



Represented Price Savings

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REPRESENTED PRICE SAVINGS

I. THE TERMS COMMONLY EMPLOYED IN PRICE SAVINGS CLAIMS ARE REGULATED UNDER THE FTC GUIDES AGAINST DECEPTIVE PRICING, STATE LAWS AND REGULATIONS, NEW YORK CITY REGULATIONS AND THE BETTER BUSINESS BUREAU CODE OF ADVERTISING.

II. REGULATED TERMS

A. Sale

- A meaningful or significant reduction from the seller's usual and customary price.
- A few states specify the minimum reduction.

B. Regular Price/Former Price

- There are 2 methods by which to substantiate a regular or former price: (i) substantial actual sales; and (ii) bona fide offers for sale.
- **Substantial Actual Sales**
The FTC Guides offer no guidance.
Several states specify what amount constitutes substantial actual sales.
- **Bona Fide Offers**
- The FTC Guides: The price at which the item was openly and actively offered for sale for a reasonably substantial period of time, in the recent, regular course of conduct, honestly and in good faith and not for the purpose of creating a fictitious high price in order to deceptively claim a reduction.
- Approximately a dozen states specify how long the item must be at the higher price to constitute a regular or former price.
- Several states also require consideration of whether the mark up utilized in arriving at the claimed regular or former price is extraordinary when compared with the seller's usual mark up.

C. Original Price

- The seller's price prior to intermediate reductions; the price immediately prior to the current price must be disclosed unless intermediate reductions are clearly indicated by



the language used. Examples: Originally \$75, then \$68, now \$65; Earlier this year \$75, now \$65; Further reduced to \$50.

D. Value

- FTC Guides & BBB Code:
 - The price at which (i) identical merchandise, (ii) is currently being sold or at least offered, (iii) by representative retail stores, (iv) in the trade area. The **BBB** Code adds that the claim should be substantiated immediately prior to publication. Timing: In several states, rather than requiring that the item is currently being sold elsewhere at that price, the statute allows a "look back" period.

E. "Comparable Value", "Comp Value", and "Compare At"

- The only difference between these terms and "value" is that when using these terms the merchandise need not be identical. However, it must be similar merchandise of like grade and quality.
- Some states are stricter in terms of limiting the variations between the advertised merchandise and the "compare at" merchandise.
- Some states also require additional disclosures to alert the consumer that the reference price was not the seller's own price or that the merchandise being compared is not identical.

F. Manufacturer's Suggested Retail Price

- FTC Guides — to the extent that a list or suggested retail price does not in fact correspond to the price at which a substantial number of sales are made, the ad may mislead the consumer.
- The **BBB** Code and many state regulations provide that a price can be compared to the MSRP only if the MSRP is currently being charged by representative retailers in the trade area.
- NJ prohibits comparison to an MSRP.

G. Factory Price/Manufacturer's Price

- The price paid by those purchasing directly from the manufacturer.

H. Wholesale Price

- The price paid by retailers.



I. Introductory Offer/Advance Sale

- Applies to new merchandise and can only last for a limited period of time, after which the price must be increased and maintained at the higher level for some period.
- Some states specifically limit how long an introductory offer can last.

J. Clearance/Close Out Sale

- A permanent reduction in price until the inventory is depleted; the merchandise cannot be reordered.

III. THE REGULATORY ENVIRONMENT

A. There has been no active enforcement by the FTC since 1979.

- In 2000, the NAD referred a matter to the FTC involving JC Penney fine jewelry ads. You're probably familiar with such ads — "50%/70% off Regular Price." The NAD did an investigation and concluded that JC Penney could not substantiate its "regular" prices and recommended that JC Penney change its ads. JC Penney refused and the NAD referred the matter to the FTC. The FTC found that JC Penney demonstrated that it offered the items at the so called "regular" price at least 50% of the time and made sales above a de minimis level (not substantial, but above de minimis). The FTC concluded that JC Penney had substantiated its regular price claims.

B. New York

- 2008 — Affordable Furniture — received cease and desist letter.
- 2006 — Federated Department stores (Kaufmann's, Macy's and Filene's) \$725,000 in civil penalties and costs.
- 2005 — Kaufmann's - \$400,000 in civil penalties and costs.
- 2005 — Metro Mattress - \$158,000 in restitution, penalties, and costs.
- 2004 — Jos. A. Brooks Clothes - \$475,000 in civil penalties and costs.
- 2002 — The Bon-Ton Stores - \$100,000 in civil penalties and costs.

C. California (Napa and Sacramento Co. D.A.'s)

- 2003 — KB Toys (fictitious references to competitors prices, list prices and former prices) — over **1,000,000** in penalties, costs and charitable donations



D. Kansas

- Kohl's — penalties of \$300,000 in 2000 and \$200,000 in 2002.

E. Massachusetts

- Terminated an investigation of Kohl's.

F. New Jersey

- 2004 — Sleepy's paid \$750,000 to settle an investigation of "our lowest prices ever" claims.
- 2003 — Rockaway Bedding paid \$437,500 to settle a lawsuit over its "sale" claims and other practices.

G. Competitor Litigation

- Target v. Kmart — Target sued Kmart after Target found that 74% of Kmart's price comparisons to Target's prices in Kmart's "Dare to Compare" campaign were wrong. Kmart dropped the campaign 10 days later.

G. Class Actions

- Nationwide class action filed against KB Toys in Chicago
- Alleging fictitious reference prices. In 2003, the case settled; the court certified a class of all consumers who purchased between 1997 and 2003 and KB Toys created a settlement fund of \$3,000,000 to be distributed through a 30% discount on all qualifying purchases of \$30 or more during a certain one week period.