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# Franchising

Paul F. Woody and  
Dawn M. Johnson

## FTC Puts Business Opportunities on Notice Regarding Promotional Claims and Content

The Federal Trade Commission has recently been sending “Notices of Penalty Offenses Concerning Money-Making Opportunities and Endorsements and Testimonials” to franchisors and companies selling other types of business opportunities. These notices from the federal consumer protection agency are seemingly coming from out of the blue and being served on registered agents similar to a lawsuit, causing recipients a fair amount of concern. Although the FTC tells the recipient that it is not being singled out, it warns in bold letters on the first page that the recipient is now on notice that engaging in certain conduct could subject the company to civil penalties up to \$43,792 per violation. A sample of the letters being sent to businesses can be viewed at <https://www.ftc.gov/system/files/attachments/penalty-offenses-concerning-money-making-opportunities/cover-letter-mmo.pdf>.

The multi-page notices inform the recipient that it is an “unfair or deceptive trade practice to make false, misleading or deceptive representations concerning the profits or earnings that may be anticipated by a purchaser of a money-making opportunity”

under the broad consumer protection law that created the FTC, the Federal Trade Commission Act (the Act). To drive the point home, the FTC provides case examples of what the FTC has previously litigated and determined are “penalty offenses” and/or resulted in cease-and-desist orders.

## What Are Unfair Practices?

The examples of what the FTC considers “unfair or deceptive” may surprise even well-meaning businesses that do not intend to deceive but are just trying to put their franchise, or business opportunity, in the best light, or intending to highlight the opportunity available by promoting the earnings of their best performers.

It is possible for all of the information in a promotional piece to be factually accurate, and still be misleading or deceptive under the FTC’s definition (and possibly under state laws). If you are selling a money-making opportunity, the standard you will be held to is not basic factual accuracy. Rather, the FTC will focus on the “overall impression” that a promotional piece gives a prospect and investigate whether that “overall impression” is consistent with what a typical participant experiences after buying into the opportunity. It is possible for a promotional piece to be factually accurate, and still leave prospects with an overall impression that

they are likely to achieve results that are not typical for other purchasers. The FTC also warns that endorsements, testimonials, and consumer reviews that companies commonly use to advertise and market their products and services in traditional and social media can be unlawful in certain circumstances.

Franchisors and other recipients of the FTC notice may be asking what they did wrong. The bottom line is that—if you receive such a notice—there is no need to panic. The FTC states that it is “widely” distributing the notice to “business opportunities, franchises, multi-level marketing companies, coaching companies, gig companies, and others,” and receipt of the notice does not necessarily indicate that the FTC believes that your company violates the Act. However, this notice may be a sign that the FTC will be looking more closely at franchisors’ and other businesses’ marketing and promotional materials and practices. Therefore, it is time to review your promotional materials and marketing practices with an attorney who is knowledgeable about the Act and FTC compliance. The scope of what the FTC considers to be misleading, deceptive or false is probably broader than what your sales or marketing teams would assume. The notice does not change a franchisor’s obligations under other laws and regulations such as the FTC Franchise Rule (specifically Item 19 financial performance representations in the Franchise Disclosure Document), the Business Opportunity Rule, or other federal and state statutes. Therefore, a franchisor will need to consult with counsel to make sure it is complying with all of these sources of legal obligations.

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More information about the FTC investigation can be found at:

- <https://www.ftc.gov/news-events/blogs/business-blog/2021/10/one-money-latest-notice-penalty-offenses-takes-deceptive>
- <https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead>

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*Paul F. Woody is an attorney in the Franchising & Distribution group at Greensfelder, Hemker & Gale, P.C. He works with franchisors in a variety of industries and previously served as general counsel for a large sports and recreation franchisor. Paul is a Certified Franchise Executive and an adjunct professor at Saint Louis University School of Law, where he received his J.D. and now teaches franchise law.*

*Dawn M. Johnson is co-leader of the Franchising & Distribution group at Greensfelder, Hemker & Gale, P.C., where she heads a team of litigation and transactional attorneys who represent franchisors nationally and internationally, from start-ups to some of the largest and most recognized brands. She is a Certified Franchise Executive and a graduate of Washington University School of Law.*

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