

Case #6020 (11/04/2016)

Lowe's Companies, Inc.

Lowe's Appliances

Challenger: Consumer

Product Type: Appliances

Issues: Pricing/Discounts/Sales Claims

Disposition: Modified/Discontinued

- Savings claims involving the phrase “up to,” require that the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectably encountered by consumers.
- An effective disclosure, regardless of format, in order to be fully understood, must be “clear and conspicuous” such that it is “displayed in a manner that is readily noticeable, readable and/or audible, and understandable to the audience to whom it is directed.

Basis of Inquiry: Claims made in a television advertisement by Lowe's Companies, Inc. (“Lowe's” or “the advertiser”) for appliances were challenged by a consumer. Specifically, the consumer referred to the claim “*Now get 20% of appliances \$396 or more at Lowe's.*” The consumer stated that the claim at issue implied that any appliance over the \$396 regular price is discounted 20%, however a hard to read footnote excludes virtually all the popular major brands of appliances from the 20% claim, limiting the discount to only 10%. The footnote states “*Valid 8/10 – 8/23. Whirlpool, Maytag, KitchenAid, Amana, GE, LG, Samsung, Frigidaire, Electrolux and Bosch brands limited to a maximum 10% discount, unless otherwise shown. See store for more details and more exclusions. US only.*” The consumer contacted NAD with concerns that this is a bait-and-switch advertisement, that lures shoppers to Lowes or Lowes.com on the promise of 20%, but they then discover that the discount is often significantly less.

Advertiser's Position:

According to the advertiser, the advertisement as aired and viewed by the consumer contained an error that deviated from Lowe's intended offer. Specifically, the advertisement was intended to read “*Up to 20% Off Appliances \$396 Or More*” to clarify the scope of the offer and the pricing variability within Lowe's product assortment.¹ Lowe's believes that the corrected advertisement, which contains the “up to” language, when taken as a whole, is not deceptive or misleading.

The advertiser stated that upon learning of the error in the television advertisement at issue, which was set to run from August 9, 2016 to August 21, 2016, Lowe's immediately pulled that advertisement and substituted a corrected advertisement. Lowe's also posted a correction notice that specifically addressed this advertisement in Lowe's stores.

Decision:

Given the advertiser's acknowledgement that the original advertisement contained an inadvertent error, NAD's review was limited only to the advertiser's intended advertisement which makes the claim “*Up to 20% Off Appliances \$396 Or More.*”

¹ As evidence that the advertisement at issue contained an inadvertent error, the advertiser submitted to NAD copies of advertisements for the same promotion in other marketing channels, which include the correct “up to” language.

With respect to the advertiser's claim of savings "*Up to 20% Off Appliances \$396 Or More,*" NAD has noted that the FTC has held that savings claims involving the phrase "up to," require that the maximum level of performance claimed can be achieved by an appreciable number of consumers under circumstances normally and expectably encountered by consumers.² Further, NAD, in several prior decisions involving "up to" savings claims has held that the number of sales at the maximum savings should comprise a "significant percentage" of all items in the offering.³ NAD has further held that to support an "up to" savings claim an advertiser must offer at least 10% of the inventory included in the offer at the maximum advertised savings.⁴ Based on the record before NAD, it is unclear whether, in fact, Lowe's "*Up to 20% Off Appliances \$396 Or More,*" claim applies to a significant percentage or meaningful number of offerings, particularly since the disclaimer excludes almost every major brand. The disclaimer states, in part, "*Whirlpool, Maytag, KitchenAid, Amana, GE, LG, Samsung, Frigidaire, Electrolux and Bosch brands limited to a maximum 10% discount, unless otherwise shown.*"

Further, whenever a "20% off" or similar type of offer is made, all the terms and conditions of the offer should be clearly and conspicuously disclosed. To the extent the advertised results can only be achieved by a certain type of consumer or circumstance, "the class of persons who can achieve the maximum level of performance claimed" must be clearly and conspicuously disclosed.⁵ Here, the advertisement does, in fact, disclose the minimum spend requirement (\$396) needed to achieve the savings of "up to 20% off." However, NAD determined that the disclaimer, which contains material terms and conditions about the major brands of appliances which are excluded from the offer, is not clear and conspicuous. NAD noted that it is well-established that an effective disclosure, regardless of format, in order to be fully understood, must be "clear and conspicuous" such that it is "displayed in a manner that is readily noticeable, readable and/or audible, and understandable to the audience to whom it is directed" for which NAD assesses, among other things, "the size of the font, the duration that the super appears on screen, the extent to which it contrasts with the background, as well as surrounding visuals and sounds that may distract a viewer's attention away from the super."⁶ Further, as a general rule, NAD considers that visuals moving above or behind a small text message are likely to distract consumers' attention away from the intended message.⁷ Here at the same time that the Lowe's disclaimer appears fleetingly, in a small font at the bottom of the screen, prominent graphic elements (images of appliances) also appear in the middle of the screen. The viewer's eye is

² See e.g., L'Oreal USA (Visible Lift® Smooth Absolute Foundation), Report #5458, *NAD/CARU Case Reports* (May 2012); Discover Financial Services LLC (Cash back programs), Report #5465, *NAD/CARU Case Reports* (May 2012).

³ See, e.g., Consumer Club, Inc. (Getaroom.com), Report #5213, *NAD/CARU Case Reports* (September 2010) (noting that to support an "up to" savings claim an advertiser must offer at least 10% of the inventory included in the offer at the maximum advertised savings so long as the limitations on the sale offer are clearly and conspicuously disclosed).

⁴ Bookrenter.com, Inc. (Bookrenter.com), Report #5323, *NAD/CARU Case Reports* (April 2011).

⁵ Discover Financial Services LLC (Cash back programs), Report #5465, *NAD/CARU Case Reports* (May 2012).

⁶ Expedia, Inc. (Sale Prices on Hotels), Report #4993, *NAD/CARU Case Reports* (April 2009); Reckitt-Benckiser (Spray 'N Wash Laundry Stain Remover), Report #3929, *NAD/CARU Case Reports* (August 2002).

⁷ Novartis Consumer Health, Inc. (Lamisil AT Gel Advanced), Report #4796, *NAD/CARU Case Reports* (February 2008).

naturally drawn to the more prominent graphics and thus, it is likely that consumers' attention would be drawn away from the disclosure.

For all these reasons, NAD recommended that Lowe's discontinue the challenged claim, "*Up to 20% Off Appliances \$396 Or More*," and recommended that, in future advertisements, it obtain appropriate substantiation demonstrating that its "up to" claims apply to a significant percentage or meaningful number of offerings before publishing the offer. NAD further recommended that any disclaimer which contains material terms and conditions of the offer (e.g., including the fact that major brands are excluded) should be sufficiently clear and conspicuous and appear in immediate proximity to the triggering claim so that consumers are likely to notice, read and understand it.

Conclusion:

NAD recommended that Lowe's discontinue the challenged claim, "*Up to 20% Off Appliances \$396 Or More*," and recommended that, in future advertisements, it obtain appropriate substantiation demonstrating that its "up to" claims apply to a significant percentage or meaningful number of offerings before publishing the offer. NAD further recommended that any disclaimer which contains material terms and conditions of the offer (e.g., including the fact that major brands are excluded) should be sufficiently clear and conspicuous and appear in immediate proximity to the triggering claim so that consumers are likely to notice, read and understand it.

Advertiser's Statement:

Lowe's agrees to comply with NAD's recommendations. Lowe's is fully committed to ensuring the truth and accuracy of its advertising and appreciates the NAD's consideration and review of the sale promotion at issue. Lowe's regrets the error in the original text of its television commercial and notes that it acted quickly to correct it. With respect to its "up to 20% off" claim, Lowe's understands that it is the NAD's longstanding position that, in order to support an "up to" savings claim, an advertiser must offer at least 10% of the inventory included in the offer at the maximum advertised savings. Moreover, the advertiser must clearly and conspicuously disclose any limitations on the offer.

Lowe's notes that the NAD's inquiry did not extend to the consideration of the ratio of sale items in Lowe's inventory or to the circumstances surrounding the disclaimer that accompanied the television advertisement. Nevertheless, Lowe's will comply with its above-stated understanding of the NAD's position regarding "up to" savings claims. In addition, Lowe's will disclose material limitations in a clear and conspicuous manner consistent with NAD guidance and agreements with suppliers. **(#6020 RG, closed 11/04/2016)**