

BUREAU OF CONSUMER FINANCIAL PROTECTION

12 CFR Chapter X

Bulletin 2022-05: Unfair and Deceptive Acts or Practices That Impede Consumer Reviews

AGENCY: Bureau of Consumer Financial Protection.

ACTION: Compliance bulletin.

SUMMARY: Reviews of products and services help to promote fair, transparent, and competitive markets. When firms frustrate the ability of consumers to post honest reviews of products and services that they use, they may be engaged in conduct prohibited by the Consumer Financial Protection Act (CFPA). The Consumer Financial Protection Bureau (Bureau) is issuing this bulletin to remind regulated entities of the CFPA's requirements and explain how the Bureau intends to exercise its enforcement and supervisory authorities on this issue.

DATES: This bulletin is applicable as of [INSERT DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

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SUPPLEMENTARY INFORMATION:

I. Background

A. Role of Consumer Reviews

Numerous studies and surveys have confirmed the importance of online reviews across the economy. For example, one prominent study estimated that a one-star rating increase on

Yelp.com translated to an increase of 5 to 9 percent in revenues for a restaurant.¹ Another study found that a one-point boost in a hotel’s online ratings on travel sites is tied to an 11 percent jump in room rates, on average.² To date, academic research has not focused specifically on markets for consumer financial products and services. But online reviews are also commonplace in many of those markets, and the Bureau expects them to play an increasing role in helping consumers choose between financial providers. This can create an incentive for dishonest market participants to attempt to manipulate the review process, rather than compete based on the value of their services, which can frustrate a competitive marketplace.

The Bureau notes that consumer reviews can be important to two groups of consumers: the consumers who read and rely upon reviews, as well as the consumers who take the time to express their viewpoints by writing them in the first place. Of course, these groups can be overlapping. Firms that interfere with consumer reviews can harm both of these groups.

B. Public Policy Regarding Consumer Reviews

Congress unanimously enacted the Consumer Review Fairness Act in 2016, in response to abuses by companies that restricted consumer reviews.³ As the legislative history of the statute explains, the “wide availability” of consumer reviews “has caused consumers to rely on them more heavily as credible indicators of product or service quality. In turn, businesses have sought to avoid negative reviews . . . through provisions of form contracts with consumers restricting such reviews. These provisions typically impose monetary or other penalties for

¹ Michael Luca, *Reviews, Reputation, and Revenue: The Case of Yelp.com*, Harv. Bus. Sch. Working Paper No. 12-016, 14 (2016).

² Chris Anderson, *The Impact of Social Media on Lodging Performance*, 12(15) Cornell Hospitality Report 6, 11 (2012).

³ Pub. L. 114-258, 130 Stat. 1355 (2016) (codified at 15 U.S.C. 45b).

publishing negative comments regarding the provider’s services or products.”⁴ The legislative history explains that these “gag clauses or non-disparagement clauses” are harmful to consumers.⁵

As discussed below, the Consumer Review Fairness Act protects “covered communications.” A covered communication is defined as “a written, oral, or pictorial review, performance assessment of, or other similar analysis of, including by electronic means, the goods, services, or conduct of a person by an individual who is party to a form contract with respect to which such person is also a party.”⁶ For simplicity, this bulletin will refer to “covered communications” as consumer reviews.

Relatedly, a “form contract” is defined as a contract with standardized terms that is: “used by a person in the course of selling or leasing the person’s goods or services;” and “imposed on an individual without a meaningful opportunity for such individual to negotiate the standardized terms.”⁷

The Consumer Review Fairness Act provides, with limited exceptions, that “a provision of a form contract is *void from the inception of such contract*” if the provision:

- A. prohibits or restricts the ability of an individual who is a party to the form contract to engage in a covered communication;
- B. imposes a penalty or fee against an individual who is a party to the form contract for engaging in a covered communication; or

⁴ H.R. Rep. No. 114-731, at 5 (2016).

⁵ *Id.*

⁶ 15 U.S.C. 45b(a)(2). The statute clarifies that the term “pictorial” includes pictures, photographs, video, illustrations, and symbols. 15 U.S.C. 45b(a)(4).

⁷ 15 U.S.C. 45b(a)(3)(A). However, the term “form contract” does not include an employer-employee or independent contractor contract. 15 U.S.C. 45b(a)(3)(B).

C. transfers or requires an individual who is a party to the form contract to transfer to any person any intellectual property rights in review or feedback content, with the exception of a non-exclusive license to use the content, that the individual may have in any otherwise lawful covered communication about such person or the goods or services provided by such person.⁸

For simplicity, this bulletin will refer to these various types of provisions as restrictions on consumer reviews.

II. Violations of the Consumer Financial Protection Act (CFPA)

Sections 1031 and 1036 of the CFPA prohibit a covered person or service provider from engaging in an “unfair, deceptive, or abusive act or practice” that is “in connection with any transaction with a consumer for a consumer financial product or service, or the offering of a consumer financial product or service.”⁹ There are a number of ways that covered persons or service providers could violate this prohibition by interfering with consumer reviews.

A. Deceiving Consumers Who Wish to Leave Consumer Reviews, Using Purported Contractual Restrictions That Are Unenforceable

“An act or practice is deceptive if: (1) there is a representation, omission, or practice that (2) is likely to mislead consumers acting reasonably under the circumstances, and (3) the representation, omission, or practice is material.”¹⁰

It is well-established that material misrepresentations to consumers that are unsupported under applicable law can be deceptive.¹¹ In particular, including an unenforceable material term

⁸ 15 U.S.C. 45b(b)(1) (emphasis added). There are additional rules of construction, 15 U.S.C. 45b(b)(2), and exceptions, 15 U.S.C. 45b(b)(3).

⁹ 12 U.S.C. 5531, 5536. For definitions of “covered person,” “service provider,” and “consumer financial product or service,” see section 1002 of the CFPA, 12 U.S.C. 5481, and the associated regulation, 12 CFR part 1001.

¹⁰ *CFPB v. Gordon*, 819 F.3d 1179, 1192 (9th Cir. 2016) (internal quotation marks and punctuation omitted).

¹¹ See, e.g., *FTC v. World Media Brokers*, 415 F.3d 758, 763 (7th Cir. 2005).

in a consumer contract is deceptive, because it misleads consumers into believing the contract term is enforceable. The Bureau’s examiners have repeatedly cited such unenforceable contract provisions in their supervisory work.¹² Moreover, disclaimers in a contract such as “subject to applicable law” do not cure the misrepresentation caused by the inclusion of an unenforceable contract term. Additionally, subsequent disclaimers cannot cure a misrepresentation.¹³

Consistent with these principles, it would generally be deceptive to include a restriction on consumer reviews in a form contract, given that the restriction would be void under the Consumer Review Fairness Act. Consumers can be expected to read the language to mean what it says: that they are restricted in their ability to provide consumer reviews. But that is not the case, since the provision is void under applicable law. And the option to post candid reviews about products or services would be material to the many American consumers who do so. Moreover, the Bureau believes that enforcing the deception prohibition is particularly important in this context, given that consumer reviews are a significant driver of competition in the modern economy.

In addition, if a covered person or service provider attempts to pressure a consumer to remove an already posted negative review, by invoking a restriction on consumer reviews that is void under the Consumer Review Fairness Act, that would also generally be a deceptive act or practice. Note that this would be an additional deceptive act or practice, not a precondition for establishing the kind of deceptive act or practice already described. Damage can be done by chilling consumers’ reviews even if, unknown to the consumer, the covered person or service

¹² See, e.g., Supervisory Highlights: Summer 2017, 82 FR 48703, 48708 (Oct. 19, 2017) (deceptive waivers of borrowers’ rights in loss mitigation agreements that were unenforceable under Regulation Z, implementing the Truth in Lending Act); Supervisory Highlights, Issue 24, Summer 2021, 86 FR 36108, 36117 (July 8, 2021) (deceptive waivers of rights in security deed riders that were unenforceable under Regulation X, implementing the Real Estate Settlement Procedures Act).

¹³ See, e.g., *FTC v. IAB Marketing Assoc., LP*, 746 F.3d 1228, 1233 (11th Cir. 2014).

provider does not later follow up by invoking the contract provision against consumers who post negative reviews. Accordingly, in other contexts, Bureau examiners have found unenforceable contract provisions to be deceptive regardless of whether the provision is ultimately enforced.¹⁴ But if a covered person or service provider does invoke the void contract provision against the consumer (for example, by claiming that the consumer is contractually required to remove a negative review, or that the consumer is contractually required to stop posting such reviews, or assessing a penalty or fee if the consumer does not remove a negative review), that can be expected to further deepen the materially misleading impression that the affected consumers would have. It would be natural for consumers to believe that they need to remove existing negative reviews, stop posting such reviews, or pay the purported penalty or fee, which is not the case.

B. Unfairly Depriving Consumers of Information Using Restrictions on Consumer Reviews

In addition to deceiving consumers who wish to leave reviews, purported contractual restrictions on consumer reviews can unfairly harm the many other consumers who rely upon reviews when deciding what products and services to purchase.

Under section 1031(c) of the CFPA, an act or practice is unfair if: (A) it causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers; and (B) such substantial injury is not outweighed by countervailing benefits to consumers or to competition.¹⁵

¹⁴ See matters cited in note 12.

¹⁵ 12 U.S.C. 5531(c).

In applying the CFPA’s unfairness prohibition, the Bureau finds persuasive the reasoning of the Federal Trade Commission (FTC) in *FTC v. Roca Labs, Inc.*¹⁶ *Roca Labs* was an enforcement action that predated the Consumer Review Fairness Act, but it was cited in the that statute’s legislative history.¹⁷ In *Roca Labs*, the FTC alleged that the Defendants’ use of “contractual provisions that prohibit purchasers from speaking or publishing truthful or nondefamatory negative comments or reviews about the Defendants, their products, or their employees” was unfair under the Federal Trade Commission Act.¹⁸ The defendants’ conduct “caused or are likely to cause purchasers to refrain from commenting negatively about the Defendants or their products. By depriving prospective purchasers of this truthful, negative information, Defendants’ practices have resulted or are likely to result in consumers buying Roca Labs products they would not otherwise have bought.”¹⁹ This substantial injury was not reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or to competition.²⁰ The Bureau intends to apply similar unfairness principles if it encounters a covered person or service provider, acting within the scope of the CFPA, who uses contractual restrictions to restrict consumer reviews.

C. Deceiving Consumers Who Read Consumer Reviews About the Nature of Those Reviews

Whether or not there are any contractual restrictions on consumer reviews, covered persons or service providers can engage in a deceptive act or practice by manipulating

¹⁶ Complaint, *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231 (M.D. Fla. filed Sept. 24, 2015), <https://www.ftc.gov/system/files/documents/cases/150928rocalabscmpt.pdf>.

¹⁷ H.R. Rep. No. 114-731, at 5 (2016) (citing *id.*).

¹⁸ Complaint at 27, *FTC v. Roca Labs, Inc.*, No. 8:15-cv-02231.

¹⁹ *Id.* at 22.

²⁰ *Id.* at 27.

consumers’ comprehension of the set of reviews that are available. Two recent FTC matters illustrate this concern.

First, in the *Sunday Riley* matter, the FTC alleged that a company instructed its employees to leave reviews of its products on a third-party website, and also to “dislike” negative reviews left by real customers.²¹ The FTC found that this was deceptive. By engaging in this conduct, the company had “represented, directly or indirectly, expressly or by implication, that certain reviews . . . reflected the experiences or opinions of users of the products.”²² But the company “failed to disclose that the online consumer reviews were written by” the company’s employees, which “would be material to consumers . . . in connection with a purchase or use decision.”²³ And, although in *Sunday Riley* the posters were the company’s own employees, the Bureau notes that another way that companies can deceive consumers is by paying non-employees to post reviews that are materially misleading.

Second, in the *Fashion Nova* matter, a company that sold products through a website allegedly had “four- and five-star reviews automatically post to the website, but did not approve or publish hundreds of thousands lower-starred, more negative reviews.”²⁴ The FTC found that this was a deceptive act or practice, misleading consumers who read the website into believing that the posted ratings accurately reflected the consumer reviews submitted.²⁵

Of course, there are also numerous other ways that firms could improperly manipulate consumer reviews. The Bureau intends to carefully scrutinize whether covered persons or

²¹ Complaint, *In the Matter of Sunday Riley Modern Skincare, LLC*, File No. 192-3008 (F.T.C. Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/192_3008_c4729_sunday_riley_complaint.pdf.

²² *Id.* at 4.

²³ *Id.*

²⁴ Complaint at 2, *In the Matter of Fashion Nova, LLC*, File No. 192-3138 (F.T.C. Jan. 25, 2022), https://www.ftc.gov/system/files/documents/cases/192_3138_fashion_nova_complaint.pdf.

²⁵ *Id.*

service providers are skewing consumers' understanding of consumer reviews in a manner that is deceptive (or unfair or abusive).

III. Conclusion

In summary, covered persons and service providers are liable under the CFPA if they deceive consumers using restrictions on consumer reviews that are unenforceable under the Consumer Review Fairness Act, if they unfairly deprive consumers of information by using such restrictions, or if they deceive consumers who read reviews about the nature of those reviews. If the Bureau identifies a violation of the CFPA, it intends to use its authorities to hold the violators accountable.

IV. Regulatory Matters

This is a general statement of policy under the Administrative Procedure Act (APA). It provides background information about applicable law and articulates considerations relevant to the Bureau's exercise of its authorities. It does not confer any rights of any kind. As a general statement of policy, it is exempt from the APA's notice-and-comment rulemaking requirements.²⁶ Because no notice of proposed rulemaking is required, the Regulatory Flexibility Act does not require an initial or final regulatory flexibility analysis.²⁷ It also does not impose any new or revise any existing recordkeeping, reporting, or disclosure requirements on covered entities or members of the public that would be collections of information requiring approval by the Office of Management and Budget under the Paperwork Reduction Act of

²⁶ 5 U.S.C. 553(b).

²⁷ 5 U.S.C. 603(a), 604(a).

1995.²⁸

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²⁸ 44 U.S.C. 3501-3521.