

OfficeMax, Inc.

MaxPerks Bonus Rewards Program

Challenger:

Office Depot, Inc.

- **Aggressive price competition benefits are only realized when claims are accurate and enable consumers to assess the value of a sales offer.**

Basis of Inquiry: Print and internet advertising claims made by OfficeMax, Inc., an office supply store (“the advertiser”), for its MaxPerks Bonus Rewards program were challenged by Office Depot, Inc. (“the challenger”), a competing office supply store. The claim at issue:

“It’s like getting one FREE.”

Under this claim appears in smaller print “Pay \$34.99 Plus Earn \$35¹ in MaxPerks Bonus Rewards.” Either directly on the bottom of the advertisement or -- as in the case of the weekly circular – on another page entirely, appears a discloser describing the limitations and conditions of the rewards program offer: consumers can not use the points for thirty days; reward points are subject to cancellation by advertiser at any time; and reward points expire ninety days after issuance.

Challenger’s Position:

The challenger and advertiser are major retailers of office products. The challenger questioned the truth and accuracy of the advertiser’s claim that *“It’s like getting one FREE”* for the advertiser’s MaxPerks Bonus Rewards program, a loyalty program whereby consumers enroll and, with each purchase at OfficeMax, earn points that can be used to purchase other office products.

The challenger maintained that the advertiser’s “free” claim conveys the message that either the consumer’s initial purchases are free or that their money will be returned to them at some future date. The challenger argued that, under the advertiser’s offer, consumers would not receive any office supplies for “free.” The textbook definition of “free” is without cost or that the seller is “not charging anything.”² By contrast, the advertiser’s offer requires consumer to pay for items with money that will not at any

¹ The challenger originally challenged the claim “Pay \$37.99 Plus Earn \$35 in MaxPerk Bonus Rewards.” The advertiser represented that the “37.99” was a typographical error and voluntarily agreed to permanently discontinue its use, a decision that NAD determined was necessary and proper. The advertiser had already permanently discontinued the use of the phrase *“Its like getting it FREE...”*

² Merriam-Webster Online Dictionary (2009); Cambridge Online Dictionary (2009).

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point be returned to them (*e.g.*, as in a rebate offer) and, the challenger maintained, consumers will also not, as an immediate result of their purchase, receive additional supplies of value equal to the items they purchased (*e.g.*, as in a “buy one get one free” offer). Instead, the challenger argued, consumers are only entitled to receive MaxPerk Bonus Rewards points subject to several material limitations: (1) consumers cannot use the points for thirty days; (2) reward points are not cash equivalent because they can be redeemed only at Office Max; (3) reward points are subject to cancellation by advertiser at any time; and (4) reward points expire ninety days after issuance.³

In response to the advertiser’s argument that the use of the word “*like*” before “*free*” (“*it’s like getting one FREE*”) vitiates any possible confusion that consumers are receiving a reward card instead of an initially free purchase or a rebate, the challenger rejoined that the word “*like*” all by itself does not convey the message that consumers are getting a rewards card. The challenger also noted that the word “*free*” is used frequently throughout the advertiser’s print advertisements and shelf talkers and that “*FREE*” appears in a bright color, capital letters and in a font three times larger than the surrounding print, drawing consumers attention to the “*free*” aspect of its claim.⁴

Advertiser’s Position:

The advertiser maintained that the challenger unfairly characterized the challenged claim, and that it should be reviewed in its full iteration: “*It’s Like Getting One FREE. You Pay \$34.99 Plus Earn \$35 in MaxPerk Bonus Points Rewards.*” The latter part of the claim (“*in MaxPerks Bonus Rewards*”) is conspicuous, easy to read and always immediately appears underneath the claim “*You Pay \$34.99 Plus Earn \$35*” as part of the main copy. In response to the challenger’s argument that the claim misleads consumers into believing that they will receive money back, the advertiser stated that the record was bereft of any evidence to support that proposition. The fact that the benefit to consumers is not cash but MaxPerks points is stated prominently in the body of the advertisement. The plain language of the claim expressly states that it is not a free cash offer.

The advertiser maintained that, while the claim had to be reviewed in the context of the complete advertisement, even standing alone the claim “*its like getting one free*” is truthful because the advertiser does not claim that the merchandise is “*free*” but “*like free.*” The phrase suggests to consumers that there are conditions on the offer and also that the offer is not a rebate.

³ The challenger also argued that the disclosures are in most cases not clear and conspicuous because they appear several pages behind the advertisements or a “click through” on its web page. However, the challenger maintained that its main argument is that the disclosures contradict the main message of the claim and therefore can not cure the misleading impression that the advertiser is offering office supplies for free.

⁴ The challenger also noted that the FTC “Free” Guides apply to “free and similar representations.” 16 C.F.R. 251.1, *et seq.*

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The advertiser denied that the conditions and limitations identified by the challenger (e.g., thirty-day waiting period, ninety-day expiration time, etc) are material terms of the “free” offer; instead, they are mere descriptors of the MaxPerk Bonus program. Thus, the advertiser argued, consumers are not required to locate material terms in a different location other than the main body copy.⁵ The advertiser also noted that the challenger had failed to submit any evidence as to how consumers would be deceived by the claim as the offer clearly states that the consumer will pay no more than the advertised price of the copier paper in order to receive an equivalent of \$35 in MaxPerk Bonus Rewards.

Decision:

NAD strives to ensure that advertising that includes sales offers and discounted prices, is truthful, accurate and not misleading to consumers. NAD recognizes that aggressive price competition benefits consumers, but such benefits are only realized when claims are accurate and enable consumers to assess the value of a sales offer. Accordingly it is incumbent on advertisers not only to clearly communicate the price of the items for sale, but to ensure that the savings promised is real. The FTC Guide *Concerning the Use of the Word “Free” and Similar Representations* notes that, “because the purchasing public continually searches for the best buy, and regards the offer of ‘free’ merchandise or service to be a special bargain, all such offers must be made with extreme care so as to avoid any possibility that consumers will be misled or deceived.”⁶ As such, the word “free” has cache with consumers and should be reserved for offers that are truly without cost to the consumer.

Retailers use the offer of “free” merchandise as a promotional device to attract customers, but NAD determined here that what the advertiser is offering is not free merchandise but rather the opportunity to join a loyalty program and earn points that can be used towards purchasing merchandise in the future. Receiving merchandise as a benefit of being a member of a loyalty program is very different from receiving free merchandise or cash back because loyalty program members must register with the advertiser, earn points redeemable only at the advertiser’s store, and must ensure that they redeem those points within a specific time frame otherwise those points are lost forever.⁷ NAD observed that that misimpression created by the claim cannot be cured with a clear and conspicuous disclaimer within close proximity to the claim because the substantial and material limitations of the loyalty program directly contradict the main message of the claim that consumers will receive merchandise for “free.” NAD further determined that phrase “like free” is a representation similar to the word “free” and connotes the same meaning, i.e., that a consumer may purchase an item to receive another item of equal value or a cash rebate. For these reasons, NAD recommended that the advertiser discontinue the claim “It’s like getting one FREE.”

⁵ The advertiser also argued that retailers routinely use the word “free” when describing the benefits of their rewards programs.

⁶ 16 C.F.R. 251.1, *et seq.*

⁷ Further, unlike cash or immediately receiving a second free item, here the advertiser may cancel the rewards points at any time.

Conclusion

NAD recommended that the advertiser discontinue its use of the claim "*It's like getting one FREE*" to characterize merchandise that can be obtained through participation in its loyalty/rewards program.

Advertiser's Statement:

OfficeMax thanks the NAD for the opportunity to participate in the self-regulatory process. OfficeMax, however, respectfully disagrees with the NAD's decision and requests a referral to the NARB to appeal. As OfficeMax stated in its submissions, the campaign at issue is very similar (if not identical) to the campaigns of many other retailers. OfficeMax is unaware, and the record is void, of evidence showing actual consumer confusion or harm in connection with OfficeMax's campaign. If this decision is uncorrected, the NAD would be negatively affecting the ability for retailers to engage in marketing beneficial to consumers. In summary, OfficeMax disagrees with the NAD's decision, specifically its findings that: (1) "it's like getting one free" connotes the same meaning as "it's free"; (2) "It's like getting one FREE." is an offer that cannot be used to characterize merchandise obtained through participation in a loyalty/rewards program; (3) clear and conspicuous disclaimers of the material terms of the offer within close proximity to the claim cannot cure the alleged misimpression created by the claim (it is unclear from the NAD's ruling if it is limiting its position to the use of disclaimers versus content contained as part of the claim); (4) the terms of the offer conflict with the claim; and (5) OfficeMax is not offering free merchandise but rather the opportunity to join a loyalty program and earn points that can be used towards purchasing merchandise in the future. **(#5186 KAD, closed 06/11/2010)**