Consumer Reviews: Anti-Disparagement Clauses and Consumer Testimonials

Mary K. Engle
Associate Director for Advertising Practices
Federal Trade Commission
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Consumer Review Fairness Act

- Prohibits sellers from using “gag clauses”: form contracts that restrict consumers’ ability to review goods, services, or conduct
  - Also prohibits clauses that impose a penalty or fee for providing a review
  - Or that require people to give up their intellectual property rights in their review’s content
- FTC staff issued business guidance on how to comply w/CRFA last February
CRFA

- Protects people’s ability to share honest opinions about products, services, conduct, in any forum, inc. online reviews, social media posts, uploaded photos/videos etc.
- Prohibits contract provisions that threaten or penalize posting honest reviews
- Doesn’t apply to employment contracts or agreements w/independent contractors
CRFA – Ok to prohibit/remove review that:

- Contains confidential or private info
- Is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate w/r/t/ race, gender, sexuality, ethnicity, or other intrinsic characteristic
- Is unrelated to company’s products/services
- Is clearly false or misleading
The FTC and the States can enforce starting Dec. 14, 2017
- States must notify FTC before filing
- If FTC action against a defendant is pending, state may not also sue same defendant

CRFA preserves FTC’s Section 5 authority to challenge unfair/deceptive use of non-disparagement provisions/complaint suppression tactics
FTC Actions re Suppressing Online Reviews

- FTC v. Roca Labs (M.D. Fla. filed 2015); alleges unfair use of non-disparagement clause to threaten & file lawsuits against consumers who shared negative experiences online re weight loss product. Case is pending.
- FTC v. NutriMost (W.D. Pa. consent filed 2017); challenges as unfair, bans non-disparagement provisions in consumer contracts for weight loss services.
- FTC v. World Patent Marketing (S.D. Fla. Filed 2017); challenges as unfair threats & intimidation to suppress consumer complaints re patent marketing services (didn’t involve contract provision). Ct. granted Pl.
FTC Endorsement Guides

- Explain how Section 5 of the FTC Act applies to endorsements & testimonials in advertising
- An endorsement is an advertising message that consumers believe reflects the views of someone other than the sponsoring advertiser
- An endorsement should reflect the honest beliefs, opinions, experiences of the endorser
- An advertiser can’t make claims through endorsers that it couldn’t make directly itself: endorsement claims need to be substantiated
Available guidance

The FTC’s Revised Endorsement Guides: What People are Asking
Disclose “material connections”

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.
Examples of Material Connections

- Endorser received compensation for endorsement
  - E.g., cash, gift cards, free product, free travel, discounts, chance to win significant prize, chance to appear in TV commercial
- Endorser is employee, business associate of advertiser
- Endorser is related to advertiser
Is the relationship or connection between the endorser and the marketer apparent from the context of the endorsement message?

- If so, then no disclosure is necessary
- If not, then the connection should be clearly and conspicuously disclosed in the endorsement message
Bobby Le 6 months ago
I found this trampoline on the Bureau of trampoline review and this is the best trampoline that I've ever owned. I had the jumpsport recently and it is not as advertised. Within 2 yrs, the frame started rusting. This crap is definitely china made. Don’t waste your money

Sonny Le and Bao Le (Trampoline Safety of America) (consent order)
Bruh.. i've won like $8,000 worth of CS:GO Skins today on @CSGOLotto I cannot even believe it!
Disclosures should be clear & conspicuous
Disclosures should be **unambiguous**
- Don’t use industry jargon, words or phrases that are ambiguous or unfamiliar, unfamiliar icons or abbreviations; and don’t rely simply on a company logo or brand name

Disclosures should be placed *where* consumers will look, in the advertising message to which they relate
- Not under a “more” or “disclosure” button

They should *stand out* so consumers will notice and read (or hear) them
- In font size and colors consumers can easily read on screen
- Not in a clutter of hashtags, handles or fine print
This video is sponsored by Warner Brother.
No one reads this far into the description...what are you doing snooping around...
FTC staff sent 90 letters to brands and influencers re Instagram posts appearing to promote a brand with no disclosure or inadequate disclosure of sponsorship. Our letters urge:
- Using unambiguous terminology
- Placing disclosure within the first 3 lines of text so it’s not under the “more” button
- Not placing the disclosure in a clutter of hashtags

We learned that not all of the posts were in fact sponsored; some were organic.

FTC staff sent 21 follow-up letters to influencers, asking them to let us know if their Instagram posts were sponsored. Our letters state:
- Tagging a photo w/brand name is endorsement requiring disclosure if sponsored
- “Thank you [brand]” not adequate to convey sponsorship b/c could just express satisfaction with the company

Again, many of the posts were organic, not sponsored.