



OFFICE OF THE SECRETARY

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FEDERAL TRADE COMMISSION
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Dear Mr. Weiss:

On October 5, 1988, the National Association of Attorneys General ("NAAG") invited comment from interested parties on the September 26, 1988, draft guidelines prepared by NAAG's Task Force on Car Rental Industry Advertising and Practices. The Federal Trade Commission always appreciates the opportunity to share its views on important issues of consumer policy and it is pleased to offer these comments on some aspects of the draft guidelines.

It is the common goal of the Commission and the Attorneys General to eliminate unfair and deceptive acts or practices from the market. Under Section 5 of the Federal Trade Commission Act, which serves as the model for the consumer protection laws of many states, the Commission challenges unfairness and deception in order to ensure the free flow of accurate information to consumers.

The Commission agrees with the guidelines' general conclusions that deception and unfairness in the advertising and marketing of rental cars should not be tolerated, and the task force has defined certain acts and practices that fall into this category. Indeed, the general premises of some of the guidelines appear to help consumers. However, the Commission is concerned that some of the guidelines' provisions could discourage advertising that may provide useful information as well as advertising that is unfair or deceptive. Other provisions could eliminate services of value to consumers, rather than prohibiting practices that injure them. The Commission hopes that the task force will reconsider those provisions.

1. The Legal Basis for the Guidelines

We question whether all the practices that the guidelines would prohibit are "deceptive" or "unfair" under existing state laws. The commentary provides that the guidelines "restate individual states' false advertising and deceptive practices laws

as they apply to car rental advertising."¹ As noted below, several rules advanced by the task force may be at variance with settled law. Moreover, to the best of our knowledge, a number of states (including task force members Arizona, Indiana, Minnesota, New York, and Texas) do not have laws that expressly prohibit unfair practices;² others have laws that specifically limit the definition of deception.³ Since the Commission is unaware of state statutes that specifically prohibit the challenged practices, it is not clear to us whether a legal basis exists under which the Attorneys General of those states could enforce these guidelines. The task force may want to explore further the legal basis for the guidelines.

A sufficient demonstration that a prohibited practice violates an applicable law is important. Regulations that are not reasonably necessary to serve legitimate state interests, such as the elimination of deception or unfairness, may violate the First Amendment or analogous state constitutional

¹ Draft Guidelines at 5.

² The other states that apparently have not statutorily proscribed unfair practices include Alabama, Nevada, New Jersey, North Dakota, Oklahoma, South Dakota, Utah, and Virginia. Nor has the District of Columbia.

³ State statutes that have limited the definition of deception by itemizing deceptive acts include: Colo. Rev. Stat. § 6-1-105 (1987), D.C. Code Ann. § 28-3904 (1987), Ind. Code § 24-5-0.5-3 (1988), Iowa Code § 714.16 (1988), Mich. Comp. Laws § 445.903(2) (1987), Miss. Code Ann. § 75-24-5 (1987), Nev. Rev. Stat. § 598.410 (1988), Okla. Stat. 15 § 753 (1988), Wyo. Stat. § 40-12-105 (1987).

provisions.⁴ As the following discussion indicates, some of the specific proposals may raise such constitutional issues.

2. Advertising guidelines

a. Mandatory disclosures

The guidelines propose to require certain disclosures in any advertisement that includes price information. The task force lists eleven disclosure requirements (and observes that there may be others) that must be made clearly and conspicuously in print advertising.⁵ Four of those disclosures are required in broadcast price advertisements.⁶ It is unclear whether the disclosure requirements are based on current law defining deception and unfairness.⁷ The Commission cannot require disclosure of information without first determining that the advertising is deceptive or unfair, and that the disclosures are necessary to remedy the law violation.

The task force notes that it has "singled out those

⁴ See, e.g., Shapiro v. Kentucky Bar Association, 108 S. Ct. 1916, 1921 (June 13, 1988); In the Matter of R.M.J., 455 U.S. 191, 203 (1982); Coldwell Banker Residential Real Estate Servs., Inc. v. Clayton, 475 N.E.2d 536 (Ill. Sup. Ct. 1985). As the Court said in Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio, 471 U.S. 626, 646 (1985):

Our recent decisions involving commercial speech have been grounded in the faith that the free flow of commercial information is valuable enough to justify imposing on would-be regulators the costs of distinguishing the truthful from the false, the helpful from the misleading, and the harmless from the harmful.

⁵ Draft Guidelines, Section 2.1. These disclosures cover three general areas: availability, restrictions on use, and potential additional costs.

⁶ Draft Guidelines, Section 2.2. If other material restrictions are not mentioned in the broadcast ad, the ad must disclose that "other substantial restrictions apply" and the car rental company must orally disclose the nature of those restrictions to consumers at the point-of-sale.

⁷ See, e.g., International Harvester, 104 F.T.C. 949 (1984), appeal dismissed, No. 85-1111 (D.C. Cir. 1985).

restrictions that it finds are the most important to disclose."⁸ While it is not clear, it appears that Section 2.1 is premised on a conclusion that many important restrictions must be disclosed in price advertising, whether or not the advertising is deceptive or unfair at the outset.⁹ The task force may want to reconsider this premise, if it does underlie the disclosure requirements. The task force's proposed treatment of price and nonprice advertising differs. When advertised claims pertain to nonprice characteristics of a product or service, the proposed guidelines do not require the disclosure of all the important information consumers might want to know. But there is no explanation why nonprice advertising is subject to the established law, while price advertising should trigger unique burdens.

Requiring the disclosure of too much information can have the paradoxical effect of stifling the information that consumers receive. For example, in ITT Continental Baking Co., the Commission declined to require certain disclosures, recognizing that the disclosures sought would be "tantamount to a de facto ban on . . . advertising through the radio and TV media."¹⁰ In considering advertising of home insulation in 1979, the Commission refused to require detailed disclosures of a variety of conditions affecting a particular savings claim. Citing concerns about discouraging savings claims, the Commission adopted a provision simply requiring a general disclosure that more information was available.¹¹

The task force apparently anticipates that the disclosures could eliminate specific price promotions from 15-second commercials.¹² The Commission would be concerned about a policy that sacrifices short price commercials, since they are a potentially important means of price competition. Advertising (including price advertising) can signal to consumers that attractive features (including lower prices) may be available, and that consumers should inquire further for details. Numerous economic studies have demonstrated that price advertising

⁸ Draft Guidelines at 7.

⁹ The guidelines also require disclosure of certain information in other circumstances. See, e.g., Section 3.3(b). We are not commenting on those sections.

¹⁰ ITT Continental Baking Co., 83 F.T.C. 865, 965 (1973).

¹¹ Statement of Basis and Purpose, Trade Regulation Rule on Labeling and Advertising of Home Insulation, 44 Fed. Reg. 50218, 50234 (1979).

¹² Draft Guidelines at 12.

enhances competition and lowers prices.¹³ Advertising is seldom an appropriate vehicle for disclosing detailed and comprehensive characteristics of a potential transaction, and the failure to do so does not necessarily render it deceptive.¹⁴ At least one court has concluded that efforts to require more disclosures than necessary to combat deception can violate the First Amendment.¹⁵

b. Inclusion of all mandatory charges in the "basic rate"

Section 2.5 of the proposed guidelines requires that any surcharge or fee that renters must pay in order to obtain a vehicle must be included in the total advertised price of the rental. The task force seems to have concluded that no separate disclosure of a mandatory charge, regardless of how clear or conspicuous it is, is sufficient to inform consumers of applicable costs of the rental transaction.

The provisions dealing with fuel charges and airport access fees could make it more difficult for smaller companies, companies offering different rental packages and off-airport

¹³ See, e.g., Cleveland Regional Office and Bureau of Economics of the Federal Trade Commission, Jacobs et al., Improving Consumer Access to Legal Services: The Case for Removing Restrictions on Truthful Advertising, Federal Trade Commission Staff Report (1984); Benham, The Effects of Advertising on the Price of Eyeglasses, 15 *J. of L. and Econ.* 337 (1972); Cady, An Estimate of the Price Effects of Restrictions on Drug Price Advertising, 14 *Econ. Inquiry* 493 (1976); Kwoka, Advertising and the Price and Quality of Optometric Services, 74 *Am. Econ. Rev.* 211 (1984); and Schroeter et al., Advertising and Competition in Routine Legal Service Markets: An Empirical Investigation, 36 *The J. of Indus. Econ.* 49 (1987).

¹⁴ We agree that renters should have access to material information concerning their rentals prior to signing an agreement. However, point-of-sale disclosures, rather than advertising, may inform renters more effectively of the numerous details connected to car rentals.

See Ehrlich and Fisher, The Derived Demand for Advertising: A Theoretical and Empirical Investigation, 72 *Am. Econ. Rev.* 366 (1982). The authors find that advertising is but one component of the general market for information and, in particular, that industries with more complicated products engage in relatively more point-of-sale marketing efforts and relatively less advertising.

¹⁵ *South Ogden CVS Store, Inc. v. Ambach*, 493 F. Supp 374, 380-81 (S.D.N.Y. 1980).

companies to compete against their larger rivals. With respect to fuel charges, we agree with the observation in the Preliminary Report (at 5) that disclosure of specific fuel charges in national advertising may be difficult because local franchisees may charge different amounts. We also agree with the Preliminary Report's statement/conclusion (at 8) that "[b]ecause [airport access] fees vary from airport to airport, it may be difficult to build the fees into a nationally advertised rate." The task force may want to re-evaluate these acknowledged restrictions on competitive price advertising in the auto rental industry in light of the points it made in the Preliminary Report and comments filed on the guidelines.

3. Price availability

In the Preliminary Report, the task force stated that it did not at that time see a need for special advertising disclosures relating to limited availability.¹⁶ The task force also recognized the benefits, in the form of discounts through "yield management" pricing, that flow from this kind of advertising.¹⁷ With appropriate qualifications, the task force approved of these practices in June.¹⁸ The Commission agrees with the task force's initial/preliminary conclusions on this issue.

Section 2.4 of the proposed guidelines apparently reverses the task force's initial/preliminary conclusions and revokes that qualified approval. Under the current proposal, advertisers must be able to meet reasonably expected demand, which could limit benefits of yield management pricing. The task force may want to consider whether a more flexible approach is desirable in light of the acknowledged consumer benefits of yield management pricing. For example, the task force might consider allowing disclosure of limits or conditions on the availability of rental cars.¹⁹

¹⁶ Preliminary Report at 24.

¹⁷ The Preliminary Report (at 23) describes "yield management" as a system by which rental companies can ensure that as many vehicles as possible are rented each day. Companies make a limited number of vehicles, i.e., those they estimate would go unrented at the full price, available at a deeply discounted rate to attract consumers who would not ordinarily rent vehicles.

¹⁸ Id.

¹⁹ Id. at 24 n. 11. In April 1988, the Commission voted (Commissioner Strenio, dissenting) to amend its rule regarding the unavailability of advertised specials in retail food stores.

16 C.F.R. Part 424. The staff argued, among other things, that
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4. Optional collision damage waiver

Guideline 3.1 recommends adoption of legislation to eliminate the sale of collision damage waiver ("CDW") and to prohibit the practice of charging a customer for damage to or loss of a rental vehicle, except in specific instances of intentional damage, or similar criminal conduct. It appears that this change would dramatically alter the allocation of risk by making car rental companies financially responsible for most damages. The Commission is concerned that this could harm consumers in two ways.

First, banning CDW will eliminate consumer choice. Currently, renters have several options. They can purchase optional CDW from the rental company, which typically relieves the renter of liability for damage to or loss of the rental vehicle in case of accident or theft. Consumers can also decline to purchase CDW and: 1) assume the risk of personal liability for damage to rental vehicles, 2) rely on their personal automobile insurance policies for coverage,²⁰ or 3) rely on the coverage from other providers.²¹ One or more of these options could be less expensive than required CDW for many consumers. Renters with good driving records can reduce their costs by arranging third-party insurance rather than purchasing a CDW. Drivers who cannot, or choose not to, arrange for third-party

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a requirement that stores have sufficient quantities of an advertised special to meet reasonably expected demand was hurting consumers by discouraging stores from advertising limited-quantity specials. The Commission decided to allow companies to advertise specials with a disclosure that there is a limited supply if they believe they may have less of the item than may be necessary to meet demand.

²⁰ According to J. Robert Hunter, president of the National Insurance Consumer Organization, approximately 60% of all drivers possess automobile insurance policies that provide coverage should the insured driver experience an accident in a rental vehicle. Car rentals: How to avoid being taken for a ride, Money, Apr. 1988, at 201.

²¹ For example, several credit card companies offer complete coverage for damages incurred while driving a rental car that is paid for with their card. Id.

insurance can still reduce the risk of driving a rented vehicle by purchasing a CDW.²²

Second, banning optional CDW and mandatory coverage for all renters may lead to higher basic rates. If the task force's recommendations are adopted, rental car companies may have to increase the rental rate to compensate for the increase in their liability for accidents and thefts. Thus, it may be more accurate to characterize the task force's recommendation as a proposal not to eliminate but to mandate the sale of CDW indirectly. Many consumers who would have declined purchasing CDW would be injured because they would be required, in essence, to pay for coverage twice: first for the coverage provided by their own insurance, which reflects their own driving records, and also for rental car company-provided insurance, which pools good and bad drivers.²³

The task force attributes problems with the marketing of CDW to renters' ignorance of the product's features. The task force then concludes that the informational gap is such that optional CDW should simply be banned. In general, when consumers lack the information needed to make an informed choice, the preferable approach is to provide them the information, not to eliminate the choice altogether.²⁴ We hope that the task force will reexamine

²² In addition, the elimination of optional CDW could cause relatively safe drivers to subsidize relatively unsafe ones. It is unclear that such a subsidy would be in the public interest. Moreover, such subsidization is discouraged by the current system, which allows consumers to choose CDW protection or to decline such protection if they are (or believe themselves to be) relatively good risks.

²³ It might even be argued that consumers, knowing they have no liability, will be less careful with the rented vehicle, and hence companies would experience higher repair costs and an increase in the proportion of vehicles under repair at any given time. The increased costs are likely to be passed through to consumers as higher rates. For a theoretical treatment of this issue, see Brown, Toward an Economic Theory of Liability 2 *J. of Legal Stud.* 323 (1973); Diamond, Single Activity Accidents, 3 *J. of Legal Stud.* 107 (1974); and Shavell, Strict Liability vs. Negligence, 9 *J. of Legal Stud.* 1 (1980).

²⁴ Cf. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1975):

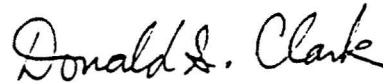
There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that
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its recommendation and explore methods of facilitating the communication of accurate information concerning optional CDW, rather than considering proposals to ban the CDW option altogether.

5. Conclusion

The task force recognized in the Preliminary Report that the issues here "are very complicated and do not lend themselves to simple solutions."²⁵ Moreover, the task force recognized that certain of the proposed requirements would make national advertising more difficult.²⁶ We are concerned that the proposed guidelines might diminish price advertising and limit price competition. Renters could also be deprived of lower rental rates if companies were prevented from offering low-priced, limited-quantity rental vehicles. Finally, the task force's recommendation that optional CDW be banned might increase car rental prices to all consumers and diminish the range of consumer choices for allocating the risk of driving rental vehicles. The Commission hopes that the task force will reconsider whether these provisions are likely to achieve the goal of protecting consumers.

By direction of the Commission.*



Donald S. Clark
Secretary

* Commissioner Strenio does not join in this letter.

24 (...continued)
people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them.

25 Preliminary Report at 3.

26 Id. at 8.