

Companies Should Not Fake It Until They Make It

By Robert J. Roby

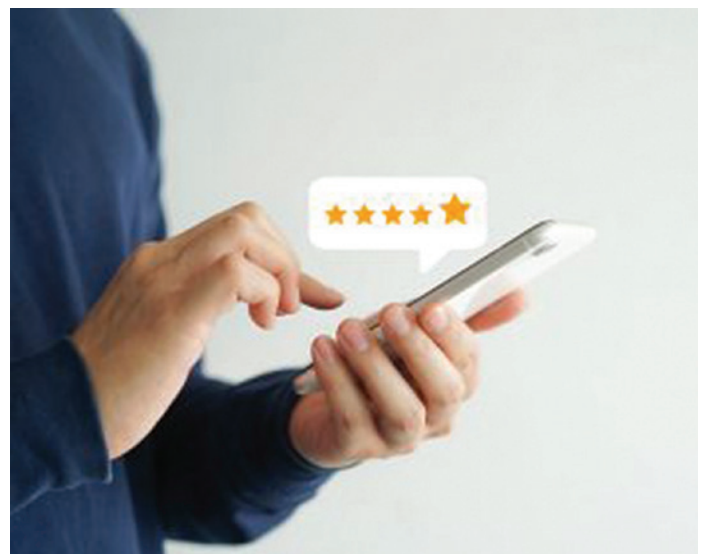
August 27, 2023

Any astute business spends time preparing for the future, while assessing past performance and returns on investment in marketing initiatives. Given the competitive nature of many industries, businesses are looking for any opportunity to improve the sales pipeline and increase revenue.

Recently, the FTC has noted a distinct trend in the online shopping world: fake reviews and review manipulation. To counteract this trend, the FTC has developed a proposed “Trade Regulation Rule on the Use of Consumer Reviews and Testimonials.” This proposed rule would render fake reviews and review manipulation illegal. The Notice of Proposed Rulemaking was published on July 31, 2023, with a request for public comment. All public comments are due by Sept. 29, 2023.

This recent Notice of Proposed Rulemaking follows an Advanced Notice of Proposed Rulemaking, which published on Nov. 8, 2022. As explained in the Advanced Notice, the FTC is concerned with:

- the use of reviews or endorsements by people who do not exist, who did not actually use or test the product or service, or who were misrepresenting their experience with it;
- review hijacking, where a seller steals or repurposes reviews of another product;
- marketers offering compensation or other incentives in exchange



Source: Adobe Stock

for, or conditioned on, the writing of positive or negative consumer reviews;

- owners, officers, or managers of a company (i) writing reviews or testimonials of their own products or services, or publishing testimonials by their employees or family members, which fail to provide clear and conspicuous disclosures of those relationships;
- the creation or operation of websites, organizations, or entities that purportedly provide independent reviews or opinions of products or services but are, in fact, created or controlled by the companies offering the products or services;
- misrepresenting that the consumer reviews displayed represent most or all of the reviews submitted when, in fact, reviews are being suppressed based upon their negativity;
- the suppression of customer reviews by

physical threat or unjustified legal threat; and

- selling, distributing, or buying followers, subscribers, views, and other indicators of social media influence.

More than 40 comments were received in response to the Advanced Notice. Those comments guided the proposed rules in the recent Notice of Proposed Rulemaking.

A primary goal of the proposed rules is to improve the information available to consumers by reducing the level of review manipulation in online reviews and endorsements. The FTC argues that the proposed rules are not really new, but simply reflect an application of preexisting law under Section 5 of the FTC Act, which prohibits unfair methods of competition.

If the proposed rules go into effect, the FTC anticipates that companies will notify their employees, conduct a review of their existing processes relating to reviews and social media influence, and take appropriate steps to ensure compliance. The threat of penalties is real. Businesses and individuals face a possible fine of up to \$50,120 per violation should they be found to have violated any of the rules.

The proposed rules define conduct that, in the context of consumer reviews or testimonials, constitutes unfair or deceptive acts or practices. These acts and practices already may be considered unlawful under Section 5 of the FTC Act, but the FTC believes the proposed rules may enhance deterrence. The proposed rules will enable the FTC to seek civil penalties against violators, and they will enable the FTC to obtain monetary redress more easily for victims.

Similar to the DMCA, the proposed rules appear to insulate platforms from enforcement actions as long as the platforms are only disseminating consumer reviews that are not of the platform's products, services, or businesses. In addition, if the platform is simply publishing the reviews and the platform is not purchasing the reviews, the platform should not find itself subject to being targeted for an enforcement action.

False Consumer Reviews and Consumer or Celebrity Testimonials

The proposed rules will address the source of fake reviews and testimonials and also will address the purchasing or dissemination of testimonials known to be false by the business. In both situations, a fake review or testimonial is one that is by someone who does not exist, who did not use or otherwise have experience with the product, service or business that is the subject of the review, or materially misrepresents the reviewer's or testimonial provider's experience with the product, service or business. Note that this does not require a reviewer to be a purchaser or a verified purchaser; rather, the reviewer must only have had experience with the product, service or business.

Consumer Review Repurposing

Another form of deceptive consumer review relates to repurposing of consumer reviews written or created for one product so it appears to have been written or created for a substantially different product. What is a different product? The definition of "substantially different product" clarifies that the term refers to a product that differs from another product in one or more material attributes other than in color, size, count or flavor. Businesses will need to take care when grouping articles for sale to ensure that they are not substantially different, and to ensure that consumers will not mistakenly attribute reviews to the wrong articles.

Buying Positive or Negative Reviews

Under the proposed rules, businesses will not be allowed to "purchase a consumer review," which will be broadly defined to include anything that provides something of value to the reviewer, and may include money, goods, or an exchange of a review. In addition, businesses will be prohibited from offering compensation or any other incentives in exchange for, or conditioned on, the writing or creation of consumer reviews expressing any "particular" sentiment, whether positive or negative, regarding the product, service,

or business that is the subject of the review. Importantly, the focus of the FTC is on the “particular” sentiment that must be expressed; yet some incentives can be provided for reviews as long as the incentives are not conditioned on the expression of a “particular” sentiment in the review. The proposed rule also does not apply to “review gating,” which is when a business asks for feedback from past purchasers and invites only positive posts online.

Insider Consumer Testimonials and Company-Controlled Review Websites

The proposed rules also will target insider consumer reviews and testimonials, as well as websites that appear to be independent while, in reality, are being controlled by the business whose products are being reviewed. While it will remain fine to have officers and managers submitting reviews, the relationship must be clearly and conspicuously disclosed.

The rules also ban testimonials written by or solicited from the business’s officers, managers, employees or agents, as well as any of their relatives without clear and conspicuous disclosures of those relationships. The FTC is trying to prohibit both the creation and publishing of insider reviews. While there is no definition of “relative,” the proposed rules likely will be limited to situations in which the officers or managers know or should know that they are soliciting a relative for an endorsement or testimonial.

Review Suppression

The FTC wants to limit review suppression, especially when the suppression is due to threats of legal action or physical intimidation. To protect good faith online reputation management, the proposed rules are limited to prohibiting unjustified or baseless threats to bring legal action.

An example of a baseless action might include an allegation of defamation against truthful speech or matters of opinion. A business could also violate

the rules if it misrepresents that the reviews of one or more of its products or services are representative of most or all of the reviews while suppressing selected justified negative reviews.

Non-publication of reviews would not, however, be considered to be review suppression as long as the criteria for non-publication relate to trade secrets, libelous or harassing language, information about a third party, discriminatory language or content that is clearly false or misleading.

Misuse of Fake Indicators of Social Media Influence

Finally, the FTC has expressed concern about the misuse of fake indicators of social media influence. The indicators mentioned by the FTC include followers, friends, connections, subscribers, views, plays, likes, reposts and comments. The FTC is proposing to prohibit the buying or selling of fake indicators of social media influence if they will be used for a commercial purpose.

Conclusion

The FTC has proposed a number of rules that will address situations in which the FTC believes consumers are being harmed. Each of the rules begins with “It is an unfair and deceptive act or practice and a violation of this rule for anyone to...” Businesses and individuals should keep in mind that a violation of any of these rules could result in an enforcement action by the FTC and significant financial penalties. Astute business owner should begin preparing for the implementation of the proposed rules now.

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