

State of Tennessee



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January 17, 1985

John C. Neff, Commissioner
State of Tennessee
Department of Commerce and Insurance
206 State Office Building
Nashville, Tennessee 37219

Dear Commissioner Neff:

You have requested an opinion on the following question:

QUESTION

Is it a deceptive or unfair business practice to use the words "list price," "suggested retail price," "retail price," "ret. price," "regular price," "reg. price" or words of similar import in reference to the price of any merchandise when it is fictitiously or deceptively higher than the price or prices at which such merchandise is customarily sold in the trade area?

OPINION

It is the opinion of this Office that a business which, through advertising or by other means, compares its special, sale or otherwise reduced price for a particular good or service to its own former price for the good or service by using the words "regular price," "reg. price," or words of similar import with regard to the reference price, would be engaging in an unfair and deceptive act or practice in violation of the provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 to -117, if the reference price was not the price at which the good or service was substantially sold by the business or was openly and actively offered for sale by the business, to the public on a regular basis for a reasonably substantial period of time in the recent and regular course of business. It is also the opinion of this Office that a business which, through advertising or by other means, compares its special, sale or otherwise reduced price for a particular good or service to the price charged by others, or to the manufacturer's suggested price for the good or service by using the words "regular price," "reg. price," "retail price," "ret. price," "suggested retail price," "list price," or words of similar import with regard to the reference price, would be engaging in an unfair and deceptive act or practice in violation of the Tennessee Consumer Protection Act if the reference price was not the prevailing or the usual and customary price at which sales of the good or service had been made in the business' trade area, i.e., the area in which the business operates.

ANALYSIS

The provisions of the Tennessee Consumer Protection Act of 1977, Tenn. Code Ann. §§ 47-18-101 to -117, make it unlawful for any person to engage in unfair or deceptive acts or practices affecting the conduct of any trade or commerce in this state. Tenn. Code Ann. § 47-18-104(a). Subsection (b) of Tenn. Code Ann. § 47-18-104 enumerates twenty-one acts or practices specifically declared unfair or deceptive, and hence, unlawful. It is the expressed intent of the legislature that the provisions of the Consumer Protection Act "be interpreted and construed consistently with the interpretations given by the federal trade commission and the federal courts pursuant to Section 5(A)(1) of the Federal Trade Commission Act. . . ." Tenn. Code Ann. § 47-18-115. Section 5(A)(1) provides, in pertinent part, that "unfair or deceptive acts or practices in commerce are declared unlawful." 15 U.S.C. § 45(a)(1).

Where a business represents, through advertising or by other means, that a particular good or service is offered at a special, sale, or otherwise reduced price, the business may make reference for purposes of comparison to another higher price for the good or service. This reference price may be the business' own former price for the good or service; it may be the price charged by others for the good or service; or it may be a manufacturer's suggested price for the good or service. The comparison by the business of its sale price to the higher reference price serves to emphasize the bargain or discount being made available, and is a powerful inducement to purchase. However, if the reference price is not valid but is in fact fictitious, then the bargain or discount represented by the business' sale price would be false, and purchasers of the good or service would not receive the unusual value they had expected.

Several decisions of the Federal Trade Commission (hereinafter "the Commission"), and of various federal courts upholding Commission rulings, have clearly established that it is an unfair and deceptive act or practice violative of Section 5(A)(1) of the Federal Trade Commission Act to misrepresent the regular and customary price of a good or service, and of the savings afforded by an offered sale price of such good or service. See FTC v. Standard Education Society, 302 U.S. 112, 58 S.Ct. 113, 82 L.Ed. 141 (1937); Tashoff v. FTC, 437 F.2d 707 (D.C. Cir. 1970); Spiegel, Inc. v. FTC, 411 F.2d 481 (7th Cir. 1969); Giant Food, Inc. v. FTC, 322 F.2d 977 (D.C. Cir. 1963), cert. denied, 376 U.S. 967 (1964); Regina Corp. v. FTC, 322 F.2d 765 (3rd Cir. 1963); Niersk Industries, Inc. v. FTC, 278 F.2d 337 (7th Cir. 1960); Grolier, Inc., 91 F.T.C. 315 (1978); Encyclopedia Britannica, Inc., 87 F.T.C. 421 (1976); Carpets "R" Us, Inc., 87 F.T.C. 303 (1976); Hollywood Carpets, Inc., 86 F.T.C. 784 (1975); John Surrey, Ltd., 67 F.T.C. 299 (1965); Silvo Hardware Co., 64 F.T.C. 409 (1964); George's Radio and Television Company, 60 F.T.C. 179 (1962). In addition to the case law in this area, the Commission has also issued its Guides Against Deceptive Pricing, 16 C.F.R. 233 (1967). The Guides are addressed to the business that in good faith desires to operate in accordance with the law, and that wants to know in advance what should be done to assure that its comparative pricing will be fair and non-deceptive. The Guides set forth in clear and uncomplicated language the practical steps that a business should take whenever it is planning to engage in such pricing of its goods or services.

A business representing that a particular good or service is offered at a special, sale, or otherwise reduced price may refer for purposes of comparison to the good or service's "regular price" ("reg. price"), using these words or words of similar import. Where the business is referring to its own former price for the good or service, then the "regular

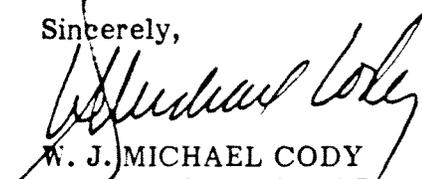
price," in order not to be unfair or deceptive, must be the price at which the good or service was substantially sold by the business or was openly and actively offered for sale by the business, to the public on a regular basis for a reasonably substantial period of time in the recent and regular course of business. Spiegel, 411 F.2d at 483; Giant Food, 322 F.2d at 980; Niersk, 278 F.2d at 340; Grolier, 91 F.T.C. at 484; Encyclopedia Britannica, 87 F.T.C. at 529; Carpets "R" Us, 87 F.T.C. at 323, 340; Hollywood Carpets, 86 F.T.C. at 822; Guides, 16 C.F.R. § 233.1.

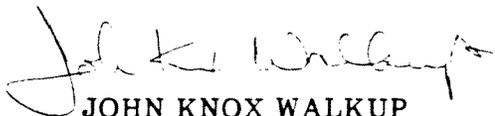
Additionally, a business may make price comparisons to the price that other businesses charge for the same good or service by reference to the other businesses' "regular price" ("reg. price") or "retail price" ("ret. price"), using these words or words of similar import. In this situation, the price referred to for comparison purposes is not unfair or deceptive if it is the prevailing or the usual and customary price at which sales of the good or service have been made in the business' trade area, i.e., the area in which the business operates. Tashoff, 437 F.2d 710-11; Niersk, 278 F.2d at 339-40; Silvo Hardware Co., 64 F.T.C. at 423, 426. The Guides discuss this price in terms of one at which substantial (that is, not isolated or insignificant) sales have been made in the business' trade area. Guides, 16 C.F.R. § 233.2.

A business may also compare its sale price for a particular good or service to the manufacturer's "suggested retail price" or "list price," using these words or words of similar import. As with a business' comparison of its price to the price charged by others for the same good or service, a comparison to a manufacturer's suggested retail or list price is not unfair or deceptive if it is the prevailing or the usual and customary price at which sales of the good or service have been made in the business' trade area. Giant Foods, 322 F.2d at 980-82; Regina, 322 F.2d at 767-68; George's Radio and Television, 60 F.T.C. at 192-94. Again, a prevailing or usual and customary price is also spoken of as the price at which substantial sales of the good or service have been made in the relevant trade area. John Surrey, Ltd., 67 F.T.C. at 328-30; Guides, 16 C.F.R. § 233.3.

Because the comparative pricing practices described, supra, have been held by the Commission and the federal courts to be unfair and deceptive acts or practices violative of Section 5(A)(1) of the Federal Trade Commission Act, we are of the opinion that such practices, in accordance with the provisions of Tenn. Code Ann. § 47-18-115, should likewise be regarded as unfair and deceptive acts or practices violative of the provisions of the Tennessee Consumer Protection Act.

Sincerely,


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