UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Bureau of Consumer Protection

November 7, 2000

Andrea C. Levine
Vice President, Director
Council of Better Business Bureaus
National Advertising Division
845 Third Avenue
New York, New York 10022-6601

Dear Ms. ~~Levine:~~ Andy

This letter states the views of the staff of the Federal Trade Commission ("FTC" or "Commission") with respect to a matter that the National Advertising Division of the Council of Better Business Bureaus, Inc. ("NAD") has referred to us relating to comparative price advertisements JC Penney has run for its fine jewelry. For reasons explained below, the FTC staff has determined not to recommend any law enforcement action in response to the referral.

Background

This matter was initiated by the Jewelry Advertising Review Program ("JARP"), a coalition of local Better Business Bureaus, who sought NAD's review of savings claims made in JC Penney's advertisements for its fine jewelry. More specifically, JARP asserted that JC Penney's comparison of its sale prices to its regular prices was misleading because the regular prices were not prices at which fine jewelry items were actually sold. JC Penney countered that its advertisements were in full compliance with FTC Guides Against Deceptive Pricing ("FTC Pricing Guides"), 16 C.F.R. Part 233, and the Better Business Code of Advertising ("BBB Code").

NAD's decision in this matter was published in the July 1999 issue of the *NAD Case Reports*. NAD determined that: (1) the product advertised is one that is not seasonal and varies little from year to year; (2) JC Penney could not demonstrate that it offered its fine jewelry items at the regular prices for a substantial period of time; and (3) JC Penney did not achieve substantial sales of those items at the regular prices. Based on these findings, NAD concluded that JC Penney could not substantiate its express and implied claims that consumers would receive the savings represented in its "sale" advertisements for fine jewelry. NAD recommended that these claims be modified to more accurately reflect the actual savings that JC Penney's sale prices offer to consumers. In arriving at its decision, NAD considered both the FTC Pricing Guides and the BBB Code.

In response to this decision, JC Penney agreed to modify its price comparison advertising for fine jewelry by ensuring that: (1) the reference prices [or regular prices] are those at which the advertised items were, or will be, offered at least 50% of the pertinent period; (2) the term "regular" is not used to describe prices at which items were, or will be, offered less than 50% of the time; and (3) former prices are described as offering prices at which sales may or may not have been made. JC Penney stated that these steps are consistent with the company's guidelines for price comparison advertising, the FTC Pricing Guides and the BBB Code.

In December 1999, JARP informed NAD that, in its opinion, the modifications made by JC Penney in its new "sales" advertising did not comply with NAD's decision because the reference or "regular" prices were inflated and did not represent realistic prices at which JC Penney actually intended to sell a substantial quantity of its fine jewelry merchandise. NAD forwarded this compliance inquiry to JC Penney, who contended that its modified advertising complied with NAD's decision, the FTC Pricing Guides and the BBB Code. More specifically, JC Penney explained that it its new advertisements were in compliance because: (1) the reference [or regular] prices it used in fine jewelry price comparison advertising were those at which the advertised items were offered for sale at least 50% of the relevant period of time; (2) it did not use the term "regular" to describe prices offered less than 50% of the time; and (3) all of its jewelry sale advertising, when describing former prices, included a disclosure that "sales may or may not have been made" at the regular offering price.

NAD, however, remained concerned that JC Penney's advertisements for its fine jewelry were not in compliance with the FTC Pricing Guides. In NAD's view, the FTC Pricing Guides set forth two standards advertisers must meet when comparing "sale" prices to a reference [or regular] price. First, the regular price must be offered on a regular basis for a substantial period of time and, second, the regular price must be an actual, bona fide price rather than an inflated or exaggerated price. NAD determined that, although JC Penney's modifications address the first of these two requirements, the advertisements do not meet the second requirement because, during the initial challenge, JC Penney was unable to demonstrate that it had made significant sales of its fine jewelry at its advertised regular prices.

Because NAD and JC Penney interpret the FTC Pricing Guides differently, and because there are several other jewelry pricing cases pending before NAD that involve the same issue, NAD referred the matter, on August 2, 2000, to the FTC.

Analysis

Promulgated in 1964, the Pricing Guides have provided long-standing guidance to advertisers engaging in comparative price advertising.[1] Section 233.1 of the Pricing Guides sets

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[1] The Commission promulgates industry guides when it appears that guidance as to the legal requirements applicable to particular practices would serve to bring about more widespread and equitable observance of the laws administered by the Commission. FTC guides, such as the Guides Against Deceptive Pricing, do not have the force or effect of law. Therefore, a Commission case brought to enforce a guide, or which embodies the theory of a guide, must plead a violation of the underlying statute on which the guide is based (*e.g.,* Section 5 of the FTC Act), not a violation of the guide itself. Thus, before bringing a case, the Commission must have reason to believe that the advertisements meet the Commission's standard for deception or unfairness.

forth standards for advertising a reduction from the advertiser's own former price:

> (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.
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> (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 by 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.

The provisions quoted above allow advertisers to offer reductions from the advertiser's former price if the former price was one at which the article was offered on a regular basis for a reasonably substantial period of time and if the former price is not fictitious. The Guides further state, however, that a former price is not necessarily fictitious because no sales were made at the former price. Therefore, the Guides do not require that substantial sales occur at the advertiser's former price. Indeed, if JC Penney had made substantial sales at its regular prices, the price comparisons automatically would have complied with the Guides and there would have been no need for a further examination of the length of the offer period or any other criterion. Instead, under the Pricing Guides, we must assess the legitimacy of former price comparisons by determining, both, whether the advertised article was offered at the former price on a regular basis for a substantial period of time, and whether the former offer price was "fictitious." Presumptively, assuming a reasonable offer period, a former price would not be considered "fictitious" if sales above a *de minimis* level actually had occurred during the period the former price was in effect.

In JC Penney's case, its fine jewelry items were openly and actively offered for sale at their regular prices for a substantial period of time. In addition, during the initial challenge, JC Penney submitted confidential data to the NAD showing that the regular prices for fine jewelry generated sales above a *de minimis* level. The percentage of sales at regular prices and the fact that JC Penney's fine jewelry merchandise was offered openly and actively at the regular prices for a reasonably substantial period of time persuades us that no FTC action is warranted at this time.

Your interest in calling this matter to the attention of the Commission is appreciated. I want to commend NAD for the role it plays in resolving complaints about advertising that is alleged to be misleading or deceptive. NAD's efforts in this area allow the FTC to concentrate its resources on matters that are less susceptible to voluntary resolution. Your important work benefits both businesses and consumers.

Sincerely,

Jodie

Joan Z. Bernstein
Director