



November 19, 2021

The Honorable Lina M. Khan  
Chair  
Federal Trade Commission  
Washington, DC 20580

Dear Chair Khan:

The U.S. Chamber of Commerce (“Chamber”) is very concerned with two recent Penalty Offense Authority (“POA”) letters sent to legitimate members of the business community regarding “endorsements”<sup>1</sup> and “money-making opportunities.”<sup>2</sup>

Congress intended the Federal Trade Commission (“FTC” or “Commission”) to have broad authority to determine on a case by case basis when a company is in violation of Section 5 of the FTC Act. Because of this broad and vague authority, Congress established safeguards to provide notice and due process to companies before subjecting them directly to civil penalties.

The Commission may only seek civil penalties for unfair and deceptive trade practices if the Commission has either 1) issued a rule under its Magnuson-Moss rulemaking authority or 2) if a company with actual knowledge engages in a practice the Commission has already determined is an unfair or deceptive trade practice in a previous, final cease-and-desist order.<sup>3</sup> The FTC Act also provides for *de novo* review of cases in which a company is not the defendant in the original cease-and-desist order.<sup>4</sup> These protections are meant to ensure that companies alleged to be in violation of the Act have fair notice.

The POA letters represent another potential worrisome example of a long line of recent attempts by the Federal Trade Commission to circumvent procedural safeguards established in law and negatively portray whole sectors of industry—especially those sectors that have been a lifeline for small businesses and households during the pandemic. Former Commissioner Rohit Chopra and now-Director of Bureau of Consumer Protection Samuel Levine in a paper entitled *The Case for Resurrecting the FTC Act’s Penalty Offense Authority*<sup>5</sup> “detailed how the authority can be used to notice whole industries of unlawful practices” that would enable the Commission to directly penalize companies and short circuit the decades-long agency approach of issuing warnings to companies before seeking civil penalties and the procedural guardrails established by Congress.

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<sup>1</sup> <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other>

<sup>2</sup> <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead>

<sup>3</sup> See 45 USC § 15(m)(1)(A)-(B).

<sup>4</sup> 45 USC § 15(m)(2).

<sup>5</sup> [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3721256](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3721256)

The approach recommended by former Commissioner Chopra of using blanket POA warnings to industry could unfairly subject businesses to crippling penalties or encourage costly settlements for allegations based on precedent that is either outdated or irrelevant. The business community puts the Commission on notice that any attempt to use POA authority beyond its authority could subject the agency to legal challenges.

In response to the more than 1,800 POA letters sent in the last few weeks and the plan outlined by former Commissioner Chopra, the Chamber urges the Commission to exhibit restraint regarding its Penalty Offense Authority in the following ways:

- **Penalty Offense Authority Should Only Be Used for Clear and Knowable Violations**—The Commission should not issue warning letters with vague or outdated descriptions of unfair and deceptive practices. Likewise, the FTC should not enforce POA authority against companies that do not have fair notice of what is illegal activity. The FTC must refrain from using its POA authority in cases where there is a “gray” area as to whether a company’s conduct violates prior FTC cease-and-desist order determinations. Given the due process protections enacted by Congress, the FTC should *only* litigate cases using POA to directly penalize companies where the alleged violating activity is substantially the same as what was determined in a prior order. For this reason, the Commission should not impose penalties on companies based on conduct tenuously connected to prior FTC determinations.
- **The Commission Should Not Subject Companies to Potentially Outdated Determinations to Directly Enforce Civil Penalties**—The POA letters at issue rely primarily on cases that are at least *forty years old* and are now potentially irrelevant to current industry practices. The Chamber agrees with prior determinations by the government that changing conditions could significantly impact whether a business practice violates Section 5 today.<sup>6</sup>

For example, the FTC’s POA notice concerning testimonials relies on a 1973 administrative case to warn companies not 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.”<sup>7</sup> The only case relied upon in the Commission’s POA notice is one in which a defendant presented endorsements in printed circulars and periodicals. There, the Commission held that in a case involving individuals who no longer were using a product at the time of endorsement publication, companies must get authorizations from endorsers before publishing testimonials unless there is good reason to believe an endorser continues to subscribe to those views.<sup>8</sup>

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<sup>6</sup> *United States v. Braswell, Inc.*, 1981 WL 2144 at 3 (N.D. GA 1981) (In a POA cast, “the government also concedes, and this court agrees, that in an appropriate case a defendant might also successfully defend on the ground that conditions had so changed since the prior case was decided that application of that determination would be improper.”)

<sup>7</sup> [https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty\\_offenses-endorsements.pdf](https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-endorsements/notice-penalty_offenses-endorsements.pdf)

<sup>8</sup> *Nat’l Dynamics Corp.* 82 FTC 488 (1973).

Advertising, technology, and the media for communicating testimonials has significantly changed since 1973. Today, content creators on social media and online can advertise multiple products in real time. If an online content creator uses a competing product to a previously advertised one during a live broadcast, does this count as “good reason” to know an endorsement has been withdrawn?

The Commission should not attempt to force rules for a paper age on the digital economy. There is not enough clarity in many of the POA notice examples to give companies fair notice, because the business environment has changed dramatically over the last four decades.

- **Further POAs Should Be Addressed to Actual Suspected Violators and Not Implicate Legitimate Businesses**—The Commission sent POA letters to nearly 1,800 companies without any factual basis to determine any are in violation of the law. Although the Commission states in its cover letters to companies that it is “not suggesting”<sup>9</sup> a company has engaged in illegal conduct, the Commission’s public listing of all companies receiving the letter smears and damages the reputation of the many legitimate companies doing business.

In the future, the Commission should focus POA letters on companies it legitimately suspects are violating Section 5. If the Commission seeks to inform a broader group rather than suspected violators, it would be more appropriate to issue formal guidance in the *Federal Register* or conduct a rulemaking if necessary.

The Chamber understands that harms exist in the market resulting from online scammers and other abusive practices that would lawfully unlock the FTC’s civil penalty authority. We do not take issue with a strong enforcement response in these instances. The Commission should work with legitimate stakeholders in industry and Congress to develop durable and bipartisan solutions to address 21<sup>st</sup> century FTC enforcement, not through extra-statutory Commission votes or legislation out of regular order.

We look forward to working with you in a cooperative manner to combat bad actors who harm consumers and legitimate businesses.

Sincerely,



Jordan Crenshaw  
Vice President  
Chamber Technology Engagement Center

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<sup>9</sup> By its own standards, the FTC on page 3 of its October 26<sup>th</sup> Cover Letter states that “disclaimers are not always effective.”