

A Retailer's Cautionary Tale On Customer Review Suppression

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In the first announcement of its kind, the Federal Trade Commission said on Jan. 25 that it had settled charges brought against Fashion Nova LLC under Section 5(a) of the FTC Act for failure to publish negative product reviews on its website.

The settlement with the California-based fast-fashion apparel company highlights the FTC's enforcement authority, with respect to customer review content. It also raises new considerations for retailers that post their customer reviews online.

Charges and Settlement With Fashion Nova

The FTC's proposed administrative complaint, which was filed simultaneously with the proposed settlement, alleges that Fashion Nova used a third-party online product review management interface to automatically post to its website customer reviews that were four stars or higher — on a five-star scale — but hold back for further scrutiny reviews that were three stars or less.

Once held back, Fashion Nova never approved or published lower-starred reviews.

Despite holding back negative customer reviews, the complaint states that Fashion Nova encouraged customers to submit product reviews directly on its product pages and in emails sent to customers following a recent purchase.

The complaint contains one count for violation under Section 5(a) of the FTC Act. Section 5(a) allows the FTC to investigate and challenge "unfair methods of competition in or affecting commerce." Here, the FTC charges Fashion Nova with using unfair methods of competition based on the company making false or misleading representations on its website concerning its products.

The terms of the FTC's settlement provide that Fashion Nova must:

- Pay a fine to the FTC in the amount of \$4.2 million;
- Cease making misrepresentations about any customer reviews or endorsements; and



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- Display all product reviews, including reviews that were previously withheld from public view unless the review contains obscene, sexually explicit, racist or unlawful content, or is unrelated to the product or customer services, such as comments regarding shipping or returns.

In the same announcement, the FTC stated that it would be sending letters to 10 review management companies to place them on notice that censoring negative reviews is a violation of the FTC Act.

Along with the settlement, the FTC also released additional guidance on how companies can properly collect, moderate and publish reviews.

Implications for Retailers

Representing the FTC's first-ever public challenge to a company's failure to post negative reviews of products, the settlement is a clear signal to retailers that the FTC is mobilizing to ensure that companies' online reviews are accurate.

Moreover, the announcement comes on the heels of the FTC's official warning issued in October 2021 to more than 700 advertisers. The warning said that companies will "incur significant civil penalties" for using "[f]ake reviews and other forms of deceptive endorsements [to] cheat consumers and undercut honest business."

While the Fashion Nova settlement falls under the FTC's enforcement authority under Section 5(a) of the FTC Act, the FTC has similar authority under the more recently enacted Consumer Review Fairness Act, which makes it illegal for a company to employ a contract provision that:

- Bars or restricts review of a company's products, services or conduct;
- Imposes a penalty or fee against someone who provides a review; or
- Mandates surrender of intellectual property rights in the content of reviews.

In 2019, the FTC announced complaints against two companies for inclusion of prohibitions of negative review in their contracts with consumers, sometimes referred to as nondisparagement clauses, in violation of the CRFA.

Between the FTC's enforcement authority under Section 5(a) and the CRFA, this settlement with Fashion Nova suggests that any editing or purging or other actions that could be seen as manipulating product reviews subject retailers to the risk of an enforcement action.

These issues also raise the possibility of class action exposure for violation of state laws prohibiting unfair or deceptive trade practices. Although the real impact of the FTC's announcement and apparent focus on customer reviews is yet to be seen, in the near term, retailers should carefully review their processes for handling reviews.

This includes a review of relevant consumer-facing terms and conditions and retailer agreements with third-party review management platforms to ensure that all customer reviews are published in accordance with the law.

The FTC's announcement and simultaneous written notice to review management companies also brings

into focus potential liability concerns for retailers that outsource review management functions to third parties.

Retailers may be held responsible for customer review suppression and manipulation on their platform, even if the review management services are contracted out of their direct control.

In this regard, it may be incumbent on retailers to enact policies and procedures to ensure not only their own compliance with the FTC Act and CRFA, but also the compliance of third parties.

In light of the implications of the Fashion Nova settlement, the FTC's new guidance for online retailers provides helpful rules of thumb for collecting, moderating and publishing reviews, including working with other companies on reviews.

With respect to collection of reviews, the FTC's guidance cautions retailers to refrain from the following conduct:

- Asking for reviews from people who have not used or experienced the product;
- Asking staff to write reviews, unless such an ask is clearly disclosed in the review;
- Asking for reviews only from customers thought likely to be positive in the review;
- Asking family and friends for reviews without revealing that connection in the review; and
- Conditioning an incentive for leaving a review on the review being positive; if any incentive is offered, the incentive should be disclosed in the review.

With respect to working with other companies, the FTC's guidance offers the following advice depending on the type of company:

- Comparison websites: Do not participate with sites that run pay-to-play operations, offering better ratings and reviews for a fee.
- Review platforms: Disclose any commercial relationship with a review platform. If using a review platform to flag potentially fake or defamatory reviews, do not use that reporting mechanism to avoid or dispose of honest, negative reviews.
- SEO and reputation management companies: Scrutinize the exact services provided by these companies before entering into an arrangement or risk responsibility for unlawful conduct they commit on your behalf.

This guidance, along with the FTC's announcement and enforcement authority, makes one thing abundantly clear — retailers must not remove, edit or otherwise alter honest, negative customer reviews.

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