



Price Comparison Advertising – Massachusetts Law

Retailers doing business in Massachusetts should ensure that their price comparison advertising complies with Massachusetts law, particularly 940 C.M.R. § 6.05 (**Section 6.05**). Otherwise, they may face a civil enforcement action by the Massachusetts Office of the Attorney General (**MA AGO**), a putative class action brought by a consumer under the Massachusetts Consumer Protection Act – Chapter 93A, or even a civil action brought by a competitor alleging unfair and deceptive trade practices.

What is price comparison advertising?

As defined in Section 6.05, price comparison advertising “is a form of advertising used in the sale of products whereby current prices are compared with the seller’s former or future prices, the prices of other sellers, or other stated values to demonstrate price reductions or cost savings.” According to the regulation, which was promulgated by the MA AGO, (1) “price comparisons based on false, arbitrary or inflated prices or values deceive or mislead the public” and (2) “[a]buse also occurs when sellers fail to disclose material information which is important to enable consumers to understand the price comparison.” To protect against this alleged deception and abuse, Section 6.05 regulates price comparison advertising.

Which practices does Section 6.05 deem unfair or deceptive?

Section 6.05 is divided into various sections (as more fully described below) that provide retailers with guidance concerning what the MA AGO deems to be unlawful. Violations of Section 6.05 may be enforced by the MA AGO in a civil enforcement action as well as by consumers, who may seek to assert claims individually and on behalf of all those “similarly situated” under Chapter 93A. Massachusetts law even supports civil actions brought by competitors harmed by unlawful advertising practices.

Specifically, Section 6.05 provides that the following are unfair or deceptive acts:

- > **Unidentified Price Comparisons.** Sellers cannot state or imply that they are offering any product savings by making a direct or indirect price comparison, unless they “clearly and conspicuously”¹ describe the basis for the comparison; provided, however, that sellers may claim a savings or make such a comparison (without disclosing the basis) if they are making a comparison to their own “former price” (as determined by Section 6.05(3)).
- > **Comparison to Seller’s Own Former Prices.** Sellers cannot compare their current price with their own former price for any product, unless such former price is a “bona fide, actual price” that they had offered “openly and in good faith for a reasonably substantial period of time in the recent past” to the public.²
- > **Introductory Offers and Future Price Comparisons.** Sellers cannot make an introductory offer or compare their current product price with a future product price unless (i) the future price takes effect immediately after the sale and not later than 60 calendar days after “the dissemination date of the introductory offer or price comparison” and (ii) following the effective date of the future price, the product is offered “openly and in good faith” at that price for at least equal to the period of time offered at the introductory price, but not less than 14 days (except for certain circumstances).³
- > **Use of “Sale” Terminology.** Sellers cannot use the words “priced for sale,” “on sale,” “sale,” “selling out,” “clearance,” “reduced,” “liquidation,” “must sell,” “must be sacrificed,” “now only \$X,” or other terms which state or imply a price savings unless certain specific factors listed in Section 6.05 are met.⁴
- > **Use of “List Price” or Similar Comparisons.** Sellers cannot compare their current product price with a “list price,” “manufacturer’s suggested retail price” or similar term, unless the list or manufacturer’s suggested retail price is the price charged for the advertised product by a reasonable number of sellers in the seller’s trade area as of a particular “measurement date” determined by Section 6.05.⁵
- > **Comparison to Other Seller’s Price for Identical Product.** Sellers cannot compare their price with another seller’s price for an identical product, unless the stated higher comparative price is at or

¹ “Clearly and conspicuously” means that “the material representation being disclosed is of such size, color, contrast or audibility and is so presented as to be readily noticed and understood by a reasonable person to whom it is being disclosed.” Section 6.01 provides guidelines for determining if disclosures are proper.

² Section 6.05(3) lists various factors that are considered when determining whether a “former price” is a “bona fide, actual price.” Section 6.05(4) provides certain safe harbors for comparison prices. A complete list of factors and a description of the safe harbors are contained in 940 C.M.R. §§ 6.05(3)(a) and 6.05(4), which are available at <http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-600.html> (MA AGO’s Website).

³ These circumstances and exceptions for certain offers limited to certain consumers who are deemed “first time purchasers” as defined in the regulation are contained in 940 C.M.R. § 6.05(5), which is available at the MA AGO’s Website. Also, Section 6.05(5) contains separate requirements for health clubs.

⁴ These factors are contained in 940 C.M.R. § 6.05(6), which is available at the MA AGO’s Website.

⁵ Section 6.05(7) contains separate requirements for manufacturers or franchisors. Also, the “measurement date” is defined in Section 6.01.

below the price at which the identical product is being offered in the seller's trade area as of the "measurement date" or other specifically identified period under certain circumstances.⁶

- > **Comparison to Seller's Own or Other Seller's Price for *Comparable Product*.** Sellers cannot compare their price with their own price or another seller's price for a comparable product unless the comparable product is being offered for sale as of the "measurement date," or other specifically identified period, at the stated higher comparative price, unless certain factors are met.⁷
- > **Price Comparisons on Price Tickets or Labels.** Sellers cannot imprint or attach any ticket or label to a product that contains a fictitious or inflated price which is capable of being used by sellers as a basis for offering fictitious price reductions.⁸
- > **Range of Savings or Price Reduction Claims.** Sellers cannot state or imply that any products are being offered for sale at a range of prices or at a range of percentage or fractional discounts unless various factors are met.⁹
- > **Use of Terms "Wholesale" or "At Cost."** Sellers cannot state or imply that any product is being offered at or near a "wholesale" price or "at cost" (or words of similar meaning) unless the price is, in fact, either at or below the price paid by the seller at wholesale, or, in the case of a service, the seller's cost for the service excluding overhead and profit.
- > **Use of Terms "Two for the Price of One" or "Buy One - Get One Free."** Sellers cannot state or imply that products are being offered at the usual price of a smaller number of the same or a different product unless (i) they clearly and conspicuously disclose all material sale conditions being imposed; (ii) the price advertised as the usual price for the smaller number of products is their own "former price"; and (iii) the products are of substantially the same quality, grade, material and craftsmanship as the seller offered prior to the advertisement.
- > **Use of Term "If Purchased Separately."** Sellers cannot make any price comparison based on the difference between the price of a system, set or group of products and the price of the products "if purchased separately" (or words of similar meaning) unless: (i) a reasonable number of sellers in the trade area are currently offering the products as separate items at or above the stated separate purchase price as of the "measurement date"; or (ii) they have actually sold or offered the products for sale as separate items at the stated separate purchase price.
- > **Prices for Parts or Units of Sets or Systems.** Sellers cannot advertise a price for any product that normally sells as part of a pair, system, or set without clearly and conspicuously disclosing that the price stated is the price per item or unit only, and not the price for the pair, system or set.
- > **Gifts.** Sellers cannot state or imply that any product is being offered for free or at a reduced price ("a gift") in conjunction with the purchase of another product unless various factors are met.¹⁰

⁶ These requirements are contained in 940 C.M.R. § 6.05(8), which is available at the MA AGO's Website.

⁷ These factors are contained in 940 C.M.R. § 6.05(9), which is available at the MA AGO's Website.

⁸ There are certain exceptions for prices that are pre-ticketed by manufacturers or other sellers, as contained in 940 C.M.R. § 6.05(10), which is available at the MA AGO's Website.

⁹ These factors are contained in 940 C.M.R. § 6.05(11), which is available at the MA AGO's Website.

¹⁰ These factors are contained in 940 C.M.R. § 6.05(16), which is available at the MA AGO's Website.

- > **Use of Disclaimers.** Sellers cannot use a price comparison that is prohibited even if the advertisement contains disclaimers or explanatory language.

Are there any other requirements¹¹ that sellers should consider when assessing their price comparison advertising?

- > **Record Keeping Requirements.** Sellers must maintain records for a period of six months after the last dissemination of subject advertisements and provide those records to the MA AGO, upon request, to substantiate the propriety of such advertisements.¹²
- > **Deceptive Pricing Generally, Examples, and Loss Leaders.** Although not contained within Section 6.05 itself, the MA AGO has adopted a more general regulation dealing with “Deceptive Pricing” set forth in 940 C.M.R. § 3.13(2).¹³ This subsection describes generally what the MA AGO deems deceptive and provides some examples. In addition, related § 3.13(3) prohibits sellers from selling or offering for sale so-called “loss leaders” to induce a buyer to make a purchase of a product sold only in combination with other merchandise on which the seller recovers such loss.

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¹¹ This advisory does not contain an all-inclusive list of the MA AGO’s advertising regulations and requirements. Sellers, among other things, should be aware of additional requirements set forth in 940 C.M.R. § 3.00 (General Regulations) and 940 C.M.R. § 6.00 (Retail Advertising).

¹² 940 C.M.R. § 6.14 contains specific and detailed record retention requirements for price comparison advertising, which is available at the MA AGO’s Website.

¹³ This more general regulation is available at <http://www.mass.gov/ago/government-resources/ags-regulations/940-cmr-3-00/940-cmr-300.html>.

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