

# DISTRIBUTION

## THE NEWSLETTER OF THE DISTRIBUTION AND FRANCHISING COMMITTEE

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## The Revised Fred Meyer Guides: What Changed? What Didn't? Recap of October 16, 2014 Committee Program

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### I. Introduction – The Fred Meyer Guides

The Robinson-Patman Act<sup>2</sup> (“RPA”) prohibits certain types of price discrimination in sales of commodities to competing buyers. Section 2(a) of the RPA prohibits sellers from charging similarly-situated competing buyers different prices, while Section 2(f) prohibits buyers from knowingly inducing unlawful price discrimination. Sections 2(d) and 2(e) prohibit sellers from providing promotional allowances or services to promote resale of their product unless they are made available to competing resellers on proportionally equal terms. The purpose of Sections 2(d) and 2(e) is to prevent a seller from using promotional allowances or services to achieve price discrimination notwithstanding the sellers’ consistent pricing to competing buyers.

Following the decision of the Supreme Court in *F.T.C. v. Fred Meyer, Inc.*,<sup>3</sup> the FTC released its Fred Meyer Guides (the “Guides”) in order to clarify how sellers should handle promotional allowances and services in order to comply with the RPA.<sup>4</sup> Although agency enforcement of the RPA has largely ceased, companies continue to face the threat of private lawsuits and associated defense costs for alleged violations.<sup>5</sup> In light of these risks, producers and distributors widely rely on the Guides as accurate statements of the law regarding promotional discounts and allowances. They serve as a key compliance resource for buyers, sellers, and third parties interested in implementing advertising, promotions, and merchandising programs. The Guides offer non-

binding guidance on various topics, including how to measure “proportionally equal terms,” how resellers can be notified of potential offers, and when offers are considered “available” to competing resellers.

The Guides were first updated in 1990 and recently updated in September 2014 following a period of public comment.<sup>6</sup> On October 16, 2014, the Distribution and Franchising Committee and the Pricing Conduct Committee of the ABA Section of Antitrust Law co-sponsored a telephonic panel discussion about the FTC’s revisions to the Guides. The panel featured three distinguished practitioners with experience in RPA compliance and enforcement: Irving Scher of Greenberg Traurig LLP, Richard M. Steuer of Mayer Brown, and Deena Jo Schneider of Schnader Harrison Segal & Lewis LLP. The Chair of the Distribution and Franchising Committee, Alicia L. Downey of Downey Law LLC, moderated the panel. Over the course of the program, the panelists discussed the FTC’s revisions to the Guides and –perhaps more importantly– the changes that weren’t made despite ongoing critiques of the Guides and the RPA more generally.

### II. The FTC’s Revisions to the Guides – a Missed Opportunity for Clarity?

Since the last updates to the Fred Meyer Guides in 1990, there have been calls to amend and update parts of the Guides. Perhaps spurred by the Supreme Court’s decision in *Volvo Trucks*, which cited concerns that RPA

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<sup>2</sup> 15 U.S.C. § 13.

<sup>3</sup> 390 U.S. 341 (1968).

<sup>4</sup> The Guides are codified at 16 CFR Part 240.

<sup>5</sup> The FTC last moved to enforce the Robinson-Patman Act in 2000. *See In re McCormick & Co.*, 2000 WL 264190 (FTC 2000).

<sup>6</sup> 79 Fed. Reg. 188, at 58245 (Sept. 29, 2014), *available at* [http://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2014/09/140929fredmeyerfrm.pdf](http://www.ftc.gov/system/files/documents/federal_register_notices/2014/09/140929fredmeyerfrm.pdf). The revisions took effect on November 10, 2014.

enforcement encourages price rigidity,<sup>7</sup> the FTC called for comments to the Guides in 2012. In response, the FTC received seven comments.<sup>8</sup> The submissions covered a range of topics, many aimed at updating the Guides to reflect developments in online retailing and perceived inconsistencies between Sections 2(d) and 2(e) and the rest of the RPA. In discussing the revisions, the ABA panel focused on three topics: (1) “proportional equality” under Sections 2(d) and 2(e); (2) promotional allowances in the context of internet commerce; and (3) the inconsistent requirements to show “competitive harm” under different sections of the RPA.

#### A. Assessing “Proportional Equality”

Under the RPA, promotional allowances and services must be made available to competing resellers on proportionally equal terms. But how should “proportionally equal” value be assessed when the costs of providing promotional services vary significantly among resellers? And should the RPA draw a bright line between value provided through price discounts rather than through promotional allowances? The ABA Panel addressed both issues in turn.

There have long been calls for the FTC to endorse a more flexible approach to valuing promotional allowances and services. Under the Guides, the value of promotional services is typically calculated by reference to the cost of those services to the reseller. Even prior to the advent of online advertising, observers questioned cost-based measurements of value given its potentially weak correlation to value received by the seller. As Mr. Steuer pointed out, “the value of a window display in a high traffic area of a store is worth a lot more to a supplier than a display in an out-of-the-way corner of the store” – even though the cost of both to the retailer may be the same.

The shortcomings of a cost-based approach have been exacerbated by the explosive growth of online advertising. In addition to the fact that online advertising can take many forms, the cost structure of such advertising bears little resemblance to traditional advertising. As a result, there are real questions as to whether it makes economic sense to require sellers to provide the same promotional allowances to competing customers with wholly different advertising costs – and to face liability under the RPA if they don’t. Contemplating the potential implications of the cost-based approach, Mr. Scher speculated about whether “a brick and mortar retailer who [has incurred] the cost of its newspaper ad or TV ad has a claim against the seller for discriminating in favor of the internet buyer whose cost for advertising is virtually nil.”

To address these concerns, the Comment submitted by the Section of Antitrust Law asked the FTC to endorse a more flexible standard in which the value of promotional services could be based on the value of those services to the *seller*, regardless of the cost of providing the service. This would enable sellers to tailor promotional advertising allowances to specific retailers without regard to the fact that retailers might have different advertising cost structures. The FTC had previously declined to endorse such an approach in its 1990 revisions to the Guides.

In the 2014 revisions, the FTC acknowledged that online retailers and brick-and-mortar retailers can indeed be “competing customers” entitled to “proportionally equal promotional allowances.” And given the difficulties of providing those allowances and services across reseller formats, the FTC reiterated that “no single means of doing so is required” and that “common sense and good faith will be relevant in assaying efforts to

<sup>7</sup> See *Volvo Trucks N. Am. Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006).

<sup>8</sup> See Alicia L. Downey, “It’s Time to Take a Fresh Look at the Fred Meyer Guides: A Survey of the Comments Submitted to the FTC on Whether (and How) to Update the Guides to Advertising Allowances and Other Merchandising Payments and Services,” THE PRICE POINT, the ABA Section of Antitrust Law Pricing Conduct Committee Newsletter (Spring 2013) (summarizing comments submitted by the American Antitrust Institute; the Section of Antitrust Law of the American Bar Association; the Food Marketing Institute; the National Automobile Dealers Association; the National Community Pharmacists Association; the National Grocers Association; and Panelist Richard Steuer, who submitted a 2012 article discussed *infra*.)

proportionalize promotional allowances and services across different sales formats.”<sup>9</sup> Still, the FTC again declined to expressly endorse what it called the “seller’s value standard” advocated by the Section of Antitrust Law, citing concerns that endorsing the standard “would result in unjustified favorable treatment for large buyers” and could result in “elastic, expansive measurements of value which could help disguise persistent, systematic discrimination.”<sup>10</sup>

Mr. Steuer described the FTC’s remarks as an “implicit halfway endorsement” of the seller’s value standard since it was not explicitly rejected. He added, however, that “the bottom line is that costs still remain the measure of proportionality in the Guides until a court squarely holds otherwise. But of course, nobody who is familiar with these new guides is likely to adopt a value standard now and test it in court.” Discussing the FTC’s approach, Ms. Schneider added that “people are left in essentially the same limbo that they were—I don’t think that a great deal has been taken away, but certainly nothing has been added.” Regardless, sellers seeking to comply with the RPA using a “seller’s value standard” will continue to do so at their own peril.

In addition to addressing valuation standards, the FTC also considered (and rejected) calls for a more flexible approach to permitting sellers to provide different prices and promotional allowances to different customers so long as the value to each customer is equal. Under the current Guides, suppliers cannot “net out” value provided to customers through differences in price and promotional allowances. Mr. Steuer advocated a new approach in a 2012 article that was submitted to the FTC in response to its request for comments.<sup>11</sup> During the panel, Mr. Steuer reiterated the value of allowing sellers to provide either price discounts or promotional allowances to customers so long as each customer receives equal value. Under the current rules, he added, “the effect of isolating discounts from promotional

assistance ... is often to discriminate against customers that cannot make use of one or the other.” The distinction can seem especially arbitrary when customers may view price and promotional allowances to be essentially interchangeable.

The FTC summarily dismissed this suggestion, noting that allowing customers to offset price differences and promotional allowances “would be inconsistent with the purpose of the Guides, which is to assist businesses in complying with the Act as it is currently understood.”<sup>12</sup> The FTC pointed to the lack of case law supporting Mr. Steuer’s proposal, and Congress’ express separation of price discrimination and promotional allowance discrimination within the terms of the RPA. Mr. Steuer was unsurprised at the result, concluding that “the bottom line is that discounts are discounts, promotional allowances are promotional allowances, and at least under the Guides, the ‘twain shall not meet until someone with a robe and a flag says that they do.” For at least the foreseeable future, sellers must treat price discounts and promotional allowances separately when complying with the RPA.

#### *B. Promotional Allowances in Ecommerce*

The FTC’s call for comments on the Fred Meyer Guides had expressly sought feedback on amending the Guides to reflect developments in online advertising and ecommerce. Submissions to the FTC made various suggestions, with several comments seeking greater clarity on how different types of online advertising should be handled and whether a seller could satisfy its notification obligations under Sections 2(d) and 2(e) by listing offers to resellers on its website. Ultimately, however, the revised Guides made few changes on either front.

First, regarding updates to the Guides’ take on online advertising, Ms. Schneider remarked that the FTC did

9 79 Fed. Reg. 188, at 58248.

10 79 Fed. Reg. 188, at 58250.

11 Richard M. Steuer, *Crossing the streams of price and promotion under the Robinson-Patman Act*, 27 ANTITRUST 64 (2012).

12 79 Fed. Reg. 188, at 58247.

“only the self-evident” by admitting that online retailers could be “competing sellers” within the meaning of the RPA and that online advertising could count as advertising. Despite calls for clarity on key questions related to online advertising (“Which ones are more valuable? Which ones will suppliers want to pay for? How much they will want to pay for them?”), the Commission chose to leave the term “online advertising” undefined. Noted Ms. Schneider, “The comments asked for guidance on these issues and they didn’t get it.”

Second, the FTC declined to allow sellers to satisfy their notification obligations by posting offers on their website. Under the Guides, sellers must take steps to ensure that offered promotional services are “useable in a practical sense” by competing customers. The Section of Antitrust Law suggested that posting notice of the offer on the seller’s website should be sufficient, and that a customer should be foreclosed from later claiming that the seller’s program was not available if it failed to look at the seller’s website.

The FTC flatly denied this proposal, arguing that “[t]he dramatic increase in Internet use by sellers and customers does not justify shifting to customers the burden of learning about sellers’ promotional programs” and noted that allowing such notice “might require a merchant . . . to regularly search scores of Web sites just to determine whether promotional services and allowances might be available.”<sup>13</sup> Mr. Scher responded skeptically to the FTC’s refusal, observing “that isn’t the way business works. The customer first decides whether it wants to advertise or promote particular suppliers products, and then it looks at what that particular supplier offers. . . and where should it look? On the internet!” For now, however, sellers must continue to affirmatively notify resellers of potential promotional allowances.

### C. *Competitive Harm Requirements under the RPA*

Unlike a price discrimination claim brought under Section 2(a) of the RPA, claims under Sections 2(d) and 2(e) do not require proof of likely adverse competitive effects. In light of case law suggesting that a competitive harm requirement would help harmonize the RPA with the antitrust laws more generally, several comments urged the FTC to explain that Sections 2(d) and 2(e) are aimed at preventing harm to competition. The FTC ultimately declined to read in a competitive harm requirement generally into Sections 2(d) and 2(e), while suggesting that a competitive harm requirement would be required for certain RPA actions against *buyers*.

In response to calls for clarity on the need to show competitive harm for claims under Sections 2(d) and 2(e), the FTC called such an interpretation “sound enforcement policy,” but refused to amend the guidelines accordingly because such a requirement could not “be fairly implied based on the current state of the law.”<sup>14</sup>

The Commission took a different approach, however, when examining potential buyer liability under Section 2(d) and 2(e). Section 240.13 of the Guides notes that a customer that knows or should know that it is receiving services or allowances not made proportionally available to other customers may be liable under Section 5 of the FTC Act.<sup>15</sup> Although the FTC reiterated that competitive harm is not an element of a claim under Section 2(d) or 2(e), it nonetheless agreed that enforcement against *customers* for inducing an unlawful promotional allowance or service should be based on a finding of injury to competition.<sup>16</sup> As a result, the FTC amended the Guides to clarify that the “giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and

<sup>13</sup> 79 Fed. Reg. 188, at 58250.

<sup>14</sup> 79 Fed. Reg. 188, at 58247.

<sup>15</sup> It is unlawful under Section 2(f) of the RPA for a buyer to induce or knowingly receive a discriminatory price in violation of Section 2(a). There is no corresponding RPA provision for inducements or receipts under Sections 2(d) and 2(e), but such actions may nevertheless lie within the scope of Section 5 of the FTC Act.

<sup>16</sup> 79 Fed. Reg. 188, at 58251.

2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer's cost of providing the promotional services."<sup>17</sup> Accordingly, the new Guides make it relatively more difficult to prove a claim against a buyer for inducing discriminatory promotional allowances.

### III. The Future of RPA Compliance and Enforcement

Confronted with an opportunity to rework the Fred Meyer Guides, the FTC ultimately declined to make significant changes. To some, the minor revisions came as a surprise; Mr. Scher concluded that the FTC "didn't do what most of us expected." Ms. Schneider found the result puzzling given the detail in the FTC's call for comments: "I thought they would do more. The notice [seeking comments] was thoughtful, reasonably comprehensive, and seemed open to suggestion... they seemed to understand that there was a wide variety of new stuff going on out there...and they punted and didn't really deal with anything."

The FTC's minor revisions may reaffirm that public enforcement of the RPA will likely remain minimal.

Mr. Scher observed that FTC Commissioner Wright has supported the repeal of the RPA altogether, and that the Commission itself has shown little interest in enforcing the Act. Mr. Steuer added that there has been little appetite by state attorneys general to enforce state analogues of the RPA. When asked if the revisions might incentivize more private litigation, Ms. Schneider noted that the revisions could "theoretically embolden small purchasers," but added that "the fact of the matter is that the RPA is a very, very difficult statute to sue under" and poses significant hurdles to proving damages and bringing class actions. The panelists all agreed that without viable class actions, private enforcement of the RPA is unlikely to significantly increase in the coming years.

For those hoping that the revisions might have provided a little more clarity for sellers and suppliers seeking to comply with the Robinson-Patman Act, the revisions represent a missed opportunity. As Mr. Steuer conclude the panel discussion: "I understand where the Commission is coming from...but this is an area where people devote a lot of hours every year in counseling and this would have been the best opportunity... to say something a little bit more fulsome."

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17 Guides 240.13(a).