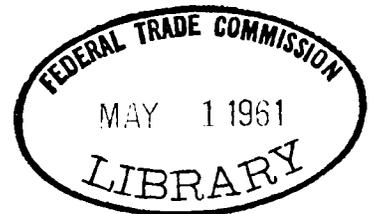


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March 31, 1961

"SELF-REGULATION THROUGH BUSINESS EDUCATION:  
A KEY TO THE PRESERVATION OF OUR  
COMPETITIVE SYSTEM"

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Statement by Earl W. Kintner  
of Arent, Fox, Kintner, Plotkin and Kahn,  
Washington, D. C., to Students and Faculty  
of the Executive Development Program in  
Food Marketing Management  
Michigan State University  
East Lansing, Michigan  
March 31, 1961



I.

The antitrust laws have, at times, been regarded by many as somewhat esoteric stuff, subjects for much argument and study by some lawyers and some economists, but not part of the bone and gristle picture for practical men of business. Indifference, ignorance, and sometimes complete misunderstanding have been the reactions in some quarters to sporadic enforcement efforts by government and blasts of exhortation from the academic community.

I believe this situation can change, must change, and probably will change in the coming decade. Several dramatic developments in the recent past have already produced a broader and sharper awareness of the existence of our antitrust and trade regulation laws.

At hearings on February 6 and 7 in Philadelphia, a U. S. District Court imposed fines and prison sentences in the electrical equipment antitrust cases. Defendants were found guilty of fixing prices. Seven 30-day sentences were imposed on individual corporate officers; 24 similar sentences were imposed but suspended. Sentenced officials included those of General Electric Company, Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, and other electrical equipment manufacturers. Fines in the total amount of almost two million dollars were imposed upon the companies found guilty, and these companies are now faced with the threat of a multitude of suits for treble damages by injured customers. These cases received wide publicity.

The General Electric case is an object lesson in the dangers of bureaucracy in private business. In business, as in government, large organizations can result in the right hand not knowing what the left hand is doing. Division of responsibility may allow practices to creep in which management at all levels may later greatly regret. There is a lesson here, I believe, for each student here -- marketing officials must remain alert to the prohibitions of the antitrust and trade regulation laws and to their individual responsibility for compliance with those laws.

The Federal Trade Commission recently has stepped up enforcement of the legal prohibitions against discriminatory pricing and promotional allowances, particularly in the food industry. Through the use of a long-ignored authority to require reports from corporations, the Commission has proceeded with broad investigations of food suppliers, and also given careful attention to the inducement by chain store and other buyers of illegal price and allowance favoritism. Receipt of orders to file reports has brought home to many the existence of the Robinson-Patman Act and the importance of keeping one's pricing practices in compliance with that Act.

## II.

In 1914 the Federal Trade Commission Act created an agency headed by five commissioners appointed by the President, by and with the advice and consent of the Senate, for terms of seven years. The Commission now has a staff of approximately 800 attorneys, economists, accountants, statisticians, scientists and supporting personnel and a budget of about \$8,000,000 for the current fiscal year.

The Act of 1914 provided merely that "unfair methods of competition in commerce are hereby declared unlawful". By amendment in 1938 "unfair or deceptive acts or practices in

commerce" were added to the declaration of illegality. The briefness of these phrases was calculated. Any attempt to list all trade practices deemed to be unfair would merely be an invitation to ingenious men to devise unlisted substitute methods. Congress also realized that no crystal ball permitted an unclouded view of the future, that undreamed-of economic advances could breed a host of new unfair practices. Therefore, Congress has chosen general prohibitions, leaving the inclusion or exclusion of specific practices to the expert administrative body.

In the last 45 years the Commission has studied thousands of trade practices, determining whether, in the context of the facts of a particular case, the given practice was lawful or unlawful. Today the more than 50 volumes of Federal Trade Commission Reports give far more explicit instructions on what is illegal in the marketplace than any statutory list possibly could.

Congress has continued to increase the responsibilities of the Federal Trade Commission. In addition to the general prohibitions in the FTC Act, the FTC today enforces a whole complex of statutes including the Clayton Act, as amended by the Robinson-Patman Act, the Wheeler-Lea Amendments to the FTC Act, the Oleomargarine Act, and the Wool, Fur, Flammable Fabrics and Textile Fiber Products Identification Acts.

The Robinson-Patman Act is of direct concern to this group. This Act, passed in 1936, among other things, completely rewrote Section 2 of the 1914 Clayton Act. The present Section 2 contains six subsections.

One of the general purposes of the statute was and is to prevent large buyers from using their economic power to extract favorable prices which are not granted to others less powerful and are not justified by savings to the seller resulting from differences in cost of manufacture, sale or delivery.

Section 2(a) declares it unlawful to discriminate in price between different purchasers of the same commodities where the effect of the discrimination may be substantially to lessen competition or tend to create a monopoly or to injure, destroy or prevent competition with any person or his customers who grants or knowingly receives the benefit of the discrimination. A series of provisos permits the defense or justification of some price discriminations. Section 2 of the original Clayton Act was aimed at predatory practices of powerful sellers seeking to eliminate their weaker competitors. It was amended by the Robinson-Patman Act to curb as well the predatory use of bargaining power by chain stores and other powerful, large buyers. The prohibition of price discrimination

contained in the old Section 2 was extended to prohibit discriminations which may "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them". By the amendments, quantity differentials were limited to actual cost differences resulting from the difference in quantities sold or delivered to different purchasers. The proviso permitting discriminations made in good faith to meet competition was eliminated from Section 2(a) and inserted in modified form in Section 2(b).

Section 2(a) also contains another defense which is of particular interest to the members of the food industry. The Act provides: ". . . that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned". It is fair to say that Congress specifically provided for one of the pressing problems of the food industry by the inclusion of the perishable commodities exception.

In a speech to the Automotive Service Industry Association last month, I included a statement of basic concepts for compliance with the prohibition against price discrimination, including specific examples. Although some of the examples are in terms of the automotive parts industry, you may find the statement of principles helpful. It is attached as Appendix 1 to my statement today.

In order to deal with the problems of inducement of discriminatory prices by large buyers, as it was then understood, Congress included Section 2(f), which declares "that it shall be unlawful for any person engaged in commerce in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this Section". This Section enables the Federal Trade Commission to proceed directly against a buyer receiving unlawful price discriminations and also subjects a buyer who receives unlawful discriminations to treble damage suits by anyone injured as a result of a violation of this law.

If the Act went no further than this, loopholes would quickly develop. For example, if a seller, either as a result of pressure from a buyer or for some more aggressively selfish purpose of his own, wished to favor one customer and not others, he could grant to the one customer special services

or special allowances for advertising or other sales promotion even though charging the same basic price to all and thus not discriminating in price in violation of Section 2(a). This possibility of indirect discrimination was recognized in the reports of the Senate and House Committees which considered the Robinson and Patman bills. The reports stated:

"Still another favored medium for the granting of oppressive discriminations is found in the practice of large buyer customers to demand, and of their sellers to grant, special allowances in purported payment of advertising and other sales-promotional services, which the customer agrees to render with reference to his business generally. Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when, in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so".

To prevent this type of circumvention, Sections 2(d) and 2(e) were included in the Act.

Section 2(d) deals with payments or allowances by the seller to the buyer for services, and requires them to be made available on proportionally equal terms to all competing customers. Section 2(e) deals with the furnishing by the seller of services to the buyer, requiring them also to be made available to all competing buyers on proportionally equal

terms. Last spring the Commission published Guides for compliance with these two subsections. These Guides are attached as Appendix 2 to my statement.

Section 2(c) of the amended Clayton Act prohibits certain unlawful brokerage payments or payments in lieu of brokerage. In addressing the National Food Brokers Association several months ago, I included "suggestions" to that group for compliance with the law on brokerage. Since these suggestions may be helpful to you, they are attached as Appendix 3 to my statement.

The Commission may employ its power to define "unfair methods of competition and unfair or deceptive acts and practices" to insure that competition will continue to be both free and fair. Section 2(f) of the amended Clayton Act is designed to prevent large buyers from inducing discriminatory reductions in price from small suppliers, but the Act contains no express prohibition against a large buyer's inducing discriminatory promotional allowances from its suppliers. In a recent decision, (F.T.C. Docket 6973), involving the Grand Union Company, a large eastern supermarket chain, the Commission found that the knowing inducement or receipt of discriminatory advertising allowances which are prohibited by Section 2(d) of

the Clayton Act, constitutes an unfair trade practice under Section 5 of the Federal Trade Commission Act.

Misleading representations to the public about price savings or qualities of products offered for sale can also lead to legal difficulties. If competition is to be free, it must be honest competition for the consumer's favor. If you mislead the consumer, you poison the atmosphere of competition and destroy the confidence of the public in your advertising, your enterprise, and the business community generally. Recent years have seen increased effectiveness by the Federal Trade Commission in stopping deceptive advertising and in alerting business people and the public to common forms of marketing chicanery.

### III.

I trust you will agree with me that there is much worth preserving in our free enterprise system. A free economy broadens opportunity for free development of individual potential -- materially, morally, and spiritually.

History teaches that abuses of freedom in a democratic society bring further governmental restrictions on freedom. Ignorance or defiance of our laws to preserve our free competitive system will surely destroy the system in two ways:  
(1) violations of these laws destroy free markets and

(2) violations of these laws bring on pressure for legislation which would not only prevent abuses but further curtail the freedom of all business to compete.

Each of you has an important role to play in the future of food marketing. Each of you has a responsibility to keep our system free by your own individual efforts. Each of you has a responsibility to yourself and to your organization to avoid the temptations of fixed markets, illegal discriminatory deals, and phony advertising appeals.

#### IV.

What can you do as a practical matter to help keep our system free?

You can encourage alertness in yourself and others to the dangers of ignorance of the antitrust and trade regulation laws.

You can raise questions with your colleagues, your suppliers, your customers, and, indeed, your superiors about compliance with the Sherman Act, the Robinson-Patman Act, and the rulings of the Federal Trade Commission on advertising.

You can yourself make recommendations or decisions avoiding questionable practices and encourage others to do the same.

You can seek legal advice from corporate counsel or your attorney on problems of pricing and advertising which may encroach upon legal prohibitions.

You can and should begin immediately a personal and corporate review of habits and practices to evaluate them against requirements and prohibitions of the law. You should plan and carry out a continuing program of compliance.

These things must be done if our free economy is to remain free and in private hands. I trust that the lesson of the Philadelphia jail sentences will not be lost on any of you. I hope that my presence here today and these few remarks have been helpful to you in understanding some of your present and future responsibilities.

## APPENDIX 1

### SUGGESTIONS BY EARL W. KINTNER FOR COMPLIANCE WITH THE PRICE DISCRIMINATION PROVISIONS OF THE ROBINSON-PATMAN ACT (SECTIONS 2(a) and 2(b) OF THE AMENDED CLAYTON ACT)

1. Any person who sells products of like grade and quality in interstate commerce to at least two purchasers at different net prices has discriminated in price within the meaning of the statutory term "to discriminate in price."

(a) The Act does not prohibit one uniform price to all purchasers. A seller may sell at the same price to wholesalers and retailers without any legal liability under Section 2(a).

(b) A seller's purchasers are not necessarily limited to persons buying direct from the manufacturing seller. A jobber obtaining a manufacturer's products through a warehousing distributor may be considered to be a "purchaser" from the manufacturer where the latter has exercised such a degree of control over the transactions between the distributor and the jobber that the sales are actually sales by the manufacturer. For example, the following factors have been considered in determining if such a jobber is a purchaser of the manufacturer:

(1) Whether the manufacturer's salesmen contact the jobber and solicit orders for the manufacturer's products.

(2) Whether the products are shipped directly from the manufacturer to the jobber, invoiced to the jobber, and payment remitted by the latter to the manufacturer.

(3) The extent to which the manufacturer sets, controls or suggests the prices at which the distributor may sell to the jobber.

(4) Whether the contracts entered into between the distributor and the jobber provide that the manufacturer may require approval before the distributor is permitted to sell any specific jobber account.

If such control is exercised, the manufacturer may be in violation of Section 2(a) when the jobber, buying through the distributor, pays a higher price than competing jobbers purchasing directly from the manufacturer.

2. While sales at different net prices may constitute discriminations in price, such sales may be illegal under Section 2(a) only where the price differences may result in adverse competitive effects. A seller, in defense, may affirmatively show (a) the price differentials do not exceed cost differences resulting from different methods or quantities in which the commodities are sold, or (b) a lower price was made in good faith to meet an equally low price of a competitor.

No magic formula permits safe prediction that any given price differential between competing purchasers will or will not be likely to result in competitive injury. The answer to this question depends upon the specific facts in particular cases.

3. Where a manufacturer is unable to justify price differences between his purchasers in accordance with the affirmative defenses provided by the statute, he may be reasonably certain that such price differences will not be illegal price discriminations if he classifies his purchasers on a functional basis and sells to all purchasers within each functional group at the same net price.

The test to be used in classifying purchasers into functional groups should be based upon how or in what manner each purchaser resells or disposes of the manufacturer's products. If this test is applied, the above rule merely recognizes that ordinarily manufacturers buying automotive parts for use as original equipment do not compete with warehouse distributors or jobbers reselling replacement parts. Similarly, distributors reselling only to independent jobbers do not usually compete with the jobbers reselling solely to dealers. Lacking any competitive relationship among such purchasers, a seller may legally discriminate in price among

the manufacturer, warehouse distributor and jobber provided the distributor pays a lower price than the jobber.

Any plan for compliance with Section 2(a) would not be complete without considering that, under certain circumstances, a seller can justify a discriminatory price under the good faith defense regardless of the competitive injury such a discriminatory price might cause.

Since the good faith defense furnishes an absolute or lawful excuse for an otherwise unlawful, injurious price discrimination, Commission and court interpretations have strict limitations upon its availability. Among the more basic limitations are the following:

(1) The defense is valid only when a lower price is given to meet individual competitive situations, as a defensive measure. It cannot be used for the purpose of gaining, instead of retaining, a customer.

Example: Supplier A decides to improve his market position in one trading area and lowers his prices to several large volume purchasers in the area and not to their competitors. Such a practice would constitute aggressive action on the part of the seller without any attempt to retain a specific customer who has been offered a lower price by a competitor of the supplier.

(2) The seller may only meet, not undercut, the price of a competitor.

Example: Suppliers A and B sell to Jobber C at \$1.00 and 95¢, respectively. Supplier A lowers his price to 90¢. A cannot justify the 90¢ price under the good faith defense.

(3) The equally low price of a competitor means the price for the same quantity.

Example: In selling to some of Supplier A's customers, Supplier B sells a smaller quantity at the same price as A's price for a larger quantity. The price for the smaller quantity cannot be defended under 2(b) by Supplier B.

(4) The defense cannot be applied where a seller lowers his price to enable his customers to meet their (the customers) competition.

Example: Supplier A cannot lower his price to Jobber B to permit B to meet Jobber C's competition in selling Supplier D's products.

(5) Whenever a seller intends to justify a lower price to specific customers, and relies upon the 2(b) defense, he should attempt to obtain verified written statements or invoices which reflect the exact price of the particular competitor whose price the seller is meeting.

**FEDERAL TRADE COMMISSION**

**Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance With Sections 2(d) and 2(e) of the Clayton Act, as Amended by the Robinson-Patman Act**

**ADOPTED MAY 19, 1960**

## FEDERAL TRADE COMMISSION

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ROBERT T. SECREST,  
SIGURD ANDERSON,  
WILLIAM C. KERN,  
EDWARD T. TAIT.

ROBERT M. PARRISH, *Secretary*

# **GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES; COMPLIANCE WITH SECTIONS 2(d) AND 2(e) OF THE CLAYTON ACT, AS AMENDED BY THE ROBINSON-PATMAN ACT**

## **What the Guides Are Meant To Do**

These guides can be of great value to businessmen who want to avoid violating the laws against giving or receiving improper promotional allowances, including advertising or special services, for promoting products. The guides will make possible a better understanding of the obligations of sellers and their customers in joint promotional activities.

The Commission's job is to obtain compliance with these laws. It has a duty to move against violators. However, as an administrative agency, the Commission believes the more knowledge businessmen have with respect to the laws enforced by the Commission the more likelihood there is that compliance with the laws will be obtained.

For the Commission to do its job properly and for business to stay out of legal trouble requires that every effort be made to give individual businessmen a better understanding of these laws. This, of course, does not mean that a businessman must become a legal expert, but it will help him—and the Commission's law enforcement efforts—if he has a good general knowledge of what he can and cannot do in the field of promotional allowances.

If a businessman knows what the legal pitfalls are he can steer his business policies to avoid them. Furthermore, such knowledge is most useful in determining when competitors are trying to use illegal methods. In other words, it pays for a businessman to know what his rights are as well as his obligations.

These guides are designed to be both practical and understandable. They contain carefully considered suggestions, or general rules of thumb, which business will find very useful in preventing unintentional violations. They highlight the requirements of law and offer means for complying with it without any attempt to suggest ways for skirting along the borderline between what is legal and illegal.

### **What They Are Not Meant To Do**

It should be made clear too that the Guides are not meant to do several things:

(1) They are not meant to cover every situation. Decided cases dealing with unusual situations are not covered. Nor are situations which have not been considered by the Commission or the courts.

(2) They are not meant to tell how to skirt illegality. Clever people can undoubtedly devise practices not mentioned in the Guides, but they may still violate the law.

(3) They are not a substitute for sound legal advice.

(4) They do not offer either new interpretations of law or change or amend the laws as determined by the Commission or the courts. They should be read as a non-technical explanation of what the law means, not as a legal restatement.

### **What the Law Covers Generally**

The Robinson-Patman Act is an amendment to the Clayton Act. It is directed at preventing competitive inequalities that come from certain types of discrimination by sellers in interstate commerce. Sections 2 (d) and (e) of the Act deal with discriminations in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, section 2(d) applies. Where the seller furnishes the service itself to the buyer, section 2(e) applies. Both sections require a seller to treat his competing customers on proportionally equal terms.

### **Other Law Covered**

In two places, the Guides go beyond sections 2 (d) and (e):

(1) A seller who uses a promotional scheme to cover a price discrimination by paying for services that are not rendered may thereby violate section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act. (See par. 11.)

(2) A customer who improperly receives payments, services or facilities may thereby violate section 2(f) of the Clayton Act, as amended by the Robinson-Patman Act, or section 5 of the Federal Trade Commission Act. (See pars. 11 and 16.)

## **THE GUIDES**

**1. When does the law apply?** Sections 2 (d) and (e) apply to a seller of products in interstate commerce, if he either (a) pays for services or facilities furnished by his customers in connection with

the distribution of his products [sec. 2(d)], or (b) furnishes such services or facilities to his customers [sec. 2(e)].

**2. Who is a seller?** "Seller" includes anyone who sells products for resale, with or without further processing. Selling corn sirup to a candy manufacturer is an example of a sale for resale with processing.

**3. Who is a customer?** A "customer" is someone who buys directly from the seller or his agent or broker. Sometimes someone who buys from the customer may have such a relationship with the seller that the law also makes him a customer of the seller. In these Guides, the word "customer" which is used in section 2(d) of the law includes "purchaser" which is used in section 2(e).

**4. What is interstate commerce?** This is something that whole law books have been written about; you cannot define it in a few words. Legal decisions tend to interpret the term quite broadly. If there is any part of a business which is not wholly within one State, (for example, sales or deliveries of products, their subsequent distribution, or purchases or deliveries of supplies or raw materials), the business may be subject to the Robinson-Patman Act. Sales in the District of Columbia are also covered by the law.

**5. What are services or facilities?** This term has not been exactly defined by the statute or in decisions. The following are merely examples—the law also covers other services and facilities.

(a) The following have been held to be services or facilities covered by the law where the seller has paid the buyer for furnishing them:

- Any kind of advertising,
- Handbills,
- Window and floor displays,
- Special sales or promotional efforts for which "push money" is paid to clerks, salesmen, and other employees of the customers,
- Demonstrators and demonstrations,
- Collecting of orders from individual stores,
- Furnishing complete distribution of seller's line.

(b) Here are some examples that have been held to be services or facilities covered by the law when the seller furnished them to a customer:

- Any kind of advertising,
- Catalogs,
- Demonstrators,
- Display and storage cabinets,
- Display materials,
- Special packaging, or package sizes,
- Warehouse facilities,
- Accepting returns for credit,
- Prizes or merchandise for conducting promotional contests.

In these Guides, the term "services" is often used as short for "services and facilities."

**6. Need for a plan.** If a seller makes payments or furnishes services that come under these sections, he must do it under a plan that meets several requirements. Although this plan need not be written or formal, this may be advisable, particularly if there are many competing customers to be considered or if the plan is at all complex.

Briefly, the requirements are:

(a) The payments or services under the plan must be available on a proportionally equal basis to all competing customers. (See par. 7.)

(b) The seller should take some action to inform all of his customers who compete with any participating customer that the promotion is available. (See par. 8.)

(c) The plan must either allow all types of competing customers to participate or provide some other means of participation for those who cannot use the basic plan. (See par. 9.)

(d) The seller and customer should have a clear understanding about the exact terms of the offer and the conditions upon which payments will be made for services and facilities furnished. (See par. 10.)

(e) The seller must take reasonable precautions to see that the services are actually furnished and also that he is not overpaying for them. (See par. 11.)

**7. Proportionally equal terms.** The payment or services under the plan must be made available to competing customers on proportionally equal terms. This means that payments or services must be proportionalized on some basis that is fair to all customers who compete. No single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can best be done by basing the payments made or the services furnished on the dollar volume or on the quantity of goods purchased during a specified time.

*Example:* A seller may properly offer to pay a specified part (say 50 percent) of the cost of local newspaper advertising up to an amount equal to a set percentage (such as 5 percent) of the dollar volume of purchases during a specified time.

*Example:* A seller may properly place in reserve a specified amount of money for each unit purchased, and use it to reimburse customers for newspaper advertising when they prove they have advertised.

*Example:* A seller may not select one or a few customers to receive special allowances to promote his product, because of their special reputation, without making those allowances available on proportionally equal terms to other customers who compete with them.

*Example:* A seller's plan may not provide an allowance on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first \$1,000 purchases per month, 2 percent of second \$1,000 per month, and 3 percent of all over that.

**8. Seller's duty to inform.** The seller should take some action to inform all his customers competing with any participating customer that the plan is available. He can do this by any means he chooses, including letter, telegram, notice on invoices, salesmen, brokers, etc. However, if a seller wants to be able to show later that he did make an offer to a certain customer, he is in a better position to do so if he made it in writing.

**9. Covering all competing customers.** The plan must allow all types of competing customers to participate. It must not be tailored to satisfy the needs of a favored customer or class, but must be suitable and usable under reasonable terms by all competing customers. This may require offering all customers more than one way to participate in the plan. The seller cannot either expressly, or by the way the plan operates, eliminate some competing customers. Where the seller has alternative promotional plans, his customers must be given the opportunity to choose among the plans.

*Example:* S offers a plan for cooperative advertising on radio, television, or in a newspaper. Some of his customers who compete with those who receive the allowance are too small to use the offer. He must offer them some usable and proportional alternative, such as advertising in a neighborhood paper, handbills, etc. (See Guide 7.)

*Example:* The seller's plan provides for furnishing demonstrators to large department store customers. He must provide usable alternatives to his customers who run other types of stores and compete with these customers but cannot use demonstrators. The alternatives might be services of equivalent value that the competing customers could use, or payments of like value for advertising or displays furnished by the customers. (See also Guide 7.)

*Example:* A seller of appliances makes his plan available only to those customers purchasing at least some minimum number (such as eight) of his appliances in a single order or a stated period. If this requirement is beyond the reach of some customers competing with those participating in the promotion, it may be illegal.

*Example:* A seller should not refuse advertising allowances to those who advertise the seller's products at prices below a given figure, where this may be a means of fixing prices illegally.

**10. Need to understand terms.** There should be a clear understanding between the seller and each participating customer as to the

exact terms of the offer and the conditions upon which payments will be made for services and facilities furnished.

**11. Checking customer's use of payments.** The seller must take reasonable precautions to see that the services he is paying for are furnished and also that he is not overpaying for them. Moreover, the customer must expend the value received in full solely for the purpose for which the allowances were given. If the seller knows or should know that what he pays or furnishes is not being properly used, the payments or services must be discontinued. It should be noted that payments by the seller where the customer performs no services may result in legal action against the seller under section 2(a) of the Robinson-Patman Act and against the customer under section 2(f) of that law. Likewise, a seller may not properly pay, nor may a customer properly receive and retain, any amount in excess of that actually used by the customer to perform the service.

**12. Competing customers.** The seller is required to provide in his plan only for those customers who compete in the distribution of the promoted product with the customer who is participating in the promotion. Therefore, the seller can limit the area of his promotion to that in which participating customers sell.

*Example:* Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three retailers who sell only in Roanoke, Va., and compete with each other there. He has no other customers selling in Roanoke or its vicinity. If he offers his promotion to one Roanoke customer he must include all three, but can limit it to them.

*Example:* Manufacturer A distributes his products nationally. He may lawfully engage in a special promotional campaign in the New England States without making the same program available to customers in the remainder of the country who do not compete with New England customers.

NOTE.—The seller must be careful here not to discriminate against customers located on the fringes but outside the area selected for the special promotion, since they may be actually competing with those participating.

**13. Indirect payments.** Payments by a seller, through an agent or a broker or to a third person, for the benefit of a customer may violate the law.

*Example:* A seller may not buy advertising time from a radio station that is furnishing free radio time to certain favored customers of the seller because the customers run an in-store promotion of the seller's goods.

**14. Meeting competition in good faith.** A seller charged with discrimination in violation of section 2(e) may defend his actions by showing that the services were furnished in good faith to meet an equivalent service furnished by a competitor. However, this is a very technical defense subject to important limitations. The Commission has held that the defense of meeting competition in good faith is not available to a seller charged with discrimination in violation of section 2(d).

**15. Cost justification.** It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment, service, or facility, could be justified through savings in the cost of manufacture, sale or delivery.

**16. Customer's liability.** Sections 2 (d) and (e) apply only to sellers and not to customers. However, a customer who knows or has reason to know that he is receiving payment or service granted or furnished when the seller violates sections 2 (d) or (e) may also be proceeded against by the Commission under section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition.

*Example:* Buyer A actively solicits his suppliers to purchase advertising in connection with an anniversary sale or new store opening knowing or having reason to believe that such payments are not made under the seller's regular cooperative advertising program and that they are not offered to competing customers.

Nothing contained in these Guides relieves any party subject to a Commission cease and desist order or other requirement from complying with the specific provisions of such order or requirement. The Guides do not constitute a finding in and will not affect the disposition of any formal or informal matter now pending with the Commission.

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The following is a full text of the Robinson-Patman Act. These Guides deal with the *italic* portions.

[74th Cong., 2d sess., Ch. 592, June 19, 1936]

AN ACT

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), is amended to read as follows:

"SEC. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however*, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further*, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

"(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however*, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished a competitor.

"(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

"(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

"(e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

"(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

SEC. 2. That nothing herein contained shall affect rights of action arising, or litigation pending, or orders of the Federal Trade Commission issued and in effect or pending on review, based on section 2 of said Act of October 15, 1914, prior to the effective date of this amendatory Act: *Provided*, That where, prior to the effective date of this amendatory Act, the Federal Trade Commission has issued an order requiring any person to cease and desist from a violation of section 2 of said Act of October 15, 1914, and such order is pending on review or is in effect, either as issued or as affirmed or modified by a court of competent jurisdiction, and the Commission shall have reason to believe that such person has committed, used or carried on, since the effective date of this amendatory Act, or is committing, using or carrying on, any act, practice or method in violation of any of the provisions of said section 2 as amended by this Act, it may reopen such original proceeding and may issue and serve upon such person its complaint, supplementary to the original complaint, stating its charges in that respect. Thereupon the same proceedings shall be had upon such supplementary complaint as provided in section 11 of said Act of October 15, 1914. If upon such hearing the Commission shall be of the opinion that any act, practice, or method charged in said supplementary complaint has been committed, used, or carried on since the effective date of this amendatory Act, or is being committed, used or carried on, in violation of said section 2 as amended by this Act, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and serve upon such person its order modifying or amending its original order to include any additional violations of law so found. Thereafter the provisions of section 11 of said Act of October 15, 1914, as to review and enforcement of orders of the Commission shall in all things apply to such modified or amended order. If upon review as provided in said section 11 the court shall set aside such modified or amended order, the original order shall not be affected thereby, but it shall be and remain in force and effect as fully and to the same extent as if such supplementary proceedings had not been taken.

SEC. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors

of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.

SEC. 4. Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

Approved June 19, 1936.

### APPENDIX 3

SUGGESTIONS BY EARL W. KINTNER FOR  
COMPLIANCE WITH THE BROKERAGE PROVISIONS  
OF THE ROBINSON-PATMAN ACT (SECTION 2(c)  
OF THE AMENDED CLAYTON ACT)

1. As a general rule, a seller may not pay brokerage or other compensation to the buyer in connection with the sale of goods in interstate commerce. <sup>1/</sup>

This is true whether the payment is made directly or indirectly or whether it is made in the form of a payment or in the form of a reduction in price in lieu of the payment. The law is also violated by the buyer in receiving the payment or discount.

2. The seller may not pay directly to the buyer brokerage or other compensation in connection with a sale.

There have been two principal situations in which direct payments have been questioned.

(a) When a broker or other sales representative or intermediary purchases goods for his own account rather than

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<sup>1/</sup> This also applies to the payment of brokerage or other compensation by the buyer to the seller in connection with the sale. This situation is seldom encountered, and, in the interests of brevity and clarity, the discussion is limited to payments or reductions made by the seller.

Questions relating to payments by the buyer may be resolved by substituting "buyer" for "seller" and "seller" for "buyer" in these suggestions.

acting as an agent for the seller in the sale of the goods, he is clearly the buyer and the seller may not pay a commission to him on these purchases. If the broker also in other transactions is making sales for the seller as a broker, the seller may pay commissions on such other sales.

(b) In some cases, payments alleged to have been made for services performed by the buyer have been declared unlawful payments of brokerage because the services, such as warehousing or reselling, were of a kind that the buyer would ordinarily perform for himself. These holdings do not preclude the use of legitimate cooperative merchandising plans.

3. The seller may not pay brokerage or other commissions in connection with the sale of goods to an intermediary who represents or is controlled by the buyer.

The problem here has been whether the intermediary represents or is controlled by the buyer. Several examples where the intermediary has been held to represent or be controlled by the buyer follow.

(a) The broker was a partnership whose partners owned virtually all of the stock of the buyer corporation. Brokerage fees were not paid over to the buyer corporation but were distributed to the partners as individuals. Nevertheless, it was held that the seller's payments of brokerage to the brokerage partnership were illegal.

(b) A broker acted as the agent for several buyers although he received no fees from them in connection with purchases made for them. Nevertheless, he could not lawfully receive a commission from the sellers on these purchases.

(c) A broker under contract with buyers supplied them with market information and purchased for them for a small monthly fee. He placed orders with sellers for goods and obtained brokerage fees from the seller which were credited to the buyers' account. The seller was prohibited from paying the fees.

(d) In a situation similar to the last one, all of the buyers advertised a common trade-mark. The broker obtained fees from the seller for advertising the trade-mark and passed the fees on to the buyers. Here again, the seller could not lawfully make the payments.

(e) All of the stock of a brokerage concern was owned by the buyers. All of the fees obtained by the brokerage concern were required to pay its expenses. The seller was prohibited from paying fees because the brokerage concern represented the buyers.

(f) A broker represented both the buyer and the seller and divided its charges equally between the two so that in effect the buyer and seller each paid half of the brokerage

fee. The payments by each were prohibited because they were payments to a representative of the other party to the transaction.

4. A seller's broker may not pay all or part of the brokerage to the buyer either directly or through a reduction in price by the seller.

This point was settled in a case where the buyer demanded a lower price than the seller was willing to accept.

A seller's broker was charging a 5% commission for handling the seller's product; in order to make a sale of significant quantities of the product to a particular buyer who would not pay the seller's going price, the seller agreed to lower the price if the broker would lower the commission; the broker agreed and a series of sales to the particular buyer were made on this basis.

It was held that the broker violated the law.

5. A seller may not reduce his price on the grounds that he has not paid brokerage or other commission on the sale.

Generally, the fact that the reduction in price was based on a savings in sales commission has been proved by the fact that the price was reduced the amount of the commission, but the rule would apply also where the price was reduced by only part of the commission or reduced more than the amount of the commission if this were the actual