

Proposed Changes to Massachusetts Advertising Regulations

As is the case in many states, Massachusetts's consumer protection law includes a set of specific advertising regulations, 940 CMR 6.00,¹ which impose unique requirements on businesses that advertise in the Commonwealth. Indeed, some of these obligations require advertisers to create Massachusetts-specific versions of their national advertising – which is both costly and unnecessarily defeats the efficiencies of national advertising.

In late January, the Massachusetts Attorney General proposed amendments to these regulations. The proposed changes are mainly non-controversial and now include Internet advertising within the regulations' coverage (including Internet videos), revise the considerations that guide whether disclosures are clear and conspicuous, restrict offers that fail to disclose material terms by referring to outside sources (e.g., "see store (or website) for details," "call for additional information," etc.), and amend the rules on comparison pricing, among other changes.

Unfortunately, these proposed changes fail to address several unique and burdensome advertising requirements contained in the existing set of regulations. The Attorney General's current request for comments provides an excellent opportunity for businesses to propose changes to these provisions. Relevant examples are summarized below.

RANGE OF PRICE/SAVINGS CLAIMS

For example, Massachusetts is one of only a handful of states that make it unlawful for sellers to advertise price reductions that identify only the lowest reduced price (e.g., "as low as X") or the highest percentage of price reduction (e.g., "up to X% off"), without also disclosing the highest reduced price or lowest price reduction (and in the same size font).² Specifically, Massachusetts's regulations require that:

- The highest price or lowest discount in the range be clearly and conspicuously disclosed and, if in print, the type must be at least the same size as the type size of the lowest price or highest discount in the range; and
- If a range of discounts or price reductions is stated, the seller must disclose the basis for the price comparison in the ad.

The specificity of these requirements often unnecessarily restricts truthful, non-misleading advertising claims.

RESTRICTIONS ON USE OF THE WORD "FREE"

In addition, to advertise a free product with the purchase of another product, the seller must, among other terms, clearly and conspicuously disclose the value of the free product and provide the free product to the buyer at the time of purchase. If there is a delay in providing the free item, the seller must obtain the customer's affirmative written consent for the delayed delivery. These additional requirements are unique to Massachusetts.

¹ Issued under Chapter 93A of the Massachusetts General Law.

² Besides Massachusetts, seven other states make it unlawful to only identify the top-end of an advertised discount, including Alaska, Connecticut, Illinois, Louisiana, Missouri, New Jersey, and North Dakota. New York City also has in place similar advertising restrictions.

USE OF “SALE” TERMS

Among other restrictions in advertising sales, Massachusetts prohibits using “sale-like” terms unless (a) the actual former price, or a price reduction stated as a fraction or percentage of the former price, is clearly and conspicuously disclosed; or (b) the product offered for sale is being offered at a price at least 10 percent below the former price of the same product if the former price was \$200 or less, or 5 percent below the former price if the former price was more than \$200. The specificity of these restrictions varies markedly from the “sale” disclosure laws in other states and enforced by the Federal Trade Commission, which typically allow the use of “sale” terms so long as the sale price is reduced by a “reasonable” amount from the product’s former price.³

CONCLUSION

In line with the more streamlined advertising framework enforced by the FTC and the majority of states, advertisers can achieve truthful and non-misleading advertising without the types of additional disclosure restrictions summarized above. Businesses have the opportunity to submit feedback to the Attorney General concerning these burdens and alternatives for achieving the regulations’ objectives. To do so, businesses must submit written comments by February 19, 2009.

Whether comments are submitted or not, businesses should anticipate a renewed focus on enforcement of the Commonwealth’s advertising regulations by the Massachusetts Attorney General after the proposed changes are adopted. Penalties for violations of the regulations are up to \$5,000 per violation, which historically has been interpreted aggressively.

Please contact a member of Kelley Dye’s Advertising Law Group if you would like to discuss filing a comment with the Attorney General’s office, or if you have any questions about how the proposals may impact your advertising and marketing campaigns.

KELLEY DRYE & WARREN LLP

The attorneys in Kelley Dye & Warren’s Advertising Law Practice Group have broad experience at the FTC, the offices of state attorneys general, the National Advertising Division (NAD), and the networks; substantive expertise in the areas of advertising, promotion marketing and privacy law, as well as consumer class action defense; and a national reputation for excellence in advertising litigation and NAD proceedings. We are available to assist clients with developing strategies to address issues contained in this Advisory.

For more information about this Client Advisory, please contact:

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³ For example, Illinois, Louisiana, Missouri, and North Dakota provide that a 5 percent price reduction creates a rebuttable presumption that the reduction is reasonable.