

PART 6: WHAT THE FTC'S FINAL RULE ON REVIEWS AND TESTIMONIALS MEANS FOR ENFORCEMENT, PENALTIES

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In this post, the final part of our six-part series, we explore the nuances of the “teeth” of the FTC’s Final Rule on consumer reviews and testimonials—the money the FTC can recover for violations of the Final Rule.

- [Part 1](#) of the series summarizes the Final Rule, in comparison with the FTC’s proposed rulemaking.
- [Part 2](#) explores the boundaries of the rule’s ban on fake reviews.
- [Part 3](#) explains what the rule means for incentivized reviews.
- [Part 4](#) explains the implications for so-called insider reviews, and review suppression.
- [Part 5](#) analyzes what the rule means for fake indicators of social media, and fake review websites.

As to penalties for violating the Final Rule, there is important history on the several different paths for the FTC to recover money. In the past, one of the primary ways the FTC got money was through its so-called “13(b)” authority, which refers to Section 13(b) of the FTC Act, 15 U.S.C. 53(b). However, in its 2021 *AMG Capital Management v. FTC* decision, the Supreme Court ruled that Congress did not give the FTC the authority to obtain equitable monetary relief under Section 13(b).

As a result of *AMG*, the FTC has had to turn to other methods to get money. Relevant here, Congress has authorized the FTC to recover money from wrongdoers in two statutes, in Section 5(m) of the FTC Act, 15 U.S.C. § 45(m), and Section 19 of the FTC Act, 15 U.S.C. § 57b.

The FTC passed the Final Rule primarily to make it easier to use these provisions. In its statement of basis and purpose accompanying the Final Rule, the FTC lays out the above history before explaining that it is passing the Rule “to secure redress more quickly and efficiently,” including providing an “efficient way” to seek civil penalties. The FTC believes this is appropriate because “[w]ithout an efficient way to seek civil penalties, bad actors have little fear of being penalized for using fraud and deception in connection with reviews and endorsements.” The FTC recognized that

this quicker means to get money leads to “the most significant anticipated benefit of the final rule, which] is increased deterrence.”

With the FTC telling us that it plans to use violations of the Final Rule to create a significant deterrent effect, it's important to understand the remaining mechanisms. In the Final Rule, the FTC explained that it plans to primarily focus on cases under Section 19(a)(1), 15 U.S.C. § 57b(a)(1) which the FTC views as being “significantly faster” than the other mechanisms. Under that part of Section 19, the FTC can go directly into federal court to prosecute violations of the Final Rule without conducting any further administrative proceedings.

If a court were to agree that the Final Rule were violated, however, the FTC's ability to obtain monetary relief under Section 19(a)(1) is limited in two key respects. First, under Section 19(b), the FTC can only obtain a variety of forms of consumer redress, such as restitution of customer's payments or other compensatory damages. Courts are split as to whether this consumer redress needs to be further narrowed further down to a wrongdoer's net profits, with at least one court agreeing that the redress does need to be further narrowed, following a recent Supreme Court decision involving the SEC. Most important, the FTC cannot obtain penalties under Section 19.

Second, the FTC's time to bring a lawsuit under Section 19(a)(1) is subject to a three-year statute of limitations. Both the U.S. government and courts dealing with violations of other FTC rules have applied this statute of limitations to cut off claims for money more than three years before filing suit. And while three years from the Final Rule's passage may seem like a long time, this limit may present a significant limitation on the FTC's ability to get money in the future.

The other primary mechanism for the FTC to obtain money for violations of the Final Rule is to use its Section 5(m) authority. This authority is the sole method the FTC identified in the Final Rule for the FTC to obtain civil penalties. Those penalties rise with inflation, with the present maximum penalty pegged at \$51,744 per violation. Notably, in the case of ongoing violations, Section 5(m) treats each day as a separate violation of the Final Rule. However, Congress imposed two significant limits on the FTC's ability to obtain statutory civil penalties.

First, civil penalties under Section 5(m) require a higher showing for the FTC than under Section 19. To obtain civil penalties, the FTC needs to show not just that the Final Rule was violated, but also that the violation of the Final Rule occurred with “actual knowledge or knowledge fairly implied on the basis of objective circumstances.” This knowledge element is also known as a “mistake of law” defense, and it can present a high bar for the FTC, especially in the case of smaller businesses. That said, courts have highlighted the receipt of consumer complaints and refusing to make changes in light of those complaints as examples of evidence that could meet this knowledge standard. So it is necessary for a company reviewing its obligations under the Final Rule to be sensitive to customer complaints about consumer reviews or testimonials and make good-faith efforts to resolve those concerns.

Second, in Section 5(m) Congress instructed courts to give a careful look at the entire set of circumstances. Specifically, courts must look at an entity's culpability, history of past similar conduct, ability to pay, the effect of a penalty on the ability to continue to do business, and other matters that justice so requires. Thus, even if the highest penalty numbers can be large, a court may reduce those penalties based on these factors.

Beyond the ability to obtain penalties, Section 5(m) benefits the FTC in another significant way: it adds two years to the statute of limitations. Section 19 contains its own special three-year statute of limitations. Section 5, on the other hand, is subject to the government's general five-year statute of limitations for civil penalties, 28 U.S.C. § 2462.

Perhaps unsurprisingly, the FTC's civil penalties can often be significantly larger than the FTC's consumer redress. For example, in a recent [high-profile case](#) involving the violations of other FTC rules, a court imposed approximately \$17 million in civil penalties but only approximately \$3.5 million in consumer redress.

One final note on monetary penalties: in addition to FTC enforcement actions, state enforcers can be quite active in this area. Whether joining the FTC's actions as co-plaintiffs or bringing their own actions under state laws that incorporate violations of FTC Rules, state enforcers have a variety of options at their disposal. Of note, state enforcers can seek monetary penalties under state laws or seek other forms of monetary relief under traditional equity principles. In another [high-profile case](#), while the FTC could not recover monetary relief under *AMG*, several states did recover nearly \$65 million in equitable monetary relief.

As the above should make clear, the Final Rule comes with significant teeth—indeed, that was one of the main motivations of the entire Rule. Companies evaluating how the Final Rule impacts their business should carefully consider the various ways federal and state enforcers can recover money. As always, BCLP lawyers are ready and willing to help a business do so.

For questions or more information, or to schedule a company webinar on this topic, contact the authors listed, [Merrit Jones](#), Co-Leader of BCLP's [Retail & Consumer Products Sector](#), and BCLP partner [David Schwartz](#), former Lead Investigative Attorney with the FTC.

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