

Minnesota Attorney General: Administrative Rules Proceedings

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Version 3
August 20, 2018

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ATTORNEY GENERAL
ADMINISTRATIVE AGENCIES

STATE OF MINNESOTA

COUNTY OF RAMSEY

CONSUMER SERVICES SECTION
DEPARTMENT OF COMMERCE
BEFORE SHERRY CHENOWETH
DIRECTOR OF CONSUMER SERVICES

Cs 20-100

In the Matter of Proposed Rules Related to Deceptive Acts and Practices Under Minn. Stat., Sections 45.16 subd. 2(b), 325.78 and 325.79 (1973)

ORDER ADOPTING RULES

The above-entitled matter came on for hearing before the Director of Consumer Services of the State of Minnesota on the seventh and eighth days of May, 1974 at 9:00 a.m. and on the ninth day of October, 1974 at 9:00 a.m., after proper notice required by Minnesota Statutes Section 15.0412 (1971), was served upon all persons, associations and other interested groups registered with the Secretary of State for that purpose as well as upon persons then members of the Minnesota Legislature.

After affording interested persons an opportunity to present written and oral data, statements and arguments, having heard all of the testimony, having considered all of the evidence adduced and upon the records, files and proceedings herein, and applicable statutory standards or criteria, and having confirmed the need for the above-captioned rules.

NOW, THEREFORE, IT IS ORDERED that these rules identified as rules of the Consumer Services Section of the Department of Commerce relating to Deceptive Acts and Practices are adopted this ninth day of July, 1975, pursuant to authority vested in me by Minnesota Statute Section 45.16 subdivision 2 (1974).

STATE OF MINNESOTA
CONSUMER SERVICES SECTION
DEPARTMENT OF COMMERCE

Sherry Chenoweth
DIRECTOR OF CONSUMER SERVICES

STATE OF MINNESOTA
DEPARTMENT OF STATE
FILED
JUL 25 1975 2:30 P.M.
Joan Anderson Growe
Secretary of State

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CHAPTER 2 (CS 20 - 100)

Regulations Relating to Deceptive Acts and Practices

CS20 Scope and Purpose. (a) Regulations CS20 - CS100 are promulgated and adopted pursuant to Minnesota Statutes, Section 45.16 subd. 2 (1973) and are promulgated to assist consumers and businessmen by:

(1) defining with reasonable specificity acts and practices which violate Minnesota Statutes, Section 325.79 (1973); and

(2) protecting consumers from persons who engage in deceptive acts and practices; and

(3) encouraging the development of fair consumer sales practices.

(b)(1) These regulations shall not apply to the sale of merchandise sold for the purpose of resale in the regular course of business.

(2) Regulations CS20 - CS31 shall not apply to the sale of merchandise usually and customarily sold at a price arrived at through bargaining rather than at a regular price or where there may be a regular price, but where other material factors such as quantity, quality or size are arrived at through bargaining.

(c) The enactment of specific regulations defining certain practices by named classes of persons which violate Minnesota Statutes, Section 325.79 (1973), shall not be construed to preclude the application of that section to any other practices by any person which may be in violation of that section.

CS21 Severability. Each substantive regulation and every part of each substantive regulation is an independent regulation and subdivision of a regulation, and the holding of any regulation or subdivision of a regulation to be unconstitutional, void, or ineffective for any cause does not affect the validity or constitutionality of any other regulation or subdivision of a regulation.

CS22 General Definitions. As used in all regulations, unless otherwise specified, in Chapter 2:

(a) "Advertisement" means any oral, written, or graphic statement or representation made by a seller and includes, without limitation, statements and representations contained on any label, tag or sign attached to, printed on, or accompanying merchandise, or printed in a catalog or any other sale literature, brochure or circular.

(b) "Merchandise" means any objects, wares, goods, commodities, intangibles, real estate, or services.

(c) "Price Comparison" means the direct comparison in any advertisement of a seller's current price for merchandise with any other price for such merchandise, or the making of other price reduction claims, statements of value, or savings claims with respect to such merchandise, if expressed in dollars, cents, fractions, or percentages.

(d) "Rain Check" means a guarantee of a consumer's entitlement to purchase advertised merchandise at an advertised price.

(e) "Regular Price" means the price, in the same quantity, quality and with the same service at which the seller of the

merchandise has sold the merchandise for a reasonably substantial period of time, in the recent, regular course of his business. A price is not a regular price unless it is based on a price which does not exceed the seller's cost plus normal markup regularly used by him in the sale of such merchandise in the regular course of business.

(f) "Regular Quality" means the quality level at which the seller of the merchandise has sold the merchandise for a reasonably substantial period of time in the recent, regular course of his business.

(g) "Sale" means any sale, offer for sale, or attempt to sell any merchandise for consideration.

(h) "Seller" means a person engaged in the sale of merchandise and includes individuals, corporation, partnerships, associations, and any other form of business organization or entity, and any agent, employee, salesman, partner, officer, director, member, stockholder, associate, trustee or cestui que trust thereof.

CS23 Use of the Word "Free". (a) It shall be a deceptive act or practice for a seller to advertise "free" merchandise in connection with the sale of other merchandise except in conformity with this regulation. When the consumer is told that merchandise is "free" to him if other merchandise is purchased, the word "free" indicates that he is paying nothing for the "free" merchandise and no more than the regular price for the other merchandise. A consumer has a right to believe that the seller will not directly and immediately recover, in whole or in part, the cost of the "free" merchandise by marking up the price of the merchandise which must be purchased, by substitution of inferior merchandise, or otherwise. It is the express intent of this regulation to prohibit the practice of advertising or offering merchandise as "free" when, in fact, the cost of the "free" offer is passed on to the consumer, in whole or in part, by raising the price of the merchandise that must be purchased in connection with the "free" offer or by decreasing the quality or quantity of merchandise that must be purchased in connection with a "free" offer.

(b) "Free", as used in this regulation, includes the use of such words and terms as "bonus", "gift", "free-of-charge", "prize", "absolutely without charge", "buy one, get one free", "two-for-one sale", "1¢ sale", "50% off with purchase of two", and words of similar import or meaning, which would reasonably lead a person to believe that he may receive something of value, entirely or in part, without a requirement of compensation. "Free", as used in this regulation, does not include a bona fide quantity discount.

(c) When using the word "free" in connection with the sale of merchandise, all the terms, conditions and obligations upon which receipt and retention of the "free" merchandise are contingent shall be set forth clearly and conspicuously. In the case of oral statements or representations, such terms, conditions and obligations shall be stated orally at the outset of the offer. In the case of written statements or representations, such terms, conditions and obligations shall be printed in a type-size no smaller than the predominant type-size used in the body of the ad and shall appear in immediate conjunction with the offer of "free" merchandise. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer shall not constitute adequate disclosure. A notice of the existence of a "free" offer on the main display panel of a label or package is not precluded under this regulation if:

(1) the notice does not constitute an offer or identify the merchandise being offered "free"; and

(2) the notice informs the customer of the location, elsewhere on the package or label, where the disclosures required by this rule may be found; and

(3) no purchase or other material affirmative act is required in order to discover the terms and conditions of the offer; and

(4) the notice and offer are not otherwise deceptive.

(d) It is a deceptive act or practice for a seller to offer "free" merchandise when the price of other merchandise required to be purchased exceeds the seller's regular price.

(e) No "free" offer shall be made in connection with the introduction of new merchandise offered for sale at a specified price unless:

(1) the offerer will discontinue the offer within 90 days after the "free" offer is first stated or specifies the duration of the "free" offer and will discontinue the offer at the specified date which date shall in no event be more than six months after the "free" offer is first stated; and

(2) the offerer will commence selling the merchandise promoted, separately, at a price no less than the price at which it was promoted with the "free" offer; and

(3) the offerer will continue to sell the merchandise for a reasonable period of time after the termination of the "free" offer at a price no less than the price at which it was promoted with the "free" offer, unless compliance becomes impossible because of circumstances beyond the seller's control.

(f) Continuously advertising "free" offers is a deceptive act or practice since the seller's regular price for merchandise to be purchased by consumers in order to avail themselves of the "free" merchandise will, by lapse of time, become the regular price for the "free" merchandise together with the other merchandise required to be purchased. Under such circumstances, an advertisement of "free" merchandise is illusory and deceptive.

CS24 Prohibited Price Comparisons. (a) Price comparison advertising is a form of advertising commonly used in the sale of merchandise whereby current prices are compared with former or future prices or other stated values to demonstrate price reductions or cost savings. While price comparisons accurately reflecting market values in the trade area provide consumers with useful information in making value comparisons and market buying decisions, price comparisons based on arbitrary or inflacted prices or values can only serve to deceive or mislead. Further abuse occurs when sellers fail to disclose material information essential to consumer understanding of the comparisons made. It is the express intent of these regulations to insure that the reference price used in a price comparison is a figure which provides meaningful guidance to the consumer. (b) It shall be a deceptive act or practice for any seller to state in any advertisement a price comparison:

(1) which is not based on his former actual sale price, his former offered price, his future price, or a competitor's price;

(2) in which the nature of the reference price is not disclosed; or

(3) in which the merchandise differs in composition, grade or quality, style or design, model, name or brand, kind or variety, or service and performance characteristics, unless the general nature of the material differences is clearly and conspicuously disclosed in the advertisement with the price comparison.

(c) These regulations shall not be interpreted to require the removal of or to prohibit reference to a base price required by federal law.

CS25 Seller's Actual Sale Prices. (a) Any price comparison made by the seller based on a former price at which merchandise was actually sold by him must be based on a recent regular price at which merchandise was actually sold by him.

(b) Notwithstanding sub. (a), price comparisons may be made by the seller based on any previous regular price which is not a recent regular price at which merchandise was actually sold by him, provided that the advertisement discloses with the price comparison the date, time or seasonal period of such sale.

(c) Disclosure of the date, time or seasonal period as required under subdivision (b), need not be made on a label or tag attached to, printed on, or accompanying merchandise of a seasonal nature in the seller's place of business if the comparison is based on a price used during the immediately preceding selling season.

CS26 Seller's Offered Prices. (a) A price comparison may be made by any seller based on a former price at which he has not actually sold merchandise only if:

(1) such price is a price at which such merchandise was offered for sale by him continuously in the regular course of business for the last 30 days immediately preceding the date on which the price comparison is first stated in any advertisement; and

(2) in said period the seller has not actually sold the merchandise at any other price; and

(3) the merchandise was displayed in a reasonable manner, consistent with the display of merchandise of similar type.

(b) Notwithstanding sub. (a), if the merchandise was not offered for sale by the seller in the last 30 days immediately preceding the date on which the price comparison is first stated in any advertisement, a price comparison may be made based on a price at which the merchandise was offered for sale by him continuously in the regular course of business during any previous 30 day period, provided that:

(1) in said period the seller did not actually sell the merchandise at any other price; and

(2) the advertisement discloses with the price comparison the date, time or seasonal period of such offer; and

(3) the merchandise was displayed in a reasonable manner, consistent with the display of merchandise of similar type.

(c) Notwithstanding sub. (a) and (b), no price comparison under this section may be made by any seller based on a price which exceeds the seller's cost plus normal markup regularly used by

him in the sale of such merchandise in the regular course of business.

(d) Any price comparison made under this section must clearly disclose that the price comparison is based on an offered price and not on a price at which actual sales were made.

CS27 Seller's Future Prices. A price comparison may be made by any seller based on his future price only if:

(1) the effective date of the future price increase is within 90 days after the price comparison is first stated in any advertisement or the effective date of the future price increase is disclosed in the advertisement; and

(2) the future price increase takes effect as stated in the advertisement or, if not stated in the advertisement, within 90 days after the price comparison is first stated in the advertisement; and

(3) the merchandise is continuously offered for sale at a price not less than the advertised future price for a reasonable period of time after the effective date of the price increase, except where compliance becomes impossible because of circumstances beyond the seller's control, and the merchandise is displayed in a reasonable manner consistent with the display of merchandise of a similar type.

CS28 Competitor's Prices. A price comparison may be based on a competitor's price only if:

(1) the competitor's price is a price at which the merchandise is sold in the trade area in which the price comparison is made and is not an isolated price; and either

(2) the competitor's price is a price at which the competitor sold merchandise at any time within the 30-day period immediately preceding the date on which the price comparison is stated in the advertisement; or

(3) the competitor's price is a price at which the competitor sold merchandise more than 30 days but less than 90 days before the date on which the price comparison is stated in the advertisement, provided that clear and conspicuous disclosure is made with the price comparison of the time, date, or seasonal period of the competitor's price.

CS29 Retail Price Labeling. (a) A price label permanently imprinted on or affixed to merchandise or its container by the manufacturer or supplier at the instigation of the retail seller shall, unless it meets the other requirements of these regulations, be removed, covered or obliterated when the retail seller's current offering price is attached to, printed on or placed on a label, tag or sign accompanying such merchandise. (b) A manufacturer shall not permanently imprint on or affix to merchandise, price tickets containing inflated prices as an accommodation to particular retailers who intend to use such prices as a basis for advertising fictitious price reductions.

CS30 Miscellaneous Price Comparisons. A price comparison shall be deceptive if it contains terms which state or suggest conditions which are not true. Examples of such deceptive price comparisons include:

(1) advertising a retail price as a wholesale price; and

(2) representing prices to be factory prices when such prices are not the prices paid by persons purchasing directly from the factory.

CS31 Reserved for Future Use.

CS32 Availability of Advertised Merchandise. (a) Consumers rightfully expect advertisements of merchandise to represent a bona fide intent to make such merchandise available to all those attracted to the place of business to take advantage of the offer, unless the advertisement discloses that quantities of such merchandise are limited.

(b) It is a deceptive act or practice for a seller, in connection with the sale of merchandise, to:

(1) fail to state in any advertisement of merchandise as explicitly as reasonably possible, in terms of time or quantities available, the period in which the advertised prices will be effective, when the offer is of limited duration; or

(2) fail to state in any advertisement of merchandise the quantity of such merchandise which may be purchased at the advertised price by an individual consumer, when there is such a limitation; or

(3) offer merchandise for sale by means of any form of advertisement when such merchandise is not available for sale to the public at or below the advertised price for the period in which the prices are advertised as effective, provided that it shall be a defense to a charge under this subdivision if the seller can demonstrate and document that the advertised offer was made in good faith, based on the fact that the advertised merchandise was ordered in adequate time for delivery in quantities sufficient to meet reasonably anticipated demands, and that the unavailability of merchandise was due to circumstances beyond the control of the seller.

(c) In determining the applicability of this regulation, the following will be considered:

(1) all circumstances surrounding failure to make advertised merchandise conspicuously and readily available for sale at or below advertised prices during the effective period covered by the advertisement; and

(2) failure to provide specific, clear, and conspicuous disclosures in all advertisements as to exceptions, limitations, or restrictions as to stores; and

(3) availability of a rain check policy, or similar policy will be considered as relevant but will not, in and of itself, constitute compliance with this regulation; and

(4) a pattern of conduct indicating an intent to not fulfill the reasonably anticipated demand for advertised merchandise; and

(5) at what point of time in an offer of limited duration the merchandise was not available for sale.

(d) This section shall not apply to:

(1) any oral statements or representations made at the seller's place of business, or to any statements or representations contained on any label, tag or sign attached to, printed on, or accompanying merchandise in the seller's place of business; or

(2) any statements or representations made in a catalog designed primarily for direct sales to consumers, rather than to attract consumers to the seller's place of business.

CS33 Reporting. To assist in the enforcement of these regulations and of Minn. Stat. Section 325.79 (1973), when the Director of the

Consumer Services Section of the Department of Commerce, from information in his possession, has reasonable ground to believe that any person has violated these regulations, or is about to violate these regulations, he may require persons whose conduct is governed by these regulations to submit a report in writing setting forth information on which an advertisement within the scope of these regulations was based. The report shall be submitted within 14 days after receipt of written demand from the Director. Additional time for cause shown may be granted upon request.

CS34 Effective Date. These regulations shall take effect on September 1, 1975, except that with respect to catalogs they shall take effect on January 1, 1976.

CS35-100 Reserved for Future Use.

Dated: July 3, 1975

APPROVED AS TO FORM AND LEGALITY
JUL 25 1975 19___
WARREN SPANNAUS, ATTORNEY GENERAL
BY Marianne B. Mueller
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