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FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20530

BUREAU OF
CONSUMER PROTECTION

COMMISSION AUTHORIZED

November 18, 1988

Helena Huang
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Department of the Attorney General
131 Tremont Street
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Dear Ms. Huang:

This letter is submitted in response to an October 14 notice and accompanying letter from your office inviting comments on proposed revisions to Massachusetts' Retail Advertising Regulations (the "Regulations"). The staff of the Bureau of Consumer Protection of the Federal Trade Commission appreciates the opportunity to comment.¹

Our preliminary review of the Regulations suggest that they reflect commendable efforts to provide flexible guidance to advertisers. Nonetheless the overall effect of several areas of the Regulations may be to restrict unnecessarily some forms of truthful advertising, particularly price advertising. Our comment is limited to addressing three main areas of concern.²

¹ These Comments are the views of the staff of the Bureau of Consumer Protection of the Federal Trade Commission. They are not necessarily the views of the Commission or of any individual Commissioner. Questions or comments concerning this document may be addressed to C. Lee Peeler (202-326-3090), Associate Director of the Division of Advertising Practices.

² Our comment does not address several provisions contained in the Regulations. For example, we have not addressed provisions regarding the availability of advertised products (§ 6.06), use of prize and gift promotions (§ 6.08) and advertising of the availability of financing (§ 6.09). We would be pleased to provide comments on these and other sections if requested.

First, we are concerned that the proposed requirement that advertisers include in every advertisement every material fact about a particular product without regard to the specific facts and circumstances surrounding the advertisement is inconsistent with the Federal Trade Commission Act and could chill the flow of truthful advertising thus depriving consumers of valuable information.³ Second, while many sections of the Regulations appear to reflect an effort to minimize restrictions on truthful advertising, certain provisions nonetheless appear to have the unintended effect of prohibiting the dissemination of truthful information, thus raising potential inconsistencies with both the FTC Act and the First Amendment. Similarly, while the Regulations indicate a substantial effort to provide flexible guidance for pricing claims, the very detailed and prescriptive nature of the Regulations, together with their detailed record retention policy, could act to chill truthful price advertising. Small merchants, who may have limited access to legal counsel to prepare and review their ads, may be most affected by such regulatory requirements. Finally, the specificity of these Regulations may have the practical effect of chilling the dissemination of advertising that is permitted in other states and under federal law.⁴

³ Massachusetts law provides that consumer protection regulations "shall not be inconsistent with the rules, regulations and decisions of the Federal Trade Commission and the Federal Courts interpreting the provisions of . . . (The Federal Trade Commission Act)." Mass. Gen. Laws Ann. ch. 93A, § 2 (c) (West 1984).

⁴ Because we have not had the opportunity to review the basis for the proposed rulemaking, we express no opinion on the questions of whether there is an adequate factual basis for the proposed rules. See, e.g., Katherine Gibbs School v. FTC, 612 F.2d 658, 664 (2d Cir. 1979) (Commission failed to show a rational connection between the fact found and the choice made); Statement of Basis and Purpose, Credit Practices Trade Regulation Rule, 49 Fed. Reg. 7740, 7742 (1984) (rulemaking record should contain evidence in support of the proposed rule). The Statement of Basis and Purpose for the Credit Practices Rule also concluded that "[b]efore promulgating a rule, rather than bringing individual cases, the Commission believes the public interest requires answers to the following additional questions: (1) Is the act or practice prevalent?; (2) Does a significant harm exist?; (3) Will the proposed rule reduce that harm?; and (4) Will the benefits of the rule exceed its costs?". Id.

A. Disclosure of Material Facts

One of our primary concerns is with the provision in Section 6.04 (2) that requires sellers to "clearly and conspicuously disclose in any advertisement any material fact." The provision defines the term "material fact" and identifies seven illustrative categories of material facts that must be disclosed.⁵ In addition to these seven specific disclosures, the Regulations also require disclosure of any fact that "has the tendency or capacity to influence reasonable buyers . . . to purchase or not to purchase the product."

Thus, as defined, the term "material fact" could include an almost endless list of required disclosures. The disclosure obligations imposed by the Regulations go well beyond those required under FTC law. As noted in International Harvester Co.,⁶ the FTC Act does not impose such broad liability:

The number of facts that may be material to consumers--and on which they may have prior misconceptions--is literally infinite. Consumers may wish to know about the life

⁵ Although we did not have sufficient background information on which to analyze each of the seven specifically required disclosures, you may wish to consider whether each of these disclosures is necessary in all cases. If the disclosures are not necessary to prevent deception, making them a requirement may increase the costs of advertising (e.g., through higher prices for space ads or through the higher cost of ensuring compliance with the regulation) with no significant benefit to consumers who might otherwise be provided with this information or who might find it immaterial. For example, the Regulations require a seller to disclose, in all instances, that a product advertised for sale is "used." It is well settled in Commission case law that a seller has an obligation to disclose that an "apparently new product was actually used." International Harvester Co., 104 F.T.C. 949, 1058 (1984) (footnote omitted), appeal dismissed, No. 85-1111 (D.C. Cir. 1985). However, advertisements for products that are clearly used--such as ads promoting the sale of used cars and second hand furniture--may not need such a disclosure. You may wish to consider whether this provision should be modified to require a disclosure that a product is used only when the failure to do so would mislead consumers that the advertised product was new.

⁶ 104 F.T.C. 949 (1984), appeal dismissed, No. 85-1111 (D.C. Cir. 1985). See also ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

expectancy of clothes, or the sodium content of canned beans, or the canner's policy on trade with Chile. 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 a net harm for consumers.⁷

Commission actions dealing with deceptive omissions often deal with cases in which a seller fails to disclose qualifying information necessary to prevent an affirmative statement from creating a misleading impression. Similarly, it can be deceptive for a seller to remain silent under circumstances that constitute an implied but false representation. Such implied representations may take several forms. They may arise from the physical appearance of the product, from the circumstances of a specific transaction, or from ordinary consumer expectations as to the irreducible minimum performance standards of a particular class of good.⁸ Finally, even absent an express or implied representation, the FTC Act requires further disclosures in situations in which the failure to do so is likely to cause substantial consumer injury that is not outweighed by benefits to consumers or competition and that could not be reasonably avoided.⁹ In applying each of these standards, the Commission must necessarily analyze the factual surroundings of the case, i.e., whether express or implied representations have been made or whether substantial consumer injury has occurred.

There are important policy as well as legal reasons for ensuring that the Regulations are consistent with the FTC Act in this area. Advertising can signal to consumers that attractive features may be available and that consumers should inquire further for details. Numerous economic studies have demonstrated that advertising for particular products or services

⁷ Id. at 1059-60.

⁸ Id. at 1057-58.

⁹ Id. at 1060-61.

tends to enhance competition and lower prices.¹⁰ Advertising, however, is often not the most efficient or effective vehicle for disclosing detailed and comprehensive characteristics of a potential transaction, and the failure to do so should not necessarily render it illegal. Subjecting retailers to the type of open-ended liability suggested by the Regulations could injure consumers because advertisers may respond simply by restricting the amount of advertising in which they engage, which in turn would reduce the amount of information they provide to consumers.

B. Advertising Substantiation

Section 6.03 (1) of the Regulations states that "sellers must be able to substantiate all claims or offers made before such claims or offers are disseminated" (emphasis added). That same section provides that sellers must maintain sufficient records to substantiate all representations made in its advertisements. Section 6.14 (1) repeats the requirement that a seller "be able to substantiate all claims it makes in an advertisement" (emphasis added). Section 6.14 (2) adds a general requirement that sellers maintain records substantiating these claims for a period of six months after dissemination. Under the Regulations, therefore, a seller must be able to substantiate both objective and subjective claims.

These provisions are similar to the Commission's well-established legal requirement that advertisers and ad agencies have a reasonable basis for advertising claims before they are made. They differ, however, in one important respect. The FTC advertising substantiation doctrine is directed to objective, verifiable claims about the item or service advertised. Consumers are likely to interpret advertisements making such

¹⁰ See, e.g., Cleveland Regional Office and 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 et al., Advertising and Competition in Routine Local Service Markets: An Empirical Investigation, 36 The J. of Indus. Econ. 49 (1987).

claims as representing, either expressly or impliedly, that support exists for the advertised characteristic. These representations of substantiation are material to consumers.¹¹

The FTC advertising substantiation doctrine also recognizes that not all claims imply to consumers that the advertiser has substantiation for them. For example, consumers are not likely to interpret subjective advertising or "puffery" claims to be backed by substantiation. To the extent that the Regulations would require advertisers to have substantiation for all claims other than objective verifiable claims, it would be inconsistent with existing Commission standards. In addition, section 6.14 (2) compounds the burden by specifically requiring that records be created and retained to substantiate these claims.

C. Price Advertising Provisions

Sections 6.05 and 6.14 specify in detail the types of price comparisons permissible and the records that must be maintained in order to substantiate those comparisons. These provisions appear to be designed to force all price advertising into certain preset categories. As such, they may have the unintended effect of increasing the cost of price advertising which in turn would reduce the amount of this important information that is available to consumers.

To illustrate, section 6.05 (11) (a) (3) provides that, when products are advertised as available at a range of savings, the seller must clearly and conspicuously disclose "[a]ll material facts about the lowest priced or highest discounted product offered (such as size, material, grade or model)." Given the broad definition of the term "material fact" and the relatively

¹¹ Substantiation Policy Statement, 104 F.T.C. 839 (1984) (emphasis added) (adopted by the Commission in Thompson Medical Co., supra).

inflexible definition of "clearly and conspicuously", the Regulations may reduce a seller's incentive to offer broad based savings to consumers.¹²

Similarly, section 6.05 (3) (a) (2) states that a seller may compare its former price with its current price if its former price is equal to or below the price at which the seller offered the product for sale for at least 30 of the 45 days prior to dissemination of the advertisement. Notwithstanding, section 6.14 (3) (a) provides that a seller must maintain records of all sales of the advertised product and all offers to sell the product which occurred during the 12 month period prior to dissemination of the advertisement. Such requirements may discourage sellers from offering and advertising reduced prices.

Further, section 6.05 (6) (b) prohibits a manufacturer or franchisor from making a "list price" or similar comparison unless the list price "is the price[^]charged for the advertised product by a reasonable number of sellers in the trade area in which the advertisement is disseminated" (emphasis added). In order to make "list price" comparison under this provision, therefore, a national manufacturer would have to investigate in detail the prevailing prices in each trade area in which the advertisement is disseminated. Recognizing the potentially

¹² The following hypothetical may illustrate our concern. Under this provision, a seller who offers a range of savings (20-30% off) on particular brands of shoes must identify the models of shoes offered at a 30% saving, what the shoes are made of, and what size shoes are being offered. Having disclosed the size of the shoes offered for sale, the provisions governing the availability of advertised products (§ 6.06) may apply to the seller which would, in turn, require additional disclosures. While such requirements may provide a great deal of information to consumers, the increased costs of compliance may be ultimately reflected in higher prices. These costs, and their potential impact on small businesses, may be unnecessary if unfairness or deception does not occur in the absence of the required disclosures.

burdensome nature of such a requirement, FTC guidelines take a different approach.¹³ As drafted, this Regulation may discourage sellers from using this type of price comparison.

Finally, section 6.05 (16) provides that "[t]he use in an advertisement of a price comparison not otherwise allowable under these regulations is an unfair or deceptive act even if the advertisement also contains disclaimers or explanatory language" (emphasis added). This section compounds the problem created by the other provisions by prohibiting price comparisons not specifically provided for in the Regulations even if they are true by virtue of using explanatory language in the advertisement. Such broad prohibitions of truthful speech that is not otherwise deceptive or misleading may not withstand constitutional scrutiny under the First Amendment.¹⁴ In

¹³ FTC guidelines state that

a manufacturer . . . who does business on a large regional or national scale cannot be required to police or investigate in detail the prevailing prices of his articles throughout so large a trade area. If he advertises . . . a list or preticketed price in good faith . . . which does not appreciably exceed the highest price at which substantial sales are made in his trade area, he will not be chargeable with having engaged in a deceptive practice.

¹⁶ C.F.R. § 233.3 (g) (1988) (emphasis added). See also 16 C.F.R. § 233.3 (h) (1988) (giving an example of when a manufacturer's conduct would not constitute a deceptive practice).

¹⁴ See, e.g., South Ogden CVS Store, Inc. v. Ambach, 493 F. Supp. 374 (S.D.N.Y. 1980).

addition, the citizens of Massachusetts will not be better served if this Regulation chills the dissemination of truthful nondeceptive price advertisements.¹⁵

Some commentators on advertising law have argued that rigid enforcement of even the FTC's more general and flexible guidelines may at times impair competition while generating little or no consumer benefits.¹⁶ In light of the much greater specificity of the Regulations, we believe a careful review of their potential impact on vigorous price competition should precede their adoption. If there is an opportunity for further comment, we will attempt to provide a more detailed comparison between the Regulations and the provisions of the FTC Act and will address in greater depth the Regulations' likely impact on consumers.

D. Impact on Interstate Advertising

A final question raised by the Regulations is their impact on interstate advertising. In addition to defining unfair or deceptive advertising practices, the Regulations contain remedial provisions specifying such matters as the size of the

¹⁵ See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985) (attorney advertising). In Zauderer, the Supreme Court wrote:

Were we to accept the State's argument in this case, we would have little basis for preventing the government from suppressing other forms of truthful and nondeceptive advertising simply to spare itself the trouble of distinguishing such advertising from false or deceptive advertising. The First Amendment protections afforded commercial speech would mean little indeed if such argument were allowed to prevail. Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

Id. at 646.

¹⁶ See, e.g., Pitofsky, Beyond Nader: Consumer Protection and the Regulation of Advertising, 90 Harv. L. Rev. 661, 687-689 (1977).

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print that must be used for disclosures in print advertising¹⁷ and wording of disclosures to be contained in catalogs.¹⁸ Because it may be costly for a firm to tailor its national advertising on the basis of distinct state requirements, the provisions ultimately adopted in Massachusetts may have the practical effect of chilling the dissemination of advertising that is permitted in other states and under federal law. We believe that you may wish to examine carefully these likely effects of the Regulations before adopting them.

E. Conclusion

The staff of the Bureau of Consumer Protection share the concern of the Massachusetts Attorney General that advertising be truthful and substantiated. We hope that you will find these comments helpful. We would be pleased to provide you with a more detailed analysis of the provisions of the proposed Regulations if requested.

Sincerely,


William C. MacLeod
Director

¹⁷ See Section 6.01 (2).

¹⁸ See Section 6.05 (10) (a) (1).