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The FTC's Newly Rediscovered Penalty Offense Authority

01 December 2022

The FTC recently announced the first use of its “Penalty Offense Authority” in many years. The agency dusted off this statutory tool as part of its multifaceted effort to continue to obtain monetary relief in its consumer protection enforcement actions in the wake of the agency’s Supreme Court loss in *AMG Capital Management, LLC v. FTC*, which stripped the agency of its ability to obtain monetary remedies pursuant to Section 13(b) of the FTC Act.

Section 5(m)(1)(B) of the FTC Act authorizes the Commission to obtain civil penalties from parties engaging in conduct with actual knowledge that the conduct has previously been found to be unfair or deceptive via a prior administrative order by the Commission. The agency refers to this authority as “Penalty Offense Authority.” Since the 1980s, the FTC has invoked this provision sparingly and in a highly targeted manner, largely because it relied heavily on Section 13(b) of the FTC Act to obtain restitution and disgorgement from its targets. However, in the wake of the *AMG* decision in April 2021, which stripped the FTC of its ability to obtain monetary relief through Section 13(b), the Commission has sought alternative mechanisms by which it can obtain such relief from defendants.

In October 2020, then-Commissioner Rohit Chopra and the current Director of the FTC’s Bureau of Consumer Protection, Sam Levine, penned an [article](#) urging the Commission to resurrect and dramatically expand Section 5(m)(1)(B) as a means of extracting monetary settlements from defendants. Chopra and Levine argued that the FTC can trigger the Penalty Offense Authority by affirmatively notifying parties of prior administrative orders, which would then expose those parties to penalty liability if they were to subsequently engage in similar practices. Because there is no statute of limitations for prior Commission findings, they argued, practices that were deemed unfair or deceptive even “decades ago” could become penalty offenses if parties were simply apprised of these findings. And because the provision authorizes civil penalties

(which are punitive in nature), as opposed to restitution or disgorgement, it could potentially allow the Commission to obtain significantly larger sums of money from defendants than Section 13(b) allowed pre-*AMG*.

Roughly one year after the article was published, the FTC began sending Notices of Penalty Offenses regarding [money-making opportunities](#), [endorsements](#) and [for-profit higher education institutions](#) to thousands of companies in relevant industries. Notably, these notices adopt a broad view of the conduct found to be deceptive or unfair in prior Commission decisions (e.g., “misrepresenting that the experience of endorsers represents consumers’ typical or ordinary experience”; describing “potential earnings” that are not “representative of what participants will generally achieve”). This is a key step – and arguably a sleight of hand – in making Penalty Offense Authority a tool available to the Commission in a large number of matters.

On November 16, 2022, the FTC announced its first enforcement action in connection with those Notices against DK Automation and its owners, who allegedly promised consumers that they would make “big returns” on various moneymaking schemes, including cryptocurrency investment schemes and business programs, despite receiving a Notice from the FTC explaining that this type of behavior is deceptive or unfair according to prior FTC decisions. The proposed order includes a \$53 million judgment, partially suspended to \$2.6 million due to the defendants’ inability to pay.

The Commission alleged a smorgasbord of statutory and rule violations and thus could have obtained a monetary remedy through multiple legal avenues. Hence, the defendants may have had little incentive to vigorously resist the Commission’s assertion of the Penalty Offense Authority. In any event, however, the matter creates a precedent for the Authority’s use in the settlement context, and we expect to see more examples in the near future. Whether courts will permit the very expansive assertion of the Authority remains to be seen. The statutory language underlying the Penalty Offense Authority is limited to “any act or practice [that] is unfair or deceptive” and does not explicitly encompass “unfair methods of competition,” the component of the FTC Act traditionally associated with antitrust (as contrasted with consumer protection) enforcement. The FTC, however, has not explicitly acknowledged that Civil Penalty Offense authority is limited to consumer protection matters.

Companies – in particular, those involved in for-profit higher education, multi-level marketing, data harvesting, targeted advertising or influencer marketing, all of which were identified by Chopra and Levine as areas of interest for purposes of the FTC’s future Penalty Offense Authority agenda – may want to be on alert for any Notices of

Penalty Offenses sent to them by the FTC, and to confirm and update their compliance policies, processes and procedures as needed.

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Suggested Reading

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