

109:4-3-04 Use of word "free" etc.

- (A) It shall be a deceptive act or practice in connection with a consumer transaction for a supplier to use the word "free" or other words of similar import or meaning, except in conformity with this rule. It is the express intent of this rule to prohibit the practice of advertising or offering goods or services as "free" when in fact the cost of the "free" offer is passed on to the consumer by raising the regular (base) price of the goods or services that must be purchased in connection with the "free" offer. In the absence of such a base price a "free" offer is in reality a single price for the combination of goods or services offered, and the fiction that any portion of the offer is "free" is inherently deceptive.
- (B) For the purposes of this rule, all references to the word "free" shall include within that term all other words of similar import and meaning. Representative of the word or words to which this rule is applicable would be the following: "Free;" "Buy 1, Get 1 Free;" "2 for 1 Sale;" "50% Off with Purchase of 2." Offers of "free" items of goods or services which may be deceptive for failure to meet the provisions of this rule may not be corrected by the substitution, for the word "free," of such similar words and terms as "gift," "given without charge," "bonus," or other words and terms which tend to convey to the consuming public the impression that an item of goods or services is "free."
- (C) When using the word "free" in a consumer transaction, all the terms, conditions, and obligations upon which receipt and retention of the "free" goods or services are contingent shall be set forth clearly and conspicuously at the outset of the offer. Terms, conditions, and obligations of the offer must be printed in a type size half as large as the word "free," and all of the terms, conditions, and obligations should appear in close **PROXIMITY** with the offer of "free" goods or services. Disclosure of the terms of the offer set forth in a footnote of an advertisement to which reference is made by an asterisk or other symbol placed next to the offer is not regarded as making disclosure at the outset.
- (D) In a consumer transaction in which goods or services are offered as "free" upon the purchase of other goods or services the supplier must insure:
- (1) That the unit regular price charged for the other goods or services is not increased, or if there is no unit regular price, the unit price charged for the other goods or services is continued for a reasonable period of time;
 - (2) That the regular quality of the other goods or services is not reduced, or if there is no regular quality, the quality level of the other goods and services is continued for a reasonable period of time;
 - (3) That no other conditions are attached to the offer except for the basic condition that the other goods or services must be purchased in order for the consumer to be entitled to the "free" goods or services.

- (E) Only the supplier's regular price for the goods or services to be purchased may be used as the basis for a "free" offer. It is, therefore, a deceptive act or practice for a supplier to offer "free" goods or services based on a price which exceeds the supplier's regular price for other goods or services required to be purchased. Likewise, it is a deceptive act or practice for a supplier to make a "free" offer when the price of other goods or services required to be purchased is based on a price being charged by others in the supplier's trade area for the same or similar goods or services when, in fact, such price is in excess of the supplier's regular price.
- (F) (1) "Regular price" means the price at which the goods or services are openly and actively sold by a supplier to the public on a continuing basis for a substantial period of time. A price is not a regular price if:
- (a) It is not the supplier's actual selling price;
 - (b) It is a price which has not been used in the recent past; or
 - (c) It is a price which has been used only for a short period of time.
- (2) "Regular quality" means the quality level at which the goods and services are openly and actively sold by the supplier to the public on a continuing basis for a substantial period of time. A quality level is not a regular quality if:
- (a) It is not the supplier's actual quality level;
 - (b) It is a quality level that has not been used in the recent past; or
 - (c) It is a quality level which has been used only for a short period of time.
- (G) It is recognized that some goods and services are almost never sold at a single regular price, but are instead sold by means of individual negotiated transactions. A supplier of goods or services sold in negotiated transactions is not precluded by this rule from making a "free" offer provided the supplier is able to establish a mean average price immediately prior to the "free" offer, the goods or services are fungible, and the mean average price during the "free" offer does not exceed the mean average price immediately prior thereto.
- (H) Continuous or repeated "free" offers are deceptive acts or practices since the supplier's regular price for goods to be purchased by consumers in order to avail themselves of the "free" goods will, by lapse of time, become the regular price for the "free" goods or services together with the other goods or services required to be purchased. Under such circumstances, therefore, an offer of "free" goods or services is merely illusory and deceptive.
- (I) This rule does not preclude the use of nondeceptive, "combination" offers in which two or more items of goods and/or services such as toothpaste and a toothbrush, or soap and

deodorant, or clothing and alterations are offered for sale as a single unit at a single stated price, and in which no representation is made that the price is being paid for one item and the other is "free." Similarly, suppliers are not precluded from setting a price for an item of goods or services which also includes furnishing the consumer with a second, distinct item of goods or services at one inclusive price if no representation is made that the latter is free.

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