

## Advertising Holiday Discounts? How Retailers Can Avoid Lawsuits



With the holidays approaching, retailers and their advertising partners are preparing for the busiest time of the year. Sales advertising is a staple of holiday marketing campaigns, which often include “former price” comparisons, in which retailers emphasize new, lower prices reduced from pre-holiday “regular” prices. However, retailers should proceed with caution when making price comparisons. Regulators and plaintiffs’ attorneys are carefully reviewing price advertising, as reflected by enforcement actions and a spate of class action lawsuits alleging that retailers made deceptive price comparisons.

As retailers craft holiday advertising, we offer a few suggestions to prevent litigation. Our tips introduce some requirements for price advertising and ways to stay out of legal trouble with regulators, competitors and plaintiffs’ attorneys.

**Advertising terms matter.** If a representation is made that a product had a certain “retail price” before a holiday discount, the product must have actually been offered for retail sale at the listed price. Price comparisons should be made only where the product was openly and actively offered for sale at the previous price for a reasonably substantial time.

**Different discounts are regulated differently.** Different legal requirements apply to different discounts, including discounts off the advertiser’s own former price, discounts off Manufacturers Suggested Retail Price and discounts off competitors’ prices. For example, when claiming a discount off a competitor’s price, retailers should be careful to base their comparison on the competitor’s actual retail price charged to a large number of consumers, and not merely a “list” price charged to few or none.

**State and federal requirements differ.** Many states have pricing laws that impose significant and unique requirements on retailers’ discount advertising. Without careful attention to various state and federal requirements, it is difficult for multistate and online advertisers to remain compliant across state lines. For example, California prohibits price comparison advertising unless the advertised former price was the “prevailing market price.” This imposes an obligation on retailers to research, track and document prices in the advertising market. Many other states impose their own local requirements.

**Challengers are paying attention.** In 2014, following complaints by members of Congress to the FTC about deceptive price advertising, dozens of class action lawsuits alleging deceptive sales claims were filed against retailers. Plaintiffs allege they were duped into buying products listed as “on sale” when the product was never sold at a higher price or where the advertised higher price did not meet state or federal legal requirements. As a result,

the plaintiffs claim, they purchased products thinking they were getting a bona fide bargain when the advertised bargain was false. These lawsuits are expensive to defend and can impose significant liability.

**Bottom line.** Given the increasing legal challenges and scrutiny given to price advertising, retailers should conduct the necessary due diligence and work with counsel to review their discount advertising for compliance with state and federal truth-in-advertising laws. A price advertising compliance program should identify the company's discount strategies and related legal requirements and should establish in-house protocols to reduce the potential for costly mistakes. These steps will go a long way to preventing unexpected challenges this holiday season and beyond.

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