previous administrative order (other than a consent order) that determined certain specific conduct was unfair or deceptive. If, after receiving notice, a business engages in practices deemed violative, the FTC can pursue civil penalties of up to \$43,792 per violation in federal court.

The FTC has flexed this new muscle twice in the past week, sending [a Notice of Penalty Offenses to more than 700 businesses](#) regarding fake reviews and misleading endorsements and a [Notice of Penalty Offenses to 70 for-profit higher educational organizations](#) in respect of false promises made about graduates' job and earnings prospects. Notably, while other FTC policy statements and initiatives have garnered dissents, the Commission voted 5-0 to authorize and distribute the notices.

Penalty Offenses Concerning Education. The FTC's [Notices of Penalty Offenses to the educational organizations](#) warned them not to misrepresent, directly or indirectly, the employment prospects of graduates, the demand for particular coursework, a graduate's potential remuneration, and the extent of the institution's job placement assistance program. In an accompanying letter, the FTC warned the companies that failure to cease deceptive conduct could result in significant fines. The notices state that receipt of the letter does not reflect an assessment that the recipient has engaged in conduct that might be deemed deceptive or unfair. Rather, it includes the following statement:

Receipt of this Notice puts your company on notice that engaging in conduct described therein could

subject the company to civil penalties of up to \$43,792 per violation. See 15 U.S.C. § 45(m)(1)(B).

In late 2020, Commissioner Rohit Chopra and FTC attorney Samuel Levine (now Director of the FTC's Bureau of Consumer Protection) jointly published an [article](#) in which they advocated for the FTC to restore its Penalty Offense Authority, which the Commission ceased using in the 1980s. Chopra and Levine argued the Commission could “substantially increase deterrence and reduce litigation risk by noticing whole industries of Penalty Offenses, exposing violators to significant civil penalties, while helping to ensure fairness for honest firms.” While the FTC has gone after for-profit educational organizations for deceptive practices multiple times, this is the first time it has issued Section 5(m)(1)(B) notices to do so.

The FTC created a [webpage](#) listing the educational organizations that received Notices, a sample Notice and letter, and links to the administrative orders cited in the Notice (which date from 1980, 1971, and 1952).

Penalty Offenses Concerning Endorsements. The FTC sent another, even larger, batch of Notices of Penalty Offenses on October 13, this time to over 700 companies in diverse industries. The Commission warned the companies that certain conduct related to the use of endorsers and testimonials, such as misrepresenting that an endorser is an actual or recent customer, misrepresenting that an endorsement represents the experience or opinions of ordinary customers, or using an endorsement to make deceptive performance claims, violates Section 5 of the FTC Act. The Commission informed the companies they are on notice that engaging in prohibited conduct could subject them to civil penalties of up to \$43,792 per violation.

As with the Notice of Penalty Offenses directed to for-profit educational institutions, the [Penalty Offenses Concerning Endorsements website](#) lists the cases the FTC relied on, which date between 1941 – 1984, and includes a sample Notice and letter and a list of recipients.

Many companies have internal policies governing endorsements and testimonials, but the FTC's recent actions emphasize the importance of reviewing those policies to make sure they are up to date or implementing internal policies if they are not already in place.

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