The American Antitrust Institute

FEDERAL TRADE COMMISSION
GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES
Comment of the American Antitrust Institute

The American Antitrust Institute (AAI) appreciates the opportunity to comment on the Federal Trade Commission's (FTC) review of its Guides for Advertising Allowances and Other Merchandising Payments and Services ("the Guides").[1] The AAI is an independent and nonprofit education, research, and advocacy organization whose mission is to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of approximately 130 prominent antitrust lawyers, law professors, economists, and business experts.[2] AAI has long been involved in issues involving the Robinson-Patman Act (the "Act") and related practices.[3]

As part of the FTC's review, the agency has requested public input on "the effect on the Guides of any technological, economic, or other industry changes" since the Guides were last published in 1990.[4] The AAI's comment describes important changes to business practice over the period and applicable to the subject matter of the Guides. The changes are organized and described following the Guides' relevant sections. The principal thrust of the AAI's comment is that knowledge of these changes should inform the FTC's review of the Guides.

Let us begin by noting that AAI is on record as supporting the proposition that, "[i]n a challenge to promotional discrimination, a plaintiff should be required to prove that the discrimination is likely to cause competitive injury"; that, at present, "plaintiffs challenging price discrimination must show competitive injury but plaintiffs challenging favoritism in promotional

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[1] 77 FEDERAL REGISTER 233 (December 4, 2012). 16 CFR 240.1-15.

[2] AAI's Board of Directors alone has approved this filing for AAI. The individual views of members of the Advisory Board may differ from AAI's positions.

[3] For a description of AAI activities, research, and analysis *see* American Antitrust Institute, www.antitrustinstitute.org.

[4] Other related questions addressed include: "(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 ecommerce?" "(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?"

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allowances or services need not"; and that "[t]his disparity is unwarranted and counterproductive.[2] We remain of that view.

It is nonetheless important for the FTC to consider revisions to its longstanding Guides in light of updated information on the uses and effects of trade promotion arrangements of various kinds. This information can provide insights into circumstances under which discriminatory grants of covered allowances and services may well threaten significant competitive injury and may thus warrant enforcement action.

In any event, courts in their adjudication of private suits under sections 2(d) and 2(e) look to the Guides for guidance on how they should interpret various aspects of these provisions. This underlines the desirability of the agency's consideration of revisions in light of relevant marketplace trends over the course of the past two decades whether or not the FTC itself is in a position to devote its own enforcement resources to this area. We offer the input set forth below in that spirit.

§ 240.2 Applicability of the law.

As described in the Guides, the substantive provisions of sections 2(d) and 2(e) apply to certain circumstances. In particular, Section 2(d) applies to circumstances where (1) A seller of products (2) Engaged in interstate commerce (3) That either directly or through an intermediary (4) Pays a customer for promotional services or facilities provided by the customer (5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products (6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality. Section 2(e) applies to the same circumstances with the exception that it applies to circumstances where the seller furnishes promotional services or facilities to a customer (versus pays a customer for the services or facilities). As described in the sections that follow, the Guides apply to circumstances common to the practice of trade promotion. The use of trade promotion has increased over time. Updating the Guides to reflect the nature of and changes to trade promotion is both necessary and important.

Trade promotion. The Guides apply to circumstances common to the practice of "trade promotion." Trade promotion is a form of sales promotion.[5] Trade promotion involves incentives directed toward members of the distribution channel[6] to induce them to buy a product or encourage them to sell it.[7] A major goal of trade promotion is to motivate the retailer to engage in promotion of the manufacturer's products and brands.[8] Trade promotion or trade deals as they are sometimes

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[2] AMERICAN ANTITRUST INSTITUTE, THE NEXT ANTITRUST AGENDA (2008), at 99.

[5] PHILIP KOTLER & GARY ARMSTRONG, PRINCIPLES OF MARKETING (2001), at 512 ("Sales promotion involves short-term incentives to encourage the purchase or sale of a product or service."). GERARD, J.TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 215-6 ("Three forms of sales promotion are common to marketing communications – consumer promotion, retailer promotion and trade promotion.")

[6] ANNE T. COUGHLAN, ERIN ANDERSON, LOUIS W. STERN AND ADEL I. EL-ANSARY, MARKETING CHANNELS (2006), at 2. ("The market or distribution channel refers to the set of interdependent organizations involved in the process of making a product or service available for use or consumption. This includes retailers, wholesalers, distributors, brokers, agents, and manufacturers among others.").

[7] ROBERT C. BLATTBERG & SCOTT A. NESLIN, SALES PROMOTION (1990), at 313. SHIMP, TERRENCE A., ADVERTISING PROMOTION (2000), at 532.

[8] GERARD, J.TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 235 & 253.

called are designed to induce actions on the part of distribution channel members to provide support for, and marketing effort to, the manufacturer's products and brands.[9]

Increasing use of trade promotion. The use of trade promotion has increased over time relative to direct media advertising and consumer promotions.[10] Industry surveys show that manufacturer expenditures have been increasingly shifting out of advertising budgets to build up trade promotion budgets for some time. In 1968, for example, manufacturers spent approximately 72% of their advertising and promotion dollars on direct consumer promotion such as network television advertising with only 28% going to trade promotion.[11] By 1987, according to Cox Direct 20th Annual Survey of Promotional Practices (1998), marketing communication expenditures for trade promotion rose to 41% with expenditures for media advertising and direct consumer promotions falling to 59%. By 1997, this ratio had changed markedly with trade promotion spending accounting for 50 percent of the total and media advertising and consumer promotion falling to 50% of the total.[12] More recent figures suggest that the proportion of trade promotion to other forms of promotion continues to rise. In 2010, for example, this figure reportedly rose to nearly 70% with trade promotion identified to be the second-largest expense for some manufacturers after the costs of goods sold and accounting for 17.4 percent of gross sales.[13] The trend toward greater use of trade promotion in practice demonstrates the importance of trade promotion and supports the utility of the FTC's review and update of the Guides.

§ 240.5 Definition of competing customers.

According to the Guides, competing customers 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 though some intermediary. Under Section 2(d), a seller must offer the same promotional allowances to customers who compete with one another. Although Section 2(e) does not contain this requirement, it has been added by judicial interpretation.[14] The identification of "competing" customers has historically turned on factual questions such as the geographic area in which customer's operate, the functional status of customers, and the relationship between a wholesaler customer and a direct-buying retailer customer.[15] Today, various factors and new forms of distribution are eliciting questions for what constitutes competing customers. The AAI urges the FTC to incorporate a thorough knowledge of these factors and new forms of distribution in its review and update of the Guides.

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[9] ROBERT C. BLATTBERG & SCOTT A. NESLIN, SALES PROMOTION (1990), at 313.

[10] *See* TERRENCE A. SHIMP, ADVERTISING PROMOTION (2000), at 510.

[11] Christopher J. MacAvoy, *Presentation*, FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES, (May 31 - June 1, 2000), at 2, ft. 7.

[12] TERRENCE A. SHIMP, ADVERTISING PROMOTION (2000), at 511. COX DIRECT 20TH ANNUAL SURVEY OF PROMOTIONAL PRACTICES (1998), at 40.

[13] CLOW BAACK, INTEGRATED ADVERTISING, PROMOTION, AND MARKETING COMMUNICATIONS (4th ed., 2010), at 340.

[14] ABA SECTION OF ANTITRUST LAW, ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (2012).

[15] ABA SECTION OF ANTITRUST LAW, ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (2012).

Market convergence. During the past two decades various factors have yielded circumstances where reseller customers who previously were not rivals now find themselves in competition with one another. This occurrence is part of a larger phenomenon known as "market convergence" – a term that describes the antecedents, process and consequences of market boundaries eroding over time.[16] Although primary attention to factors influencing market convergence has focused on changes in technology (i.e., the Internet), market convergence has also been influenced by the globalization of trade, socio-economic changes, deregulation and other factors. It is important that review of the Guide's definition of competing customers include consideration of these added factors.

Multichannel distribution. Leading up to 1990, the primary approach for developing and managing distribution channels was based on the understanding that people typically shopped for and purchased products within a single channel.[17] In this context, the determination of competing customers emphasized differences in reseller formats within a channel of distribution versus different channels. The past two decades, however, have witnessed the growing use by sellers of multiple channels of distribution to reach and market to consumers.[18] Multichannel systems of distribution may now include traditional brick-and-mortar retailers, company owned stores, telemarketing agents, Internet resellers, catalogs, kiosks, box vending machines, home shopping networks, and other options.[19] Given that each channel includes intermediary customers (i.e., resellers) that may compete with one another, the increasing occurrence of multichannel distribution poses important implications for the Guides' definition of competing customers.

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16 *See* J.M. Pennings & P. Puranm, *Market convergence & firm strategies: towards a systematic analysis*, (2010) available at http://faculty.fuqua.duke.edu/oswc/2000/papers/wednesday/JohannesPennings.doc.

17 *See* Avrind Rangaswamy & Gerrit H. Van Bruggen, *Opportunities and Challenges in Multichannel Marketing: An Introduction to the Special Issue*, 19 J. INTERACTIVE MARKETING 5, 5 (2005) ("[I]n the past [customers] typically obtained all their channel services from a single integrated channel...."). Paul F. Nunes & Frank V. Cespedes, *The Customer Has Escaped*, HARV. BUS. REV., Nov. 2003, at 96 ("Just a few years ago, when typical retail shoppers went to a store and received advice on the size, style, or purpose of a product, they almost always bought the product right then and there...Whichever distribution channel they opted for, they stayed with it until the sale was made."). Avrind Rangaswamy & Gerrit H. Van Bruggen, *Opportunities and Challenges in Multichannel Marketing: An Introduction to the Special Issue*, 19 J. INTERACTIVE MARKETING 5, 5 (2005) ("[I]n the past [customers] typically obtained all their channel services from a single integrated channel....").

18 *See* Sonja Gensler, Marnik G. Dekimpe & Bernd Skiera, *Evaluating Channel Performance in Multi-channel Environments,* 14 J. RETAILING & CONSUMER SERVICES 17, 17 (2007) ("More and more companies [have] become multi-channel operators."). Paul F. Nunes & Frank V. Cespedes, *The Customer Has Escaped*, HARV. BUS. REV., Nov. 2003, at 97 ("The marketers who once sold through a chain or specialty stores now also has a Web site and often a catalog—not to mention several factory outlet stores.")

19 David C. Court, Thomas D. French & Trond Rilber Knudsen, *The Proliferation Challenge*, at 9-10, (Allen P. Webb ed., 2006) PROFITING FROM PROLIFERATION ('Recent advances in technology, information, communications, and distribution have created an explosion of...sales and service channels....The number of distribution touchpoints has increased..., including company owned stores, shared and exclusive dealers, telemarketing agents, affinity partners, and the Web."). ROBIN LEWIS AND MICHAEL DART THE NEW RULES OF RETAIL: COMPETING IN THE WORLD'S TOUGHEST MARKETPLACE (2010), at 12 ("…consumers have total access, which is accelerated by the Internet and numerous other distribution platforms.")

Dual distribution. Dual distribution involves circumstances where a manufacturer simultaneously sells through independent resellers and manufacturer-owned outlets.[20] Developments in Internet-based commerce and the transformation of shipping economies spurred by the growth of the third-party logistics industry have increased the use of dual distribution. [21] Dual distribution arrangements raise implications for the definition of competing customers under the Guides where outlets owned by the manufacturer compete directly with independent reseller customers and the latter receives payments or are furnished promotional services or facilities also received by the former. Although it is uncertain what these implications are given they involve provision of these payments and services and facilities to both independent resellers and manufacturer-owned outlets, review of the Guides should include examination of the nature of dual distribution for defining competing customers.

Internet based reselling. According to Forrester Research, online retail sales in the U.S. will grow to $250 billion by 2014, up from $155 billion in 2009. In addition, according to eMarketer (2010), online retail sales in Western Europe will have crossed the $200 billion threshold by 2012.[22] For a particular brand, given their virtual nature, Internet-based resellers may compete with their brick and mortar counterparts. However, differences in reseller formats and strategies together with differences in consumers and factors important to them (i.e., delivery time) will affect this determination. A rigorous review of the Guides should include knowledge of these differences and factors for defining competing customers.

Other reseller formats. Beyond the Internet, the past two decades have witnessed the emergence of other new reseller formats and increased sophistication of prior formats. These include company-owned stores (e.g., Nike Outlets), interactive kiosks (e.g., ATMs) and vending machines (e.g., Redbox) and home shopping networks (e.g., QVC, HSN), etc. [23] Depending on the

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[20] ANNE T. COUGHLAN, ERIN ANDERSON, LOUIS W. STERN AND ADEL I. EL-ANSARY, MARKETING CHANNELS (7th 2006), at 144 (Characterizing dual distribution as a form of multi-channel distribution "On the face of it dual distribution (going to market via third parties and via one's own distribution divisions) appears to be just a variation on the theme of multiple formats."). Gary L. Frazier, *Organizing and Managing Channels of Distribution*, 27 JOURNAL OF THE ACADEMY OF MARKETING SCIENCE 226, 232 (1999) ("... a multiple channel would be involved when a manufacturer uses a direct channel to sell to large customers and an indirect channel to sell to small to medium-sized customers. The other approach is to define a multiple channel as when more than one primary channel is used to sell the same product line to the same target market. An example of this is General Electric, which uses both electrical distributors and category killers like Home Depot to serve small to medium-sized contractors' needs for electrical products."). *See also* ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS (6th ed. 2007), at 159 ("Manufacturers or trademark licensors sometimes use independent distributors and operate themselves as distributors in actual or potential competition with their independent distributors (dual distribution)"). THEODORE L. BANKS, DISTRIBUTION LAW: ANTITRUST PRINCIPLES AND PRACTICE (2nd 2011), paragraph 6.01, at 6-3 ("Although defined in various ways, when a manufacturer sells its products in competition with or on the same distributional level as its own distributors, it is said to engage in 'dual distribution.'"). PHILLIP E. AREEDA & HERBERT HOVENKAMP, 8 ANTITRUST LAW (2004), at 68 ("In so-called dual distribution, a manufacturer simultaneously sells to independent dealers and to those who might otherwise be customers of those dealers.").

[21] Andy A. Tsay & Narendra Agrawal, *Channel Conflict and Coordination in the E-Commerce Age,* 13 PRODUCTION & OPERATIONS MANAGEMENT 93, 107 (Special Issue: Collaboration and Coordination in Supply Chain Management and eCommerce 2004).

[22] Cited *in* Ruiliang Yan, Peijun Guo, John Wang & Nawel Amrouche, *Product Distribution and Coordination Strategies in a Multi-Channel Context,* 18 JOURNAL OF RETAILING AND CONSUMER SERVICES 19, 19 (2011).

[23] ROBIN LEWIS AND MICHAEL DART THE NEW RULES OF RETAIL: COMPETING IN THE WORLD'S TOUGHEST MARKETPLACE (2010), at 12.

circumstances, these new formats may compete with one another and more traditional reseller formats and accordingly be considered competing customers. Review of the Guides should further consider these formats and their implications for the definition of competing customers.

Multichannel shopping. Multichannel shopping occurs when consumers use multiple channels of distribution to complete a purchase.[24] Two decades ago consumers typically relied upon a single channel of distribution to obtain information, evaluate options, transact a purchase, and seek follow-up service and support. [25] As the Internet and other channels of distribution have gained prominence, consumers increasingly use multiple channels to make a purchase.[26] Multichannel shopping poses implications for defining competing customers generally and in those circumstances where different resellers compete at the same level of distribution accessed by a consumer in route to a purchase. Consequently, multichannel shopping should be an important consumer-based consideration in the FTC's review of the Guides.

§ 240.7 Services or facilities.

The terms promotional "services" and "facilities" have not been exactly defined by the Act or in subsequent decisions. However, where promotional services or facilities are used primarily to promote the resale of the seller's product by a customer and include a performance requirement, Sections 2(d) and 2(e) have been found to apply. Where the promotional services or facilities relate to the seller's initial sale of the product to the customer, Section 2(a) has been found to apply. The distinction is important given discrimination that falls under Section 2(a) does not violate the Act unless there is injury to competition, but discrimination that falls under Sections 2(d) and 2(e) is a *per se* offense requiring no proof of competitive injury. Courts and others have had difficulty making this determination for some forms of promotional services and facilities. AAI believes that the FTC should attempt to clarify when the provision of services and facilities are subject to Section 2(a) versus when they are subject to Sections 2(d) and 2(e) because there is a serious gap in understanding about this distinction.[27] Knowledge of the nature of trade promotion as found in the

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[24] Kim K. P. Johnson, Jeong-Ju Yoo, Jonguen Rhee, Sharron Lennon, Cynthia Jasper, & Mary Lynn Damhorst, *Multi-channel shopping: channel use among rural consumers*, 34 JOURNAL OF RETAIL AND DISTRIBUTION MANAGEMENT 453 (2006). V. Kumar & Rajkumar Venkatesan, *Who are the multichannel shoppers and how do they perform? Correlates of multichannel shopping behavior*. 19 JOURNAL OF INTERACTIVE MARKETING 44 (2005).

[25] *See* Avrind Rangaswamy & Gerrit H. Van Bruggen, *Opportunities and Challenges in Multichannel Marketing: An Introduction to the Special Issue*, 19 J. INTERACTIVE MARKETING 5, 5 (2005) ("[I]n the past [customers] typically obtained all their channel services from a single integrated channel...."). Paul F. Nunes & Frank V. Cespedes, *The Customer Has Escaped*, HARV. BUS. REV., Nov. 2003, at 96 ("Just a few years ago, when typical retail shoppers went to a store and received advice on the size, style, or purpose of a product, they almost always bought the product right then and there...Whichever distribution channel they opted for, they stayed with it until the sale was made"). Avrind Rangaswamy & Gerrit H. Van Bruggen, *Opportunities and Challenges in Multichannel Marketing: An Introduction to the Special Issue*, 19 J. INTERACTIVE MARKETING 5, 5 (2005) ("[I]n the past [customers] typically obtained all their channel services from a single integrated channel...."). Jie Zhang et al., *Crafting Integrated Multichannel Retailing Strategies* 4 (Harvard Bus. Sch. Working Paper, No. 09-125,2009), available at http://hbswk.hbs.edu/item/6181.html, at 6-7 ("Prior to the Internet, customers typically researched and purchased products during a trip to one store because it was too costly to visit multiple stores before making a purchase decision.").

[26] Kim K. P. Johnson, Jeong-Ju Yoo, Jonguen Rhee, Sharron Lennon, Cynthia Jasper, & Mary Lynn Damhorst, *Multi-channel shopping: channel use among rural consumers*, 34 JOURNAL OF RETAIL AND DISTRIBUTION MANAGEMENT 453 (2006).

[27] For a similar view, *see* Richard M. Steuer, *Crossing the streams of price and promotion under the Robinson-Patman Act*, 27 ANTITRUST 64 (2012) ("In short, a serious gap remains between the conventional

literature and in practice and the treatment of specific types of trade promotion by other institutions, such as the Financial Accounting Standard Boards (FASB) treatment of slotting allowances and fees, should be helpful to the FTC's efforts.

Nature of trade promotion. Trade promotion has been defined to apply to the initial purchase of products,[28] their resale,[29] and both their initial purchase and resale.[30] Similarly, identified objectives for trade promotion include those that relate to the initial sale of a product as well as those that relate to its resale.[31] Frameworks for organizing the different types of trade promotions

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wisdom and today's business realities with respect to combining discounts and promotional assistance under the

Robinson-Patman Act, and it is time to adopt a new convention and some up-to-date wisdom. The alternative—administering discounts and promotional assistance independently of one another—is making it difficult for sellers to compete effectively in today's environment, to the detriment of retailers and consumers alike.").

[28] CLOW BAACK, INTEGRATED ADVERTISING, PROMOTION, AND MARKETING COMMUNICATIONS (4th ed., 2010), at 340. (Definining trade promotion as "incentives members of the trade channel use to entice another member to purchase goods for eventual resale."). GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7TH ED., 2007), at 526 (Describing trade promotions as "used to encourage retailers to give shelf space to new products.").

[29] GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7TH ED., 2007), at 526 (Describing trade promotions as "designed to maintain distribution and trade support for established brands.").

[30] ROBERT C. BLATTBERG & SCOTT A. NESLIN, SALES PROMOTION (1990), at 313 ("Trade promotion involves incentives directed toward members of the distribution channel to induce them to buy a product or encourage them to sell it."). TERRANCE A. SHIMP, ADVERTISING, PROMOTION, AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (8TH ED., 2010), at 605 ("Trade promotion refers to any incentive used by a manufacturer to induce the trade (wholesalers, retailers, or other channel members) and/or consumer to buy a brand and to encourage the sales force to aggressively sell it."). LOUIS E. BOONE & DAVID L. KUTZ, CONTEMPORARY MARKETING (14th ed., 2010), at 592 ("Trade promotion is sales promotion that appeals to marketing intermediaries rather than to final customers. Marketers use trade promotion in push strategies by encouraging resellers to stock new products, continue to carry existing ones, and promote both effectively to consumers."). TOM DUNCAN, IMC USING ADVERTISING AND PROMOTION TO BUILD BRANDS (2002), at 586 ("The essence of a trade promotion, in most cases, is a reduction in price. Yet price reductions come in many forms. The idea is that the manufacturer will financially make it worth a retailer's effort to "push" a brand."). *See also* GERARD J. TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 256 ("A trade deal is any manufacturer promotion that offers the retailer a price reduction, more favorable terms or cash to more easily buy, stock or sell the product.'). ROBERT C. BLATTBERG & SCOTT A. NESLIN, SALES PROMOTION CONCEPTS, METHODS, AND STRATEGIES (1990), at 314 ("Trade dealing is a mechanism for the manufacturer to try to induce actions for its direct customer just as the retailer tries to influence the consumer.").

[31] TERRANCE A. SHIMP, ADVERTISING, PROMOTION, AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (8TH ED., 2010), at 505 (Listing trade promotion objectives as: "introducing new or revised products, increasing distribution of new packages or sizes, building retail inventories, maintaining or increasing the manufacturer's share of shelf space, obtaining displays outside normal shelf locations, reducing excess inventories and increasing turnover, achieving product features in retailers' advertisements, countering competitive activity, selling as much as possible to final consumers."). GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7TH ED., 2007), at 525. ("Typical objectives for promotions targeted to marketing intermediaries such as wholesalers and retailers include obtaining distribution and support for new products, maintaining support for established brands, encouraging retailers to display established brands, and building retail inventories."). TOM DUNCAN, IMC USING ADVERTISING AND PROMOTION TO BUILD BRANDS (2002), at 586. ("Like all promotions, trade promotions are used to motivate certain types of actions by channel members: (1) obtain or increase distribution of a brand, (2) have the brand featured in the store's advertising, and (3) expand amount of shelf display and/or get temporary off-shelf display. In essence, trade promotions offer retailers something of value in exchange for making an extra effort to increase a brand's sales."). GERARD J. TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 252. ("In offering trade promotions manufacturers have three broad classes of goals: to win adequate distribution, control inventory or stimulate retail promotions for their brands [...]. The most important goal of trade promotions is to win adequate distribution for the brand, in terms of both the number of retailers who carry the brand and the shelf space each retailer affords the brand."). ROBERT C. BLATTBERG & SCOTT A. NESLIN, SALES PROMOTION (1990), at 316 ("The following are a list of

include those that organize trade promotions in categories that relate to the initial sale and those that relate to the resale of a product.[32] Review of the literature on these distinctions should be helpful to the FTC as it reviews and updates the Guides.

FASB treatment of slotting allowances and fees.[3] The term slotting fee or allowance was originally conceived to refer to trade promotion that involved a one-time payment by manufacturers for the slot that had to be created in a retailer's warehouse for pallets when a new product was introduced into distribution. Since their inception the allowances and fees have grown rapidly in magnitude, prevalence and kind.[4] They now can include upfront and recurring payments, which are paid in cash, free product and off-invoice discounts, and are known by various trade names such as market or product development allowances, pay to stay fees, etc.[5] Reflecting their widening scope, in 2002 the Financial Accounting Standards Board (FASB) broadened the definition of slotting allowances to include all payments and discounts to retailers that did not involve a measurable marketing quid pro quo on the part of the retailer. Accordingly, slotting fees now include vendor consideration for other types of product placement arrangements such as brand development or new product introduction allowances, favorable in-store positioning, end-cap placement or additional shelf space. They may be incurred before the vendor sells any product to the reseller, on a regular schedule to maintain shelf space or continue as a vendor, or periodically as negotiated.[6] The FASB's treatment of trade promotion involving slotting allowances and fees should be informative to the FTC as it reviews and updates the Guides.

§ 240.8 Need for a plan.

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objectives for trade promotions. Each will be discussed in more retail: Induce retailers to offer a price discount, Induce retailers to display the brand, Induce retailers to advertise the brand, Offer incentives for the retailer's/dealer's sales force to push the brand to the customer, Gain or maintain distribution for a model or item within the product line, Gain or maintain distribution for the brand, Load the retailer, dealer, or distributor, with inventory to avoid out-of-stocks, Shift inventory from the manufacturer to the channels of distribution and the consumer, Avoid price reductions, Defend the brand against competitors, Induce price fluctuations into the market, Finance retailer inventories.").

[32] GERARD J. TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 256 ("Trade promotions vary a lot. Following the criteria laid out in the previous chapter, we can classify these promotions depending on whether they are primarily incentive (price or nonprice) or communicative (informative or motivational)."). CLOW BAACK, INTEGRATED ADVERTISING, PROMOTION, AND MARKETING COMMUNICATIONS (4TH ED., 2010), at 340 (Describing that: "Trade allowances provide financial incentives to other channel members to motivate them to make purchases (Off-invoice allowances, slotting fees, exit fees)") and, at 343 (Describing that: "Trade incentives are similar to trade allowances. The difference is that trade incentives involve the retailer performing a function in order to receive the funds (Cooperative merchandising agreements, premiums and bonus packs, and cooperative advertising)").

[3] *See generally* Ravi S. Achrol, *Slotting allowances: a time series analysis of aggregate effects over three decades*, 40 JOURNAL OF ACADEMY OF MARKETING SCIENCE 673, 674 (2012).

[4] Gregory T. Gundlach, *Slotting Allowances and Fees: Research Status, Emerging Insights and Future Directions*, Oral and written testimony before the UNITED STATES SENATE, COMMITTEE ON SMALL BUSINESS, HEARING ON SLOTTING FEES: ARE FAMILY FARMERS BATTLING TO STAY ON THE FARM AND IN THE GROCERY STORE (2000) ("Broadly defined, slotting allowances and fees describe payments by suppliers to gain the patronage of downstream channel members. Though originally defining payments to obtain a "slot" in a wholesaler's warehouse for the supplier's products, the term's meaning has expanded in practice. This expansion has led to varying interpretations and some confusion.").

[5] Ravi S. Achrol, *Slotting allowances: a time series analysis of aggregate effects over three decades*, 40 JOURNAL OF ACADEMY OF MARKETING SCIENCE 673, 674 (2012).

[6] Financial Accounting Standards Board, *EITF 02-16 and 02-25*. Publications of the deliberations, minutes and summaries of the EMERGING ISSUES TASK FORCE OF THE FINANCIAL ACCOUNTING STANDARDS BOARD (2002).

According to the Guides, a seller who makes payments or furnishes services that come under sections 2(d) and 2(e) should do so according to a "plan." Further, if there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. In its review of this part of the Guides, the FTC should consider the implications of changes to the way in which trade promotion is planned and communicated.

Trade promotion planning and programs. Today, trade promotion is often offered to reseller customers in the form of a trade promotion "program." The program spells out the details of the trade promotion plan and asks resellers to agree upon their participation and performance. Trade promotion programs can range from short descriptions of the incentives and requirements of the program to more elaborate contracts that detail each aspect of the arrangement. According to ACNielsen, in 1999 41% of surveyed manufacturers reported participation in annual trade promotion agreements and contracts while retailers reported this participation to be 90%.[7] Larger ($1 billion plus) and general merchandise/nonfood firms reported greater levels of participation -- 51% and 75% respectively.[8] Knowledge of the behavior of sellers in planning and presenting their trade promotion programs and the extent of participation by reseller customers should assist the FTC in its review process.

§ 240.9 Proportionally equal terms.

According to the Guides, promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. 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. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable. The Guides further describe that when a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper advertising or handbills. Various examples are provided for how sellers may make promotional services and payments available to all competing customers on proportionally equal terms. Finally, a footnote to one example (i.e., example 5) states that the discriminatory purchase of display or shelf space, whether directly or by means of so-called allowances, may violate the Robinson-Patman Act, and may be considered an unfair method of competition in violation of section 5 of the Federal Trade Commission Act. With respect to this footnote, AAI urges the FTC to incorporate in their review of the Guides knowledge of practices related to slotting allowances and fees developed since 1990.

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[7] The disparity in these figures is reported to be due, in part, to sample size. ACNIELSEN, NINTH ANNUAL SURVEY OF TRADE PROMOTION PRACTICES (1999).

[8] The disparity in these figures is reported to be due, in part, to sample size. ACNIELSEN, NINTH ANNUAL SURVEY OF TRADE PROMOTION PRACTICES (1999).

Discriminatory purchase of display or shelf space. Since 1990 knowledge of the purchase of display and shelf space directly and indirectly through slotting allowances and fees has increased dramatically. A number of studies examining slotting allowances and fees and related practices (e.g., category management) have been published.[9] The FTC itself has conducted workshops and studies of the topic.[10] Findings from these studies provide theoretical, analytical, empirical, and practical knowledge for understanding the discriminatory purchase of display or shelf space directly or by means of slotting allowances and fees. For example, according to the findings of one nationwide study of both manufacturer-owned outlets and reseller customers: "The results provide some support for the propositions that (1) not all manufacturers pay the same amount for their slotting fees, (2) some are able to negotiate lower fees, and (3) slotting fees have led to profit differences among large and small manufacturers, which possibly reflects discrimination."[11] It

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[9] Ravi S. Achrol, *Slotting allowances: a time series analysis of aggregate effects over three decades*, 40 JOURNAL OF ACADEMY OF MARKETING SCIENCE 673, 674 (2012). Y-Y Wang, H-S Lau, & J-C Wang, *Defending and improving the 'slotting fee': how it can benefit all the stakeholders dealing with a newsvendor product with price and effort-dependent demand,* 63 JOURNAL OF THE OPERATIONAL RESEARCH SOCIETY 1731 (2012). Leslie M. Marx & Greg Shaffer, *Slotting allowances and scarce shelf space,* 19 JOURNAL OF ECONOMICS & MANAGEMENT STRATEGY 575 (2010). Øystein Foros, Hans Jarle Kind, & Jan Yngve Sand, *Slotting allowances and manufactureres' retail sales efforts,* 76 SOUTHERN ECONOMIC JOURNAL 266 (2009). GÖker Aydın & Warren H. Hausman, *The role of slotting fees in the coordination of assortment decision,* 18 PRODUCTION AND OPERATIONS MANAGEMENT 635 (2009). Øystein Foros & Hans Jarle Kind, *Do slotting allowances harm retail competition,* 110 SCANDANAVIAN JOURNAL OF ECONOMICS 367 (2008). Dmitri Kuksov & Amit Pazgal, *The effects of costs and competition on slotting allowances,* 26 MARKETING SCIENCE 259 (2007). Leslie M. Marx & Greg Shaffer, *Upfront payments and exclusion in downstream markets*, 38 RAND JOURNAL OF ECONOMICS 823 (2007). John L. Stanton & Kenneth C. Herbst, *Slotting allowances: short-term gains and long-term negative effects on retailers and consumers*, 34 INTERNATIONAL JOURNAL OF RETAIL & DISTRIBUTION MANAGEMENT 187 (2006). K Sudhir & Vithalar R. Rao, *Do slotting allowances enhance efficiency or hinder competition,* 42 JOURNAL OF MARKETING RESEARCH 1547 (2006). Paula Fitzgerald Bone, Karen Russo France, & Richard Riley, *A multiform analysis of slotting fees,* 25 AMERICAN MARKETING ASSOCIATION 224 (2006). Patrick Rey, Jeanine Thal, & Thibaud Vergé, *Slotting allowances and conditional payments*, Working Paper, University of Toulouse, Toulouse, France (2006). Norwegian Competition Authority, *Payment for Shelf Space*, Report 2/05 (2005). Debbie M. Desrochers & William L. Wilkie, *Slotting allowances and fees: practice, influence and trends*, JOURNAL OF PUBLIC POLICY AND MARKETING (2003). Akshay R. Rao & Humaira Mahi, *The price of launching a new product: empirical evidence on factors affecting the relative magnitude of slotting allowances*, 22 MARKETING SCIENCE 246 (2003). William L. Wilkie, Debra M. Desrochers, & Gregory T. Gundlach, *Marketing research and public policy: the case of slotting fees,* 21 JOURNAL OF PUBLIC POLICY & MARKETING 275 (2002). Bavid Balto, *Recent legal and regulatory developments in slotting allownaces and category management,* 21 JOURNAL OF PUBLIC POLICY & MARKETING 289 (2002). J. Chris White, Lisa C. Troy, & R. Nicholas Gerlich, *The role of slotting fees and introductory allowances in retail buyers' new-product acceptance decisions,* 28 JOURNAL OF THE ACADEMY OF MARKETING SCIENCE 291 (2000). Paul N. Bloom, Gregory T. Gundlach & Joseph P. Cannon, *Slotting allowances and fees: schools of thought and the views of practicing managers*, 64 JOURNAL OF MARKETING 92 (2000). Robert J. Aalberts & Marianne M. Jennings, *The ethics of slotting: is this bribery, facilitation marketing or just plain competition?,* 20 JOURNAL OF BUSINESS ETHICS 207 (1999). Martin A. Lariviere & V. Padmanabhan, *Slotting allowances and new product introductions*, 16 MARKETING SCIENCE 112 (1997). M. Sullivan, *Slotting allowances and the marketing for new products*, 40 JOURNAL OF LAW AND ECONOMICS 461 (1997). Paul R. Messinger & Wujin Chu, *Product proliferation and the determination of slotting and renewal allowances*, 1 SEOUL JOURNAL OF BUSINESS 93 (1995). Judy A. Siguaw & K. Douglas Hoffman, *The role of slotting allowances in retail channel relationships: review and propositions*, Working Paper, The University of North Carolina at Wilmington (1992). Greg Shaffer, *Slotting allowances and resale price maintenance: a comparison of facilitating practices*, 22 THE RAND JOURNAL OF ECONOMICS 120 (1991). Vithala R. Rao & Edward W. McLaughlin, *Modeling the decision to add new products by channel intermediaries*, 53 JOURNAL OF MARKETING 80 (1989).

[10] FEDERAL TRADE COMMISSION, REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY (February 2001), available at: http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf. FEDERAL TRADE COMMISSION, SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES (November 2003), available at: http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf.

[11] Paul N. Bloom, Gregory T. Gundlach & Joseph P. Cannon, *Slotting allowances and fees: schools of thought and the views of practicing managers*, 64 JOURNAL OF MARKETING 92 (2000).

should be very desirable for this knowledge and other information regarding trade promotion in the form of slotting allowances and fees and related practices (e.g., category management) to be a part of the FTC's review of the Guides.

§ 240.11 Wholesaler or third party performance of seller's obligations.

According to the Guides, a seller may contract with intermediaries, such as wholesalers, distributors, or other third parties, to perform all or part of the seller's obligations under sections 2(d) and 2(e). The use of intermediaries does not relieve a seller of its responsibility to comply with the law. Therefore, in contracting with an intermediary, a seller should ensure that its obligations under the law are in fact fulfilled. An important change since 1990 applicable to this section involves the growth of third-party providers of trade promotion services. Knowledge of this growth, the entities and the services that they provide should be a part of the FTC's review of the Guides.

Merchandising service industry. In the U.S. there are a number of organizations and groups that provide third-party assistance in the performance of trade promotion and make up what is known as the merchandising services industry. These include merchandising service organizations who assemble merchandise and displays, collect data and provide reports on merchandising activity, provide assistance with inventory and ordering, make sales presentations, perform plan-a-gram maintenance and merchandising, and engage in new item placement (i.e., cut-ins), resets and signage placement. It also includes professional installers who specialize in the installation of displays, showcases, graphics, signage, racking, and other fixtures at retail. It further includes event marketers, mystery shoppers and demonstrators who provide demonstrations, samplings, couponing, field event marketing and promotions, surveys and audits. Professional associations for the merchandising services industry include the National Association for Retail Merchandising Services (NARMS), the Institute of Store Planners, POPAI, and the National Association of Store Fixture Manufacturers. Many of these associations hold annual events and publish information concerning trade promotion, related in-store marketing, merchandising and promotion. These organizations, events and publications possess considerable knowledge of trade promotion practices that could be of assistance to the FTC in its review process.

§ 240.12 Checking customer's use of payments.

According to the Guides, a seller should take reasonable precautions to see that the services the seller is paying for are furnished and that the seller is not overpaying for them. The customer should expend the allowance solely for the purpose for which it was given. If the seller knows or should know that what the seller is paying for or furnishing is not being properly used by some customers, the payments or services in question should be discontinued. In the past, monitoring compliance with program requirements was a difficult process. Today, however, technology and advances in trade promotion practices have enabled sellers to understand better how their payments are being used. It is important that these changes inform the FTC's review process.

Pay-for-performance trade promotion programs. In the past, manufacturers that offered trade promotion found it difficult to make sure retailers applied the full amount of their trade deals as required.[12] Retailers were known to pass less than 100 percent of the trade deals they received

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[12] PHILLIP KOTLER, MARKETING MANAGEMENT (2000), at 602.

from manufacturers on to consumers.[13] Although challenges remain, manufacturers have taken steps over time to increase their knowledge of how their deals are applied including obtaining proof of performance before paying allowances.[14] Evolving changes in technology and in particular the increasing use of scanner checkout systems and scanner data have changed this. Pay-for-performance programs reward retailers for performing the primary function that justifies a manufacturer's offering of a trade allowance – namely, selling increased quantities of the manufacturer's brand to consumers.[15] One form of this type of allowance is called scanner verified trade promotions or scan downs where retail sales volume for a trade-supported brand is recorded via optical scanning devices at the point of sale.[16] The technological infrastructure to support scanner verified trade promotion is now widely available in the United States through companies like ACNielsen and Information Resources who serve as scanning agents.[17] Knowledge of the increased use of these systems should be helpful for the FTC's review.

§ 240.13 Customer's and third party liability.

According the Guides, Sections 2 (d) and (e) apply to sellers and not to customers. However, the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows or should know that it is receiving services or allowances not made available on proportionally equal terms to its competitors engaged in the resale of a seller's product. Liability for knowingly receiving such discrimination may result whether the discrimination takes place

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[13] GERARD, J.TELLIS, ADVERTISING AND SALES PROMOTION STRATEGY (1998), at 215. ("The fraction of a trade deal that retailers pass on to consumers is called the "pass-through" rate."). . ACNIELSEN, NINTH ANNUAL SURVEY OF TRADE PROMOTION PRACTICES (1999), at 36 (Disagreement exists as to the precise "pass-through" rate. According to ACNielsen, in 1999, manufacturers perceived that on average retailers pass along 49% of the trade promotion dollars they receive, while retailers estimated on average they passed along 81% of trade promotion dollars to consumers. ACNielsen reports this disparity in perceptions has been stable across the previous three years of the study. Unless otherwise obligated, retailers typically choose to pass along price promotions and other incentives they receive from manufacturers if their calculus leads them to the conclusion that greater profits can be earned from passing discounts to consumers rather than directly "pocketing" the discount. TERRENCE A. SHIMP, ADVERTISING PROMOTION (2000), at 519. ("Discounts can also be passed along to consumers in the form of better services or facilities versus through price reductions.")

[14] PHILLIP KOTLER, MARKETING MANAGEMENT (2000), at 602.

[15] TERRANCE A. SHIMP, ADVERTISING, PROMOTION, AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (8th ed., 2010), at 470.

[16] TERRANCE A. SHIMP, ADVERTISING, PROMOTION, AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (8th ed., 2010), at 471. ("Scan downs entail three key facets: (1) A manufacturer agrees with a retailer on a period during which the retailer receives an allowance for all quantities of a promoted brand that are sold to consumers at the designated deal price (e.g., an item that regularly sells to consumers at $1.99 per unit is to be reduced to $1.79), (2) The retailer's own scanning data verify the exact amount of the promoted brand that has been sold during this period at the deal price (e.g., 5,680 units at $1.79 each), (3) The manufacturer pays the retailer quickly, say within five days, at the designated allowance for the quantity sold. The manufacturer then reimburses the retailer for the reduced margin in selling a certain number of units (e.g., 5,680 units at a reduced margin of $0.20, or $1,136) and compensates the retailer for the amount of the trade allowance (e.g., 5,680 units at $0.05 each, or $284.00; thus, the manufacturer would mail a check to the retailer totaling $1,420).")

[17] TERRANCE A. SHIMP, ADVERTISING, PROMOTION, AND OTHER ASPECTS OF INTEGRATED MARKETING COMMUNICATIONS (8th ed., 2010), at 471. ("Scanning agents profit from performing the following functions: (1) collecting scanner data from retailers, (2) verifying the amount of product movement that meets the manufacturer's promotional requirements and warrants compensation, (3) paying the retailer, and (4) collecting funds from the manufacturer along with a commission for services rendered.").

directly through payments or services or indirectly through deductions from purchase invoices or other similar means. The FTC has ruled that the inducement of such allowances or services is an unfair method of competition prohibited by Section 5 of the Federal Trade Commission Act. This approach has been endorsed by several courts of appeals.[18] Further, although by its terms Section 2(f) of the Robinson-Patman Act does not prohibit buyer from inducing discriminatory allowances or services subject to Sections 2(d) or 2(e), it has been held that the inducement of advertising allowances and promotional payments in excess of legitimate costs for such purposes states a claim for indirect price discrimination under Section 2(a) and therefore a Section 2(f) claim against the buyer.[19] Accordingly, a reseller customer may be liable for knowingly inducing a seller to grant the customer an advantage because the services or allowances that the customer receives were not made available on proportionally equal terms to competing customers. Two decades ago, the symmetry of power in many seller-customer relationships favored sellers. Since that time in many of these relationships there has been a shift in power from sellers to their customers. Consequently, reseller customers have gained greater influence over their upstream sellers. This change increases the potential that a powerful customer may successfully induce a seller to grant them an advantage through not making trade promotion available on proportionally equal terms to competing customers. The FTC should be aware of this change.

Increasing power of reseller customers. In the past and for many years manufacturers of national brands held power and influence over their reseller customers; resellers were viewed as passive distributors of their products.[20] Consumer-product manufacturers created consumer demand for their brands primarily through advertising and consumer-oriented promotions, such as samples, coupons, and premiums.[21] They exerted pressure on resellers to carry and promote their products.[22] Retailers did very little research and sales analysis; they relied on manufacturers for information regarding the sales performance of individual brands.[23] The last few decades, however, have witnessed a fundamental shift in the locus of power held by resellers and manufacturers with increasing power acquired by resellers. As concluded by two observers "a common theme is that buyers within many sectors of our economy are acquiring increasing clout in their relationships with upstream sellers."[24] Considerable research documents the growing influence of reseller customers in their relationships with manufacturer sellers. Reporting on the factors that have led to this change, two authors recently documented that "[r]etailer's buying power has significantly increased in recent years as a result of a process of market concentration."[25] According to researchers, the "retailing revolution" (as it is called) has taken place over the last two decades due to the "steady growth in the absolute and relative size of retailers and the replacement of manufacturer dominance of distribution

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18 ABA SECTION OF ANTITRUST LAW, ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (2012).

19 ABA SECTION OF ANTITRUST LAW, ANNUAL REVIEW OF ANTITRUST LAW DEVELOPMENTS (2012).

20 GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7th ed., 2007), at 498.

21 GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7th ed., 2007), at 498.

22 GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7th ed., 2007), at 498.

23 GEORGE E. BELCH & MICHAEL A. BELCH, ADVERTISING AND PROMOTION (7th ed., 2007), at 498.

24 Gregory T. Gundlach & Albert A. Foer, *Buyer Power in Antitrust: An Overview of the American Antitrust Institute's Invitational Symposium on Buyer Power,* 53 ANTITRUST BULLETIN 233, 234 (2008).

25 SRINIVAS REDDY & LUCA PELLEGRINI, RETAIL AND MARKETING CHANNELS (2012), at i.

channels by that of retail chains."[26] This shift has also been aided by information technology in the form of optical checkout scanners and computers that permit resellers to understand the performance of a manufacturer's brands with greater precision and detail.[27] Resellers use this information to analyze sales of a manufacturer's products and to demand discounts and other promotional support from manufacturers.[28] The result has been that "[m]anufacturers' brands and power in the market-place no longer reign supreme."[29] That position has been captured by retailers who have "strengthened their influence over the shape of the industry,"[30] and reportedly "exert [discriminatory] buying power over manufacturers."[31] Understanding this shift and its implications should be important to the FTC's Guides review.

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[26] Susan Segal-Horn & John McGee, *Strategies to Cope with Retailer Buying Power*, *in* Ch. 2 (Srinivas Reddy & Luca Pellegrini eds, 2012) RETAIL AND MARKETING CHANNELS, at 24.

[27] George E. Belch & Michael A. Belch, Advertising and Promotion (7th ed., 2007), at 498.

[28] George E. Belch & Michael A. Belch, Advertising and Promotion (7th ed., 2007), at 498.

[29] Susan Segal-Horn & John McGee, *Strategies to Cope with Retailer Buying Power*, *in* Ch. 2 (Srinivas Reddy & Luca Pellegrini eds, 2012) RETAIL AND MARKETING CHANNELS, at 24.

[30] SRINIVAS REDDY & LUCA PELLEGRINI, RETAIL AND MARKETING CHANNELS (2012), at i.

[31] Susan Segal-Horn & John McGee, *Strategies to Cope with Retailer Buying Power*, *in* Ch. 2 (Srinivas Reddy & Luca Pellegrini eds, 2012) RETAIL AND MARKETING CHANNELS, at 24.