

TITLE 12 TRADE, COMMERCE AND BANKING
CHAPTER 2 CONSUMER PROTECTION
PART 7 COMPARATIVE PRICE ADVERTISEMENTS AND SAVINGS CLAIMS FOR THE
NATIVE AMERICAN JEWELRY AND ARTS AND CRAFTS RETAIL INDUSTRY

12.2.7.1 ISSUING AGENCY: Office of the New Mexico Attorney General, Consumer Protection Division, Post Office Drawer 1508, Santa Fe, New Mexico 87504-1508.
[7/15/98; 12.2.7.1 NMAC - Rn, 1 NMAC 2.7.1, 02/14/08]

12.2.7.2 SCOPE: Native American jewelry and arts and crafts retail industry.
[7/15/98; 12.2.7.2 NMAC - Rn, 1 NMAC 2.7.2, 02/14/08]

12.2.7.3 STATUTORY AUTHORITY: New Mexico Unfair Practices Act, Section 57-12-13 NMSA 1978 (1967); New Mexico and False Advertising Act, Section 57-15-7 NMSA 1978 (1967).
[7/15/98; 12.2.7.3 NMAC - Rn, 1 NMAC 2.7.3, 02/14/08]

12.2.7.4 DURATION: Permanent.
[7/15/98; 12.2.7.4 NMAC - Rn, 1 NMAC 2.7.4, 02/14/08]

12.2.7.5 EFFECTIVE DATE: July 15, 1998, unless a later date is cited at the end of a section.
[7/15/98; 12.2.7.5 NMAC - Rn & A, 1 NMAC 2.7.5, 02/14/08]

12.2.7.6 OBJECTIVE: These regulations provide a foundation for comparative price advertisements for the Native American jewelry and arts and crafts retail industry. Although these regulations reflect New Mexico law and federal trade commission regulations (16 C.F.R. Ch. 1, Part 233 (*Guides Against Deceptive Pricing*), they should not be presumed to constitute a guard against deceptive pricing practices entirely. The principal objective of these regulations is to deter unfair, deceptive and misleading price comparison advertising within the industry.
[7/15/98; 12.2.7.6 NMAC - Rn, 1 NMAC 2.7.6, 02/14/08]

12.2.7.7 DEFINITIONS:

A. “Advertisement” means any statement, offer, sales presentation or representation, whether oral or written, regardless of medium or form, concerning or related to any good offered for sale or lease, including, but not limited to, any statement or representation contained on any label, tag or sign, or in any catalog or other printed material, or whether through any electronic transmission or medium, including, but not limited to, television, radio, facsimile or electronic data transmission over a modem or electronic mail, the purpose of which is to promote, describe or characterize the good in order to induce the public to buy or lease it, or otherwise to give consideration to the offer for the good.

B. “Clearly and conspicuously” means that the statement, representation or term being disclosed is reasonably understandable, is in such size, color contrast or audibility, is so placed and represented as to be readily noticeable, is in close proximity to the information it modifies, and, where applicable, is of a sufficient duration as to be reasonably understandable.

C. “Comparable good” means a good that is substantially identical in composition, style, design, model, kind, variety, service or performance characteristics to the good to which it is compared in any advertisement.

D. “Good” means any item or article of jewelry, including, but not limited to, necklaces, earrings, bracelets, pendants, broaches, rings and pins. “Good” means also any Native American or southwestern style art or craft object or article, including, but not limited to, kachinas, fetishes, pottery and drums, whether or not the object or article is “Indian handmade” or “Indian crafted”, as defined by New Mexico Indian Arts and Crafts Sales Act, Section 30-33-4 NMSA 1978.

E. “List price” means a price given to a retailer by a manufacturer, supplier or other non-retail distributor as a suggested retail price for the good and includes the term “manufacturer’s suggested retail price”.

F. “Native American jewelry and arts and crafts” means such goods meeting the criteria of of the Indian Arts and Crafts Sales Act, Section 30-33-4 NMSA 1978, for “Indian handmade” and “Indian crafted” and all other jewelry and arts and crafts which, although they do not qualify as “Indian handmade” or “Indian crafted”, are made or manufactured to appear to be in the Native American style.

G. "Price comparison" means an express or implied comparison in any advertisement (whether or not expressed wholly or in part in dollars, cents, fractions or percentages) of a seller's current price for a good with any reference price, whether or not the price is actually stated in the advertisement.

H. "Reasonably substantial period of time" means 90 consecutive days.

I. "Reference price" means the price or other description of value of a good to which a seller compares its current price in an advertisement.

J. "Regular price" means the price at which a seller offered the good for a reasonably substantial period of time in the recent, regular course of its business, openly, actively and in good faith, with an intent to sell such good or product at that price.

K. "Seller" means any person who offers to sell, or sells, and in doing so disseminates advertisements for any good (as defined in Subsection D of 12.2.7.7 NMAC) in New Mexico, whether or not the sale of goods as defined herein is the seller's primary business. "Seller" may include any officer, agent, employee, sales person or representative of the seller, and any advertising agency employed by a seller.

L. "Trade area" means the geographic area where a seller's outlets are located.

M. "Wholesale" means the sale of goods to a retail merchant who intends to resell the merchandise to the public at a higher retail price.

[7/15/98; 12.2.7.7 NMAC - Rn, 1 NMAC 2.7.7, 02/14/08]

12.2.7.8 IDENTIFICATION OF BASIS FOR PRICE COMPARISON REQUIRED:

A. Except as provided in this rule, it is an unfair and deceptive trade practice to mark, label or otherwise advertise Native American jewelry or arts and crafts at any price other than the actual, good faith retail price at which the seller offers and intends to sell the goods to the public.

B. Except as provided in Subsection B of 12.2.7.9 NMAC, it is an unfair and deceptive practice for a seller to advertise using a price comparison or claim of savings as to any good offered for sale unless the seller clearly and conspicuously discloses the basis or source of the price comparison or savings claim.

(1) Comment: It is a prevalent advertising practice in the retail Native American jewelry and arts and crafts industry to compare, directly or indirectly, a seller's price to another's price for the purpose of emphasizing the bargain to be had. The attorney general has received numerous inquiries and complaints from consumers, artists and retailers regarding misleading and deceptive advertising in the form of the perpetual sales, fictitious reference prices, fictitious discounts and the absence of a bona fide reference price.

(2) Comment: Often consumers rely upon advertising which contains an implied or express comparison between prices or the offer of a price reduction to make purchasing decisions. Consumers can be misled or deceived as to the existence or amount of a bargain when such advertisements utilize a fictitious reference or former price, or imply a "regular" price that has been established only to create the illusion of a bargain. Sellers have also complained about such advertising practices as an unfair method of competition.

(3) Comment: The Unfair Practices Act prohibits deceptive representations in connection with the sale or lease of goods or services, the making of false or misleading statements of fact concerning the price of goods and the existence of or amounts of price reductions. Under the act, it is also unlawful to fail to state a material fact if such failure deceives or tends to deceive the public. Regulations are needed to ensure that price comparison advertising and other savings claims are not unfair, deceptive or misleading. The attorney general has determined that regulation of price comparison advertisements and other savings claims in the affected industry is in the interest of the citizens of New Mexico.

[7/15/98; 12.2.7.8 NMAC - Rn, 1 NMAC 2.7.8, 02/14/08]

12.2.7.9 COMPARISON TO SELLER'S OWN FORMER PRICE:

A. It is an unfair and deceptive practice for a seller to advertise using a comparison between the seller's current price and the seller's former price for any good unless the good was offered to the public openly and honestly, in good faith, with intent to sell at the former price, for a reasonably substantial period of time which immediately preceded the effective date of the price reduction.

B. A seller may advertise using a price comparison or claim a savings without the required disclosure(s), as described in Subsection B of 12.2.7.8 NMAC, only if the price comparison or savings claim is clearly based on the seller's former price. Terms such as "regular," "regularly," "formerly," "originally," "was" or words of similar meaning may be used by the seller to refer and identify a comparison to his or her former price.

[7/15/98; 12.2.7.9 NMAC - Rn, 1 NMAC 2.7.9, 02/14/08]

12.2.7.10 COMPARISON TO SELLER'S FUTURE PRICES: It is an unfair and deceptive practice for a seller to advertise an introductory offer or to compare its current price for a good with the price at which the good will be offered in the future, unless both of the following requirements are met:

A. the future price takes effect within a reasonable time not to exceed 30 days after the introductory offer of price comparison is first published; and

B. after the end of the introductory sale, the advertised future price of the good becomes the seller's regular and customary price.

[7/15/98; 12.2.7.10 NMAC - Rn, 1 NMAC 2.7.10, 02/14/08]

12.2.7.11 USE OF LIST PRICE OR SIMILAR COMPARISONS: It is an unfair and deceptive practice for a seller to advertise using a price comparison or to claim a savings, expressed or implied, from a list price or term of similar meaning, including the manufacturer's suggested retail price, unless one of the following requirements is met:

A. the list price does not exceed the highest price at which a substantial number of sales of the same or substantially comparable goods have been made in the seller's trade area; or

B. the list price is the price at which the seller offered the good for at least 90 consecutive days in the regular course of its business, openly, actively and in good faith, with an intent to sell the good at that price; the 90-day period must precede immediately the start of any advertised price comparison; or

C. the list price does not exceed the highest price at which the good is offered by a reasonable number of merchants in the seller's trade area for 90 consecutive days in the regular course of business; the 90 day period must precede immediately the start of any advertised price comparison; or

D. the list price does not exceed the seller's cost plus the percentage mark-up regularly used by the seller in the actual sale of such good or service of an identical class or kind, in the seller's recent, regular course of business.

[7/15/98; 12.2.7.11 NMAC - Rn, 1 NMAC 2.7.11, 02/14/08]

12.2.7.12 COMPARISON TO COMPETITOR'S PRICE: It is an unfair and deceptive practice for a seller to advertise using a comparison between the seller's price with a price currently being offered by another seller for goods or services unless the goods are comparable in quality, design, grade, material and craftsmanship and the seller's price is at or below the price at which the comparable goods are being offered currently in the seller's trade area by a reasonable number of other sellers in the same trade area, or another seller identified in the advertisement.

A. Any seller making price comparisons with another seller or sellers shall be required to document the basis on which the comparisons are made. Such documentation shall include identification of the seller(s) with whom goods and prices are being compared, identification of the goods being compared and claimed to be the comparable, a statement of the prices charged by each seller for the comparable goods and the date(s) on which the comparison was made.

B. Any seller making price comparisons with another seller or sellers shall update his or her records no less than every six months, and shall be required to retain the documentation which form the basis of the price comparisons, as required by Subsection A of 12.2.7.12 NMAC, for a period of no less than two years from the date of the first advertisement which uses the price comparisons.

[7/15/98; 12.2.7.12 NMAC - Rn, 1 NMAC 2.7.12, 02/14/08]

12.2.7.13 UNFAIR OR DECEPTIVE TRADE PRACTICE TO ADVERTISE OR OTHERWISE REPRESENT A SALE USING A FICTITIOUS REGULAR PRICE: It is an unfair and deceptive trade practice to advertise or otherwise represent a sale or bargain using a fraudulent regular or former price at which the seller never sold or could not in good faith reasonably have expected to sell the good or service. A "fraudulent regular or former price" is any price at which the seller did not offer the good openly and honestly, in good faith, for a reasonably substantial period of time, and includes any unreasonably inflated price at which a reasonable and prudent seller would not have expected to sell the good. Example. Seller's cost for a concha belt is \$300. Seller labels the item with a price of \$3,000, knowing that no reasonable buyer would pay that much for this particular belt. Shortly thereafter, Seller then advertises a "70% discount" on the belt, offering it for \$900, which is the price she wanted from the beginning. This violates the rule.

[7/15/98; 12.2.7.13 NMAC - Rn, 1 NMAC 2.7.13, 02/14/08]

12.2.7.14 PRICE NEGOTIATIONS:

- A. Except as provided in this rule, a seller shall offer and sell goods at the marked or labeled retail prices.
- B. It is an unfair and deceptive trade practice for a seller to mark and offer goods at prices which he or she does not intend to sell them, for the purpose of being able to negotiate price reductions off the marked or labeled prices, except that a seller may routinely and regularly negotiate price reductions not to exceed 25%, so long as the seller clearly and conspicuously discloses to the prospective purchasers that the prices of the goods offered for sale are negotiable. A seller may, on an infrequent and non-regular basis, accept more than a 25% price reduction as a result of negotiations with a customer.
- C. The disclosure that prices are negotiable shall be in writing and posted in a conspicuous manner at each entrance to the seller's place of business, and at each cash register or other place where the seller accepts payment for goods. The disclosure must be no less than 8 by 8 inches at any entrance, and no less than 6 by 8 inches at any cash register or other place where the seller accepts payment for goods. The disclosure must be in bold-face type of 26 point or greater font, and shall state as follows:

PRICES ARE NEGOTIABLE

The prices of [specify goods for which prices are negotiable] are negotiable. The marked or labeled prices of these items are initial asking prices only.

D. Subsection B of 12.2.7.14 NMAC shall not apply to reasonable discounts given to consumers for good faith purchases of more than one object or article from the seller; provided that the seller shall not engage in a pattern and practice of encouraging or permitting a customer to purchase a second low-cost item in order to qualify for the discount.

(1) Example: Consumer is interested in a three hundred dollar (\$300) necklace. Seller tells consumer that if she buys a pair of \$10 earrings, he will give consumer a 25% multiple purchase discount on the price of the necklace. This transaction violates this rule because the seller-initiated offer of a multiple item discount is intended to circumvent the requirement that merchandise be marked and sold at the actual price.

(2) Example: Consumer asks about a \$300 necklace and a \$100 ring. Seller tells consumer that she will give a 25% price reduction if consumer buys both items, although any single item purchase will be at the labeled price. This transaction does not violate the rule because the consumer-initiated purchase of more than one item is in good faith and is not intended merely to obtain a price reduction.

[7/15/98; 12.2.7.14 NMAC - Rn & A, 1 NMAC 2.7.14, 02/14/08]

12.2.7.15 BARGAIN OFFERS BASED ON THE PURCHASE OF OTHER GOODS AND USE OF THE WORD "FREE":

A. It is an unfair and deceptive practice to use the word "free" or words of similar meaning, or to represent bargain offers, including "buy one - get one free," "buy one - get one at half price," "two for one" and "one cent sale," when describing a good to be given to a customer who purchases other goods, if the seller recovers, in whole or in part, the cost of the free or bargain good by marking up the price of the item which must be purchased, by substituting an inferior item, or otherwise.

B. It is an unfair and deceptive practice to represent that another good is being offered free or at a bargain price with the sale if the advertised good can be purchased from the seller at a lesser price without the free or bargain good.

[7/15/98; 12.2.7.15 NMAC - Rn, 1 NMAC 2.7.15, 02/14/08]

12.2.7.16 USE OF SALE TERMINOLOGY:

A. It is an unfair and deceptive practice for a seller to use terms such as "sale," "sale price," "now only \$ _____" or other words and phrases that imply a price savings unless the price of the good is reduced by no less than 10% from the former price of the good. If the seller reduces the price by 10% or more from the former or regular price, a rebuttable presumption exists that the price reduction was of a reasonable amount.

B. The term "sale" may be used in an advertisement where not all goods are offered at a reduction from the former or regular price if the goods to which the sale applies are clearly and conspicuously identified.

C. It is an unlawful and deceptive trade practice for a seller to use such terms as "sale" or "sale price," unless the goods offered have been offered to the public openly and honestly, in good faith, for a reasonably substantial period of time, at a former price of at least 10% more than the "sale price".

D. No sale which is legitimate under these rules shall exceed 30 consecutive days in length, except for a going-out-of-business sale which complies with the requirements of the New Mexico Distress Sales Act,

Section 57-10-1 NMSA 1978 (1967) et seq. Comment: Because other provisions of this rule require that sellers offer goods at the regular retail price for a “reasonably substantial period of time” prior to placing them on sale, an attempt to circumvent Subsection D of 12.2.7.16 NMAC, by offering goods at the regular retail price for a short period of time (e.g., one week) following a sale, and then putting them back on sale, will constitute a violation of this rule.

E. A seller who conducts a sale which complies with 12.2.7.16 NMAC herein shall not be required to re-mark or relabel the prices of all items placed on sale (see Subsection A of 12.2.7.8 NMAC) during the term of the sale; provided that, if, following the completion of a legitimate sale, the seller wishes to permanently reduce the price of sales merchandise which was not sold, the seller must re-mark and re-label all such inventory to reflect the new, lower retail price.

[7/15/98; 12.2.7.16 NMAC - Rn, 1 NMAC 2.7.16, 02/14/08]

12.2.7.17 EVIDENCE OF ADVERTISED VALUE OR BARGAIN REQUIRED: Any seller who makes a comparison price advertisement or other savings claim must retain any and all documents evidencing the basis for the comparison or other savings claim for a period of at least two years after the last date on which the advertisement was made. It is an unfair or deceptive practice for any seller who advertises using a reference or comparison price, or other savings claim, to fail to retain any and all documents evidencing the basis for the comparison claim or other savings claim for a period of not less than two years after the last date on which the claim is made.

[7/15/98; 12.2.7.17 NMAC - Rn, 1 NMAC 2.7.17, 02/14/08]

12.2.7.18 USE OF THE TERM “WHOLESALE”: It is an unfair and deceptive practice to advertise the phrase “wholesale to the public,” or any similar term or phrase or to otherwise state or imply that the public is able to buy merchandise at “wholesale” prices, unless the seller is, in fact, a wholesaler, and unless the seller sells to the general public at exactly the same prices as he or she sells to retailers who are buying merchandise intended for resale to the public at a higher retail price.

[7/15/98; 12.2.7.18 NMAC - Rn, 1 NMAC 2.7.18, 02/14/08]

12.2.7.19 SEVERABILITY: If any part of these regulations is held invalid, the remainder and the application thereof shall not be affected.

[7/15/98; 12.2.7.19 NMAC - Rn, 1 NMAC 2.7.19, 02/14/08]

12.2.7.20 [RESERVED]

[7/15/98; 12.2.7.20 NMAC - Rn & Repealed, 1 NMAC 2.7.20, 02/14/08]

HISTORY OF 12.2.7 NMAC:

Pre NMAC History: none.

History of Repealed Material: [RESERVED]

NMAC History:

1 NMAC 2.7, Comparative Price Advertisements and Savings Claims For The Native American Jewelry and Arts and Crafts Retail Industry (filed 06/25/1998) was renumbered, reformatted, amended and replaced by 12.2.7 NMAC, Comparative Price Advertisements and Savings Claims For The Native American Jewelry and Arts and Crafts Retail Industry, effective 02/14/08.