

FTC Notice of Penalty Offense – What it is, what it isn't, and what to do next

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During a closed press conference last week, the Federal Trade Commission (FTC) announced that it had issued *Notices of Penalty Offense* to 70 for-profit colleges and was cracking down on unfair and deceptive conduct in the education marketplace due to a recent 70% spike in education-related complaints between 2018-2020. The FTC has made clear that it is reviving its dormant Penalty Offense Authority (not used since the 1980s), under Section 5 of the FTC Act, to ensure compliance with a list of activities the FTC has previously found to be deceptive, in violation of the FTC Act, related to claims made by institutions about graduates' job and earnings prospects. The FTC notes that engaging in these practices can lead to significant financial penalties.

Although many of the institutions identified as recipients had not received the Notices by the time of the press release, those that have received it, confirmed that they received a letter that mirrored the template published [here](#), accompanied by a list of prohibited deceptive acts or practices published [here](#). Below is a summary of context and considerations related to the announcement prepared by Cooley's FTC and Education practices.

What is a *Notice of Penalty Offense*?

Despite the name, the *Notice of Penalty Offense* is neither a notice of a penalty nor of any offense. As described in the [FTC's blog post accompanying the announcement](#), it is a "heads up" to those schools that they are subject to substantial fines for conduct the FTC has previously adjudicated to be deceptive, in violation of Section 5 of the FTC Act.

As described by the FTC:

This is a document listing certain types of conduct that the FTC has determined, in one or more administrative orders (other than a consent order), to be unfair or deceptive in violation of the FTC Act. Companies that receive this Notice and nevertheless engage in prohibited practices can face civil penalties of up to \$43,792 per violation.

So why send it now? The FTC must provide such notice in order to exercise its Penalty Offense Authority, which mandates "...that (1) the company knew the conduct was unfair or deceptive in violation of the FTC Act and (2) the FTC had already issued a written decision...that such conduct is unfair or deceptive." As described on the [FTC blog post accompanying the announcement](#),

Once a company has received a notice listing relevant claims or conduct, it has "actual knowledge" that those practices violate the law. Should the company then engage in those acts or practices, the FTC may sue in federal court, seeking civil penalties. The receipt of a Notice of Penalty Offenses will help the FTC establish that the company had "actual knowledge."

The FTC has advocated for the revival of the dormant penalty authority for years, but this has recently become more important because earlier this year the Supreme Court invalidated the agency's longstanding authority to seek restitution for improper conduct. The agency has argued that the abolition of its "Section 13(b)" authority, which allowed the FTC to bypass administrative proceedings and bring actions directly to federal court, has left it without a major tool to prevent consumer harm. We expect the FTC to issue other industrywide notices as a part of the FTC's broader enforcement agenda.

What a *Notice of Penalty Offense* isn't

The FTC was careful to note that the *Notice of Penalty Offense* is not an allegation of any wrongdoing by any of the recipients nor any indication that an investigation is underway, imminent or contemplated. The *Notice of Penalty Offense* does not create any new obligations, requirements, or standards for any institutions. Section 5 of the FTC Act and the FTC's *Guide for Vocational Schools*, outlined at 16 CFR Part 264, and [available here](#) have not changed as a result of the Notices or the announcement of increased scrutiny. The Notice is simply a reminder that these laws and regulations exist and a clear indication of the agency's expectations going forward.

What should happen next?

For those who eventually receive a letter, no response to the Notice is necessary. However, the FTC encourages “...companies involved in the education marketplace conduct a careful assessment to make sure their practices are lawful.” Importantly, to understand what is lawful in this context requires a careful understanding of the FTC Act as applied to educational institutions. Cooley’s FTC and Education practices are happy to discuss and assist with any related questions or review.

Dee Bansal’s practice focuses on defending clients in high-stakes litigation, including complex class actions, and in investigations brought by the Department of Justice, the Federal Trade Commission and State AGs related to claims of monopolization, restraint of trade and unfair and deceptive practices.

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