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PART 3: WHAT THE FTC'S FINAL RULE MEANS FOR INCENTIVIZED REVIEWS

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In this post, part of a six-part series, we explore what the FTC's Final Rule on consumer reviews and testimonials means for incentivized reviews.[1] The Final Rule prohibits businesses from providing compensation or other incentives that are conditioned (either expressly or by implication) on the reviewer providing a favorable review or expressing a particular sentiment.

Importantly, the FTC in its Final Rule doesn't prohibit incentivizing reviews. Moreover, the FTC expressly rejected a commentator's suggestion that all incentivized reviews should require disclosure of the incentive, stating: "These requests are beyond the scope of this rulemaking but are addressed in the Endorsement Guides, which provide that unexpected material connections such as incentives given in exchange for customer reviews without any requirement as to the sentiment of the reviews must be disclosed clearly and conspicuously." In any event, the FTC states, "there is no basis on the current rulemaking record for the Commission to conclude that all incentivized reviews should be prohibited or that all incentivized reviews should require a disclosure."

In turn, the FTC's Endorsement Guides, at Section 255.5 concerning disclosure of material connections, provide:

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, and that connection is not reasonably expected by the audience, such connection must be disclosed clearly and conspicuously. Material connections can include a business, family, or personal relationship. They can include monetary payment or the provision of free or discounted products (including products unrelated to the endorsed product) to an endorser, regardless of whether the advertiser requires an endorsement in return. Material connections can also include other benefits to the endorser, such as early access to a product or the possibility of being paid, of winning a prize, or of appearing on television or in other media promotions. Some connections may be immaterial because they are too insignificant to affect the weight or credibility given to endorsements. A material connection needs to be disclosed when a significant minority of the audience for an endorsement does not understand or expect the connection. A disclosure of a material connection does not require the complete details of the connection, but it must clearly communicate the nature of the connection sufficiently for consumers to evaluate its significance.

As one example of a material connection that should be disclosed, the Endorsement Guides use the example of a college student that signs up to be part of a program in which points are awarded each time a participant posts on social media about a particular advertiser's products. Participants can then exchange their points for prizes, such as concert tickets or electronics. The FTC states that “these incentives would materially affect the weight or credibility of the college student's endorsements. They should be clearly and conspicuously disclosed, and the advertiser should take steps to ensure that these disclosures are being provided.”

Although the FTC has stated that there may be incentives that are too insignificant to be material and require disclosure, the Endorsement Guides do not provide any examples. In its comments to the Endorsement Guides, the FTC responded to a request for such examples by stating “[w]hether a connection is too insignificant to be material is such a fact-specific question that it is difficult to devise a useful example of a necessarily immaterial connection.”

In short, the FTC in its Final Rule continues to prohibit review incentives that are conditioned on a particular sentiment, but doesn’t prohibit incentivized reviews altogether or require disclosure of the incentive in all circumstances – only incentives that are “material” – leaving open precisely what that means. A cautious approach would be to disclose incentivized reviews as a general rule.

Violations of the Final Rule can result in significant consequences. The FTC will be empowered to impose penalties against violators of up to $51,744 per rule violation, along with other relief—including consumer redress, conduct restraints, and broad oversight authority.

In our next post, we explore what the FTC’s Final Rule means for so-called “insider” consumer reviews and testimonials.

For questions or more information, or to schedule a company webinar on this topic, contact the authors listed, Merrit Jones, Co-Leader of BCLP’s Retail & Consumer Products Sector, and BCLP partner David Schwartz, former Lead Investigative Attorney with the FTC.

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[1] The Federal Trade Commission, as we previously reported, has published a Final Rule on consumer reviews and testimonials that prohibits certain practices the FTC deems to be deceptive or misleading in six areas: (1) fake or false consumer reviews, consumer testimonials, or celebrity testimonials; (2) buying positive or negative consumer reviews; (3) insider consumer reviews and consumer testimonials; (4) company-controlled review websites or entities; (5) review suppression; and (6) misuse of fake indicators of social media influence. This is part of a six-part series explaining the FTC’s new rule in each of those areas.

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