



# National Grocers Association

---

March 1, 2013

***Submitted Electronically***

Donald S. Clark  
Secretary  
Federal Trade Commission  
Office of the Secretary  
Room H-113 (Annex B)  
600 Pennsylvania Avenue NW  
Washington, DC 20580

Re: Fred Meyer Guides Review

Comments on Guides for Advertising Allowances and Other Merchandising Payments  
and Services  
16 CFR Part 240

The National Grocers Association (NGA) takes this opportunity to express its appreciation to the Federal Trade Commission (FTC) for extending the comment period so NGA and others may submit comments on the "Guides for Advertising Allowances and Other Merchandising Payments and Services" (the Fred Meyer Guides; hereinafter also referred to as the "Guides"). NGA, including its predecessor associations the National Association of Retail Grocers of the United States (NARGUS) and the Cooperative Food Distributors of America (CFDA), have strongly supported passage and retention of the Robinson-Patman Act ("the Act") and the Fred Meyer Guides since their inception.

The National Grocers Association (NGA) is the national trade association representing retail and wholesale grocers that comprise the independent sector of the food distribution industry. An independent retailer is a privately owned or controlled food retail company operating in a variety of formats. Most independent operators are serviced by wholesale distributors that are either retailer owned companies or voluntary wholesalers, while others may be partially or fully self-distributing. Some are publicly traded, but with controlling shares held by the family, and others are employee-owned. Independents are the true "entrepreneurs" of the grocery industry and dedicated to their customers, associates, and communities.

## **Background**

NGA and its predecessor organizations have consistently and strongly opposed repeal or weakening of the Robinson-Patman Act. NGA's former Chairman J.H. Campbell Jr., President and CEO of Associated Grocers, Inc. in Baton Rouge, Louisiana, testified on July 28, 2005 before the Antitrust Modernization Commission and stated it well when he said that the Act "has been attacked over the years as being protectionist legislation, as being designed to protect inefficient retailers, and yet nothing could be further from the truth."

"The Act is an integral part of our antitrust fabric and framework. It is designed to benefit and protect the American consumer by ensuring the widest variety and selection of highest quality products at the lowest possible prices. "

"At NGA and at our company, we desire merely an open market fair to all competitors with equality of opportunity, where survival depends upon efficiency rather than upon scale or unfair advantage of the buyer."

The Act's purpose is not to protect competitors, but to provide "equality of opportunity in business by strengthening the antitrust laws" (House Judiciary Committee Report, March 31, 1936). The Act was never intended to insure a retailer's right to exist, nor has it in practice resulted in such. However, it was intended that one's success would not be determined by the ability to obtain unfair buying advantages based upon one's size or buying power. Likewise NGA's mission is to ensure independent community-focused retailers and wholesalers have the opportunity to succeed and better serve the consumer. American consumers have benefited from the most diversified food distribution and supply system in the world, and independent retailers and wholesalers have historically been the cornerstone of that diversity by providing competitive prices, product variety, service, and value for the consumer. The Act and the Guides have contributed to the ability of independent retailers and wholesalers to provide consumers robust competition in the marketplace.

With that as background NGA will address the some of the Commission's requests for comments on the following questions:

### **1. Is there a continuing need for the Fred Meyer Guides?**

NGA has strongly supported the Fred Meyer Guides because of the assistance and guidance they provide to buyers, sellers, and their counsel in assuring voluntary compliance with Sections 2(d) and (e) of the Act. Generally, Section 2(d) makes it unlawful for a seller of products in commerce to pay a customer anything of value for promotional services or facilities provided by the customer in connection with a sale of products of like grade and quality unless such payments are available on proportionally equal terms to all other competing customers. Section 2(e) applies when the seller furnishes promotional services or facilities to the purchaser and requires any services or facilities to be made available to all purchasers on proportionally equal terms.

NGA continues to support retention of the Guides for the role they play in preventing price discrimination and assuring all competing customers, including independent retailers and wholesalers, are informed and have access to promotional allowances, services or facilities that are either paid or furnished to competing customers. The Guides provide important examples and interpretations upon which retailers, wholesalers and manufacturer/suppliers often rely to develop promotional plans and avoid unnecessary and costly litigation. NGA has continually advocated that voluntary compliance is preferable to regulatory enforcement. NGA's goal is for any wholesaler or independent retailer in the marketplace to have the opportunity to receive the same price offerings, deals, allowances, promotions, packaging, and payment terms that are being made available to any other competitor at the same time.

If the FTC decides to undertake another periodic review based upon the comments filed, it is important that the FTC conduct a thorough factual analysis based upon the application of the requirements of the Act to the changing nature of the competitive marketplace before publishing any recommended changes for further comment. NGA, as in the past, looks forward to participating in the process and being a resource.

## **2. Have there been changes in the case law that are not, but should be, reflected in the Guides?**

For purposes of these comments, NGA is not in the position to provide a thorough analysis of the case law. However, as the FTC pointed out in its preamble to the publication of the 1990 Guides "Section 2(d) and (e) are virtually *per se* sections." (55 Fed. Reg.33651, August 17, 1990). In recent years several commentators have recommended that violations of Sections 2(d) and (e) be amended to require proof that the discrimination caused competitive injury similar to the burden of proof in Section 2(a) price discrimination cases.

In fact some may seek to interpret the Supreme Court's decision in *Volvo Trucks N.Am.,Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) to justify that course of action citing the Court's opinion "we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*" (181) . It is important to point out that *Volvo Trucks* was a **Section 2(a) price discrimination case** focused on the question: "May a manufacturer be held liable for secondary line price discrimination in the absence of showing that the manufacturer discriminated between dealers competing to resell its products to the same retail customer?" (175)

The Supreme Court in *FTC v. Fred Meyer*, 390 U.S. 341,357 (1968) made it clear that the statutory language of Section 2(a) as passed by Congress "to injure, destroy, or prevent competition" was not included in Sections 2(d) and (e). NGA opposes any amendment that would require proof of competitive injury in order to establish a violation of Section 2(d) or (e) and such action would require an amendment to the Act by Congress.

3. How, if at all, should the Guides be revised to account for new methods of commerce introduced as a result of the Internet since 1990? How should the Guides address: (a) Support for Internet or electronic promotion in various forms, such as pay-per-click, display ads, targeted ads, mobile ads, or other formats; (b) manufacturer support for different pages within a retailer's Web site (*e.g.*, support for display on the home or "landing" page of a Web site versus support on an interior page); (c) general principles for distinguishing between price reductions and promotional allowances in an Internet context; (d) the definition of "competing sellers" as it applies to traditional and Internet retailers; (e) general principles of proportional equality, if any, that should apply to promotional support given to traditional and Internet retailers; and (f) any other aspects of the Guides that might need revision or clarification in light of the development and prominence of e-commerce?

The questions posed here by the Commission require substantial factual analysis but there are several principles within the Guides which are applicable here. A core or central issue to these questions is encompassed in **Section 240.5-Definitions of Competing Customers** which "are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary." As NGA highlighted in its February 15, 1989 comments there should not be distinctions between so called "classes of trade" in which in some manufacturers' view retailers as being in different classes and that they do not compete within the meaning of the Act even though they may sell the same product to the same customers in the same market area.

NGA submitted and recommended Example 3 which the Commission adopted in the current Section 240.5. It provides if a manufacturer sells laundry detergent to a grocery store and to a discount department store that compete with each other, then any allowance, service, or facility should be made available on proportionally equal terms. As a matter of principle, the same standard should apply to internet retailers, such as Amazon. For example, Amazon may be selling the same detergent as the competing grocery store, department store, or other retailer is selling to the same customers. This is no different than the responsibility that is imposed on manufacturers when they sell to national brick and mortar retailers that compete with other retailers in the same marketplace. This clearly broadens who are "competing sellers" to "competing customers."

NGA strongly supports retention of Example 3 and urges the Commission to consider a similar example for transparent treatment, notice, and disclosure by manufacturers who are selling to internet retailers that compete with other retailers regardless of the location or format of the retail establishment.

Questions (a) and (b) in NGA's view would require factual analysis by the Commission of the practices being used in the marketplace by both Internet and brick and mortar companies recognizing that the internet no longer restricts a retailer to just a brick and mortar environment. As a matter of principle, it would appear that the questions posed

here are related to a “medium” of delivering and communicating promotional allowances and services similar to newspaper advertising, couponing and other plans that may exist today. Payments for pay-per-click, display ads, targeted ads, mobile ads and other formats require factual analysis to assure that the competing retailers are receiving proportionally equal offers in a timely fashion. The same is true for displays on a retailer’s home or a “landing” page of a Web site versus an interior page. Many NGA retailers from single store operators to large multi-store retailers are utilizing Web sites and the Internet to provide promotions to consumers. Therefore, the issue of having the Guides provide guidance on how suppliers provide proportionally equal payments and furnished services to competing retailers is especially important. Technology and the internet can serve to level the playing field in competing for customers with power buyers, if manufacturers choose to utilize it in order to facilitate timely, complete, and cost effective communication of promotional allowances and services.

Question (e) asks what general principles of proportional equality, if any, should apply to traditional and Internet retailers. From NGA’s perspective the same principles of proportional equality should apply.

Related to this question about the principles of proportional equality is the question of how is it measured- cost versus value. **Section 240.9 Proportionally equal terms** provides that “promotional allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period.”

A number of commentators have once again raised the specter for the Commission to provide for a value standard in light of the Supreme Court’s decision in *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990). In 1989 NGA strongly opposed the adoption of a value standard to determine proportional equality because manufacturers would favor large power buyers to the competitive detriment of independent retail and wholesale grocers based upon a subjective and undefined value. In 1990 the Commission noted that most comments opposed the adoption of a value standard because it would allow sellers to vary allowances across individual customers and was considered too subjective. It even noted that those supporting the standard were cautious in their support. The Commission concluded “the vast majority of the comments addressing this issue are concerned that the value standard creates indeterminacy and thus, the potential for abuse by sellers. These comments have merit, unless carefully monitored, sellers may use elastic, expansive measurements of value which could help disguise persistent, systematic discrimination, making it more difficult to detect discrimination, especially to the benefit of power buyers. These concerns about the operation of a value standard counsel against including it in the Guides, which are intended to help businesses comply with the law.”

NGA continues to oppose a value standard. The concerns about unfair, discriminatory and preferential allowances and payments being given to power buyers to the detriment of competing retailers are just as valid as in 1990, if not more so today. The

Commission is well aware of the numerous subjective factors that make a value standard a slippery slope to price discrimination by sellers for the advantage of power buyers. The Commission must, at a minimum, conduct more research and obtain factual information from the proponents who acknowledge the subjectivity of a value standard before proposing a change for public comment.

**4. Questions 5, 6 and 7 address costs and benefits of the Guides to businesses that grant and receive promotional allowances and services, and ultimately to consumers?**

To the extent manufacturers make promotional allowances and services available to independent retailers and wholesalers it promotes a level playing field and the opportunity to compete against power buyers. Manufacturers benefit by having a diverse field of customers to promote and offer their products for sale, and ultimately, consumers benefit by having a diverse choice of retail competitors that offer them competitive prices, product variety, service, and value.

**5. Question 11 asks what, if any, developments in technology or economic conditions require modification to the Guides?**

The prolonged economic recession beginning in 2008 accompanied by deflationary prices and the proliferation of competitive retail formats has intensified the need for retailers to control costs and seek competitive sources of supply. The Guides are particularly important in assuring that sellers are transparent and communicate promotional allowances, services and facilities that are being offered in a timely fashion to all competing buyers. In an industry that operates on a one percent profit margin, having timely and accurate access to competitive prices, products, packaging, promotions, and payment terms is essential to having the opportunity to succeed in serving consumers.

**Section 240.7 Services or facilities** lists examples that are used to promote the resale of a seller's product. Some have recommended that "Special packaging, or packaging sizes" should be eliminated from the list of examples. NGA strongly opposes the deletion because independent retailers and wholesalers in recent years have found discriminatory "Special packaging, or packaging sizes" to be one of the most arbitrary means for sellers to create class of trade distinctions between competing retail customers. Why should a power buyer be offered the same two boxes of the same product wrapped in plastic but a competing retail customer be denied that opportunity and forced to buy two separate boxes of the same product and deny their consumers a choice? What is the economic rationale for such a distinction?

The consumer should never be funneled to any particular retail customer because they have been given any preference in price, product, packaging, promotion, or payment terms to the detriment of any other retail customers of a seller. A fair and open market permits retail competitors to solicit the consumer fairly and equitably, and earn the business without any such preference or advantage.

The Commission should continue to communicate the need for voluntary compliance with the Act and the Guides to sellers, buyers, and counsel.

**6. Question 12 asks “What effects, if any, do the Guides have on the costs, profitability, competitiveness and employment of small business entities?”**

As discussed previously, the Act and Guides offer customers regardless of size the opportunity to compete. Small business, including independent retail grocers and wholesalers, benefit when promotional allowances, services and facilities are made known to all rather than a few favored power buyers. Ultimately, consumers benefit because they are offered competitive choices in the marketplace when it comes to products, price, packaging, variety, service, and value.

**Conclusion**

Once again, NGA thanks the Federal Trade Commissioners for the opportunity to express its views on the Guides that are not only of importance to independent retail grocers and wholesalers, but also to consumers and the economy. The Guides are frequently relied upon by the Courts, and therefore any changes should be made after a full factual record is developed by the Commission, and public hearings are held. The importance of the Guides merits the adoption of such factual consideration and procedures by the Commission.

Sincerely,

Thomas F. Wenning  
Executive Vice President and General Counsel