

FTC Snares Deceptive Apartment Reviews, Issues New Marketing Guides and Proposed Rule

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The Federal Trade Commission and six state attorneys general on August 28 resolved an enforcement matter against apartment listing platform Roomster over fake reviews and listings. Brought under Section 5 of the FTC Act and state unfair and deceptive practices laws, the enforcement settlement follows recent FTC guidance about deceptive online reviews and endorsements. Savvy rental property management marketing professionals and their counsel will review both the settlement and guidance and take steps to implement appropriate marketing program practices and oversight.

The agencies alleged that the platform: posted fake positive apartment reviews, many of them purchased from a third party; promoted as "verified" listings that were, in fact, unverified non-residential facilities; and created and took fees for available unit listings that did not exist.

The settlement includes a monetary judgment of \$36.2 million and civil money penalties of \$10.9 million payable to the states. All but \$1.6 million of that is suspended due to defendants' finances.

The order includes significant conduct consequences. The principal defendants are banned from certain consumer review practices, including paying for or incenting consumer reviews, or disseminating reviews where the party's relationship with the reviewer might impact the review's weight or credibility. Defendants are also obligated to conduct 20 years' of recordkeeping to demonstrate compliance with the order.

Of interest to marketing professionals, the order sets out specific oversight requirements for the apartment listing platform in reviewing the work of marketing affiliates paid by the platform. The platform must:

- monitor affiliates' marketing materials, at least monthly, without notice,
- investigate consumer complaints about affiliates,
- terminate affiliates who pose as independent users, or who fail to disclose, clearly and prominently, the affiliate's relationship with the platform or its principals; and
- provide refunds to consumers affected by affiliate practices that violate the order.

New Endorsement Guidance and A Proposed Rule on Reviews

The enforcement order applies principles articulated by the FTC in its new Endorsement Guides and a proposed new trade regulation rule governing the use of consumer reviews and testimonials. When final, the rule's new standards can be the basis for FTC enforcement actions with civil money penalties, independent of state claims.

Endorsement Guides: Examples of What (Not) to Do

Effective July 26, the FTC's updated Endorsement Guide and the related business guidance FTC's Endorsement Guides: What People are Asking provide new examples to guide business-to-consumer marketing.

The updated Guides define these marketing activities as "misleading," in violation of the Act: procuring, suppressing, boosting, organizing, publishing, upvoting, downvoting, or editing consumer reviews that distort what consumers think of a product.

Specifically, the Guides describe the following as misleading review practices:

- Sorting reviews by favorability, such as putting highest star reviews at the top;
- Hiding, deleting or otherwise suppressing unfavorable reviews;
- Labeling reviews as "most helpful" when the advertiser, not other consumers, makes that determination;
- Buying or otherwise incentivizing positive reviews, especially fake reviews; and
- Threatening reviewers who publish negative reviews.

The Guides provide guard rails for the use of incentivized reviews, reviews by employees or company relatives, and fake negative reviews of competitors. Property marketing professionals should ensure that incentivized reviews are adequately disclosed.

Required disclosures, such as for compensated reviews, must be "clear and conspicuous" - which means difficult to miss and easily understandable by ordinary consumers or the targeted audience. For internet or in social media ads, clear and conspicuous means "unavoidable." The Guide specifically notes that a platform's built-in disclosure tools may not be adequate under this standard.

Tagging in social media as well as fake reviews are now "endorsements" that may be violations, and "endorsers" include both virtual and fake reviewers (including nonexistent entities) and those who appear to be an individual, group or institution that purport to give endorsements. Thus, as seen in the Roomster order, fake positive reviews of a property, product, or service can be unfair or deceptive practice violations.

Clarification of Liability

The Guides also articulate key marketing roles' liability exposure for unfair or deceptive

marketing practices in online reviews and endorsements:

Advertisers. An advertiser may be subject to liability for misleading, atypical or unsubstantiated statements made through endorsements...even where there is not a material connection between an advertiser and the endorser. If a manager "retweets" or "reposts" something online, the claims being made in the tweet/post require substantiation.

Endorsers. An endorser could be liable for statements that are false or misleading, representations inconsistent with or beyond their own experience with the product, and failure to disclose an unexpected material connection with the advertiser/product - such as an employee relationship.

Intermediaries. The term "intermediaries" includes specific entities the FTC intended to address, including advertising agencies, public relations firms, review brokers, reputation management companies and other similar intermediaries, all of whom may be liable for participating in or facilitating misleading ads involving endorsement or review practices outlined in the Guides.

Next Up: Upcoming Rule on Reviews

Shortly after announcing the updated Guides, the FTC also announced the proposal of a new rule on consumer reviews that, when final, would spell out prohibited, clearly deceptive marketing practices. Subject to comment through September 29, the rule as drafted prohibits or limits:

- Selling or obtaining fake reviews and testimonials including prohibitions on writing reviews and testimonials for someone who does not exist, did not have experience with the product, or who misrepresented their experience. Businesses would also be prohibited from procuring or disseminating these testimonials if the business knew or should have known they were false.
- "Hijacking" consumer reviews written for one product for use with a substantially different product.
- Providing compensation or incentives for the writing of consumer reviews expressing a particular positive or negative sentiment.
- Writing "insider" reviews and testimonials about a business - by a manager or officer of the business - without disclosing the employee's relationship to the business.
- Creating or controlling web sites with "independent" opinions about the controlling business' products or services.
- Suppressing reviews through threat, intimidation, or accusation, or misrepresenting that all reviews on a website are represented when some reviews have been suppressed.

- Selling fake followers or views, or buying such indicators to misrepresent their importance for a commercial purpose.

Takeaways: What to Do Now

With an enforcement order targeting apartment listing platforms and the specific new Guides, rental housing operators should assess their oversight of affiliate marketing and practices for generating online reviews and endorsements. While the final Reviews Rule, on its release, will give clarity, the enforcement order, Guides, and draft Reviews Rules provide actionable guidance now for property marketing executives and their counsel. At a minimum, marketing leaders should consider the following steps:

- Revisit your current advertising and social media marketing policies to ensure they comply with FTC views of deceptive acts and practices described here. Develop and implement them if you do not already have any in place. Train marketing staff on your firm's policies.
- Steer clear of aggressive review tactics - Property marketers should not use or repurpose a consumer review for a different property, or disseminate employee property reviews (e.g., from company officers or employees) without disclosing the relationship. Operators should not use companies in the business of buying and selling reviews.
- Disclose relationships with influencers and other ambassadors in a clear and conspicuous manner. Where compensation is given for a review, the relationship should be disclosed by the reviewer.
- Educate and monitor endorsers, including residents, to ensure they do not make misleading or deceptive statements. Undertake remedial or corrective action as necessary, such as informing reviewers of disclosure obligations and removing noncompliant reviews.
- Ensure that oversight of third-party marketing affiliates includes adequate review of materials and endorsements, ongoing monitoring of ads in use, and timely review and response to consumer complaints about marketing representations.
- Seek experienced counsel when you are unsure about the cleanest way to comply with the FTC's new marketing guidance and enforcement.

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410.684.3200

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