Alert to Ecommerce Marketers: Suppressing Negative Reviews Can Lead To Legal Trouble

Fashion retailer agrees to $4.2 million settlement with the FTC and the issuance of guidance regarding consumer reviews

Ecommerce marketers are increasingly relying on reviews to help drive sales, particularly given the impact of Amazon on retail sales. How marketers select and post online reviews have come under increasing scrutiny by federal and state regulators. A recent enforcement action and published guidance highlights these concerns.

Recently, online fashion retailer Fashion Nova, LLC agreed to pay $4.2 million to the Federal Trade Commission (“FTC”) to resolve allegations that it blocked negative customer reviews from its website. Besides the payment, Fashion Nova will also be prohibited from suppressing negative reviews in the future. The FTC alleged that the California-based retailer, which sells fast fashion products online, implicitly misrepresented that the reviews on its website reflected the views of all purchasers who submitted reviews, when in fact it suppressed reviews with ratings lower than four stars out of five. The case is the FTC’s first involving a company’s efforts to conceal negative customer reviews.

The FTC's administrative complaint contained a single cause of action, entitled deceptive review practices. Fashion Nova used a third-party interface that automatically posted four- and five-star reviews to its website but held three-star and below reviews for review and approval. The FTC alleged that from late 2015 until November 2019, Fashion Nova never posted “hundreds of thousands” of the lower-starred reviews. According to the FTC, suppressing negative reviews deprives consumers of potentially useful information and artificially inflates the product’s average star rating.

In conjunction with this first-of-its-kind settlement, the FTC issued a set of guidelines for online retailers and review platforms to educate them about collecting and publishing reviews in ways that do not mislead consumers.

The guidance includes the following recommendations by the FTC:

1. Publish all genuine reviews and don’t exclude negative ones.
2. Don’t display reviews in a misleading way. For example, it could be deceptive to feature the positive ones more prominently.
3. If you display reviews when the reviewer has a material connection to the company offering the product or service – for example, when the reviewer has received compensation or a free product in exchange for their review – that relationship should be clearly and conspicuously disclosed.
4. Clearly and conspicuously disclose how you collect, process, and display reviews, and how you determine overall ratings, to the extent necessary to avoid misleading consumers.
5. Have reasonable procedures to identify fake or suspicious reviews after publication. If a consumer or business tells you a review may be fake, investigate and take appropriate action. That may include taking down suspicious or phony reviews, leaving them up with appropriate labels, issuing an alert about them, and addressing the issue with those responsible for it.

The FTC also announced that it placed 10 other companies that offer review management services on notice that avoiding the publication of negative reviews violates the FTC Act. This is in addition to the more than 700 warning letters issued to marketers regarding potential violations relating to fake reviews.

Under the proposed settlement, Fashion Nova will pay $ must post on its website all customer reviews of products currently being sold—with the exception of reviews that contain obscene, sexually explicit, racist, or unlawful content and reviews unrelated to the product or customer services (such as shipping or returns).

Keep in mind that this action was brought under Section 5 of the FTC Act, and not under the Consumer Review Fairness Act. That regulation prohibits a company from using a contractual provision to bar or restrict, impose a penalty for a review, or requires a reviewer to give up their intellectual property associated with the review. The law also provides that a company can prohibit or remove a review that contains confidential or private information – for example, a person’s financial, medical, or personnel file information or a company's trade secrets, is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristic; is unrelated to the company’s products or services; or is clearly false or misleading.

These recent developments put marketers on notice that they need to be careful have objective criteria with respect to selective posting of consumer reviews that treats all reviewers the same, regardless of whether the reviews are positive or negative.

**TAKEAWAY:** Key takeaways for businesses that publish online reviews are: do not prevent or discourage people from submitting negative reviews and treat all reviewers equally regardless of positive or negative; while you can offer an incentive to leave a review, it is risky to do so and must not be conditioned on the review being positive. The best practice is to label incentivized reviews; and don’t ask for reviews only from people you think will leave positive ones.

**Tags:** FTC, Settlement