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NAD Takes a "Byte" Out of Teeth Aligner's Incentivized Reviews

Orthodontics remains an oddly hot topic at NAD, this time regarding the use by Straight Smile of incentivized reviews for its Byte tooth aligners. Although Straight Smile discontinued most of the claims challenged by competitor SmileDirectClub, NAD weighed in on two remaining claims of concern—one relating to its **use of and disclosures regarding incentivized reviews generally and the related use of #1 rankings provided by third-party review site BestCompany.**

Recommendations regarding disclosures of incentivized reviews is not new ground for NAD, but its discussion of **rankings by third-party review sites** is an extension of prior NAD opinions.

Regarding the first issue, SmileDirectClub alleged that reviews and testimonials that appeared on BestCompany.com and on Byte's own webpage were **incentivized without sufficient disclosure.** More specifically, Byte used a **blanket disclosure** to explain that some of its reviewers **"were given free product in exchange for their honest opinions."** The problem for NAD was that a blanket disclosure does not differentiate between reviews that are incentivized and those which are not—a concern tangentially **raised by the FTC** in its 2017 Guidance for Business.

NAD explained that, "[t]he goal of providing a disclosure is to allow consumers to assess the credibility of the review." That goal is not served if consumers can't know whether or not incentives were provided, noting that "[c]onsumers reading individual reviews may not see the disclosure or, even if they do see it, realize that it applies to the particular reviews they are reading."

NAD did not accept Byte's excuse that it has no way of knowing which are which, and suggested that reviewers simply be told to include they received free product when writing their reviews. Further, based on well-settled NAD precedent that **companies are responsible for their advertising even if it appears on a third-party site**, NAD recommended that Byte take reasonable measures to provide clear and conspicuous disclosures for each individual incentivized review appearing on BestCompany.com as well.

NAD then turned to the purported **"expert recommendation" received by BestCompany.** The use of third-party review sites to support **"ranking" claims** is common among many companies—but as NAD noted in its decision, many of these sites include a **pay-to-play component**, and that payment changes the game and the disclosure requirements. Straight Smile happily touted its "BEST OVERALL" ranking by review site BestCompany. What it did not mention, at least clearly enough for NAD, was the pay-to-play nature of the relationship between the two companies.

First, the **disclosure of the financial arrangement, which appeared as a pop-up box, was not clear and conspicuous** because consumers had to click on it to access the disclosure. More importantly, however, NAD also agreed with SmileDirectClub that the ranking conveyed a **false impression that it was based on an honest assessment of the company rather than on the paid relationship.**

Since BestCompany's rankings are influenced by the material connection with Byte and companies in essence pay for a higher rating, NAD recommended Byte discontinue use of this ranking entirely (whether by Byte directly or by BestCompany on behalf of Byte), or modify it to provide a clear and conspicuous disclosure so consumers understand that the ranking is advertising paid for by Byte, and is not based on independent review.

Key Takeaways

Is this the end of pay to play? Going forward, advertisers should note that advertising use of rankings received from pay-to-play review websites are likely a no-go, even with disclosure of the sites somewhat-independent, somewhat-paid-for "process."

*Article from Davis Wright Tremaine Blog
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