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Picture is Bleak for Michaels' Crafty Ads

On September 19, the New York Attorney General ("AG") announced a settlement with retail chain Michaels Stores over its allegedly deceptive advertising practices. Attorney General Eric Schneiderman claimed that the arts and crafts giant deceived consumers into thinking they were receiving enormous discounts on certain products when, in fact, they were really paying regular store prices. In an Assurance of Discontinuance ("Assurance" or "AVC"), Michaels agreed to pay \$1.8 million, including \$800,000 in civil penalties and \$1 million in arts and crafts supplies to be donated to New York public schools, and agreed to limit its advertising practices in the future and comply with all applicable state and federal laws.

According to the AVC, in early 2009 Michaels began advertising its custom framing services on sale for "50% off," "55% off," "60% off" and "\$50 to \$150 off" regular store prices. Though Michaels ran these advertisements for over 104 consecutive weeks, each advertisement described the sale as "this week only" or listed dates when the sale prices were available. Meanwhile, Michaels also issued email coupons to consumers that gave "50% off custom framing," but "could not be combined with any other sale."

Attorney General Schneiderman claimed that Michaels' advertised sales were deceptive under Sections 349 and 350 of New York's Consumer Protection Act, Article 22-A of the New York General Business Law, because the "regular price" of framing in the advertisements was not actually a regular price. The AVC noted that due to the extended nature of the promotion, the discounted price of "50% off" was no longer a special value but was instead simply the store's regular price for framing. Schneiderman claimed that Michaels' ads created the misleading impression that the prices on frames would increase and revert back to the regular price if a consumer did not purchase the custom framing by the end of the sale. Because the price never increased back to the regular price, and the frames were on sale every week for two years, the ad was deceptive. The 50% off email coupons were also rendered worthless because redeeming them was impossible so long as the framing was otherwise discounted.

Section 349 of New York's Consumer Protection Act deals generally with deceptive acts or practices; Section 350 is specific to false advertising. Though neither of the provisions specifically enumerate proscribed advertising practices, the standards of each violation are very similar. In the Michaels' AVC, the AG charged that Michaels violated both Section 350 and 349, as well as Executive Law § 63(12), which prohibits fraud or illegality in the conduct of business. Schneiderman also charged Michaels with violating the Federal Trade Commission's ("FTC") Guides Against Deceptive Pricing (16 C.F.R. § 233) and Guide Concerning Use of the Word Free and Similar Representations (16 C.F.R. § 251.1) by "openly and actively" offering the custom frames for sale at the regular price on a regular basis for a reasonably substantial period of time.

In its compliance provisions, the Michaels AVC offers guidance to all companies on what the NY Attorney General may see as proper standards for advertising price and setting the "regular price" when seeking to advertise sales and offers such as "50% off" and "buy one get one free." While the "fencing in" provisions imposed by a regulator on a company that has already violated the law are sometimes very restrictive, this guidance is nonetheless particularly helpful in New York State, where the Consumer Protection Act does not always include specific reference pricing standards and the state Attorney General has proved to be especially aggressive. Requirements in the AVC include the following:

- **Disclaimers and Disclosures.** When disclaimers and footnotes are used to inform consumers of additional information about advertised offers, the disclaimers must not contradict, confuse, unreasonably limit or materially modify a principal message of the advertisement. Asterisks or other words or symbols used to draw the consumer's attention to the accompanying disclaimer or footnote must be clear and conspicuous and adjacent to the offer which is supplemented by a disclaimer or footnote. Disclaimers cannot use print in type so small that it is not easily readable and the color contrast in the advertisement cannot render the text of the offer difficult to read.
- **Former Price Comparisons.** Advertisements cannot offer a "sale," or use a similar term that implies a savings from the advertiser's former price when the advertised "sale" price is not a significant reduction from the former actual price. Fictitious or inflated regular prices also cannot be used for the purpose of offering a subsequent price reduction. The following are some examples of fictitious former prices:
 - prices that are not used in the regular course of business;
 - prices that were not used in the recent past but refer to some remote period in the past without disclosing that fact;

- prices that are not openly offered to the public;
 - prices that are not maintained for a reasonable length of time, but are advertised and then immediately reduced; or
 - prices that are rarely paid by consumers because reductions are offered by salespeople or prices reduced as a result of negotiation.
- **“Regular Price.”** For purposes of the Michaels AVC specifically, a “regular price” is presumptively bona fide when the item was offered for sale at the regular price more than 55% of the time during the prior business year, and 30% of sales were made at the regular price during that time period.
- **Retail Price Comparison.** Advertisements cannot use retail price comparisons (bargain advertising based on comparisons with prices being charged by other retailers for the same merchandise in the same area) unless the advertised higher price is based on fact and is not fictitious or misleading.
- **Comparable Value Comparison.** Advertisements cannot use comparable value comparisons (bargain advertising based on a comparison with prices charged by others in the area for merchandise of like grade and quality) unless the advertisement is clear that the comparison is being made with other merchandise of similar quality and obtainable in the same area.
- **Photographs & Illustrations.** Advertisements cannot use inaccurate photographs or illustrations that conflict with other representations in the offer.
- **Television.** Television advertisements must conform to the following standards:
 - all disclosures must be presented in either the audio or the video portions of the advertisement;
 - video disclosures must contain text of a font size sufficiently large enough to be easily read by the average viewer;
 - video disclosures must contain letters of a color or shade that is readily visible;
 - in audio, no other sounds, including music, shall obscure disclosures and it shall be presented in a speed and cadence readily comprehensible to the average listener;
 - in video, disclosures shall appear on the screen for a duration at least equal to the duration of the display of the offer; and
 - the audio or the video portions of disclosures must immediately follow the specific sales representations to which they relate.
- **Radio.** Radio advertisements must conform to the following standards:
 - disclosures must be delivered in a volume at least equivalent to that employed in communicating the offer; and
 - disclosures must be presented in a speed and cadence readily comprehensible to the average listener.
- **Free Offers.** When offering “free” additional merchandise with the purchase of a particular item, the advertisement cannot increase the price of the item required to be purchased or decrease the quantity or quality of the item required to be purchased. The advertisement of “free” offers must clearly and conspicuously disclose, at the outset and adjacent to the offer, all terms, conditions, restrictions or eligibility requirements for the free offer.
- **“Factory Direct.”** Advertisements cannot use a retail price as a wholesale price. A promotion cannot list something as a “factory price” unless the merchandise is being sold at prices paid by those purchasing directly from the manufacturer.
- **“Sale Price.”** Advertisements cannot compare a sale price with a higher price unless the basis for the higher price comparison is disclosed. For example, “Save \$100” or “Save 25%” would not be appropriate.

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