



HOTEL ASSOCIATION OF NEW YORK CITY, INC.

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Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Sharing Economy Workshop, Project No. P15-1200

The Hotel Association of New York City (“HANYC”) respectfully submits these comments to the Federal Trade Commission with respect to Airbnb, Inc. and other companies, such as HomeAway, that are in the business of listing residential properties in New York City for rent for transient lodging purposes. These companies have used their booking platforms to create massive virtual hotels that violate Federal, New York State, and New York City laws.

As we explain below, these companies are, at the very least, aiding and abetting violations of the law in New York City, tortiously interfering with contracts between lessees and their landlords, and creating situations that endanger not only the Airbnb guests, but, more critically, the other long-term residents in the apartment buildings who have no say in and thus no control over the flood of transient guests in the hallways of their homes. These virtual hotels control thousands of rooms located throughout the City, without any of the safeguards that hotels are required to put into place to protect guests and the community, and without obeying the numerous laws applicable to hotels that address everything from consumer protection to fire safety. These massive virtual hotels comply with none of the construction or fire standards that are dictated for hotels in order to ensure guest safety. As a practical matter, they operate outside the purview of the federal or state laws banning unlawful discrimination and in particular, discrimination against the disabled and their rights to transient lodging. If these virtual hotels pay any transient hotel related taxes at all, they do not pay the same taxes paid by hotels, most notably real estate tax. In short, these companies are operating illegally, putting at risk those who list on their sites, those who book on their sites, and the residents of the buildings who live in the apartment buildings in which they do business.

This pattern of illegal and anti-social behavior has allowed Airbnb and its ilk to operate at a competitive advantage over those legitimate businesses, such as our member hotels, who do obey the law. They are flooding the hotel market in New York City based on a model that drastically lowers their cost in comparison to true hotels. Yet, that cost differential is not being passed on to the consumer. One need only compare prices on Airbnb with rooms available in the hotel market to verify that fact. That cost differential created by not complying with the law creates a wide profit margin. That profit is going into Airbnb’s pocket to the tune of \$61 million in less than 5 years in New York alone, and the pockets of its commercial users (“hosts” that ran large-scale operations on Airbnb), which collected over a third of the total revenue generated – or \$168 million in New York alone. That profit margin represents the difference between being a safe hotel and an unsafe one and the difference between being a socially responsible hotel and a socially irresponsible one.

ABOUT HANYC

The Hotel Association of New York City, Inc. was founded in 1878 and is one of the oldest professional trade associations in the nation. Its membership includes more than 270 hotels in New York City, representing more than 75,000 rooms and approximately 50,000 employees. HANYC is an internationally recognized leader in New York City's \$5 billion tourism industry. It provides advocacy services, educational services, and labor representation for its members. It is active in NYC & Company (the destination marketing association for the City), the management of the Jacob Javits Convention Center, and in numerous of New York City's business and charitable organizations. It played an active role in the charitable and other recovery activities necessitated by the attack of September 11. It works closely with the New York City Police Department on all security matters, including the Joint Terrorism Task Force, and with the New York City Fire Department. Its Chief Executive Officer was the Commissioner of the New York Fire Department under The Honorable Mayor Edward I. Koch.

I. THE NEW YORK STATE ATTORNEY GENERAL'S INVESTIGATION FOUND WIDESPREAD ILLEGALITY IN AIRBNB'S NEW YORK CITY LISTINGS AND THAT THE MAJORITY OF AIRBNB'S NEW YORK CITY "HOSTS" ARE LARGE-SCALE COMMERCIAL ENTERPRISES

In October 2014, the New York State Attorney General Eric Schneiderman issued an extensive report that concluded that as much as 72% of Airbnb reservations violated New York law and that the majority of Airbnb's "hosts" were commercial users operating multimillion-dollar businesses. See <http://www.ag.ny.gov/pdfs/AIRBNB%20REPORT.pdf>. The report was based on data for bookings between January 1, 2010 and June 2, 2014 obtained directly from Airbnb by the Attorney General's Office.

The key findings from the New York Attorney General's report include:

- **More than 72% of Airbnb listings are illegal:** Of the 35,354 private, short-term listings, data suggest that 25,532 of them violated either New York State's Multiple Dwelling Law and/or New York City's Administrative Code (zoning laws). Hosts generated approximately \$304 million in revenue from these listings alone and, Airbnb itself earned almost \$40 million from these transactions. Additionally, these figures are likely significantly understated as they do not account for those listings in which the permanent resident was not present (*i.e.*, "private rooms"), which is in and of itself illegal in New York City.
- **Commercial users accounted for the majority of Airbnb listings to run multimillion-dollar businesses:** Over 100 users controlled more than 10 different apartments that were rented out regularly through Airbnb. Together, these hosts booked 47,103 reservations and earned \$59.4 million in revenue. The most prolific user administered 272 unique listings, booked 3,024 reservations and made \$6.8 million in revenue. Additionally, while only 6% of hosts ran large-scale operations on Airbnb, that same group dominated the

platform, generating 36% of all rental transactions and collecting 37% of total revenue – or \$168 million.

- **Numerous units appear to serve as illegal hostels:** New York law prohibits commercial enterprises from operating hostels. In 2013, approximately 200 units were booked through Airbnb for more than 365 nights during the year, indicating that multiple, unrelated guests shared the same unit on the same night, as they would in a hostel. The 10 most-rented units were booked for an average of 1,900 nights in 2013, with one top listing average 13 reservations per unit per night.
- **Gentrified neighborhoods account for vast majority of Airbnb revenue:** Bookings in just three Manhattan neighborhoods – Greenwich Village/SoHo, Chelsea/Hell’s Kitchen and Lower East Side/Chinatown – accounted for more than 40% of hosts’ revenue, or about \$187 million. By contrast, all reservations in Queens, the Bronx and Staten Island combined brought in \$12 million, less than 3% of the New York City total.
- **Short-term rentals are displacing long-term housing options:** In 2013, more than 4,600 units were booked for at least three months of the year. Of these, nearly 2,000 were booked for a cumulative total of six months or more, rendering them largely unavailable for use by long-term residents. Notably, the share of host revenue from units booked as short-term rentals for more than half the year increased steadily, accounting for 38% of the site’s revenue by 2013.

Airbnb is now circulating a feel-good advocacy piece in the form of a “study” that ignores the Report from the New York Attorney General. See <https://www.airbnbnyc.com/economic-impact>. As between findings by the New York Attorney General and Airbnb’s “study”, we suggest that the former has much more credibility given that Airbnb continues to violate Federal, New York State, and New York City laws.

II. AIRBNB AND OTHER VIRTUAL HOTELS ARE VIOLATING NEW YORK LAW

A. New York City Laws Governing Hotels Protect Tourists and the Public

New York City is one of the largest hotel and tourist markets in the world. For the safety of those tourists, New York City hotels are subject to more burdensome regulations than apartment buildings. This is because tourist use is distinctly different from long-term residential use.

As a generalization, hotels are required to be “safer” than apartment buildings because tourists are much less likely to understand the building they are staying in than long-term residents of an apartment building. We have not done an empirical study, but we believe this is true for every major tourist destination in the world.

Specifically, New York City hotels are particularly heavily regulated to be much more fire safe, by the building code and the fire code, than apartment buildings. For example, hotels are

required to have sprinkler systems, and detailed systems to let guests know of a fire emergency as well as detailed evacuation plans and the staff must ensure that those systems and plans work. Hotels are also required to adhere to detailed construction standards to prevent the spread of fire through the building. These same standards do not apply to apartment buildings.

The virtual hotels also claim that they are not subject to these building and fire codes and they certainly are not obeying them. See <http://www.sharebetter.org/story/after-major-fires-at-illegal-hotel-buildings-nyc-official-calls-for-increased-fire-safety-inspections/>. Before the virtual hotels were created, it was unthinkable that there could be a fire in an apartment building as a group of transient tourists, unfamiliar with the building, wandered the hallways trying to find a staircase with no staff or PA system to tell them whether to go up or down to avoid suffocation. Now, it is a clear and present danger.

In addition to the building and fire codes, New York City law contains specific provisions governing the operation of a hotel to further protect guests and the public. For example, hotels are required to: (1) maintain a register of hotel guests, a requirement that helps ensure that undesirables, or those with whom US citizens cannot do business, can be easily found by law enforcement if necessary; (2) the posting of rates to ensure that a person staying in the room is being charged a reasonable rate for it; and (3) the necessity of latching chains on hotel room doors. See <http://codes.lp.findlaw.com/nycode/GBS/12>.

B. New York Laws Are Intended to Benefit the Citizens of New York City and Protect the Character of the City

For decades, large areas of New York City, as a matter of zoning law, have not permitted transient occupancy, such as tourist occupancy, and thus do not allow hotels in such zones. The purpose of these zoning laws is to maintain those areas of New York City as long-term residential communities, necessary to maintain the neighborhood nature of the City. See, generally, <http://www.nyc.gov/html/dcp/html/zone/zonehis.shtm>. These zoning regulations effectively prevent the transient use of apartments within such zones.

At the time that the laws preventing transient use in certain portions of New York City went into effect over fifty years ago in 1961, two types of hotels were operating throughout the City – transient hotels and apartment hotels. See <http://www.andersonkill.com/webpdfext/RealEstateWeekly-Dec2008.pdf>. Transient hotels were hotels that typically had a high number of guests that stayed for less than 30 days. By contrast, apartment hotels were buildings that were constructed for long-term use (including amenities such as, for example, some method of cooking) and generally had guests who stayed longer than 30 days.

The zoning law grandfathered in then existing transient hotels. As a result, if a transient hotel was previously operating in a district that disallowed transient use after the zoning law, that hotel could continue to do so. But no other transient hotels could be built in such a district. Similarly, the zoning law also prevented apartment hotels from being converted into transient hotels and required them to remain long-term use hotels.

Among apartment hotels were “single room occupancy” (SRO) hotels. SRO hotels provided affordable housing for low income individuals. See http://en.wikipedia.org/wiki/Single_room_occupancy. In or about 2009, the City of New York became concerned that owners of SROs were illegally renting out rooms for transient use in order to increase their income stream. These rentals both violated the zoning law and, at the same time, deprived the city of much-needed affordable housing. In a lawsuit by the City against an owner of an SRO, the New York State court held that in order to get an injunction prohibiting further transient use, the City would have to prove that the transient use was not incidental because the statute at that time permitted incidental transient use.

C. New York City Affirms the Prohibition Against The Renting Of Apartments As Hotel Rooms

In 2010, the City succeeded in having the State Legislature clarify the zoning law by adopting what it believed to be the then standing interpretation of incidental transient use. See <http://www.nysenate.gov/press-release/illegal-hotels-bill-passes-legislature-bill-protect-residents-increase-apartment-avail>. HANYC was asked by the City to support the legislation. HANYC did so as an accommodation to the City and only after satisfying itself that the concern of the City was substantial and legitimate. That 2010 legislation had nothing to do with Airbnb and, at that time, the issues raised by Airbnb had yet to bubble to the surface.

While the 2010 legislation is widely referred to as the “illegal hotel” law, in fact, all it did was define certain terms in a law that had already been on the books for decades. The fact is that the prohibition against renting residential apartments as *any* type of transient hotel room arises from the New York City building and fire codes and from a decades-old zoning prohibition designed to protect the character of the City.

D. Airbnb’s New York City Listings Deliberately Violate New York City and New York State Laws That Are Intended to Safeguard Tourists and Protect the Character of the City

It is common knowledge that Airbnb’s New York City listings are nearly exclusively in apartment buildings. These rentals of apartments by tourists for short-term stays are illegal, *regardless of where they occur in the City*, because, as explained above, apartment buildings cannot be used for transient purposes. If the rentals are also in a “non-transient zone”, then the illegality is compounded. Not only are they forbidden by the building and fire code, they are also operating to defeat the zoning purpose to maintain the character of the City. For Airbnb to claim it does not understand (nor is it required to understand) these laws is not believable. The fight over this issue has been going on for some years now. Airbnb has lawyers and it has lobbyists. It is deliberately acting to facilitate and in concert with the “hosts” who are violating the laws of New York City and it knows that it is.

III. VIRTUAL HOTELS ARE TORTIOUSLY INTERFERING WITH CONTRACTS

It is well known throughout the New York City real estate market (and, we submit, in virtually every major real estate market) that residential leases include a standard “no sublet” clause that flatly prevent tenants from subleasing to any other party without the express written permission of the landlord. A breach of that provision, including a sublet through Airbnb, is a violation of the contract and is grounds for eviction. See <http://nypost.com/2015/02/21/landlords-planning-more-evictions-after-airbnb-ruling/>.

The standard “no sublet” clause is hardly a surprise to a company such as Airbnb and its ilk. They did not fall off of the turnip truck yesterday. For example, Airbnb is capitalized in the multiple billions of dollars, and has hundreds of thousands of listings on its website. See http://dealbook.nytimes.com/2014/03/20/airbnb-said-to-pursue-valuation-of-over-10-billion-in-new-fund-raising-round/?_r=0). It is with knowledge of such clauses that Airbnb openly solicits, encourages and accepts listings in apartment buildings in New York City, and then uses its multimillion dollar advertising campaigns to induce travelers to contract with the tenants of those apartments in violation of the leases, and in derogation of the landlord’s rights. A systematic effort to induce hundreds of thousands of breaches of contract within the borders of New York City is, we believe, the most monumental case of tortious interference with contract in the history of the law.

IV. VIRTUAL HOTELS AND THE UNLAWFUL DISCRIMINATION PROBLEM

Hotels have for centuries been under the duty to accept all those who may seek a room, if rooms are available. It is one the primary duties of a hotel. The exceptions to this rule are extremely narrow – as a general rule, a hotel can only refuse a guest who has a communicable disease, who is known to be potentially dangerous to other guests, or who is unable to pay. See Jefferies & Brown, *Understanding Hospitality Law*, Chapter 4 (5th Ed. AHLEI). Federal and state laws reiterate a large part of this common law this duty in the form of preventing unlawful discrimination. These laws prevent discrimination based on characteristics, such as race, color, and gender, and on the basis of religious belief, but also of particular importance, on the basis of disability. The Americans With Disabilities Act (ADA), was enacted with the hotel industry’s support, **specifically to assure that public accommodations, and in particular accommodations for transient guests – the millions of guests that these virtual hotels target, market to and facilitate the transactions of** – were available to and usable by, the disabled. See <http://www.ada.gov/hsurvey.htm>. Under the ADA, a hotel must make available specified numbers of ADA compliant rooms and make certain that all of its rooms are compliant to myriad standard applicable to all rooms and the hotel itself.

We are aware of the types of legal arguments that Airbnb and other virtual hotel companies might make to escape a conclusion that their operations must also obey these laws. The argument goes like this: *As virtual hotels we do not own or manage any property, and therefore we are not bound by the ADA. Nor do we, or can we, have a duty to police those who list on our sites and who might be discriminating in their choice of guests based on other impermissible criteria. The only exception, so goes the argument, is that the Fair Housing Act might apply to those who are*

listing on our site, but that's not our responsibility either. Presto – no discrimination laws apply to our rental business.

See <https://www.airbnb.com/support/article/898>.

This type of logic gives the term “loophole” a bad name. Whatever its surface appeal, it overlooks reality of discrimination with respect to the disabled, at the very least. See <http://nypost.com/2014/11/03/airbnb-spots-dupe-the-disabled-on-accessibility-advocates/>; <http://www.bkmag.com/2014/11/03/airbnb-in-new-york-is-terrible-for-the-disabled/>.

Contrast the virtual hotels’ “business model” to the online travel agencies and companies, such as Orbitz. The type of argument that the virtual hotels make might fly for Orbitz because Orbitz is marketing rooms found in hotels that *are* required to comply with the law. Contrast virtual hotels to a hotel franchise arrangement where the franchisees are hotels that *are* required to obey the ADA, and where some courts have found, in decisions we disagree with, that the franchisor in certain situations may also be subject to the ADA. See http://www.americanbar.org/publications/franchise_lawyer/2013/fall_2013/how_does_americans_with_disabilities_act_affect_franchising1.html. Contrast it also to real estate listings for rentals where the real estate agents *are* subject to the Fair Housing Act, as are those individuals who are listing with those agencies. The real estate agents provide a mechanism to detect an individual who is trying to rent his apartment in a way that discriminates on an impermissible basis. Contrast it also to a newspaper that does nothing but accept advertisements. The newspaper may have no duty with respect to any discrimination in a transaction resulting from such an advertisement because it has no part in the transaction between the advertiser and those who are answering the ad, unlike Airbnb and its ilk who participate not only in the listing, but in the transaction itself, by putting the transaction together in order to generate the massive revenues that will support billions of dollars in capitalization.

The point is that Congress has mandated that the transient occupancy trade be made accessible to the disabled. Yet Airbnb and its ilk have, so they claim, managed to create a massive market of transient trade that does not have to, and does not, obey the policy of that law. Indeed they apparently believe that they have designed a structure where neither they nor their “hosts” can be adequately policed or “blamed” for discrimination of any sort under the fiction that all they are doing is putting together two willing parties in the sharing economy. Such a claim rings as hollow as every other excuse for unlawful discrimination. It is the same old story dressed up in new catch words and slogans. Even if the massive loophole they rely upon does in fact exist as a technical matter of law, it is a business model that the virtual hotels should be ashamed of and that the FTC should soundly condemn.

V. AIRBNB DOES NOT ENSURE THE SAFETY OF GUESTS OR APARTMENT BUILDING RESIDENTS

A primary duty of a hotel is to protect its guests. See Jefferies & Brown, Understanding Hospitality Law, Chapter 10 (5th Ed. AHLEI). See also http://hotelexecutive.com/business_review/347/common-legal-issues-that-confront-hotel-operators.

In order to fulfill this duty, hotels employ security directors, security officers, and train their employees on guest security and potential guest issues. Hotels have specific lockdown procedures in the event of emergencies and protocols to respond to suspected infectious or contagious diseases on the premises, terrorist attacks, unauthorized persons on the premises, including human traffickers, and for reports of theft or other illegal activity on the premises. Hotels also provide safes for valuables, doormen to assist in transportation, and 24-hour staff to respond to guest concerns, including providing for disabled individuals so that they can use the facilities and so that they can be safely evacuated in the case of emergency. Each hotel has detailed fire plans that are filed with the New York City Fire Department and are required to have fire safety directors present 24 hours a day. See http://www.nyc.gov/html/fdny/pdf/cof_study_material/fsd_hotel_study_guide.pdf.

Hotels also regularly assist law enforcement on a wide-range of issues, varying from petty theft to trafficking to terrorism. Every member of the staff of a hotel operates as a safety officer in this sense: inactivity in a room and refusal of maid service for more than one or two days is usually reported to hotel management in case there is something wrong with the guest; the manager of the hotel, as well as the room staff are charged with surveying the premises to use reasonable care that the premises are in order and create no danger; operators or desk clerks are available 24 hours a day in case any guest has a problem, or an illness, or an accident; special fire safety directors are on duty 24 hours a day; and, in many cases, room furnishings are standardized because they have been tested to be reasonably safe for guest use.

Airbnb and other virtual hotels do none of this.

Rather, Airbnb and other virtual hotels facilitate the booking of any apartment in any apartment building that a “host” wishes to list, safe or not. **And anybody – literally anybody – can rent those apartments.**

Imagine the following scenario. A married couple with two young children lives in a rental building in New York City. The building is home to many other similarly situated couples, also with young children. In fact, on any given day, children play in the hallways or in the front of the building. The building has no doorman and no other security personnel. Their neighbor, looking to make a quick buck while away, decides to sublet his apartment and lists on Airbnb. One only has to imagine the parade of horrors – all of which are realities in New York City – that could happen next. The “guest” that “checks in” could be a child molester, a rapist, a prostitute, a thief, a terrorist, or a human trafficker. This gives a whole new meaning to the phrase “case a joint.” It provides a new platform for criminals to use at their leisure.

Airbnb and other virtual hotels provide no security in case such a person wishes to check in and roam the hallways to the detriment of those who rent or buy apartments in New York City in hopes of having a stable environment in which to live, a place that does not require the type of security which hotels have and provide as a matter of law and which is necessary when dealing with heavy transient traffic.

VI. AIRBNB'S WEBSITE IS MATERIALLY MISLEADING

Airbnb's website contains some information for what it calls "Responsible Hosting". It then lists the cities that it operates in. When one clicks on New York, one finds the following (see <https://www.airbnb.com/support/article/868>):

When deciding whether to become an Airbnb host, it's important for you to understand the laws in your city. As a platform and marketplace we do not provide legal advice, but we want to provide some useful links that may help you better understand laws and regulations in New York. This list is not exhaustive, but it should give you a good start in understanding your local laws. If you have questions, contact the Department of Buildings, Department of Finance or other city agencies directly, or consult a local lawyer or tax professional.

- **Business Licensing.** *The New York City Administrative Code (ADC) requires certain businesses to obtain a license. You should consult these requirements to determine if your activity must be licensed. For more information, paste the following URL into your browser: <https://www1.nyc.gov/nycbusiness/startabusiness/>.*
- **Multiple Dwelling Law.** *The New York State Multiple Dwelling Law restricts renting out a Class A multiple dwelling for periods of fewer than 30 days. The definitions of "Class A" and "multiple dwelling" can be found in Sections 4-7 and 4-8 (Article 1 of "MDW" under "Laws."). The law exempts rentals to a "boarder, roomer or lodger," which has been interpreted to mean that, in general, if a guest shares the apartment with a permanent resident who is present for the duration of the rental (i.e., a "shared space" rental), it is permissible under the Multiple Dwelling Law.*
- **New York City Zoning Code.** *The New York City Zoning Code sets out the city regulations on zoning, which may apply to your listing. Chapter 2 contains definitions of things like "hotels" that could apply to you.*
- **Rent Control.** *The Administrative Code (ADC) sets out rules for rent stabilized and rent control properties. If you live in a property subject to rent stabilization or rent control, you should review these rules carefully.*
- **Taxes.** *New York City and New York State impose multiple taxes that may apply to transient occupancy or tourist use, subject to certain exemptions. Examples of taxes that could apply to your listing are State sales and use tax, City hotel room occupancy tax, and State and City nightly room fees. Additional information about hotel sales taxes is available here. Additional information about NYC hotel occupancy taxes is available here. (The word "hotel" has a broad definition that could apply to you.)*
- **Other Rules.** *It's also important to understand and abide by other contracts or rules that bind you, such as leases, condo board or co-op rules, HOA rules, or rules established by tenant organizations. Please read your lease agreement and check with your landlord if applicable.*

We're committed to working with local officials to help them understand how Airbnb benefits our community. Where needed, we will continue to advocate for changes that will allow regular people to rent out their own homes.

Last updated: April 30, 2015

If there has ever been an example of a “disclosure” hiding the truth, this is it. **It fails to mention that there is a law that prohibits the rental of apartments in New York City for transient use.** Instead, it tells the prospective host to call all over New York to learn that simple, indisputable fact.

To make it even worse, by a simple internet search, Airbnb can determine if a short term transient listing in New York City violates the law. The Certificates of Occupancy for every address in New York City are on line. See <http://www.nyc.gov/html/dob/html/bis/bis.shtml>. If the Certificate of Occupancy indicates it is in a permanent residential building (condo, co-op, or residential apartment building), the answer is “Yes, it violates the law”.

That is specific for New York. For New York and the rest of the country, the “disclosure” also fails to mention to hosts that: You could be liable if someone is injured in your apartment. You are liable if someone in your building is injured by someone who rents from you. You could be subject to penalties and in some cases indictment for trading with the enemy if you rent your apartment to someone listed on OFAC’s Specially Designated Nationals list. See <http://www.treasury.gov/resource-center/sanctions/SDN-List/Pages/default.aspx>.

CONCLUSION

Airbnb is not part of a sharing economy. It is part of the taking economy. It is worried about its own capitalization. It is worried about its public offering. It is pretending that it does not violate the law in New York City. It is ignoring the safety of the guests that it invites to its website. It is ignoring the safety of the people living in the buildings that it is preying upon in New York City. Its website is misleading. We submit that the FTC will recognize this for what it is: virtual hotels trying to cover-up illegality and profiting with the pretense of being part of a “sharing” economy and will condemn the true nature of these companies.

Respectfully submitted,

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