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FTC Publishes Revised Guides for Advertising Allowances and Other Merchandising Payments

Recently, for the first time in 24 years, the Federal Trade Commission (“FTC”) published revisions to its guidelines on advertising allowances and other promotional payments and services, widely known as the Fred Meyer Guides (“Guides”). Originally published in 1969, the Guides explain Sections 2(d) and 2(e) of the Robinson-Patman Act, which require a seller that pays for or provides promotional allowances to customers to do so on proportionally equal terms for all competing customers. These provisions are intended to prevent indirect, disguised price discrimination.

The Guides, published in the Code of Federal Regulations, “are not binding regulations, but are advisory interpretations.” However, many businesses and practitioners rely on the Guides and use them to gain insight into the FTC’s thinking about promotional allowances.

The revised Guides take effect on November 10, 2014, and include modest changes to incorporate new technological advances such as online advertising. The FTC declined to make more significant changes that were suggested during the public comment period. For example:

- **No competitive injury required.** The FTC declined to change the Guides to state that providing differential promotional allowances is privately actionable only where there is injury to competition. The FTC reiterated that Sections 2(d) and 2(e) do not require injury to competition. The FTC noted, however, that “requiring

proof of injury to competition is sound enforcement policy,” implying that it would not bring an enforcement action without competitive harm.

- **Online stores.** The FTC acknowledged that brick-and-mortar and online stores may be competing customers within the meaning of the Robinson-Patman Act—and that sellers must provide online customers any allowances on proportionally equal terms. The agency, however, declined to give examples of how to provide equal allowances across reseller formats. Relatedly, the Guides now include online advertising on a list of examples of promotional services subject to the Robinson-Patman Act. The FTC stated that where an online retailer is too small to take advantage of TV or print advertising allowances, the retailer should be afforded a practicable equivalent, such as an allowance for online advertising.
- **Shelf space and slotting fees.** The FTC clarified that a seller’s payment to a reseller in exchange for prime shelf space is a promotional allowance related to the product’s resale; and that such payment is therefore actionable if it is not provided on proportionally equal terms to all competing customers. But the Guides also now note that a seller’s provision of an allowance or discount for a reseller to carry a new product (sometimes called a “slotting fee”) is related to the initial

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sale, not resale, and is therefore a form of differential pricing, actionable only if there is competitive injury.

- **Seller's burden to make promotions available.** The FTC reiterated that it is the seller's burden to notify competing customers of the seller's available promotional allowances. The agency declined to change the Guides to state that a seller satisfactorily notifies resellers of its allowance program merely by posting the program details on the seller's website.

Despite the conventional wisdom that it is no longer enforced by either the government or by private litigants, and notwithstanding the many efforts to repeal the law, the Robinson-Patman Act remains an important component of many private antitrust cases. It is a mistake for businesses with distributional issues that implicate Robinson-Patman to ignore the law. The antitrust lawyers at Wiggin and Dana have significant experience in advising clients how best to deal with this exceptionally complicated and confusing piece of federal legislation.

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