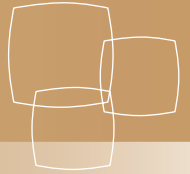




Enforcement Guidelines



Consumer Rebate Promotions

*Competition Act
Consumer Packaging and Labelling Act
Textile Labelling Act*

This publication is not a legal document. It contains general information and is provided for convenience and guidance in applying the *Competition Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act*.

This publication replaces the following Competition Bureau publication:

Draft — Enforcement Guidelines — The Application of the *Competition Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* to Consumer Rebate Promotions, March 31, 2009

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I. INTRODUCTION

The Competition Bureau (the “Bureau”) is an independent law enforcement agency that contributes to the prosperity of Canadians by protecting and promoting competitive markets and enabling informed consumer choice. Headed by the Commissioner of Competition (the “Commissioner”), the Bureau is responsible for the administration and enforcement of the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act* and the *Precious Metals Marking Act*.

This publication explains the Bureau’s approach to interpreting the false or misleading representations provisions of the *Competition Act*, the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act* in the area of consumer rebate promotions¹.

It also sets out best practices that the Bureau recommends businesses follow when offering rebates, both to comply with the law and to help consumers make informed purchasing decisions.

It is not the Bureau’s intention with this publication either to change the law or for it to be a substitute for legal advice. This publication is not binding on the Commissioner, whose enforcement decisions depend on the circumstances of each case.

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

Businesses that are considering offering rebates may request a binding written opinion on whether their proposed approach will raise any concerns under the *Competition Act*. Guidance can also be sought as to whether they would be in compliance with the other statutes enforced by the Bureau. For more information on written opinions, please refer to section 8 of this publication¹.

¹ Provinces and other federal departments and agencies also administer legislation dealing with advertising and marketing practices. This publication does not attempt to provide information on statutes administered by other agencies.



2. WHAT ARE CONSUMER REBATE PROMOTIONS

Consumer rebate promotions include any type of promotion that involves a partial refund or discount from a manufacturer or retailer to consumers upon the purchase of a product². Refunds are normally paid in the form of cash or a cheque. For the purposes of this publication, “rebate” is defined as excluding gift cards and other forms of credit on future purchases, given that the term “rebate” can create the general impression in the minds of consumers that a portion of the price of the product will be returned to them.

Rebates can be beneficial to both consumers and businesses. For consumers, rebates can result in lower effective prices. For businesses, rebates provide a flexible tool that may increase the volume of sales. However, when rebates are not promoted or administered correctly, consumers may ultimately pay more than intended, and competitors can be unfairly disadvantaged.

There are two types of rebates:

Instant rebates

Consumers receive the rebate at the time of purchase. The rebate is generally available to anyone who purchases the product, without further condition.

Mail-in rebates

Consumers apply for the rebate after the purchase, by mail-in application, online or by other means. In this publication, the term “mail-in rebate” includes mail-in, Internet and other delayed-payment rebates.

Various market participants may be involved in promoting and administering rebates. These participants are described below.

Manufacturers

Manufacturers generally design the rebates and set the conditions. Manufacturers most commonly make representations about rebates on product packaging and associated promotional materials. They may also do so on point-of-purchase displays, on the Internet and through print or broadcast advertising.

Retailers

Retailers may decide to participate in rebate promotions designed by manufacturers. In such cases, they may choose to make additional representations about the rebates, through flyers, in-store signage or by other means. Retailers also occasionally offer their own rebates.

2 Section 2 of the *Competition Act* defines the term “product” as including an article and a service.

Fulfillment houses

Fulfillment houses specialize in managing rebate programs. Some manufacturers and retailers manage rebate programs themselves, while others use the services of fulfillment houses to receive and process rebate application requests, and to make rebate payments.



3. WHAT LEGAL PROVISIONS APPLY TO REBATES

Subsection 52(1) of the *Competition Act* is a criminal provision that prohibits anyone from knowingly or recklessly making a materially false or misleading representation to the public to promote the supply or use of a product or business interest. Any person who contravenes this provision is guilty of an offence and liable to a fine and/or imprisonment.

Paragraph 74.01(1)(a) of the *Competition Act* is a civil provision that provides that anyone who makes a materially false or misleading representation to the public to promote the supply or use of a product or a business interest engages in “reviewable conduct”. When the Competition Tribunal or a court, on application by the Commissioner, finds that a person has engaged in reviewable conduct, it may order the person to not engage in such conduct, to publish a 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.

The *Competition Act* states that, for representations to raise concerns, they must be “false or misleading in a material respect.” This has been interpreted to mean that consumers would act in a way they believe is advantageous, as a result of the representations. The Bureau considers that representations on price and rebates (including eligibility) are generally material to consumers. For example, representations of rebates and post-rebate prices in flyer advertisements may lead consumers to purchase items they would not have purchased in the absence of the representations.

The *Consumer Packaging and Labelling Act* is a regulatory statute governing the packaging, labelling, sale, importation and advertising of pre-packaged products³. Subsection 7(1) prohibits false or misleading representations on pre-packaged products. Anyone who contravenes this provision is guilty of an offence and liable to a fine.

The *Textile Labelling Act* is another regulatory statute, and requires consumer textile articles to bear accurate and meaningful labelling information to help consumers make informed purchasing decisions⁴. Section 5 prohibits the making of false or misleading representations

³ The *Consumer Packaging and Labelling Act* requires pre-packaged consumer products to bear accurate and meaningful labelling information, such as product identity, net quantity and the dealer’s name and principal place of business, to help consumers make informed purchasing decisions.

⁴ The *Textile Labelling Act* sets out specifications for mandatory label information, such as the generic name and the percentage by mass of each fibre present, and the dealer’s full name and postal address or a CA identification number, to help consumers make informed purchasing decisions.

relating to consumer textile articles. Anyone who contravenes this provision is guilty of an offence and liable to a fine.

4. WHO BEARS THE RESPONSIBILITY FOR MAKING FALSE OR MISLEADING REPRESENTATIONS

As a general principle, the misleading representations and deceptive marketing practices provisions of the Act attribute liability to the person who caused the representation to be made, i.e., the person who makes or permits it to be made. The determination of whether a person should bear responsibility will be made on a case-by-case basis. The following sections provide greater detail on the subject.

Manufacturers and Importers

The *Competition Act* indicates that whoever has caused the representation to be made on or accompanying a product is deemed to have made it. However, when the person who has caused the representation to be made⁵, including a manufacturer, is located outside of Canada, then the importer of the product is deemed to have made the representation.

Under the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act*, each of the manufacturer, importer and retailer is considered to be a “dealer” with respect to pre-packaged products and consumer textile articles, respectively, and may be liable for any representation pertaining to a product. In the case of rebates, this means that if a manufacturer in Canada makes false or misleading representations about a rebate on or accompanying a product, the manufacturer and retailer would be liable unless the manufacturer is located outside of Canada, in which case the importer and retailer are liable.

Retailers

Retailers are generally not liable under the *Competition Act* for representations on or accompanying products, except when the manufacturer who makes a representation is located outside of Canada. In that case, the representation is deemed to be made to the public by the person who causes the representation to be expressed, which can include an importer or dealer⁶. However, when a retailer makes its own representation about a rebate (for example, in a flyer, a “shelf talker”, on its Web site or in an in-store display), then the retailer could be liable under the *Competition Act* if the representation was found to be false or misleading in a material respect.

5 Subsection 52(1.2) of the *Competition Act* specifically assigns liability for making a representation, as set out in subsection 52(1) and paragraph 74.01(1)(a), to the person who makes it or who permits it to be made.

6 If the product is supplied to the retailer by a Canadian importer or dealer, then the Canadian importer or dealer may be liable for representations made by a manufacturer located outside of Canada pursuant to subsections 52(2.1) and 74.03(2).

It is important to note that under the *Consumer Packaging and Labelling Act* and the *Textile Labelling Act*, the retailer is considered to be a “dealer” and is liable if it sells, imports into Canada or advertises any pre-packaged product or textile article that has a label applied to it containing any false or misleading representations.

Fulfillment houses

Fulfillment houses are not generally held responsible for false or misleading representations relating to rebates, given that the manufacturer and/or retailer usually makes the representation. However, if fulfillment houses were to make their own false or misleading representation, they could be held responsible.



5. EXAMPLES OF FALSE OR MISLEADING REPRESENTATIONS

When evaluating whether a representation is false or misleading, the Bureau considers the general impression conveyed by the representation, as well as its literal meaning. A consumer’s decision to purchase a product that features a rebate is based on the general impression created by the representation as a whole.

In the following five examples, the Bureau identifies conduct that could comprise a false or misleading representation in respect of rebate promotions.

5.1 Inadequate Disclosure of Rebate Conditions, Limitations and Exclusions

Mail-in rebate representations typically create the general impression for consumers that if they purchase a product, complete an application, provide proof of purchase and a return address, they will obtain the advertised rebate. Accordingly, any conditions, limitations or exclusions that are inconsistent with that general impression, should be clearly and conspicuously disclosed so that they will likely come to the attention of consumers before they act upon the representation.

In this regard, disclosure of conditions likely to alter the general impression of a representation only after the consumer makes the purchase, may not be adequate to ensure that the rebate representation is not false or misleading. For example, disclosure inside product packaging, on the rebate application form or on the website to which consumers are directed to apply for the rebate would likely be insufficient.

How to avoid making false or misleading representations

The Bureau recommends that any material conditions, limitations or exclusions be clearly and conspicuously disclosed where the rebate representation is made. Examples of material conditions include:

- having to provide information beyond proof of purchase and contact information;
- a deadline to submit a claim;
- an obligation to purchase another product in order to qualify for the rebate;
- geographic limitations within Canada restricting eligibility for the rebate;
- restrictions as to the eligibility of certain mailing addresses, such as rural addresses;
- having to forgo the right to confidentiality or allowing personal information to be shared with others in order to receive the rebate;
- any limits on the number of rebates that can be claimed; and
- a rebate that is only valid if the purchase is made at certain eligible retailers.

5.2 Rebates Disguised as the Sale Price or Regular Price

Rebate promotion representations that create the general impression that a product is on “sale” may be misleading, if in fact the lower price results from a mail-in rebate. Consumers may not realize that the lower price is the result of a mail-in rebate, and may be surprised when they are required to pay the full price up-front. Consequently, representations of this type may mislead consumers about the amount they must pay at the time of purchase.

In addition, the Goods and Services Tax (“GST”) and the Harmonized Sales Tax (“HST”) on products that are on sale are calculated on the lower sales price, but when products are offered with a mail-in rebate, the GST and HST are generally calculated on the before-rebate price⁷. Similarly, some representations may lead consumers to believe that the price being promoted is simply the regular price, when in fact it is the after-rebate price. Again, in such circumstances, consumers would pay taxes on the before-rebate price.

The example below illustrates a mail-in rebate promotion that refers to a “sale” and “\$20 off”, while prominently displaying an after-rebate price. As a result, consumers could form the general impression that they will not be required to pay the full price at the time of purchase and would not be aware that the savings of \$20 must be claimed through a mail-in rebate. In addition, consumers could be under the impression that taxes will only be calculated on the lower sale price. Consequently, this representation may be considered to be false or misleading.



⁷ Please refer to the publication entitled *General Information for GST/HST Registrants*, available on the Canada Revenue Agency Web site at: www.cra.gc.ca. Provinces may have different rules as to how to calculate provincial sales tax.

How to avoid making false or misleading representations

The term “sale” could give the general impression that the price is the result of a sale, not a rebate. In order not to mislead consumers, 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. This would ensure that consumers are aware of the price they will be required to pay at the time of purchase. Section 6 of this publication provides examples of best practices.

5.3 Mail-in Rebates Disguised as Instant Rebates

Mail-in rebates disguised as instant rebates could lead consumers to believe that they will receive the rebate at the time of purchase, when in fact they will have to apply for it by mail or online.

The example below does not specify what type of rebate is offered. Consequently, consumers could form the general impression that they will receive the advertised rebate at the time of purchase. If they do not receive the advertised rebate at the time of purchase, they could have been misled about the amount they will be required to pay. As a result, this representation may be false or misleading.



How to avoid making false or misleading representations

Manufacturers and retailers should ensure that their representations disclose prominently the type of rebate offered (mail-in or instant). This will help ensure consumers are not misled about the actual price they will pay at the time of purchase. Section 6 of this publication provides examples of best practices.

5.4 Discounts on Future Purchases Disguised as Rebates

Some manufacturers and retailers offer gift cards or credits to be used for future purchases. Occasionally, representations show the price that results when the value of the gift card or credit is subtracted from the regular price. These representations could mislead consumers, causing them to believe that they will pay the lower price for the product when in fact they will receive a gift card or credit that can be used towards a future purchase.

The example below shows a net price of \$119.99. Consumers will not be able to obtain the product for this price, given that they may only use the gift card on a future purchase. As such, this representation may be false or misleading.



\$119⁹⁹

\$139.99
Gift card: \$20.00

CAM2009 XL | 7 Megapixels Digital Camera
5x optical zoom | 2.5" LCD Screen
Shockproof | Optical image stabilization

How to avoid making false or misleading representations

When making representations as to the price of a product, manufacturers and retailers should not subtract the value of the gift card or credit from the original price of the product, because such a gift card or credit does not alter the price of the product at the time of purchase.

In the case of mail-in “rebate” representations, manufacturers and retailers should avoid describing a promotion as a rebate if consumers are provided with a gift card or credit because consumers may be misled into believing that they will receive a portion of the price of the product in the form of cash or a cheque.

5.5 Mail-in Rebates that are not Fulfilled

Occasionally, even when all of the applicable conditions are met and a valid rebate application is submitted, a consumer fails to receive the promised rebate, receives partial payment, receives payment in a package that appears to contain only unsolicited ad-mail, or receives payment after an unreasonable delay. Where this occurs, it may be contrary to the consumers’ general impression that they will obtain the advertised rebate. In addition, it may result in the consumer paying a higher price than represented, at which price the consumer may not have originally chosen to make the purchase.

How to avoid making false or misleading representations

It is important that businesses using rebate promotions take measures to ensure that fulfillment houses and any other third-party service providers are performing their duties as part of the rebate process properly and in accordance with the terms and conditions of the rebate. As such, these businesses should ensure that rebate payments are paid within a reasonable timeframe and are made in such a way that consumers can easily identify them as a rebate payment when received.

Furthermore, businesses that are considering offering mail-in rebates should first perform their financial due diligence to ensure they can afford such promotions and ensure that the fulfillment houses that manage these programs are properly funded and supervised to ensure that the fulfillment obligations are met.



6. BEST PRACTICES

When the Bureau evaluates whether a representation is false or misleading, it considers the general impression created by the representation as well as its literal meaning.

Generally, a rebate promotion should:

- prominently and clearly disclose all conditions, limitations or exclusions that are inconsistent with consumers' general impression, all in a manner that is likely to come to their attention;
- show the price consumers will pay at the time of purchase;
- clearly indicate the amount of the rebate that may apply;
- clearly identify the type of rebate offered (mail-in or instant);
- clearly explain, in the case of a mail-in rebate, that if the after-rebate price is stated, this price is subject to conditions, and ensure that this information is prominently disclosed in a manner that is likely to come to consumers' attention.

Although there are many ways to make rebate representations in a manner that is not false or misleading, the following two examples illustrate some of the practices manufacturers and retailers can follow to lessen the likelihood of making a false or misleading representation.

Example I: Mail-in rebate offer

Example I shows a mail-in rebate promotion that would be unlikely to create a false or misleading general impression:

EXAMPLE I: MAIL-IN REBATE OFFER



\$85 Regular price
\$15 Mail-in rebate available
(Deadline to submit December 31, 2015)
After rebate price: \$70, if redeemed

M400 PHONE
5 megapixels camera | 5x optical zoom
GPS positioning

Consumers should be able to discern the following important details from this representation:

- the price at the time of purchase is \$85;
- a mail-in rebate is offered;
- the amount of the mail-in rebate is \$15;
- the after-rebate price of \$70 is only obtained if the rebate is successfully redeemed, such that the consumer has received payment by cash or cheque; and
- all conditions, limitations or exclusions other than completing an application, providing proof of purchase and a return address are clearly indicated, which, in the example, is a deadline to submit the claim.

Example 2: Instant rebate offer

Example 2 shows an instant rebate promotion that would be unlikely to create a false or misleading general impression:

EXAMPLE 2: INSTANT REBATE OFFER



The advertisement features a central image of a computer sound system consisting of a subwoofer and two satellite speakers. To the left of the subwoofer is an orange tag with the text "INSTANT REBATE". To the right of the speakers, the pricing is displayed: a regular price of \$135, an instant rebate of \$15 (with the condition "One per household"), and an after-rebate price of \$120. Below the pricing, the product name "COMPUTER SOUND SYSTEM X3" is listed, along with its specifications: "ESW-C8 200-watt subwoofer" and "R34 speakers".

Consumers should be able to discern the following important details from this representation:

- the price at the time of purchase is \$135;
- an instant rebate is offered;
- the amount of the instant rebate is \$15;
- the after-rebate price is \$120; and
- all conditions, limitations or exclusions are clearly indicated, which, in the example, is a limit of one per household.

7. CONSUMER REBATE PROMOTIONS AND THE ORDINARY SELLING PRICE PROVISIONS OF THE COMPETITION ACT

When making representations about consumer rebate promotions, manufacturers and retailers should be mindful of the ordinary selling price provisions of the Competition Act.

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.

For more information on these provisions, please consult the Bureau's Enforcement Guidelines entitled *Ordinary Price Claims*, which are available on the Bureau Web site.



8. WRITTEN OPINIONS

The Bureau facilitates compliance with the law by providing various types of written opinions that are subject to fees. Company officials, lawyers and others are encouraged to request an opinion on whether the implementation of a proposed business plan or practice would raise an issue under the Competition Act. These written opinions are binding on the Commissioner when all the material facts have been submitted by or on behalf of an applicant for an opinion and when they are accurate. A specific written opinion will be based on information provided by the requestor and will take into account previous case law, prior opinions and the stated policies of the Bureau⁸.

⁸ For more information on Written Opinions, please refer to the *Fee and Service Standards Handbook*, which is available on the Competition Bureau Web site at: www.competitionbureau.gc.ca.



9. HOW TO CONTACT THE COMPETITION BUREAU

Anyone wishing to obtain additional information about the *Competition Act*, the *Consumer Packaging and Labelling Act*, the *Textile Labelling Act*, the *Precious Metals Marking Act*, or the program of written opinions, or to file a complaint under any of these acts should contact the Competition Bureau's Information Centre:

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