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UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
CHICAGO REGIONAL OFFICE

**COMMISSION AUTHORIZED**

September 19, 1990

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Dear Mr. Cole:

The staff of the Federal Trade Commission's Chicago Regional Office and the Bureaus of Consumer Protection and Economics are pleased to have this opportunity to respond to your letter requesting our comments on the Council of Better Business Bureaus' draft Code of Advertising for Comparative Price Advertising ("Draft Code" or "Code").<sup>1</sup>

As the Council recognizes, price advertising is vital to price competition at the retail level. We have reviewed the Draft Code and we believe that it in general provides useful guidance to advertisers. At the same time, it is possible that a few of the Code provisions could be interpreted rigidly and thereby unnecessarily restrict some forms of truthful price information, which in turn could reduce the amount of truthful price advertising available to consumers.<sup>2</sup> We therefore suggest that the Council consider whether revising the guidelines to balance specificity with the flexibility that retailers need to adopt and advertise their pricing policies might be warranted. The Draft Code is a constructive document with considerable potential to benefit advertisers and consumers alike, and we will limit our discussion to several areas where we believe the Code could be improved.

**I. Interest and Experience of the Staff of the Federal Trade Commission**

Comparative price advertising is a field in which the Federal Trade Commission (FTC) has long been involved, and one that has also been the subject of significant activity at the

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<sup>1</sup> These comments are the views of the staff of the Chicago Regional Office and Bureaus of Consumer Protection and Economics of the Federal Trade Commission. They are not necessarily the views of the Commission or any individual Commissioner.

<sup>2</sup> These comments are limited to the consumer protection aspects of the Code.

state and local level.<sup>3</sup> Our interest in comparative price advertising stems both from the FTC's mandate to protect consumers from unfair or deceptive practices and from our mandate to maintain and promote vigorous competition.<sup>4</sup>

The FTC's involvement in deceptive pricing enforcement is almost as old as the agency itself,<sup>5</sup> and has consisted principally of case enforcement. In 1958 the FTC adopted its first Industry Guides on reference pricing.<sup>6</sup> On January 8, 1964 the FTC promulgated revised Guides Against Deceptive Pricing (the "1964 Guides").<sup>7</sup>

The FTC continues to challenge deceptive price claims.<sup>8</sup> Phony sales, or other inflated claims of "savings" based on misrepresentations of an advertiser's current prices are practices that can injure consumers, and injury is most likely when the advertised "sale" prices are higher

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<sup>3</sup> See, e.g., Letter from William C. MacLeod, Director, Federal Trade Commission Bureau of Consumer Protection, to Helena Huang, Consumer Protection Division, Massachusetts' Attorney General (November 18, 1988) (Comment on proposed revisions to Massachusetts' Retail Advertising Regulations); Illinois Price Comparison Rule, 14 Ill. Admin. Reg. 470 (effective June 28, 1989).

<sup>4</sup> See 15 U.S.C. § 41 *et seq.*

<sup>5</sup> See, e.g., Chicago Mill Works Co., 1 F.T.C. 488 (1919) (order against a manufacturer of lumber and building materials who advertised falsely that purchasers could realize savings from 25-50 percent by buying directly from him).

<sup>6</sup> 23 Fed. Reg. 7955 (October 15, 1958).

<sup>7</sup> 16 C.F.R. Part 233 (1988).

<sup>8</sup> Recent Commission actions concerning price claims have involved misrepresentations of the true cost, or hidden charges that were not disclosed to consumers until after purchase. See, e.g., *F.T.C. v. World Travel Vacation Brokers, Inc.*, No. 87 C 8449 (N.D. Ill. Sept. 28, 1987) (temporary restraining order) (Complaint alleged that the company represented that the costs of its travel certificates would entitle consumers to a round-trip airfare to Hawaii, when, in fact, the cost of the airfare was added to the actual rates for accommodations); *F.T.C. v. Amy Travel Services, Inc.*, No. 87 C 6776 (N.D. Ill. Aug. 3, 1987) (temporary restraining order) (Complaint alleged that company engaged in unfair and deceptive acts or practices by misrepresenting and deceptively failing to disclose the true costs of the vacations they sold); and *General Rent-A-Car, Inc.*, 54 Fed. Reg. 30,106 (July 18, 1989) (consent order) and *Alamo Rent-A-Car, Inc.*, 54 Fed. Reg. 25,106 (June 13, 1989) (consent order). (The complaints in both *General Rent-A-Car* and *Alamo Rent-A-Car* alleged that the companies failed to disclose to consumers the existence and amount of airport surcharges and mandatory fuel charges when consumers inquire about renting vehicles).

than the prices offered by competitors or when consumers are misled into purchasing products with a different level of quality than they would otherwise consider.<sup>9</sup>

Truthful price information, by contrast, helps consumers make informed purchase decisions. In addition, comparative price advertising plays an important role in promoting vigorous competition among retailers.<sup>10</sup> Studies have demonstrated that price advertising tends to enhance competition and lower prices.<sup>11</sup>

The challenge to policy makers and the Council is to protect consumers from deceptive price claims without imposing unnecessarily strict or rigid standards that could discourage truthful price advertising and ultimately reduce competition. It is particularly important that all advertisers, large and small alike, enjoy sufficient latitude to respond quickly to changing market conditions and competitive pressures. If overly rigid standards or substantiation requirements prevent sellers from truthfully advertising price changes quickly and effectively, consumers will be denied useful information and competition in general will be blunted. With these considerations in mind, we turn to a detailed analysis of the Draft Code provisions.

## II. Analysis of the Draft Code

The Draft Code appropriately notes that it is not possible to provide standards that will apply specifically to the advertising of all retail goods and services in the economy.<sup>12</sup> In our view the attendant flexibility is a major strength of the Draft Code. Although departures from

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<sup>9</sup> See R. Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 687 (1977).

<sup>10</sup> The Supreme Court has observed that the free flow of commercial information "is indispensable to the proper allocation of resources in a free market system." Virginia Pharmacy Board v. Virginia Consumers Council, 425 U.S. 748, 765 (1976) (invalidating statute that prohibited pharmacist from advertising prescription drug prices). Accord, Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 561-62 (1980).

<sup>11</sup> See, e.g., Cleveland Regional Office and the Bureau of Economics of the Federal Trade Commission, Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, Federal Trade Commission Staff Report (1984); Benham, The Effect of Advertising on the Price of Eyeglasses, 15 J. of L. and Econ. 337 (1972); Cady, An Estimate of the Price Effects of Restrictions on Drug Price Advertising, 14 Econ. Inquiry 493 (1976); Kwoka, Advertising and the Price and Quality of Optometric Services, 74 Am. Econ. Rev. 211 (1984); and Schroeter, Advertising and Competition in Routine Legal Services Markets: An Empirical Investigation, 36 J. of Indus. Econ. 49 (1987).

<sup>12</sup> Draft Code at 1.

the Code may not constitute a sufficient basis to conclude that a claim is deceptive, a deviation from the standards raises a question whether the claim is deceptive under the circumstances of the case.

We identify in the analysis that follows certain areas where we believe the Code could be further improved. In order to provide an orderly review, we have divided our comments into four parts: (a) basic principles; (b) comparative price provisions (i.e., the first four provisions of the Draft Code); (c) price matching and lowest price claims; and (d) use of the term "sale."

**A. The Draft Code's Basic Principles**

The Council's efforts to provide basic, voluntary guidelines intended to promote truthful and accurate comparative price advertising will benefit consumers if the efforts reduce the types of potential injury outlined above without imposing unreasonable burdens. In assessing how well the Draft Code meets this goal, the Council may wish to consider how the FTC approaches its enforcement responsibilities in this area.

The FTC considers several factors when determining whether an advertisement deceives consumers in violation of Section 5. These factors are set out in the Commission's 1983 Policy Statement on Deception, which defines as deceptive any "representation, omission or practice that is likely to mislead the consumer acting reasonably in the circumstances, to the consumer's detriment."<sup>13</sup> When applied to comparative pricing claims, we believe that this framework appropriately balances the need to protect consumers from deceptive advertisements and the need to provide retailers with the flexibility to advertise accurate price information. We recommend that the Council incorporate the FTC's definition of deception to provide useful guidance to advertisers when their marketing methods do not fit easily into the safe harbors envisioned by the Draft Code.

In this regard, we suggest that the Council consider noting explicitly that the objective of pricing guidelines is to prevent deception. Thus, the Council may wish to state that any available information concerning consumer interpretations of particular claims would be useful in applying these guidelines. We also believe the Council should consider incorporating a general statement that the use of qualifying or otherwise informative disclosures concerning price and sales claims could alleviate deception that might otherwise result from advertisements that depart from the more specific guidelines of the Code.

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<sup>13</sup> Policy Statement on Deceptive Acts and Practices, attached to Commission decision in Cliffdale Associates, Inc., 103 F.T.C. 110 (1984).

The Draft Code states as a "basic principle" that advertisers should "be prepared to substantiate any claims or offers made before publication or broadcast ..."14 This principle is similar to the FTC's well-established legal requirement that advertisers and ad agencies possess a reasonable basis for objective advertising claims before they are made. We suggest that the Code recommend substantiation under standards similar to those articulated by the FTC in its Policy Statement Regarding Advertising Substantiation<sup>15</sup> to ensure that the Code is not read to require that advertisers substantiate purely subjective claims, such as "you'll love our prices." This policy would require that advertisers possess a reasonable basis for claims such as "our prices are the lowest in town."

#### **B. The Draft Code's Comparative Price Provisions**

The Draft Code recognizes that an advertiser may offer a price reduction or savings by comparing its selling price with: (1) its own former price; (2) the current price of identical merchandise offered by others in the market area; (3) the current price of comparable merchandise offered by others in the market area; or (4) a manufacturer's list price.

##### **1. Comparisons with Own Former Selling Price**

Section 1(a) of the Draft Code addresses the deceptive practice of advertising substantial reductions from a price that has been increased greatly for a brief period of time for the sole purpose of enabling the subsequent offer of a large price reduction. Pursuant to this section of the Code, an advertiser may claim savings from its own former selling price only if the former selling price was a bona fide or genuine price from which the reduction represents a genuine savings for the consumer.

The Code provides two methods by which a retailer can establish that its former selling price was a bona fide price. First, a former selling price will be considered a bona fide price if "reasonably substantial sales' were made at or above the price in the recent regular course of business" ("reasonably substantial sales" test).<sup>16</sup> Second, if reasonably substantial sales cannot be documented, a retailer may nonetheless establish that its former selling price was a bona fide price if the merchandise was offered in "good faith" for a "reasonably substantial

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<sup>14</sup> Draft Code at 14. (emphasis added). Although the Code does not expand on this statement of general principle, some of the provisions of the Code that follow provide guidance on the types of substantiation that advertisers should possess.

<sup>15</sup> See FTC Policy Statement Regarding Advertising Substantiation (incorporated into case law by the Commission in *Thompson Medical Co.*, 104 F.T.C. 684, 821-26 (1984)).

<sup>16</sup> Draft Code at 3.

period of time" in the recent regular course of business ("good faith" test).<sup>17</sup> In providing a "good faith" test, the Code appropriately provides retailers the latitude to advertise truthful price reductions when substantial sales have not occurred at the former price.<sup>18</sup>

The Code properly recognizes that the relevant time period for evaluating a savings claim under the "reasonably substantial sales" test may vary depending upon the product in question. For instance, if the product is seasonal, the "season" may be the appropriate time period in which to evaluate sales volume. By contrast, if the product is a staple, up to a year could be a proper period of measurement.<sup>19</sup> On the other hand, for a product that is subject to significant price fluctuations (such as fresh meat or produce), a week might be the most appropriate period of measurement. We interpret these Code provisions to provide a retailer considerable latitude in selecting an appropriate time period. We presume, for example, that a retailer of a staple item could advertise a reduction from a former price if reasonably substantial sales had occurred at that price during the last year. The Council may wish to consider stating this presumption explicitly or providing specific examples in order to provide additional guidance to retailers.

With regard to the "good faith" test, the Council may also wish to consider providing additional clarification to ensure that Section 1(a)4's discussion of "relevant selling period" is not interpreted to impose an undue burden on advertisers of staple goods. The factors outlined in the Code that can be relied on to show "good faith" provide practical guidance that will be useful for advertisers in determining whether their business practices comply with the Code. The Council may wish to consider providing similar guidance regarding how advertisers may determine a "reasonably substantial period of time" for staple goods.

Without greater specificity, it may be difficult for retailers to understand when they can legitimately advertise a price reduction. For example, a retailer who receives a shipment of television sets and establishes a retail price may encounter poor sales at that price because of changes in demand or because of price cutting by competitors. Such a seller might then wish to adopt lower prices and advertise this decision for the very reason that sales had been disappointing at the former price.

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<sup>17</sup> Id.

<sup>18</sup> This is similar to the Commission's 1964 Guides. See 1964 Guides, supra note 7, Section 233.1. As the Guides state: "If the former price is 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, it provides a legitimate basis for the advertising of a price comparison."

<sup>19</sup> See supra note 16.

In this case, the television retailer might interpret the Draft Code to preclude comparative advertisements for lower prices unless the higher price had been in effect for the majority of a selling period of up to one year. This degree of caution could deter retailers from advertising truthful price reductions that would benefit consumers.<sup>20</sup> We suggest therefore that the Council consider providing additional clarification in this area by listing examples of criteria that would be relevant in determining when shorter times are reasonable. We suggest that the Code expressly allow, among other things, competitors' price reductions, changes in demand, or other objective factors as justification for advertising a reduction in price when few items have been sold at the former price and the former price has been in effect for only a relatively short period of time.

## **2. Comparison With Price of Identical Merchandise Sold by Others**

Another common form of comparative price advertising states that a price for an article is less than that being charged elsewhere for the same item. We agree with the Draft Code that this marketing technique "can enhance competition in the marketplace to the benefit of consumers." Under the Code, the advertised reference price should represent the "prevailing price, offered in representative principal retail outlets in the market area, and not merely an isolated and unrepresentative price,"<sup>21</sup> unless the retailer discloses the basis for the comparison.

We agree that the type of price comparisons addressed by this section should not be made without sufficient support. We would be concerned, for example, if a retailer stated "our toaster \$24, compare elsewhere at \$60" if the only competitor charging the higher price was one upscale full service store and the vast majority of retailers charged a lower price than the advertising retailer. The Code is clearly intended to prevent this type of unqualified claim where the higher comparison price is "isolated and unrepresentative."

We suggest, however, that the Draft Code specify more clearly what level of substantiation is needed to justify these claims. Section 1(b)(2) of the Draft Code provides that representative principal retail outlets are those that individually or collectively represent a significant share of the market for the offered merchandise. The Code suggests that price

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<sup>20</sup> Similarly, sellers of white goods, such as sheets and towels, may wish to lower prices to participate in the periodic "white sales" that are characteristic of this area of retailing. A relevant selling period of up to one year could curtail the frequency of such beneficial price reduction.

<sup>21</sup> Draft Code at 5.

comparisons be based on a survey of a "representative sample" of principal retail outlets within the advertiser's market or trade area. Factors cited as relevant in determining an appropriate cross section of outlets include location, size, and pricing methodologies.<sup>22</sup>

The Council may wish to consider describing more fully the role "pricing methodologies" is to play in the selection of principal retail outlets for a price survey. As currently drafted, this section of the Code may be open to several interpretations. First, an advertiser might conclude that the sample could include only those outlets that adhere to the same general pricing policy as the retailer advertising the price comparison. Second, the Code might be read to mean that the sample could include outlets, such as full service department stores, that follow a common pricing methodology even though the pricing methodology differs from the advertising retailer's. Third, and most plausibly, the Code could mean that the sample must include outlets that span the range of pricing methodologies commonly followed within the relevant trade area.

Consumers would likely be harmed if the first interpretation were followed. We would not want to see the Code interpreted to require that discounters limit comparisons to prices that are charged by other discounters. Such an interpretation could severely restrict comparative price advertising and deny consumers truthful information on alternative prices that are commonly charged within the trade area.

The likely effects of the second and third interpretations are less clearcut because much depends on the implied claims that accompany express price comparisons. Consider, for example, the simple express claim, "Our price \$40, Compare elsewhere at \$60." Consumers might infer from this claim that the retailer was truthfully comparing its \$40 price with the \$60 price charged by a representative sample of full service department stores in the trade area. If consumers interpret the claim in this way, the advertiser could substantiate the claim by showing that full service department stores customarily charged \$60.

Alternatively, and more plausibly, consumers might infer from this claim that the \$60 price reflected the average price charged by the full range of retailers in the trade area. If consumers interpret the claim in this way, the retailer's substantiation burden would require the more extensive survey commensurate with consumers' expectations.

Given the broad range of possible substantiation burdens, one of which entails substantial costs to retailers, we suggest that the Council consider incorporating an expanded discussion of what is meant by the term "pricing methodology." Further, the Council may wish to note explicitly that the appropriate substantiation standard derives directly from the messages consumers infer from the advertisements.

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<sup>22</sup> Id.



In this regard, we note that any standard could prove unduly burdensome if applied rigidly, particularly in those instances where retailers run frequent advertisements listing comparison prices for a large number of items. For example, it seems unlikely that general claims such as "compare at \$60" accompanying each of many advertised items would lead consumers to believe that the advertiser had invested substantial resources in a rigorous survey designed to estimate numerous prevailing market prices with great precision. Rather, it may be that consumers would expect that the seller had made a good faith effort to determine that the advertised items were commonly for sale at the cited higher price. Of course, even under this circumstance, the advertiser would have to substantiate this general claim. Thus, for example, a claim that a product is sold in department stores for \$60 would require substantiation relating to department store prices generally, and a claim that a product is sold by a leading department store for \$60 would require information about a particular competitor's price.

We also recommend a flexible application of the Code's provision that large regional and national chains "be prepared to substantiate that the competition's price is the prevailing price charged by representative principal retail outlets in each area in which the advertising was principally disseminated."<sup>23</sup> We would note that the 1964 Guides recognize the latter problem in the context of a suggested retail price, providing that "a manufacturer...who does business on a large or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area."<sup>24</sup>

### **3. Comparison with Price of Comparable Merchandise Sold by Others**

Another way an advertiser may engage in comparative price advertising is by comparing its current selling price with the current price of comparable merchandise offered by others in the market area. Pursuant to Section 1(c) of the Code, a retailer who compares the price of its merchandise with the current price of merchandise sold by others "must be able to demonstrate that the merchandise is indeed comparable in virtually all material aspects." If the comparable merchandise is "superior in any material aspect," the advertiser must disclose this fact clearly and conspicuously in the advertisement.<sup>25</sup> For purposes of this provision, a

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<sup>23</sup> The Code appropriately does allow a national advertiser to reduce its substantiation burden by identifying in the advertisement the trade areas to which the claim applies. We question, however, whether in such circumstances it is also necessary to require the advertiser to "disclose clearly and conspicuously that prices in the community where the ad is disseminated may vary from those found in the areas described in the claim." Draft Code at 6.

<sup>24</sup> 1964 Guides, supra note 7, Section 233.3(g).

<sup>25</sup> Draft Code at 6.

"material aspect" is "one which is likely to influence significantly the consumer's purchasing decision."<sup>26</sup>

The FTC recognizes that failing to disclose material facts can be deceptive.<sup>27</sup> The relevant question is whether an advertisement that compares the prices of two items would lead a reasonable consumer to believe that the items were comparable in virtually all material respects. Such a conclusion might be expected if the items compared were simple commodities that perform very simple functions. The Code may work well in these situations, since it might not be difficult for advertisers to note the presence of any significant differences between the products being compared.

An advertisement might also suggest that the retailer's product is identical or very similar in all material respects to the item compared if the higher priced item were not specifically identified. For example, it could well be deceptive to advertise a very basic food processor selling for \$50 with the statement "Compare at \$250" if the unidentified comparison were with a top of the line brand.<sup>28</sup>

In other situations, however, reasonable consumers may not interpret comparative price claims to mean that the two products are functionally identical or very similar in all material respects. For example, consumers would be unlikely to expect that there were no material differences between two competing brands of automobiles (even when fitted with equivalent options) simply because an advertisement compared the prices of the two cars. Yet, the Code would allow this kind of advertisement only if all material differences were disclosed.

In such situations, we believe consumers would expect to engage in additional shopping and research to compare individual features that were of particular concern to them. Unlike a catalog or a detailed buying guide, price advertising by its very nature does not attempt to provide consumers with all of the information needed to make a purchase decision. The function of such advertising in many instances merely will be to signal the availability of bargains, under the reasonable expectation that consumers will inquire further for details.

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<sup>26</sup> Id.

<sup>27</sup> Policy Statement on Deceptive Acts and Practices, supra note 13.

<sup>28</sup> The potential for abuse can also exist where consumers interpret an ad to mean that the advertiser's product is approximately equal in quality, though not necessarily identical, to the compared item. Such an interpretation would be particularly reasonable when advertisers cite comparison prices for unstandardized items such as furniture and clothing. If a furniture retailer were to advertise that its \$200 lounge chair should be compared with competitors' lounge chairs selling for \$400, consumers reasonably could conclude that the quality of the chairs was indeed comparable.

Requiring retailers to discover and disclose all such differences in comparative price advertisements could impede the dissemination of important price information for many consumer products.<sup>29</sup>

Thus we would recommend that disclosure of material differences should be required only in those instances in which the advertisement states or implies that the products are functionally identical or very similar in all material respects. The preceding discussion suggests that some comparative price advertisements are unlikely to contain this claim.

#### 4. List Price

The final direct price comparison that the Draft Code addresses involves manufacturers' suggested retail prices. The Code would prohibit use of these prices for comparisons in advertising unless the "list price" is an actual former price of the advertiser or is the price "at which the product is currently offered for sale by representative principal retail outlets."<sup>30</sup>

The standards for substantiating list price references would be the same that the Code specifies for comparisons with former prices or prices of identical goods sold by competitors. Our earlier comments concerning the effects of these standards are also relevant here. In particular, an overly strict application of the Section 1(b) substantiation standard for comparisons with prices of identical goods sold by competitors could unduly burden retailers who advertise list price comparisons for a large number of items.

We agree that retailers must have a reasonable basis for all objective comparative price claims. However, as noted earlier, the 1964 Guides explicitly acknowledge that large regional and national sellers can not be expected to monitor in detail prevailing prices over a large trade area. The Guides state that such sellers will not be considered to have engaged in a

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<sup>29</sup> In International Harvester Co., the Commission addressed a similar issue of disclosure burden:

Since the seller will have no way of knowing in advance which disclosure is important to any particular consumer, he will have to make complete disclosures to all. A television ad would be completely buried under such disclaimers, and even a full-page newspaper ad would hardly be sufficient for the purpose . . . The resulting costs and burden on advertising communication would very possibly represent net harm for consumers.

See International Harvester Co., 104 F.T.C. at 1059-60.

<sup>30</sup> Draft Code at 7.

deceptive practice if the seller advertises a list price "in good faith . . . which does not appreciably exceed the highest price at which substantial sales are made in his trade area."<sup>31</sup> Language of this kind should prove sufficient to discourage deceptive claims of savings from a list price that is substantially above actual prices charged in the trade area.

We would urge, however, that any guidelines concerning list price comparisons be applied cautiously. There are many situations where suggested list prices that are not prevailing prices can serve useful competitive purposes without deceiving consumers. For instance, in some cases suggested list prices established independently by a manufacturer could provide a benchmark for consumers, allowing different retailers to compete by advertising different discounts from the same suggested list price. Such advertising would be particularly useful for products that come in many different configurations or models and are offered for sale by a variety of sellers.

For example, use of a common denominator such as a manufacturer's suggested list price could be of significant assistance to consumers in shopping for such products as window blinds. Because price depends critically on the size of the window to be covered and the specific style of blind chosen, consumers could not compare competitors' prices meaningfully unless retailers happened to advertise the same size and style of blind. The common practice of advertising percentage discounts from the manufacturer's list price solves this problem; consumers can determine easily which retailer offers the largest percentage discount and hence has the most competitive prices on a given manufacturer's line of blinds, even though few if any of the retailers actually charge the list price.<sup>32</sup>

The example of automobile sales is also illustrative. We believe that most consumers understand that the manufacturer's sticker price is rarely the actual selling price.<sup>33</sup> Because the sticker price for a specific model of car is identical for all dealers, it can serve as a valuable basis for consumers to compare discounts.

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<sup>31</sup> 1964 Guides, supra note 7, Section 233.3(g). See also 1964 Guides at Section 233.3(h) (illustrating when a manufacturer's conduct would not constitute a deceptive practice).

<sup>32</sup> This example assumes that retailers are using a uniform manufacturer's list price as the basis for their price savings claims. We note this illustration is in no way intended to indicate the actual presence or absence of deception in the sales of this type of product.

<sup>33</sup> The Automobile Information Disclosure Act, 15 U.S.C. § 1232 (1958), contains no requirement that the automobile's suggested price bear any relationship to its final negotiated price. The Act requires that the window sticker provide, among other things, "the retail price of [the] automobile suggested by the manufacturer." Id. at 1232(f)(1).

**C. Price Matching and Lowest Price Claims**

Section 1(j) of the Code expresses concern about the use of price matching and lowest price claims. The Code treats these terms differently. The Code states that some claims imply that the consumer will not find lower prices for the advertised items anywhere else and states that these lowest price claims are difficult, or impossible, to substantiate. The Code also notes, however, that similar terms can carry the different message that the advertiser does not necessarily have the lowest prices, but will lower prices of advertised goods if consumers find them offered elsewhere at a lower price.

As we read the Draft Code, it is intended to encourage advertisers to make these distinctions more explicit than is currently common. If a lowest price claim is being made, the Draft Code provides that the advertiser should be prepared to substantiate that its prices are in fact the lowest in the trade area. If, on the other hand, a retailer is offering only a price-matching policy, the Code would provide that all material terms of the pledge be set out in a clear and conspicuous manner in any print ad.<sup>34</sup> We believe that these provisions of the Draft Code may benefit consumers by clarifying the actual content of lowest price or price matching claims.<sup>35</sup>

The Council may wish to reconsider, however, the Code's posture toward lowest price claims in advertisements that cover a large number of items or competitors. In this regard, the Code notes that:

Despite an advertiser's best efforts to ascertain competitive prices, the rapidity with which prices fluctuate and the difficulty of determining prices of all sellers at all times preclude an absolute knowledge of the truth of generalized lowest price claims. Thus,

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<sup>34</sup> Draft Code at 10.

<sup>35</sup> We believe that an advertisement which indicates that substantial conditions, terms, and limitations apply to the price-matching policy, generally would be sufficient to prevent the deceptive practices addressed in this section of the Code. Of course, it would be another story if the conditions, terms, and limitations were so extensive as to bring into question the good faith of the overall claim of price matching. Under certain circumstances, requiring the disclosure of all material terms and conditions in a clear and conspicuous manner may place an unreasonable burden on truthful price advertising. See International Harvester, supra note 31, for a discussion of the burdens placed upon advertisers by requiring such detailed disclosures.

if the claim purports to cover a large number of competitors or a large number of items it is not likely that any monitoring program could be fashioned to assure the accuracy of the claim.<sup>36</sup>

Application of the substantiation standard adopted by this section of the Code would in effect ban use of general claims such as "Our prices are the best" or "lowest prices" unless the ad applied only to a relatively small number of items or competitors. Retailers could not use these terms even if they had in good faith undertaken their "best efforts to ascertain competitive prices."

We question whether consumers would interpret such advertisements to mean that the retailer could prove that at any moment none of its competitors charged a lower price for any of the possibly thousands of items that the advertiser carries. For example, in the context of retail food price advertising, consumers might interpret a "best prices" claim to mean that the advertiser is likely to charge the lowest total price for a given market basket of grocery items, even though there may be individual items in the selection that could be purchased for less elsewhere. Alternatively, a reasonable consumer might interpret a "best prices" advertisement by, for example, a large appliance discounter, to mean that the advertiser had surveyed the prices of a representative sample of products and competitors, and that the results substantiated that the advertiser's prices were generally the "best" or "lowest." We therefore suggest that the Council consider adopting a somewhat more flexible standard for general lowest price claims.<sup>37</sup>

**D. Use of the Term "Sale"**

Section 1(g) of the Draft Code contains provisions on advertising a "sale." The Code attempts to address general claims that typically cover many items. Pursuant to the Code, advertisements for "sales" should be made only when there is "a significant reduction from the advertisers' bona fide former price in effect before the advertisement and the sale opportunity is for a limited time." Reductions in price need not be "significant" so long as the "actual percentage or dollar amount of the reduction is clearly and conspicuously disclosed."<sup>38</sup> The provisions of Code Section 1(a) would apply in determining a former price.

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<sup>36</sup> Draft Code at 12.

<sup>37</sup> See supra note 16.

<sup>38</sup> Draft Code at 8.

An advertiser's obligations at the end of the advertised sale period are addressed in Section g(3). According to the Code, "the day after the 'sale' ends, the advertiser shall increase the price of the items reduced in price . . ."<sup>39</sup> The failure to increase prices at the end of the sale period does not necessarily indicate, however, that the original sale offer was deceptive. Although it would be deceptive for a retailer to advertise a limited time sale if the retailer had no intent to end the sale as stated, overly rigid application of the Code provision could make timely responses to competitive changes in the market difficult. For example, a retailer might find that the reduced price increased sales volume even more substantially than anticipated, and conclude that the sale price should become the regular selling price. Similarly, a retailer could be forced by competitors' price reductions to keep the sale price in force beyond the original sale period. In either event, we believe that consumers benefit if the retailer is able to offer products on a regular basis at the lower price, as long as these prices are no longer advertised as special reductions.

### III. Conclusion

We believe that the Draft Code is a commendable effort to provide a workable set of principles for price advertisers. As long as it is treated as general guidance rather than bright-line standards, it can serve both competition and consumers well. We have attempted in these comments to identify certain provisions that could be explained more fully or otherwise modified to afford advertisers greater flexibility in communicating accurate price information. We hope that you find these comments helpful, and we would be happy to assist you in any further efforts you may undertake to encourage advertisers to provide consumers with truthful and nondeceptive price information.

We appreciate this opportunity to comment.

Sincerely,



C. Steven Baker  
Director  
CHICAGO REGIONAL OFFICE

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<sup>39</sup> Id. at 8-9. A similar provision pertains to advertisers using "introductory" and "price prediction" sales. Id. at 9. Moreover, "if the sale exceeds thirty days the advertiser should be prepared to substantiate that the offering is indeed a valid reduction and has not become the regular price." Id. at 8.