



DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

LEGAL ASPECTS OF PRICING EXECUTIVE PROGRAM ON PRICING STRATEGIES AND TACTICS

J.L. Kellogg Graduate School of Management

Northwestern University

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EXECUTIVE PROGRAM ON PRICING STRATEGIES AND TACTICS

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DISCUSSION OUTLINE

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- a. Enhanced Technical Support

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SUPPLEMENTARY MATERIALS

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BACKGROUND OF DISCUSSION LEADER

Eugene F. Zelek, Jr.

Specializing in marketing and trade regulation law, Gene Zelek is a partner in the Chicago law firm of Freeborn & Peters and is a member of its Marketing Law Group. He received an undergraduate degree in journalism with high honors from the University of Illinois, then graduated in 1978 *cum laude* from the Northwestern University School of Law and with Distinction from the J.L. Kellogg Graduate School of Management. While at Northwestern, Gene was Executive Editor of its law review and a Distinguished Scholar.

After practicing marketing law with a large law firm and The Quaker Oats Company, he became a marketing manager in Quaker's Foods Division before returning to law in 1983. Gene has written and spoken frequently on various marketing-related legal issues, represents a wide variety of companies and consultants throughout the United States and abroad and taught an annual 10-week course in the Marketing Department at Kellogg, "The Legal Aspects of Marketing Strategy," for 11 years. He also teaches at Kellogg's semiannual Executive Program on Pricing Strategies and Tactics, serves as a member of the National Advisory Board of The Pricing Institute and the International Licensing Industry Merchandisers' Association (LIMA) and is the legal issues columnist for *Building Online Business*, a monthly e-commerce magazine.

Gene has extensive counseling and litigation experience in antitrust, pricing and distribution, as well as e-commerce, intellectual property, new product development, licensing, strategic alliances and other marketing issues.

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EXCERPTS FROM THE FEDERAL ANTITRUST STATUTES

SHERMAN ACT

Section 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Section 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding \$10,000,000 if a corporation, or, if any other person, \$350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

FEDERAL TRADE COMMISSION ACT

FEDERAL TRADE COMMISSION ACT

Section 5

(a)(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

ROBINSON-PATMAN ACT

Section 2

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: ... *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made ... that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section ...: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity brought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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HEXAGON, INC.

RESALE PRICE POLICY

HEXAGON has unilaterally determined to implement the following policy with respect to all of its Model 63-CA and 64-DB Aluminum Storm Doors (the "Products") effective January 1, 2000:

Although resellers remain free to establish their own resale prices, HEXAGON will, without assuming any liability, cancel all orders and will refuse to accept any new orders from any reseller immediately following HEXAGON'S verification to its satisfaction that such reseller has advertised, offered or sold any of the Products at a net retail sales price less than the minimum retail price established and announced by HEXAGON from time

offered or sold any of the Products at a net retail sales price less than the minimum retail price established and announced by HEXAGON from time to time (the "Floor Price").

This policy applies to first-quality goods and not distressed merchandise, close-outs, and during the clearance period of November through January of each year. It may be modified at anytime by HEXAGON, and the Floor Price may be affected by promotions announced by HEXAGON or may change during promotional periods designated by HEXAGON.

The Floor Price effective January 1, 2000 is \$227.70 -- a discount of approximately 24% from HEXAGON'S regular suggested retail price of \$ 299.99. During the promotional period from February 1, 2000 through March 31, 2000, the Floor Price is \$197.70, representing an approximate 34% discount from the suggested retail price.

HEXAGON will not discuss any conditions of acceptance related to this policy. In addition, HEXAGON neither solicits, nor will it accept, any assurance of compliance with this policy.

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HEXAGON, INC.

PRICE VERIFICATION FORM

To ensure that all appropriate steps are taken to verify a competitor's lower offer, this form must be completed to the extent possible and reviewed with the Pricing Department *in advance* of any price concession offered to meet competition. Whenever possible complete all questions in this form. If the information necessary to complete this form is not available, obtain as much information as possible and provide that information on this form. This form, even if only partially completed, must be returned before a competitor's bid can be met.

Send completed form to the Pricing Department.

I. BASIC INFORMATION

Obtain the following information about the competitive bid:

- A. Name of customer:
- A. Name of customer contact and title:
- A. Name of competitor:
- A. Competitor's price:
- A. Product involved (including description of category, class, size and other relevant data):
- A. Quantity of product involved:

I. DOCUMENT THE COMPETITIVE OFFER

Request that the customer sign a letter verifying that the competitive offer was made.

- A. Have the customer sign a letter (like the sample at the end of this form). Return the original signed letter with this form.
- A. If the customer signs a verification letter other than the one you provided, be sure it includes at a minimum the following information:
 - Name of competitor
 - The date offer was made
 - Description of offer

Use of the attached form letter is, of course, preferred. If the customer signs the verification letter, no further verification is needed.

I. COMPETITOR'S OFFER SHEET

If the customer does not sign a letter verifying the competitive offer, request that the customer provide the competitor's offer sheet or other similar documentation. Return a copy of the document(s) with this form.

A. Please identify the following:

Name and title of customer contact providing

document(s):

The document(s) provided:

Name of competitor:

Date of document(s):

Product(s) involved:

Competitor's price(s):

Other information:

If the customer provides the offer sheet or similar documents, no further verification is needed.

A. If the customer refuses to sign a verification letter or provide the offer sheet or similar documents:

What reasons were given for the customer's refusing to sign a verification letter or provide the offer sheet or similar documents?

If neither a price verification letter nor an offer sheet or similar document is obtained, further verification of the competitor's prices is needed as provided in Part IV.

I. ADDITIONAL INFORMATION

A. Did the customer threaten to terminate HEXAGON or place its order with the competitor if HEXAGON did not meet the competitor's price?

1. Yes No

1. Specifically, note whether HEXAGON has ever lost sales to this customer *because HEXAGON failed to meet a competitor's price*. If so, please indicate.

Date of lost prior sale:

Name of competitor:

Did the customer inform the company of competitive offer?

A. Has the customer in the past told HEXAGON that it has received a lower offer, and accurately stated the competitor's price on that or those occasions?

1. Yes No

1. If yes:

Discuss the circumstances, indicating the basis for your belief that the competitor's price was as represented on those past occasions (*e.g.*, competitor's offer sheet, reports from other customers of competitor's price).

A. Have any other HEXAGON customers reported that the competitor has offered them a similarly low price?

1. Yes No

1. Yes No

1. If yes, identify:

The customer(s):

The date(s):

The substance of communication(s):

If you received no direct reports from other customers, but received information from some other source, identify:

Other source:

Date:

The substance of communication:

A. Has the company recently lost sales to other customers because of this competitor?

1. Yes No

1. If yes, identify:

Customer:

Date:

Any communications you had with such customer:

Any information on why the customer purchased from competitor:

I. MISCELLANEOUS INFORMATION

A. Do you have competitor's price list?

Yes No

If so, attach the price list.

B. Discuss any additional measures you have taken to verify the competitor's reported offer:

Signature

Title

Date

Sample Competitive Offer Verification Correspondence

Dear :

This letter will confirm that [*name of competitor*] has offered us a sales arrangement which includes the following terms:

A. Products involved:

B. The price offered:

C. Terms of payment:

D. Date of offer:

E. Quantity of the product involved:

F. Other terms of the agreement:

This information is provided in order to allow HEXAGON to meet the offer of [*Name of Competitor*].

Sincerely,

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GUIDES FOR ADVERTISING ALLOWANCES

AND OTHER MERCHANDISING PAYMENTS AND SERVICES

§ 240.1 Purpose of the Guides.

The purpose of these Guides is to provide assistance to businesses seeking to comply with sections 2 (d) and (e) of the Robinson-Patman Act (the "Act"). The guides are based on the language of the statute, the legislative history, administrative and court decisions, and the purposes of the Act. Although the Guides are consistent with the case law, the Commission has sought to provide guidance in some areas where no definitive guidance is provided by the case law. The Guides are what their name implies--guidelines for compliance with the law. They do not have the force of law.

§ 240.2 Applicability of the law.

(a) The substantive provisions of section 2 (d) and (e) apply only under certain circumstances. Section 2(d) applies only to:

- (1) A seller of products
- (2) Engaged in interstate commerce
- (3) That either directly or through an intermediary
- (4) Pays a customer for promotional services or facilities provided by the customer
- (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products
- (6) Where customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(b) Section 2(e) applies only to:

- (1) A seller of products
- (2) Engaged in interstate commerce
- (3) That either directly or through an intermediary
- (4) Furnishes promotional services or facilities to a customer
- (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products
- (6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(c) Additionally, section 5 of the FTC Act may apply to buyers of products for resale or to third parties. See § 240.13 of these Guides.

§ 240.3 Definition of seller.

Seller includes any person (manufacturer, wholesaler, distributor, etc.) who sells products for resale, with or without further processing. For example, selling candy to a retailer is a sale for resale without processing. Selling corn syrup to a candy manufacturer is a sale for resale with processing.

Seller includes any person (manufacturer, wholesaler, distributor, etc.) who sells products for resale, with or without further processing. For example, selling candy to a retailer is a sale for resale without processing. Selling corn syrup to a candy manufacturer is a sale for resale with processing.

§ 240.4 Definition of customer.

A customer is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a "customer" is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word "customer" which is used in section 2(d) of the Act includes "purchaser" which is used in section 2(e).

Note: There may be some exceptions to this general definition of "customer." For example, the purchaser of distress merchandise would not be considered a "customer" simply on the basis of such purchase. Similarly, a retailer or purchasing solely from other retailers, or making sporadic purchases from the seller or one that does not regularly sell the seller's product, or that is a type of retail outlet not usually selling such products (e.g., a hardware store stocking a few isolated food items) will not be considered a "customer" of the seller unless the seller has been put on notice that such retailer is selling its product.

Example 1: A manufacturer sells to some retailers directly and to others through wholesalers. Retailer A purchases the manufacturer's product from a wholesaler and resells some of it to Retailer B. Retailer A is a customer of the manufacturer. Retailer B is not a customer unless the fact that it purchases the manufacturer's product is known to the manufacturer.

Example 2: A manufacturer sells directly to some independent retailers, to the headquarters of chains and of retailer-owned cooperatives, and to wholesalers. The manufacturer offers promotional services or allowances for promotional activity to be performed at the retail level. With respect to such services and allowances, the direct-buying independent retailers, the headquarters of the chains and retailer-owned cooperatives, and the wholesaler's independent retailer customers are customers of the manufacturer. Individual retail outlets of the chains and the members of the retailer-owned cooperatives are not customers of the manufacturer.

Example 3: A seller offers to pay wholesalers to advertise the seller's product in the wholesalers' order books or in the wholesalers' price lists directed to retailers purchasing from the wholesalers. The wholesalers and retailer-owned cooperative headquarters and headquarters of other bona-fide buying groups are customers. Retailers are not customers for purposes of this promotion.

§ 240.5 Definition of competing customers.

Competing customers are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

Example 1: Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three competing retailers that sell only in the Roanoke, Virginia area. Manufacturer A has no other customers selling in Roanoke or its vicinity. If Manufacturer A offers its promotion to one Roanoke customer, it should include all three, but it can limit the promotion to them. The trade area should be drawn to include retailers who compete.

Example 2: A national seller has direct-buying retailing customers reselling exclusively within the Baltimore area, and other customers within the area purchasing through wholesalers. The seller may lawfully engage in a promotional campaign confined to the Baltimore area, provided that it affords all of its retailing customers within the area the opportunity to participate, including those that purchase through wholesalers.

Example 3: B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store. If these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made available on proportionally equal terms to the discount department store.

§ 240.6 Interstate commerce.

The term "interstate commerce" has not been precisely defined in the statute. In general, if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials), the business may be subject to sections 2(d) and 2(e) of the Act. (The commerce standard for sections 2 (d) and (e) is at least as inclusive as the commerce standard for section 2(a).) Sales or promotional offers within the District of Columbia and most United States possessions are also covered by the Act.

§ 240.7 Services or facilities.

The terms "services" and "facilities" have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples--the list is not exhaustive--of promotional services and facilities covered by sections 2(d) and (e):

Cooperative advertising;

Handbills;

Demonstrators and demonstrations;

Demonstrators and demonstrations;

Catalogues;

Cabinets;

Displays;

Prizes or merchandise for conducting promotional contests;

Special packaging, or package sizes.

§ 240.8 Need for a plan.

A seller who makes payments or furnishes services that come under the Act should do so according to a plan. If there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. What the plan should include is describe in more detail in the remainder of these Guides. Briefly, the plan should make payments or services functionally available to all competing customers on proportionally equal terms. (See § 240.9 of this part.) Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of some of the plan's offerings. The seller should inform competing customers of the plans available to them, in time for them to decide whether to participate. (See § 240.10 of this part.)

§ 240.9 Proportionally equal terms.

(a) Promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.

(b) When a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper advertising or handbills.

Example 1: A seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time.

Example 2: A seller may place in reserve for each customer a specified amount of money for each unit purchased, and use it to reimburse these customers for the cost of advertising the seller's product.

Example 3: A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first \$ 1,000 purchased per month, 2 percent of the second \$ 1,000 per month, and 3 percent of all over that.

Example 4: A seller should not identify or feature one or a few customers in its own advertising without making the same service available on proportionally equal terms to customers competing with the identified customer or customers.

Example 5: A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.

The discriminatory purchase of display or shelf space, whether directly or by means of so-called allowances, may violate the Act, and may be considered an unfair method of competition in violation of section 5 of the Federal Trade Commission Act.

Example 6: A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of \$ 1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the \$ 1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of \$ 2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.

Example 7: A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing \$ 100 to Buyer A, \$ 50 to Buyer B, and \$ 25 to Buyer C, to be used for the Buyers' expenditures on promotion.

§ 240.10 Availability to all competing customers.

(a) Functional availability:

- (1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate. When a seller provides alternatives in order to meet the availability requirement, it should take reasonable steps to ensure that the alternatives are proportionally equal, and the seller should inform competing customers of the various alternative plans.
- (2) The seller should insure that promotional plans or alternatives offered to retailers do not bar any competing retailers from participation, whether they purchase directly from the seller or through a wholesaler or other intermediary.
- (3) When a seller offers to competing customers alternative services or allowances that are proportionally equal and at least one such offer is useable in a practical sense by all competing customers, and refrains from taking steps to prevent customers from participating, it has satisfied its obligation to make services and allowances "functionally available" to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act.

Example 1: A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer's customers are too small this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them.

Example 2: A seller furnishes demonstrators to large department store customers. The seller should provide alternatives useable in a practical sense on proportionally equal terms to those competing customers who cannot use demonstrators. The alternatives may be services useable in a practical sense that are furnished by the seller, or payments by the seller to customers for their advertising or promotion of the seller's product.

(b) Notice of available services and allowances: The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances. Such notification should include enough details of the offer in time to enable customers to make an informed judgment whether to participate. When some competing customers do not purchase directly from the seller, the seller must take steps reasonably designed to provide notice to such indirect customers. Acceptable notification may vary. The following is a non-exhaustive list of acceptable methods of notification:

- (1) By providing direct notice to customers;
- (2) When a promotion consists of providing retailers with display materials, by including the materials within the product shipping container;
- (3) By including brochures describing the details of the offer in shipping containers;
- (4) By providing information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information;
- (5) By placing at reasonable intervals in trade publications of general and widespread distribution announcements of the availability and essential features of promotional offers, identifying a specific source for further information; and
- (6) If the competing customers belong to an identifiable group on a specific mailing list, by providing relevant information of promotional offers to customers on that list. For example, if a product is sold lawfully only under Government license (alcoholic beverages, etc.), the seller may inform only its customers holding licenses.

(c) A seller may contract with intermediaries or other third parties to provide notice. See § 240.11.

Example 1: A seller has a plan for the retail promotion of its product in Philadelphia. Some of its retailing customers purchase directly and it offers the plan to them. Other Philadelphia retailers purchase the seller's product through wholesalers. The seller may use the wholesalers to reach the retailing customers that buy through them, either by having the wholesalers notify these retailers, or by using the wholesalers' customer lists for direct notification by the seller.

Example 2: A seller that sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its product at the retail level. If the seller directly notifies competing direct purchasing retailers, and competing retailers purchasing through the wholesalers, the seller is not required to notify its wholesalers.

Example 3: A seller regularly promotes its product at the retail level and during the year has various special promotional offers. The seller's competing customers include large direct-purchasing retailers and smaller retailers that purchase through wholesalers. The promotions offered can best be used by the smaller retailers if the funds to which they are entitled are pooled and used by the wholesalers on their behalf (newspaper advertisements, for example). If retailers purchasing through a wholesaler designate that wholesaler as their agent for receiving notice of, collecting, and using promotional allowances for them, the seller may assume that notice of, and payment under, a promotional plan to such wholesaler constitutes notice and payment to the retailer. The seller must have a reasonable basis for concluding that the retailers have designated the wholesaler as their agent.

§ 240.11 Wholesaler or third party performance of seller's obligations.

A seller may contract with intermediaries, such as wholesalers, distributors, or other third parties, to perform all or part of the seller's obligations under sections 2(d) and (e). The use of intermediaries does not relieve a seller of its responsibility to comply with the law. Therefore, in contracting with an intermediary, a seller should ensure that its obligations under the law are in fact fulfilled.

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§ 240.12 Checking customer's use of payments.

The seller should take reasonable precautions to see that the services the seller is paying for are furnished and that the seller is not overpaying for them. The customer should expend the allowance solely for the purpose for which it was given. If the seller knows or should know that what the seller is paying for or furnishing is not being properly used by some customers, the improper payments or services should be discontinued.

§ 240.13 Customer's and third party liability.

(a) Customer's liability: Sections 2 (d) and (e) apply to sellers and not to customers. However, the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price through services or allowances not made available on proportionally equal terms to its competitors engaged in the resale of a seller's product. Liability for knowingly receiving such a discrimination may result whether the discrimination takes place directly through payments or services, or indirectly through deductions from purchase invoices or other similar means.

Example 1: A customer should not induce or receive advertising allowances for special promotion of the seller's product in connection with the customer's anniversary sale or new store opening when the customer knows or should know that such allowances, or suitable alternatives, are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 2: Frequently the employees of sellers or third parties, such as brokers, perform in-store services for their grocery retailer customers, such as stocking of shelves, building of displays and checking or rotating inventory, etc. A customer operating a retail grocery business should not induce or receive such services when the customer knows or should know that such services (or usable and suitable alternative services) are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 3: Where a customer has entered into a contract, understanding, or arrangement for the purchase of advertising with a newspaper or other advertising medium that provides for a deferred rebate or other reduction in the price of the advertising, the customer should advise any seller from whom reimbursement for the advertising is claimed that the claimed rate of reimbursement is subject to a deferred rebate or other reduction in price. In the event that any rebate or adjustment in the price is received, the customer should refund to the seller the amount of any excess payment or allowance.

Example 4: A customer should not induce or receive an allowance in excess of that offered in the seller's advertising plan by billing the seller at "vendor rates" or for any other amount in excess of that authorized in the seller's promotional program.

(b) Third party liability: Third parties, such as advertising media, may violate section 5 of the Federal Trade Commission Act through double or fictitious rates or billing. An advertising medium, such as a newspaper, broadcast station, or printer of catalogues, that publishes a rate schedule containing fictitious rates (or rates that are not reasonably expected to be applicable to a representative number of advertisers), may violate section 5 if the customer uses such deceptive schedule or invoice for a claim for an advertising allowance, payment or credit greater than that to which it would be entitled under the seller's promotional offering. Similarly, an advertising medium that furnishes a customer with an invoice that does not reflect the customer's actual net advertising cost may violate section 5 if the customer uses the invoice to obtain larger payments than it is entitled to receive.

Example 1: A newspaper has a "national" rate and a lower "local" rate. A retailer places an advertisement with the newspaper at the local rate for a seller's product for which the retailer will seek reimbursement under the seller's cooperative advertising plan. The newspaper should not send the retailer two bills, one at the national rate and another at the local rate actually charged.

Example 2: A newspaper has several published rates. A large retailer has in the past earned the lowest rate available. The newspaper should not submit invoices to the retailer showing a high rate by agreement between them unless the invoice discloses that the retailer may receive a rebate and states the amount (or approximate amount) of the rebate, if known, and if not known, the amount of rebate the retailer could reasonably anticipate.

Example 3: A radio station has a flat rate for spot announcements, subject to volume discounts. A retailer buys enough spots to qualify for the discounts. The station should not submit an invoice to the retailer that does not show either the actual net cost or the discount rate.

Example 4: An advertising agent buys a large volume of newspaper advertising space at a low, unpublished negotiated rate. Retailers then buy the space from the agent at a rate lower than they could buy this space directly from the newspaper. The agent should not furnish the retailers invoices showing a rate higher than the retailers actually paid for the space.

§ 240.14 Meeting competition.

A seller charged with discrimination in violation of sections 2 (d) and (e) may defend its actions by showing that particular payments were made or services furnished in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. This defense is available with respect to payments or services offered on an area-wide basis, to those offered to new as well as old customers, and regardless of whether the discrimination has been caused by a decrease or an increase in the payments or services offered. A seller must reasonably believe that its

whether the discrimination has been caused by a decrease or an increase in the payments or services offered. A seller must reasonably believe that its offers are necessary to meet a competitor's offer.

§ 240.15 Cost justification.

It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment or service could be justified through savings in the cost of manufacture, sale

or delivery.

LEGAL ASPECTS OF PRICING

EXECUTIVE PROGRAM ON PRICING STRATEGIES AND TACTICS

J.L. Kellogg Graduate School of Management

Northwestern University

PROMOTIONAL NOTICE (EXAMPLE)

OCEAN SPRAY PERIODICALLY MAKES AVAILABLE ALLOWANCES FOR DISPLAYING, ADVERTISING OR PROMOTING ITS LINE OF PRODUCTS TO ALL COMPETING CUSTOMERS REGARDLESS OF SIZE. CONTACT YOUR LOCAL OCEAN SPRAY REPRESENTATIVE OR WRITE TO OCEAN SPRAY FOR SPECIFIC DETAILS.

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