

All care home review sites

From: Jon Riley  
Project Director

11 February 2016

Dear Sir or Madam,

**CMA advisory letter**

This is an advisory letter from the Competition and Markets Authority (CMA) to businesses hosting online reviews, comments or feedback about care homes ('care home review sites').

In June 2015, the CMA published a [report on online reviews and endorsements](#), following a call for information. The report raised concerns about the potential for review sites practices to distort the picture presented to consumers. After publishing our report we have worked with a number of review sites, including a number in your sector, to agree changes to the way that they check and present reviews.

We are writing to encourage you to:

- review your business models, processes and practices as they apply to reviews; and
- consider, in consultation with legal advisers as appropriate, whether you need to make any changes to your business to ensure that you are complying with the law.

In the attachment to this letter, we provide our views on how the Consumer Protection from Unfair Trading Regulations 2008 (CPRs) are likely to apply to care home review sites. For the avoidance of doubt, we have not specifically investigated nor formed a view as to whether your business is in breach of the law.

The CMA has also been working with the Scottish government, the Care Quality Commission and NHS Choices in relation to their partnerships with care home

review sites.<sup>1</sup> We have asked them, going forward, to draft their partnership agreements to make clear reference to the CPRs and the CMA's expectations.

If you have any general queries about this letter, please reply by email to [ProjectORE@cma.gsi.gov.uk](mailto:ProjectORE@cma.gsi.gov.uk).

Yours faithfully

Jon Riley  
Project Director  
Competition and Markets Authority

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<sup>1</sup> Care Quality Commission (CQC) uses reviews from review sites, alongside other information from partners and the public, to inform its decisions on the scheduling and planning of inspections of care homes. NHS Choices pools reviews with partners, so the consumer reviews it collects are shown on its partners' sites, and vice-versa. The Scottish government is providing funding to support a pilot scheme, in two areas, that enables users to feed back their experiences in using adult social care services in Scotland and so help drive improvement.

## Attachment: CMA advisory letter to care home review sites

### *The Consumer Protection from Unfair Trading Regulations 2008<sup>2</sup>*

1. The commercial practices of care home review sites fall within the scope of the CPRs. Businesses may breach the prohibitions in the CPRs where, for example, they mislead consumers<sup>3</sup> or engage in practices that contravene the requirements of professional diligence (meaning honest market practice and good faith).<sup>4</sup> Enforcers such as the CMA or Trading Standards Services can take civil or criminal enforcement action in the courts in respect of CPRs breaches.
2. In our [report on online reviews and endorsements](#) published in June 2015, we set out in paragraphs 4.40 and 4.41 our views on what review sites should do to help ensure that they comply with the CPRs in terms of collection, moderation, verification and publication of reviews. We also published a 60 second summary setting out our expectations for review sites and the businesses listed on them.<sup>5</sup> Now that we have undertaken further work with a number of care home review sites, we are able to offer additional advice which we consider will help care home review sites to comply with the law.<sup>6</sup>

### *Our advice to you<sup>7</sup>*

3. The CMA expects care home review sites to do the following:
  - (a) **Ensure that moderation and verification processes<sup>8</sup> do not have a built-in bias that distorts the overall picture presented by reviews in a way that might mislead consumers.**

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<sup>2</sup> The [guidance on the CPRs](#) offers the CMA's views on the CPRs. It is not a definitive interpretation, however, since only the courts can decide whether or not a commercial practice is unfair within the meaning of the CPRs.

<sup>3</sup> Regulations 5 and 6. For there to be a breach, the commercial practice must cause or be likely to cause the average consumer to take a decision they would not have taken otherwise.

<sup>4</sup> Regulation 3(3). For there to be a breach, the commercial practice must materially distort or be likely to materially distort the economic behaviour of the average consumer with regard to the product.

<sup>5</sup> [Online review and endorsements: advice for businesses](#).

<sup>6</sup> We have also published a new 60 second summary and an infographic that can both be found on the [case page](#). These look specifically at the DOs and DON'Ts for review sites to ensure they give consumers the full picture.

<sup>7</sup> We have set out our views on the CPRs to help businesses to comply with their legal obligations. Ultimately, however, only the courts can decide whether or not a commercial practice is unfair within the meaning of the CPRs. This letter should not be regarded as a substitute for, or definitive interpretation of, the CPRs and should be read in conjunction with them. It does not cover every situation or practice in which a breach of the CPRs may occur.

<sup>8</sup> Moderation involves checks that ensure content complies with the review site's rules (eg no swearing, no personal names, no advertising). Verification involves checks to verify that the reviewer has a genuine connection with the care home (eg that they are a resident or a relative of a resident). Moderation and verification checks may cover all reviews or only some of them.

Where some reviews are subject to more rigorous checks than others (for instance, where negative reviews are held to a different standard or a far greater percentage of them are verified than positive reviews), this has the potential to distort the overall picture presented to consumers. Care home review sites should consider whether their moderation and verification processes are liable to create such distortions and, if they are, modify their procedures.

We also note that some sites may collect reviews through card-based feedback forms that are handed out to residents (or their family and friends) by care home providers. Such processes may be vulnerable to abuse by providers (or their staff) that choose to submit fake positive reviews or hand out forms to selective residents only.<sup>9</sup> Care home review sites should therefore take a risk-based approach in determining what checks to carry out if reviews are collected by different methods.

They should also ensure that their moderation and verification policies are clearly and prominently explained to consumers, eg in clearly labelled FAQs that can be easily accessed and viewed on their websites.

**(b) If care home providers are involved at the pre-publication stage, ensure that your website, not the provider, has the final say on what is published.**

The CMA considers that allowing a care home provider the **final say** on whether a review (or part of a review) is published has the potential to result in consumers being misled, as it may lead to genuine, relevant and lawful negative reviews being suppressed.

Allowing a care home provider to be involved in the moderation/verification process is less likely to be problematic if their involvement:

- does not cause an unreasonable delay before the review is published;
- is clearly and unambiguously explained to site users; and
- allows the provider to challenge publication of a review only because the review fails to comply with the review site's own rules (eg on content standards or the reviewer having a valid connection with the

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<sup>9</sup> Note that such practices may put the care home provider in breach of the CPRs.

care home). The review site would then need to consider the complaint and reach its own view.

**(c) Ensure that onscreen messages explaining that a review's publication has been withheld or is pending do not mislead consumers.**

The CMA does not regard the use of a 'publication withheld' message to be a problem in and of itself, provided:

- the review site is satisfied that the review has failed to comply with its lawful policy or rules on what can be published;
- the message itself does not mislead a reader about why the review, or part of it, has not been published (for example, saying the review has failed to meet the content standards when in fact it has met them); and
- the use and meaning of the message is clearly and prominently explained to site users.

Similarly, the use of a 'review pending' messages may not be a problem, provided its meaning is clearly explained to site users and clear and unambiguous wording is used to accurately explain why publication has been delayed. Further, there should not be an unreasonable delay before reviews are published.

**(d) Have an appropriate policy and process to handle threats of legal action for defamation.**

Review sites should consider including, within their rules on content standards, an explanation of what they consider to be 'defamatory' content and therefore not publishable. Reviewers will then be clear, from the start, about what content will not be accepted.

The CMA takes the view that, where a provider uses legal threats against a review site to get genuine, relevant and lawful negative comments withdrawn, this trader's practice is likely to be unlawful.<sup>10</sup>

It is an absolute defence to a defamation claim to show that a statement is true. Review sites should also consider the applicability of section 5 of the Defamation Act 2013 ('the website operator's defence') when weighing up

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<sup>10</sup> This is likely to be a generally unfair commercial practice under regulation 3(3) CPRs.

defamation risk.<sup>11</sup> However, we would strongly advise review sites to take independent legal advice on this area of law.

**(e) Ensure that you do not breach the law when receiving online consumer reviews from other care home review sites.**

If a review site accepts and publishes reviews from other sites, it should check that the business supplying those reviews maintains an appropriate system for collecting, moderating and publishing reviews – ie a system which meets the requirements of the CPRs. Where they do not, the review site that receives and publishes the reviews may themselves be misleading consumers.

Care home review sites can reduce the risk of breaching the law by:

- ensuring that the feed mechanisms copy over content in a way that is complete and can be updated regularly;
- checking and amending their partnership agreements to refer to the CPRs and require partners to abide by the CMA's expectations (as set out in this letter and our 2015 report on online reviews and endorsements); and
- not entering into or continuing partnerships with businesses whose practices fall short of these standards.

**(f) Have an appropriate procedure in place for handling allegations of serious misconduct, clinical negligence or criminal activity.**

Care home review sites may receive reviews, comments or feedback alleging that care home residents have been seriously mistreated or are at serious risk of harm. Whilst it may not be appropriate to publish very serious allegations like these, we would expect a professionally diligent business in this sector to have relevant procedures in place and to advise complainants on how to redirect such claims to the appropriate bodies, eg to the NHS Complaints Procedure, the relevant regulatory authority (such

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<sup>11</sup> Where an action is brought or threatened in England and Wales against a website operator in respect of a statement posted on the website, it may be a defence for the operator to show that it did not post that statement itself. Where the person who posts the statement is identifiable (ie the claimant has enough information to enable it to bring proceedings against that person), section 5 may provide a complete defence. For more information see Ministry of Justice (2014), [Complaints about defamatory material posted on websites: Guidance on Section 5 of the Defamation Act 2013 and Regulations](#). Section 5 is only applicable in England and Wales and not to the rest of the UK. However we would encourage care home review sites throughout the UK to come to their own considered view as to what constitutes defamatory content when threatened with legal action, in the light of the potential breaches of the CPRs outlined above.

as England's Care Quality Commission or Scotland's Care Inspectorate),  
or the Police.