

STAPLES, INC.**Staples® Rewards Program**Challenger: *Office Depot, Inc.*

- **NAD recognizes that aggressive price competition benefits consumers, but such benefits are only realized when savings claims are accurate and enable consumers to assess the value of a bargain or sale. Accordingly it is incumbent on advertisers to ensure that the savings promised is real.**

Basis of Inquiry: Claims made in print and Internet advertisements by Staples for its Staples Rewards Program were challenged by Office Depot, Inc., a competitive retailer of office supply products. The following are representative of the claims that formed the basis of this inquiry:

“Buy ANY of these office supplies, get 100% back in Staples Rewards.”

“It’s like getting supplies for FREE.”

The Challenger’s Position:

The challenger asserted that the advertised promotion does not give consumers the ability to get office supplies for “free” and runs contrary to the principles outlined in the FTC Guide Concerning Use of the Word “Free” and Similar Representations (“The FTC Guide”).¹ It was the challenger’s position that the advertiser’s “Free” claims do not provide any articles without cost or without charge to consumers but, rather, consumers must pay cash out of their own pockets for the items – cash they will never receive back in return. Rather than getting their supplies without cost or charge, the challenger argued, consumers are only entitled to receive a Staples Rewards Card at a later time, via the mail, which can only be used to purchase additional products at Staples subject to a number of material limitations, thereby making the advertiser’s “Free” claims nothing “like getting supplies for free.”

The challenger further argued that more recent variations of the advertiser’s claim “It’s Like Getting [specific item] for FREE” expressly mislead consumers into believing that their *initial* purchase will be free and that consumers will not understand that the offer merely entitles the consumer to receive additional items in the future as part of the Rewards program.²

The challenger cited the FTC Guide, which state that in order to avoid misleading or deceiving consumers with regard to the use of the term “Free”:

“when making ‘Free’ or similar offers all the terms, conditions and obligations upon which receipt and retention of the ‘Free’ item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms,

¹ 16 C.F.R. §251.1

² For example, recent advertising claims now tout, “Your final price [of the advertised product] after Staples Rewards – FREE”, “Buy ANY backpack, get 100% back in Staples Rewards. It’s like getting a **FREE backpack!**” and “Get 100% back in Staples Rewards on select Duracell batteries. It’s like getting *them* for free”

conditions and obligations should appear in close conjunction with the offer of ‘Free’ merchandise or service.”³

The challenger asserted that the advertiser’s “Free” claims violate both the spirit and the letter of the FTC Guide, in that despite its claim “it’s like getting supplies for free”, the advertising does not include the conditions and major limitations of its offer clearly and conspicuously.⁴

The challenger rejected the advertiser’s argument that its advertisements are not deceptive because consumers are familiar with loyalty programs and that disclosures are made at the time of the customer’s registration for its Rewards Program and/or by the disclaimer in the advertising. The challenger argued that material terms and conditions cannot be relegated to a mere footnote or legal disclaimer, nor can an advertiser assume that consumers are familiar with an advertiser’s offerings, particularly consumers who are not members of its Rewards program.

The challenger argued that the advertiser’s “Free” claims attract consumers’ attention by misleading them into believing that they may actually get free office supplies from Staples when, in fact, all they receive is the possibility that they may be able to obtain more office supplies (using Rewards points) at some future time provided that they spend enough money and act fast enough.

The Advertiser’s Position:

It was the advertiser’s position that its advertisement promote, in a straightforward manner, an offer whereby consumers can earn 100% back in Staples Rewards when purchasing the office supplies that are pictured in the advertisements. When a consumer buys any of the office supplies depicted, he or she will earn 100% of the purchase price back in Staples Rewards, which can then be used to get the same or other products at Staples. Unlike a regular purchase, for this special offer, consumers are not required to spend a minimum amount of money or meet any other thresholds in order to earn the Staples Rewards. Regardless of how much the consumer spends, they will receive that amount in Staples Rewards. While consumers are limited to the purchase of one of each item, that information is clearly and conspicuously disclosed in the advertisement, in close proximity to the claim. Given that consumers earn back 100% of the purchase price of each of the items purchased, if they choose to do so they can receive the same supplies for free (or redeem the Rewards for other supplies up to that same value). As such, the advertiser asserted, its “like free” claim is fully substantiated.

³ 16 C.F.R. § 251.1(c).

⁴ The challenger explained that the material limitations, which are inadequately disclosed, are that (1) the reward that consumers receive is not cash (i.e., the equivalent of “free”), but rather a Staples Rewards gift card, which can only be redeemed for additional products at Staples, subject to a number of exclusions including sales tax, delivery charges, custom printing orders placed online, promotional products, Staples gift cards, prepaid phone cards or postage stamps; (2) the rewards, if received at all, aren’t received immediately, but rather are not paid until, at the earliest, the following month after the actual purchase (assuming that the consumer has actually earned \$10 in that calendar quarter); and (4) the rewards aren’t usable like cash, as they expire only two months after issuance.

The advertiser rejected the challenger's argument that because Staples has used the word "free" in connection with a Rewards offer, the disclosures accompanying its offer are no longer sufficient. The advertiser asserted that the challenger, in so arguing, ignores the context in which the word "free" is used. The advertiser argued that no "free" claim is being made here. Rather, the phrase "like free" is used in the context of a specific Rewards offer, to explain the benefits of the Rewards program. When the actual claims are reviewed in context, it is clear that Staples' has properly disclosed all material terms and conditions of the advertised offer. Moreover, the advertiser contended, the phrase "like free" means "similar to free;" it does not mean "free" – a fact which cannot be ignored when making a determination about what claims are communicated by the advertisements when viewed in their entirety.⁵

The advertiser further maintained that, in accordance with the FTC Guide⁶ the disclosures in its advertisements are clear and conspicuous in that they are prominently placed in a location where it is easy for consumers to see and read them, and presented in clear, simple language, in sufficiently large type, against a contrasting background and in close proximity to the claims that they modify. As such, the advertiser stated, there is no possibility that a consumer will see the claim without also seeing all material limitations associated with its Staples Rewards program.

Additionally, the advertiser argued, the headline in its advertisements prominently state that consumers receive "100% back in Staples Rewards" such that there is no confusion that what is being offered is not cash. Nonetheless, the advertiser added a clear and conspicuous disclaimer directly under the word "free" which states "no cash/credit back." and that Rewards are not paid immediately.⁷

As concerns the advertisements stating, "Get 100% back in Staples Rewards on select Duracell Batteries. It's like getting them for FREE" and "Buy ANY backpack, get 100% back in Staples Rewards. It's like getting a FREE backpack!" the advertiser pointed out that the material details as to these offers are clearly and conspicuously made clear to the consumer.

DECISION:

In recent years, NAD has had the opportunity to review advertising claims wherein an advertiser touted "Free" merchandise or services, and the reasonable message conveyed by such advertising. NAD recognizes that aggressive price competition benefits consumers, but such

⁵ In any event, the advertiser argued, consumers taking advantage of its valuable offer actually *do* earn supplies that are free. There is no fee to participate in its Rewards Program and no fees charged to redeem the Rewards. Consumers simply pay the regular price for the initial supplies depicted (the prices, of course, are not marked up to cover the cost of the Rewards that are earned), and any supplies that consumers obtain thereafter through its Staples Rewards Program are truly free. Therefore, the advertiser maintained, its offer meets the definition of "Free" as set forth in the FTC Guide (Citing 16 C.F.R. §251.1[b][1]).

⁶ 16 C.F.R. §251.1

⁷ With respect to the challenger's contention that the advertiser should disclose that Rewards cannot be redeemed to pay sales tax, delivery charges, custom printing orders placed online, gift cards, prepaid phone cards, or postage stamps, the advertiser countered that the central message of its advertisement is that when you buy office supplies, you can earn more of the same in return – which is precisely what consumers can do. The advertiser added that only the *material* terms of an offer are required to be disclosed – not every single possible term and limitation.

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benefits are only realized when savings claims are accurate and enable consumers to assess the value of a bargain or sale.⁸ Accordingly it is incumbent on advertisers to ensure that the savings promised is real.

The challenged advertisements state, “Buy ANY of these office supplies, get 100% in Staples Rewards. It’s like getting supplies for FREE!” Directly beneath the word “FREE”, the advertiser details various material limitations on this offer including, but not limited to, the fact that the purchase price paid for the item(s) will be credited to the customer’s Staples Reward account, that he or she must be a member of the Staples Rewards program, that Rewards will be issued by a certain time in the future, and that the customer will not receive cash or credit back.

The offer of “Free” merchandise is a promotional device frequently used to attract customers and providing such merchandise with the purchase of some other article or service is undeniably a useful, valuable and strong marketing tool.⁹ However, as NAD has previously noted, the FTC Guide Concerning the Use of the Word “Free” and Similar Representations does not exist in a vacuum, and that use of the word “Free” carries a certain cache and should be reserved for those offers that are genuinely “Free.”¹⁰

NAD acknowledged (and the challenger did not dispute), that the advertiser should have the right to tout that it offers a “Rewards” program wherein consumers can accrue Staples Rewards through their purchases, which they can redeem at some later point in time for other office supplies. In this respect, NAD took no issue with the advertiser’s claim, “Buy ANY of these office supplies, get 100% back in Staples Rewards.” However, NAD determined, this cannot be equated with receiving merchandise for “Free” as that word is commonly understood by the general consumer.

For example, typically when an advertiser offers a promotion such as “Buy One, Get One Free”, the consumer purchases the first item at its regular price whereupon, at the register, the consumer obtains the second item at no additional charge. Indeed, the advertiser here offers other supplies (within the same circulars for the challenged offer), as “FREE...after easy rebate.” In these rebate offers the consumer purchases, for example, a 10-pack of mechanical pencils for \$2.99” and is provided with an, “easy rebate” of \$2.99 – the same amount as the consumer’s purchase. In this instance, with little effort, the consumer truly receives “free” merchandise.

In contrast, in the challenged promotion, after purchasing the initial item, it is only after the customer has been explained the details the advertiser’s Staples Rewards program *and registers* for the advertiser’s loyalty program, that the purchase price is paid back in Staples Rewards – a month or so after the initial purchase. These Rewards are good for future purchases of supplies (subject to various exclusions noted in the disclaimer), only at the advertiser’s store, provided

⁸ See Time Warner Cable (Time Warner Cable Internet & High Definition Television Offerings), Report #5143, *NAD/CARU Case Reports* (February 2010).

⁹ 16 C.F.R. 251.1(a)

¹⁰ Time Warner Cable (Time Warner Cable Internet & High Definition Television Offerings), *supra*.

that the customer uses his or her earned Rewards¹¹ within a limited specified time frame, before the Rewards expire. NAD concluded that such an offer cannot be equated with receiving the subsequent items for “Free” as that word is commonly understood by the general consumer. Moreover, any of the disclosures discussed by the parties (concerning the material terms of this offer), only serve to contradict the main overarching message conveyed by the challenged advertisements – that simply by making an initial purchase at regular price, the consumer is obtaining additional merchandise for “Free.” Simply put, merchandise is either free or it’s not – such an offer it cannot be qualified, by disclosures explaining, for example, that an item is free if one redeems Rewards for another time before a time-sensitive date. Likewise, NAD determined that the claim “like getting supplies for FREE” (as noted by the FTC Guide) is a representation similar to the word “free” connoting the same thing and recommended it be discontinued.

Nothing in NAD’s decision precludes the advertiser from promoting its Staples Rewards Program (with accompanying disclosures) or that consumers can accrue 100% of their purchase on select items in Staples Rewards good towards future purchases of supplies.

Conclusion:

NAD concluded that the advertiser’s claim “Buy ANY of these office supplies, get 100% back in Staples Rewards” was substantiated. However, NAD concluded that the advertiser’s use of the claim, “It’s like getting supplies for FREE” in the context of characterizing merchandise that can be obtained through participation in its rewards/loyalty program, was inaccurate and recommended that it be discontinued.

Advertiser’s Statement:

Staples is fully committed to ensuring the truth and accuracy of its advertising and welcomes the opportunity to participate in the self-regulatory process. Staples is pleased that NAD found that the claim, “Buy any of these office supplies, get 100% back in Staples Rewards®,” is proper. Staples is proud of its well-known Staples Rewards® program, which enables Staples Rewards® members to gain valuable benefits from their shopping with Staples, including free supplies. However, Staples respectfully disagrees with NAD’s finding that Staples may not advertise that obtaining free supplies through the Staples Rewards® program is “like getting supplies for free,” regardless of any qualifying information that may be included. Therefore, Staples will appeal this part of the NAD’s decision to the NARB pursuant to Section 3.1 of the NAD Procedures. **(#5185 MSZ, closed 06/11/2010)**

¹¹ by returning to the store, shopping online or by phone.