



The Dos and Don'ts of Using and Managing Customer Reviews

Alexandra Megaris

Partner | 212.370.6210 | amegaris@Venable.com

Deborah Bessner

Associate | 212.503.9818 | dbessner@Venable.com

VENABLE LLP

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Advertising Law Touches Customer Reviews in Many Ways

- Incentivized reviews are endorsements; submit a review and receive:
 - An entry to a sweepstakes
 - A giveaway
 - A charitable donation to a particular charity
 - A discount on your next order
- Reviews containing or making claims
 - Performance claims – “This product boosted my metabolism and helped me lose 40 pounds!”
 - Aggregation claims – “This product is the most recommended in America!”
- Display of customer reviews depicting accurate picture

The Guides Concerning the Use of Endorsements and Testimonials in Advertising

Part IV

Federal Trade Commission

16 CFR 255

Guides Concerning the Use of Endorsements and Testimonials in Advertising Federal Acquisition Regulation; Final Rule

§ 255.5 Disclosure of material connections.

When there exists a connection between the endorser and the seller of the advertised product that might materially affect the weight or credibility of the endorsement (*i.e.*, the connection is not reasonably expected by the audience), such connection must be fully disclosed.

FTC Currently Seeking Public Comment on Its Endorsement Guides

- In February 2020, the FTC began seeking public comment on whether to make changes to its Endorsement Guides
- As it relates to reviews, the FTC is seeking comment on the following:
 - Whether incentives like free or discounted products bias consumer reviews even when a favorable review is not required to receive the incentive, and whether or how those incentives should be disclosed;
 - Whether composite ratings that include reviews based on incentives are misleading when reviewers disclose incentives in the underlying reviews; and
 - What, if any, disclosures advertisers or operations of review sites need to make about the collection and processing of publication of reviews to prevent them from being deceptive or unfair
- Comments close on April 21, 2020



Office of Commissioner
Rohit Chopra

UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

**STATEMENT OF
COMMISSIONER ROHIT CHOPRA**

*Regarding the Endorsement Guides Review
Commission File No. P204500*

February 12, 2020

Who Enforces the Law?

- The FTC and state attorneys general have jurisdiction over anyone who participates in the “creation or dissemination of advertising” or anyone who “directly or indirectly” participates in presenting a commercial message:
 - Advertisers
 - Ad agencies
 - Affiliate marketers
 - Publishers/media companies
 - Endorsers



The Advertising Self-Regulatory Council (ASRC) has merged into BBB National Programs, Inc.



Reviews Are Endorsements

- The FTC Guides Concerning the Use of Endorsements and Testimonials in Advertising therefore apply
 - If the knowledge that a reviewer received a gift or incentive to write her review would affect how much weight readers give to that review, then the incentive should be disclosed
 - Even small gifts can affect credibility, so FTC advises it's "always safer to disclose"
- Reposting reviews across platforms compounds problems of reliability (has customer actually used the product being reviewed?) and failure to disclose connections between reviewer and advertiser

Endorsements and Testimonials: Basic Rules

- Endorsements must reflect honest opinion, beliefs, or experience of endorser; should be from bona fide user
- Endorsements must not contain any false or misleading statement or implication.
- Advertised portion must reflect spirit of complete testimonial
- Testimonials cannot be used to make claims that advertisers cannot make directly
- Any testimonial conveying that the results achieved by the consumer are typical requires substantiation or a disclosure of typical results
- Experts must possess qualifications represented and use their expertise in providing endorsement/evaluation
- **Material connections that might affect credibility must be disclosed, e.g., payment or other compensation; employment, business, or family connections**

FTC: Employees/Agencies Cannot Pose as Consumers and Review Product Without Disclosing the Connection

- Posing as a consumer to post a review violates basic advertising principles and is violative of Section 5 of the FTC Act
- Sony/Deutsch (Nov. 2014): FTC alleged Deutsch LA misled consumers by posing as consumers and posting reviews of Sony's new PlayStation Vita by using term “#gamechanger” in ads to direct consumers to online conversations about product and posting positive tweets about product without disclosing connection
- Sunday Riley (Oct. 2019): Sunday Riley and her cosmetics company ordered employees to write positive fake reviews on Sephora.com
 - Sunday Riley told employees how to avoid detection when posting these reviews
 - The FTC charged Sunday Riley and her company with deceiving consumers about the material connections between the company and the reviewers
 - The FTC and Sunday Riley settled with a no-money, no-fault order
 - Commissioner Chopra issued a scathing dissent on what he perceived to be weak remedies for the company

Compensating Customers for Reviews

- FTC is cracking down on disclosures with respect to reviews
- Contends it's misleading not to disclose consumers were incentivized to submit review

What the
FTC Says...

ONLINE REVIEW PROGRAMS

My company runs a retail website that includes customer reviews of the products we sell. We believe honest reviews help our customers and we give out free products to a select group of our customers for them to review. We tell them to be honest, whether it's positive or negative. What we care about is how helpful the reviews are. Do we still need to disclose which reviews were of free products?

Yes. Knowing that reviewers got the product they reviewed for free would probably affect the weight your customers give to the reviews, even if you didn't intend for that to happen. And even assuming the reviewers in your program are unbiased, your customers have the right to know which reviewers were given products for free. It's also possible that the reviewers may wonder whether your company would stop sending them products if they wrote several negative reviews – despite your assurances that you only want their honest opinions – and that could affect their reviews. Also, reviewers given free products might give the products higher ratings on a scale like the number of stars than reviewers who bought the products. If that's the case, consumers may be misled if they just look at inflated average ratings rather than reading individual reviews with disclosures. Therefore, if you give free products to reviewers you should disclose next to any average or other summary rating that it includes reviewers who were given free products.

My company, XYZ, operates one of the most popular multi-channel networks on YouTube. We just entered into a contract with a videogame marketer to pay some of our network members to produce and upload video reviews of the marketer's games. We're going to have these reviewers announce at the beginning of each video (before the action starts) that it's "sponsored by XYZ" and also have a prominent simultaneous disclosure on the screen saying the same thing. Is that good enough?

Many consumers could think that XYZ is a neutral third party and won't realize from your disclosures that the review was really sponsored (and paid for) by the videogame marketer, which has a strong interest in positive reviews. If the disclosure said, "Sponsored by [name of the game company]," that would be good enough.

NAD and Consumer Reviews

- NAD, like the FTC, has held that product reviews are endorsements that invoke the requirement that any material connection be disclosed
 - Incentivized reviews may be considered endorsements that require disclosure of any material connection that is not reasonably anticipated by the consumer
- Similar to FTC standards, NAD states that an advertiser cannot make claims through consumer reviews that the advertiser could not substantiate itself
 - If a manufacturer responds to customer reviews on a third-party retail site and reiterates positive statements made in the review or validates a customer's comment that may constitute advertising, and a manufacturer is responsible for substantiating those claims
- If an advertiser learns about inaccurate claims in third-party ads, the advertiser must take steps to correct those claims

Examples of NAD Decisions on Consumer Reviews

- APEC (Jan. 2019): Removed its advertisements that its water filtration systems were “Made in the USA” after an FTC inquiry. Consumers continued to write “Made in the USA” claims in reviews.
 - A competitor argued that APEC continued to benefit from these inaccurate reviews and should be tasked with correcting the reviews
 - NAD asked “whether the advertiser exercises control over the messages conveyed through customer reviews”
 - The NAD found that APEC “did not exercise sufficient control over the messages truthfulness of reviews...,” including the fact that APEC did not respond to the reviews
 - Even though APEC responded to other favorable reviews, the “silence and decision to refrain from responding to reviews does not convey a message” that the USA claims are accurate
 - That APEC responded to other reviews did not burden it with the obligation to correct unsupported claims from reviews

Examples of NAD Decisions on Consumer Reviews

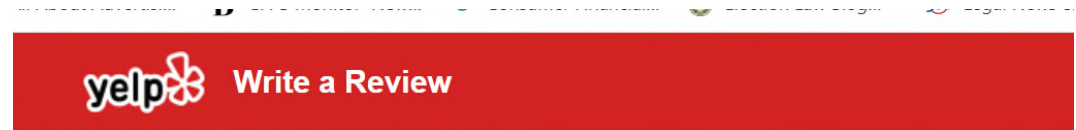
- Pyle Audio, Inc. (Aug. 2019): Pyle allegedly solicited reviews for its products by encouraging users of its product to write positive reviews in exchange for free product
 - NAD recommended that Pyle take reasonable measures to discontinue or modify posted online reviews for its products to include a “clear and conspicuous disclosure that the reviews are incentivized” and “to disclose the material connection between the reviewer and Pyle should it offer incentives to product purchasers in exchange for posting reviews”
 - NAD also recommended that in future solicitations Pyle should invite consumers to leave a review in exchange for a reward, without suggesting it must be a positive review to receive a reward
- Fit Products, LLC (Dec. 2016): NAD reviewed express claims, implied claims and endorsements, and testimonial claims for FitTea
 - NAD advised the advertiser to separate its endorsements and testimonials from its product reviews and prominently disclose that the reviews on its website were “authentic user reviews” and the reviews were not edited by Fit Products

Best Practices to Comply with the Endorsements and Testimonial Rules

- Give clear direction to reviewers to disclose any connections/incentives received, e.g., money, free product, employment relationship
- Require disclosures or, even better, automatically tag incentivized reviews (e.g., Sweepstakes Entry, #ad)
- Monitor and enforce compliance with disclosure requirements
- Before using reviews as basis for claim/as survey, independently substantiate advertising claims with reliable, representative data
 - Don't use reviews or social media reposts as a back door to make claims that you would not be able to make directly
 - Carefully evaluate cross-platform compatibility before aggregating reviews, and don't forget about offline purchasers
 - Collect product reviews in a systematic way, from a representative sample of purchasers, and post all of them – don't cherry-pick

Managing Negative Reviews: Consumer Review Fairness Act

- Enacted in December 2016, effective March 14, 2017
- Enforcement authority belongs to the FTC and state attorneys general
 - Violations of the CRFA are treated the same as a violation of an FTC rule that defines an unfair or deceptive act or practice
 - A company could be subject to financial penalties, as well as a federal court order
- Purpose?
 - To protect consumers' ability to share their honest reviews
 - Promotion of transparency and free speech



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[Read our review guidelines](#)

★ ★ ★ ★ ★ Select your rating

I needed a local company to help me design a website for my business. I used Yelp to request quotes and got quotes from a few different companies. After I compared their work, I chose Pixelette Studios. Web design is something I leave up to the pros. My portfolio needed some spring cleaning and knowing that they're trained professionals made it easy to justify the price. For \$30 I could get a complete website redesign and add some cool widgets too.

What Does the CRFA Actually Do?

- Big Picture: Makes gag clauses illegal and void in form contracts
 - “Form Contract” is defined as “a contract with standardized terms – (i) used by a person in the course of selling or leasing the person’s goods or services and (ii) imposed on an individual without a **meaningful opportunity** for such individual **to negotiate the standardized terms.**” (emphasis added)
 - Excludes employer-employee or independent contractor contract
 - Example of a form contract: a website’s Terms and Agreements
- The CRFA makes it illegal for a company to use a contract provision that:
 - Bars or restricts the ability of a person who is a party to that contract to review a company’s products, services, or conduct;
 - Imposes a penalty or fee against someone who gives a review; or
 - Requires people to give up their intellectual property rights in the content of their reviews
- The use of a non-disparagement clause, *even without the threat of a penalty*, is enough to violate the CRFA
- The CRFA establishes that the existence of an illegal contract provision is enough to subject a company to an enforcement action *even if the company did not follow through against consumers*
- Companies can also be subject to financial penalties for knowing violations of the CRFA

What does the CRFA Apply To?

- The CRFA protects a variety of consumer assessments, including:
 - Online Reviews
 - Social Media Posts
 - Uploaded Photos
 - Uploaded Videos
- It does NOT just cover product reviews
- It also applies to consumer evaluations of a company's customer service

What Types of Reviews Are NOT Covered by the CRFA?

- Reviews containing confidential or private information
- Reviews that are libelous, harassing, abusive, obscene, vulgar, sexually explicit, or inappropriate with regard to race, gender, sexuality, ethnicity, or other intrinsic characteristics
- Reviews unrelated to a company's product or services
- Reviews that are clearly false or misleading
 - However, a disagreement over a consumer's assessment or opinion likely does not meet the "clearly false or misleading" standard

What Is the FTC Up To?

In May 2019, the FTC issued three separate proposed administrative complaints and orders enforcing the CRFA

- The three proposed complaints and orders were approved in August 2019

The three companies were from different industries

In June 2019, the FTC announced two more administrative complaints regarding companies that violated the CRFA by using form contracts with non-disparagement provisions that barred consumers from writing or posting negative reviews online or that imposed financial penalties for doing so

- The final orders for these two complaints were also approved in August 2019

May 2019 Enforcement Actions

- PA-Based Waldron HVAC used a “confidentiality clause” in its form contracts
 - The contract stated: 1) “CUSTOMER and COMPANY agree that the within contract is a private and confidential matter and that the terms and conditions of the contract...shall not be made public, or given to anyone else to make public, INCLUDING THE BETTER BUSINESS BUREAU”; and 2) “Should the CUSTOMER breach this confidentiality clause, the CUSTOMER agrees to pay COMPANY liquidated damages....**THE COMPANY MAY ALSO BE AWARDED COUNCIL [sic] FEES AND COSTS AS REQUESTED BY COMPANY.**”
- National Floors Direct, a MA flooring company, included a non-disparagement clause in its form contracts that imposed financial penalties
 - “By signing this purchase order you are agreeing, under penalty of civil suit, for an amount not to exceed three times the monetary value of this order, plus attorney’s fees...not to publicly disparage or defame National Floors Direct in any way or through any medium.”
- LVTR LLC, a NV-based horseback trail riding operation, included non-disparagement text in form contracts it offered consumers who booked trips with the company
 - Included language such as:
 - “I agree not to call Animal Control or any governmental agency or individuals if there is a discrepancy to how the horses/ animals or property are taken care of.”
 - If consumers “report anything” or make contact with “any persons or agency,” the form contract said the company would assess “a minimum of \$5,000 in damages” and hold them “responsible for all fines” and the cost of “our legal representation.”

June 2019 Enforcement Actions

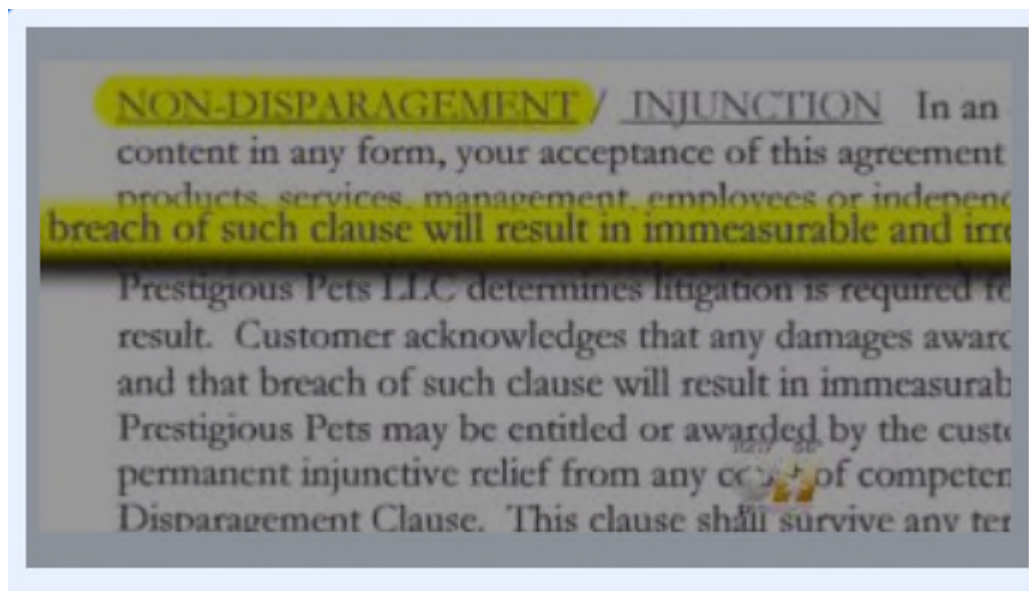
- Shore to Please Vacations LLC rental contract included non-disparagement provision under its disclaimers section
 - Under the provision, any vacationer who posted a review giving the property less than a “5 star or absolute best rating” owed the company at least \$25,000.
 - Owner filed lawsuits against renters who posted negative reviews, asserting in his demand letters that by breaching the non-disparagement provisions, the renters owed him \$25,000 plus attorney fees.
 - NAD was actually first in this area with case involving **sweepstakes** where entrants were offered a prize to review but failed to disclose that...and went back to fix emails/disclosures, ads and all posts to include a #[Brand]Sweepstakes disclosure to comply with the Endorsements and Testimonials Rule.
- Staffordshire Property Management, LLC rental contracts included:
 - “Authorization, Agreement & Release Consent Form” that included prohibited language, such as “[t]he Applicant ... specifically agrees not to disparage [Staffordshire], and any of its employees, managers, or agents in any way, and also agrees not to communicate, publish, characterize, publicize or disseminate, in any manner, any terms, conditions, opinions and communications related to [Staffordshire], this application, or the application process....”
 - It further stated that prospective renters specifically agree that “[a]ny breach of such confidentiality will support a cause of action and will entitle [Staffordshire] to recover any and all damages from such a breach.”

What Did the Consent Orders Require?

- All orders bar the companies from using non-disparagement clauses in form contracts for goods or services AND require them to notify customers who signed such contracts that those clauses are not enforceable
- In the final order against Shore to Please, it required the company to dismiss with prejudice a count in a private lawsuit in which the company alleged a renter violated the non-disparagement agreement

Best Practices to Comply with the CRFA

- Review existing form contracts to make sure they do not contain these types of provisions
- If the form contracts do have illegal provisions, notify customers of the invalidity of the provisions
- Do not include gag provisions in any new form contracts
- Don't cherry-pick which reviews to post
- Remember that the FTC Act also applies, and any questionable conduct can also be challenged under Section 5 of the FTC Act



Questions?



Alexandra Megaris

212.370.6210
amegaris@Venable.com



Deborah Bessner

212.503.9818
dbessner@Venable.com

Upcoming Webinars

- **Financial Services Advertising Enforcement Update, April 23, 2-3 p.m. ET**

Our team at Venable will discuss the more significant regulatory actions taken by financial services regulators since the end of 2019 with regard to advertising practices. These regulators include the Consumer Financial Protection Bureau, the Federal Trade Commission, and prudential banking regulators.

Resources:

All About Advertising Blog: www.allaboutadvertisinglaw.com

COVID-19 Resources: www.Venable.com/Covid-19



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