

## Publications

## How Not to Deal With Negative Online Reviews: Addressing Online Criticism in Light of Pending Federal Legislation on Non-Disparagement Clauses

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Colleen M. Devanney

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On Tuesday, Sept. 12, the [House of Representatives passed H.R.5111](#), better known as the Consumer Review Fairness Act of 2016.

The Consumer Review Fairness Act is a bipartisan bill aimed at protecting consumers who criticize businesses online. More specifically, the legislation is aimed at prohibiting businesses from inserting language in “form contracts” with customers—essentially non-disparagement clauses in customer agreements—that limits the ability of customers to speak (negatively) about businesses’ goods and services.

Some businesses utilize these clauses—which some refer to as “gag orders”—to preemptively avoid negative reviews, perhaps even burying the language in the agreements.

In December 2015, the Senate passed the Consumer Review Freedom Act, a bill similar to the Consumer Review Fairness Act. Now, [H.R.5111](#) will return to the Senate for consideration.

The next step after the Senate would be for the President to sign the legislation into law.

If President Obama or his successor were to sign it into law, the new law would invalidate existing non-disparagement clauses. It would also give the Federal Trade Commission (FTC) the ability to take action against businesses attempting to silence their dissatisfied customers.

#### *Non-disparagement clauses in the news*

Negative online reviews can be troubling for some businesses. But these efforts by businesses to protect their online reputations can result in much worse publicity.

A recent example involves a pet sitting company that sued a customer for \$1 million for a negative review. [The case was recently dismissed.](#)

We have also written about a [hotel](#) and [apartment complex](#) that had their respective policies backfire when their attempts to fine guests and tenants for negative reviews became public.

And last year, the [FTC filed a lawsuit](#) based on efforts to dissuade customers from publishing negative comments online.

In Sept. 2014, before the current federal legislation was introduced, California became the first state to crack down on prohibitions of negative online reviews. Specifically, [California passed a new law](#) subjecting businesses to fines for contractual language aimed at having consumers waive their rights to publish online reviews.

Earlier this year, [Maryland passed a similar law](#), often referred to as the “right to Yelp.”

### *Handling negative online reviews*

When it comes to online speech, businesses can feel that are with little legal recourse.

It is something we see every day in representing businesses that are harmed online by disgruntled customers/clients, competitors, former employees and more. It is what makes every new opinion addressing Section 230 of the Communications Decency Act potentially significant, including the recent [Hassell v. Bird](#) matter in California.

When considering the potential federal ban on non-disparagement clauses directed at online reviews, however, businesses should not be too concerned.

Certainly, businesses must monitor and protect their online reputations. However, lawful or not, businesses should avoid these types of overbroad non-disparagement clauses and attempts to silence legitimate customer opinions in the first place.

Not only are there major PR risks, but also people who study online reviews and survey consumers often say that having some negative feedback or constructive criticism is generally a good thing.

For starters, it does not look authentic when a business has, say, 20 online reviews and all have perfect five-star ratings. Second, businesses can view negative reviews as opportunities to both make individual customers happy and improve overall as a company.

Of course, things get more complicated when online reviews or comments go beyond negative opinions, but are actually false and defamatory statements.

Depending on the circumstances, certain factually false online statements might be actionable. While no business wants to have to deal with internet defamation, at least they are not without recourse.

But when it comes to simple criticism, businesses need not panic and do anything to worsen the situation. Instead, [what a business can do](#) is encourage customers to share feedback online.

Businesses should avoid soliciting, including paying for, positive reviews. But by getting more reviews in total, if a business is actually deserving of high ratings, this will likely improve its online reputation by drowning out the small number of negative reviews.

If necessary, a business can address particularly problematic reviews, specifically legitimate defamatory online postings. But it should not go out of its way—including preventatively—to stifle negative customer speech.

That is, regardless of whether the government passes the pending federal legislation, businesses should avoid these non-disparagement clauses.

*For more information, contact Colleen Devanney at 855.542.9192 or [cmdevanney@vorys.com](mailto:cmdevanney@vorys.com). Read more about the practice at <http://www.defamationremovalattorneys.com/>.*