

Navigating the New FTC Rule on the Use of Consumer Reviews and Testimonials

Health Law Webinar

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Fredrikson

Trade Regulation Rule on the Use of Consumer Reviews and Testimonials

Announced August 14, 2024

Effective October 21, 2024

The Final Rule has “put businesses that unlawfully game the system on notice.”

FTC Chair Lina M. Khan

Process

- Advance notice of proposed rulemaking (November 2022)
- Notice of proposed rulemaking (June 2023)
- Final Notice of Informal Hearing (January 2024)
- Order (February 2024)
- Hearing Session (March 2024)
- Order (May 2024)
- Final Rule (August 2024)

Statement of Basis and Purpose (“SBP”)

- (1) the prevalence of the acts or practices addressed by the rule
 - (2) the manner and context in which the acts or practices are unfair or deceptive
 - (3) the economic effect of the rule, taking into account the effect on small businesses and consumers
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- *AMG Capital Management, LLC v. FTC*

§ 465.2 Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials

§ 465.2(a)

- (a) It is an unfair or deceptive act or practice and a violation of this part for a business to **write, create, or sell** a consumer review, consumer testimonial, or celebrity testimonial that materially misrepresents, expressly or by implication:
 - (1) that the reviewer or testimonialist exists;
 - (2) that the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or
 - (3) the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

§ 465.2(b)

- (b) It is an unfair or deceptive act or practice and a violation of this part for a business to **purchase** a consumer review, or to **disseminate** or cause the dissemination of a consumer testimonial or celebrity testimonial, about the business or one of the products or services it sells, which the business knew or should have known materially misrepresented, expressly or by implication:
 - (1) that the reviewer or testimonialist exists;
 - (2) that the reviewer or testimonialist used or otherwise had experience with the product, service, or business that is the subject of the review or testimonial; or
 - (3) the reviewer's or testimonialist's experience with the product, service, or business that is the subject of the review or testimonial.

§ 465.2(c)

- It is an unfair or deceptive act or practice and a violation of this part for a business to **procure** a consumer review from its **officers, managers, employees, or agents, or any of their immediate relatives**, for posting on a third-party platform or website, when the review is about the business or one of the products or services it sells, and when the business knew or should have known that the review materially misrepresented, expressly or by implication:
 - (1) that the reviewer exists;
 - (2) that the reviewer used or otherwise had experience with the product, service, or business that is the subject of the review; or
 - (3) the reviewer's experience with the product, service, or business that is the subject of the review.

§ 465.2(d)

- (d) However, paragraphs (b) and (c) of this section do not apply to:
 - (1) reviews or testimonials that resulted from a business making generalized solicitations to purchasers to post reviews or testimonials about their experiences with the product, service, or business; or
 - (2) reviews that appear on a website or platform as a result of the business merely engaging in consumer review hosting.

Is a professional athlete who appears at a business to sign autographs without making any statements or representations about the business violating § 465.2?

- A. Yes
- B. No
- C. It Depends

A business pays the tenant in the office next to them to submit a review and provides the content for the tenant to transcribe. Is the business violating § 465.2(a)?

- A. Yes
- B. No
- C. It Depends

A competitor posts fifty fake reviews on a company's website. Is the company violating § 465.2(a)?

- A. Yes
- B. No
- C. It Depends

A business hires a third party to provide free samples of its products to consumers in order to generate reviews. The business notices that the resulting reviews are submitted in a very short period of time. Is the business violating § 465.2(b)?

- A. Yes
- B. No
- C. It Depends

§ 465.4 Buying Positive or Negative Consumer Reviews

§ 465.4

- It is an unfair or deceptive act or practice and a violation of this part for a business to provide compensation or other **incentives** in exchange for, or conditioned expressly or by implication on, the writing or creation of consumer reviews **expressing a particular sentiment**, whether positive or negative, regarding the product, service, or business that is the subject of the review.

Does it violate § 465.4 for a business to say “Tell us how much you loved [product] for 10% off your next purchase!”?

- A. Yes
- B. No
- C. It Depends

§ 465.5 Insider Consumer Reviews and Consumer Testimonials.

§ 465.5(a)

- It is an unfair or deceptive act or practice and a violation of this part for an **officer or manager** of a business to write or create a **consumer review or consumer testimonial** about the business or one of the products or services it sells that fails to have a **clear and conspicuous disclosure of the officer's or manager's material relationship** to the business, unless, in the case of a consumer testimonial, the relationship is otherwise clear to the audience.

§ 465.5(b)

- (b)(1) It is an unfair or deceptive act or practice and a violation of this part for a business to **disseminate** or cause the dissemination of a **consumer testimonial** about the business or one of the products or services it sells by one of its **officers, managers, employees, or agents**, which fails to have a **clear and conspicuous disclosure** of the testimonialist's material relationship to the business, when the relationship is not otherwise clear to the audience and the business knew or should have known the testimonialist's relationship to the business.
- (b)(2) However, paragraph (b)(1) of this section does not apply to:
 - (i) generalized solicitations to purchasers for them to post testimonials about their experiences with the product, service, or business, or
 - (ii) merely engaging in consumer review hosting.

§ 465.5(c)(1)

- (c)(1) It is an unfair or deceptive act or practice and a violation of this part for an **officer or manager** of a business to **solicit or demand a consumer review** about the business or one of the products or services it sells from any of their **immediate relatives or from any employee or agent** of the business, **or** to solicit or demand that such employees or agents seek such reviews from **their relatives**, when:
 - (i) the solicitation or demand results in an officer's or manager's immediate relatives, an employee or agent, or the immediate relatives of an employee or agent writing or creating such a review **without a disclosure** of the reviewer's material relationship to the business, and
 - (ii) the officer or manager:
 - (a) encouraged the prospective reviewer not to make such a disclosure,
 - (b) did not instruct that prospective reviewers disclose clearly and conspicuously their relationship to the business, or
 - (c) knew or should have known that such a review appeared without such a disclosure and failed to take remedial steps.

§ 465.5(c)(2)

- However, paragraph (c)(1) of this section does not apply to generalized solicitations to purchasers for them to post reviews about their experiences with the product, service, or business.

A review invitation system operates via integration with a CRM platform where customer details are automatically fed through to generate review invitations following on from purchases. A business inadvertently invites persons that are related to an officer, manager, employee, or agent. Is this a violation of § 465.5(c)?

- A. Yes
- B. No
- C. It Depends

465.6 Company-Controlled Review Websites or Entities

§ 465.6

- It is an unfair or deceptive act or practice and a violation of this part for a business to **materially misrepresent**, expressly or by implication, that a website, organization, or entity that it controls, owns, or operates provides **independent reviews or opinions**, other than consumer reviews, about a category of businesses, products, or services including the business or one or more of the products or services it sells.

465.7 Review Suppression

§ 467.6(a)

- It is an unfair or deceptive act or practice and a violation of this part:
- (a) for anyone to use an unfounded or groundless legal threat, a physical threat, **intimidation**, or a public false accusation in response to a consumer review that is made with the knowledge that the accusation was false or made with reckless disregard as to its truth or falsity, in an attempt to:
 - (1) **prevent a review** or any portion thereof from being written or created, or
 - (2) cause a review or any portion thereof to be **removed**, whether or not that review or a portion thereof is replaced with other content or

§ 465.7(b)

- for a business to **materially misrepresent**, expressly or by implication, that the consumer reviews of one or more of the products or services it sells displayed in a portion of its website or platform dedicated in whole or in part to receiving and displaying consumer reviews represent **most or all the reviews** submitted to the website or platform when reviews are being suppressed (i.e., not displayable) based upon their ratings or their negative sentiment.
- For purposes of this paragraph, a review is not considered suppressed based upon rating or negative sentiment if the suppression occurs based on criteria for withholding reviews that are applied equally to all reviews submitted without regard to sentiment, such as when:

§ 465.7(b) Cont.

- (1) the review contains:
 - (i) trade secrets or privileged or confidential commercial or financial information,
 - (ii) defamatory, harassing, abusive, obscene, vulgar, or sexually explicit content,
 - (iii) the personal information or likeness of another individual,
 - (iv) content that is discriminatory with respect to race, gender, sexuality, ethnicity, or another intrinsic characteristic, or
 - (v) content that is clearly false or misleading;
- (2) the seller reasonably believes the review is fake; or
- (3) the review is wholly unrelated to the products or services offered by or available at the website or platform.

Is it legitimate to suppress a review due to a snowstorm obstructing the delivery of a package under § 465.7

- A. Yes
- B. No
- C. It Depends

465.8 Misuse of Fake Indicators of Social Media Influence

§ 465.8

- It is an unfair or deceptive act or practice and a violation of this part for anyone to:
 - (a) **sell or distribute fake indicators of social media influence** that they knew or should have known to be fake and that can be used by individuals or businesses to materially misrepresent their influence or importance for a commercial purpose; or
 - (b) **purchase or procure fake indicators of social media influence** that they knew or should have known to be fake and that materially misrepresent their influence or importance for a commercial purpose.

Conclusions & Summary

Conclusions

- This rule will enhance deterrence and strengthen FTC enforcement actions.
- In the preliminary regulatory analysis, the high-cost compliance scenario assumed an average compliance burden of 8 hours of attorney time for firms with greater than 500 employees.
- A business offering third-party review fraud detection tools offered research that it claimed showed that the rule would generate benefits of \$180.83 billion and that the benefits would outweigh the costs 100:1. These estimates are similar to those of the Commission.

Summary

- 465.2 Fake or False Consumer Reviews, Consumer Testimonials, or Celebrity Testimonials.
- 465.4 Buying Positive or Negative Consumer Reviews.
- 465.5 Insider Consumer Reviews and Consumer Testimonials.
- 465.6 Company-Controlled Review Websites or Entities.
- 465.7 Review Suppression.
- 465.8 Misuse of Fake Indicators of Social Media Influence.

Presenter



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