

Insights

## THE BEST LEGAL REVIEW OF THE FTC'S REGULATORY REVIEW OF CONSUMER REVIEWS

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As we drifted into this past July 4 weekend, the FTC set off some fireworks with the publication of its long-awaited updates to the *Endorsement Guides* and its corresponding FAQs, and it followed up on last year's advance notice of proposed rulemaking on fake reviews with a [Proposed Rule](#) on which it will be seeking public comments. This overview is intended to distill down the core elements of this activity solely as to consumer reviews – what's changed and what it means for your business.

The *Endorsement Guides* have been a topic of intense speculation since they had last been updated in 2009, and when the FTC sought public comments on them in 2020 many of us speculated about changes we might expect to see. I previously wrote about the [swirl of FTC activity surrounding its enforcement powers](#) and its continuing efforts to protect a public that it believed could not adequately protect itself in this space in 2021, and I submitted [comments](#) to the proposed updates to the *Endorsement Guides* last year. While there are no surprises in the newly-proposed version of the *Endorsement Guides*, it appears I was right in at least two respects – namely, an increased focus by the Commission on the role that consumer reviews play in commerce, and the Commission's decision to seek to codify as actual *binding law* a portion of the *Endorsement Guides*.

This latter aspect is important because the *Endorsement Guides* themselves are not law *per se*, but rather the Commission's published guidance regarding certain misleading or deceptive practices that it believes constitute violations of Section 5 of the FTC Act. Except in certain narrow circumstances (discussed in the article cited above), the Commission's ability to file lawsuits to seek damages or financial penalties for violating the *Endorsement Guides* is extremely limited.

However, if any of the practices described in the *Endorsement Guides* are deemed unlawful by a formal *rule*, then the FTC's enforcement powers with respect to those practices are greatly expanded. The tricky part of this framework for the Commission lies in enacting a rule. To do so, it must follow a prescribed [process](#) which includes giving the public a chance to participate and presenting evidence that the practices sought to be governed by the rule are *prevalent*. Given the breadth of the *Endorsement Guides*, it would be a difficult if not impossible task for the Commission to demonstrate that *all* of the allegedly deceptive practices covered by them are prevalent; hence,

the Commission has appeared to zero in on a handful of specific practices that are widespread and which – importantly for purposes of the Commission’s consumer protection objectives – meaningfully impact commerce.

It doesn’t take a rocket scientist to deduce that a significant portion of purchases are made online on sites that feature reviews that can materially influence purchase decisions. As such, given that protecting the integrity of that process is a fundamental goal of the Commission, reviews are where the rubber meets the road in ecommerce.

While it is too soon to tell if and to what extent the Proposed Rule will be enacted (which likely wouldn’t happen until at least next year), the language of the Proposed Rule strongly suggests the Commission’s focus going forward, providing some insight into where businesses ought to be looking to ensure they are not running afoul of the Commission’s expectations. The Proposed Rule focuses on seven specific practices that the Commission alleges are deceptive:

- The purchase, sale, or procuring of consumer or celebrity reviews or testimonials that are “fake”, either because (i) the reviewer doesn’t actually exist, (ii) the reviewer didn’t actually use or otherwise have experience with the product or service, or (iii) the review materially misrepresents the reviewer’s actual experience;
- “Review hijacking” – i.e. using a review written or created for one product or service for a substantially different product or service;
- Providing compensation or other incentives in exchange for reviews that express a particular sentiment – i.e. conditioning incentives on a review being positive or negative;
- Facilitating “insider” reviews by officers, employees, or family members that do not contain a clear and conspicuous disclosure of the relationship;
- Setting up sites that appear to be independent review sites when in fact they are controlled by the business whose products or services are reviewed;
- Suppressing reviews, either by intimidation or by only publishing certain reviews (e.g., only positive reviews); and
- Misusing fake indicators of social media influence, such as buying or selling fake followers, likes, subscribers, views, etc.

Almost all of these represent a subset of the practices discussed in the *Endorsement Guides*. However, it is notable that the Proposed Rule’s prohibition of the facilitation of reviews that fail to include *a clear and conspicuous disclosure of a material connection* is limited to “insiders” – i.e. officers, managers, employees, and agents of a business or the relatives of any of them; the *Endorsement Guides* deem it deceptive for *anyone* with a material connection to fail to disclose that

connection in a review, but for now it appears that the Proposed Rule, if enacted as is, would only codify that practice as illegal if the reviewer or the reviewer's family member works for the business.

It's also interesting that, while the Proposed Rule requires "insiders" to "clearly and conspicuously" disclose their relationship to the business when posting reviews (which is consistent with the *Endorsement Guides*), the Proposed Rule does not use the same definition of "clear and conspicuous" as the *Endorsement Guides*. Instead, the Rule repurposes a more stringent definition lifted from the Commission's recently proposed update to the [Negative Option Rule](#); while the two definitions are substantively similar, a key difference is that the definition in the *Endorsement Guides* uses the word "should" when describing the placement and presentation of the disclosure, while the definition repurposed for the Proposed Rule uses "must". This is a mandatory higher standard for the disclosure of a material connection under the Proposed Rule and an important one to be aware of.

Another difference of note is that the updated *Endorsement Guides* specifically identify a couple of practices as deceptive but outside the scope of the *Endorsement Guides* (because they aren't "endorsements"), namely (i) purchasing fake negative reviews of a competitor's product, and (ii) buying fake indicators of social media influence. Both of these would be covered by the Proposed Rule.

## SO WHAT DOES THIS MEAN FOR BUSINESSES?

While this is not the grand finale of the FTC's fireworks, it is a very loud and very bright signal that the Commission's endgame will be focused on how marketers solicit, collect, organize, filter, and publish consumer reviews.

While the consumer review process may feel like an organic process that just happens on its own and is mostly out of scope for marketers to take responsibility for, the Commission went into extreme detail in the analysis it prepared in connection with the Proposed Rule to note how widespread and harmful deceptive consumer reviews are and the ways that marketers' acts or omissions contribute to this harm. Thus, no business whose products or services are reviewed – either on its own site or on third-party sites – can afford to take a hands-off approach or stick its head in the sand.

It is critical to understand what mechanisms your business has in place to manage consumer reviews and to develop and implement appropriate processes and protocols to identify and minimize any fraudulent or deceptive practices. Whether the Proposed Rule is ultimately promulgated or not, this responsibility deserves your full attention.

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