

FEDERAL TRADE COMMISSION
WASHINGTON, D. C. 20580**COMMISSION AUTHORIZED**

OFFICE OF THE SECRETARY

February 24, 1989

The Honorable Robert T. Stephan
Attorney General of Kansas
Kansas Judicial Center
301 West 10th Street
Topeka, Kansas 66612-1597

Dear General Stephan:

During its winter meeting the National Association of Attorneys General ("NAAG") preliminarily approved guidelines on car rental industry practices.¹ By letter of January 19, 1989 to Federal Trade Commission ("Commission") Chairman Daniel Oliver, you indicated that the Attorneys General would appreciate Commission comment on the Final Guidelines. In reply, the Commission is pleased to provide these remarks, which supplement earlier Commission comments² regarding a prior draft of the Guidelines ("Prior Draft"). The Commission believes that several of the revisions embraced in the Final Draft are salutary but that some aspects of the Final Guidelines could discourage or prevent non-deceptive, fair, and competitive conduct, thereby injuring consumers.

Revisions to Prior Draft

The Final Guidelines reflect an effort to clarify and modify the Prior Draft so as to enhance the Guidelines' workability. For example, the Prior Draft appeared to imply that car rental companies were restricted to the use of specified type sizes and advertising formats. The Final Guidelines, however, expressly state that use of suggested type sizes and formats is not required; rather, their use is said to be only one of the methods of providing "clear and conspicuous notice of limitation and extra charges," as specified in the Final Guidelines.³ Similarly, the Final Guidelines delete the Prior Draft's broad proscription of entry of credit card charges after a consumer has

¹ National Association of Attorneys General, Final Guidelines of the Task Force on Car Rental Industry Advertising and Practices (1988) (hereinafter cited as "Final Guidelines").

² Letter from Federal Trade Commission to Kansas Deputy Attorney General Art Weiss (November 4, 1988), Commissioner Strenio not joining (hereinafter referred to as "Prior Comment").

³ See Final Guidelines, Appendix B, Para. 4.

returned the rental car. Apparently recognizing that so broad a proscription may impair unnecessarily the ability of rental car companies to obtain payment for a variety of "non-damage" charges, such as traffic tickets, the proscription in the Final Guideline is limited to credit card charges for car damage.⁴ The Prior Draft also asserted that "[a]ny advertised price must be available in sufficient quantity to meet reasonably expected public demand for the rental cars advertised"⁵ The Final Guidelines have been revised to provide that "[p]rices can be advertised although less cars are available than would be required to meet the expected demand, as long as this limitation is clearly and conspicuously set forth in the advertisement and a reasonable number of cars are made available at the advertised price."⁶

Insofar as these revisions affirm the propriety of non-deceptive and fair marketing practices, they are likely to foster the continuation and development of competitive strategies that convey significant benefits to consumers. Accordingly, the Commission believes that these revisions, and others of similar import, are useful. Nevertheless, the Commission remains concerned that the adoption of these guidelines could, in some important respects, deprive consumers of the benefits of some non-deceptive, fair, and competitive rental car company conduct.

Legal Foundation

The Final Guidelines assert, as did the Prior Draft, that prohibited practices are limited to those that contravene state consumer protection statutes.⁷ However, the Final Guidelines cite neither specific statutes nor decisional law finding practices similar to the proscribed car rental industry practices to be deceptive or unfair, and the guidelines might be enhanced by the addition of a section discussing some of the relevant

⁴ See Final Guidelines, Appendix B, Para. 16.

⁵ Prior Draft, Guideline 2.4.

⁶ Final Guideline 2.4. The Final Guideline does not define what constitutes "a reasonable number" of cars, but we understand the quoted language to suggest that the meaning of "reasonable number" depends on the context in which the advertising message appears. For example, the availability of just a few of a company's cars at an advertised deep discount rate might satisfy the condition of "reasonable number" if the advertisements expressly and conspicuously noted that only a few of a company's cars were available at the advertised rate.

⁷ See, e.g., Final Guidelines, "Introduction, 3. Scope of the Guidelines."

statutes, regulations and cases, including Federal Trade Commission decisions. Such a discussion may be relevant because most state laws prohibiting unfair or deceptive conduct provide that their interpreters give weight to the precedents established by the Federal Trade Commission under Section 5 of the FTC Act.⁸ Some of the practices cited as the subjects of frequent consumer complaints in the abstract appear similar to those the Commission has found unfair or deceptive.⁹ For example, falsely stating that CDW is required or switching cars and charging more than the price promised in the reservation,¹⁰ would contravene the law against deceptive practices. Other practices addressed seem less likely to do so.¹¹

⁸ Many state statutes specifically reference § 5(a) of the FTC Act and the Commission's interpretations as guidance for construction of state law. For example, the Texas statute, in relevant part, states:

(c)(1) It is the intent of the legislature that in construing Subsection (a) of this section in suits brought under Section 17.47 of this subchapter the courts to the extent possible will be guided by Subsection (b) of this section and the interpretations given by the Federal Trade Commission and federal courts to Section 5(a)(1) of the Federal Trade Commission Act [15 U.S.C.A. 45(a)(1)].

Tex. Bus. & Com. Code Ann. § 17.46 (Vernon 1987).

⁹ See International Harvester Co., 104 F.T.C. 949 (1984), which contains an extensive discussion of deception and unfairness principles.

¹⁰ See Final Guideline 3.1.3 and Comment thereto.

¹¹ For example, the Commission has recognized the impossibility of disclosing in an advertisement all terms and conditions that may be material to consumers. International Harvester Co., supra, at 1059-1060. Of course, under certain circumstances determined most typically on a case-by-case basis, the Commission has found that the omission of material information is deceptive or unfair. Id. See also Letter from Federal Trade Commission to the Hon. John D. Dingell (October 14, 1983) (Deception Statement), reprinted in Cliffdale Associates, Inc. 103 F.T.C. 110, 174 (1984) and Commission Enforcement Policy Statement on Unfairness, Letter from Federal Trade Commission to Senators Wendell H. Ford and John C. Danforth (December 17, 1980) (Unfairness Statement), reprinted in International Harvester Co., 104 F.T.C. 949, 1070 (1984).

The failure of the Final Guidelines to articulate their legal basis seems particularly relevant in light of the possible constitutional questions raised by some aspects of their content. Although commercial speech is generally entitled to less protection under the First Amendment than other forms of expression, the courts have recognized that absent a substantial government interest, the state may not regulate truthful and nonmisleading advertising. See Central Hudson Gas and Electric Corp. v. Public Service Commission, 447 U.S. 557, 566 (1980). In addition, regulation that prohibits speech must be limited to the least restrictive method of preventing harm. Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 651 (1985).¹² It is not clear that all of the allegations of deception or remedies articulated in the Final Guidelines meet this standard, and we urge that additional consideration be given to any modifications that might achieve the intended goals in a less restrictive manner.

Examination of Advertising Provisions

The Commission believes that an examination of several of the practices addressed in the Final Guidelines will demonstrate that some of the covered practices may not satisfy the standard for deception or unfairness applied under state law or Section 5 of the FTC Act. Furthermore, proscription or unduly broad restriction of these practices may well injure consumers.¹³

The Final Guidelines take the position that restrictions significantly affecting the price or use of, or consumers' financial responsibility for, a rental car must be clearly and conspicuously disclosed in advertisements containing price information to prevent those advertisements from being

¹² Other questions may also arise in connection with guidelines of this nature. Trans World Airlines, Inc. v. Mattox, Civ. No. A-89-CA-067 (W.D. Tex., Austin Div., Jan. 23, 1989) appeal filed (5th Cir., Feb. 10, 1989) (holding that Federal Department of Transportation regulations preempted state laws regulating airline fare advertising and activities involving rates, routes or services, but not reaching plaintiffs' other constitutional arguments based on the Commerce and Interstate Compact Clauses of and the First Amendment to the United States Constitution).

¹³ In an effort to avoid undue repetition, either of material covered in its Prior Comment or of aspects of these remarks, the Commission has not sought to critique the Final Guidelines in a comprehensive manner. Rather, these remarks focus on several of the provisions, either to furnish examples or to provide previously unfurnished information.

deceptive.¹⁴ In more particularly describing the restrictions that must be disclosed, the Final Guidelines specify more restrictions to be disclosed in print advertisements than to be disclosed in broadcast advertisements.¹⁵ The basis for this distinction is said to be the practical limitations of broadcast advertising.¹⁶ As a matter of deception law, if it is determined that omission of a particular fact is not deceptive in a broadcast advertisement, it is not clear why its omission is deceptive in a print advertisement.

The distinction between print and broadcast advertising in the Comment to Final Guideline 2.2 implicitly recognizes that advertising is often a poor vehicle by which to convey detailed disclosures of all material information regarding a product or service, and that the failure of an advertisement to disclose all material information does not necessarily render the advertisement deceptive.¹⁷ See Prior Comment.

Disclosure requirements can impose costs that in turn may inhibit advertising and thereby reduce the incentive for affected firms to engage in price competition.¹⁸ Therefore, the

¹⁴ See Final Guideline 1.4 and 2.0.

¹⁵ For example, such restrictions as geographical limitations on use, the extent of advance payment requirements, and penalties or higher rates for early or late car returns must be disclosed in print advertisements. In broadcast advertisements, however, similar restrictions require only a disclosure like "[o]ther important restrictions apply." See Final Guidelines 2.1 and 2.2.

¹⁶ Comment to Final Guideline 2.2.

¹⁷ For example, the Guidelines specify that penalties or higher rates for early or late car returns should be disclosed. To the extent that consumers are quoted discounted rates for fixed rental terms, such as weekends or weeks, they reasonably may anticipate that late return will result in the imposition of penalties or higher rates. If they do, the omission from advertisements of information relating to the penalties or higher rates might not be material or deceptive. Before including such a provision in the Guidelines, therefore, we suggest that the Task Force determine if there is evidence concerning consumers' expectations regarding the consequences of late car returns that would justify its inclusion.

¹⁸ See Prior Comment, notes 10-13 and related text. Car rental companies might respond by shifting to "image" advertising, which may benefit consumers less than price promotion.

Commission urges caution against imposing disclosure requirements unless required by deception or unfairness law.

The Final Guidelines also state that any fee that consumers generally must pay should be reflected in the total advertised price rather than being stated separately.¹⁹ This requirement, referred to as "bundling," is said to be directed toward preventing car rental firms from advertising base rental rates that have been artificially reduced by subtracting charges that must be paid, at least in certain locations, such as fuel charges, surcharges, and airport access fees. The Commission agrees that it is an unfair or deceptive act or practice for a company to fail to disclose unavoidable charges prior to taking reservations for rental cars. The bundling approach, however, may be unnecessary to protect consumers from deception or unfairness. For instance, it is not clear why an advertisement stating the availability of a vehicle for "\$25 per day plus a \$12 fuel charge" is more deceptive or unfair than an advertisement in the format approved in the Final Guidelines stating the rate as "\$37 for first day; \$25 for each succeeding day." Nor is it clear that consumers would be misled as to the total cost of car and fuel by either advertisement.

Adoption of the requirement that any mandatory fee must be included in the total advertised price may reduce consumer welfare in several ways. This requirement may increase the cost of advertisements containing price information because, as the preliminary report accompanying NAAG's Prior Draft appeared to recognize, the bundling requirement, coupled with differences in charges assessed by franchisees and in surcharges imposed by various airports may make it difficult for some car rental companies to build these fees into nationally advertisable rates.²⁰ This may result in reduced price promotion, and lead to higher prices.

Collision Damage Waiver

The Final Guidelines conclude that some current car rental industry practices with respect to the sale of collision damage waivers ("CDW") are deceptive, unfair, and unconscionable. The Guidelines make three alternative legislative proposals, two of which would irrevocably allocate most of the risk of damage to or

¹⁹ Final Guideline 2.5.

²⁰ National Association of Attorneys General, Task Force on Car Rental Industry Advertising and Business Practices, Preliminary Report (June 19, 1988) at 5 and 8, respectively.

loss of a rental car to the rental car company.²¹ This result seems to be an overly broad solution to what may be a genuine problem -- the unfair or deceptive marketing of CDW arrangements.

The Commission previously indicated that legislative restriction of the offering of a distinct CDW product would be tantamount to mandating that car rental companies bundle CDW coverage into every car rental transaction.²² Any legislatively imposed bundling requirement will restrict consumer choice among CDW-like coverages of rental cars,²³ resulting in some consumers having to bear greater costs primarily in the form of higher base prices than they otherwise might have to cover the accident and theft losses statutorily shifted to the rental car companies. Recent news reports suggest that this may be happening to some consumers in at least one state. A recent article in The New York Times regarding adoption of CDW-bundling legislation in Illinois said:

[C]ar-rental companies have raised their rates in Illinois, where the ban on collision waivers took effect Jan. 1. Hertz raised its prices by 8 percent in Illinois and by 2.5 to 5 percent elsewhere in anticipation of a decline in waiver sales to American Express's 22.1 million cardholders. Alamo and Budget have also followed Hertz's lead by raising prices in Illinois, but no other major company has raised prices across the board.²⁴

²¹ The final legislative proposal would permit a rental car company to hold consumers liable for damages resulting from their negligence or intentional misconduct provided that the rental car company offered to sell to consumers a waiver at a regulated price related to the company's loss experience. See Final Guideline 3.1.

²² Hereinafter the Commission refers to measures that would restrict the offering of a distinct CDW product as "CDW-bundling" measures, in recognition of their practical effect.

²³ These options include purchasing no insurance and assuming the full risk ("going naked"), purchasing CDW, relying on personal automobile liability insurance that extends to rented cars, and using coverage provided by a third party such as a credit card provider. Initially, credit card providers extended these benefits to holders of their "prestige" cards, such as "gold," "platinum," and corporate cards. Recently, however, American Express extended rental car damage coverage to its basic "green" card. Other credit card companies are expected to follow suit. The Record, Jan. 15, 1989, at B2, col. 2.

²⁴ N.Y. Times, Jan. 7, 1989, § 1 at 52, col. 1.

According to the Final Guidelines, CDW sales are troubling in part because consumers lack adequate information and they encounter deception or high pressure at the rental counter.²⁵ Where consumers suffer from insufficient or confusing information, remedies requiring the disclosure of more or better information often may resolve the problem. Therefore, providing consumers information on CDW may be more effective and less costly than requiring that CDW be sold in the rental bundle regardless of whether or not consumers want it.²⁶ On the other hand, if consumers are encountering unfair or deceptive marketing practices at some car rental counters, the most direct and efficient remedy may be law enforcement action against the offenders.

The authors of the Final Guidelines state that they do "not believe that this [CDW] information gap can be filled by more disclosures" Comment to Final Guideline 3.1(c). No explanation is offered for this belief. Nevertheless, if this conclusion is supported, traditional law enforcement efforts might be adequate to prevent deception or unfairness in the marketing of CDW. These alternatives are worth exploring in detail before concluding that mandated purchase of CDW is the proper solution to the problem of unwanted purchase of CDW.

"Upselling"

Final Guideline 3.3(a)3 states that a rental car company may not attempt to "upsell" a consumer by "disparaging" the reserved class of vehicles as "uncomfortable or unsafe." The Commission agrees that deceptively switching consumers from reserved cars to more expensive vehicles is unlawful. The Commission is concerned, however, that Final Guideline 3.3(a)3 may be interpreted as barring all efforts to persuade consumers to rent more expensive cars. Car rental company personnel perform a valuable function in advising consumers, who may be unaware of the capabilities and limitations of vehicles other than their own, of the suitability of various vehicles for consumers' intended purposes.²⁷ In order to ensure that consumers are not deprived of the counseling function performed by rental car

²⁵ See generally Final Guideline 3.1 (c) and following discussion.

²⁶ See Beales, Craswell & Salop, "The Efficient Regulation of Consumer Information," 24 J. of L. & Econ. 491 (1981).

²⁷ For example, a consumer who has reserved a low-powered car to take a family of four, plus baggage, across mountainous terrain might find it useful to be told that a more powerful and more expensive car might serve the purposes better.

personnel, it should be made clear that "upselling" is regarded as problematic only when it involves such improper conduct as coercion or false or misleading representations of fact.²⁸

Frequent Renter Programs

Final Guideline 3.5, which is applicable to car rental companies' "frequent renter programs," also may be unnecessary and, indeed, seems to lack an empirical basis. That Guideline would require that car rental companies refrain from modifying "any aspect" of a frequent renter program "that will adversely affect . . . members' ability to obtain any award or other promised benefit" without providing at least one year prior notice to members. The adoption of a one year's notice requirement may make firms reluctant to experiment with premiums for frequent renters, because of the hazard of having to keep an unexpectedly costly premium in place for a full year. Accordingly, consumers may be deprived of the benefit of vigorous competition among "frequent renter programs."

As the commentary appended to Final Guideline 3.5 acknowledges, "frequent renter programs" are a new and "not very sophisticated" phenomenon; they offer consumers premiums of small value;²⁹ and they "are not nearly as complex as the airlines' frequent flyer programs" The Commission urges caution against adopting rigid limitations on these programs unless they are demonstrably necessary and unless they are designed to permit innovative promotional efforts that will encourage competition and benefit consumers.

28 A 1975 Synopsis of Federal Trade Commission decisions concerning "Bait and Switch" sales practices provides that it is an unfair or deceptive trade practice to disparage an advertised product for the purpose of "switching" a customer to the purchase of another product. See *Southern States Distributing Co.*, 83 F.T.C. 1125, 1169 (1973) (condemning "bait and switch" practices but holding that even sellers who have engaged in unlawful "bait and switch" activities must have the right, for the sake of consumers as well as themselves, to point out genuine shortcomings in advertised and unadvertised products).

29 "Most simply offer consumers expedited check-in and reservations, free upgrades for luxury cars and some discounts on CDW." Comment to Final Guideline 3.5.

Conclusion

The Commission urges the Attorneys General to reconsider whether the Final Guidelines are adequately supported in law and fact and whether they will benefit consumers. As illustrated by the discussion above, the Commission concludes that the Final Guidelines as presently written may well prevent some non-deceptive, fair and competitive conduct in the car rental industry.

By direction of the Commission.*

Donald S. Clark

Donald S. Clark
Secretary

* Commissioner Strenio does not join in this letter.