

Note: All deletions in this proposed amended administrative rule are *[bracketed and in italics]* and all new additional language is in **bold letters**.

137-020-0015

Misleading Use of "Free" Offers and Rebates

1. *[(1)]* Definitions: As used in this rule:

a. *[(a)]* The definitions of terms set forth in ORS 646.605 and OAR 137-020-0020 are applicable;

b. *[(b)]* "Free" means without charge or cost, monetary or otherwise, to the recipient, and includes terms of essentially identical import, such as **"included in the price," "at no additional cost," "1¢ sale," "2 for the price of 1" and "give away"** and, in the case of real estate, goods or services described in subsection (2)(a) of this rule, an offer of any combination of real estate, goods or services at a single price. A free offer in conjunction with the sale or lease of real estate, goods or services is one that conveys to customers the message that real estate, goods, *[or]* services, **gift certificates or cards, cash cards, gas cards, or any other things of value** are offered at no cost in conjunction with the purchase of other real estate, goods or services for no more than their regular price;

c. "Rebate" means the return of any part of a payment made by a consumer in conjunction with the sale or lease of real estate, goods or services and includes, but is not limited to, an offer of a future cash refund, a direct or indirect payment of money to a consumer or a voucher for future payments.

d. "Regular Price" means the price, in the same quantity, quality and with the same service, at which the seller or advertiser of the product or service has openly and actively sold the product or service in Oregon in the most recent and regular course of business, for a reasonably substantial period of time, for not less than a continuous 30-day period prior to the offer. For consumer products or services which fluctuate in price, the "regular price" is the lowest price at which any substantial sales were made during the described 30-day period. Except in the case of introductory offers, if no substantial sales were made at the "regular price", the price will be presumed to be arrived at through bargaining with potential purchasers.

e. *[(c)]* "Verifiable retail value" means:

(1) *[(A)]* A price at which an offeror *[or]* can demonstrate that a substantial number of free items have been sold at retail in Oregon by a person other than the offeror; or

(2) *[(B)]* If substantiation described in this section is not available to an offeror, no more than one and one-half times the amount an offeror paid for a free item.

EXAMPLE: If substantiation of **verifiable retail value**, as [described in this] **required by subsection (2)(b)(3) of this rule**, is not available, and the offeror pays \$10 for a free item, the verifiable retail value of that free item would be \$15.

2.[(2)] Unfair or Deceptive Use of "FREE" Offers: A person engages in conduct which is unfair or deceptive in trade or commerce:

a.[(a)] When *[it]* **the person** makes a free offer in conjunction with the purchase or lease of real estate, goods or services[.]:

(1) [it] The price, size, quantity, or quality of which is normally [determined by that seller by] **arrived at through** bargaining with potential purchasers;

(2) When the item to be purchased or leased can be purchased or leased for a lesser price without the "free" item;

(3) At a price that is higher than the "regular price;" or

(4) During a home solicitation as defined by ORS 83.710(1), unless:

(a) Exempted by ORS 83.710(2);

(b) The goods or services are sold by a person or entity that has a franchise from a unit of local government to operate and sell its goods or services and pays franchise fees;

(c) The seller's rates or prices are regulated by local, state or federal government; or,

(d) The home solicitation offer is for real estate, goods or services, the price, size, quantity, or quality of which is not arrived at through bargaining and is not sold at a regular price.

[For purposes of this subsection, an offer of any combination of real estate, goods and services for a single price is not a free offer if:

(A) The "free" item is offered by a manufacturer or another party, separate from the seller, and there is no direct cost to the seller; or

(B) The offer includes no terms, other than the offer of the combination itself, indicative of a free offer as defined in subsection (1)(b) of this rule and the offer includes one of the following disclaimers, communicated in a clear and conspicuous manner, as defined in OAR 137-020-0050:

(i) "Cost of promotion may increase price of _____." (The phrase shall be completed with a description of the basic real estate, goods or services offered for sale.); or

(ii) "This is a combination offer. Make your best deal on a package price."]

[(b) When it makes a free offer combined with the offer of real estate, goods or services, the price of which is not normally determined by bargaining and in order to receive the "free" real estate, goods or services the recipient must at any time purchase or lease other real estate, goods or services at a price which is higher than that at which the person offered for sale or sold such real estate, goods or services in the ordinary course of business during the 30 days preceding the "free" offer (unless such higher price is the regular price at which such real estate, goods or services are thereafter sold in the regular course of business);]

b.[(c)] When *[it]* **the person** makes a free offer and in order to qualify for the offer, the recipient will be given a presentation intended to result in the promotion of a business or sale or lease of real estate, goods or services unless the offer contains a clear and conspicuous disclosure:

(1)[(A)] Identifying the business promoted *[or]* **and** the goods or services offered for sale or lease;

(2)[(B)] That the recipient must listen to a sales or promotional presentation in order to receive the free offer or that the recipient is entitled to receive the free offer after refusing to listen to the presentation, whichever is the case. If the free item described is not immediately available for delivery to the recipient after the recipient has listened to a sales or promotional presentation, the recipient shall be given the verifiable retail value of the free item in cash or by a valid check;

(3)[(C)] Including a description of each potentially free item and its verifiable retail value *[in the trade area in which the offer is made];*

(4)[(D)] If the free item is one or more of a larger group, if received on a random basis, *(in addition to compliance with subsection (2)(e) of this rule [section])* a description of the actual odds of receiving each item based on the initial odds and revised to reflect actual current odds at the beginning of each month of use of the free promotion; if not on a random basis, a description of the method of selection used. The description of the initial odds and the current odds shall include a statement of the total number of each free item to be given away by the offeror and the total number of chances to obtain the free item being distributed by the offeror. If the promotion utilizing the free item involves distribution by more than one offeror or sponsor, the description of the initial odds and the actual current odds also include a statement of the total number of each free item to be given away by all offerors or sponsors and the total number of chances to obtain the free item being distributed by all offerors or sponsors. The odds and verifiable retail value shall be printed in the same size type as the principal description of each free item and shall appear immediately adjacent to said description; **and**

(5)[(E)] In a telephone or door-to-door solicitation, inclusion of the information required by ORS 646.608(1)(n) within 30 seconds after beginning the conversation.

c.[(d)] When [it] the person makes a free offer in conjunction with the purchase or lease of real estate, goods or services at or lower than their regular price,

d. When the person makes a free offer as described in subsection (2)(b) [or (c)] of this rule [section] and, in order to receive the free real estate, goods or services, the recipient is required to pay money to the offeror, promoter or any other person for any fee, including but not limited to a fee for postage, shipping, storage, handling, processing, registration or verification, which terms are used herein for purposes of illustration and not by means of limitation;

e.[(e)] In the case of all free goods or services offered on a random basis as described in subsection [paragraph] (2)(b)(4) [(c)(D)] of this rule, unless it retains for at least one year a list of the names and addresses of all persons receiving free goods or services with a verifiable retail value of \$10 or more.

f. When a person makes a free offer in conjunction with the purchase or lease of real estate, goods or services that is permitted by this rule, which requires the recipient to pay any other costs or meet other conditions in order to accept or use the "free" offer, and the person fails:

(1) To clearly and conspicuously display in an advertisement of a free offer all terms, conditions, limitations and costs of accepting the free offer; or

(2) To clearly and conspicuously disclose, in any sales presentation or home solicitation, orally and in writing in at least 12 point bold type, all terms, conditions, limitations and costs of accepting any free offer, prior to consummating any transaction.

3. For purposes of subsection (2)(a) of this rule, an offer of any combination of real estate, goods and services for a single price is not a free offer if the "free" item is offered by a manufacturer or another party, separate from the seller, and there is no direct cost to the seller.

4. Unfair or Deceptive Use of "REBATE" Offers: A person engages in conduct which is unfair or deceptive in trade or commerce:

a. When the person makes a misleading or deceptive rebate offer in conjunction with the purchase or lease of real estate, goods or services; or

b. When the advertisement or solicitation of the rebate fails to clearly and conspicuously display in close proximity to the rebate offer all terms, conditions, limitations and costs of receiving the rebate.