

**Comments of the  
Section of Antitrust Law of the American Bar Association  
in Response to the Federal Trade Commission’s Request for Public Comment  
Regarding its Guides for Advertising Allowances and  
Other Merchandising Payments and Services (the “Fred Meyer Guides”)**

**January 29, 2013**

The Section of Antitrust Law (the “Antitrust Section” or “Section”) of the American Bar Association (the “ABA”) is pleased to submit these comments to the Federal Trade Commission (the “Commission”) in response to its December 4, 2012 request, 77 Fed. Reg. 71,741, for public comment regarding its Guides for Advertising Allowances and Other Merchandising Payments and Services (the “Fred Meyer Guides” or “Guides”), 16 C.F.R. Part 240. The Fred Meyer Guides are intended to assist businesses to comply with Sections 2(d) and 2(e) of the Robinson-Patman Act (the “RPA”), 15 U.S.C. §§ 13(d)-(e), dealing with the provision of advertising and promotional allowances and services provided in connection with the resale of commodities. The Guides were first promulgated in 1969, and most recently amended by the Commission in 1990. The views expressed herein are solely those of the Antitrust Section, have not been approved by the House of Delegates or the Board of Governors of the ABA, and therefore should not be construed as representing the policy of the ABA.

As part of the Commission’s review of its current regulations and guides, it has requested comments on the benefits and costs of, and continuing need for, the Fred Meyer Guides; developments in the case law that should be reflected in the Guides; and the effect of technological, economic, or other industry changes on the Guides. The Commission has also posed a series of specific questions concerning the Guides. The Antitrust Section’s comments will first state views on the Guides as a whole and will then address the specific questions raised by the Commission. The following section will recommend revisions to specific sections of the Guides in light of legal and technological developments since 1990.

## **I. GENERAL COMMENTS**

As the Commission noted in its request for comments, the Fred Meyer Guides are “administrative interpretations of the law” and are “intended to reflect and interpret the requirements that courts have imposed upon sellers, in actions brought by private parties as well as by the Government. 77 Fed. Reg. 71,741, 71,742 (Dec. 4, 2012). They “do not have the force and effect of law and are not independently enforceable.” *Id.* Nevertheless, lawyers, industry, and the courts have generally relied on them as accurate statements of the law. *See, e.g., Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938, 945 (9th Cir. 1998) (giving “considerable weight” to the Fred Meyer Guides in determining that § 2(e) did not apply to alleged discriminatory improvements to leased premises); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.3d 1319, 1329 (6th Cir. 1983) (summary judgment dismissal because defendant followed procedures approved in the Fred Meyer Guides). Moreover, the Guides serve the additional purpose of providing “guidance in some areas where no definitive guidance is provided by the case law.” 16 C.F.R. § 240.1. The Guides were last revised in 1990—more than 20 years ago—and therefore do not reflect important judicial developments since then that involve or impact interpretations of Sections 2(d) and 2(e), as well as the significant impact that the Internet and

other technological advances have had on advertising and promotional practices throughout the economy. For these reasons, the Antitrust Section believes that the Commission should revise the Guides to bring them into conformity with current case law and technology.

Of more importance, both before and after the 1990 revisions to the Fred Meyer Guides, the Supreme Court has emphasized the need to ensure that the RPA is interpreted in a manner that is consistent with the overall goal of the antitrust laws to protect competition—not individual competitors. See *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (the Court “would resist interpretation [of the Robinson-Patman Act] geared more to the protection of existing *competitors* than to the stimulation of *competition*”) (emphasis added); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (the RPA is one of the antitrust laws, and “[i]t is axiomatic that the antitrust laws were passed for the ‘protection of *competition*, not *competitors*’”); *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 80 (1979) (interpretations of the RPA should not “‘extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation’”); *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978) (“[T]he Robinson-Patman Act should be construed so as to insure its coherence with the ‘broader antitrust policies that have been laid down by Congress.’”).

In that regard, the Antitrust Section is concerned that the focus of the Fred Meyer Guides is on whether conduct constitutes an advertising and promotional discrimination rather than the potential competitive impact of the applicable conduct. While Sections 2(d) and 2(e) technically do not require proof of likely adverse competitive effects, Judge (now Justice) Stephen Breyer, considering Section 2(e) in particular, declared even before the 1990 revisions that “§ 2(e), like the rest of the Robinson-Patman Act, is aimed at significant harm to competition.” *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 25 (1st Cir. 1981). That principle should be made clear at the outset of the Guides. Moreover, the Guides should emphasize that the Commission’s concern is not on an advertising or promotional discrimination alone but, as the Supreme Court most recently stated in its *Volvo* decision, “the perceived harm to competition occasioned by powerful buyers” as a result of significant discriminations. 546 U.S. at 180-81. Such harm could manifest itself, for example, in a powerful buyer’s gaining or maintaining market power, with the attendant risk of higher prices to consumers or the loss of retail services or resale channels desired by consumers.

Particularly after *Volvo*, the federal courts have struggled to reconcile the RPA with general antitrust principles requiring focus on injury to competition rather than a single competitor. As stated by the Third Circuit in *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 206 n.17 (3d Cir. 2010):

We are asked [in *Volvo*] to apply the RPA, a statute that is “fundamentally inconsistent with the antitrust laws” . . . in a fashion that is “consistent with the broader policies of the antitrust laws.” This conundrum is bound to create confusion for judges called upon to apply the RPA in a host of settings.

In the view of the Section, the revisions to the Fred Meyer Guides recommended in these comments will allow the Commission to help courts interpret the RPA, and more specifically

Sections 2(d) and 2(e), consistent with the competitive concerns and antitrust norms articulated by the Supreme Court in *Volvo* and the earlier decisions noted above.

The Commission's request for comments does not invite comments on whether the RPA itself should be repealed or amended. We note, however, that in 1987 the Antitrust Section and the ABA recommended that the RPA should be amended to make it more internally consistent and bring it into greater harmony with antitrust principles expressed in the Sherman Act. *See* ABA Report to the House of Delegates #105 at 1 (1987). One of the recommended changes was that Sections 2(d) and 2(e) should be amended to integrate into them the part of the language of Section 2(a), 15 U.S.C. § 13(a), that requires proof of a likelihood of an adverse overall competitive impact as well as discrimination. *Id.* at 2. The comments herein with respect to the Fred Meyer Guides are consistent with, but independent of, the 1987 recommendations, which remain in place.

## **II. RESPONSES TO THE QUESTIONS POSED BY THE COMMISSION'S NOTICE**

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

Yes. Lawyers, businesses, and courts continue to rely on the Guides as accurate statements of the law. The Guides provide important guidance in counseling as well. Thus, the Guides are more than a summary of the law; they are an important compliance resource for sellers, buyers, third parties, and their counsel in designing and implementing advertising, promotions, and merchandising programs. The Guides are particularly valuable to lawyers who do not specialize in RPA law.

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

Yes. As will be summarized in the next section of these comments, there have been significant changes, particularly relating to the requirements of practical availability and proportionality.

### ***(3) How, 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? In particular, how should the Guides address: (a) Support for Internet or other 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 for display 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 Internet, combined with mobile technology, have revolutionized marketing and communications in this country and around the world. Because the Internet is omnipresent, sellers may now market to consumers from wherever their businesses are located. Except to the extent that they are restricted geographically by their suppliers or other practical limitations, Internet retailers in particular are potential competitors of every other retailer that sells the same or comparable products. *See, e.g., Am. Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1040-41 (N.D. Cal. 2001); *Nat'l Ass'n of College Bookstores, Inc. v. Cambridge Univ. Press*, 990 F. Supp. 245, 250, 253 (S.D.N.Y. 1997). As the Commission's request for comments notes, this changes dramatically the concept of who is a "competing seller."

As recognized in the subparts of this Question, marketing and promotional practices are much different today than they were in 1990 in light of the new technologies. As suggested in the Section's specific comments on Guide 7 of the Fred Meyer Guides, the Commission should provide guidance relating to the application of Section 2(d) to the promotion of products on the Internet. In our view, the seller should have the ability to determine what constitutes Internet advertising covered by its cooperative advertising plan and to require more than the mere listing of a product as long as it does so on a non-discriminatory basis. Moreover, as will be addressed by the Section in our comments relating to Guide 9 of the Fred Meyer Guides, it is essential that suppliers are authorized to pay for promotional services based not just on the cost of the service, but also on the value to the supplier of the promotional service provided by a retailer. For example, as suggested in the subparts of this Question, payment could permissibly be based on the number of consumer visits to the seller's product information described on the Internet retailer's website.

- (4) *To what extent, if any, should § 240.13(a) of the Guides be revised to reflect cases discussing the possibility that what appears to be a discrimination in promotional allowances may support a private action for inducing or receiving a discrimination in price? See, e.g., American Booksellers Ass'n v. Barnes & Noble, 135 F. Supp. 2d 1031 (N.D. Calif. 2001); but see United Magazine Co. v. Murdoch Magazines Distribution, 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001).*

Current Guide 13 addresses that lower courts have ruled that no private right of action is available against a buyer for knowingly inducing or receiving an unlawfully discriminatory promotional allowance or service. Question (4) asks whether the Guides should reflect lower court decisions to the effect that funds supposedly received as reimbursement for a buyer's promotional services in fact involved a price discrimination and therefore would give rise to a suit under Section 2(f) against a buyer knowingly receiving such a payment.

Most decisions to date, which could be referred to in Guide 13, allow such a suit against a buyer if the seller did not require any promotional services at all, or if the payment far exceeds the value of the services to the seller or the cost to the buyer. *See Am. Coop. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907, 913 (7th Cir. 1946) (gross disparity between payment and cost of services subject to § 2(a)); *Coalition for a Level Playing Field, LLC v. AutoZone, Inc.*, 737 F. Supp. 2d 194, 211 (S.D.N.Y. 2010) (advertising reimbursement illegal under § 2(a) only if given for services not performed at all or amount greatly exceeds value or cost of the service); *Am. Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (promotional payment greatly in excess of actual promotional expenses and creating profit for

buyer subject to § 2(a)); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 138 (S.D.N.Y. 2000) (excessive payment may be subject to § 2(a) indirect price discrimination claim). See also *United Magazine Co. v. Murdoch Magazines Distribution, Inc.*, 2001 U.S. Dist. LEXIS 20878, at \*19 (S.D.N.Y. 2001) (in claim against allegedly favored buyer, court concluded that advertising and promotional allowance discriminations as such are subject to § 2(d) rather than § 2(f)).

Some courts focused solely on the disparity between the amount of the seller's payment and the buyer's cost in performing the services. This is an unduly narrow approach, because a promotional payment can depend on the value of the services performed, their cost, and the number of units purchased and time period covered. Therefore, the standard to be adopted by the Commission should make it clear that Section 2(a) should apply only if the payment substantially exceeds any legitimate measurement, including a value- or cost-based measure.

A few decisions, however, fail to consider, or are otherwise unclear as to, how excessive the overpayment has to be to give rise to a claim under Section 2(f). For that reason, the Section believes those decisions fail to establish any meaningful standard and should not be considered authoritative. See *Kirby v. P.R. Mallory & Co.*, 489 F.2d 904, 910 (7th Cir. 1973); *Sofa Gallery v. Mohasco Upholstered Furniture Corp.*, 639 F. Supp. 677, 678-70 D. Minn. 1986).

- (5) ***What benefits and costs have the Guides had on businesses that grant promotional allowances and services?***
- (6) ***What benefits and costs have the Guides had for businesses who receive promotional allowances and services?***
- (7) ***What benefits and costs have the Guides had for ultimate consumers?***

As previously noted, the Guides are a valuable resource to both sellers and resellers as a summary of the advertising and promotional requirements of the RPA, and as guides for counseling as well. Yet, if the Guides do not reflect current RPA case law and technological changes, they may inhibit sellers and resellers from engaging in permissible promotional practices. Unlike other antitrust laws, which are intended to enhance and protect consumer welfare, the RPA was designed to protect small businesses against the entry and growth of larger, sometimes more efficient competitors, and by its nature may result in higher prices for consumers. The Section is unaware of any empirical evidence addressing the issues posed by Questions (5), (6), and (7). It may be that individual sellers or buyers and/or their trade associations could address these questions from the standpoint of actual marketplace experience in their comments submitted to the Commission in response to its December 4, 2012 notice concerning the Fred Meyer Guides.

- (8) ***What changes, if any, should be made to the Guides to increase their benefits to those who use them and to consumers? Are there terms in the statute or concepts in the case law that are not presently addressed in the Guides, and that might benefit from clarification? How would these changes affect the costs that the Guides impose on firms that conform to them?***

- (9) *What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on firms that conform to them? How would these changes affect the benefits provided by the Guides?***

The Section's specific suggested changes to the Fred Meyer Guides relating to Questions (8) and (9) appear in the next section of these comments. In part, they address concepts in the case law that are not presently addressed in the Guides that the Section believes should be clarified. These changes would increase the Guides' benefits to the lawyers, businesses, litigants, and courts that use them by bringing them into conformity with current case law and technology. They would also benefit consumers to the extent that the 1990 version of the Guides currently in effect may inhibit lawful practices that could result in lower costs. While some concerns would remain because case law has not definitively addressed all aspects of the RPA's promotional provisions and technology continues to evolve, the Section believes the revisions to the Guides suggested in these comments should significantly reduce the costs to businesses imposed by the 1990 version.

- (10) *Do the Guides overlap or conflict with other federal, state, or local laws or regulations? If so, what changes in the Guides, if any, would be appropriate?***

As previously noted, the Fred Meyer Guides prohibit conduct that does not threaten competitive harm, and to the extent that the Guides do not focus their coverage on the protection of small buyers from anticompetitive conduct by "power buyers," they are inconsistent with the current views of the RPA expressed by the Supreme Court in 2006 in its *Volvo* decision. The Section's specific suggested changes to the Guides in the next section of these comments would reduce some, but not all, of these concerns.

- (11) *In addition to the issues mentioned in Question (3) above, since the Guides were last amended, what, if any, developments in technology or economic conditions require modification to the Guides? What modifications are required?***

The revisions to the Guides suggested in response to Question (3) above address the Internet and mobile technological developments.

- (12) *What effects, if any, do the Guides have on the costs, profitability, competitiveness and employment of small business entities?***

The Section has addressed this Question in its responses to Questions (8), (9) and (10) above.

- (13) *Are there foreign or international laws, regulations, or standards concerning the avoidance of discriminatory allowances and services that the Commission should consider as it reviews the Guides? If so, what are they? (a) Should the Guides be changed to harmonize with these foreign or international laws, regulations, or standards? Why or why not? (b) How would harmonization affect the costs and benefits of the Guides for consumers? (c) How would harmonization affect the costs and benefits of the Guides for businesses, particularly small businesses?***

Few countries' antitrust statutes address the RPA issues addressed by the Fred Meyer Guides. Those that do, generally do so only in the context of monopolistic practices similar to those subject to Section 2 of the Sherman Act. Harmonization of the Guides with the laws of those jurisdictions would require interpretation of the injury to competition requirement consistent with the standard of Section 2.

*(14) Are there any other problems occurring in the provision of promotional allowances and services covered by the Guides that are not dealt with in the Guides? If so, what mechanisms should be explored to address such problems?*

The Antitrust Section has nothing to add beyond its responses above and those that will be made in the next section of these comments in connection with specific Guides.

### **III. SUGGESTED REVISIONS TO SPECIFIC GUIDES**

#### **Guide 3, 16 C.F.R. § 240.3 – Definition of seller**

Guide 3, which defines “seller,” should exclude an entity offering a digital product for downloading. Such intangibles are not commodities subject to the RPA. *See Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1317 (C.D. Cal. 1992); *Record Club of Am. v. CBS*, 310 F. Supp. 1241, 1243-44 (E.D. Pa. 1970). Moreover, transactions involving those digital products are generally not sales but licenses.

#### **Guide 4, 16 C.F.R. § 240.4 – Definition of customer**

a. Guide 4, which defines “customer,” should exclude an Internet retailer that is merely acting as an agent for some other reseller of the product involved. From the standpoint of the seller providing promotional allowances or services, the actual reseller of the product providing the applicable services is the customer. This is true, for example, when the Internet retailer performs billing and collection functions as an agent for the seller's customer.

b. In view of the ubiquitous nature of the Internet, a retailer who claims not to have received notice of the availability of a promotional service or allowance through a seller's Internet website used to communicate with its resellers (in compliance with the notice requirements of Guide 10(b), if that Guide is modified as suggested below) lacks any basis to challenge an alleged discrimination.

c. The Note to Guide 4 states that a retailer “purchasing solely from other dealers,” or only “making sporadic purchases from a seller,” or merely “stocking a few isolated items” in a product category it does not usually sell, will not be considered a “customer” “unless the seller has been put on notice that such retailer is selling its product.” To be consistent with the views expressed by the Supreme Court in *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 448-49 (1983), concerning the congressional purpose of the RPA, and to reduce unnecessary compliance costs, this last clause should be deleted. Such a retailer should not be considered a competitor of those customers who actively sell the applicable products.

### **Guide 6, 16 C.F.R. § 240.6 – Interstate commerce**

Guide 6 provides that the statutory commerce requirement is satisfied for purposes of Sections 2(d) and 2(e) when “any part of a business . . . is not wholly within one state . . .,” as the standard under these provisions should be “at least as inclusive as” under Section 2(a). This is not an accurate statement of the law. The great weight of judicial authority is that Sections 2(d) and 2(e) have the same jurisdictional limitations as Section 2(a). *See Zoslow v. MCA Distrib. Corp.*, 693 F.2d 870, 881 (9th Cir. 1983) (declaring it “incongruous” to have a different commerce requirement for §§ 2(d) and 2(e) than for § 2(a)); *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1115-16 (5th Cir. 1982); *Shreveport Macaroni Mfg. Co. v. FTC*, 321 F.2d 404, 408 (5th Cir. 1963). Accordingly, this Guide should be revised to limit the application of Sections 2(d) and 2(e) to advertising and promotional allowances and services relating to transactions as to which at least one of the sales crosses state lines, rather than basing their application on the location of the seller.

### **Guide 7, 16 C.F.R. § 240.7 – Services or facilities**

a. Guide 7 states that the terms “services” and “facilities” are limited to activities used “primarily” to promote the resale of a product by a customer, while “services or facilities that relate primarily to the original sale are covered by section 2(a).” The word “primarily” should be deleted in both of these sentences because it is ambiguous and contrary to current legal interpretations of the provisions, which limits their application to activities used to promote the resale of a product by a customer. *See, e.g., Freightliner of Knoxville, Inc. v. Daimler Chrysler Vans, LLC*, 484 F.3d 865 (6th Cir. 2007); *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1424 (11th Cir. 1990).

b. Guide 7 also lists “[s]pecial packaging, or package sizes” as examples of promotional services covered by Section 2(e). This statement was considered to be a “close call” when the Guides were revised in 1990, apparently based on a then 50 year old decision, *Luxor, Ltd.*, 31 F.T.C. 658, 664-65 (1940). The established law is now clear that partial refusals to deal with particular resellers, including refusals to sell them particular products in a product line, are not covered by the RPA. *See, e.g., Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318 (9th Cir. 1989); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 682-83 (10th Cir. 1984); *L & L Oil*, 674 F.2d at 1120; *Mullis v. Arco Petroleum Corp.*, 502 F. 2d 290, 294 (7th Cir. 1974). Accordingly, this example of a service subject to the statute should be deleted, with the above-referenced cases being referred to as the reason.

c. As noted in the Section’s response to Question (3) of the Commission’s request for comments, the Commission should clarify that the seller has the ability to determine what constitutes Internet advertising covered by its cooperative advertising plan subject to Section 2(d). The seller may include or exclude the mere listing of a product on a website as available for purchase, as it had the right to include or exclude printed catalog listings before the advent of Internet retailing.

### **Guide 8, 16 C.F.R. § 240.8 – Need for a Plan**

a. Guide 8 states that if a seller’s promotional plan “is complex” or “there are many competing customers to be considered,” the seller “would be well advised to put the plan in writing.” This recommendation should be satisfied when the plan itself is contained on the seller’s website.

b. Guide 8 also states that “[a]lternative” offerings should be made available to customers who cannot as a practical matter take advantage of “some of the plan’s offerings.” This is overly restrictive: the plan should be sufficient so long as a customer can take advantage of *any* of the offerings. Moreover, it should be sufficient for the plan to contain a statement that a customer who cannot take advantage of any of the offerings should contact the seller so that something usable by the customer can be arranged.

### **Guide 9, 16 C.F.R. § 240.9 – Proportionally equal terms**

a. Guide 9 acknowledges that “[n]o single way to [proportionalize] is prescribed by law.” It adds, however, that “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 specific period,” and every example is based on one of these measures. The courts have long provided more flexibility concerning proportionality. The Supreme Court indicated as early as 1959 that there is a “relatively broad scope to the standard of proportional equality,” and that “tailoring of services and facilities to meet the different needs of two classes of customers” may constitute proportionality. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 61 n.4 (1959). Indeed, emphasizing the flexibility that should be allowed to meet the proportionality requirement, the Sixth Circuit has authorized sellers to devise any method of proportionality desired 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). This, of course, was a major focus of *Volvo*, and, in particular, provides freedom to smaller brick and mortar and Internet retailers to create advertising techniques tailored to the manner in which they do business.

b. The concept of proportionality also should not require a seller to cost justify the amount it pays resellers for their advertising services. Instead, the seller should offer competing resellers the opportunity to participate in the seller’s promotional opportunities in a manner that provides value both to the seller and reseller alike. *See L.S. Amster & Co. v. McNeil Labs., Inc.*, 504 F. Supp. 617, 625 (S.D.N.Y. 1980) (customers need not be offered equal promotional opportunities so long as they are able to participate to a significant degree). In this regard, the same year that the Commission narrowly determined not to adopt a “value” concept for proportionality in its 1990 revisions to the Guides, instead keeping in place an unduly restrictive “cost” standard, the Supreme Court rejected a narrow “cost” standard with respect to seller payments of “functional allowances” for distribution services performed by resellers other than promotional services. In *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 562 (1990), the Court declared that such allowances do not violate the RPA so long they accord due recognition to the value to the seller of the marketing functions performed by the reseller, regardless of the cost of the service.

The Commission did acknowledge in its comments accompanying the 1990 revisions to the Guides that “the law may also permit use of the value standard, at least so far as recognizing

the varying value of different media for the seller's promotional efforts." 55 Fed. Reg. 33,651, 33,657 (Aug. 17, 1990). Yet, the Commission declined to endorse proportionalization based on the *value* to the seller of the promotional services rendered, *e.g.*, legally paying more for a window display in a high traffic area than for one where there is considerably less consumer traffic. The Commission concluded that such a standard might be too subjective and indeterminate. *Id.* at 33,655. Subsequent judicial developments, in particular, the Supreme Court's *Hasbrouck* decision, demonstrate that the Commission's fears were misplaced, and reinforce the propriety of achieving proportionally equal treatment based on cost *or* value. The Supreme Court made it clear in *Hasbrouck* that providers and recipients of functional discounts need not come forward with expensive and time consuming detailed cost analyses to establish the reasonableness of a functional discount, so long as the payment is reasonably related to the value the *seller* places on the services involved. 493 U.S. at 561 & n.18. *Hasbrouck* and subsequent lower court decisions approving the legality of functional discounts do not appear to have been concerned that sellers and buyers might rely on subjective measures of cost or value. *See, e.g., Coalition for a Level Playing Field, L.L.C. v. AutoZone, Inc.*, 737 F. Supp. 2d 194, 211 (S.D.N.Y. 2010); *Servicetrends, Inc. v. Siemens Medical Systems, Inc.*, 870 F. Supp. 1042, 1059 (N.D. Ga. 1994). Applying this rationale and experience to the similar question of how the propriety of a promotional allowance may be assessed, the Guides should be revised along the lines of the approach set forth in *Hasbrouck*. A seller should be able to satisfy the proportionality standard based either on the cost of the services performed or their reasonable value to the seller.

The recommended change would be consistent not only with the recent case law, but also with commercial reality. For example, advertisements in certain magazines and newspapers have a significant greater publicity value to a seller than other newspapers or magazines charging similar rates, and an advertisement by a major fashion retailer, particularly for a new high fashion product, has considerable favorable "spillover" benefits to competitors of the major retailer that placed the advertisement. Similarly, a seller should be allowed to pay for an end cap or window display in a high traffic area on the basis of its value to the seller rather than the "cost" of the retail space involved. The change is particularly important in the world of the Internet, where the value to the seller of the amount of traffic by visitors to a retailer's website, and to consumers' repeated exposure to the announcement of a promotion, is far greater than the cost to the reseller of providing that promotion. A useful discussion of a "value received" standard, including examples of its application, is set out in Chairman Daniel Oliver's Concurring Statement in 1988 to the proposed revisions to the Fred Meyer Guides at that time.

c. Example 4 to Guide 9 adopts a strict approach to supplier advertising that refers to specific customers (*i.e.*, "tagging"), stating that when only one or a few customers are mentioned in an advertisement, the supplier should "mak[e] the same service available" to competing customers. This Example should be deleted because alternative offers should be as acceptable for tagging as they are for any other form as advertising or promotion. *See, e.g.*, Example 5, which allows for *alternative* "useable and suitable" offers to competing customers when a seller's or a third party's employees perform work only for certain customers.

## **Guide 10, 16 C.F.R. § 240.10 – Availability to all competing customers**

### **a. Functional availability**

1. Guide 10(a) states that sellers “should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers.” A provision or Example should be added noting that a seller can limit participation in a promotional program to customers willing to meet certain conditions that are within the practical reach of most competing customers, such as a minimum purchase requirement or an agreement to provide special marketing services for a promoted product. The courts have considered such programs to satisfy the statutory requirements. *See Bouldis*, 711 F.2d at 1329 (upholding program with “modest” minimum purchase requirement that was within the practical reach of the “average” customer); *L.S. Amster & Co.*, 504 F. Supp. at 625 (seller met practical availability requirement even though condition required to participate could only be met in 10% of the particular plaintiff’s outlets). The FTC also has endorsed this approach in its decisions. *See Ford Motor Co.*, 104 F.T.C. 1732, 1737 (1983) (consent order) (seller allowed to limit assistance to auto rental firms that purchased 20 or more automobiles annually); *Sunbeam Corp.*, 67 F.T.C. 20, 56-57 (1965) (\$440 minimum purchase requirement to receive reimbursement for electric shaver advertisement met practical availability requirement since customer “would have to stock at least that amount of merchandise to satisfy demand” generated by advertisement).

2. A provision or Example should also be added to Guide 10(a) indicating that in view of the rise of the Internet as an advertising medium, so long as proportionality requirements are met, a seller may now tailor available advertising or promotional media to the manner in which a particular retailer generally advertises or does business or, applying the principles of *Hasbrouck*, to the forms of advertising or promotion that provide the greatest value to the seller with respect to the channel of trade involved. *See also* revisions suggested to Guide 9, *supra*.

### **b. Notice of available services and allowances**

1. Guide 10(b) states that a seller’s notice of the availability of promotional services and allowances “should include enough details of the offer in time to enable customers to make an informed judgment whether to participate.” In view of the general availability and use of the Internet by both sellers and customers, this provision should be revised to state that it is sufficient for the notice to direct customers to the seller’s website for details of the offer.

2. For the same reason, website postings should be added to the list of “acceptable methods of notification” of the offer.

3. Finally, a retailer claiming it did not receive notice of an offer because it failed to look at a seller’s website should be foreclosed from later challenging the seller’s promotional program as not available to it. *See also* revisions suggested to Guide 4, *supra*.

**Guide 11, 16 C.F.R. § 240.11 – Wholesaler or third party performance of supplier’s obligations**

Guide 11 states that when a seller “contract[s] with intermediaries . . . to perform all or part of the seller’s obligations under sections 2(d) and 2(e),” the seller remains obliged to comply with the law. The Section agrees that the seller continues to have responsibility to meet its legal requirements, which may include an obligation to monitoring and supervising the intermediaries, but it should not be held as a guarantor of its intermediaries’ performance. A new sentence of should be added to the Guide to inform intermediaries that when they contract to perform some or all of a seller’s obligations, they may be held responsible under Section 5 of the FTC Act for failing to perform.

**Guide 12, 16 C.F.R. § 240.12 – Checking customer’s use of payments**

Guide 12 states that a seller “should take reasonable precautions” to see that its payments for services “are being properly used” and it is not “overpaying.” The Section’s views on this issue are discussed in the Section’s response to Question (4) of the Commission’s request for comments, *supra*.

**Guide 14, 16 C.F.R. § 240.14 – Meeting competition**

Guide 14, dealing with the meeting competition defense to a claim of discrimination in promotional allowances or services, should be modified to clarify that a supplier can meet the competition offered by a lower priced brand, including a private label brand, when the customer—particularly a retailer with strong bargaining power—informs the seller that unless the seller offers the allowance or service requested by the reseller, the customer will accept a competitive offer from the lower-priced brand, including a seller of a private label brand bearing the retailer’s trademark, and either eliminate or reduce the promotional services provided to the seller refusing the request. This change is appropriate in light of the emphasis on interbrand competition and power buyers in *Volvo*, 546 U.S. at 178-80. It would also aid in the Court’s declaration in *Volvo* of the importance of “reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers.” *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 83 n.16 (1979). *See also Falls City Industries, Inc. v. Vanco, Inc.*, 460 U.S. 428, 441 (1983) (the meeting competition defense should be “flexible and pragmatic,” rather than “technical or doctrinaire”).