

ADVERTISING, MARKETING & PROMOTIONS

>> **ALERT**

NEW FEDERAL LAW PROTECTS CONSUMER REVIEWS OF PRODUCTS AND SERVICES

A new federal law, the Consumer Review Fairness Act of 2016 (the CRFA), protects the ability of consumers to review a company's products, services, and conduct – including on social media.

Congress passed the CRFA in response to reports that some businesses tried to prevent consumers from writing negative reviews by binding them to form contracts, such as online terms and conditions. These form contracts often included contractual provisions that allowed businesses to sue or otherwise penalize consumers for posting negative reviews about their products or services.

THE CRFA

Specifically, the CRFA makes it illegal for a company to contractually bar a consumer from reviewing – including by electronic means – a company's goods, services, or conduct. The CRFA also bars any provision in a form contract that imposes a penalty or fee against a consumer for posting such a review.

In addition, the CRFA makes it illegal to include and voids any provision in a form contract that requires a consumer to transfer his or her intellectual property rights in such a communication, with the exception of a non-exclusive license permitting the business to use that content. This provision was intended to close a loophole in the Digital Millennium

THE BOTTOM LINE

Companies that utilize form contracts, including online terms and conditions, to try to prevent consumers from posting negative reviews about its products, services or conduct, should review their contracts immediately to ensure that they are in compliance with the new law and remove any provisions that restrict consumers from sharing their honest reviews or that claim ownership over consumer's reviews. It is important for companies to review their form contracts, because even if companies do not intend to act on these contractual provisions, they could still be in violation of the CRFA.

Copyright Act (DMCA) that allowed businesses to take down reviews for which they claimed copyright ownership.

EXCEPTIONS

The CRFA contains a number of important limitations to its broadly-stated prohibitions. For instance, a company still may act to protect any duty of confidentiality imposed by law or in cases of defamation, libel, or slander. The CRFA also does not affect a company's right to remove or refuse to display publicly on the company's website or webpage content that:

>> Contains the personal information or likeness of another person, or is libelous, harassing, abusive, obscene, vulgar, sexually explicit, or is inappropriate with respect to

race, gender, sexuality, ethnicity, or another intrinsic characteristic;

>> Is unrelated to the goods or services offered by or available at the company's website or webpage; or

>> Is clearly false or misleading.

Moreover, companies are permitted to establish terms and conditions with respect to photographs or videos of their property created for commercial purposes by employees or independent contractors.

The CRFA also exempts from its broad bar any contractual provision that prohibits the disclosure of, or that permits the removal of:

>> Trade secrets or commercial or financial information considered privileged and confidential;

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- >> Personnel and medical files and similar information the disclosure of which would constitute an unwarranted invasion of privacy;
- >> Records or information compiled for law enforcement purposes, the disclosure of which would constitute an unwarranted invasion of privacy;
- >> Content that is unlawful or contains computer viruses, worms, or other potentially damaging computer code, processes, programs, applications, or files.

ENFORCEMENT

The CRFA grants the FTC and state attorneys general the authority to enforce the Act. Violations will be

treated the same as unfair or deceptive practices and may result in injunctive orders, penalties and/or monetary fines.

The provisions of the CRFA that make it illegal to include terms in form contracts barring a consumer from posting a review and penalizing consumers for negative reviews go into effect on March 14, 2017. The FTC and state attorneys general have authority to begin enforcing the CRFA beginning on December 14, 2017.

The FTC already has issued tips to help companies comply with the law, available [here](#).

FOR MORE INFORMATION

Allison Fitzpatrick
Partner
212.468.4866
afitzpatrick@dglaw.com

Rohini C. Gokhale
Associate
212.468.4978
rgokhale@dglaw.com

or the D&G attorney with whom you have regular contact.

Davis & Gilbert LLP
212.468.4800
1740 Broadway, New York, NY 10019
www.dglaw.com
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