THE VOICE OF FOOD RETAIL
Feeding Families Enriching Lives

January 29, 2013

BY ELECTRONIC MAIL

Donald S. Clark
Secretary
Federal Trade Commission
Room H-113 (Annex B)
600 Pennsylvania Avenue, N. W.
Washington, D. C. 20580

Re: Fred Meyer Guides Review

Dear Mr. Clark:

The Food Marketing Institute ("FMI") is pleased to respond to the Commission's request for comments on its *Guides for Advertising Allowances and Other Merchandising Payments and Services*, also known as the *Fred Meyer Guides* (hereafter, "the *Guides*"). FMI is a not-for-profit organization that conducts programs in public affairs, food safety, research, education and industry relations on behalf of its nearly 1,250 food retail and wholesale member companies in the United States and around the world. FMI's U.S. members operate more than 25,000 retail food stores and almost 22,000 pharmacies, with a combined annual sales volume of nearly $650 billion. FMI's retail membership is composed of large multi-store chains, regional firms, and independent operators.

FMI believes the *Guides* serve a useful purpose and should be retained. They should be revised, however, to reflect developments in the law and changes in distribution and marketing practices.

FMI's comments take as their starting place the Supreme Court's repeated position that the Robinson-Patman Act (RPA) should be construed, where possible, in harmony with the other antitrust laws. Thus, in its most recent RPA decision, *Volvo Trucks*,[1] the Court observed that "[i]nterbrand competition is the 'primary concern of antitrust law'" and that "[t]he Robinson-Patman Act signals no large departure from that main concern."[2] In interpreting the RPA, the Court said it "would resist interpretation

[1] *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc*., 546 U.S. 164 (2006).

[2] *Id.* at 180-81.

geared more to the protection of existing *competitors* than to the stimulation of *competition*."[3] The Commission has likewise, through a process of statutory interpretation and enforcement policy evolution, sought to reconcile the RPA with the other antitrust laws.[4]

FMI's comments have three parts. First, we address the Commission's general questions about the *Guides*' utility, including their benefits and costs, and whether they should be revised in light of new methods of commerce introduced as a result of the growth of the Internet since 1990. Next, we address some of the Commission's questions about specific provisions in the *Guides*. Finally, we discuss issues relating to competitive injury in "buyer inducement" cases that might be brought by the Commission under Section 5 of the FTC Act.

I. The *Guides* Should Be Retained But Revised

(a) Continuing utility of the *Guides*

FMI believes the *Guides* serve a useful purpose and should be revised, not scrapped. They have been relied upon for many years, and continue to be relied upon, by grocery retailers and wholesalers, suppliers, and their legal counsel as authoritative summaries of the law and as compliance guides. They are also cited and relied upon by the courts.[5]

While the public interest would not be served by withdrawing the *Guides*, we believe they should be updated. The Commission last reviewed and revised the *Guides* in 1990. In their current form, the *Guides* contain infirmities that predate the 1990 revisions and can be traced back to the 1972 version of the *Guides*. In other respects the *Guides* do not reflect changes in the law or Commission enforcement policy that have occurred since 1990. Finally, there are several respects in which the *Guides* should be revised to take into account changes in the methods and technologies of product distribution and marketing since 1990.

(b) Benefits and costs of the *Guides*

The text of the RPA is notoriously difficult to understand and apply. As Justice Frankfurter observed, "precision of expression is not an outstanding characteristic of the

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[3] *Id.* at 181 (emphasis in original).

[4] *See, e.g.*, *In re General Motors Corp.*, 103 F.T.C. 641, 696 (1984) ("The United States Supreme Court has recently admonished that Congress has mandated competition to be 'the heart of our national economic policy.' . . . Accordingly, the Commission will eschew efforts to broaden application of the Robinson-Patman Act beyond that established by law.") (citation omitted).

[5] *See, e.g.*, *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 945 (9th Cir. 1998) (court gave "considerable weight" to *Fred Meyer Guides* as administrative interpretations of the RPA).

Robinson-Patman Act."[6] A primary benefit of the *Guides* is that they facilitate understanding of, and compliance with, the RPA. They also provide a helpful summary of the requirements of Sections 2(d) and 2(e), using language and examples accessible to non-specialist lawyers and non-lawyers.

The costs of the *Guides* cannot readily be measured, which may reflect the inherent difficulty of quantifying the costs of potentially beneficial conduct that has been deterred.[7] To the extent the *Guides* perpetuate misstatements or misinterpretations of the requirements of the RPA, they may deter suppliers and their customers from engaging in procompetitive advertising, promotion, and merchandising. This is to the detriment of the ultimate consumer, of course, but it also hurts, in particular, smaller suppliers and customers (or potential customers), for which the ability to engage in cooperative advertising and promotion may be important to compete effectively in the market.[8]

(c) Updating the *Guides* to reflect the Internet

The Commission requests comment on "[h]ow, if at all, should the Guides be revised to account for new methods of commerce introduced as a result of the growth of the Internet since 1990?" Subparts to this question note that the Internet has had significant effects on marketing and promotional practices, and ask whether the *Guides* should address various forms of manufacturer support for Internet advertising and promotion on retailer Web sites.

It would be helpful for the Commission to provide guidance in this area. In particular, the *Guides* should acknowledge and explain the distinction between the mere identification or listing of a manufacturer's product and its price on a retailer's Web site, and retailer Web site content that constitutes advertising or promotion of the manufacturer's product; only the latter should potentially be subject to Section 2(d), if it is paid for by the manufacturer.

II. Recommendations On Specific Provisions Of The *Guides*

The following comments concern specific provisions of the *Guides* which, in FMI's view, should be revised.

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6 *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 65 (1953).

7 *See* U.S. DEP'T OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1976) [hereafter JUSTICE DEP'T REPORT] 37-38.

8 *See In re Sunbeam Corp*., 67 F.T.C. 20, 57-58 (1965) ("Cooperative advertising, when conducted under a fair, reasonable, and non-discriminatory plan, has been recognized as a means whereby the competitive ability of small business is enhanced since the supplier undertakes to assume advertising costs which many retailers could not defray unaided."); *see also* I ABA SECTION OF ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW (1980) [hereinafter ABA, ROBINSON-PATMAN ACT] 30-31.

Guide 4 -- Definition of a customer

The current guide defines a "customer" as "any person who buys for resale directly from the seller, or the seller's agent or broker," as well as "any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller." This is a recapitulation of the Supreme Court's holding in *Fred Meyer* that indirect-buying retailers are "customers" of the seller within the meaning of Sections 2(d) and 2(e).[9] An explanatory note, however, provides that "a retailer purchasing solely from other retailers, or making sporadic purchases from the seller, or one that does not regularly sell the seller's product . . . (e.g., a hardware store stocking a few isolated food items)" is not considered a customer of the seller "*unless the seller has been put on notice that such retailer is selling its product*" (emphasis added). The italicized clause should be removed, because it seems to be inconsistent with the previously stated proposition that a retailer making sporadic or trivial purchases of the seller's products is not a "customer" within the meaning of Sections 2(d) and 2(e).

Guide 6 -- Interstate commerce

This guide should be revised to more accurately reflect the law. It suggests the commerce standard for Sections 2(d) and 2(e) differs from, and is more relaxed than, Section 2(a)'s commerce standard, but case law holds otherwise. *See Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 881-82 (9th Cir. 1982) ("incongruous" for Sections 2(d) and 2(e) to have different commerce standard than Section 2(a)), *cert. denied*, 460 U.S. 1085 (1983).[10] The guide should be revised to state that the application of Sections 2(d) and 2(e) is limited to advertising and promotional allowances and services relating to sales taking place in commerce; i.e., where at least one of the transactions is across state lines.

Guide 8 -- Need for a plan

In its current form, the guide states that, although a written plan is not required, if a promotional program is complex the "seller would be well advised to put the plan in writing." The guide should be revised to provide that a seller may comply with this recommendation by putting its plan on its Web site.

In addition, the current guide is inappropriately restrictive in providing that alternative offerings should be made available to customers that cannot take advantage of "some of the plan's offerings." If a customer can take advantage of any of the alternatives that are available from the seller, that should be sufficient, provided the

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[9] *Fred Meyer, Inc. v. FTC*, 390 U.S. 341 (1968).

[10] An early decision by the Fifth Circuit, *Shreveport Macaroni Manf. v. FTC*, 321 F.2d 404 (5th Cir. 1963), indicated that Sections 2(d) and 2(e) may apply even if none of the transactions crosses state lines, but it does not appear to be good law, because a subsequent Fifth Circuit decision reached the same result as the Ninth Circuit in *Zoslaw*. *See L&L Oil Co. v. Murphy Oil Corp*., 674 F.2d 1113, 1115-16 (5th Cir. 1982).

other requirements of Sections 2(d) or 2(e) are satisfied.[11] (*See also* discussion of *Guide 10*, below.)

Guide 9 -- Proportionally equal terms

(1) "Cost" is not the only acceptable basis on which to proportionalize

When the Commission reviewed the *Guides* in 1990 it acknowledged, but did not resolve, uncertainty over the status of value-based methods for achieving proportionally equal treatment in the provision of allowances or services. While observing that "no single way to proportionalize is prescribed by law," the only methods the *Guides* cited with approval were cost-based standards, thereby implying that seller's cost or buyer's cost are the only acceptable methods of proportionalization. The Commission declined to endorse value-based approaches as acceptable alternatives, citing concerns that value might be too subjective a standard and might permit sellers and large buyers to evade the RPA.[12]

There is ample support in the case law for value-based methods of proportionalization.[13] Thus, in *Lever Bros. Co.*, 50 F.T.C. 494, 511-12 (1953), the Commission held that either cost or value could be used to achieve proportional equality, and the Supreme Court's later decision in *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) noted, with apparent approval, "that the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under Sections 2(d) and 2(e)."[14] Later still, the Sixth Circuit held that a seller has broad freedom to devise any method of proportionality so long as it "does not discriminate in favor of the larger volume buyer." *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1329 (6th Cir. 1983).

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[11] *See, e.g., In re Sunbeam Corp.*, 67 F.T.C. 20, 57-58 (1965).

[12] 55 Fed Reg. 33651, 33657 (Aug. 17, 1990).

[13] For a detailed discussion of the issues raised by various methods of proportionalization, see II ABA ANTITRUST SECTION, THE ROBINSON-PATMAN ACT: POLICY AND LAW 62-69 (1983).

[14] 360 U.S. at 61 n.4. A leading authority on the RPA, Frederick Rowe, has read *Lever Bros.* and *Simplicity Pattern* as:

> "permitting a supplier to formulate a promotional campaign maximizing the potency of the media choice -- as long as *some* 'fair and reasonable' equivalent is provided for those competing rivals who could not otherwise participate. Nevertheless, the supplier's program need not ignore the relative desirability of particular promotional media and may scale reimbursements accordingly, thereby ensuring 'proportionality' not only with respect to 'customers' 'purchasers' but also 'their ability and equipment to render or furnish the services to be paid.'"

FREDERICK ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 409 (1962) (emphasis in original; quoting 80 Cong. Rec. 9416 (1936)).

The Commission should reconsider the value standard, and should be guided by developments in the law regarding functional discounts, principally the Supreme Court's decision in *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990). The term "functional discount" refers to a discount or rebate that is provided by a seller in consideration for marketing or other redistribution functions performed by the customer. *Id.* at 554 n.11. Before *Hasbrouck*, the status of functional discounts under the RPA was unsettled, and some lower court and FTC decisions had indicated that the prohibited competitive injury could be found regardless of the favored customer's performance of marketing or redistribution functions. In *Hasbrouck*, however, the Supreme Court held that functional discounts may be justified under the RPA under cost-based *or* value-based standards. Thus, the Court held that "a functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions will not violate the Act" (a customer's cost standard), but also analyzed Texaco's functional discounts in terms of their relationship to Texaco's cost savings (a seller's cost standard)[15] *and* their "reasonableness" in relation to the *value to Texaco* of the services the customers performed.[16] The Court made it clear, moreover, that providers and recipients of functional discounts need not come forward with detailed cost or accounting analyses to establish their reasonableness, and hence legality.[17]

It is significant that in *Hasbrouck* the Court expressed no concern that suppliers and their customers might rely on subjective or otherwise unverifiable measures of cost or value: as long as the size of the functional discount is reasonably closely related to the cost or value of legitimate marketing or redistribution functions performed by the customer, it will not support a price-discrimination claim under Section 2(a).[18]

The Commission should take this opportunity to harmonize the *Guides*' treatment of "proportionally equal treatment" with *Hasbrouck* and the treatment of functional discounts under Section 2(a), by expressly acknowledging that proportionalization may be achieved based on cost (buyer's or seller's) as well as value to the seller. Any remaining concern over the potential for subjective or arbitrary measures of value can, consistent with *Hasbrouck*, be dispelled by emphasizing that whether the supplier uses a cost- or value-based method of proportionalizing promotional allowances, its method must be reasonable.

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[15] 496 U.S. at 561.

[16] *Id*. at 562 ("there was no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions").

[17] *Id.* at 561 ("A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers." (footnote omitted)).

[18] *Id.* at 561; *see also Coalition for a Level Playing Field, L.L.C. v. Autozone, Inc.*, 737 F. Supp.2d 194, 211 (S.D.N.Y. 2010).

(2) Example 4 should be deleted

Example 4 to *Guide 9* is unnecessarily restrictive and should be deleted. The example involves supplier advertising that identifies (or "tags") one or a few customers by name, and says that a supplier should make "the same service" available to competing customers. The law is not so strict, however; alternative offers involving other forms of advertising or promotion should be acceptable.[19] Indeed, Example 5 indicates that a supplier who provides or pays for employees to perform in-store work only for certain customers may satisfy its legal obligation by making "alternative offers" to other customers, without suggesting the alternative offers must involve "the same" services.

(3) Note 1, concerning "shelf space" allowances, should be revised

Note 1 to *Guide 9* says that the "discriminatory purchase of display or shelf space … may violate the Act…." This statement is incomplete and should be clarified.

The Commission acknowledged, in its explanatory statement accompanying the 1990 revisions, that while discriminatory payment for specific in-store display treatment of a product (e.g., special shelf position or aisle-end display) may be subject to Section 2(d),[20] payments for access to a customer's warehouse or store, unrelated to specific display treatment, are outside the scope of Section 2(d) due to the absence of a resale nexus.[21] The footnote should be revised to make this clear.

Moreover, the footnote's further statement that discriminatory purchase of display or shelf space "may be considered an unfair method of competition" might be taken as implying a general view on the competitive effects of slotting allowances, whereas Commission staff studies of slotting payments have emphasized the need for case-by-case analysis.[22]

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[19] *See In re Sunbeam Corp.*, 67 F.T.C. 20, 57-58 (1965) ("Since the examiner found, we think correctly, that the point-of-sale and other promotional materials made available by respondent to retailers in lieu of cooperative advertising credits were equivalent in value to such credits, complaint counsel's theory has no merit as applied to the facts of this case.").

[20] *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

[21] 55 Fed. Reg. 33651, 33663 (Aug. 17, 1990); *see also In re Yakima Fruit & Cold Storage Co.*, 59 F.T.C. 693, 697 (1961) ("there must be some showing that the payment was made as consideration for 'services or facilities' provided by the customer in connection with the seller's product. Thus, payments made for other types of consideration or for which no tangible consideration was expected would not violate Section 2(d).").

[22] *See* REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY (Feb. 2001); *see also H. J. Heinz Co. v. FTC,* 246 F.3d 708, 718-19 (D.C. Cir. 2001) (agreeing with FTC's argument that district court erred in analysis of merger between makers of baby foods by failing to treat payments for shelf space as significant aspects of competition that ultimately benefit consumers).

Guide 10 -- Availability to all competing customers

(1) Practical availability

This guide should be revised to provide that a supplier may limit participation in a promotional program to customers that are willing to comply with conditions that are within the practical reach of *most* competing customers, such as minimum purchase requirements or performance of specific marketing functions connected with the promoted product. Among the court decisions and FTC consent orders recognizing this principle are *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1329 (6th Cir. 1983) (upholding "modest" minimum purchase requirement that was within practical reach of "average" dealer); *L.S. Amster & Co. v. McNeil Labs, Inc.*, 504 F.Supp. 617, 625 (S.D.N.Y. 1980) (practical availability satisfied even though participation condition was met in only 10% of the plaintiff's outlets); *In re Ford Motor Co.*, 104 F.T.C. 1732, 1737 (1983) (consent order allowed seller to limit promotional assistance to car rental companies that purchased at least 20 cars per year); *In re Sunbeam Corp.*, 67 F.T.C. 20, 56-57 (1965) (minimum purchase requirement for receipt of advertising reimbursement satisfied practical availability requirement).

Consistent with the above recommendation regarding value-based proportionalization, the guide on practical availability should be further revised by adding a statement to the effect that, provided the proportional equality requirement is satisfied, Sections 2(d) and 2(e) permit a supplier to design and implement advertising or promotional offers in a manner that provides the greatest value to the supplier, and in doing so the supplier may tailor its offers to make most effective use of the methods by which particular resellers or categories of resellers advertise or promote its products.[23]

(2) Notice

The guide on "notice" should be revised to reflect the prevalence of the Internet in modern commerce, in two ways. First, Web site notification should be added to the list of permissible methods of notification. Second, it is unnecessarily burdensome to continue to require that a supplier's notification include "enough details of the offer in

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[23] The Commission acknowledged this point many years ago, in *Sunbeam*:

> "Complaint counsel further contends that, in view of the unique effectiveness of newspaper advertising as a method of sales promotion, no provision for alternative forms of promotional assistance to retailers who cannot or do not desire to utilize cooperative advertising in their business can satisfy the requirements of Section 2(d). The argument is far-reaching in its implications; if accepted, the consequence would be that no cooperative advertising plan would pass muster under the statute since inevitably there will be some retailers whose nature or scale of operation precludes their participation in cooperative advertising. . . . To hold every such plan inherently discriminatory and unlawful merely because not every retailer can or wants to take advantage of the plan would destroy cooperative advertising and thereby seriously harm the very class, small independent retailers, which Section 2(d) was enacted to protect." *In re Sunbeam Corp.*, 67 F.T.C. 20, 57-58 (1965).

time to enable customers to make an informed judgment whether to participate." It should be enough to direct customers to the supplier's Web site for further details.

Guide 13 -- Customer's and third party liability

(1) Example 1 should be deleted

Example 1 states that a customer should not induce or receive promotions in connection with "the customer's anniversary sale or new store opening" when it "knows or should know that such allowances, or suitable alternatives" are not available to all competing customers. The suggestion of liability by a retailer that solicits support for an anniversary celebration or new store opening is unwarranted and anticompetitive. Retailers and their suppliers should not be discouraged from developing special or exclusive promotions, where such promotions are part of the supplier's overall promotional program for customers. Deleting this example would seem to be precisely the sort of reconciliation of the RPA with broader antitrust policy that the Supreme Court had in mind in *Volvo Trucks*.

(2) Example 2 should be deleted

The example begins by accurately noting that "[f]requently 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." It goes on, however, to warn customers not to induce or receive such services if they "know or should know" that such services (or usable and suitable alternative services) are not available on proportionally equal terms to all competing customers.

The practices referred to here are aspects of in-store execution. As the example indicates, it is common for suppliers to send their own employees, or employees of brokers or other third-parties, into customers' stores to help ensure that they comply with the supplier's promotional programs and to assist with stock rotation and shelf maintenance. Recognizing the importance of in-store follow through, suppliers devote considerable attention to the questions of how and when to provide retail coverage. Few, if any, suppliers have the resources to provide or pay for personnel for every customers' stores, nor would this be beneficial to retailers or ultimate consumers. Indeed, a recent study conducted for the Grocery Manufacturers Association by Nielsen and McKinsey & Company found that the most successful grocery suppliers outperformed their competitors in the basic metrics of in-store execution (in-stock rates, display compliance, and planogram adherence) chiefly through their greater flexibility, selectivity, and efficiency in providing in-store coverage, using their own, or third parties', personnel.[24]

[24] Grocery Manufacturers Association, "The 2012 Customer and Channel Management Survey: Winning Where It Matters," at 14-15, available at http://www.gmaonline.org/file-manager/GMA_Publications/2012CCMfinal.pdf.

Example 2 should be deleted because it suggests it is unlawful for suppliers to seek to optimize their in-store services by tailoring or "fine-tuning" them to particular customers or channels. So long as alternative services are made available under the seller's overall promotional plan, such fine-tuning is permissible and should not be discouraged by the *Guides*.[25]

(3) No private right of action for inducing/receiving discriminatory promotional allowances or services

The Commission requests comment on whether, and to what extent, the *Guides* should be revised "to reflect cases discussing the possibility that what appears to be a discrimination in promotional allowances may support a private right of action for inducing or receiving a discrimination in price?"

Subpart (a) to *Guide 13* correctly points out that "Sections 2(d) and (e) apply to sellers and not to customers." Because the RPA contains no buyer-liability provision regarding promotional allowances or services, the courts have routinely rejected private plaintiffs' attempts to bring claims against customers under Sections 2(d) or 2(e). And, except as noted below, the courts have rejected private plaintiffs' efforts to challenge customers' receipt of discriminatory promotional allowances or services under Section 2(f) by simply calling them "price" concessions. *See, e.g., Sofa Gallery, Inc. v. Mohasco Upholstered Furniture Corp.*, 639 F. Supp. 677, 678-79 (D. Minn. 1986).

Some decisions have held that a buyer's receipt of what were ostensibly promotional allowances could be challenged in a private suit under Section 2(f), in two circumstances: when the buyer performed no promotional services at all; and when the buyer did perform some promotional services but the cost of those services was grossly exceeded by the size of the payments it received. *See, e.g., American Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1067-68 (N. D. Cal. 2001); *Coalition for a Level Playing Field, L.L.C. v. Autozone, Inc.*, 737 F. Supp.2d 194, 211 (S.D.N.Y. 2010); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 138 (S.D.N.Y. 2000).

FMI believes the law on this subject is sufficiently clear that no additional discussion is needed in the *Guides*. But if the Commission is inclined to say something on this subject in the *Guides*, it should say that Sections 2(a) and 2(f) may apply to ostensible promotional allowances for which *no* services are performed in return, or where the payments are not reasonably related to the customer's cost of performance *or the value of the promotional service to the supplier*.[26] The inclusion of language along the lines of the italicized clause would be important to achieve consistency with the *Guides'* discussion of proportionality.

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[25] *See In re Sunbeam Corp.*, 67 F.T.C. at 57.

[26] The word "may" rather than "would" should be used, since such a payment might, depending on the circumstances, be outside the coverage of the RPA.

III. Competitive Injury and Buyer-Inducement Cases Under Section 5

Sections 2(d) and 2(e) are often referred to as "per se" prohibitions. This is not strictly accurate, since they are subject to the "meeting competition" defense. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). Nevertheless, a salient characteristic of these provisions is that, unlike Section 2(a), injury to competition is not an element of the plaintiff's claim. In light of this, and in the interests of sound antitrust enforcement policy, the Commission should add language to the *Guides* to the effect that, in interpreting and enforcing Sections 2(d) and 2(e), the presence -- or absence -- of likely harm to competition will be a paramount concern. *Cf. In re Herbert R. Gibson, Sr.*, 95 F.T.C. 553, 726 (1980) ("Because of the easier threshold of proof carved out for Sections 2(d) and (e), the Commission and the courts have an obligation to ensure that the jurisdictional prerequisites of those sections are reasonably, and not expansively, construed."); *In re General Motors Corp.*, 103 F.T.C. 641, 696 (1984).

Language should also be added to *Guide 13(a)* regarding competitive injury in buyer-inducement cases brought by the Commission under Section 5, to make it clear that the Commission would not proceed against a buyer for allegedly inducing or receiving unlawfully discriminatory promotional allowances or services absent evidence of likely injury to competition.

It was established many years ago, in *Grand Union*,[27] that the Commission may proceed under Section 5 against buyers for inducing or knowingly receiving discriminatory promotional allowances or services. At the same time, it was held that the Commission is not required to prove injury to competition in such cases.[28] But this does not mean the Commission should bring buyer-inducement cases irrespective of whether there was injury to competition.

To begin with, *Grand Union's* rationale for permitting application of a *per se* rule may be unsound. Noting that Section 2(d) does not require competitive injury, the court concluded that "[t]here is no reason why this rule should not apply to the buyer as well as to the seller."[29] Continuing, the court reasoned:

> "Congress made no such distinction; Section 2(f), being the corollary of Section 2(a), requires proof of injury to competition in cases brought against buyers, while Section 2(c) applies a per se rule to buyers as well as sellers . . . . Since Section 5 is here utilized to reach an integral part of a violation of Section 2(d), and the rationale of the proceeding is to fulfill the policies of that prohibition, it would seem an unwarranted amendment of

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[27] *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962); *see also Giant Food, Inc. v. FTC*, 307 F.2d 184 (D.C. Cir. 1962).

[28] *Grand Union*, 300 F.2d at 99.

[29] *Id.*

> the legislative scheme to apply a different standard on the question of competitive effects to the buyer than it applies to the seller."[30]

This analysis is questionable. In seeking to achieve an internal consistency in the RPA's treatment of price, brokerage, and promotional allowances and services, the court observed that Congress made no distinction between the standards for seller and buyer liability for granting/receiving discriminatory promotional allowances or services -- indeed, because Congress did not address the issue of buyer liability for inducing or receiving promotional allowances or services. The court could have just as readily concluded that Congress' silence manifested a determination on its part to treat sellers and buyers differently where promotional allowances and services are concerned. And it would have been just as logical an interstitial supplement of the RPA if the court were to have concluded that Congress "inadvertently" omitted promotional allowances and services not from Sections 2(d) and 2(e) but from the Act's buyer-inducement provision, Section 2(f), and to have required competitive injury on that basis.

A more fundamental flaw in the *Grand Union* analysis was the court's treatment of the relationship between the "unfair methods of competition" standard of Section 5 and the terms of the RPA. The court said it was using Section 5 to reach a practice that violated the "policy" of Section 2(d); if so, it should have held that buyer inducement of *unfair* discriminatory promotional allowances, that is, a method of competing that injures competition, is illegal.

RPA enforcement policy should not discourage robust buyer bargaining for promotional allowances and services. Such bargaining is procompetitive; indeed, it can play an important part in dislodging oligopolistic pricing structures.[31]

IV. Conclusion

FMI appreciates the opportunity to comment on the *Guides*. The questions posed by the request for comments suggest that the review process will be thoughtful and thorough, and we look forward to the issuance of proposed revised *Guides* in the near future.

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[30] *Id.*

[31] *See* JUSTICE DEP'T REPORT, *supra*, at 50; *see also Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953) (warning against interpretations of the RPA that "extend beyond the prohibition of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation").

Sincerely,

Erik R. Lieberman
Regulatory Counsel