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On Notice: FTC Issues Warning to Hundreds of Companies Regarding the Use of Fake Reviews and Other Misleading Endorsements in Online Marketing Campaigns

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Prompted by the proliferation of social media advertising that often blurs the line between authentic content and sponsored posts, the Federal Trade Commission last week sent more than 700 companies a Notice of Penalty Offenses warning them against the use of deceptive endorsements in their online advertising. The Notice advises recipient companies that engaging in advertising conduct the FTC has previously determined to be unfair, unlawful or deceptive under Section 5 of the FTC Act can subject them to civil liability of up to $43,792 per violation. As we had previously predicted, these letters may reflect a shift in the FTC's focus towards reliance on §5 of the FTC Act, following last term's Supreme Court opinion in *AMG Capital Mgmt. v. FTC* which curtailed the FTC's ability to seek monetary relief under §13(b) of the Act.

Companies receiving the Notice include large household names including leading retailers and major advertising agencies. Recipients were also directed to distribute copies of the Notice to each of their subsidiaries engaged in the sale or marketing of products or services to consumers in the United States. While the FTC makes clear that recipients of the Notice are not alleged to have engaged in any wrongdoing, the scope of the Notices sent out—and the Commission's 5–0 vote to authorize the Notice and its distribution—demonstrates that the FTC is highly focused on the use of deceptive endorsements in online advertisements and is willing to aggressively pursue advertisers that flout its directives.

The Notice sent to companies provides a non-exhaustive list of practices the FTC has found to be unlawful in previous FTC administrative orders, including:

- Falsely claiming an endorsement by a third party;
- Misrepresenting whether an endorser is an actual, current, or recent user;

- Using an endorsement to make deceptive performance claims;
- Failing to disclose an unexpected material connection with an endorser;
- Misrepresenting that an endorsement represents the experience, views, or opinions of users or purposed users;
- Misrepresenting that the experience of endorsers represents consumers' typical or ordinary experience; and
- Continuing to use an endorsement without good reason to believe that the endorser continues to subscribe to the views presented.

Copies of the case decisions discussed in the notice are available on the FTC's website. The Notice also points advertisers to additional resources, including a staff business guidance document *The FTC's Endorsement Guides: What People Are Asking*¸ and the FTC's *Guides Concerning the Use of Endorsements and Testimonials in Advertising*, 16 C.F.R. Part 255, for further guidance on their responsibilities under the FTC Act.

While navigating the evolving regulatory landscape regarding deceptive online advertising can present challenges for companies and their advertising partners, avoiding the practices outlined above will likely go a long way in mitigating the risk of facing an FTC enforcement action and subsequent liability. Our team continues to monitor these changes and will apprise our readers of any FTC enforcement actions that arise as a result of the Notices issued today. Watch this space for further developments.

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- **Jessica M. Griffith**
  Associate