

January 29, 2013

Donald S. Clark
Secretary
Federal Trade Commission
Room H-113 (Annex B)
600 Pennsylvania Avenue, N.W.
Washington, DC 20580

RE: *Comments on the Guides for Advertising Allowances and Other Merchandising Payments and Services (“the Fred Meyer Guides”)*

Dear Secretary Clark:

The National Community Pharmacists Association (“NCPA”), founded in 1898, represents the interests of America’s community pharmacists, including the owners, managers, and employees of more than 23,000 independent community pharmacies across the United States. Together, independent pharmacies represent an \$88.5 billion health care marketplace, dispense nearly 40 percent of all retail prescriptions, and employ more than 315,000 people, including 62,400 pharmacists. NCPA’s members are dedicated to promoting high-quality pharmacy care in this country. They serve a vital need in many communities, particularly in rural and other underserved communities, where the local independent pharmacist is often the most accessible day-to-day healthcare resource.

NCPA offers these comments on the Federal Trade Commission’s “Fred Meyer Guides,” (“Guides”) focusing in particular on the Commission’s first question in its request for public comment: “Is there a continuing need for the Fred Meyer Guides?” The Guides have been in place since 1969. Were they to be rescinded or weakened now, after more than 40 years, that action potentially would be received as a signal from the Commission that the discriminatory conduct addressed by Sections 2(d) and (e) of the Robinson-Patman Act either no longer occurs or, if it does, that it warrants no concern. Neither is true.

To take our industry as just one example: It is a widely acknowledged fact that, dating back at least to the early 1990s, major drug manufacturers have charged independent pharmacies the list prices for their drugs while offering a substantially (sometimes *dramatically*) discounted price to others such as hospitals, universities, large pharmacy chains, and mail-order pharmacies (including especially those mail-order operations owned by or affiliated with pharmacy benefit managers). *See In re Brand Name Prescription Drugs Antitrust Litigation*, 186 F.3d 781, 786 (7th Cir. 1999) (observing that “[e]veryone knows” brand name prescription drug manufacturers engage in price discrimination). This price discrimination has occurred through up-front price discounts to favored customers as well as through back-end rebates and, importantly, through advertising and promotional allowances, denied to

independent pharmacies, which are the subject of the Commission's Guides.

Whether independent pharmacies ultimately will recover adequate compensation for all the business lost as a result of this years-long discrimination remains a contested issue in litigation. This will depend in large part on how courts construe the elements, burdens of proof, and scope of defenses under the Robinson-Patman Act, particularly on the question of damages. The point remains, however, that the underlying core conduct, price discrimination, is real and longstanding, is largely uncontested at this point, and has had a dramatic negative impact on our industry.

There are roughly one-third fewer independent pharmacies in this country as there were in the early 1990s, for example, and many of the survivors had to consolidate locations to stay in business. Throughout the 1990s and well into the first decade of this century, mail-order pharmacy's market share roughly doubled while independent retail shrunk by half, due in large part to pervasive price discrimination. That is a problem.

Local pharmacies often function as an economic anchor in the underserved areas where the majority of them are located, especially in rural and inner-city neighborhoods, providing jobs as well as a range of goods and services to their communities. In those places, moreover, where access to quality healthcare resources can be limited, local pharmacists perform a uniquely valuable service as healthcare professionals, forming the face-to-face relationships that are key to patients being comfortable enough to ask questions about their health needs, getting good advice, taking the correct medications properly, refilling those prescriptions promptly, and avoiding harmful drug interactions.

Community pharmacies did not decline because consumers suddenly started preferring to buy their medications by mail or from large chains instead of patronizing the local pharmacists who know them. They declined because price discrimination (put in place, not to advance consumer welfare or choice, but to serve the profit-making interests of the manufacturers and their favored purchasers) has artificially made those options appear cheaper than community pharmacies.

NCPA is well aware of the many voices in the legal and academic communities that have questioned the goals and economic theory of the Robinson-Patman Act, and that have sought its repeal at several points in its long history. But despite all these assaults on the Act over the years, Congress has chosen again and again to leave it in place, largely as it existed in 1936, as a means of preventing large businesses from prospering unfairly at the expense of small ones because of the favorable, non-functional, pricing concessions those large players have the power to extract from manufacturers.¹

¹ See Antitrust Modernization Commission, *Report and Recommendations* 313 (2007) ("By 1936, during the Great Depression, Congress was concerned that the growth of large chain stores was harming small 'mom and pop' competitors," and "undertook to strengthen the original Clayton Act to give small businesses greater protection from what Congress saw as large powerful buyers extracting favorable concessions from their suppliers to the detriment of smaller competitors").

As NCPA members' experience shows, this original congressional concern is still very much at the forefront in our industry. We submit that now is not the time for the Commission to set long-standing law and enforcement aside and, in that retreat, to signal indifference to enduring legislative concern over the impact of price discrimination on small business, especially in the underserved markets that depend on these businesses. NCPA therefore submits that, yes, there certainly is a continuing need for the Guides and, beyond that, for the Commission to bring its expertise and resources to bear in assuring that the core purposes of the Robinson-Patman Act are still honored.

Respectfully submitted,

B. Douglas Hoey, RPh, MBA
CEO, National Community Pharmacists Association