



FAIR TRADING COMMISSION

RETAIL BUSINESS GUIDE



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I. OVERVIEW

The world has changed rapidly within the last two (2) years and so have advertising and selling practices. Gone are the days when traditional brick and mortar stores and print media are the focal point of doing business and advertising. Due to our current environment, consumers and businesses have been increasingly operating online via social media marketplaces and stores, apps and websites.

Given this rapid change, it is important to ensure that all businesses are aware of their obligations under Barbados' consumer laws to ensure compliance within the ambit of the Consumer Protection Act, CAP. 326D (CPA).

The Retail Guide (Guide), is aimed at ensuring that all businesses are aware of the provisions of the consumer legislation regardless as to whether their operations are online or in traditional brick and mortar shops.

About the Guide

This Guide was created for businesses to provide essential information pertaining to their legal obligations under the CPA.

Who is the Guide for?

Entrepreneurs, Business owners, Managers and Staff involved in the supply of goods or services to consumers.

2. THE CONSUMER PROTECTION ACT

Unfair Contract Terms

Having a Standard Form Contract (SFC) that sets out the terms and conditions for providing a good or service is not only beneficial for a business's strategy but also cost effective. When developing these contracts, it is advisable to have them reviewed by an Attorney since the CPA contains key considerations that have to be taken into account when preparing these contracts.

What is a Standard Form Contract?

SFCs are:

- ❖ Made between a business and a consumer;
- ❖ Prepared in advance on a *'take it or leave it'*¹ basis;
- ❖ The goods or services in question were purchased/utilised for personal/private use or consumption; and
- ❖ Generally, there are some terms in the contract which consumers can negotiate including – the amount of monthly repayments, the price and the rate of interest. These clauses are deemed to be individually negotiated and are typically not reviewed for fairness. However, the remaining clauses that were not individually negotiated may be assessed by the Commission for fairness.

What types of businesses use Standard Form Contracts?

A variety of businesses use SFCs including but not limited to those that:

- ❖ Sell goods on Hire Purchase;
- ❖ Offer loans;

¹ The consumer has no opportunity to negotiate or influence the terms in the contract.

- ❖ Make pastries and sweet goods;
- ❖ Host events;
- ❖ Aesthetics services;
- ❖ Offer layaway on clothes; and
- ❖ Allow you to “*trust*” food or items at their shop.

If the Commission considers a term to be unfair, the Commission may either ask the business to remove or amend the clause. If the business refuses, the Commission may institute proceedings in the law courts of Barbados to obtain the necessary relief. In determining whether a SFC is unfair, the Commission will seek to assess whether the term causes a significant imbalance in the parties’ rights and obligations to the consumers’ detriment. For example, in situations where the business has the option to cancel the contract but the consumer does not have the same option. In addition, the Commission will also examine the contract to ensure that it is drafted in plain and intelligible language and has avoided the use of convoluted language, jargon and legalese.

Examples of potentially unfair terms:

Potentially unfair terms are those which:

- ❖ Gives the business the exclusive right to interpret the contract;
- ❖ Exclude or Limit the business’s responsibility for death or personal injury;
- ❖ Give the business the right to determine whether the goods or services conforms with the contract ;
- ❖ Avoid liability for negligence; and
- ❖ Use legalese or convoluted language. For example ““*In witness whereof the parties hereunto have set their hands to these presents as a deed on the day month and year hereinbefore mentioned*” instead, the contract should simply say “*signed on*”

3. MISLEADING & DECEPTIVE CONDUCT

Barbadian businesses utilize advertisements to promote their goods and services through television, radio, social and print media. Regardless of the medium utilised, all advertisements must comply with the law. In order to ensure compliance, business conduct, advertisements and selling techniques should not be misleading and/or deceptive or *likely* to be misleading and/ or deceptive.

Advertising & Selling

Generally speaking, advertisements and selling techniques will be perceived as misleading if they can mislead the average consumer. This law applies even if a business does not intend to mislead or deceive anyone or even if no one has suffered any loss or damage as a result of its behaviour.

Disclaimers & Fine Print

It is usual practice to see advertisements denoted with an asterisk and then a statement which suggests that consumers should review information in '*fine print*' or that additional terms and conditions apply. However, this may not safeguard a business from breaching the CPA.

It must be noted that the Commission closely examines the overall impression created by an advertisement. Therefore, it is important to provide enough information to ensure that the primary message and the core contractual terms are clearly communicated. Always remember that the core message or selling point used for a product or service may make such a serious imprint that no disclaimer can dissipate its effect.

Consequently, disclaimers, restrictions, conditions, limitations, fine print or qualifications of an offer, must be communicated to the consumer to prevent a false impression from being made.

For example, if a business offers a discount to new customers, be sure to mention any disclaimers or limitations that apply to consumers such as whether it applies to all items in stock or a select few. If the business merely mentions that terms and conditions apply but there are onerous requirements for consumers to be able to get the discount or offer, you may be in breach of the CPA.

Misleading Consumers about their Rights

Consumer guarantees for goods or services cannot be altered or waived by sellers or consumers. This means that **contracting out of the guarantees is not permitted**. In addition, if a business attempts to restrict or limit consumers' rights, it is likely to also breach the CPA on the basis that it may mislead or deceive consumers.

Example:

- ❖ No refund on sale items;
- ❖ Exchange or credit note only for the return of sale items;
- ❖ Store credit only;
- ❖ Items are not returned in original packaging;
- ❖ Opened items cannot be returned or exchanged;
- ❖ *"No Exchange, No Refund"*; and
- ❖ *"No Exchange, No Refund, sold as is"*.

These signs breach the CPA because it limits the statutory rights of the consumer and should not be displayed in stores, on invoices, receipts or contracts.

Signs that state *"No Exchange, No Refund"* as well as advising consumers that they have no choice other than to receive a Store Credit as a Refund, may lead consumers to believe they have no right to an exchange or refund under any circumstances². The reality is that consumers may have a right to a refund or exchange if there is a breach of the CGA. Therefore, this statement may be misleading.

False or Misleading Claims

In addition to the general prohibition against engaging in misleading or deceptive conduct, the CPA prohibits businesses from making false representations. For example, the CPA states that a business must not make false or misleading claims that goods are of a particular standard,

² For further information, refer to the Consumer Guarantees Act, CAP. 326E

quality, value, grade, composition, style or model or have had a particular history or particular previous use.

Some examples of misleading or false representations are as follows:

- ❖ An item is advertised as being made in Barbados but there is a tag that shows that it was made in another country; and/or
- ❖ Advertising a mobile phone as *'new'* even though it has been refurbished.

'Free' Products

Consumers are always looking for bargains and therefore their interest is piqued when a *'free'* offer is made to them. A business must therefore ensure that the offer is *'free'* to the extent that there are no additional costs or requirements.

A business may be in breach of the CPA if there are additional conditions for the consumer to comply with in order to get the *'free'* offer or gift.

For example, a business has a BOGO or *'buy one, get one 'free'* sale on toys. However, when the consumer gets to the cashier they are told that a nominal fee is payable in order to get the *'free'* item. This is likely to be misleading or deceptive.

Bait Advertising & Special Offers

Bait Advertising occurs when an item is advertised for sale at a low price to attract consumers to shop. However, the business knows that it does not have a justifiable basis for believing that it would be able to supply a reasonable quantity of the item for a reasonable period.

If you know upfront that you have limited stock, you should clearly advise consumers and indicate the quantity of stock on hand.

For example, a retailer runs a campaign advertising a front loading washing machine/dryer set for \$499.00 for its December sale. The retailer usually sells about ten (10) of these washer/dryer machines each week. However, they only stock one (1) washer/dryer at the advertised price and refuses to take any orders but redirect consumers to a more expensive model that costs \$2,000.00. This is likely to be **Bait Advertising** as the retailer does not have a reasonable supply of the advertised item.

Full Costs to be Stated

When a business advertises the payment of a good or service in instalments, if the transaction is on credit, the following information must be provided:

- i. the total sum to be paid for the goods or services;
- ii. the number of instalments;
- iii. the rate of interest; and
- iv. the deposit, if any, that must be made.

For example, if a car dealer advertises that a new sedan costs \$500.00 per month, they must also indicate that the total cost of the item is \$50,000.00, the total number of instalments is forty (40), the rate of interest is 20% per annum and that there is a deposit of \$5,000.00.

General Recommendations

- ❖ Do not use fine print to significantly alter the main offer in the advertisement; and
- ❖ Disclose all costs to the consumer at the onset. If you include hidden costs, you may be guilty of misleading or deceiving a consumer.

Dual Pricing

A business that appends more than one (1) price to the same good, where one (1) price is higher than the other, may be in breach of the CPA.

The business in question is advised to sell the goods for the lowest price displayed, withdraw the goods from sale until the price is corrected and/or issue a retraction.

What is an Appended Price?

An appended price is:

- ❖ Attached to or placed on the goods, written or stamped on or located on, or otherwise applied to the goods, any band, ticket, covering, label, reel or thing used in connection with the good;
- ❖ Used in connection with the goods or anything on which the goods are mounted for display or exposed for sale;
- ❖ Determined on the basis of anything encoded on or in relation to the goods; and

- ❖ Anything published in relation to the goods in a catalogue available to the public when the timeline to buy at that price has not passed and the catalogue is not out of date.

What is not an Appended Price?

A price can be disregarded when it is:

- ❖ A duty free price;
- ❖ Not in Barbadian currency;
- ❖ In an old magazine or catalogue and the deadline to buy at that price has passed; and
- ❖ Appended to goods outside of Barbados in relation to the supply of goods outside Barbados.

Falsely Accepting Payment

Businesses should not accept payment for a good where they:

- ❖ Do not intend to supply the goods or services; and/or
- ❖ Intend to supply materially different goods or services

For example, a home goods company accepts payment for a mahogany desk despite knowing that it can only intend to supply Khaya (which is a look-a-like but cheaper version of mahogany). This is likely to be a breach of the CPA.

4. OTHER PROMOTIONAL TECHNIQUES

❖ **Social Media/Online Shopping**

In recent times, consumers have been spending more time online and utilising these platforms for shopping purposes. It is therefore important for businesses to be cognisant of the CPA as these laws equally apply to these platforms. As a result, materials that are contrary to the consumer laws should be removed. Further, persons who have been misled or deceived by social media/online advertisements, should be refunded.

❖ **Reviews and Testimonials**

Reviews and testimonials are powerful and influential tools used by businesses to promote their goods and services, especially in the online arena.

Regardless of the advertising medium, any review or testimonial should reflect the honest views of the person that made it. Businesses should not post false reviews to induce consumers to make a purchase. This may contravene the CPA.

“What happens if my business fails to comply with the CPA?”

The Commission can take legal action against businesses for contraventions of the CPA. Based on the nature of the offence, the Commission can either seek criminal or civil pecuniary penalties against the individuals or corporations in question.

This guide will be updated as required.

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