



Legal Considerations When Managing and Protecting Your Brand Online

May 26, 2021



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Soliciting and Using Reviews Is a Form of Advertising

1. Incentivized reviews are paid endorsements.
2. Reviews that contain or make claims must be true and substantiated.
3. Reviews—including how they are displayed, formatted, and aggregated—cannot be misleading, including by omission.

Positive Reviews Are Endorsements

FTC 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**

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THE FTC'S ENDORSEMENT GUIDES: WHAT PEOPLE ARE ASKING

TAGS: [Advertising and Marketing](#) | [Endorsements, Influencers, and Reviews](#) | [Online Advertising and Marketing](#) | [Credit and Finance](#) | [FinTech](#)

Answers to questions people are asking about the FTC's Endorsement Guides, including information about disclosing material connections between advertisers and endorsers. The brochure also addresses how those established consumer protection principles apply in social media and influencer marketing.

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**

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 Section 5 of the FTC Act
- 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
- Health Center, Inc. (March 2020): The FTC settled with this vendor of “cure-all” health and wellness products on charges that they used deceptive advertising about their products that targeted older consumers. One of the allegations is that the company published ads that contained fake consumer testimonials that were actually from company employees who provide positive reviews. The order prohibited the company from engaging in these practices and imposed a fine of \$5,000.

Compensating Customer for Reviews – Disclosure Required

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.

Monitoring Your Network of Influencers

Our company uses a network of bloggers and other social media influencers to promote our products. We understand we're responsible for monitoring our network. What kind of monitoring program do we need? Will we be liable if someone in our network says something false about our product or fails to make a disclosure?

Advertisers need to have reasonable programs in place to train and monitor members of their network. The scope of the program depends on the risk that deceptive practices by network participants could cause consumer harm – either physical injury or financial loss. For example, a network devoted to the sale of health products may require more supervision than a network promoting, say, a new fashion line. Here are some elements every program should include:

1. Given an advertiser's responsibility for substantiating objective product claims, explain to members of your network what they can (and can't) say about the products – for example, a list of the health claims they can make for your products, along with instructions not to go beyond those claims;
2. Instruct members of the network on their responsibilities for disclosing their connections to you;
3. Periodically search for what your people are saying; and
4. Follow up if you find questionable practices.

Recent FTC Enforcement Actions

[Teami, LLC](#) (March 2020): The FTC settled with Teami, a marketer of teas and skincare products, based on charges that the company promoted its products with endorsements by well-known social media influencers, including Cardi B. and Jordin Sparks, who did not properly disclose that they were being paid to advertise the products. The final order mandated clear and conspicuous disclosures, endorser monitoring requirements, and a fine of \$1,000,000.

Reviews That Contain Claims

Claims Must Be Substantiated and Experiences Typical

We want to run ads featuring endorsements from consumers who achieved the best results with our company's product. Can we do that?

Testimonials claiming specific results usually will be interpreted to mean that the endorser's experience reflects what others can also expect. Statements like "Results not typical" or "Individual results may vary" won't change that interpretation. That leaves advertisers with two choices:

1. Have adequate proof to back up the claim that the results shown in the ad are typical, or
2. Clearly and conspicuously disclose the generally expected performance in the circumstances shown in the ad.

How would this principle about testimonialists who achieved exceptional results apply in a real ad?

The Guides include several examples with practical advice on this topic. One example is about an ad in which a woman says, "I lost 50 pounds in 6 months with WeightAway." If consumers can't generally expect to get those results, the ad should say how much weight consumers can expect to lose in similar circumstances – for example, "Most women who use WeightAway for six months lose at least 15 pounds."

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

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 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

Soliciting and Publishing Reviews

- What are advertisers' obligations when soliciting reviews and posting them on websites they control?
- What are advertisers' rights if a review includes false or inflammatory content?

Recent FTC Cases

[LendEDU, et al., In the Matter of](#) (May 2020): The FTC entered into a settlement with LendEDU.com, resolving allegations that the company falsely claimed it provided “unbiased” information about consumer financial products, when they actually offered higher rankings and ratings to companies that paid for placement. The final order prohibited the company from misrepresenting “the objectivity of the rankings of any entity offering products; the influence of compensation on any content, including any rate tables; and any material connections or endorsements with companies.” The company was also fined \$350,000.

[Mortgage Solutions FCS, Inc.](#) (Jan. 2020): The company agreed to pay a \$125,000 fine to settle FTC allegations that they revealed personal information about consumers in response to negative reviews posted on Yelp.

[Yotpo, Ltd.](#) (Nov. 2020): FTC published a closing letter it had sent to counsel at Yotpo. The letter notably recommended not enforcing any action against the company, citing the company’s commitment to implementing “clear and prominent guidance to its clients on their need to promptly post reviews, including negative reviews,” as the primary determinant of this recommendation. The letter also notes that in general, the FTC does not believe that companies are obligated to post obscene, vulgar, or offensive reviews “so long as the criteria for withholding reviews is applied uniformly to all reviews submitted.” The letter also specifies that companies are not required to post reviews unrelated to their products or services.

FTC Considering Updating 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 operators of review sites need to make about the collection and processing of publication of reviews to prevent them from being deceptive or unfair

Best Practices

- 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?



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