

CLIENT ALERT

Beware the Negative Online Review: New Federal Law Prohibits Companies from Restricting the Right to Complain

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Retailers and consumer products companies need to be aware of a new law affecting negative online reviews. Last Wednesday, President Obama signed the Consumer Review Fairness Act of 2016 (H.R. 5111) into law. The Act voids “non-disparagement clauses” in form contracts designed to prevent consumers from posting negative comments and online reviews of products and services. The Act also makes it unlawful for companies to include these clauses in their form contracts. The Federal Trade Commission will enforce the Act in the same way it enforces against unfair or deceptive trade practices under its jurisdiction; state attorneys general may also enforce the Act under certain conditions. For existing contracts, the Act will take effect in 90 days and FTC/state enforcement may commence one year from now.

According to the sponsoring House Committee on Energy and Commerce, the Act is designed to “curtail non-disparagement clauses in order to preserve the credibility and value of online consumer reviews.” The Act arose following high profile actions by companies to suppress negative consumer reviews pursuant to “gag” clauses in form contracts. In one instance, a company referred a bad review to a debt collector to enforce a \$3,500 contract penalty against the consumer.

Whether the Act leads to serious FTC/state enforcement of the now-banned clauses is uncertain. The Congressional Budget Office estimates that enforcement collections will be “insignificant” because of the small number of cases that will be pursued. More likely, companies will simply remove non-disparagement clauses from their contracts to comply with the law, or otherwise be in a position to defend these clauses under the Act’s exceptions. Those exceptions include clauses prohibiting disclosure of, or allowing the removal of, trade secrets, privileged or confidential information, private medical information, and clearly false or misleading content.

The Act is careful to make clear that it does not restrict companies’ rights to take actions against false, abusive, vulgar, or discriminatory reviews. Companies may still take down such reviews and/or pursue defamation and similar claims against reviewers. The Act’s scope is thus intentionally narrow: companies cannot include (and must now remove) non-disparagement clauses in their form contracts.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Cheryl A. Falvey

Partner – Washington, D.C.
Phone: +1 202.624.2675
Email: cfalvey@crowell.com

Clifford J. Zatz

Partner – Washington, D.C.
Phone: +1 202.624.2810

Email: czatz@crowell.com