

Advertising and Marketing Hot Topics: Sale Pricing

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Sale pricing and advertised savings are a huge incentive for consumers when purchasing products and services. Consumers rely on the truth of the advertised savings and sellers may be subject to huge penalties if their sale advertising is deemed deceptive or misleading. Advertisers must make sure the stated savings are genuine and truthful.

Deceptive pricing is subject to federal and state oversight. An entity could face:

- Potential consumer, competitor and class action litigation
- Possible impact on business ratings
- Possible record-keeping requirements

Outlined below are some of the most common industry strategies and helpful information for sellers to stay in compliance.

Former Price Comparisons

To meet FTC guidelines, the advertised former price must be the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time. An advertised former price is subject to challenge if the item was never routinely offered for the stated price or if the item has not been recently offered at that price.

Sale pricing is also subject to multiple state statutes on deceptive trade practices. Many states have express and specific timing requirements, including rules on how long the product/service was offered at the original price and how close in time it was offered at that price before the sale period.

Some states also have specific timing and record-keeping requirements to support the claimed original price. Here are some examples:

- *Utah*: It is likely a deceptive act to advertise a nondiscounted price if that nondiscounted price was not offered for 15 days immediately preceding an advertisement of the nondiscounted

price

- *South Dakota*: It is a deceptive act to advertise a former price without offering that former price for at least seven consecutive business days during the 60-day period prior to the advertisement. Former-price advertisers shall maintain reasonable records for a period of two years from the date of sale and advertisement, which records shall disclose the factual basis for such representations or statements and from which the validity of any such claim be established.
- *North Dakota*: It is a deceptive act to advertise a former price unless the alleged former price was the prevailing market price within three months immediately preceding the advertisement or unless the date when the alleged former price did prevail is clearly, exactly, and conspicuously stated in the advertisement.
- *Massachusetts*: It is a deceptive act to advertise a former price unless such former price is a bona fide, actual price at which the seller offered the product to the public, openly and in good faith for a reasonably substantial period of time in the recent past.

Comparable Value Comparisons

FTC Guidelines state that the advertiser must be reasonably certain that the comparative price is the price at which substantial sales are being made in the same shopping area. If not comparing identical products, that fact must be clearly disclosed and the products should be essentially similar in quality and obtainable in the area.

MSRP (Manufacturer's Suggested Retail Price)

In accordance with FTC Guidelines, reference to the manufacture's list price is proper comparison only if the MSRP represents the price at which the product is generally sold in the principal retail outlets. Otherwise, it may be deemed a fictitious price reduction.

BOGO (Buy One Get One)

According to FTC Guidelines, Buy One Get One (BOGO) and other conditional sale pricing cannot be used if there is an increase in the regular price of an article to be bought, a decrease in the quantity or quality of the article or if there is additional undisclosed condition.

The Better Business Bureau (BBB) Code of Advertising states that a continuous BOGO offer can be construed as an item's regular everyday price; such a finding has resulted in the BBB lowering a seller's rating to F.

Wholesale/Factory Prices

The FTC Guidelines state that retailers should not:

- advertise a retail price as "wholesale" price
- represent sale at "factory" prices unless price equals price paid when purchasing directly from manufacturer
- offer seconds, imperfect or irregular merchandise without disclosure that the higher comparative price refers to the price of perfect merchandise
- advertise an "advance" sale when they do not have a good faith expectation to increase the price at a later date
- make a "limited time offer" which in fact is not limited

To avoid being misleading by omission, disclosures may be required to inform consumers of restrictions, such as the sale's duration or limited available inventory.

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