

SB0085S02 compared with SB0085S01

~~text~~ shows text that was in SB0085S01 but was deleted in SB0085S02.

text shows text that was not in SB0085S01 but was inserted into SB0085S02.

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Senator Todd Weiler proposes the following substitute bill:

TRUTH IN ADVERTISING AMENDMENTS

2015 GENERAL SESSION

STATE OF UTAH

Chief Sponsor: Todd Weiler

House Sponsor: ~~_____~~ Mike Schultz

LONG TITLE

General Description:

This bill modifies provisions of the Truth in Advertising act relating to deceptive trade practices.

Highlighted Provisions:

This bill:

- ▶ provides that certain advertising practices relating to a ~~weight loss product or a~~ cosmetic medical procedure constitute a deceptive trade practice; and
- ▶ makes technical changes.

Money Appropriated in this Bill:

None

Other Special Clauses:

None

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Utah Code Sections Affected:

AMENDS:

13-11a-2, as last amended by Laws of Utah 2009, Chapter 133

13-11a-3, as last amended by Laws of Utah 2010, Chapters 54 and 378

Be it enacted by the Legislature of the state of Utah:

Section 1. Section **13-11a-2** is amended to read:

13-11a-2. Definitions.

As used in this chapter:

(1) "Advertisement" means any written, oral, or graphic statement or representation made by a supplier in connection with the solicitation of business. It includes, but is not limited to, communication by noncable television systems, radio, printed brochures, newspapers, leaflets, flyers, circulars, billboards, banners, or signs. It does not include any oral, in person, representation made by a sales representative to a prospective purchaser.

(2) To "clearly and conspicuously disclose" means:

(a) in the print media:

(i) to state in typeface that is sufficiently bold to be obviously seen;

(ii) to state in type size of at least 10 point type for a 14" x 23" document, and, in larger documents, of a type size of proportionately the same size; and

(iii) to place in the text so as to be obviously seen;

(b) in radio advertising, to verbally state in the same volume as that used in the advertisement;

(c) in television advertising, the method for print media or radio advertising is acceptable unless contrary to other governing laws.

(3) "Cosmetic medical procedure" means the same as that term is defined in Section 58-68-102.

~~(3)~~ (4) "Generic good" means a product which is offered for sale under its common descriptive name rather than under a trademark, trade name, brand name, house brand, or other distinguishing appellation.

~~(4)~~ (5) "Goods and services" means all items which may be the subject of a sales transaction.

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~~[(5)]~~ (6) "Nondiscounted price" means a price at which the goods or services are offered at the time of the price assessment without a temporary store reduction in price.

~~[(6)]~~ (7) "Performing group" means a vocal or instrumental group that performs live music for a paying audience.

~~[(7)]~~ (8) "Person" means an individual, including a consumer, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

~~[(8)]~~ (9) "Price assessment" means the determination of the prices underlying a price comparison.

~~[(9)]~~ (10) "Price assessor" means a firm or individual that determines the prices, including the reference prices, underlying the price comparison, or who makes the price comparison.

~~[(10)]~~ (11) "Price comparison" means any express representation that a specific savings, reduction, or discount exists or will exist between the supplier's advertised price and another specific price. A representation which does not reasonably imply a comparison to identifiable prices or items does not express a price comparison. Language constituting mere sales "puffing" is not prohibited by this chapter.

~~[(11)]~~ (12) "Product area" means the geographical area in which the prospective purchasers to whom the advertisement is aimed could reasonably be expected to seek the goods or services in question.

~~[(12)]~~ (13) "Recording group" means a vocal or instrumental group at least one of the members of which has released a commercial sound recording under the group's name, if the member has a legal right to use of the group's name.

~~[(13)]~~ (14) "Reference price" means a higher price to which a supplier compares a lower price to indicate that a reduction in price exists or will exist.

~~[(14)]~~ (15) "Regular price" means the price at which a supplier has recently offered the goods or services for sale in good faith in the regular course of business. Every price represented in an advertisement is considered a regular price unless it is specifically represented as a price other than a regular price, such as a discount price or a manufacturer's suggested price. It is prima facie evidence that a price is other than a regular price when it was

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not offered as the nondiscount price of the goods or services for the 15 days immediately preceding an advertisement of the price, and the price change during the 15 day period was not due to price changes inherent in the pricing of seasonal or perishable goods, due to changes in cost of the goods or services to the supplier, or due to pricing changes made to match a competitor's price.

~~[(15)]~~ (16) "Sales transaction" means a sale, lease, assignment, award by chance, or other written or oral transfer or disposition of goods, services, or other property, both tangible and intangible (except securities and insurance), to a person or business, or a solicitation or offer by a supplier with respect to any of these transfers or dispositions. It includes any offer or solicitation, any agreement, and any performance of an agreement with respect to any of these transfers or dispositions.

~~[(16)]~~ (17) "Sound recording" means a work resulting from the fixation on a material object, such as a disk, tape, or phono-record, of musical or instrumental sounds.

~~[(17)]~~ (18) "Supplier" means a seller, lessor, assignor, offeror, broker, or other person who regularly solicits, engages in, or enforces sales transactions, whether or not he deals directly with the purchaser.

~~{~~ ~~—~~ ~~(19)~~ ~~"Weight loss product" means a product that is intended to cause or facilitate a reduction in the weight of a person who uses the product.~~

~~‡~~ Section 2. Section **13-11a-3** is amended to read:

13-11a-3. Deceptive trade practices enumerated -- Records to be kept -- Defenses.

(1) Deceptive trade practices occur when, in the course of a person's business, vocation, or occupation, that person:

- (a) passes off goods or services as those of another;
- (b) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (c) causes likelihood of confusion or of misunderstanding as to affiliation, connection, association with, or certification by another;
- (d) uses deceptive representations or designations of geographic origin in connection with goods or services;
- (e) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or qualities that they do not have or that a person has a sponsorship,

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approval, status, affiliation, or connection that the person does not have;

(f) represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or second-hand;

(g) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;

(h) disparages the goods, services, or business of another by false or misleading representation of fact;

(i) advertises goods or services or the price of goods and services with intent not to sell them as advertised;

(j) advertises goods or services with intent not to supply a reasonable expectable public demand, unless:

(i) the advertisement clearly and conspicuously discloses a limitation of quantity; or

(ii) the person issues rainchecks for the advertised goods or services;

(k) makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions, including the false use of any of the following expressions in an advertisement:

(i) "going out of business";

(ii) "bankruptcy sale";

(iii) "lost our lease";

(iv) "building coming down";

(v) "forced out of business";

(vi) "final days";

(vii) "liquidation sale";

(viii) "fire sale";

(ix) "quitting business"; or

(x) an expression similar to any of the expressions in Subsections (1)(k)(i) through (ix);

(l) makes a comparison between the person's own sale or discount price and a competitor's nondiscounted price without clearly and conspicuously disclosing that fact;

(m) without clearly and conspicuously disclosing the date of the price assessment makes a price comparison with the goods of another based upon a price assessment performed

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more than seven days prior to the date of the advertisement or uses in an advertisement the results of a price assessment performed more than seven days prior to the date of the advertisement without disclosing, in a print ad, the date of the price assessment, or in a radio or television ad, the time frame of the price assessment;

(n) advertises or uses in a price assessment or comparison a price that is not that person's own unless this fact is:

(i) clearly and conspicuously disclosed; and

(ii) the representation of the price is accurate;

(o) represents as independent an audit, accounting, price assessment, or comparison of prices of goods or services, when the audit, accounting, price assessment, or comparison is not independent;

(p) represents, in an advertisement of a reduction from the supplier's own prices, that the reduction is from a regular price, when the former price is not a regular price [~~as defined in Subsection 13-11a-2(14)~~];

(q) advertises a price comparison or the result of a price assessment or comparison that uses, in any way, an identified competitor's price without clearly and conspicuously disclosing the identity of the price assessor and any relationship between the price assessor and the supplier;

(r) makes a price comparison between a category of the supplier's goods and the same category of the goods of another, without randomly selecting the individual goods or services upon whose prices the comparison is based;

(s) makes a comparison between similar but nonidentical goods or services unless the nonidentical goods or services are of essentially similar quality to the advertised goods or services or the dissimilar aspects are clearly and conspicuously disclosed in the advertisements; [~~or~~]

(t) (i) advertises the results of a {weight loss product or a }cosmetic medical procedure with an image or photograph that is false, misleading, or deceptive, including a before and after image that exaggerates or otherwise fails to accurately depict the expected results of the {weight loss product or} cosmetic medical procedure; and

(ii) does not clearly and conspicuously disclose the aspects of the image or photograph that make it false, misleading, or deceptive; or

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[(†)] (u) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(2) (a) For purposes of Subsection (1)(i), if a specific advertised price will be in effect for less than one week from the advertisement date, the advertisement shall clearly and conspicuously disclose the specific time period during which the price will be in effect.

(b) For purposes of Subsection (1)(n), with respect to the price of a competitor, the price shall be one at which the competitor offered the goods or services for sale in the product area at the time of the price assessment, and may not be an isolated price.

(c) For purposes of Subsection (1)(o), an audit, accounting, price assessment, or comparison shall be independent if the price assessor randomly selects the goods to be compared, and the time and place of the comparison, and no agreement or understanding exists between the supplier and the price assessor that could cause the results of the assessment to be fraudulent or deceptive. The independence of an audit, accounting, or price comparison is not invalidated merely because the advertiser pays a fee for the audit, accounting, or price comparison, but is invalidated if the audit, accounting, or price comparison is done by a full or part-time employee of the advertiser.

(d) Examples of a disclosure that complies with Subsection (1)(q) are:

- (i) "Price assessment performed by Store Z";
- (ii) "Price assessment performed by a certified public accounting firm"; or
- (iii) "Price assessment performed by employee of Store Y".

(e) For the purposes of Subsection (1)(r), goods or services are randomly selected when the supplier has no advance knowledge of what goods and services will be surveyed by the price assessor, and when the supplier certifies its lack of advance knowledge by an affidavit to be retained in the supplier's records for one year.

(f) (i) It is prima facie evidence of compliance with Subsection (1)(s) if:

(A) the goods compared are substantially the same size; and

(B) the goods compared are of substantially the same quality, which may include similar models of competing brands of goods, or goods made of substantially the same materials and made with substantially the same workmanship.

(ii) It is prima facie evidence of a deceptive comparison under this section when the prices of brand name goods and generic goods are compared.

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(3) Any supplier who makes a comparison with a competitor's price in advertising shall maintain for a period of one year records that disclose the factual basis for such price comparisons and from which the validity of such claim can be established.

(4) It is a defense to any claim of false or deceptive price representations under this chapter that a person:

(a) has no knowledge that the represented price is not genuine; and

(b) has made reasonable efforts to determine whether the represented price is genuine.

(5) Subsections (1)(m) and (q) do not apply to price comparisons made in catalogs in which a supplier compares the price of a single item of its goods or services with those of another.

(6) To prevail in an action under this chapter, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

(7) This chapter does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state.