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SUPPLIER COMPLIANCE WITH SECTION 2(d) OF THE ROBINSON–PATMAN ACT — AN EXAMINATION OF THE FRED MEYER GUIDES

I. Introduction

The Robinson–Patman Act¹ was passed in 1936, in part, as an amendment to the ineffectual provisions of section 2 of the Clayton Act.² While Robinson–Patman Act sanctions are generally addressed to the original seller of goods, i.e., the manufacturer, the Act was designed to prohibit all devices by which large buyers, because of their greater purchasing power, could gain discriminatory preferences over smaller buyers.³ The Act’s basic provision, section 2(a), prohibits unjustified price discrimination⁴ by a manufacturer–supplier while the remaining sections guard against commercial arrangements which may constitute price discriminations concealed as brokerage payments,⁵ promotional allowances⁶ and special services.⁷ Section 2(d), the promotional allowance provision, prohibits a

1. 15 U.S.C. § 13 (1964) [hereinafter referred to as the “Act”].

2. 38 Stat. 730 (1914). The first price discrimination law was introduced in section 2 of the Clayton Act of 1914. However, like the other sections of the Clayton Act, its aim was the prevention of monopoly by elimination of local price cutting practices by which powerful enterprises might exclude competitors from the market and attain or consolidate control of their markets. The Robinson–Patman Act focused its attention on the powerful buyer who was able to secure unjustifiable competitive advantages over his smaller competitors. See A. Neale, The Antitrust Laws of the United States of America 217-18 (1962). The ineffectivity of the Clayton Act is best illustrated by the fact that only twelve cease and desist orders were issued in price discrimination cases, and of these, the four that were appealed were reversed by the courts. See C. Edwards, The Price Discrimination Law 6 (1959).


4. Robinson-Patman Act § 2(a), 15 U.S.C. § 13(a) (1964), provides in pertinent part:

That 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 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 . . .


It shall be unlawful for any person . . . to pay or contact for the payment of anything of value . . . in consideration for any services or facilities furnished . . . 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 such customers competing in the distribution of such products or commodities.

7. Robinson-Patman Act § 2(e), 15 U.S.C. § 13(e) (1964). The difference between Robinson 2(d) and Robinson 2(e) is that the former pays for customer-developed promotional programs while in the latter the supplier provides
manufacturer–supplier from giving discounts to a customer for advertisements or other customer-created promotions, "unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

In 1968, the Supreme Court announced in FTC v. Fred Meyer, Inc.,

that section 2(d) places a duty on manufacturers to provide promotional considerations to small retailers who purchase from wholesalers in proportion to the considerations given by the manufacturer to direct–buying retail customers. This decision greatly increased the number of persons entitled to promotional allowances. The proper method of instituting a program which would insure a manufacturer's compliance with this most recent interpretation of section 2(d) is unclear. This Comment will explore the effects of the Fred Meyer decision, the guides for compliance promulgated thereunder, and the problems inherent therein. Its scope will be limited to section 2(d) of the Act. Related sections of the Act and other antitrust legislation will be discussed only in so far as relevant to its interaction with section 2(d).

II. THE FRED MAYER DECISION

Fred Meyer, Inc., a large retail supermarket chain, incorporated the wholesaler's function by purchasing goods directly from suppliers. In connection with an annual promotion campaign, several manufacturer–suppliers granted Fred Meyer, Inc., special promotional allowances which were not made available to wholesalers or to small retailers who purchased through wholesalers and who competed with Meyer in the retail market. In the initial Commission proceeding, the FTC ruled that suppliers are in violation of section 2(d) if they fail to make promotional allowances available to their wholesalers.

In so holding, the FTC adopted the broad view that direct–buying retailers and wholesalers were ultimately competing for the same consumer dollars since a wholesaler's volume depended upon sales to retailers who competed with Meyer. On appeal, the Ninth Circuit reversed,

basing its decision on the traditional statutory interpretation that promotional allowances need only be extended to those

the services himself. For example, if a supplier gives a customer large display cases, this would be a section 2(e) problem; if he paid the customer to set up an in-store promotion this would fall within the realm of section 2(d).


10. Fred Meyer, Inc. [1963–1965 Transfer Binder] Trade Reg. Rep. ¶ 16,500 at 21,372 (FTC 1963). While it should be noted that in the Fred Meyer case the FTC charged customer violations for inducing illegal promotional payments, the corrective measures were levied upon the suppliers and herein lies the importance of the case. This was in direct opposition to its earlier findings that “wholesalers who resold to retailers . . . were . . . not in competition with” chain stores. Atlanta Trading Corp., 53 F.T.C. 565, 566, 573 (1956). For a discussion of the original FTC decision in the Fred Meyer case, see Hickey, The Fred Meyer Case — Its Implications Under Section 2(d) of the Robinson-Patman Act, 9 Antitrust Bull. 255 (1954).

11. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966).
customers competing on the same functional level.12 Historically, retailers who purchased goods from wholesalers were not treated as customers of the manufacturer—supplier because they did not purchase the goods directly from the supplier. A supplier who granted promotional allowances to a retailer buying directly from him was only obligated to grant proportionally equal allowances to competing, direct—buying retailers. In the instant case, the Supreme Court, adopted neither the FTC's nor the Ninth Circuit's statutory interpretation13 but rather held that the legislative history of the Robinson—Patman Act requires the protections afforded by section 2(d) be extended to retailers buying through wholesalers,14 but not to wholesalers themselves. The Court reasoned that any other interpretation would permit large direct—buying retailers, who could assume the wholesaling function, to escape the provisions of the Act while preventing smaller retailers whose only access to suppliers is through wholesalers from availing themselves of its protection. "Such a result would be diametrically opposed to Congress' clearly stated intent to improve the competitive position of small retailers . . ." by protecting them from discrimination induced by the purchasing power of the chain stores.15

In order to provide manufacturer—suppliers with a guide for compliance with the Fred Meyer decision, the Commission, as directed by the Court,16 issued the Guides for Advertising Allowances and Other Merchandising Payments and Services.17 While the Guides make an attempt to outline procedures for a comprehensive promotional plan, there is much

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12. The former (1960) Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.3 (1969), provided that, "a 'customer' is someone who buys directly from the seller or his agent or broker" (emphasis added). See Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964); Elizabeth Arden, Inc., 39 F.T.C. 288, 301 (1944), aff'd 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). Cf. Liggett & Myers Tobacco Co., 56 F.T.C. 221 (1959). Contra, Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956). The Krug decision is the only example of a court interpreting section 2(d) as obligating a supplier to provide promotional allowances to wholesalers because they were, in effect, competing with direct—buying retailers. The new Guides, see note 17 infra, have also eliminated the wholesaler from consideration. See Guide 3(b)'s definition of a competing customer as "businesses that compete in the resale of the seller's product . . . at the same functional level . . ." 1 TRADE REG. REP. ¶ 4003, at 6095 (FTC June 2, 1969) (emphasis added).

13. This fact is noted because courts have often recognized the "well accepted rule that the administrative agency should be given deference in its interpretation of the statutory scheme it is charged with administering." General Tel. Co. v. FCC, 413 F.2d 390 (D.C. Cir. 1969) (emphasis added). See also Udall v. Tallman, 380 U.S. 1 (1965); Unemployment Comp. Comm'n v. Aragon, 329 U.S. 143 (1946).

14. This was the first instance that any court so held. In professing such an interpretation, perhaps the Court's purpose was to encourage Congress to overhaul the Act. See Fred Meyer, Inc. v. FTC, 390 U.S. 341, 362 (1968) (Harlan, J., dissenting).


16. FTC action in drafting the new Guides was predicated upon the Court's statement: so long as the supplier takes responsibility, [to insure that there is no discrimination in the granting of promotional allowances] under rules and guides promulgated by the Commission for the regulation of such practices. . . .


17. 1 TRADE REG. REP. ¶ 4003, at 6093 (FTC June 2, 1969) [hereinafter cited as the Guides]. These provisions will be included in the CIR. ¶ 390 (1970).
reservation\(^{18}\) as to whether they will actually give a semblance of order to the traditional Robinson-Patman chaos.\(^{19}\)

The following sections of this Comment will explore various provisions of the *Guides* and their effect upon the supplier and his customers. In addition, the interrelationship of conduct required by the *Guides* and their possible conflict with other sections of the Robinson-Patman and Sherman Acts will be examined.

### III. Competing Customers and the Indirect Purchaser

*Guide Three* defines a “customer”\(^ {20} \) as one who buys for resale directly from the seller and, in compliance with the *Fred Meyer* decision, includes those who purchase the seller’s product through a wholesaler.\(^ {21}\) The earlier definition\(^ {22} \) of customer as “someone who buys directly from the seller . . .”\(^ {23} \) was significantly more restrictive. The only manner in which one who purchased through a wholesaler could claim discrimination under the Act against a supplier’s giving preferred treatment to direct-buying retailers was to allege that the supplier had sufficient contact with the aggrieved retailer so as to invoke the “indirect purchaser” doctrine.\(^ {24} \)

Under this doctrine, a seller was held responsible for proportional promotional payments to buyers who acquired his product from intermediate distributors only if he exercised such a degree of control over the trans-

\(^{18}\) These reservations may be illustrated by the fact that with the passage of the final guides, three of the five Commissioners issued separate statements. Commissioner Elman, whose dissent in the *Fred Meyer* case originally proposed the system of making promotional allowances directly available to the wholesalers’ customers, vigorously objected to the *Guides* in their final form. Commissioners MacIntyre and Nicholson, although agreeing with the general tenor of the *Guides*, expressed reservations. See FTC Robinson-Patman Act News Release (May 26, 1961) [hereinafter cited as the *Release*]. See generally Symposium, Robinson-Patman Act: Trends and Developments, 38 Antitrust L.J. 252 (1969) [hereinafter cited as Symposium].


\(^{20}\) For purposes of this Comment, the term “customer” in section 2(d) will be considered as synonymous with the term “purchaser” in section 2(e).

\(^{21}\) *Guide 3, 1 Trade Reg. Rep.* ¶ 4003, at 6095 (FTC June 2, 1969), provides in pertinent part:

> in addition, a “customer” is any buyer of the seller’s product . . . who purchases from or through a wholesaler . . .

\(^{22}\) Before the *Fred Meyer* decision, a supplier’s distribution of promotional allowances was controlled by the 1960 Guides for Advertising Allowances and Other Merchandising Payments and Services. 16 C.F.R. § 240 (1969).

\(^{23}\) 16 C.F.R. § 240.3 (1969) (emphasis added).

\(^{24}\) See *Kay Windsor Frock, Inc. v. U.S.* 31 F.T.C. 662-63 (1940). It has also been held that if a manufacturer gives a promotional allowance to his wholesalers’ customers, he must also give proportionally equal allowances to his direct-buying customers. Of course, this is the clearest example of the “indirect purchaser” doctrine because a manufacturer obviously has direct dealing with direct-buying customers. See Elizabeth Arden, Inc. v. FTC, 156 F.2d 132, 135 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). See also *Ronson Corp. v. FTC* 31 F.T.C. 655 (1969).
action that the sales were, in effect, made directly to the buyer. In determining whether the "indirect purchaser" doctrine can be invoked, the FTC searches for a course of direct dealing between the supplier and his customer regardless of whether the goods pass through a middle man. The doctrine as applied to section 2(d) is obsolete under the Fred Meyer decision because the former "indirect" purchaser is now a "direct" purchaser.

While the contacts exhibited by a supplier in his dealings with his wholesaler’s customer are no longer at issue in the section 2(d) context, they are still very much a question in an action based on the price discrimination provisions of section 2(a). This may pose a problem in that the Guides require the supplier to maintain certain relationships with his wholesaler’s customers to insure that the promotional services he is paying for are, in fact, being furnished by the retailer, and that the supplier is not overpaying for them. If it is found that such association by the supplier with his wholesaler’s customers is sufficient to invoke the "indirect purchaser" doctrine for possible section 2(a) violations, then the supplier could be held responsible for discriminatory practices by his wholesalers who might vary prices among their customers — the retailers. Under the "indirect purchaser" doctrine, these retailers would then be deemed the supplier’s customers.

It has been suggested that the "indirect purchaser" doctrine is an unfortunate concept to begin with. Assume, for example, that the associations required by the Guides would not invoke the "indirect purchaser" doctrine for the purposes of section 2(a). The course of direct dealing with a supplier which a retailer, purchasing through a wholesaler, must allege before a cause of action arises under section 2(a) may be price fixing between the parties and clearly violative of the Sherman Act. 29

25. The standards of the "indirect purchaser" doctrine concerning price discriminations in section 2(a) are the same as those of section 2(d), i.e., it "treats as the supplier’s own customers . . . the accounts of his distributors whose autonomy he has supplanted by his own activities." F. Rowe, supra note 3, at 57-59.
27. See Klein v. Lionel Corp., 237 F.2d 13, 15-16 (3d Cir. 1956), wherein the court, doubting the wisdom of the "indirect purchaser" doctrine, repudiated the concept entirely in private litigations and specifically held that it was not applicable to fair trading by a supplier.
28. In Luxor, Ltd., 31 F.T.C. 658, 662-63 (1940), the "indirect purchaser" doctrine was invoked when the supplier actually controlled the retailer’s resale prices. See American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962), where the court upheld a Commission cease and desist order against inducing disproportionate promotional allowances from a supplier under circumstances where petitioner did not purchase directly from, but whose resale prices were effectively set by, the supplier.
29. 15 U.S.C. § 1 (1964), provides in pertinent part:
Sec. 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 misdemeanor. . . .

Assuming slight pressures by the supplier to insure that the retailers did carry out his pricing policies, it would appear difficult to distinguish the cases cited, supra note 28, from United States v. Parke-Davis, 362 U.S. 29 (1960), where the supplier required unanimous adherence by his wholesalers’ customers to his price schedule, or FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922), where the manufacturer agreed in advance to supply him with a quantity of goods, selling his
For example, if a supplier and retailer agree to fix the resale price of the supplier's product, this contact between the supplier and the wholesaler would be sufficient to evoke the "indirect purchaser" doctrine and would, of course, be violative of the Sherman Act. With the removal of the "indirect purchaser" doctrine from the section 2(d) context, the doctrine's elimination from the section 2(a) situation should follow shortly. The recent Supreme Court decision in *Perkins v. Standard Oil Co. of Calif.*, \(^\text{30}\) gives rise to an interpretation that a wholesaler's customer will be deemed the customer of the supplier regardless of the fact that the supplier has not had any direct contacts with him. This decision while sounding in section 2(a) rests squarely on the section 2(d) considerations of *Fred Meyer* and seems to indicate the demise of the section 2(a) "indirect purchaser" doctrine.

It may appear from the above discussion that the *Guides* consider any person who deals in a supplier's products as a customer of the supplier. For the most part, this is correct. However, the *Guides* do recognize certain exceptions. Retailers who purchase supplier's goods from another retailer are not considered customers of the supplier "unless the seller has been put on *notice* that such retailers are selling his product." \(^\text{31}\) This exception raises questions as to whether the definition of "customer" is a function of the supplier's knowledge, or whether the only relevant consideration is existing competition among these customers. It is submitted that a supplier will only be bound to provide promotional allowances to those he knew or had reason to know were his "customers." Prior to the *Fred Meyer* decision, the standard for determining availability of promotional allowances was whether the supplier's customers were competing. \(^\text{32}\) However, since those who were previously considered as only wholesaler's customers are now deemed to be customers of the supplier, the new standard must be considered as protecting the supplier against inadvertent violation of section 2(d). For example, a supplier in meeting the requirements of *Guide Eight* to notify his wholesaler's customers of product at the prescribed price and discontinued sales to those who failed to comply. It would appear that the arrangements between a manufacturer-supplier and a retailer or a wholesaler to stabilize prices as required to invoke the "indirect purchaser" doctrine come well within the standards of interference with setting of prices by a free market and stabilization required for a Sherman Act violation. See United States v. Container Corp., 393 U.S. 333 (1969); United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 224 n.59 (1940). See also United States v. American Linseed Oil Co., 262 U.S. 371 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).


32. The *Guides* have apparently established a classification of customers based upon a supplier's knowledge. Previously, in Liggett & Myers Tobacco Co., 56 F.T.C. 221, 246-47 (1959), it was held that the standard of availability of promotional allowances was solely that of competition. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 62 (1959). Cf. FTC v. Motion Picture Advertising Service Co., 344 U.S. 445, 452 (1952); 343 U.S. 470, 475 (1952).
promotional plans may use the wholesaler's customers lists and therefrom compile his own "reasonably complete" mailing lists. Therefore, if knowledge were not a factor in determining whether a supplier has discriminated in granting promotional allowances, it would seem that a supplier who has attempted to make promotional allowances available to all his customers would be held to have violated the Act by inadvertently passing over someone who is, in fact, a customer of the supplier.

While the requirement of knowledge serves to protect the supplier from inadvertent violation of the Act, it may be suggested that in certain instances, it should not be the sole criterion. For example, where the retailer is engaged in a business which does not usually sell the supplier's product, but the retailer actually notifies the supplier that he is now a "customer," he should not be entitled to section 2(d) promotional payment considerations. The FTC should examine the factual situation and determine whether the "customer" was selling the product sporadically; if this is the case, the "customer" should not be entitled to the promotional allowances. Unfortunately, in light of prior case law and the Guides' emphasis on "knowledge," it is doubtful whether a supplier would be excused from granting promotional allowances to this type "customer."

Guide Three's definition of customer has also created problems in the classification of chain and cooperative stores. It should be noted that following most sections of the Guides are examples of their application. These examples do not serve as a rehashing or clarification of the section but rather, in many instances, may be considered as a subsection expounding a separate, though obviously related, point. Example 2 of Guide Three provides that individual retail outlets which are part of chain stores or members of cooperative groups are not "customers" of the supplier when the supplier sells directly to the chain or cooperative headquarters. This, of course, makes these stores ineligible for promotional allowances which are granted to their individual competitors. In a separate statement accompanying the Guides, Commissioner MacIntyre points out that while a cooperative warehouse management might reject a promotional program

34. Id. Example 1 of this section states: "The seller may use the wholesalers to reach the retailing customers ... by using the wholesalers' customer lists for direct notification by the seller."
35. Id. at 6097-98. Example 2 of this section provides that:
The seller may satisfy his notification obligations to the retailers by undertaking, in good faith ... (c). Advising customers from accurate and reasonably complete mailing lists ... (emphasis added).
36. Different commercial enterprises competing for the same consumer dollar have been given rights to proportional treatment by the FTC. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 59-63 (1959) (department stores and small fabric stores); Liggett & Myers Tobacco Co., 56 F.T.C. 221, 246 (1959) (retail and vending machine sales of cigarettes); General Foods, Inc., 52 F.T.C. 798, 825 (1956) (wholesalers and institution wagon distributors). Considering the advantages the supplier derives from the inclusion of "knowledge" as a criteria for granting promotional allowances, the inclusion of certain occasional "customers" within the definition is not disastrous. See pp. 448, 449 supra.
for a small-volume product, that product may be of considerable importance to some of the cooperative's members who would now be foreclosed from the promotional assistance.\textsuperscript{38} The \textit{Guides} seem to have taken a position concerning chains and cooperatives which is directly opposed to the holdings in \textit{National Dairy Products Corp. v. FTC}\textsuperscript{39} and \textit{United States v. Borden}.\textsuperscript{40} These cases, decided under section 2(a), rejected price discount formulas, \textit{i.e.}, a regimented plan by which a supplier justifies lower prices to certain customers, which did not consider each store in a chain independently. Thus, while the Commission has ruled, and the courts have affirmed, that individual chain stores are in competition with independent retailers for the purpose of section 2(a) volume or functional discounts, they have failed to apply this rule to the section 2(d) area by making individual chain stores independently eligible for promotional allowances. Although it might be strongly argued that a supplier will not discriminate against his best customers and will provide the individual chain and cooperative stores with promotional allowances if they want them, the inconsistency of dealing with individual stores in a chain in section 2(a) situations while treating the chain as a whole in the section 2(d) area has even greater significance when evaluating the standards which require proportionality in the promotional allowances.\textsuperscript{41}

IV. \textsc{Proportionally Equal Terms}

While there have been no changes from the 1960 Guides in the text of \textit{Guide Seven}, the question of what is or should be proportional equality is still subject to debate and merits comment in any discussion of section 2(d). \textit{Guide Seven} provides that "payments or services must be proportionally distributed on some basis that is fair to all customers who compete in the resale of the seller's products." Though the Commission theorizes that "any method that treats competing customers on proportionally equal terms may be used," it does recommend that "this can best be done by basing the payments made or services furnished on the dollar volume or the quantity of goods purchased during a specified period."\textsuperscript{42} However, the use of the word "best" might now be interpreted to mean that the payments would otherwise be unlawful. The legislative history of section 2(d) indicates that promotional allowances given to selected customers were considered a form of secret price discriminations.\textsuperscript{43} Since promo-

\begin{itemize}
\item \textsuperscript{38} \textit{See Release, supra} note 18.
\item \textsuperscript{39} 395 F.2d 517, 525 (7th Cir.), \textit{cert. denied}, 393 U.S. 977 (1968). The court in rejecting an argument that all stores in a chain or group be considered as a unit, asserted: "An averaging system, when it permits some stores to receive a significantly larger discount than they could earn individually, has an anticompetitive effect. . . ."
\item \textsuperscript{40} 370 U.S. 460 (1962). The Court, when considering cost averaging between chain stores and independent stores asserted: "It is like averaging one horse and one rabbit." \textit{Id.} at 470.
\item \textsuperscript{41} \textit{See} pp. 451-52 infra.
\item \textsuperscript{42} \textit{1 Trade Reg. Rep.} ¶ 4003, at 6095 (FTC June 2, 1969) (emphasis added).
\item \textsuperscript{43} Congress intended to stop price favoritism coercively obtained by large buyers. \textit{See} 79 CONG. REC. 7078 (1935); 80 CONG. REC. 8111 (1936). Prior to passage of the \textit{Act}, advertising allowances were paid to large buyers without the expectation of any.
tional allowances are considered as affecting the net price of goods purchased, the Commission apparently believes the only way to effectively counter—act them is to force their payment to be related solely to the volume of purchases. It is in this perspective that the inconsistencies between the Guides and the National Dairy and Borden cases can best be appreciated. The separate classification of chain stores was denied in these cases because neither supplier could show an actual savings in their dealings with the individual stores of the chain. In these cases, a showing of value to the supplier was mandatory, however, value received is not in issue under the Guides. A supplier must institute a plan whereby all competing customers are given a chance to participate, whether or not the supplier would derive any value from the promotions. For example, a manufacturer develops a cooperative television advertisement campaign whereby he offers to pay for 50% of the costs of such advertisements promoting his product. Many of his wholesaler's customers would not be able to participate because even with a 50% rebate the cost would be too high. Thus the supplier must make available alternate plans to these customers, such as newspaper advertisements or handbills, even though the manufacturer considers this promotion type of little or no value to himself. A few earlier cases indicated that if a manufacturer instituted a program whereby he would pay for promotions at a percentage of purchases, he could vary the percentage rates depending upon the value to him of the service rendered. Also, in a 1966 advisory performance whatsoever. Congress made continual references to subsections (c), (d), and (e) practices as secret discriminations. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 68 n.12 (1959), citing 80 Cong. Rec. 8126, 8127, 8132, 8135, 8137, 8226 (1936). See also C. Edwards, supra note 2, at 49–53; 2 H. TOULMAN, ANTI-TRUST LAWS at 61 n.3 (1949).

44. See pp. 449–50 supra; notes 39, 40 supra.

45. The suppliers in National Dairy and Borden were making deliveries and refilling orders directly to the individual stores of the chains. The similarity in the volume of purchases and method of operations of certain independent stores who were receiving smaller discounts was the key to a finding of discrimination.

46. For examples of how a value received system might be effected see Millstein, Cooperative Advertising, 7 ANTITRUST BULL. 873, 895–96 (1962).

47. Guide 6, 1 TRADE REG. REV. ¶ 4003, at 6096 (FTC June 2, 1969), provides in pertinent part:

If a seller makes payments or furnishes services . . . he should do it under a plan . . .

48. See Guides 6(a), (c) and 9(c). Guide 6(c), provides in part:

If the basic plan is not functionally available to some customers . . . alternatives that are functionally available should be offered to such customers.

49. See Millstein, Sections 2(d) and (e) Robinson-Patman Act — Compulsory Universal Reciprocity?, 37 ANTITRUST L.J. 77, 77–78 (1968). Professor Corwin Edwards, considering the plight of the supplier being forced to purchase advertising he doesn't need just to comply with the law, states:

One might, with similar logic, require a steel manufacturer to buy railway transportation service from every railroad in proportion, not to his need for service from each, but to the amount of his steel products purchased by each. C. Edwards, supra note 2, at 159.

50. For example, if a retailer purchased $1,000 of a manufacturer's product he would receive a 5% promotional allowance or $50.

51. See Lever Bros. Co., 50 F.T.C. 494 (1953); Proctor & Gamble Dist. Co., 50 F.T.C. 513 (1953); Colgate-Palmolive Co., 50 F.T.C. 525 (1953). These cases appeared to sanction a plan where the suppliers could apply X% of purchases for
opinion the FTC approved an apparently value-based plan where a manufacturer’s promotional payments were proportionate to the number of persons exposed to in-store commercials. The Commission noted, however, that this method would, in the long run, probably correspond to the total volume of purchases of the supplier’s product. One year later, the Commission, in another advisory opinion, quashed hopes of a new liberality by rejecting a plan for payments based on floor space assigned to in-store promotion. Therefore, while a value-based proportional plan might be consistent with Commission considerations under section 2(a), by its failure to change the text of Guide Seven, the Commission has obviously chosen to continue its policy of rejecting all but volume-based plans, and the supplier should not be misled by the apparent choice of plans which the Guides offer.

V. THE NOTIFICATION REQUIREMENT

Guide Eight of the 1960 Guides required the supplier to inform his customers of available promotional programs, but specified no particular method of notification. Under the 1969 Guides, Guide Eight dictates that a “seller should take reasonable action, in good faith, to inform all his competing customers of the availability of his promotional program,” and outlines recommended means of direct notification. The Commission recognizes that sometimes more direct methods of notification are impractical, and as such it allows indirect notification but has burdened the supplier with “preferred” methods, e.g., announcements made on or in product containers, in trade publications, or through contracts with his wholesalers, distributors, or other third parties. In addition there is a requirement that the supplier check his system to make sure it is effective.

newspaper ads, X-1% for handbills, X-2% for dump displays, etc. See Millstein, supra note 49, at 93-94.

52. FTC Advisory Op. No. 88, [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,686, at 22,985 (1966), cited in Millstein, supra note 49, at 94. Former FTC Chairman Dixon, in 1962 at FTC sponsored hearings, made statements which might indicate that proportional plans other than volume based could be used, and he even encouraged lawyers to develop them. See Millstein, supra note 46, at 893-94.


55. 1 TRADE REG. REP. ¶ 4003, at 6097 (FTC June 2, 1969). Guide 8(a) provides: "If he (the seller) wants to be able to show later that he gave notice to a certain customer, he is in a better position to do so if it was given in writing.

Id.


In his dissent, Commissioner Elman, finding fault with Guide 8 (b) (2)’s requirement that the manufacturer give notice by placing the information on the shipping containers in such a way that the retailer’s managerial personnel will be alerted, referred to the joint statement of the Grocery Manufacturers of America, National Ass’n of Food Chains, National Ass’n of Retail Grocers, and the National Food Broker’s Ass’n to the effect that a manufacturer “cannot effectively control the flow of an individual product container between the time it leaves his plant or warehouse and the time... it arrives at its ultimate destination in the hands of some retailer somewhere in the United States.” Release, supra note 18.

57. Guide 8(b) (1)-(3), 1 TRADE REG. REP. ¶ 4003, at 6098 (FTC June 2, 1969).
In a vigorous dissent to the final Guides, Commissioner Elman, considering the inflexibility of the notification requirements stated: “It insults the framers of the Robinson–Patman Act to suggest that anything in the law as enacted by Congress requires such silliness.” 58 However, it is submitted that the Guides are sufficiently flexible to enable the seller himself to choose the most feasible method of notice in terms of his own distributional system even if outside the particulars of the notification plans set out in the Guides. The very terms “reasonable action” and “in good faith” which are embodied in Guide Eight 59 would appear to substantiate the idea that any reasonable effort on the part of a supplier to inform his customers would meet with Commission approval. The dominant requirement appears to be that the supplier must take affirmative action by instituting and operating under a set plan. Therefore, unless the plan is demonstrably irrational, the supplier will have met his “good faith” requirements. 60

After selecting a method of notification, a supplier must include in such notification a summary of the “essential features” of his promotional plan. These “essential features” appear to be: (1) the amount of the allowance; (2) the products involved; (3) the time and place of the promotion; (4) any deadlines for signing up; and (5) a general statement of the nature of the performance. 61 When direct methods of notification are impracticable, 62 Guide Eight also permits a supplier to enter

58. Release, supra note 18.

59. Guide 8(a), 1 Trade Reg. Rep. ¶ 4003, at 6097 (FTC June 2, 1969), provides:

The seller should take reasonable action, in good faith, to inform all his competing customers of the availability of his promotional program (emphasis added).

It should be noted that the terms “reasonable” and “in good faith” were not present in the Guides of 1960. 16 C.F.R. § 240.8 (1969).

60. In his concurring statement Commissioner Nicholson referring to the specificity of the notification requirements stated:

For my part, I care little whether he (seller) writes each of them (customers) a personal letter or shouts the glad tidings from his office window so long as they get the message. Release, supra note 18.

While Commissioner Nicholson’s nonchalance might not necessarily be the prevailing view of the Commission, other factors indicate that any well thought-out plan will be acceptable to the Commission or upheld in the courts. In FTC v. Standard Motor Products, Inc., 371 F.2d 613 (2d Cir. 1967), the court indicated that any method of discount allocation, unless demonstrably irrational, would be accepted despite the FTC’s preference for some other method. Also, in Philadelphia Carpet Co. v. FTC, [1963–1965 Transfer Binder] Trade Reg. Rep. ¶ 16,801, at 21,765, aff’d, 342 F.2d 994 (3d Cir. 1965), the Commission indicated that plans formulated before action was brought would be much more favorably received. In Viviano Macaroni Co. v. FTC, 411 F.2d 235 (3d Cir. 1969), the Commission rejected a defense of “good faith” meeting of competition under section 2(b) of the Act where a manufacturer relied on his salesman’s 18 years of experience, without taking affirmative steps to make certain the information was factual.

61. See Symposium, supra note 18, at 274. Commissioner Elman, again quoting from the joint statement, Release, supra note 18, said:

Grocery products promotions are of numerous, diverse types, have to be changed frequently in response to competitive conditions, and vary in duration and in the geographical area covered. Thus, “the ‘essential features’ of each . . . cannot be memorialized on a shipping container . . . in any practical manner that they can insure that they are not misleading, inaccurate, or obsolete, by the time they reach the customer.”

62. Guide Eight, supra note 18, at 274.
into agreement — calling for notification of retailers — with his wholesalers or other third parties who would be better able to perform the notification functions. While this privilege is limited to a situation where direct notification is "impracticable," it would again appear that any reasonable, good faith effort by a manufacturer to inform all his customers will be acceptable if it works, even though it is not in strict compliance with the Guides. Thus, whether the supplier is giving direct or indirect notice, the fact that a supplier is not following the examples and suggested methods in the Guide should not be a basis for FTC intervention in itself.

The requirement that a supplier inform his customers as to the existence of a promotional plan is not a new one. Earlier the Commission had made it clear that it was not sufficient for a supplier to have an available plan, but rather that he must alert his customers to the promotion. The difference is, of course, that after the Fred Meyer decision the number of those who warrant notification as a supplier's customer are so greatly increased that the process has become a complicated burden upon the supplier and a regimented system is a necessity.

VI. THE REQUIREMENT TO CHECK PERFORMANCE

Guide Eleven provides, as did the 1960 Guides, that, "[t]he seller should take reasonable precautions to see that services he is paying for are furnished and also that he is not overpaying for them." This requirement was designed to prevent the purchaser from transforming moneys paid by the supplier for promotional programs into cash rebates or hidden price reductions. Guide Eleven indicates that the manufacturer can comply with the requirements by getting a signed certificate of compliance from the customer plus either: (1) requiring that each customer give direct evidence that the allowances granted are being used for promoting the seller's product; or (2) in cases where such direct evidence is not "readily available," by making spot checks of a "representative cross section of participating customers." The question then arises as to whether the manufacturer must obtain direct evidence when such evidence is available, or whether he may always rely on spot checks. It is suggested that the above mentioned requirements of Guide Eleven when read in light of Guide Eleven (b) which provides that "[a] seller who, in good faith,

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63. Guide 13, 1 TRADE REG. REP. ¶ 4003, at 6100 (FTC June 2, 1969), outlines the obligations and requirements of the parties in such written agreements. Included in the agreement are provisions whereby the intermediary must:
1) give notice to seller's customers;
2) check customer performance;
3) insure functional availability to all seller's customers;
4) certify at reasonable intervals that a plan complying with the agreement is being carried out.

64. See note 60 supra.

65. See Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962); Harry Rosenfeld, Inc., 52 F.T.C. 1535 (1956); Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954).


67. Examples of direct evidence would be: receipts for broadcasting payments; invoices for purchases of printed materials; etc.
takes reasonable and prudent measures to verify the performance of his competing customers will be deemed to have satisfied his obligations under the Act," indicates that any method of checking customer performance would be acceptable to the FTC as long as the manufacturer actively and systematically imposes customer checks. With such compliance, absent any widespread misuse of the promotional allowance which would effectively demonstrate a lack of a supplier's control, the supplier would not be held in violation of the Act for isolated infractions by a customer.

As is the case with notification, a manufacturer may assign his checking obligation to his wholesalers or third parties. However, this "does not relieve the seller of his ultimate responsibility of compliance with the law," and the manufacturer must still spot check customer performance to be certain that his customers are notified of the plan and receiving proportionally equal treatment, even though the supplier has assigned this task to a third party.

VII. THE THIRD PARTY ORIENTED PLAN . . . SHERMAN ACT CONFLICTS

It is well established that in the absence of a valid fair trade agreement, any arrangement between a manufacturer–supplier and a wholesaler fixing the resale price of the wholesaler is illegal per se. If one may assume that a promotional allowance is a "hidden" price rebate, then it follows that the fixing of a wholesaler's distribution of promotional allowances is at least analogous to fixing his resale price because the retailer's price will be stabilized by the supplier's controls. Assume, for example, a manufacturer cuts his wholesaler's prices by 2% and instructs him to pass on the discount to his customers as a promotional allowance. This could be an incident of resale price maintenance, since promotional rebates are generally considered a form of hidden price discrimination. Under such a plan if the wholesaler decided that he would

68. See Symposium, supra note 18, at 276.
69. Guide 11(b), 1 Trade Reg. Rep. ¶ 4003, at 6099 (FTC June 2, 1969), provides:
   If a seller has taken such steps, the fact that a particular customer has retained an allowance in excess of the cost or value of services performed by him shall not alone be deemed to place the seller in violation of the Act.
70. Of course, the agreement must be carried out in compliance with Guide 13. See note 63 supra.
74. See pp. 450–51 supra.
75. For example, a supplier who wants to protect his established resale prices would want his price stabilized at the consumer level, as part of an overall price maintenance scheme. See White Motor Co. v. United States, 372 U.S. 253, 260 (1963); United States v. Bausch & Lomb Co., 321 U.S. 707, 720 (1944).
76. See p. 451 supra.
pocket the savings, his actions would leave his supplier open to suit from that supplier's customers who would not be receiving their proportional share of the allowances given to their competitors by other wholesalers. In addition, another Sherman problem confronts the supplier in that the wholesaler could claim that the supplier was precluded under the decision in United States v. Arnold Schwinn & Co.78 from demanding compliance with supplier oriented distributional procedures after the wholesaler has purchased the goods, as they are an alienation upon the freedom of the wholesaler to deal with anyone in any manner he chooses.79 Considering further the question of possible wholesaler restraints on alienation, the Guides raise conflicts in other situations. For example, the Guides provide that a supplier can limit his promotion to a particular territory.80 In such an instance, if a supplier distributes these allowances through his wholesalers he must dictate to his wholesalers which of their customers are eligible under the plan. If strong controls are not employed, the supplier may be faced with the possibility of having his wholesalers give allowances to customers outside the prescribed areas and thereby become susceptible to action for discriminating against competitors of those customers receiving the allowances and who were not within the area in which the promotion was to be effected. Even if the arrangement between a supplier and a wholesaler for the distribution of promotional allowances would not amount to price fixing,81 the supplier who limits the actions of his wholesalers to a specified territory by means of an agreement, combination or understanding, might violate section 1 of the Sherman Act. This is because the arrangement effects a restraint upon the wholesalers' right to complete dominion over his actions in relation to the goods he has purchased.82

The basic conflicts between the Guides' provisions and the Sherman Act center upon the purpose for which the promotional payments are being used in a distributional plan where the supplier uses a wholesaler to distribute these allowances in the form of price reductions. While it might be most expedient for a supplier to effect a promotional plan by reducing his price to the wholesaler who in turn reduces his price to the retailer as payment for promotional activities, it is submitted that a sup-

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77. See Albrecht v. Herald Co., 390 U.S. 145 (1968). The Albrecht decision indicates that a supplier would not be able to prevent his wholesalers from absorbing the allowance nor could he enter an agreement with the wholesaler’s customers to insure that the allowance would be distributed.
78. 388 U.S. 365 (1967), where the Court stated:
   "The decree should be revised to enjoin any limitation upon the freedom of distributors to dispose of the . . . products, which they have bought . . . where and to whomsoever they choose."
   Id. at 375.
plier who is contemplating the use of intermediaries in carrying out the Guides provisions should set up a separate fund out of which he advances money to the wholesaler or compensates him later for proven promotional expenses. Under such a plan there can be no use of the money for purposes other than promotions, and the wholesaler would be acting merely as an agent to pay back his customers who participated in the promotional scheme. Neither the supplier’s price to his wholesaler nor the wholesaler’s price to the retailer need be affected, and it would be unnecessary for the supplier to direct his wholesaler to lower prices in the wholesaler’s territory where the promotional plan is to be effected.

In Commissioner Elman’s original proposals there was a provision whereby agreements between a manufacturer and a third party which were approved by the FTC would not violate antitrust laws. However, this was omitted in the final guides. The FTC, of course, is in no position to dispense immunity from either Department of Justice suits or private treble damage actions. Only Congress is capable of such action and, as yet, Congress has not chosen to exempt promotional allowances from suit under the Sherman Act. However, if one recalls that the interpretation of section 2(d) which gave rise to the Guides was made by the Supreme Court in Fred Meyer, and if one may assume that the Guides meet the requirements of that interpretation, it is suggested that a supplier, complying with the Guides, should be protected in the courts against any possible Sherman conflict brought about by such compliance. The Supreme Court in Automatic Canteen Co. v. FTC spoke of the need to reconcile the Robinson—Patman Act with the policies of the Sherman Act. Perhaps the time has come when the Court will be forced into making such a reconciliation.

VIII. Conclusion

Though the Guides place a great burden upon the supplier, this burden may, to a certain extent, be a welcome one. While a manufacturer might well receive certain benefits from customer-directed advertising promotions, these promotions are generally instituted by powerful retailers primarily for their own benefit — to get more people into their stores by

83. The “Proposed” Guides of July 25, 1968, drafted by Commissioner Elman provided in Guide 13(b) the following:
Sellers, customers, or intermediaries contemplating the use of tripartite promotional plans may obtain an advisory opinion concerning . . . its legality . . . from the FTC.
85. 346 U.S. 61 (1953).
86. Id. at 74.
87. Since it was the Court’s interpretation of section 2(d) which prompted drafting of the Guides in the first instance, it would seem only logical for the Court to uphold its interpretation by giving to the supplier who complies with the Guides certain immunities from Sherman Act violations. If the Court fails to do this, the supplier who complies with the Guides could very well find himself stepping from the Robinson—Patman Act into private antitrust law.
advertising reduced prices on certain goods.88 Thus, the supplier himself ultimately finances through rebates any increase in his sales volume that the campaign might produce.89 Under the Guides, a supplier will no longer be subject to the same pressures from his most powerful customers to provide them with large promotional payments because he is precluded from giving allowances beyond a fixed percent of the customer's sales as established by the Guides' proportionality requirement. Conversely, because of the volume-percentage limitation which the Guides place on the supplier, and because the Guides have vastly increased the number of those entitled to promotional allowances, promotional allowances will play much less a role in supplier competition. A manufacturer–supplier, realizing that he must extend all allowances to all his customers, will no longer find it practical to lure large accounts with promises of large pseudopromotional kick-backs. It is submitted that the increases in the class of supplier's customers coupled with the requirements to notify these customers of promotional plans90 and to maintain a system for assuring compliance with the plans, will lead suppliers to consider: 1) weeding out certain accounts where it would not be advisable or economical to provide promotional plans; 2) relying much more heavily on their own product advertising and promotional programs;91 3) and as a final alternative, suppliers might accelerate vertical integration where possible, thereby bypassing the independent wholesalers.92 However, in projecting the effects of the Guides, it must be remembered that one of the prime considerations in drafting93 the Robinson–Patman Act was to protect independent wholesalers. It would indeed be ironic if the Guides led to the elimination of a group which the Act was designed to protect.

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88. This is illustrated by the fact that promotional allowances can be considered, under certain circumstances, a form of hidden price discrimination allowing retailers to sell the manufacturer's product at a reduced price. See p. 451 and note 43 supra.

89. The facts of the Fred Meyer case indicate that the suppliers underwrote the retailers promotions by replacing a percentage of their product sold or by redeeming coupons in cash at an agreed rate. 390 U.S. at 345.

90. See pp. 452–54 supra.

91. Besides expanding newspaper, radio and television product advertisement, smaller manufacturers who cannot afford such promotions might turn to the direct mailing of coupons to the consumer, redeeming them from any retailer who sells his product.

92. Since most manufacturers will have to expand their staffs to comply with the notification–checking provisions of the Guides, those who were leaning toward vertical integration might well conclude that this would be the best time to accomplish it.

93. H.B. Teegarden, counsel for the United States Wholesale Grocers Ass'n is generally credited with drafting the Act.