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CFPB-CONSUMER REVIEWS-UNFAIR AND DECEPTIVE ACTS

I. INTRODUCTION

The Consumer Financial Protection Bureau (CFPB) has issued a bulletin to remind regulated entities of the requirements of the CFPB and explain how the CFPB intends to exercise its enforcement and supervisory authorities when firms frustrate the ability of consumers to post honest reviews of products and services that they use. Firms taking such actions may be engaged in conduct prohibited by the Consumer Financial Protection Act (CFPA).

II. VIOLATIONS OF THE CONSUMER FINANCIAL PROTECTION ACT

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.” 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.” It is well-established that material misrepresentations to consumers that are unsupported under applicable law can be deceptive. In particular, including an unenforceable material terms in a consumer contract is deceptive because it misleads consumers into believing the contract term is enforceable. 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.

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.

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. Damage can be done by chilling consumers' reviews even if, unknown to the consumer, the covered person or service provider does not later follow up by invoking the contract provision against consumers who post negative reviews. 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.

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.

In applying the CFPA's unfairness prohibition, the CFPB finds persuasive the reasoning of the Federal Trade Commission (FTC) in *FTC v. Roca Labs, Inc.* Roca Labs was an enforcement action that predated the Consumer Review Fairness Act, but it was cited in that statute's legislative history. 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. 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." This substantial injury was not reasonably avoidable by consumers or outweighed by countervailing benefits to consumers or to competition. The CFPB 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 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. 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.” 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.” And, although in Sunday Riley the posters were the company’s own employees, the CFPB notes that another way that companies can deceive consumers is by paying nonemployees 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.” 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.

Of course, there are also numerous other ways that firms could improperly manipulate consumer reviews. The CFPB intends to carefully scrutinize whether covered persons or 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 CFPB identifies a violation of the CFPA, it intends to use its authorities to hold the violators accountable.

The foregoing Compliance Update is for informational purposes only, and does not constitute legal advice. As a reminder, the NBA general counsel is the attorney for the Nebraska Bankers Association, not its member banks. The general counsel is available to assist members with finding resources to help answer their questions. However, for specific legal advice about specific situations, members must consult and retain their own attorney.