Rethinking Online Review Compliance After FTC Enforcement

By **Vejay Lalla, Kimberly Culp and Justin Stacy** (May 9, 2023)

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The Federal Trade Commission announced an enforcement action against The Bountiful Company for a practice the FTC dubbed "review hijacking" on Feb. 16.

Bountiful, a vitamin and supplement company, falsely represented that certain products received ratings and reviews that, in reality, belonged to other products sold by Bountiful.

Bountiful is set to pay $600,000 under the agency's proposed consent order.

Background

This case marks the first action the FTC has taken against a company for review hijacking, one of several practices that the FTC had foreshadowed it would take aim at when it released an advanced notice of proposed rulemaking back in October 2022.

In that release, it announced that it was considering a new rule to help protect consumers against deceptive and unfair review or endorsement practices, such as fake reviews, suppression of negative reviews, or positive reviews that were bought and paid for.

The FTC identified several practices involving the use of reviews or endorsements that it considered to be "clearly deceptive or unfair" in its announcement of the proposed rulemaking:

- Fake reviews: These include reviews and endorsements by people who do not exist or have not used the product or service or who are not truthful about their experiences.

- Review reuse fraud: Some sellers hijack or repurpose reviews posted about another product or service.

- Paid reviews: Marketers may pay for positive reviews about their products or negative reviews about competitors' products.

- Insider reviews: These include reviews written by a company's executives or solicited from its employees that don't mention their connections to the company.

- Review suppression: Companies might claim that their websites display all reviews submitted by customers when they suppress negative reviews or attempt to suppress reviews on other platforms by threatening the reviewers.

- Fake review websites: This is when a seller sets up a purportedly independent website or organization to review or endorse its own products.

- Buying followers: This involves buying or selling followers, subscribers, views or other indicators of social media influence.

By identifying these practices as "clearly deceptive or unfair," the FTC has essentially stated its interpretation that such acts violate the Federal Trade Commission Act.

The FTC Act provides that "unfair or deceptive acts or practices in or affecting commerce ... are ... declared unlawful."

Deceptive practices are defined in the FTC's policy statement on deception as involving a material representation, omission or practice that is likely to mislead a consumer acting reasonably in the circumstances.

According to the FTC Act, an act or practice is unfair if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition."

Section 12 of the Federal Trade Commission Act specifically prohibits false advertisements likely to induce the purchase of food, drugs, devices or cosmetics.

Accordingly, a company engaging in any of the above practices involving reviews or endorsements will be held to have violated Section 5(a) of the FTC Act, as well as Section 12 if the product at issue is a food, drug, device or cosmetic. Such violations can expose a company to stiff civil fines and other penalties.

This enforcement action marks a continuation of the goals the FTC stated when announcing its October advanced notice of proposed rulemaking: "to crack down on purveyors of deceptive reviews and endorsements." Before this, in August 2022, the FTC charged the rental listing platform Roomster and its owners with duping consumers seeking affordable housing by paying for fake reviews.

In some cases, using proper disclosures can resolve the potential risk of violating the FTC's guidance, but this is not always the case.

For example, if a brand pays for a review or endorsement and discloses that to the consumer in the form of a proper disclosure such as #Ad or #Sponsored, this could resolve the potential deceptive act or omission. However, in other cases, disclosure may not necessarily mitigate the risks.

For example, even where a paid review is disclosed as being paid for by a brand, the disclosure would be ineffective in protecting the marketer against a claim based on an underlying false or misleading claim made in the review. In such a case, the marketer could still be responsible for the deceptive product claim if it amplifies such false or misleading claim in its own marketing.

Key Takeaways and Best Practices

Businesses operating online and displaying customer reviews or other endorsements must do so honestly and carefully to ensure consumers are not making purchasing decisions relying on a deceptive act or practice that affects the credibility of the review.

Accordingly, it is important for the marketing, business and legal teams to work together to develop a process to ensure compliant marketing practices with respect to the display of reviews or endorsements for products for sale online.

It is also worth noting that such practices could increasingly become the target for consumer class actions under various state laws that have similar prohibitions against false or deceptive advertising, much like the FTC Act. Therefore, businesses that utilize or market customer reviews or other endorsements alongside their products on online marketplaces should heed not only the recent activity by the FTC, but also the threat of consumer class actions that mirror or follow the FTC's own enforcement actions for the same conduct.

So what should businesses that display product reviews or endorsements online do to ensure that they do not draw the ire of the FTC or consumers? At a minimum, they should consider the following:

- Understand the practices outlined above and what constitutes a fake review. Companies should identify any reviews or endorsements displayed for their products online, and honestly assess whether corrective action is needed to comply with the standard set forth by the FTC in its recent proposed rulemaking and illustrated by the case against Bountiful.

- Work with their development teams and counsel to create a standard set of practices for the use and display of any reviews or endorsements to ensure that they are honest and real.

- Ensure that reviews or endorsements that are paid or otherwise incentivized have clear and conspicuous disclosures indicating so in accordance with FTC guidance on how to properly make such disclosures.

- Avoid suppressing negative reviews, creating fake reviews or lumping reviews for different products into a single set.

- Review social media presence and practices to ensure that the company is not buying or otherwise paying for followers, subscribers or the like.

- Review their online marketplace presence to ensure that if reviews are being selectively displayed, there is no indication that the reviews shown are the entirety of reviews ever left for that product.

- Make consumer trust and transparency of choice a top priority for the use of reviews or endorsements.

- Review e-commerce platform relationships that help seed reviews as well as talent and other endorsement agreements to ensure that such partners are both contractually required to make proper disclosure and complying with FTC guidance, and terminate noncompliant partners.

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