

## THE ANTITRUST LITIGATOR

# Legalities of Promotions and Allowances

By Jeffery M. Cross

Many of my clients manufacture or produce products that they sell to retailers who resell to consumers. Sometimes the products are sold to retailers through distributors. My clients often want to help their retailers promote the resale of their products through various promotions and allowances. My advice to these clients is grounded in Section 2(d) and 2(e) of the Robinson-Patman Act, and the Guides for Advertising Allowances and Other Merchandising Payments and Services, issued by the FTC.

The Robinson-Patman Act is the principal federal statute directed at price discrimination. The principal provision of the Act is Section 2(a). It bars direct or indirect discrimination in pricing.

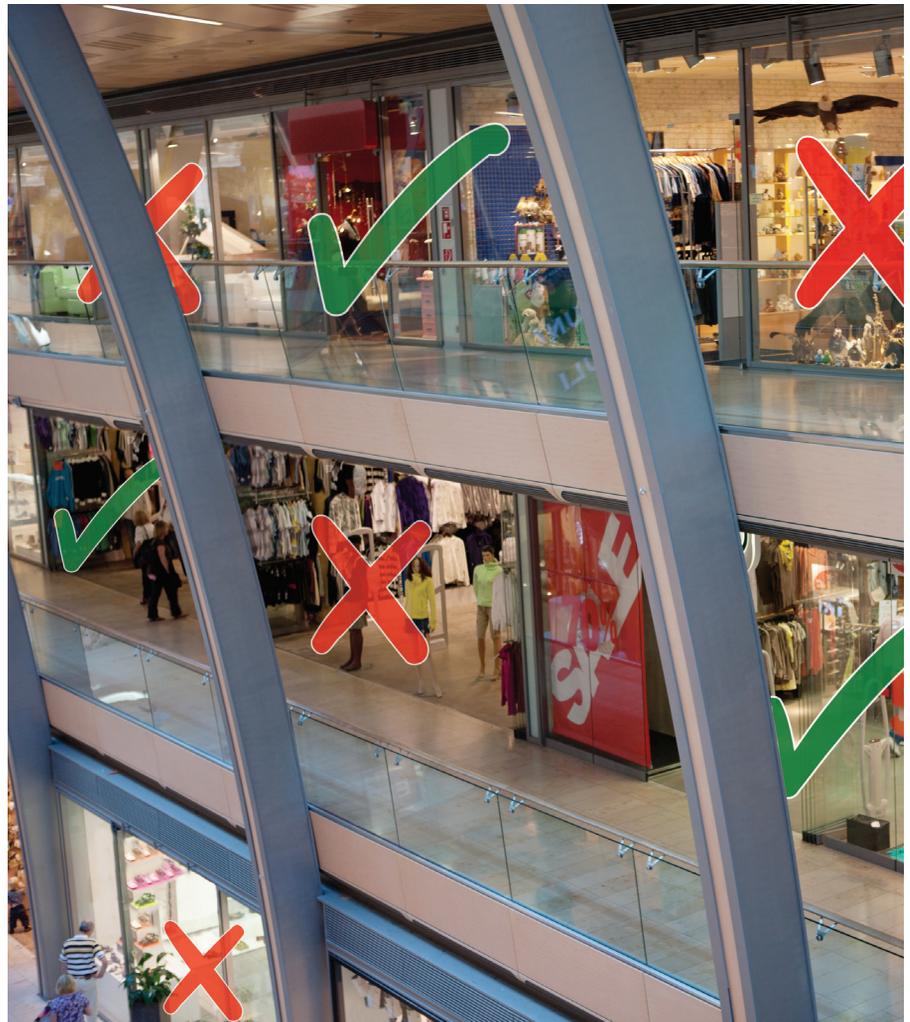
Sections 2(d) and 2(e) of the Robinson-Patman Act generally prohibit a “seller,” in this case a manufacturer of products, from paying allowances or furnishing services to promote the resale of the seller’s products unless the allowances or services are offered to all competing “customers” (such as retailers) on proportionally equal terms.

Section 2(d) covers “payments” made by the manufacturer to the retailers to promote the resale of the products.



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Section 2(e) covers the “furnishing of services or facilities” to a retailer to promote the resale.

An injury to competition is required in order to incur a penalty under Section 2(a). The injury can be proven by actual diversion of sales to the favored retailer or a presumption created by a substantial price difference over a significant time period. No injury to competition is required to be penalized under Sec-

tions 2(d) and 2(e). In this regard, these sections are a form of strict liability. Consequently, it is very important that those counseling manufacturers make sure that payments or services provided by the manufacturer are primarily used to promote resale by the retailer, rather than primarily to promote initial sale to the retailer or the distributor. The latter payments or services are covered by Section 2(a), not Sections 2(d) and 2(e).

A private plaintiff suing for a violation of all three sections would have to show causation and actual damages. If successful, the plaintiff would be awarded three times actual damages and could also recover attorney's fees and costs. The government, which rarely brings suit under Robinson-Patman, could obtain injunctive relief; and the FTC, under its authority pursuant to Section 13(b) of the FTC Act, could impose a fine.

Examples of promotions and allowances made to retailers in connection with resale of the manufacturer's products include cooperative advertising, handbills, in-store demonstrators and demonstrations, catalogs, cabinetry, displays, prizes or merchandise for conducting promotional contests. The overarching principle of Sections 2(d) and 2(e) is that the manufacturer cannot cause a retailer to be at a competitive disadvantage to another retailer in the resale of the manufacturer's products.

This principle means that two retailers that are not in competition do not have to be offered promotions and allowances on proportionally equal terms. For example, promotions and allowances may be offered to retailers in one geographic market but not to retailers in another geographic market. However, the fact that retailers are in different channels of distribution does not mean that the retailers do not com-

pete. New forms of commerce such as the Internet may be in competition with others, such as brick-and-mortar stores. If they are, then the retailers are entitled to proportionally equal promotional allowances and services.

The FTC Guides were issued in 1969 at the invitation of the Supreme Court in a case entitled *F.T.C. v. Fred Meyer, Inc.* Consequently, the Guides are often called the "Fred Meyer Guides." The Guides are not binding regulations, but are advisory interpretations providing assistance to businesses seeking to comply with Sections 2(d) and 2(e) of the Act. Although the Guides are consistent with case law, the FTC has sought to provide guidance in some areas where no definitive guidance is provided by the case law.

Although the Guides do not have the force of law, they are useful, particularly on the requirement that promotions and allowances be offered on "proportionally equal terms." The Guides provide valuable examples in this regard.

The Guides note that there is no single way prescribed by law to offer all competing retailers promotional services and allowances on proportionally equal terms. Any method that does so may be used. This can be done most easily, according to the Guides, by basing the payments made or the services furnished on the dollar volume or the quantity of product purchased during a specified period. However, one of the

examples states that a manufacturer should not provide an allowance or service on the basis of rates graduated according to the amount of goods purchased, as for instance, one percent of the first \$1,000 purchased per month, two percent of the second \$1,000 per month, and three percent over these amounts. Implicit in this example is the idea that such a scheme places smaller retailers at a competitive disadvantage to larger retailers.

The Guides note that manufacturers should take reasonable steps to ensure that promotional services and facilities are useable, in a practical sense, by all competing customers. An example of guidance that I have given clients is that when all retailers cannot accommodate "endcap" displays for the manufacturer's products, the manufacturer may have to make counter racks available as an alternative.

The manufacturer has the obligation to inform all retailers of the promotions and allowances plan. This is true even for those payments, services or facilities made through wholesalers and distributors.

Promotions and allowances can be a valuable tool for manufacturers to help their retailers resell their products to the consumer. However, care must be taken that the proffered promotions and allowances meet all the requirements of the Robinson-Patman Act. ■

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