

advertising and marketing bulletin

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truth in consumer rebate programs

The Competition Bureau (the “Bureau”) recently signalled its interest in and explained its approach to false or misleading consumer rebate programs in a draft Information Bulletin entitled “The Application of the *Competition Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* to Consumer Rebate Promotions”¹ dated March 31, 2009 (the “Rebate Bulletin”).

Retailers and manufacturers sometimes use consumer rebate programs to attract consumers who might otherwise find their products too expensive to purchase. Rebates may be implemented either instantly or by delayed payment (usually by mail or Internet). An instant rebate is one that is applied immediately when an item is purchased from the retailer. A mail-in rebate is only applied after the consumer has purchased the product at the full price and redeems their rebate with the manufacturer at a later date.

The Rebate Bulletin describes the following examples that the Bureau views as false or misleading representations. These examples are, however, only illustrative. Moreover, the Rebate Bulletin is not binding on the Commissioner of Competition, whose enforcement decisions depend on the circumstances of each case.

inadequate disclosure

When conditions, limitations and exclusions to rebates are not brought to consumers’ attention, consumers may be misled since their general impression of the rebate and price of the product may be incorrect. Conditions may include requiring the purchase of another product while a limitation may include a deadline to submit rebates. Conditions, limitations and exclusions to consumer rebate programs are permitted so long as they are clearly communicated to potential consumers. Only disclosing them inside product packaging or on the website to which the consumers go to apply for their rebate will likely be inadequate to counter consumers’ general impression.

rebates disguised as the sale price

If a rebate must be mailed-in after purchasing the product from the retailer, the retailer cannot advertise the after-rebate price of the product as the sale price because it would be misleading in two respects. First, consumers will be surprised to learn that they have to pay the full price up front with the retailer. Second, the consumer will pay more tax than expected because they will have to pay taxes on the full price and not the after-rebate price.

mail-in rebates disguised as instant rebates

If a mail-in rebate is not clearly labelled as such, it may mislead consumers to believe that the mail-in rebate is an instant rebate. As is the case with rebates disguised as the sale price, consumers will be surprised to learn that they must pay the full price at the cash register.

discounts on future purchases disguised as rebates

In some situations, manufacturers and retailers provide consumers with gift cards or discounts for future use when they purchase their products. Some manufacturers and retailers, however, try to pass off these future-use gift cards and discounts as rebates.

The Bureau's investigation of The Brick Warehouse's ("The Brick") art promotion is one example of how the Bureau will investigate situations where discounts on future purchases are disguised as rebates. The Brick advertised an \$80 mail-in rebate on the purchase of art. However, when consumers tried to redeem their rebate with The Brick, they instead received an \$80 gift certificate for a future purchase. On March 26, 2009, after the Bureau's investigation, The Brick agreed to provide consumers who purchased its art with an \$80 rebate cheque and discontinued its art promotion program.

mail-in rebates that are not fulfilled

There may be times when consumers have only received a partial rebate payment or no payment at all while expecting to receive their full rebate after completing the mail-in rebate process. In some of these cases, mail-in rebates are not honoured because the deadline was not fully and clearly disclosed. Other times, rebates are not received until after an unreasonable delay. Finally, rebates may be delivered in envelopes that look deceptively like junk mail which may result in consumers accidentally disposing the rebate cheques. The Bureau views such practices as false or misleading rebate representations.

best practices

The Bureau suggests the following best practices to lessen the likelihood of a manufacturer or retailer making a false or misleading rebate representation:

- prominently and clearly disclose all rebate conditions, limitations and exclusions that could contradict consumers' general impression;

- show the price consumers will effectively pay;
- clearly indicate the amount of the rebate that may apply; and
- clearly indicate the type of rebate offered (instant or mail-in).

ordinary selling price

The Bureau warns that when making representations about consumer rebate promotions, manufacturers and retailers should be mindful of the ordinary selling price provisions of the *Competition Act*. Prior to offering an instant rebate, retailers and manufacturers who sell directly to consumers should determine whether they meet the time and volume tests set out in these provisions.

implications

The Rebate Bulletin provides helpful guidance for manufacturers and retailers striving to ensure their consumer rebate programs are neither false nor misleading. It also signals that the Bureau sees this area as one of its enforcement priorities.

With the recent enhancement of remedies under the *Competition Act* (including the 100-fold increase in penalties for businesses violating the civil misleading advertising provisions - i.e., from a maximum penalty of \$100,000 to \$10,000,000 for the first offence), care should be taken to ensure compliance. This care may include getting specific advice from legal counsel that your proposed rebate program is compliant. It may also include getting a binding written opinion on the proposal from the Bureau which the Bureau will provide for a fee.

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a cautionary note

The foregoing provides only an overview. Readers are cautioned against making any decisions based on this material alone. Rather, a qualified lawyer should be consulted. © McMillan LLP 2009.