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Draft Information Bulletin on Consumer Rebate Promotions

**NATIONAL COMPETITION LAW SECTION
CANADIAN BAR ASSOCIATION**

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PREFACE

The Canadian Bar Association is a national association representing 37,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Competition Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Competition Law Section of the Canadian Bar Association.

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Draft Information Bulletin on Consumer Rebate Promotions

I. INTRODUCTION

The National Competition Law Section of the Canadian Bar Association (the CBA Section) is pleased to have the opportunity to comment on the draft information bulletin, *Application of the Competition Act, the Consumer Packaging and Labelling Act and the Textile Labelling Act to Consumer Rebate Promotions* (the *Draft Bulletin*), released for comment by the Competition Bureau on March 31, 2009. The CBA Section strongly supports the Bureau's public education program, including guidelines, bulletins and other interpretive aids made widely available to the business community in Canada. The CBA Section supports the purpose and position reflected in the *Draft Bulletin*. Our comments are largely technical, intended to ensure that the bulletin does not overstate legal prohibitions and to suggest revisions that may make the intended meaning clearer to the reader.

II. GENERAL COMMENTS

The Introduction of the *Draft Bulletin* states that it explains the Bureau's approach to interpreting the false or misleading representations provisions of the *Competition Act* (CA), the *Consumer Packaging and Labelling Act* (CPLA) and the *Textile Labelling Act* (TLA), and sets out best practices that the Bureau recommends businesses follow when offering rebates. In addition, the *Draft Bulletin* provides summary statements of the relevant statutory requirements of the CA, CPLA and TLA. The CBA Section recommends that the *Draft Bulletin* spell out to which of these objectives certain text corresponds and we suggest some changes to the text in this regard.

The Draft Bulletin identifies the potential for representations about a consumer rebate promotion to be false or misleading in a material respect unless there is both timely disclosure of certain facts about the rebate and the fulfillment of valid rebate claims made in

accordance with applicable terms and conditions. However, in the CBA Section's view, the central issue of whether consumers are likely to be misled in a material respect is lost at points in the *Draft Bulletin*. The CBA Section recommends some changes to address this.

The CBA Section commends the logical organizational structure and readable prose of the *Draft Bulletin*. The Section offers recommendations to help the document read even better.

III. DETAILED COMMENTS

1. Introduction

The CBA Section recommends stylistic additions to the fourth paragraph of this part, so the paragraph would read:

Business practices that deviate from the practices in this bulletin may not necessarily contravene the *Competition Act* or the other laws mentioned here. The examples of consumer rebate promotions included in this bulletin are for illustrative purposes only and are not exhaustive.

2. What Are Rebates

To accurately reflect the subject of the *Draft Bulletin*, the CBA Section recommends that the title of this part be changed to "What Are Consumer Rebate Promotions" and that the first paragraph be amended to begin "Consumer rebate promotions include any type ..."

The term "rebate" most commonly refers to a cash or cheque payment. However, nothing prohibits manufacturers or retailers from using the term "rebate" in connection with payment in the form of, for example, a gift card where the nature of the offer is clearly disclosed to the consumer. For this reason, the CBA Section recommends the first paragraph of this part read "**generally** in the form of cash or a cheque".

To better capture the distinguishing feature of a delayed-payment consumer rebate, the CBA Section recommends that the term "delayed-payment rebate" be used instead of "mail-in rebate" as the term is meant to include collectively "mail-in, Internet and other delayed-payment rebates" (as provided in footnote 1).

To describe the motivations for these rebates more precisely, the CBA Section recommends that the second and third sentences of the second paragraph under “Mail-in Rebates” be amended to read: “For consumers, rebates can result in lower effective prices. For businesses, rebates provide a flexible tool that may increase sales volumes.”

3. What Legal Provisions Apply to Rebates

To accord more accurately with the CA, the CBA Section recommends that the second sentence of the second paragraph in this part begin with “When the Competition Tribunal or a court, on application ...”, and end with “... corrective notice, to pay an administrative monetary penalty and/or to pay an amount to be distributed among the persons to whom the products were sold.”

To better capture the intended meaning, the CBA Section recommends that the first sentence of the fourth paragraph be amended to read: “The *Competition Act* states that for representations to raise concerns they must be false or misleading „in a material respect“.”

In the CBA Section’s view, the second sentence of the fourth paragraph is confusing and does not elucidate the meaning of “in a material respect” under the CA. The CBA Section recommends that the sentence be deleted.

To better capture the key issue of the effects of representations on consumers, the CBA Section recommends that the last sentence of the fourth paragraph be amended to read: “For example, representations of rebates and post-rebate effective prices in flyer advertisements may lead consumers to purchase items they would not have purchased absent these representations.”

To accord more accurately with the CPLA, the CBA Section recommends that the second sentence of the fifth paragraph be amended to read: “Subsection 7(1) prohibits making false or misleading representations on the labels of prepackaged products, including any such representations about consumer rebate promotions.”

To accord more accurately with subsections 5(1) and 5(2) of the TLA, the CBA Section recommends that the second sentence of the sixth paragraph be amended to read: “Section 5 prohibits the making of false or misleading representations relating to consumer textile articles.”

4. Who Bears Responsibility for Making False or Misleading Representations

In the first sentence of this part, the word “principal” should be “principle”.

For more consistent wording in the paragraph, the CBA Section recommends that the second paragraph be amended to read: “The *Competition Act* states that whoever has caused ... However, when the person who has caused the representation to be made, including a manufacturer, is outside Canada, then”

To accord more accurately with the CPLA and TLA, the CBA Section recommends that the third paragraph be amended to read: “Under the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act*, each of the manufacturer, importer and seller is considered to be a „dealer“ with respect to prepackaged products and consumer textile articles, respectively, and may be liable for representations made on the labels of such products. A dealer under the *Textile Labelling Act* may also be liable for any representations made otherwise by the dealer that are related to a textile fibre product.”

To accord more accurately with the CA, the CBA Section recommends that in the fourth paragraph the word “materially” be inserted before “false or misleading representations”.

The fifth paragraph of this part indicates that retailers are generally not liable under the TLA for representations on or accompanying products except when the manufacturer is outside Canada. The CBA Section recommends that the *Draft Bulletin* clarify the grounds for this approach, given that the Bureau’s Guide to the Textile Labelling and Advertising Regulations (September 2000) indicates that it views “dealers” under the TLA to generally include retailers and makes no mention of excluding retailers from liability as dealers, except where the manufacturer making the representation is outside Canada.

To accord more accurately with the CPLA, the CBA Section recommends that in the sixth paragraph the word “accompanying” be replaced by the phrase “applied to the label of”.

To better capture the intended meaning and to accord more accurately with the CA, the CBA Section recommends that in the seventh paragraph the phrase “under the *Competition Act*” be moved to follow “then the retailer could be liable”, and that “in a material respect” be added following “found to be false or misleading”.

To better capture the intended meaning, including the intended generality of application to all consumer rebate offers, the CBA Section recommends that in the eighth paragraph the phrase “who have sent in a valid application and meet all conditions” be replaced by “who have met all terms and conditions for the rebate”.

5. Examples of False or Misleading Representations

To reflect the fact that individual purchase decisions are generally influenced by more than rebate offers, the CBA Section recommends amending the second sentence of the first paragraph to read: “A consumer’s decision to purchase a product that features a rebate is normally based on the general impression created by corresponding product representations taken as a whole.”

To more accurately describe the content and role of the examples, the CBA Section recommends replacing the second paragraph with: “The Bureau identifies in the following five examples conduct that could comprise or result in false or misleading representations in respect of rebate promotions.”

5.1 Inadequate Disclosure

To capture the intended focus of this part, the CBA Section recommends changing the title to “Inadequate Disclosure of Rebate Terms and Conditions”.

To better capture the intended message about how general impressions can vary with the disclosure of terms and conditions, the CBA Section recommends replacing the first sentence of the first paragraph of this part with: “Conditions, limitations and exclusions that

affect whether consumers will receive the advertised rebate can, when they are not brought appropriately to consumers' attention, contradict the general impression that they are eligible for a rebate that is not subject to such conditions, etc.”

To communicate the possible consequences of non-disclosure, the CBA Section recommends replacing the second sentence in the first paragraph with: “Thus, in some situations the Bureau may conclude that consumers have been materially misled when certain information is not disclosed.”

To make clear the Bureau's view that consumers can be materially influenced by this information, but to refrain from representing that disclosure of all of the information is a legal requirement in every case, the CBA Section recommends replacing the beginning of the second paragraph with: “As a matter of best practices, the Bureau recommends that the following information, where applicable, be clearly and conspicuously disclosed:” Also, the CBA Section recommends changing the fourth and fifth bullet points in the paragraph to:

- consumers are required to provide information beyond proof of purchase and contact information sufficient to permit the rebate payment to be received
- the rebate will not be sent to a post office box address

To capture what the CBA Section believes to be intended, but to refrain from representing that disclosure of conditions on a website is likely to be inadequate in every case, the CBA Section recommends replacing the paragraph under the heading “How to avoid making false or misleading representations” with: “Where conditions, limitations or exclusions attached to a rebate would, once disclosed, alter the general impression of the rebate offered, manufacturers (and, where applicable, retailers) should bring them to the attention of consumers before they must act upon the representations. Disclosure of conditions likely to influence the general impression of a representation only after the consumer makes the purchase, such as disclosure inside product packaging, may render the representation false or misleading in a material respect.”

There are many instances where disclosure of conditions of a rebate offer only after consumers make the purchase decision, including on a website, for example, will be

perfectly adequate, either because consumers expect those conditions or similar conditions, or because the conditions would not generally alter a consumer's purchase decision.

5.2 Rebates Disguised as Sale Price or Regular Price

The CBA Section believes that use of the word "sale" may be appropriate in connection with a rebate promotion. The issue is one of adequate disclosure. To reflect this possibility, the CBA Section recommends replacing the first and second sentences in the first paragraph of this part with: "Rebate promotion representations indicating only that a product is on „sale“ may be misleading. Absent sufficiently prominent disclosure that the source of savings is a delayed-payment rebate, consumers may be surprised when they are required to initially pay the full price."

Reference to "sale" in the context of a rebate may be made without any intent to disguise. To ensure that the reader becomes aware that representing a rebate as a sale alone could have a "disguising" effect, the CBA Section recommends in the second sentence of the second paragraph that the phrase "the practice of disguising a rebate as a sale" be replaced by "representing a rebate as a sale alone".

To allow for the fact that the end price may be the result of a rebate and other sources of price reduction, the CBA Section recommends replacing the second sentence of the last paragraph with: "In order not to contradict the general impression, manufacturers and retailers should clearly disclose the extent to which the price of a product is the result of a rebate rather than a price reduction."

5.3 Mail-in Rebates Disguised as Instant Rebates

This part is meant to illustrate a retailer or manufacturer failing to specify the type of rebate available (instant or delayed-payment). However, the example does not indicate that any rebate is available. The CBA Section recommends that the example be revised to include a rebate representation that fails to indicate the type of rebate.

5.4 Discounts on Future Purchases Disguised as Rebates

To better capture the intended meaning, the CBA Section recommends that the phrase "Consumers will never be able to see this price" in the second sentence of the second

paragraph of this part be replaced by “Consumers will not be able to obtain the product for this price”.

The third paragraph of this part advises manufacturers and retailers to avoid creating the impression that consumers will receive a cash or cheque rebate when they will receive a gift card to be used in future purchases. The CBA Section supports the intended disclosure point. But the paragraph, as drafted, strays from the key issues of disclosure and risk of misrepresentation. It overreaches by suggesting that “gift card” and “rebate” cannot be used together. The CBA Section recommends modifying the paragraph to read:

When making representations as to the effective price of a product, manufacturers and retailers should not merely subtract the value of a gift card for future purchases from the original price, since such a gift card does not alter the effective price of the product being purchased. In the case of delayed-payment “rebate” representations, manufacturers and retailers should provide the rebate payment to the consumer in the form of cash or cheque, unless it is clear from the representation that the “rebate” will be provided by way of another specified form of payment to the consumer, such as a gift card. This will help ensure that consumers are not led to believe that the after-gift card price is the effective price they will pay for the product in question.

5.5 Mail-in Rebates That are Not Fulfilled

The term “junk mail” may be viewed as pejorative. The CBA Section recommends that it not be used.

To better capture what we understand to be the intended message of the first two paragraphs of this part, the CBA Section recommends replacing those paragraphs with:

Sometimes even when all the applicable conditions are met and a valid rebate application is submitted, a consumer fails to receive the promised rebate, receives only partial payment, receives payment in a package that appears to contain only unrelated materials, or receives payment only after an unreasonable delay. Where this occurs, it may result in the consumer paying a higher effective price than represented, at which price the consumer may not have chosen to make the purchase in the first place.

When consumers do not receive the rebate as represented to them, having regard to both the literal meaning and the general impression created by the representation, the representation may be found by the Bureau to be false or misleading in a material respect. The CBA Section recommends that the second sentence of the first paragraph of this part be deleted because it does not appear to add to the points already made.

The CBA Section recommends in the third paragraph of this part that the word “who” be replaced with “that”.

6. Best Practices

To focus on the relevant legal and practical issue of what may be “false and misleading”, the CBA Section recommends in the first sentence of the second paragraph of this part that the word “correctly” be replaced by “in a manner that is not false or misleading”.

To clarify the examples in this part, the CBA Section recommends including the effective price (post-rebate) in each sample representation (consistent with the second bullet point under this part) and adding a bullet point for each example that states: “the effective price (post-rebate) price is \$xx” (i.e., \$60 for the first example and \$120 for the second example).

To emphasize the relevance of rebate timing, the CBA Section recommends insertion of the phrase “at time of purchase” immediately after the “rebate” in the last bullet point of this part (for the second example).

7. Consumer Rebate Promotions and Ordinary Selling Price Provisions of *Competition Act*

The second sentence of the first paragraph of this part is confusing and the CBA Section recommends that it be deleted and that the second paragraph of this part be amended to read:

The ordinary selling price provisions apply when businesses refer to the price at which products have been, are being or will be ordinarily sold. This generally includes where manufacturers’ and/or retailers’ representations about consumer rebates refer to a product’s regular price.

IV. CONCLUSION

The CBA Section thanks the Bureau for the opportunity to submit these comments and hopes they are of assistance. The CBA Section would be pleased to discuss its comments further at the Bureau’s convenience.