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Legal & Regulatory Group

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SUBMITTED ELECTRONICALLY

Federal Trade Commission
Office of the Secretary
Room H-113 (Annex B)
600 Pennsylvania Avenue, N.W.,
Washington, D.C. 20580

Electronic address: https://ftcpublic.commentworks.com/ftc/fredmeyerguides

Re: "Fred Meyer Guides Review": File No. P123900

The National Automobile Dealers Association ("NADA") submits the following comments in response to the request for comments by the Federal Trade Commission ("FTC" or the "Commission") on the Commission's Guides for Advertising Allowances and Other Merchandising Payments and Services, or "Fred Meyer Guides" (the "Guides").

NADA represents nearly 16,000 franchised automobile and truck dealers who sell new and used motor vehicles, and engage in vehicle service, repair, and parts sales. Together our members employ upwards of one million people nationwide. Many NADA members are smaller, in many cases, rural dealers, who live in and serve their communities with the highest level of personal service. NADA is particularly focused on the practical impact that the Fred Meyer Guides have on our members, and we submit these comments in support of the continuing relevance and importance of the Guides.

In response to the following specific Requests for Comment, NADA submits the following:

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

ANSWER: Yes, there is a definite continuing need for the Fred Meyer Guides, which continue to serve a constructive, pro-competitive role in

> *governing the relationship between large manufacturers and their retailers.*

The Robinson-Patman Act (the "Act") as a whole and the promotional allowance section in particular, protect small businesses, including smaller car and truck dealers, from abusive treatment by manufacturers and distributors. The protection and continued existence of small dealers is a benefit to consumers because these small dealers foster competition, leading to lower prices and increased customer choice and convenience. NADA strongly believes that the Fred Meyer Guides continue to be of vital importance in helping to preserve fair competition.

Small car and truck dealers, like other small businesses, are not only essential job-creators, they are innovative, and uniquely responsive to consumer demand. For example, a smaller, locally-owned dealership can be expected to have a better ability to respond to local customers than a centrally-owned business, resulting in, for example, services more closely-tailored to local needs, or a vehicle selection that targets local preferences.

We must also keep in mind that many parts of the country do not have the same myriad of options or the same level of competition as there are in major metropolitan areas. For example, in a smaller town with only two competing dealers selling and servicing the same manufacturer's vehicles, if one dealer is driven out of business due to the discriminatory application of promotional allowances, competition will of course be weakened and consumers in those communities will pay more over time and have less choice than they would have if the playing field were to remain level in terms of promotional allowances.

The Commission should also recognize that new car and truck dealers not only sell vehicles, they service and repair them as well, and they are generally the only option for consumers to make warranty repairs. Also, a new car or truck is a relatively large purchase for most consumers, and one made relatively rarely. As a result, many consumers may be willing to travel a great distance to save money on that occasional purchase. This is especially true in the context of internet advertising where consumers can shop online many hundreds of miles away. However, most consumers are not as willing or able to travel to complete warranty or other service on their vehicle.

What this means is that disparities in promotional allowances in connection with the sales of new vehicles could eventually drive a smaller dealer out of business, even in cases where they are the only dealer in a small town or rural area. In many small towns and rural areas around the country, small dealers are the only option consumers have to purchase and service their vehicles. It goes without saying that for most Americans, reliable transportation is a vital daily need. If promotional payments from manufacturers were allowed to operate in a discriminatory fashion against smaller dealers, and those small dealers were ultimately driven out of business, the sole option for many Americans would be eliminated. Without a local dealer, consumers may have to drive dozens (or, in some cases, hundreds) of miles to purchase or service their vehicle

In addition, in the car and truck retail world, these promotional allowances can represent a significant portion of the full profit margin for the retailer. This gives the manufacturer exceptional control over the retailer, and the potential for abuse is very real. In addition, because a retailer must have a franchise contract with a manufacturer in order to sell new cars and trucks, and be authorized to complete warranty repairs, access to markets is functionally controlled by the manufacturers. As a result, the market may not always be able to fill the void left when an otherwise viable dealership goes away. A large manufacturer operating globally cannot, and cannot be expected to establish and allocate its retail network with the same level of efficiency at a local level as local independent business owners who know their market and the people in it. This potential market inefficiency is yet another reason why promotional allowance equalization, and the protection of smaller dealers, (and ultimately consumers), is of particular importance in the car and truck retail industry.

The Guides are more effective than merely the Act itself in inducing manufacturers to give proportionally equal allowances to all dealers. Experience has shown that manufacturers will often carefully structure their various promotional plans not only to comply with the Act but also expressly to comply with the Guides. Any given manufacturer's plan may not always actually meet the requirements, but there clearly is a very sophisticated effort by the manufacturers to structure their promotional plans in concordance with the Guides. If the Guides are significantly weakened, manufacturers will have less incentive to comply. The Act will still be effective, but at the margins the manufacturers may be less attentive to the proportionally equal requirement.

In addition to helping to induce manufacturers to attempt to comply with the Act in establishing and administering their promotional plans, the Guides also provide a great deal of certainty for manufacturers and dealers alike. Again, the Guides provide just that – guidance – to manufacturers in structuring their promotional plans. Without the Guides, non-compliance would be higher, perhaps minimally so or perhaps significantly so. Moreover, disfavored dealers would be far more likely to have to enforce the act through litigation, which would impose substantial unnecessary costs on manufacturers and dealers, and ultimately on their customers.

> *(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? Is there a continuing need for the Fred Meyer Guides? 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; [and] (b) manufacturer support for different pages within a retailer's website . . . . "*

While we believe that most manufacturers understand, and that the current Guides contemplate, that promotional allowances or services can extend to the Internet-based platforms, such as those outlined above, we also agree that the relevance and in some cases prevalence of such platforms should not be ignored. We would suggest that the Commission consider updating the definition of "Services or Facilities" in § 240.7 of the Guides to include websites, and other online advertising. This would be a sensible update to reflect current market realities. This updated definition of "services and facilities" would also allow manufacturers to recognize the varied advertising and other promotional platforms that smaller dealers – in tune with the needs of their local customers - choose to utilize.

Conclusion

The Guides continue to serve an important function in protecting small businesses, strengthening competition, and increasing customer choice and service. We urge the Commission to maintain the Guides. Sensible, limited changes to reflect modern market conditions in line with those suggested above would be welcome, but we would urge the Commission to reject calls to make significant changes to the Guides where there is no pressing need to change them. Such changes would send an unmistakable message to the market that compliance is not necessary. We appreciate the opportunity to comment on this matter.

Sincerely,

/s/

Bradley T. Miller

Associate Director, Legal and Regulatory Affairs