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FEDERAL TRADE COMMISSION

16 CFR Part 424

Retail Food Store Advertising and Marketing Practices Rule

AGENCY: Federal Trade Commission (“Commission” or “FTC”).

ACTION: Final rule.

SUMMARY: The FTC has completed its regulatory review of its Retail Food Store Advertising and Marketing Practices Rule (“Unavailability Rule” or “Rule”). After reviewing public comments regarding the Rule’s overall costs, benefits, and regulatory and economic impact, the Commission retains the Rule. The Commission, however, takes this opportunity to issue guidance concerning the Rule’s coverage. The Commission also corrects a typographical error, and ceases to publish dissents to the Rule’s previous amendment.

DATES: This action is effective on

¹ Retail food stores are stores that advertise food prices and sell more than incidental or minimal amounts of food. *424*, 36 FR 8777 at 8781 (May 13, 1971) (“Rule Promulgation”).

³ *54* FR 35456 (Aug. 28, 1989) (“Rule Amendment”).

⁴ Excessive overstocking caused retail food stores to carry excess inventory, including perishables, and to incur monitoring, recordkeeping, legal and survey costs, and indirect costs to document Rule compliance. *54* FR 35460–35461. The record indicated that the costs imposed by the original rule exceeded benefits by ratios from over 2½ to one to nearly eight to one. *54* FR 35461.

⁵ *54* FR 35459.

⁶ *76* FR 51308 (Aug. 18, 2011) (“Request for Public Comment”).

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⁹ All comments are available at: [http://www.ftc.gov](#).

one commenter stated that he accumulated 50 rainchecks in a 6-month period due to stockouts.¹³

Two individual commenters joined the organizational commenters in questioning whether the Commission should retain the Rule.¹⁴ FMI commented that the Rule is unnecessary because competition forces retail food stores to avoid stockouts and to compensate customers even without the Rule.¹⁵ Nonetheless, FMI stated that the Rule imposes no significant costs on retail food stores. FMI also cautioned that if the Commission retains the Rule, it should keep the 1989 amendments to avoid the costs eliminated by those amendments.

HF recommended repealing the Rule, arguing increased competition should protect consumers.¹⁶ In support of this argument, it asserted that the number of grocery stores in America has grown substantially since the Rule was amended in 1989, noting that today there are 92,300 grocery stores nationwide and that large chains run thousands of stores each. It did not provide data on the number of stores in 1989. HF also stated that the number of farmers' markets increased between 1994 and 2011. Finally HF commented that state regulation is adequate to protect consumers where competitive pressure is insufficient.

Fitzsimmons recommended repealing the Rule generally while expanding it in "food deserts."¹⁷ For areas other than food deserts, he argued market competition is sufficient to protect consumers. Fitzsimmons also recommended that the Commission expand the Rule to cover non-traditional retail food stores in food deserts, where competition is insufficient to protect consumers.

Finally, Lunsford recommended repealing the Rule because market competition and state regulatory

agencies adequately protect consumers.¹⁸

IV. Retention of the Unavailability Rule

The Commission retains the rule in its existing form. To determine whether the Rule should be amended, repealed, or retained, the Commission has evaluated a number of factors, including the relative costs and benefits of the Rule and its effect on competition and consumer choice. The Commission has determined that the Rule imposes no significant costs on retail food stores, and it benefits consumers as there is evidence that market or state regulatory forces would not adequately protect consumers without the Rule. Given this record, the Commission has no basis to repeal or amend the Rule at this time.

None of the comments identified any specific costs or burdens associated with complying with the Rule. To the contrary, FMI—which rephrased the Rule and

Skaggs, Pritchard, Goodman, Frame, Cummings, DelSole, Wheat, Marino, John K, Rasley, Bacher, Samuel, Purcell, Dickey, Crofoot, Sinex, Aikins, Anonymous/Mad in Miami, Thorson, Angelo, Bates, Burleson, Boyd, Black, Marcuse, Steenhoven, Gettz, Millison, Nardo, Rose, and Doyal.

¹³ Angelo.

¹⁴ FMI, HF, Lunsford, Fitzsimmons.

¹⁵ FMI commented that it did not believe that there is a continuing need for the rule because competitive pressures induce retailers to respond to the needs of their customers, and "[t]here is no incentive for grocery retailers to engage in the types of activity the Unavailability Rule was intended to address." FMI at 2–4.

¹⁶ HF asserted that "market competition clearly can police against any grocery businesses that advertise products that they do not have for sale at the advertised price." HF at 3.

¹⁷ Fitzsimmons recommended that the Rule define food deserts as low-income areas where the nearest grocery store is more than a mile away. Fitzsimmons at 3.

¹⁸ Lunsford argued that "market competition should deter most business from deceptive practices."

¹⁹ FMI at 5.

²⁰ FMI stated that stockouts hurt retailers because they increase costs while also decreasing customer satisfaction. . . . at 3–4. HF stated that "[n]o-one would condone the commercial conduct prohibited by the Unavailability Rule." HF at 2. Lunsford indicated that unavailability and overpricing are not "honest business." Fitzsimmons proposed retaining and expanding the Rule for certain geographic areas to prevent "predatory business practices." Fitzsimmons at 2–3. This support contrasts with the evidence that compliance with the Commission's original Rule was costly and wasteful. . . . 54 FR 35460–35462 (noting, for example, that retail food stores stocked excessive inventory and incurred monitoring and recordkeeping costs to comply with the original Rule).

²¹ In *United States v. . . .*, 767 F.2d 957, 987–988 (D.C. Cir. 1985), the court found that it was not unreasonable for the Commission, in promulgating the Credit Practices Rule, to discount "abstract or . . . theoretical arguments . . . which have little or no factual support in the record."

²² HF and Fitzsimmons comment that there are 92,300 grocery stores in America, but do not provide evidence that this number is above a threshold for a sufficiently competitive marketplace. HF at 2, Fitzsimmons at 1.

²³ HF at 3, Fitzsimmons at 2–3.

²⁴ Dexter, Harris, Heiser, Haas, Pritchard, Cummings, Wheat, John K, Dickey, Crofoot, Burleson.

²⁵ HF at 4 & n.14, Lunsford.

²⁶ The four state laws cited by HF do not establish that most states directly regulate retail food store advertising. Indeed, one of those laws broadly prohibits unfair and deceptive practices but does not address specifically the advertising of sale items. Wash. Rev. Code § 19.86.020.

²⁷ Forty-eight consumer commenters supported continuing to require rainchecks.

²⁸ *See* *id.*, *P.*, 76 FR at 51309.
²⁹ *See* Dexter, Lewis, Marshall, Thompson, Ash,

⁵⁰ 16 CFR 424.1.

⁵¹ 54 FR at 35463.

⁵² To the extent that there is any ambiguity about the meaning of "raincheck," it is proper to interpret the term consistently with the purpose of the Rule.

⁵³ *P. v. . . .*, 491 U.S. 440, 455 (1989).

⁵³ *P. v. . . .*, 50 FR at 43230. *at* 43225 ("the Rule could produce benefits by saving shoppers an extra trip back to the same store or to another store to purchase the advertised item (the 'trip gain')."); *at* 35459 (the Rule benefits consumers "through the avoidance of trip losses