

Client Alert

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FTC Continues Crackdown on Misleading Online Reviews: Businesses Must Clarify Material Connections With Consumer Endorsers

For many consumers, online reviews play a role in the decision to make any purchase. Before making dinner reservations, choosing a hotel, hiring a service provider or even buying a toaster, consumers often look to online reviews as an assessment of the product, service or experience they want to buy. In a market where a negative online review or rating from a dissatisfied customer can influence countless other potential buyers — not just people the dissatisfied customer knows in real life — companies have a strong incentive to maintain a positive reputation online. However, in a desire to separate themselves from the competition with strong reviews, some companies have taken the race for positive online reviews too far, and the Federal Trade Commission is watching.

What to Know

The FTC began cracking down on biased online reviews around five years ago, when the agency updated its advertising disclosure guidelines. In its [Endorsement Guides](#), the FTC specifies that marketers should disclose any material connections between endorsers and the marketer that consumers would not expect. In the case of online reviews, marketers must disclose when a review is in response to a product provided for free or at a discount, and when the company is sponsoring reviews. According to the FTC, consumers have a right to expect that online reviews are independent and impartial, and must be told when that is not the case.

The FTC's cases have focused on different aspects of allegedly deceptive review practices — using paid influencers and affiliates as well as company employees to promote products, offering reviewers undisclosed discounts and incentives, and even threatening litigation for posting negative reviews.

In 2010 and 2011, as a part of its initial crackdown on biased consumer reviews, the FTC settled with several companies accused of misrepresenting their consumer reviews as impartial. In 2010, the FTC [settled](#) with a public relations agency, Reverb Communications, Inc., that had been hired by video game developers to post game reviews on iTunes without disclosing that the reviews came from paid employees and not disinterested users. In 2011, a seller of guitar-lesson DVDs, Legacy Learning Systems Inc., had to [pay the FTC](#) \$250,000 to settle charges that the company recruited affiliates to promote and endorse the program in exchange for commissions on the sale of products generated by the referrals.

In 2015, the FTC [settled](#) with AmeriFreight, an automobile shipment broker charged with failing to disclose that online reviewers were compensated for their reviews with discounts and incentives. AmeriFreight provided a \$50 discount to a consumer who agreed to write an online review, increased the cost of the service if the consumer did not agree to write a review, and enrolled consumers who left an online review into a \$100 per month “Best Monthly Review Award” for the most creative subject title and “informative content.” This case marked the first time the FTC brought a complaint against a company not for hiring employees to write reviews that resembled consumers' reviews, but for failing to disclose a monetary connection between the actual consumer and the posted online review.

The FTC has gone after companies for not disclosing the monetary connections with influencers who promote their products through blogs and videos and on Twitter and Instagram. In 2015, the FTC [settled](#) with the advertising agency Deutsch LA, which had urged its employees to create buzz around Sony's PlayStation Vita without instructing them to disclose their affiliation to Deutsch or to Sony. In 2016, the FTC [alleged](#) that the video gaming network Machinima, Inc. paid its influencers to post videos endorsing Microsoft's Xbox One without adequately disclosing they were being paid for their seemingly objective opinions.

The fashion retailer Lord & Taylor also [came under FTC scrutiny](#) for its use of influencers. The company gave 50 fashionistas the same dress and paid each to post a picture of the dress on Instagram as part of a social media campaign. Lord & Taylor did not require its influencers to disclose this monetary connection, leading to an FTC investigation and consent order establishing a monitoring and review program for Lord & Taylor's future endorsement campaigns.

The FTC's focus on consumer reviews continues unabated. Just last week, the FTC [settled](#) with SmartClick Media LLC over, among other charges, claims that several websites misrepresented the accuracy of consumer reviews. The agency also continues its [litigation](#) against Roca Labs, Inc., alleging that the company threatened to enforce "gag clause" provisions against consumers to prevent them from posting negative reviews online. According to the complaint, Roca Labs sued and threatened to sue consumers who shared negative reviews of their weight-loss supplements. The company also allegedly solicited "Success Videos" from customers, offering to discount the price of the product 50 percent in exchange for providing a positive review.

Even Congress is getting in on the action — in December, the Consumer Review Freedom Act of 2015 [passed unanimously](#) in the Senate. The law is modeled on a California law that prohibits businesses from penalizing customers who post negative reviews online. Though the bill was [introduced in the House](#) in April by Representative Darrell Issa, it has not yet made its way out of subcommittee onto the floor for a vote.

What to Do

Based on increased FTC attention over the last few years, it seems clear that the agency is serious about pursuing marketers that use biased endorsements. Clients who plan on incorporating customer reviews in their advertising should:

- As a best practice, ask your customers to provide reviews without promising them any material benefit in return. The aim is to develop a body of unbiased customer feedback.
- Do not punish customers for negative reviews.
- Should a material connection exist between you and a reviewer, always clearly and prominently disclose it — whether you have paid the customer, offered the customer a sample or a comp or provided any other incentive.
- Do not bury your disclosures. Clear and prominent means just that.

Hunton & Williams LLP has extensive experience in this area, including counseling companies on advertising, marketing and other consumer protection issues. Our practice includes a number of FTC alumni, including the former chief of staff to the Bureau of Consumer Protection's Division of Advertising Practices. We are well situated to counsel clients on compliance with FTC advertising guidelines, including for the use of online reviews and endorsements.

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