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as the case may be, under any and all driving conditions. [Guide 17]

§ 228.18 Other claims and representations.

(a) No claim or representation should be made concerning an industry product which directly, by implication, or by failure to adequately disclose additional relevant information, has the capacity or tendency or effect of deceiving purchasers or prospective purchasers in any material respect. This prohibition includes, but is not limited to, representations or claims relating to the construction, durability, safety, strength, condition or life expectancy of such products.

(b) Also included among the prohibitions of this section are claims or representations by members of this industry or by distributors of any component parts of materials used in the manufacture of industry products, concerning the merits or comparative merits (as to strength, safety, cooler running, wear, or resistance to shock, heat, moisture, etc.) of such products, components or materials, which are not true in fact or which are otherwise false or misleading. [Guide 18]

§ 228.19 Snow tire advertising.

Many manufacturers are now offering winter tread tires with metal spikes. Certain States, or other jurisdictions, however, prohibit the use of such tires because of possible road damage. Accordingly, in the advertising of such products, a clear and conspicuous statement should be made that the use of such tires is illegal in certain States or jurisdictions. Further, when such tires are locally advertised in areas where their use is prohibited, a clear and conspicuous statement to this effect must be included. [Guide 19]

PART 233—GUIDES AGAINST DECEPTIVE PRICING

Sec.

233.1 Former price comparisons.
233.2 Retail price comparisons; comparable value comparisons.
233.3 Advertising retail prices which have been established or suggested by manufacturers (or other nonretail distributors).
233.4 Bargain offers based upon the purchase of other merchandise.
233.5 Miscellaneous price comparisons.

AUTHORITY: Secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46.

SOURCE: 32 FR 15534, Nov. 8, 1967, unless otherwise noted.

§ 233.1 Former price comparisons.

(a) One of the most commonly used forms of bargain advertising is to offer a reduction from the advertiser's own former price for an article. If the former price is the actual, bona fide price at which the article was offered to the public on a regular basis for a reasonably substantial period of time, it provides a legitimate basis for the advertising of a price comparison. Where the former price is genuine, the bargain being advertised is a true one. If, on the other hand, the former price being advertised is not bona fide but fictitious—for example, where an artificial, inflated price was established for the purpose of enabling the subsequent offer of a large reduction—the ''bargain'' being advertised is a false one; the purchaser is not receiving the unusual value he expects. In such a case, the ''reduced'' price is, in reality, probably just the seller's regular price.

(b) A former price is not necessarily fictitious merely because no sales at the advertised price were made. The advertiser should be especially careful, however, in such a case, that the price is one at which the product was openly and actively offered for sale, for a reasonably substantial period of time, in the recent, regular course of his business, honestly and in good faith—and, of course, not for the purpose of establishing a fictitious higher price on which a deceptive comparison might be based. And the advertiser should scrupulously avoid any implication that a former price is a selling, not an asking price (for example, by use of such language as, ''Formerly sold at $_____''), unless substantial sales at that price were actually made.

(c) The following is an example of a price comparison based on a fictitious former price. John Doe is a retailer of Brand X fountain pens, which cost him $5 each. His usual markup is 50 percent over cost; that is, his regular retail price is $7.50. In order subsequently to

offer an unusual ''bargain'', Doe begins offering Brand X at $10 per pen. He realizes that he will be able to sell no, or very few, pens at this inflated price. But he doesn't care, for he maintains that price for only a few days. Then he ''cuts'' the price to its usual level—$7.50—and advertises: ''Terrific Bargain: X Pens, Were $10, Now Only $7.50!'' This is obviously a false claim. The advertised ''bargain'' is not genuine.

(d) Other illustrations of fictitious price comparisons could be given. An advertiser might use a price at which he never offered the article at all; he might feature a price which was not used in the regular course of business, or which was not used in the recent past but at some remote period in the past, without making disclosure of that fact; he might use a price that was not openly offered to the public, or that was not maintained for a reasonable length of time, but was immediately reduced.

(e) If the former price is set forth in the advertisement, whether accompanied or not by descriptive terminology such as ''Regularly,'' ''Usually,'' ''Formerly,'' etc., the advertiser should make certain that the former price is not a fictitious one. If the former price, or the amount or percentage of reduction, is not stated in the advertisement, as when the ad merely states, ''Sale,'' the advertiser must take care that the amount of reduction is not so insignificant as to be meaningless. It should be sufficiently large that the consumer, if he knew what it was, would believe that a genuine bargain or saving was being offered. An advertiser who claims that an item has been ''Reduced to $9.99,'' when the former price was $10, is misleading the consumer, who will understand the claim to mean that a much greater, and not merely nominal, reduction was being offered. [Guide I]

§ 233.2 Retail price comparisons; comparable value comparisons.

(a) Another commonly used form of bargain advertising is to offer goods at prices lower than those being charged by others for the same merchandise in the advertiser's trade area (the area in which he does business). This may be done either on a temporary or a permanent basis, but in either case the advertised higher price must be based upon fact, and not be fictitious or misleading. Whenever an advertiser represents that he is selling below the prices being charged in his area for a particular article, he should be reasonably certain that the higher price he advertises does not appreciably exceed the price at which substantial sales of the article are being made in the area—that is, a sufficient number of sales so that a consumer would consider a reduction from the price to represent a genuine bargain or saving. Expressed another way, if a number of the principal retail outlets in the area are regularly selling Brand X fountain pens at $10, it is not dishonest for retailer Doe to advertise: ''Brand X Pens, Price Elsewhere $10, Our Price $7.50''.

(b) The following example, however, illustrates a misleading use of this advertising technique. Retailer Doe advertises Brand X pens as having a ''Retail Value $15.00, My Price $7.50,'' when the fact is that only a few small suburban outlets in the area charge $15. All of the larger outlets located in and around the main shopping areas charge $7.50, or slightly more or less. The advertisement here would be deceptive, since the price charged by the small suburban outlets would have no real significance to Doe's customers, to whom the advertisement of ''Retail Value $15.00'' would suggest a prevailing, and not merely an isolated and unrepresentative, price in the area in which they shop.

(c) A closely related form of bargain advertising is to offer a reduction from the prices being charged either by the advertiser or by others in the advertiser's trade area for other merchandise of like grade and quality—in other words, comparable or competing merchandise—to that being advertised. Such advertising can serve a useful and legitimate purpose when it is made clear to the consumer that a comparison is being made with other merchandise and the other merchandise is, in fact, of essentially similar quality and obtainable in the area. The advertiser should, however, be reasonably certain, just as in the case of comparisons involving the same merchandise, that the