

Let Thy Consumer Review: Gag Clauses Outlawed in Form Contracts

To preserve their image, some companies began putting "gag" clauses in their standardized sales terms that prohibited consumers from posting any negative reviews. When consumers described their bad experiences with products or services, often in online reviews, companies contacted them to remind them of the clauses and, in some cases, even threatened consumers with breach of contract. Congress took note and responded with an act that basically gags the gag clauses: the Consumer Review Fairness Act of 2016 (the "CRFA").

In essence, the CRFA invalidates and prohibits all gag clauses in standardized or "form" contracts. Specifically, the CRFA targets contracts with standardized terms used in the selling or leasing of products or services and for which a purchaser has no meaningful negotiating power. The law does not apply to employer-employee and independent contractor contracts, but will apply to online contracts with "click to accept" terms and conditions, as well as other types of contracts.

The CRFA went into effect in part on March 14, 2017, and enforcement by federal and state agencies will begin on December 14, 2017.

The CRFA was enacted to allow consumers to freely post their honest reviews without fear of backlash or lawsuits. It protects a broad range of consumer assessments, including written, oral, or pictorial reviews, online reviews, and social media posts.

What Is Prohibited?

Under the CRFA, a provision of a form contract will be void from the inception if it:

- prohibits or restricts an individual who is a party to the form contract from posting a review;
- imposes a penalty or fee against an individual who is a party to the form contract for posting a review; or
- requires an individual who is a party to the form contract to relinquish his or her intellectual property rights in the content of his or her review.

Congress granted enforcement authority to both the Federal Trade Commission

POSTED:

May 19, 2017

RELATED PRACTICES:

[Litigation](#)

<https://www.reinhartlaw.com/practices/litigation>

RELATED SERVICES:

[Corporate Governance](#)

<https://www.reinhartlaw.com/services/corporate-governance>

[Commercial and Competition Law](#)

<https://www.reinhartlaw.com/services/commercial-and-competition-law>

RELATED PEOPLE:

[Jeffrey D. Roeske](#)

<https://www.reinhartlaw.com/people/jeffrey-roeske>

[Laura A. Brenner](#)

<https://www.reinhartlaw.com/people/laura-brenner>

[Troy A. Hilliard](#)

<https://www.reinhartlaw.com/people/troy-hilliard>



and state Attorneys General, and also authorized any state consumer protection officer to bring civil actions. Violations of the CRFA will be treated the same as an FTC Rule violation for an unfair or deceptive act or practice, and violators could be subject to financial penalties and a federal court order. While the CRFA does not expressly provide for a private cause of action, there is the potential that private litigants may try to use CRFA violations as a predicate for claims under state deceptive trade practices acts and similar laws, which could significantly increase the financial risk to companies that violate the CRFA.

Can a Company Still Protect Its Image?

Under the CRFA, companies may still protect themselves against inappropriate or irrelevant reviews. For example, companies may prohibit or remove reviews that:

- contain confidential or private information
- are libelous, harassing, abusive, obscene, vulgar, sexually explicit, or inappropriate with respect to race, gender, sexuality, ethnicity, or other intrinsic characteristics
- are unrelated to the company's products or services
- are clearly false or misleading
- contain malware

It is worth noting that just because a company disagrees with a review does not mean that the review qualifies for removal under the "clearly false or misleading" exception. Also, companies are not required to provide a forum for reviews. But if they do so, they should consider this new law.

Questions About the Law

If you have any questions or concerns that your policies may not comply with the CRFA, feel free to contact your Reinhart attorney or a member of Reinhart's [Commercial and Competition Law Group](#).

These materials provide general information which does not constitute legal or tax advice and should not be relied upon as such. Particular facts or future developments in the law may affect the topic(s) addressed within these materials. Always consult with a lawyer about your particular circumstances before acting on any information presented in these materials because it may not be applicable to you or your situation. Providing



these materials to you does not create an attorney/client relationship. You should not provide confidential information to us until Reinhart agrees to represent you.