



**NEW YORK STATE
DEPARTMENT OF AGRICULTURE AND MARKETS
DIVISION OF FOOD SAFETY AND INSPECTION
10B AIRLINE DRIVE
ALBANY, NY 12235**

CIRCULAR 936

Subpart 272-2

**Advertising and Marketing of
Food for Sale at Retail**

Revised as of April 1987

SUBPART 272-2

ADVERTISING AND MARKETING OF FOOD FOR SALE AT RETAIL

Section

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Section 272-2.1 Definitions.

As used in relation to food and food products sold or offered for sale at retail and as used in this Part:

(a) *Sale at retail* means a transaction wherein a person sells or offers for sale food or food products to the consumer, whether at the place of business of such person or whether such sale is consummated by mail, by telephone or in writing at a place other than at the place of business. Places of business carrying on the aforesaid transaction include supermarkets, grocery stores, butcher shops, food freezer dealers, food plan companies and other retail foodstores.

(b) *Food and food product* mean all articles of food, drink confectionery or condiment, whether simple, mixed or compound, used or intended for use by men or animals, and shall also include all substances or ingredients to be added to food for any purpose.

(c) *Advertisement or advertising* means all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or which are likely to induce, directly or indirectly, the purchase of a food or food product.

(d) *Commissioner* means the Commissioner of Agriculture and Markets.

Section 272-2.2 Availability of advertised items.

No person shall offer for sale at retail any food or food product at a stated price by means of any advertisement disseminated in a area served by any of his stores or places of business which are covered by the advertisement which do not have such products in stock, and readily available for sale to customers during the effective period of the advertisement, unless there is a clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores or places of business, products or prices otherwise included within the advertisements.

(a) If an advertised item is not readily available, clear and adequate notice shall be provided that the item is in stock and may be obtained upon request.

(b) It shall constitute a defense to a charge under this section if the retailer maintains records sufficient to show that the advertised products were ordered in adequate time for delivery and delivered to the stores or places of business in quantities sufficient to meet reasonably anticipated demands.

(c) It shall also constitute a defense to a charge under this section if the retailer establishes that advertised products were actually ordered in good faith, in quantities sufficient to meet reasonably anticipated demands, but were not delivered due to circumstances beyond the retailer's control and not reasonably foreseeable by him. In determining whether the retailer acted in good faith and with reasonable foresight, the commissioner shall consider all circumstances surrounding the placement of the advertisement and the nondelivery of the product. The availability of "rain checks" shall be considered by the commissioner as a relevant factor, but the existence of a "rain check" policy, in and of itself, shall not constitute compliance with this section.

Section 272-2.3 Mispricing of advertised items.

(a) No person shall offer for sale at retail any food or food product at a stated price by means of any advertisement disseminated in an area served by any of his stores or places of business which are covered by the advertisement which do not have such products conspicuously and readily available for sale to customers at or below the advertised prices, unless there is a clear and conspicuous disclosure in all such advertisements as to all exceptions and/or limitations or restrictions with respect to stores or places of business, products or prices otherwise included within the advertisements.

(b) In determining whether this section will be applied, the commissioner shall consider all circumstances surrounding failure to make advertised items conspicuously and readily available for sale at or below the advertised prices but were not made available at those prices due to circumstances beyond the advertiser's control.

Section 272-2.4 Disclaimers.

(a) General disclaimers in advertising relating to product availability will not be considered to be in compliance with the disclosure provisions of sections 272-2.2 and/or 272-2.3 of this Subpart. Examples of such general disclaimers would be:

- (1) "Not all items available at all stores."

(2) A statement that a particular item or group of items is “Available at most stores.”

(b) Specific, clear and conspicuous disclaimers in advertising relating to product availability only in those stores possessing particular facilities will be considered to be in compliance with the disclosure provisions of section 272-2.2 of this Subpart. An example of such a disclaimer would be: “Available only at stores featuring delicatessen departments.”
