MISLEADING ADVERTISING GUIDE

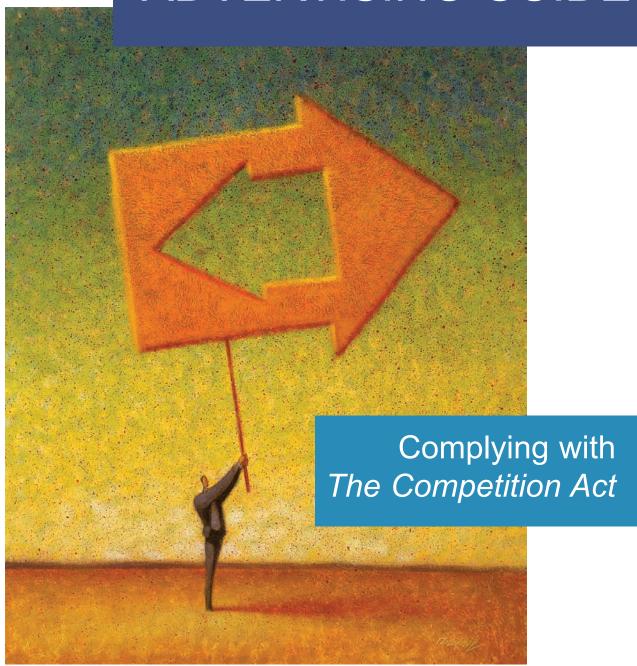






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INTRODUCTION



Advertising is an important part of providing real estate services in Canada. This Guide is intended to assist REALTORS® in understanding and complying with the misleading advertising and deceptive marketing practices provisions of the federal *Competition Act* (the "Act").

The Act, which is Canada's principal competition legislation and applies to most businesses and industries, is administered and enforced by the Competition Bureau, a federal law enforcement agency headed by the Commissioner of Competition.

The Act contains general criminal and civil misleading advertising sections, as well as sections dealing with specific types of advertising and marketing, including ordinary price claims, selling above advertised price, performance claims, bait and switch selling and deceptive telemarketing. It is important for members to understand the relevant advertising and marketing sections of the Act to reduce the potential liability associated with non-compliance, which could include investigation, fines, imprisonment and negative publicity.

This Guide outlines the general misleading advertising sections of the Act and some of the specific advertising and marketing sections that could apply to members' business activities. An advertising guiz, advertising dos and don'ts and additional resources are also included.

This Guide is intended to provide general information to assist members in complying with the misleading advertising sections of the Act. It should not be taken as legal advice. Members who would like additional information on misleading advertising, or have specific questions not addressed in the Guide, should obtain legal advice or contact their local Board or Association.

Other relevant regulations

It is important to remember that competition law does not exist in a vacuum.

It is not only the Act that applies to advertising in Canada. Other types of regulation that may apply to members' advertising activities include provincial consumer protection laws, copyright and trademark legislation and regulator or other industry codes, such as the Canadian Code of Advertising Standards (administered by Advertising Standards Canada). REALTORS® should ensure that their advertising complies with all applicable regulation.

In the real estate industry (and organized real estate in particular) there are at least three other areas of regulation that impact member advertising directly:

1. The REALTOR® Code

Advertising is specifically dealt with in three articles of the REALTOR® Code (Articles 13, 14 and 15) and is referred to in Article 19. Article 15 is particularly important as it sets out specific information that must now be included by REALTORS® in certain types of promotional advertising.

Article 14 sets out that REALTORS® may only advertise a property if such advertising has not been restricted at the request of the Seller and is in accordance with provincial and federal regulations. Therefore, if a Seller has limited advertising to advertising by the listing agent, other REALTORS® may not advertise the Seller's property.

Note: Particular Interpretations to relevant articles of the REALTOR® Code are discussed in this document, and must be understood by REALTORS® before they advertise, as a failure to include the essential information required by the Interpretations may result in a professional standards complaint.

These articles are from the REALTOR® Code:

Advertising - Content/Accuracy

All Advertising and promotion of properties shall accurately reflect property and other details and prominently display the name of the brokerage and any additional information required by provincial regulation.

14. Advertising listings of other REALTORS®

REALTORS® may only advertise a property if such Advertising has not been restricted at the request of the Seller and is in accordance with provincial and federal regulations.

15. Advertising claims

Claims or offerings in Advertising must be accurate, clear and understandable.

19. Discrediting another Registrant

The REALTOR® shall never publicly discredit any other Registrant. If the REALTOR®'s opinion is sought, it should be rendered with strict professional integrity and courtesy.

Advertising means any marketing activity to promote the brokerage, the REALTOR® or a transaction and includes any verbal, written or graphic representation in any form, including electronic media.

2. The Personal Information Protection and Electronic Documents Act (PIPEDA)

PIPEDA is the federal privacy legislation that came into effect across Canada in 2004. This Act limits the use that can be made of the personal information of consumers, and affects certain marketing activities.

3. The 2006 amendments to the federal *Telecommunications Act* (the "Do Not Call Registry")

The purpose of the 2006 amendments to the *Telecommunications Act* was to create a national "Do Not Call List". Consumers who put their names on this list may not be called by people looking to market their goods or services (which includes real estate practitioners). The Canadian Radio Television and Telecommunications Commission (CRTC) has the responsibility for implementation and review of the Do Not Call List in Canada. Regulations relating to the Do Not Call List, to be implemented likely in the fall of 2008, may have a significant effect on REALTOR® marketing.

WHAT IS MISLEADING ADVERTISING?

The *Competition Act* contains criminal and civil sections that prohibit false or misleading representations to the public in connection with promoting the supply or use of a product (i.e., "misleading advertising").



The civil (i.e., non-criminal) misleading advertising section prohibits any person, for the purpose of promoting the supply or use of a product (including a service) or business interest, from making a representation to the public that is false or misleading in a material respect. There is a substantially similar criminal section that requires that a false or misleading representation be made "knowingly or recklessly."

The Competition Bureau has said that in most instances, misleading representations will be pursued under the civil track. However, the Bureau has indicated that it will proceed under the criminal track where there is clear and compelling evidence that the accused intentionally made a false or misleading representation to the public and criminal prosecution would be in the public interest (which depends on factors including the seriousness of the alleged offence and mitigating factors). See "Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act* (Guidelines)" referred to in the Additional Resources section on page 14.

In considering whether a representation is false or misleading in a material respect, both its literal meaning and the "general impression" it conveys are relevant. For example, an advertisement can be literally true and still constitute misleading advertising if the "general impression" is false or misleading (e.g., a failure to disclose essential information such as additional cost or conditions or restrictions relating to the supply of the product).



Whether a representation is "material" does not depend on the value of the product, but the degree to which a consumer is affected by the representation in deciding whether to purchase the product. It is also not necessary to show that any person was actually deceived or misled.

In the example shown in Figure A, if it is not true that ACME Realty Inc. will list a property on the Board's MLS® system for \$500, for example, because ACME Inc.'s fee is actually \$750 (i.e., a \$500 general fee plus a \$250 administrative fee), this would likely be false or misleading in a material respect (i.e., likely to induce a consumer to purchase the services) as a significant part of the fee is not disclosed.

Our next example shown in Figure B, would create a false or misleading general impression if the agent does have a 1% commission package but this fee does not include open houses, advertising, etc. (i.e., they are available for an additional charge).

Assuming this is the case, while it is true that the agent offers a 1% commission package that includes some services, the general impression is likely false or misleading because the agent does not offer all of the stated services for a 1% commission.

Both of these examples are directly impacted by Interpretation 15.1 of the REALTOR® Code which requires that an advertisement that includes the amount of compensation being charged by a Broker include the following minimum information:

- 1. The details of the service provided for that price;
- 2. Whether that price includes listing the property on a Board's MLS® system; and
- 3. Whether there are any additional charges that may apply.

An advertisement may be false or misleading if it is literally untrue or if the "general impression" is false or misleading (e.g., information likely to influence a purchasing decision is omitted). As such, it is a good



Figure B
Could be false or misleading
if all services are not included

Interpretation from Article 15 of REALTOR® Code:

15.1 Advertising of Compensation shall include the details of services provided and whether any additional charges may apply. If the services to be provided for the advertised Compensation does not include listing on MLS®, a statement to that effect must be included.

practice to include any information likely to affect a purchasing decision in an advertisement. In the case of Figure C, assuming there are conditions or restrictions relating to ABC Co.'s offer to buy a client's house, they should be clearly disclosed in the claim or in an effective disclaimer (see the Disclaimers section in this booklet).

Any advertising of programs or promotions must also comply with Interpretation 15.3 of the REALTOR® Code which requires that all details of how the program works (including any exceptions, time frames and costs) must be included in the advertisement. It is not sufficient to simply provide contact information or to direct consumers to where details can be found.

Interpretation from Article 15 of REALTOR® Code:

15.3 Advertising of programs, initiatives or guarantees (e.g. "Buy a house with 0% down," "If I don't sell your house, I will buy it from you," etc.) must clearly set out all significant details of how the program works, including, but not limited to, exceptions and time frames.

The Internet

The misleading advertising sections of the Act apply to all types of representations to the public regardless of the media used (including printed, broadcast, written, oral and electronic representations such as the Internet). As such, members should ensure that all representations to the public in connection with providing their services comply with the Act, including those made through the Internet.

The Competition Bureau has issued an Information Bulletin describing its enforcement approach to Internet advertising (see "Application of the Competition Act to Representations on the Internet" referred to in the Additional Resources section).

Most provincial regulatory bodies have adopted the Internet Advertising Guidelines put out by the Association of Real Estate Law and License Officials (ARELLO) which clarify that a web site is an advertising vehicle, and every page of a multi-page web site is an advertising vehicle. This concept is formalized in Interpretation 13.1 of the REALTOR® Code, so all REALTORS® must ensure that their web sites conform to relevant advertising requirements.



Figure C
Could be false or misleading
if conditions apply

Interpretation from Article 13 of REALTOR® Code:

13.1 The Internet website of a REALTOR® is an Advertising vehicle. In the event of a multiple page website, every page is an Advertising vehicle. All properties displayed and all representations made on a website must comply with the Code of Ethics and Standards of Business Practices as well as applicable provincial, federal and any other requirements regarding Advertising.

WHAT IS NOT MISLEADING ADVERTISING?

It is also important to understand what is not misleading advertising. For example, comparative advertising that may be seen as "tacky" or disparaging to competitors, but is not false or misleading in a material respect is not misleading advertising (see the section below on "Comparative Advertising"). This may include advertising of commission rates, comparative advertising that is hard-hitting but accurate and mere "puffery" (i.e., advertising claims that are exaggerated but would be unlikely to induce a consumer into

Interpretation from Article 19 of REALTOR® Code:

19.3 This Article (i.e., Article 19) does not apply to truthful Advertising by REALTORS®. Any Advertising by a REALTOR® which contains seemingly derogatory statements about other Registrants or competitors, their businesses or their business practices may form the basis of an ethics charge only if such statements are false or misleading within the meaning of the *Competition Act*, or are otherwise prohibited by law.

purchasing a product such as "Canada's favourite agents").

Advertisement that discredits another REALTOR® is also not enough to justify disciplinary action by a Board on the grounds that it violates Article 19 of the REALTOR® Code relating to "Discrediting another Registrant". Article 19.3 makes it clear that Article 19 does not apply to truthful advertising by REALTORS®.

While it is important to ensure that advertising is not false or misleading, unfounded or frivolous complaints or discipline against a particular advertiser could, depending on the circumstances, be seen as an anti-competitive act (e.g., if a complaint or discipline is based on an agent's pricing policy). One approach that members may take if faced with aggressive advertising by competitors is to respond by advertising and marketing their own strengths (e.g., the price, quality or variety of real estate services offered).

Boards should also be aware of CREA's Principle of Competition #7 that states that Boards and Associations must not "generally restrict advertising by members or non-members unless the advertising is (i) false or misleading, (ii) prohibited by law or (iii) restricted at the request of the vendor".

The Principles of Competition explain that board complications of MLS® listings (e.g. listings on a Board's MLS® system) are not considered "advertising" (for the purposes of the Principles of Competition).

ORDINARY PRICE CLAIMS

The Competition Act also contains sections dealing with materially false or misleading representations to the public relating to a supplier's own ordinary price (e.g., "regular" price) or the ordinary price of suppliers generally.

Where a representation is made as to the ordinary price of suppliers generally, one of the following two tests must be met:

- a substantial volume of the product was sold at that price (or higher) within a reasonable period of time before or after the representation ("volume test"); or
- the product was offered for sale, in good faith, at that price (or higher) for a substantial period of time recently before or immediately after the representation ("time test").

This section is meant to ensure that where advertising claims are made about the ordinary price charged by suppliers generally, the product has either been sold in a substantial volume or offered for sale for a substantial period of time at the reference price.

The Competition Bureau's position is that "substantial volume" means more than 50% of sales at or above the reference price, "reasonable period of time" means twelve months before or after the representation, "substantial period of time" means the product is offered at or above the reference price more than 50% of the time period (six months before or after the representation).

In considering whether a product was offered in "good faith", the Bureau considers several factors including whether the product was openly available in appropriate volumes, the reference price was one the supplier fully expected the market to validate and/or the reference price was one at which genuine sales had occurred.

The significance of the ordinary price claims sections to members is that when making advertising comparisons to the ordinary (e.g., "regular") commission of other agents, one of the above two tests must be met.

Members making this type of comparison to the current "regular" commission charged by other agents should ensure that they meet one of the above two tests. For example, the claim in Figure D could violate the ordinary price sections if either:



Figure D
Comparison claim that
REALTOR® must be able
to substantiate

- a "substantial volume" of real estate services have not been recently sold at 7% or higher (e.g., more than 50% within 12 months before the claim); or
- the real estate services were not offered for sale in good faith at 7% or higher for a substantial period of time (e.g., more than 50% of the time within 6 months before the claim).

SALE ABOVE ADVERTISED PRICE

Members should also be aware that the *Competition Act* contains a section dealing with sales above the advertised price. It prohibits persons from advertising a product for sale or rent and, during the period and in the market to which the advertisement relates, supplying the product at a higher price than advertised.

For example, an agent advertises "MLS® Service for 1%", then supplies the same service for 2%.

There are several exceptions, including where an advertisement is immediately issued correcting the price, and where the supply of a product is by or on behalf of a person not engaged in the business of dealing in that product.

When advertising the price of a service, members should ensure that they supply the service at the same price as advertised (see also Interpretation 15.1 to the REALTOR® Code previously discussed).

PERFORMANCE CLAIMS

The Competition Act also specifically deals with false performance claims relating to a product. The Act prohibits representations to the public, for the purpose of promoting the supply or use of a product, in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that are not based on an "adequate and proper test."

When making performance claims about a product, a person must have an "adequate and proper test" to substantiate the claim <u>before</u> making the claim and must include in the advertisement the information required by Interpretation 15.2 of the REALTOR® Code.

While this section may be more applicable to other types of consumer products, it could apply in relation to real estate services (e.g., where a claim is made regarding an agent's performance).

When making a performance claim about services, you should ensure that you have adequate support for the claim (e.g., data, statistics, etc.) <u>before</u> making the claim.

Interpretation from Article 15 of REALTOR® Code:

15.2 Representations of performance (e.g. "#1", "top-selling," etc.) must include the geographical area referred to, the relevant time-frame (e.g. January-June 2004) and the source or basis on which the claim is based (e.g. based on the number of sales on the MLS® system of the relevant Board for the specified time period).



Figure E
Performance claim that
REALTOR® must be able to
substantiate

Interpretation 15.2 of the REALTOR® Code states that any advertisements containing performance representations must include the following information in the body of the advertisement:

- 1. The relevant geographical area;
- 2. The relevant time frame; and
- 3. The source on which the claim is based.

The example in Figure E does not contain any of this required information, and could be the subject of a professional standards complaint.

COMPARATIVE ADVERTISING

Advertising that compares the accomplishments or skills of one member over another may only be restricted if it is materially untrue or deceptive. The mere fact that an advertisement is tacky or disparaging is not enough to constitute misleading advertising under the *Competition Act*.

A Board rule that restricts comparative advertising could be seen as a restraint on a member's ability to advertise freely, and could therefore be seen as having an anti-competitive effect. As noted previously, CREA Principle of Competition #7 generally provides that Boards must not restrict advertising by members unless the advertising is: (i) false or misleading; (ii) prohibited by law, or (iii) restricted at the request of the vendor.

However, there is a distinction between comparative advertising naming individuals and comparative advertising naming companies. A decision of the Privacy Commissioner of Canada concluded that a complaint about comparative advertising that compared the production of individuals ("John Doe sold 20 houses, and I sold 40") was well founded as it involved the disclosure of personal information without the consent of the individual. Therefore, comparative advertising involving individuals could violate privacy laws in provinces where the *Personal Information Protection and Electronic Documents Act* (PIPEDA) applies or where the provincial legislation prohibits this type of advertising. PIPEDA does not, however, apply to corporations, so the Privacy Commissioner's ruling does not prevent corporate comparative advertising (e.g., "Company X Winnipeg sold 40% of the MLS® listings last year and Company Y Winnipeg sold 30%").

As mentioned previously, advertisement that discredits another REALTOR® is also not enough to justify disciplinary action by a Board on the grounds that it violates Article 19 of the REALTOR® Code relating to "Discrediting another Registrant".

BAIT AND SWITCH SELLING

Bait and switch selling is one of the civil deceptive marketing practices sections of the *Competition Act*. It arises when a person advertises a product at a bargain price and does not have reasonable quantities of that product available to meet demand. For this section to apply, a person must have advertised a product at a "bargain price" (e.g., indicating a bargain by reference to an ordinary price) and the product must not be available in "reasonable quantities" based on the market, nature and size of the person's business and nature of the advertisement.

While the bait and switch selling section could apply in the context of real estate services, it is generally more applicable to bargain advertisements of consumer products (e.g., electronics, airline tickets, etc.).

DISCLAIMERS

Disclaimers can be an effective way of qualifying an advertising claim. However, they must be used effectively to ensure that advertising claims are not false or misleading.

When a disclaimer is used, it should be large enough to be easily read by a consumer, close to the claim to which it relates and include any information that could influence a consumer's purchasing decision (e.g., additional cost information or conditions/qualifications relating to the supply of the product).

The Competition Bureau's position is that disclaimers that expand upon and add information to the principal representation do not raise an issue under the Act. However, a disclaimer can only qualify a representation but cannot cure or retract a false or misleading representation.

REALTORS® should also be aware of the general requirement in Interpretations 15.4 and 15.5 of the REALTOR® Code which applies to all advertising. Any and all significant conditions, restrictions or additional charges that may apply and would likely affect a consumer's decision to retain the REALTOR®/brokerage must be displayed in the ad.

Interpretation from Article 15 of REALTOR® Code:

15.4 Significant conditions, restrictions, limitations and additional charges shall be fully and prominently displayed in the body of the advertisement near the claim or offering in easily readable form and shall comply with all applicable laws.

15.5 A condition, restriction, limitation or additional charge shall be considered "significant" if it would likely affect a consumer's decision to retain the REALTOR®/brokerage.

An advertisement may be false or misleading if is it literally false or the "general impression" is false or misleading (e.g., if certain essential information such as additional cost or conditions/restrictions are not disclosed). The advertisement in Figure F may be false or misleading if information that could influence a consumer's purchasing decision, such as additional fees or conditions are not disclosed in a disclaimer.

This advertising could also violate the REALTOR® Code if the information required by Interpretation 15.1 is not included (see discussion above).



DECEPTIVE TELEMARKETING

There are specific sections in the *Competition Act* relating to telemarketing, which could apply to members who market their services by telephone. They require that certain disclosure be made when engaging in telemarketing and also prohibit certain types of telemarketing activities.

"Telemarketing" is defined as the "practice of using interactive telephone communications for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest."

Required Disclosure

A telemarketer must disclose the following at the beginning of each call:

- The identity of the person on whose behalf the call is made.
- The nature of the product or business interest being promoted.
- The purpose of the call.

A telemarketer must disclose the following at some time during the call:

- The price of any product being promoted.
- Any material restrictions, terms or conditions that apply to its delivery.

The *Competition Act* also prohibits the following telemarketing activities:

- Making a representation that is false or misleading in a material respect.
- Conducting a contest, lottery or game of chance where delivery of a prize is conditional on payment in advance or not fairly disclosing the number and approximate value of the prizes, the areas to which they relate and other facts that materially affect the chances of winning.

- Offering one product free (or at less than fair market value) as an inducement to selling a second product unless the fair market value of the first product and any restrictions, terms or conditions relating to its supply are disclosed.
- Requiring payment in advance for any product offered at a price grossly in excess of its fair market value.

Note: Telemarketing will be further regulated by amendments to the *Telecommunications Act*, which provides for the creation of a national Do Not Call List. Any individual will be able to put their name of the list, and no person (subject to certain exceptions) will be able to call that individual to market his/her services. REALTORS® will be required to refer to this list before cold calling.

PENALTIES

Violation of the *Competition Act* can involve significant penalties. The potential penalties under the criminal misleading advertising sections are fines of up to \$200,000 and/or imprisonment for one year (a fine in the discretion of the court and/or imprisonment for up to five years on indictment). The potential penalties under the civil misleading advertising sections are a court order to cease the activity, publish a corrective notice and/or pay an administrative monetary penalty of up to \$50,000 for individuals (\$100,000 for corporations).

The Act also contains a private right of action where any person that has suffered loss or damage as a result of a violation of the criminal sections of the Act (e.g., the criminal misleading advertising sections) may commence a civil action for damages.

ADDITIONAL RESOURCES - CREA

CREA provides the following other competition law awareness resources to members:

VIDEOS

Several competition law awareness videos are available.

REAL ESTATE COMPETITION GUIDE

This competition law compliance booklet is available free of charge from CREA. You can order one by contacting CREA at info@crea.ca.

COMPETITION COMPLIANCE CENTRE

CREA operates this on-line competition compliance centre, which is available to all members on www.realtorlink.ca. It includes a quiz and competition law problems to test your knowledge of competition law.

PRINCIPLES OF COMPETITION

The Principles of Competition set out the mandatory competition principles for Boards and Associations.

ARTICLE 15 BOOKLET

This booklet explains the operation of Article 15 of the REALTOR® Code dealing with promotional advertising.

CREA LEGAL SERVICE

Boards and Associations with competition questions should contact CREA's Competition Counsel.

THE REALTOR® Code, which is available on www.realtorink.ca.

ADDITIONAL RESOURCES – Competition Bureau

The following compliance materials are available from the Competition Bureau in the "News & Resources" section of the Bureau's web site at www.competitionbureau.gc.ca:

- Misleading Representations and Deceptive Marketing Practices (Pamphlet).
- What You Should Know About Telemarketing (Pamphlet).
- Bait and Switch Selling (Pamphlet).
- Misleading Representations and Deceptive Marketing Practices: Choice of Criminal or Civil Track under the *Competition Act* (Guidelines).
- Telemarketing: Section 52.1 of the Competition Act (Guidelines).
- Ordinary Price Claims: Subsections 74.01(2) and 74.01(3) of the Competition Act (Guidelines).
- Application of the Competition Act to Representations on the Internet (Guidelines).

DOS & DON'TS

The following are some basic "Dos" and "Don'ts" to help REALTORS® comply with the misleading advertising sections of the Act.

- **DON'T** mislead the public in your advertising. Ensure that all advertising is true and accurate.
- **DON'T** make representations to the public where the "general impression" could be seen as false or misleading (e.g., clearly disclose any additional information that could influence a purchasing decision, such as additional cost or conditions/restrictions).
- **DON'T** make performance claims (e.g., sales performance) without having adequate data to support the claim <u>before</u> making the claim.
- **DON'T** make comparisons to the "regular" commission charged by other agents unless the service has been offered at that price (or higher) for a substantial period of time or a substantial volume of the service has been sold at that price (or higher). See the Ordinary Price Claims section above.
- **DON'T** forget that no person needs to actually be misled or deceived to establish misleading advertising.
- **DO** clearly disclose all information in the advertisement that could affect a consumer in deciding whether to purchase the service (e.g., additional fees, conditions/restrictions). Such disclosure should be in the main body of the advertisement near the claim or offering in easily readable form.
- **DO** avoid fine print disclaimers. Make sure any disclaimer is large enough to be easily read by a consumer, close to the claim it relates to and any important additional information or conditions/restrictions are clearly stated.
- **DO** ensure that you comply with the disclosure and deceptive telemarketing rules if engaging in telemarketing (see the Deceptive Telemarketing section above).

ADVERTISING QUIZ	TRUE	FALSE
The following are "true or false" questions to test your knowledge of misleading advertising.		
To establish misleading advertising, at least one consumer must be misled or purchase the product.		
Some part of an advertisement must be literally untrue to constitute misleading advertising.		
3. A performance claim can be made about a product (e.g., sales performance) if accurate data can be obtained to verify the claim.		
 There is no limit to the potential fine that can be imposed for criminal misleading advertising. 		
5. The misleading advertising sections of the Act only apply to print publications (e.g., newspapers, flyers, etc.).		
6. When telemarketing, a caller may disclose the identity of the person on whose behalf the call is made in a "fair, reasonable and timely manner" any time during the telephone call.		
7. The REALTOR® Code requires that any advertising of compensation include whether any additional charges apply.		
8. The REALTOR® Code requires REALTORS® to disclose any conditions, restrictions, limitations or additional charges in an advertisement.		
9. For a representation to be false or misleading in a "material" respect it must involve a large purchase price or other significant impact on a consumer.		
10. To constitute misleading advertising, it must be shown that an advertiser intended to make a false or misleading advertising claim.		

(To check your quiz score, please visit www.realtorlink.ca)

Any questions or comments about the services or products CREA provides?

You can contact us at info@crea.ca.

