Court Rules FTC's Non-Compete Rule Is Unenforceable Nationwide

By Leonard L. Gordon, Liz Clark Rinehart & Jay Prapaisilp on August 22, 2024
POSTED IN FTC

The Federal Trade Commission's (FTC) rulemaking crusade suffered a serious blow this week, when Judge Ada Brown of the Northern District of Texas set aside the agency's Final Rule that made most employment-related non-compete agreements unenforceable. The court found that the rule exceeded the FTC's authority and was arbitrary and capricious. Absent appellate intervention, the decision will prevent the rule from taking effect nationwide.

Although the rule arose from the FTC's competition mission, the rationale of the decision has larger implications and highlights some of the challenges the FTC faces in its effort to regulate broad swaths of the economy, including as part of its consumer protection efforts.

1. The Rule

In January 2023, after studying the issue for several years, the FTC announced its first cases challenging non-competes. Days later, the FTC proposed the Non-Compete Rule, justifying the agency's expertise in the area by citing the recent cases. In April 2024, the FTC adopted the Final Non-Compete Rule, which broadly banned non-compete provisions in employment relationships. The rule was scheduled to take effect on September 4, 2024.

In promulgating the rule, the FTC claimed that Sections 5 and 6(g) of the FTC Act authorized the agency to make rules prohibiting unfair methods of competition. Section 5 permits the FTC to prevent covered entities "from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." Section 6 allows the FTC to promulgate rules and regulations to carry out its mission.

2. The Challenges

Litigation challenging the rule under the Administrative Procedure Act (APA) quickly ensued in the Northern District of Texas. The plaintiffs alleged that the

FTC's actions in issuing the rule exceeded the agency's authority, were unconstitutional, and were arbitrary and capricious.

On July 3, 2024, the court granted the plaintiffs' motion for a preliminary injunction enjoining the FTC from enforcing the rule as to the named plaintiffs. By contrast, in a case brought by different parties, a district court in the Eastern District of Pennsylvania subsequently denied a similar request for an injunction, creating a split.

The parties in the Texas action cross-moved for summary judgment, and this week the court granted the plaintiffs' motion and denied the FTC's motion.

3. The FTC Exceeded Its Authority

Judge Brown began her analysis by quoting the Supreme Court's recent decision in *Loper Bright*, noting that the APA serves "as a check upon administrators whose zeal might otherwise have carried them to excesses not contemplated in legislation creating their offices." She then concluded that Section 6(g) did not authorize the Non-Compete Rule for the following reasons:

- The plain language of Section 6(g) and its placement in the overall statutory scheme (separate from the substantive rulemaking provisions) demonstrated that it permitted the FTC to engage in procedural rulemaking, but not substantive rulemaking
- The lack of any provision creating a penalty or consequence for violating rules issued under Section 6(g) also supports the conclusion that Section 6(g) permits only procedural rulemaking
- Before the Non-Compete Rule, the FTC had not promulgated a substantive rule under Section 6(g) since 1978 and, even before that, had rarely invoked Section 6(g)
- Congress has never affirmatively granted the FTC substantive rulemaking power regarding unfair methods of competition. When Congress added Section 18 to the FTC Act, it provided the FTC with substantive rulemaking authority that was limited to unfair and deceptive acts or practices
- Although Section 18 states that it does not affect the FTC's authority to prescribe rules or policy statements on unfair

competition, that does not affirmatively grant the FTC the authority to issue substantive rules

Based on this analysis, the court concluded that the FTC had exceeded its statutory authority in issuing the Non-Compete Rule.

4. The Rule Is Arbitrary and Capricious

The court also found that the rule was overbroad without a reasonable basis for that breadth, rendering the rule arbitrary and capricious under the APA. In so finding, the court noted:

- The FTC relied on studies examining the effects of state non-compete policies, but no state had enacted a rule as broad as the FTC's Non-Compete Rule, and the FTC had failed to provide an evidentiary basis for that breadth
- The FTC ignored the positive benefits of non-compete agreements and the empirical evidence regarding such benefits
- The FTC failed to sufficiently address alternatives to the broad rule

5. Remedy and Consequences

Pursuant to the APA, the court set aside the rule and ordered that it shall not be enforced or take effect, explicitly stating that the remedy was to apply nationwide.

The decision here is part of a long string of decisions in the Fifth Circuit pushing back against novel or expansive exercises of agency power. The Supreme Court has been sympathetic to some, but not all, of these efforts. This case is likely headed to the Fifth Circuit and then the Supreme Court, absent a change in administration and regulatory approach.

The case is also significant for the rest of the FTC's rulemaking agenda. To the extent that the FTC was considering other regulations on unfair methods of competition, such regulations seem dead on arrival for now. The court's criticisms of the FTC's rulemaking as arbitrary and capricious will also be raised by plaintiffs challenging other FTC rules, including rules touching on consumer protection issues.

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Façade, Fraud: FTC Final Rule Banning Fake Reviews

By Leonard L. Gordon, Shannon Sansom & Ellis McKennie on August 16, 2024
POSTED IN CONSUMER PROTECTION, ENDORSEMENTS, FTC

On August 14, the Federal Trade Commission (FTC) announced a final rule aimed at protecting American consumers against fake reviews and testimonials. The rule, approved through a 5-0 vote, comes after nearly two years of rulemaking proceedings on the topic. The FTC has said customer reviews play an important role in consumer decision making, and the rule follows in the steps of related cases and notices of penalty offenses brought and issued by the FTC against the use of fake reviews, as well as guidance the FTC has published on the use of endorsements and testimonials. This final rule now provides the FTC with a potentially powerful tool to punish businesses that knowingly violate it, and to seek consumer redress for violations of the rule.

The rule, which is set to be effective 60 days after its publication in the *Federal Register*, addresses the following practices:

- **Fake Reviews:** The rule prohibits reviews which misrepresent the fact that they are provided by someone who does not exist, or who does not have actual experience with the product or service. Reviews that misrepresent the experience of the reviewer are also prohibited.
- **Paid Reviews:** Expressly or implicitly conveying an offer of compensation or benefits in exchange for a review that communicates a particular sentiment is prohibited.
- **Disclosure Requirements:** The rule requires that, in most instances, any reviews or testimonials provided by an officer or manager of a business must be accompanied by a clear and conspicuous disclosure of the individual's material relationship to the business; where a communication is made through both video and audio, that disclosure must be provided in the same manner as the claim that requires the accompanying disclosure. Similarly, the rule deems it unfair or deceptive to expressly or implicitly misrepresent a review website as independent, when in reality it is materially related to the business.

- **Review Suppression:** The rule prohibits review suppression through threats or intimidation tactics. Correspondingly, it is unfair and deceptive for a business to materially misrepresent that reviews displayed by the business represent a majority or all of the reviews related to a product or service, when in fact additional reviews are suppressed because of their negative or unfavorable comments.
- **Influence Inflation:** The buying and selling of social media indicators to misrepresent the online influence of certain accounts is prohibited, including when those indicators are known to be or should be known as fake.

Under this new rule, the FTC can seek penalties not only on individuals or companies who create fake reviews, but also on those who may be involved in the purchase, sale, or facilitation of fake reviews, particularly when the business knows or should know the reviews or testimonials are fake or false.

Multiple stakeholders throughout the rulemaking process submitted comments arguing that the rule is unnecessary or unwarranted. However, even though the practices addressed in the new rule are already unlawful under Section 5 of the FTC Act, the FTC ultimately disagreed with the commenters, writing that the rule will further deter such unfair and deceptive acts, and aid in the law's enforcement. As is commonly relied upon as the rationale behind these arguably redundant rules, the FTC believes the compliance costs will be outweighed by the consumer benefits, and that the rule will increase proper competition between businesses.

In the wake of the *AMG Capital Management* decision, which limited the agency's ability to seek equitable monetary relief for deceptive advertising, the FTC continues to push its rulemaking agenda in an attempt to fill the gap left by *AMG*. Whether industry participants will seek to challenge this rule remains to be seen, but the Supreme Court's recent decision in *Loper Bright* may serve as encouragement for such action.

In the interim, companies that use consumer reviews in their marketing and advertising practices should ensure their compliance with this new rule. If you think your business's tactics may be affected by the rule's requirements, we are here to help. Bookmark our All About Advertising Law blog and subscribe to our monthly newsletter for more updates.

The Loper Bright Impact: Agency Action Likely to Face More Scrutiny in Light of the Supreme Court's Disposal of Chevron Deference

By Leonard L. Gordon & Shahin O. Rothermel on July 10, 2024
POSTED IN FEDERAL REGULATIONS, U.S. SUPREME COURT

These days, it seems like there are three guarantees in life—death, taxes, and monumental Supreme Court administrative law opinions in the summer. As you've probably heard by now, the trend continues this year, including perhaps the largest fireworks display possible (in the administrative law context, that is). If for some reason you've been ignoring the news, just recently in *Loper Bright Enterprises v. Raimondo*, the Supreme Court overruled the *Chevron* decision and held that courts need not defer to an agency's interpretation of a statute; rather, courts must exercise independent judgment when determining whether an agency acted within its statutory authority.

There's a lot to unpack in the 109 pages of majority, concurring, and dissenting opinions. So, we'll just focus on what this could mean for the recent uptick in agency action coming out of the Federal Trade Commission (FTC) and Consumer Financial Protection Bureau (CFPB).

1. Heightened Scrutiny for FTC Rulemaking and Enforcement

It's no secret (at least for those following this blog) that the latest iteration of the FTC is flexing its rulemaking muscles in new areas—such as AI impersonation, junk fees, and consumer reviews—as well as further refining areas of scrutiny—such as implementing the Negative Option Rule beyond what the Restore Online Shoppers Confidence Act (ROSCA) curtails. This flurry of rulemaking results in large part from the Supreme Court's *AMG* decision stripping the FTC of its equitable monetary relief authority. The *Loper Bright* opinion now presents several layers of issues for the FTC's regulatory regime.

First, where statutes that the FTC enforces or implements are ambiguous, courts are no longer required to defer to the FTC's interpretation of the statute. This has already impacted the FTC's Non-Compete Clause Rule, which largely imposes a future ban on non-compete agreements. The FTC relied on Section 6(g) of the FTC Act as its purported authority to promulgate rules to prevent unfair methods of competition. Several parties challenged the rule, alleging that Section 6(g) does not authorize substantive unfairness rulemaking.

On July 3, the court hearing the case in the Northern District of Texas issued a preliminary injunction preventing the rule from taking effect. Relying on *Loper Bright*, the court concluded that the "text, structure and history of the [FTC] Act," opposed to the FTC's interpretation, demonstrates that the FTC lacks substantive rulemaking authority under Section 6(g). (Other potential ambiguities in the FTC's enforcement regime could be the FTC's policy view purporting to define "clear and conspicuous," "material terms of the transaction," and "simple mechanisms" to cancel under ROSCA.)

Second, *Loper Bright* casts a looming shadow on courts' deference to an agency's interpretation of its own rules—known as *Auer* deference. Though the Supreme Court recently reaffirmed *Auer* deference, that could prove difficult to square with the reasoning in *Loper Bright*. Specifically, *Loper Bright* is grounded in the principle that courts' role is to recognize the bounds of the delegated authority and "ensur[e] the agency has engaged in reasoned decision making within those boundaries." This also may arise in circumstances where, as the Court acknowledged, "the regulation is procedurally defective."

2. Impact on CFPB Authority

The CFPB's recent expansive exercise of its authority also leaves it susceptible to challenges after *Loper Bright*. As we and our colleagues have highlighted, the CFPB has begun to forgo notice and comment rulemaking, instead issuing circulars and advisory opinions to prescribe conduct it deems violative. Since these types of policy statements are not formal rules, they only provide insight as to how the CFPB seeks to enforce the statutes it is tasked with.

In light of *Loper Bright*, these policy statements may have diminishing value for the agency should a statutory ambiguity argument be raised. Furthermore, the CFPB's broad interpretation of the Consumer Financial Protection Act's

unfair, deceptive, or abusive act or practices (UDAAP) restrictions may face additional headwinds. Specifically, *Loper Bright* may open the door to courts rejecting or scrutinizing the CFPB's expansive view of what constitutes "unfair" or "abusive."

However, the Court in *Loper Bright* took pains to observe that "although an agency's interpretation of a statute cannot bind a court, it may be especially informative to the extent it rests on factual premises within the agency's expertise." Given this monumental shift away from *Chevron* deference, only time will tell what the wake of *Loper Bright* will look like.

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Tags: Chevron deference, Loper Bright

FTC Contemplates Rule Aimed at Combating Deceptive Consumer Reviews

By Leonard L. Gordon & Ellis McKennie on February 21, 2024
POSTED IN CONSUMER PROTECTION, CONSUMER REVIEWS, FTC

On Tuesday, February 13, the Federal Trade Commission (FTC) held an informal hearing regarding the Proposed Rule on the Use of Consumer Reviews and Testimonials. Three interested parties each had the opportunity to submit 30 minutes of oral commentary on the proposed rule and generally voiced concerns about the rule's ability to address the issues surrounding consumer reviews.

The FTC's proposed rule seeks to prohibit certain unfair or deceptive acts involving consumer reviews and testimonials. Specifically, it would prohibit buying positive reviews, selling or obtaining fake reviews, suppression of negative reviews, and selling fake social media indicators. Perhaps most importantly, if the rule becomes final, the FTC would be able to seek civil penalties against those engaged in violative review and testimonial practices. Previously, the FTC has only been able to obtain injunctive relief when combating fake reviews, and would have to rely on state attorneys general to join a suit to obtain monetary relief.

The first testifying party, Fake Review Watch, argued that the rule doesn't go far enough to increase transparency from third-party review platforms that host reviews for companies potentially violating the proposed rule. Fake Review Watch indicated that, although Section 230 of the Communications Decency Act likely protects third-party review platforms from liability for hosting reviews, the FTC may have the ability to force third-party review platforms to increase transparency, which could increase the trust in reviews. Specific recommendations from Fake Review Watch include requiring third-party platforms to show users the number of fake reviews removed, give access to information for all removed reviews, provide the geographic location of reviewers, and link to a reviewer's other reviews.

Next, the Interactive Advertising Bureau (IAB) shared concerns that the proposed rule violates Section 230 and the First Amendment. IAB stated that the proposed rule could be chilling on speech and not without excessive cost of

compliance for those subject to the proposed rule. In addition to the substantive critiques, IAB remained critical of the lack of transparency and participatory process required by the FTC's Magnusson-Moss rulemaking procedures. IAB argued that curtailing these procedures has impeded the FTC's ability to promulgate an effective rule.

Finally, Ben Beck, a professor from Brigham Young University introduced multiple studies on the potential impact of the proposed rule and its ability to improve consumer trust. The study concluded that there are five effective ways to build trust in reviews: identity disclosure, monitoring, sanctioning, community building, and status endowment. Inasmuch as privacy is a key factor in any policy decision, the professor advocated against identity disclosure in the proposed rule, as it could present a host of privacy issues, such as misuse and exploitation. However, he argued that if the other four "governance mechanisms" are properly implemented, then identity disclosure in reviews is unnecessary.

At the conclusion of the interested parties' testimony, the presiding administrative law judge outlined the remainder of the informal rulemaking process. Any comments in response to proposed disputed issues of material fact are due on February 20, and if another informal hearing is needed, that will take place on February 27. Be sure to check back in as we continue to follow the rulemaking process.

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Unpacking the FTC's Negative Option Rule Informal Hearing

By Leonard L. Gordon & Shahin O. Rothermel on January 18, 2024
POSTED IN AUTOMATIC RENEWALS, FTC, NEGATIVE OPTION MARKETING

Earlier this week, the Federal Trade Commission (FTC) held its informal hearing on the proposed amendments to the Negative Option Rule. Clearly on display was not only industries' concern about the impact of the proposed rule, but also concern about the FTC's haste toward implementing the rule changes.

As a refresher, the FTC generally must promulgate rules under the Magnuson-Moss Warranty Federal Trade Commission Improvements Act (Mag-Moss) instead of the less-stringent Administrative Procedures Act. Under Mag-Moss, the FTC must first issue an advanced notice of proposed rulemaking (ANPR) seeking public comment, issue a notice of proposed rulemaking (NPRM), have reason to believe that the conduct at issue is "prevalent," conduct informal hearings allowing parties to present their views and finally publish the final rule with a "statement of basis and purpose" accompanying the rule.

Particularly relevant to the Negative Option Rule informal hearing is fact-finding during the rulemaking process. If there are disputed issues of fact (such as, for example, whether conduct is "prevalent"), the FTC must allow participants to rebut and cross-examine those making oral presentations at the informal hearing. Most notably, each party testifying at the hearing opposed either the rule itself or at least the scope of the rule as written.

Thus, as one trade group pointed out in seeking to compel the FTC to present a testifying witness, interested parties were not given the opportunity to cross examine proponents—specifically the FTC—of the proposed rule. Further, several parties also objected to the abbreviated nature of the rulemaking proceedings. As Tech Freedom argued, scheduling of the hearing was rushed, and the parties were limited to 10-minute presentations where Mag-Moss requires more thorough deliberation of the proposed rule. Thus, as Performance Marketing Institute testified, given the abbreviated fact-finding process, the FTC's assertion that there are no disputed issues of fact is disingenuous at best.

As a result of the hearing's limitations, a recurring theme emerged from the parties that testified—that the FTC has not demonstrated the substantial harm to consumers required to promulgate the rule. Hearing participants made several noteworthy points:

- The Restore Online Shoppers' Confidence Act (ROSCA) and state laws already address deceptive billing practices within the proposed rule
- The proposed rule goes beyond imposing requirements on negative option features themselves. Rather, the proposed rule addresses claims for the underlying products or services that use a negative option feature
- Consumers who purchase products or services in bundles, such as in the television and internet context, may face significant difficulties in choosing the services they want, mistaken cancellation, or price increases because of the proposed rule's click-to-cancel requirements
- As at least one hearing participant noted, the FTC provided no evidence that the "save-the-sale" provision harms consumers or interferes with their ability to cancel

Overall, hearing participants expressed concern that the FTC has not conducted an adequate cost-benefit analysis for many aspects of the proposed rule.

Before concluding, the presiding administrative law judge noted that her authority to extend the hearing is limited to 30 days, set a one-week deadline for the parties to brief the material facts that they believe are at issue, and suggested that there will be an additional hearing in two weeks. Accordingly, we will continue to monitor updates in the rulemaking process in the coming weeks.

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FTC Releases Proposed Rule Targeting "Junk" Fees

By Leonard L. Gordon, Ellen T. Berge, David McGee & Jay Prapaisilp on October 11, 2023
POSTED IN CONSUMER PROTECTION, FTC, PRICING

This week, the Federal Trade Commission (FTC) released a Proposed Rule, "Rule on Unfair or Deceptive Fees." The Proposed Rule comes after the FTC solicited comments through its Advance Notice of Proposed Rulemaking in November 2022. The Proposed Rule would cover any business selling in physical locations and online. There is one exception for motor vehicle dealers, which is addressed in a separate rule. The below requirements apply to businesses regardless of whether they are providing the goods or services themselves (e.g., an online travel agent advertising for a hotel chain).

The FTC broadly identified two practices that it intends to regulate: (1) omitting mandatory charges and fees from advertised prices; and (2) misrepresenting the nature and purpose of the charges or fees.

1. Disclosing the "Total Price" for Goods and Services

Under the Proposed Rule, businesses would be required to disclose the "Total Price" clearly and conspicuously (i.e., it must be difficult to miss and easily noticeable) in any offer, display, or advertisement. The Total Price must be disclosed *more prominently* than any other pricing information.

The "Total Price" includes the maximum total of all charges or fees a consumer must pay for a good or service, including mandatory fees for ancillary goods or services. "Maximum total" is intended to allow businesses to apply discounts and rebates after they disclose the Total Price. "Ancillary" goods or services are those that arise out of the same transaction and can be mandatory or optional. To illustrate the mandatory vs. optional ancillary goods/services, the corresponding fees, and the required disclosures: a business would need to include a mandatory trash pickup fee contained in a rental agreement in the advertised listing, but a travel company need not include the cost of an optional travel insurance policy in the booking price.

The Total Price excludes certain fees, such as shipping and government charges, but these nonetheless must be separately disclosed to consumers prior to purchase. Shipping charges do not include delivery via couriers, such as meal delivery mobile applications. Government charges are limited to fees imposed directly by a government entity and do not encompass any charges or fees that businesses choose to pass on to consumers to offset those costs. Additional types of fees that would require disclosure include optional fees, voluntary gratuities, and invitations to tip.

The FTC makes clear that businesses may not artificially increase shipping charges, as those charges must reasonably reflect the costs a business incurs for providing the shipping service. Likewise, government charges cannot be inflated, as they only include charges imposed by the government on consumers.

2. Disclosing the "Nature and Purpose" of Charges and Fees

When listing any charges or fees, a business would be prohibited from categorizing different charges or fees under the same label if they serve distinctly different purposes. Relatedly, the FTC addressed several comments that complained of the use of labels such as "convenience fees," "improvement fees," and "economic impact fees," which are often used as catchall terms for multiple fees. As an illustration, the FTC posits that a meal delivery application could not charge both a fee to compensate its drivers and a fee to run the service under the same label or line item and instead must list the two fees separately. The same business must also disclose the allocation of fees, for example, if a portion of an additional gratuity is used to offset the driver's wages or benefits. If any charges or fees are refundable, that information must also be disclosed.

3. Similar State Laws

The Proposed Rule provides that any state law, regulation, or rule that affords greater protection is not superseded or altered if it is not inconsistent with the Proposed Rule. California Governor Newsom recently signed into law SB 478, which will take effect in July 2024. The law is aimed specifically at "drip pricing," a term for "junk" fees, where advertised prices are less than the actual price consumers end up paying.

Businesses will need to be careful to comply with the forthcoming federal rule and the emerging patchwork of state laws. The Consumer Financial Protection Bureau also recently issued guidance for large banks concerning similar fee issues, and the Biden administration has taken a leading role in promoting the new agency actions.

The FTC is soliciting comments on the Proposed Rule, which are due 60 days after publication in the *Federal Register*.

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FTC Finalizes Updated Endorsement and Testimonial Guides

By Alexandra Megaris, Shahin O. Rothermel & Leonard L. Gordon on July 5, 2023
POSTED IN ENDORSEMENTS, FTC

Thirteen months after proposing sweeping changes to its Endorsements and Testimonial Guides (Guides), the Federal Trade Commission (FTC) has finalized its revised guidelines and released an updated set of FAQs to help guide the industry with respect to the proper use of customer reviews, influencer marketing, and traditional endorsements and testimonials.

The new Guides are over 80 pages. We will dive into specific sections in greater depth in the coming weeks, but here are some highlights:

- **Expanded and clarified definition of "endorsements" and "endorsers**." The revised definitions state that "endorsements" might include tags and "likes," depending on the circumstances. Bots and nonexistent entities or persons purporting to provide endorsements or reviews are considered endorsers.
- **Material connections**. The Guides reiterate the FTC's position that material connections between endorser and advertiser should be disclosed but clarify that a "material connection needs to be disclosed *when a significant minority of the audience for an endorsement does not understand or expect the connection*." Per the FTC, certain well-known influencers may be so closely identified with a particular brand that almost everyone knows of the connection. Furthermore, followers of well-known influencers expect that they endorse products only when paid (but the FTC did not identify specific influencers fitting these descriptions). Instead, it states that *whether any connection is not expected by an audience is a factual question that might require empirical testing*.
- **Disclosures**. The Guides' definition of "clear and conspicuous" aligns with the Commission's guidance in other areas, including that an online disclosure should be "unavoidable." If users can view an endorsement but must click a link labeled "more" to see the disclosure, the FTC will not consider this disclosure sufficiently

clear and conspicuous. This guidance could forecast changes for the FTC's updates to its Dot Com Disclosures.

- **Purchasing "likes**." The Guides state that it is a deceptive practice for advertisers to purchase or create indicators of social media influence and misrepresent these in advertising.
- **Liability of intermediaries**. Section 255.1 now addresses intermediaries like advertising agencies, public relations firms, review brokers, and reputation management companies. The revisions state that such entities might be liable for their roles in "creating" ads containing endorsements that *they know or should know* are deceptive.
- **Changing the likeness or image of endorser**. The Guides state that an endorsement displaying the image or likeness of a person other than the actual endorser is deceptive *if* it misrepresents an attribute that would be material to consumers, e.g., an endorser's complexion in an acne treatment ad.
- **Reformulated products**. The revised Guides clarify that neither the advertiser not the endorser is required to take down or delete historic posts preceding a product's reformulation. However, if an original post is shared or reposted after the product's reformulation, the advertiser should confirm that the reformulation does not change the endorser's views from the original post.
- **Customer reviews**. The revised Guides address the solicitation, use, and misuse of customer reviews. Interestingly, the Guides were issued one day before the FTC issued a Notice of Proposed Rulemaking Banning Fake Reviews and Testimonials. The Endorsement Guides state:
    - The FTC considers it a misleading practice for an advertiser to forward only favorable reviews to a third-party website or omit unfavorable reviews.
    - If an advertiser suppresses negative reviews on its website, the FTC would consider the resulting product pages misleading. However, the FTC clarified that it will apply the Guides consistently with the Consumer Review Fairness Act (CRFA), which states that sellers are not required to display customer reviews with unlawful, harassing, abusive, obscene, vulgar, or sexually explicit content; content that is inappropriate

    with respect to race, gender, sexuality, or ethnicity; reviews that the seller reasonably believes are fake; reviews that "contain[] the personal information or likeness of another person, or [are] libelous," content "that is clearly false or misleading," or "trade secrets or privileged or confidential commercial or financial information." The FTC stated, however, that a seller should apply its criteria uniformly to all reviews. The Commission also clarified its belief that customer service is related to a seller's products when provided by that seller's customer service department.
  - The Guides include a new example addressing "review gating," or asking purchasers to provide feedback but inviting only those with positive feedback to post online reviews. The example states that this "may be unfair or deceptive if it results in the posted reviews being substantially more positive than if the marketer had not engaged in the practice." But the FTC clarified that nothing prohibits businesses from asking happy customers for reviews.
- **Review sites**. The Guides provide that the FTC considers review websites deceptive if they appear to be independent when they are not. Similarly, the FTC takes the position that paid rankings on review sites are deceptive *even if the site discloses that rankings are impacted by payment*. However, if the review site is not paid for higher rankings, and instead receives commissions like affiliate referral fees, the site would not be deceptive, as long as it adequately discloses this payment.
- **Endorsements by employees**. Employers can limit liability for its employees' undisclosed material connections by taking steps to ensure compliance, including appropriately training employees and monitoring endorsements. The Guides clarify that an employer need not monitor employees' reviews or endorsements unless the employer solicits them, or otherwise has reason to know about them.
- **Endorsements directed to children**. New Section 255.6 states that endorsements in ads directed to children may be of special concern because of the character of the audience. The FTC did not provide additional guidance on disclosures in children's advertising, but notes that research suggests disclosures will *not* work for younger children. FTC staff recently held a

workshop to learn more about advertising to children in digital media, including endorsements directed to children, and will likely issue more guidance.

Although the Guides do not have the force of law, they reflect the FTC's position on endorsement practices that are deceptive. Practices inconsistent with the Guides could result in actions by the FTC or a state attorney general alleging Section 5 violations. The proposed rule on reviews will have the force of law if it becomes final.

If you think you may be affected by the changes made to the Guides, let us know how we can help. Bookmark our *All About Advertising Law* blog and subscribe to our monthly newsletter for more updates.

Tags: FTC, FTC Endorsement Guides

Click to Cancel: FTC Proposes New Rule Regulating Subscription Services and Negative Option Programs with Broad Implications

By Ellen T. Berge, Liz Clark Rinehart & Jay Prapaisilp on March 29, 2023
POSTED IN FTC, SUBSCRIPTIONS AND RENEWALS

Last week, the Federal Trade Commission announced that its proposed rule replacing its Prenotification Negative Option Rule would result in new, expansive requirements for all forms of negative option offers, including automatic renewals, continuity plans, and free-to-pay conversations, made in all media, including Internet, telephone, in-person, and printed material.

Still subject to another round of comments, the proposed Rule Concerning Recurring Subscriptions and Other Negative Option Plans also features a federal requirement to provide an online cancellation mechanism to consumers who enroll in the negative option program online. That requirement is already imposed by laws in California, New York, and other states, and may be the least consequential of the proposed changes.

If enacted, the proposed rule would reach far beyond the scope of usual disclosure, consent, and cancellation requirements. Among other things, it would prohibit misrepresentations related to the underlying product or services, impose restrictions on “save” efforts when a consumer attempts to cancel, and require annual reminders for negative option features not involving physical products.

As support for its rule, the FTC estimated that 109,000 entities would need to comply at a total annual cost of about $5.7 million. We believe these numbers underestimate the compliance burdens, and the cumulative compliance obligations of these requirements are likely to be significantly higher for businesses.

While the FTC intends the proposed rule to provide a consistent legal framework across all media offers, the proposed rule has no preemptive effect on the various state automatic renewal laws and offers no help to businesses

targeted by excessive class action lawsuits based on subjective and sometimes frivolous interpretations of state law requirements.

1. Key Provisions to Know about the Proposed Rule

Notwithstanding the FTC's efforts to provide more clarity to sellers of subscription-based products and services and other negative option features, there remains a tremendous potential for subjective interpretation as to disclosures, placements, and other issues now specifically covered by the proposed rule. The following list outlines some elements of the FTC's proposed rule:

- "Negative option sellers" subject to the rule are not limited to those who sell to consumers; business-to-business sales would be encompassed in the rule, feasibly including commercial contractual arrangements with automatic renewal clauses.

- The proposed rule prohibits misrepresenting any fact related to the underlying good or service associated with the negative option feature, not just facts relating to the negative option feature. This includes costs, product efficacy, free trial claims, fees, billing information, deadlines, authorization, refunds, cancellation, and any other material representation.

- Disclosure placement requirements specify that specific information about the negative option feature must appear immediately adjacent to the means of recording the consumer's consent; if not directly related to the negative option feature, disclosures must appear "before consumers make a decision to buy (e.g., before they 'add to shopping cart')."

- Necessary disclosures "must not contain any other information that interferes with, detracts from, contradicts, or otherwise undermines the ability of consumers to read, hear, see, or otherwise understand the disclosures." This provision of the proposed rule may create complexities for making disclosures and obtaining agreement to other key terms, including Privacy Policies and Terms of Use.

- The proposed rule specifies that sellers must obtain the consumer's unambiguous affirmative consent to the offer "separately from any other portion of the offer." How can sellers obtain agreement to

negative option terms and privacy policies and general terms of use? The answer may need to be separate and multiple check boxes. The FTC stopped short, however, of mandating a check box, instead stating that check boxes, signatures, or "other substantially similar methods" could be used.

- The proposed rule expands the existing requirement to provide a "simple cancellation mechanism" under the Restore Online Shoppers' Confidence Act and requires the mechanism to be at least as easy to use as the method the consumer used to enroll in the offer. At a minimum, the cancellation mechanism would need to be made available through the same medium the consumer used to consent to the offer, and, if the consumer enrolled online, the cancellation mechanism must be *over the same* website or web-based application the consumer used for the initial purchase.

- For subscriptions not involving physical goods, consumers would need to receive reminders, at least annually, identifying the product or service, the frequency and amount of charges, and a means to cancel. Such reminders must be provided through the same medium the consumer used to enroll.

- When consumers contact the seller to cancel, the seller must immediately cancel the negative option feature upon request, unless the seller obtains the consumer's unambiguous affirmative consent to receive a "save" prior to cancellation.

- New recordkeeping requirements appear in the proposed rule, including a requirement to maintain verification of the consumer's consent for at least three years, or one year after the contract is otherwise terminated (whichever is longer). A similar recordkeeping requirement would be imposed on recording the consumer's assent to hearing a save offer.

Comments are due within 60 days once the proposed rule is published in the Federal Register. If you are interested in commenting or working with your trade association to comment, please let us know.

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