

## § 240.6

## 16 CFR Ch. I (1–1–04 Edition)

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 pri-

marily 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;
- 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