

FTC Threatens 70 Colleges with Civil Penalties in Attempt to Resurrect Penalty Offense Authority

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Section 13 (b)log



Making good on promises to creatively explore all of its options for enforcement, the FTC yesterday [notified](#) 70 for-profit higher educational institutions that it intends to use its long dormant Penalty Offense Authority to obtain civil penalties when institutions make misrepresentations about their programs and job and earnings prospects. The move closely follows recommendations proposed in a paper authored by Commissioner Rohit Chopra and Bureau of Consumer Protection Director Sam Levine, which we previously discussed [here](#).

Chopra was [confirmed](#) last week as CFPB Director and the announcement is likely to be one of his last acts as FTC Commissioner before he departs for the CFPB on Friday. Levine was formally [named](#) Director of the Bureau of Consumer Protection last week by Chair Lina Khan, following his stint as Acting Director. In prepared remarks announcing the notices, Chopra characterized the Penalty Offense Authority as “a unique authority in consumer protection enforcement . . . that past Commissioners largely ignored, depriving our hardworking staff of the ability to pursue the full range of sanctions against bad actors.” Chopra emphasized that its use was particularly important in the wake of the Supreme Court’s decision in *AMG Capital Management*. The move also follows last month’s [cease and desist letters](#) issued to companies making diabetes treatment claims, which were structured to include references to the FTC’s Penalty Offense Authority.

In yesterday’s [notice](#), the FTC identifies seven categories of claims made by for-profit colleges that the FTC has determined to be deceptive or unfair, including misrepresentations about the need or demand for consumers who have graduated from the institution, employment prospects, the number or percentage of graduates who have obtained employment, and typical or potential earnings for graduates. The notice includes cites to three dated decisions from 1980, 1971, and 1952 as support for use of the Penalty Offense Authority. The Penalty Offense Authority requires the Commission to have determined in a litigated administrative decision under Section 5(b) that a specific act or practice is unfair or deceptive, issue a final cease and desist order regarding that practice, and

provide notice to an entity such that they have “actual knowledge” that the act is prohibited.

While it is clear that the FTC intends to aggressively use its Penalty Offense Authority, there are many unanswered questions about that use:

- **Are precedents from 40 or more years ago sufficiently similar to serve as a predicate offense?** Legislative history to the Penalty Offense Authority makes clear that Congress intended use of the authority to be limited. Does the FTC’s reliance on dated decisions involving different facts align with the provisions of the FTC Act, congressional intent, and due process standards? Notably, the Commission itself never even issued a determination that any act or practice was unfair or deceptive in *MacMillan*, one of three cases relied upon in yesterday’s notice. Instead, the Commission allowed an initial unappealed decision by the ALJ to become final. Particularly in the wake of *AMG* and courts taking a closer look at actual FTC authority, it seems unlikely that *MacMillan* qualifies under Section 5(b)’s requirement for the Commission to “make a report in writing in which it shall state its findings as to the facts.”
- **Are the facts and legal standards sufficiently similar?** A lot has changed in the 40-60 years from the decisions cited in the notice letters. While the limits of the Penalty Offense Authority have not been extensively tested, at least one court has rebuked the FTC’s attempted use of the authority where the facts in the underlying decision were not sufficiently similar to the new conduct.
- **Who’s next?** For-profit colleges were just one of a number of targets identified in Chopra’s and Levine’s paper. Other industries ripe for use of the Penalty Offense Authority according to the paper include direct sellers and others in the gig economy making earnings claims, deceptive online reviews and influencer campaigns, deceptive data harvesting and privacy misrepresentations, and targeted advertising that allegedly runs afoul of the Fair Credit Reporting Act. Income claims seems like the most likely next target, particularly given the Commission’s [forthcoming review](#) of the FTC’s Business Opportunity Rule.