

§ 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.

§ 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

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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