(d) The delivery of the advertised product which is defective, unusable or impractical for the purpose represented or implied in the advertisement. (Guide 4.)

NOTE: *Sales of advertised merchandise.* Sales of the advertised merchandise do not preclude the existence of a bait and switch scheme. It has been determined that, on occasions, this is a mere incidental byproduct of the fundamental plan and is intended to provide an aura of legitimacy to the overall operation.

Nothing contained in these Guides relieves any party subject to a Commission cease and desist order or stipulation from complying with the provisions of such order or stipulation. The Guides do not constitute a finding in and will not affect the disposition of any formal or informal matter before the Commission.

Adopted: November 24, 1959.

By direction of the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 67-13199; Filed, Nov. 7, 1967; 8:47 a.m.]

PART 239—GUIDES AGAINST DECEPTIVE ADVERTISING OF GUARANTEES

The following guides were adopted by the Federal Trade Commission April 26, 1960 for the use of its staff in evaluation of the advertising of guarantees. They were released to the public in the interest of education of the businessman and the consumer and to obtain voluntary, simultaneous, and prompt cooperation by those whose practices are subject to the jurisdiction of the Federal Trade Commission.

The guides enumerate the major principles applicable to the advertising of guarantees although they do not purport to be all-inclusive and do not attempt to define the exact border lines between compliance with and violation of the law.

The Federal Trade Commission Decisions, upon which these guides are based, indicate that the major difficulty with this type of advertising has been the failure to state adequately what the guarantee is. Concerning this, an appellate court stated: "Ordinarily the word, guarantee, or warrantee, is incomplete unless it is used in connection with other explanatory words. To say a * * * [product] or other subject is guaranteed is meaningless. What is the guarantee? The answer to this question gives meaning to the word, 'guaranteed'."

The guides have application not only to "guarantees" but also to "warranties", to purported "guarantees" and "warranties", and to any promise or representation in the nature of a "guarantee" or "warranty".

Adversary actions against those who engage in deceptive advertising of guarantees and whose practices are subject to Commission jurisdiction are brought under the Federal Trade Commission Act (15 U.S.C., secs. 41–58). Section 5 of the Act declares unlawful "unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce".

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239.0 Determining violations.
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239.3 "Satisfaction or Your Money Back" representations.
239.4 Lifetime guarantees.
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239.7 Guarantee as a misrepresentation.

AUTHORITY: The provisions of this Part 239 issued under secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46.

§ 239.0 Determining violations.

In determining whether terminology and direct or implied representations concerning guarantees, however made, i.e., in advertising or otherwise, in connection with the sale or offering for sale of a product, may be in violation of the Federal Trade Commission Act, the following general principles will be used:

§ 239.1 Guarantees in general.

In general, any guarantee in advertising shall clearly and conspicuously disclose—

(a) *The nature and extent of the guarantee.* This includes disclosure of—product is guaranteed,

(1) What product or part of the product is guaranteed,

(2) What characteristics or properties of the designated product or part thereof are covered by, or excluded from, the guarantee,

(3) What is the duration of the guarantee,

(4) What, if anything, any one claiming under the guarantee must do before the guarantor will fulfill his obligation under the guarantee, such as return of the product and payment of service or labor charges; and

(b) *The manner in which the guarantor will perform.* This consists primarily of a statement of exactly what the guarantor undertakes to do under the guarantee. Examples of this would be repair, replacement, refund. If the guarantor or the person receiving the guarantee has an option as to what may satisfy the guarantee this should be set out; and

(c) *The identity of the guarantor.* The identity of the guarantor should be clearly revealed in all advertising, as well as in any documents evidencing the guarantee. Confusion of purchasers often occurs when it is not clear whether the manufacturer or the retailer is the guarantor. (Guide 1.)

§ 239.2 Prorata adjustment of guarantees.

(a) Many guarantees are adjusted by the guarantor on a prorata basis. The advertising of these guarantees should clearly disclose this fact, the basis on which they will be prorated, e.g., the time for which the guaranteed product has been used, and the manner in which the guarantor will perform.

(b) If these guarantees are to be adjusted on the basis of a price other than that paid by the purchaser, this price should be clearly and conspicuously disclosed.

Example: "A" sells a tire with list price of $48 to "B" for $24, with a 12 months guarantee. After 6 months use the tire proves defective. If "A" adjusts on the basis of the price "B" paid, $24, "B" will only have to pay one-half of $24, or $12, for a new tire. If "A" instead adjusts on the basis of list price, "B" will owe one-half of $48, of $24, for a new tire. The guarantor would be required to disclose here the following: That this was a 12 months guarantee, that a list price of $48 would be used in the adjustment, that there would be an adjustment on the basis of the time that the tire was used, and that he would not pay the adjusted amount in cash, but would make an adjustment on a new tire.

NOTE: Guarantees which provide for an adjustment based on a fictitious list price should not be used even where adequate disclosure of the price used is made. (Guide 2.)

§ 239.3 "Satisfaction or Your Money Back" representations.

(a) "Satisfaction or Your Money Back", "10 Day Free Trial", or similar representations will be construed as a guarantee that the full purchase price will be refunded at the option of the purchaser.

(b) If this guarantee is subject to any conditions or limitations whatsoever, they shall be set forth as provided for in § 239.1.

Example: A rose bush is advertised under the representation "Satisfaction or Your Money Back". The guarantor requires return of the product within 1 year of purchase date before he will make refund. These limitations, i.e., "return" and "time" shall be clearly and conspicuously disclosed in the ad. (Guide 3.)

§ 239.4 Lifetime guarantees.

If the words "Life", "Lifetime", or the like, are used in advertising to show the duration of a guarantee, and they relate to any life other than that of the purchaser or original user, the life referred to shall be clearly and conspicuously disclosed.

Example: "A" advertised that his carburetor was guaranteed for life, whereas his guarantee ran for the life of the car in which the carburetor was originally installed. The advertisement is ambiguous and deceptive and should be modified to disclose the "life" referred to. (Guide 4.)

§ 239.5 Savings guarantees.

(a) Advertisements frequently contain representations of guarantees that assure prospective purchasers that savings may be realized in the purchase of the advertiser's products.

(b) Some typical advertisements of this type are "Guaranteed to save you 50%", "Guaranteed never to be undersold", "Guaranteed lowest price in town".

(c) These advertisements should include a clear and conspicuous disclosure of what the guarantor will do if the savings are not realized, together with any time or other limitations that he may impose.

Example: "Guaranteed lowest price in town" might be accompanied by the following disclosure: "If within 30 days from the date that you buy a sewing machine from me, you purchase the identical machine in town for less and present a receipt therefor to me, I will refund your money".

NOTE: The above guarantees may constitute affirmative representations of fact and, in this respect, are governed by § 239.7. (Guide 5.)

§ 239.6 Guarantees under which the guarantor does not or cannot perform.

(a) A seller or manufacturer should not advertise or represent that a product is guaranteed when he cannot or does not promptly and scrupulously fulfill his obligations under the guarantee.

(b) A specific example of refusal to perform obligations under the guarantee is use of "Satisfaction or your money back" when the guarantor cannot or does not intend promptly to make full refund upon request. (Guide 6.)

§ 239.7 Guarantee as a misrepresentation.

Guarantees are often employed in such a manner as to constitute representations of material facts. If such is the case, the guarantor not only undertakes to perform under the terms of the guarantee, but also assumes responsibility under the law for the truth of the representations made.

Example 1: "Guaranteed for 36 months" applied to a battery is a representation that the battery can normally be expected to last for 36 months and should not be used in connection with a battery which can normally be expected to last for only 18 months.

Example 2: "Guaranteed to grow hair or money back" is a representation that the product will grow hair and should not be used when in fact such product is incapable of growing hair.

Example 3: "Guaranteed lowest prices in town" is a representation that the advertiser's prices are lower than the prices charged by all others for the same products in the same town and should not be used when such is not the fact.

Example 4: "We guarantee you will earn $500 a month" is a representation that prospective employees will earn a minimum of $500 each month and should not be used unless such is the fact. (Guide 7.)

Nothing contained in these Guides relieves any party subject to a Commission cease and desist order or stipulation from complying with the provisions of such order or stipulation. The guides do not constitute a finding in and will not affect the disposition of any formal or informal matter before the Commission.

Adopted: April 26, 1960.

By direction of the Commission.

[SEAL] JOSEPH W. SHEA, *Secretary.*

[F.R. Doc. 67-13200; Filed, Nov. 7, 1967; 8:48 a.m.]

PART 240—GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES; COMPLIANCE WITH SECTIONS 2(d) AND 2(e) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON-PATMAN ACT

These guides were adopted by the Federal Trade Commission on May 19, 1960 and revised on January 31, 1967.

What the guides are meant to do. These guides can be of great value to businessmen who want to avoid violating the laws against giving or receiving improper promotional allowances, including advertising or special services, for promoting products. The guides will make possible a better understanding of the obligations of sellers and their customers in joint promotional activities.

The Commission's job is to obtain compliance with these laws. It has a duty to move against violators. However, as an administrative agency, the Commission believes the more knowledge businessmen have with respect to the laws enforced by the Commission the more likelihood there is that compliance with the laws will be obtained.

For the Commission to do its job properly and for business to stay out of legal trouble requires that every effort be made to give individual businessmen a better understanding of these laws. This, of course, does not mean that a businessman must become a legal expert, but it will help him—and the Commission's law enforcement efforts—if he has a good general knowledge of what he can and cannot do in the field of promotional allowances.

If a businessman knows what the legal pitfalls are he can steer his business policies to avoid them. Furthermore, such knowledge is most useful in determining when competitors are trying to use illegal methods. In other words, it pays for a businessman to know what his rights are as well as his obligations.

These guides are designed to be both practical and understandable. They contain carefully considered suggestions, or general rules of thumb, which business will find very useful in preventing unintentional violations. They highlight the requirements of law and offer means for complying with it without any attempt to suggest ways for skirting along the borderline between what is legal and illegal.

What they are not meant to do. It should be made clear too that the Guides are not meant to do several things:

(a) They are not meant to cover every situation. Decided cases dealing with unusual situations are not covered. Nor are situations which have not been considered by the Commission or the courts.

(b) They are not meant to tell how to skirt illegality. Clever people can undoubtedly devise practices not mentioned in the guides, but they may still violate the law.

(c) They are not a substitute for sound legal advice.

(d) They do not offer either new interpretations of law or change or amend the laws as determined by the Commission or the Courts. They should be read as a nontechnical explanation of what the law means, not as a legal restatement.

What the law covers generally. The Robinson-Patman Act is an amendment to the Clayton Act. It is directed at preventing competitive inequalities that come from certain types of discrimination by sellers in interstate commerce. Sections 2 (d) and (e) of the Act deal with discriminations in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, section 2(d) applies. Where the seller furnishes the service itself to the buyer, section 2(e) applies. Both sections require a seller to treat his competing customers on proportionally equal terms.

Other law covered. In two places, the Guides go beyond sections 2 (d) and (e):

(a) A seller who uses a promotional scheme to cover a price discrimination by paying for services that are not rendered may thereby violate section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (See § 240.11)

(b) A customer who improperly receives payments, services or facilities may thereby violate section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, or section 5 of the Federal Trade Commission Act. (See § 240.11 and § 240.16)

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AUTHORITY: The provisions of this PART 240 issued under secs. 5, 6, 38 Stat. 719, as amended, 721; 15 U.S.C. 45, 46; 49 Stat. 1526; 15 U.S.C. 13, as amended.

§ 240.1 When does the law apply?

Sections 2 (d) and (e) apply to a seller of products in interstate commerce, if he either (a) pays for services or facilities furnished by his customers in connection with the distribution of his products (section 2(d)), or (b) furnishes such services or facilities to his customers (section 2(e)). (Guide 1.)

§ 240.2 Who is a seller?

"Seller" includes anyone who sells products for resale, with or without further processing. Selling corn syrup to a candy manufacturer is an example of a sale for resale with processing (Guide 2.)