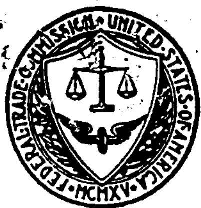

Federal Trade Commission

THE ROBINSON-PATMAN ACT:

A PERSPECTIVE FROM THE FTC

Remarks by

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before the

American Bar Association
Section of Antitrust Law
and
Corporate Counsel Center
Northwestern University School of Law

Program on

"LIVING WITH THE ROBINSON-PATMAN ACT"

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Good afternoon. I have been asked to speak about my perspective from the Federal Trade Commission on the Robinson-Patman Act and also about the Fred Meyer Guides. I will begin by offering the customary disclaimer: my remarks will reflect my own views and not necessarily those of the Commission or any other commissioner.

I have tried to think of a poetic approach to my topic, but the best I have been able to do is to observe that the Robinson-Patman Act is like an onion. The onion is simple, just as the basic concept of the Robinson-Patman Act -- variously described as providing a level playing field or ensuring fairness and equal competitive footing -- is simple. Under the surface, however, we find layer after layer of qualifications, questions and complexities. And delving into the Act, like peeling an onion, often brings tears to my eyes. Like other poets, I will leave the interpretation of my artistic endeavors to you. I suppose the onion simile could be extended with comparisons involving aroma, omnipresence and matters of taste. But enough of poetry. Let me turn for a moment to history.

Historically, the Federal Trade Commission has been the principal enforcer of the Act. Between 1937 and 1971, the Commission issued 1,395 Robinson-Patman complaints.[1] You may be

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[1] R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 30 (1976).

surprised to learn that 505 of those complaints, more than one-third of the total, were issued between 1960 and 1963. The greatest number of complaints issued in a single year was 215; the year was 1963.[2] By the mid-1960's, the number of Robinson-Patman complaints issued by the Commission each year had fallen into the single digits, and the Commission issued only one Robinson-Patman complaint in each of the years 1972 and 1973. The number of new investigations also declined dramatically, from 159 in 1967 to none in 1978.

Although the Commission has issued far fewer Robinson-Patman complaints in the 1980's and 1990's than in the early days, we still initiate investigations, a few of which I will mention later, and, in my opinion, remain committed to enforcing the Act. This commitment has been evidenced by consent orders and administrative complaints, and I also will discuss a few of these.

I do not plan today to explore the possible reasons for the change in enforcement emphasis. Clearly, both the Act and the Commission's enforcement of it were widely criticized.[3] For example, the Antitrust Division in its 1976 report described the

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[2] Id. at 32-33 (Table 1 (1937-1974)); ABA Section of Antitrust Law, I The Robinson-Patman Act: Policy and Law 41 n.158 (1980) (statistics for 1965-1978).

[3] See, e.g., U.S. Department of Justice, Report on the Robinson-Patman Act (1976); Liebeler, "Let's Repeal It," 45 Antitrust L.J. 18 (1976).

Act's objectives as "narrow" and "protectionist" and said that "the greater the . . . compliance" with the Act, "the greater the Act's deleterious impact upon competition."[4] The Supreme Court in the A&P case reiterated its warning "against interpretations of the . . . Act which 'extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.'"[5] Litigation losses no doubt helped shape the Commission's enforcement of the Act. The A&P complaint, issued in 1971, was resolved by the Supreme Court in A&P's favor in 1979.[6] The Commission in 1984 dismissed the complaints in General Foods,[7] the coffee case, and IT&T, the bread case.[8]

The Commission's enforcement of the Act has focused in recent years on competitive injury. We are concerned with whether the challenged practice is likely to cause injury or whether it is instead conduct that is likely to promote competition. This focus is not a new invention. Section 2(a) of

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[4] U.S. Department of Justice, Report on the Robinson-Patman Act 250 (1976).

[5] Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80 (1979), quoting Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63 (1953).

[6] Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69 (1979), rev'g 555 F.2d 971 (2d Cir. 1977), aff'g 87 F.T.C. 962 (1976).

[7] General Foods Corp., 103 F.T.C. 204 (1984).

[8] International Tel. & Tel. Corp., 104 F.T.C. 280 (1984).

the Act includes a competitive injury standard, and the courts and the Commission long have counseled that the Act should be interpreted in ways consistent with broader antitrust policies.[9] Let us call it then a renewed concern about the competitive implications of enforcement. We have seen more explicit and more extensive analysis of competitive effects under other statutes enforced by the Commission, such as Section 7 of the Clayton Act, and it seems only sensible to apply the same type of analysis in other areas as well.

We also are concerned about the competitive effects of remedies. This, too, is sensible. It would be counterproductive to challenge particular conduct only to enter a remedy that would itself hinder competition. In Robinson-Patman enforcement, as with other laws enforced by the Commission, we consider possible remedies at the early stages of an investigation.

We all may agree on these general principles, but the application of them to particular facts is more difficult. This also is true in other areas of the law, but the Robinson-Patman Act, perhaps because of its potential for inhibiting competition, seems to engender more than its share of differences of opinion.

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[9] E.g., Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 74 (1953).

Take Boise Cascade Corporation,[10] for example. I think we can assume that from the outset the Commission viewed the case as economically sensible and competitively sound. Each step along its torturous way, however, Boise generated uncommon levels of disagreement. In 1980, the Commission issued a complaint, but over the vigorous dissent of two commissioners. The commissioners who supported the complaint did not agree on the appropriate legal standard for functional discounts and directed the administrative law judge to make alternative findings under two different standards. To the extent that Boise was thought to be a vehicle for resolving the question of the appropriate standard, it was a failure, because the discounts obtained by Boise were viewed as unlawful under either standard.[11]

Boise was a dual distributor, selling both at wholesale and retail. The complaint challenged wholesale discounts granted to Boise on goods resold at retail to end users in competition with dealers that also bought directly from manufacturers but at higher prices. The prices that Boise paid were 5% to 33% lower than those paid by the direct-buying dealers. The complaint did not challenge wholesale discounts Boise obtained on goods that it resold at wholesale. The case finally was settled in 1991 with a

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[10] 107 F.T.C. 76 (1986), rev'd & remanded, 837 F.2d 1127 (D.C. Cir. 1988), opinion on remand reprinted in 5 Trade Reg. Rep. (CCH) ¶ 22,902 (Nov. 1, 1990), modified final order reported in 5 Trade Reg. Rep. (CCH) ¶ 23,013 (June 20, 1991).

[11] 107 F.T.C. at 209-15; see also Texaco, Inc. v. Hasbrouck, 496 U.S. 543 (1990).

negotiated order, following an appeal to the Court of Appeals for the District of Columbia Circuit and two opinions by the Commission.

The Commission in its first opinion -- the only unanimous opinion in the case -- found that Boise knowingly received discriminatory prices in violation of the Act. The Commission relied on the Morton Salt inference to find injury from evidence of substantial, persistent price differences. The Court of Appeals disagreed. Although the court said that the Morton Salt inference is "alive and well in the law," it also said that Boise "is simply not of the lineage of Morton Salt." The court concluded that the Commission should consider Boise's argument that the direct-buying dealers had not been injured but remained competitively viable and healthy.

Each of the three judges on the panel of the court of appeals wrote an opinion. The three opinions include views that could hardly be more disparate if someone had tried to write them with that end in mind. On remand, not to be outdone, each of the three participating commissioners, including me, wrote an opinion. Without intending disrespect for any of the six opinions, each of which is arguably defensible, the combination of opinions, were the matter not so serious, might be amusing if not downright laughable.

On remand, the Commission agreed on the question of liability but little else. The first of the three opinions from the Commission relied for the most part on presumptions to conclude that the kind of evidence to which the court of appeals had directed our attention was "not probative" of the lack of injury. That opinion did not address whether the evidence showed what Boise said it showed. I took a different approach in a concurring opinion and, after examining the record, concluded that the evidence did not show the absence of injury, as Boise claimed. To compound the confusion, the third commissioner agreed with both the first opinion and with my concurring opinion.

On some issues, in my view, the Commission was simply unable to respond to the court's concerns. For example, the court of appeals expressed concern that Boise was not a "power buyer exerting its muscle to win additional pricing concessions . . . piggishly demanding more than its equal share at the wholesale discount trough."[12] There simply was not evidence to respond to this concern. Boise was one of the largest purchasers and resellers in the industry, one of the so-called "Big 5," but complaint counsel had not attempted to prove that Boise had power in any market, believing that such a showing was legally unnecessary. The court of appeals also was concerned that the manufacturers that had granted discounts to Boise, by implication

[12] 837 F.2d at 1147.

if Boise had obtained unlawful discounts, had "run afoul of Robinson-Patman, even though they have followed neutral, objective criteria." The record was replete with evidence of substantial discounts in Boise's favor, no matter what the manufacturers' "neutral, objective criteria" said. What could we say to the court? The majority said, and I agreed, that the discounts "appear to have been more 'neutral' on paper than . . . in practice." Needless to say, Boise appealed again.

This was the state of affairs (perhaps I should say the state of confusion) when Boise proposed a settlement, which the Commission ultimately accepted. I dissented, finding the relief inadequate and potentially both anticompetitive and inconsistent with the Act itself. Perhaps an even greater disappointment, considering the time and resources that had been poured into the case, was the lost opportunity to get another opinion (or two or three) from the court of appeals. Almost nothing the court could have said or done at that point could have created a greater state of uncertainty about the issues. Although confusion still reigns in the District of Columbia circuit, opinions in other circuits perhaps have helped clarify the standard for determining competitive injury.

The Commission's most recent foray into the Robinson-Patman ring is the book publisher cases, complaints issued in 1988 against six book publishers, alleging that they discriminated in

price in favor of large chain stores at the expense of independent booksellers.[13] The cases were removed from adjudication last November for the purpose of considering proposed consent agreements. Nevertheless, given the possibility that the cases may return to adjudication, I will limit my remarks to a description of the allegations in the complaints.

According to the complaints, the book publishers have given chain stores, including Waldenbooks, B. Dalton and Crown Books, favorable discounts and promotional allowances and services that have been denied to the independent booksellers. The complaints allege that the publishers treat a book order from a chain bookseller as a single order for purposes of volume discounts, even if the order is broken down into a number of small shipments for individual chain outlets, but charge higher per book prices to independent booksellers for shipments that are as large or larger than those sent to individual chain outlets. The complaints also allege that the publishers have granted unpublished discounts to the chain stores and have provided promotional allowances and services that are not available on a proportionally equal basis. The publishers have denied the allegations and claim, among other things, that the discounts are cost-justified.

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[13] Harper & Row, Docket 9217; MacMillan, Inc., Docket 9218; Hearst Morrow, Docket 9219; Putnam Berkley, Docket 9220; Simon & Schuster, Docket 9221; Random House, Docket 9222.

One of the most interesting developments in the Robinson-Patman area in my opinion is the proposed consent order in YKK (USA) Inc.[14] that was published for comment in April. This is a case involving the zipper industry. The complaint in YKK does not contain a Robinson-Patman count but the case involves Robinson-Patman issues. The theory of violation is that a lawyer for YKK, on behalf of his client, invited a lawyer for Talon, YKK's principal competitor, to fix prices. This is one of several recent invitation-to-collude cases brought under Section 5 of the Federal Trade Commission Act that the Commission has settled by consent agreement.

I dissented in the YKK case. In my view, what the majority of the Commission viewed as an invitation to fix prices was in fact a discussion about available options under Section 2(b) of the Robinson-Patman Act. Section 2(b) permits a seller to rebut a prima facie case of price discrimination by showing that the lower price to a customer was made in good faith to meet the equally low price of a competitor. Consistent with the intense and varied reactions that the Robinson-Patman Act seems to evoke, this simple consent agreement issued not only with a dissent but also with what must surely be an unprecedented set of three concurring statements. Whether you agree with the majority or with me on the merits, you may find the implications of YKK, in terms of the Robinson-Patman Act, interesting.

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[14] File 911-0005, published for comment April 14, 1993.

These are the facts. The lawyer for YKK, who practices with a private firm but also is a member of YKK's board of directors, initiated a dialogue with the lawyer for Talon when he objected to Talon's practice of providing free zipper installation equipment to some customers. This was discriminatory pricing, in his view, and he requested that Talon stop the practice. Talon's lawyer responded that Talon had stopped giving away free equipment but would resume the practice if necessary to meet competition. YKK's lawyer replied that if Talon were to resume the practice, YKK could meet Talon's competition. YKK's lawyer also said that YKK would view it as "a plus" if Talon did not resume giving away free equipment. The two lawyers concluded their conversation by saying that neither client contemplated suing the other any time soon.

The majority of the Commission found in this conversation an offer to fix prices by eliminating discounts. According to the majority, when YKK's lawyer threatened to meet Talon's competition, he was offering Talon's lawyer a quid pro quo: If Talon would agree to discontinue its free equipment offer, YKK also would agree to discontinue discounting, ergo, YKK's lawyer solicited an agreement to stop discounting.

I viewed the same behavior differently. It seemed to me that the threat to meet Talon's competition was a statement of one of YKK's lawful alternatives: YKK could sue Talon under

Section 2(a) of the Robinson-Patman Act, or YKK could meet Talon's prices, hoping to defend itself against charges of unlawful price discrimination by proving the meeting competition defense under Section 2(b). The flip side of the Section 2(b) defense is that it is not available except to meet a competitor's lower price. As a result, the request that Talon cease its discounting implicitly included a "threat" that YKK could meet Talon's competition as well as an "offer" that YKK would not meet Talon's competition if Talon acceded to the request.

The proposed consent order in YKK explicitly permits YKK to request that a competitor cease unlawful conduct, and it is clear that threats to litigate also are protected. But under YKK, it appears that even though meeting competition is lawful and threatening to litigate is lawful, threatening to meet competition is not lawful.

The majority of the Commission seemed to view as inculpatory the statement by YKK's lawyer that YKK would consider it "a plus" if Talon did not resume the challenged pricing. But, under the circumstances, the statement is not surprising, nor is it very troubling. It is risky and can be expensive to rely on the meeting competition defense. It is even more risky and more expensive when your client already is under a Commission order barring price discrimination. Since 1981, YKK has been under just such an order.

The Commission's complaint and order implicitly assume that YKK's lawyer was trying to persuade Talon to stop engaging in competitively beneficial conduct by offering to agree to forgo the same beneficial conduct. The approach has some superficial appeal, but it is fundamentally invalid in this situation. YKK's lawyer was not asking Talon to stop doing something right but rather to stop violating Section 2(a).

Also implicit in the Commission's complaint is the notion that the better way to level the playing field between Talon and YKK is for YKK to emulate Talon's conduct and offer its own selective discounts under the cover of Section 2(b). This assumption ignores real world costs and risks of significant dimension. If a firm wants to undertake the risk and cost of establishing a Section 2(b) defense, that is one thing. But it is quite another matter for the Commission to require that course of action.

One final irony pervades this case: YKK is the only zipper firm under a Robinson-Patman order. Because the order is based on Section 2(a), YKK's lawyer must be particularly sensitive to the need for his client, to avoid a civil penalty action, to limit differential price offers to meeting competition situations. Indeed, YKK's attorney sought and obtained advice from the FTC that YKK lawfully could avail itself of the meeting competition defense. Then, when YKK's lawyer repeated the advice

that he had received from the staff of the Commission about compliance with an order of the Commission, the Commission alleged an unlawful invitation to fix prices. YKK surely has been caught between the proverbial devil and the deep blue sea.

YKK may have significant implications for the private bar, if, assuming I understand it correctly, the meeting competition defense of the Act falls in the area of prohibited communication between competing firms or their lawyers. The proposed consent order in YKK will be on the record for comment until June 14.

As I mentioned earlier, the Commission continues to investigate possible violations of the Robinson-Patman Act. The investigations may or may not lead to formal complaints, and I do not intend in describing them to express an opinion on their merits.

In one investigation, the Commission's staff are looking into whether a large retailer, after announcing that it no longer would purchase goods through brokers, is receiving from its suppliers a discount in lieu of the fee that the suppliers previously had paid to brokers. The staff are focusing on the threshold question whether there have in fact been any discounts in the wake of the retailer's elimination of brokers. The conduct, if it exists, could be analyzed as unlawful brokerage under Section 2(c) of the Act, which was intended to prevent

sellers from giving secret rebates to buyers or, more likely, to protect sellers from buyer pressure to grant secret discounts. The practice might also be analyzed as unlawful price discrimination under Section 2(a). Unlawful price discrimination may be more difficult to prove, because proof of injury to competition would be required. In addition, the meeting competition and cost justification defenses can be asserted against a price discrimination case but have been held inapplicable to Section 2(c).

The issues here, as in most Robinson-Patman cases, are complex. If a buyer and seller are dealing directly, some costs of distribution may have been reduced. If the buyer is providing services that once were performed by the seller or by third parties, why shouldn't the buyer be compensated in the form of lower prices? The discounts would seem to be justified by cost savings, perhaps in the nature of functional discounts, according, as the Supreme Court said in Texaco v. Hasbrouck, "'due recognition and reimbursement for actual marketing functions.'"[15] The Commission in the past declined to interpret Section 2(c) in this way: buyer services were not credited under the Act.[16] The Supreme Court intimated in the Henry Broch case

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[15] 496 U.S. at 560, quoting Report of the Attorney General's National Committee To Study the Antitrust Laws 208 (1955).

[16] See R. Posner, The Robinson-Patman Act: Federal Regulation of Price Differences 45 (1976) ("So interpreted, [Section 2(c)] became a charter protecting food brokers from the competition of alternative forms of distribution.").

that a different result might be appropriate if the buyer rendered services for the seller,[17] and the Commission in the Gibson case[18] recognized the possibility.

A second investigation also involves possibly unlawful brokerage payments under Section 2(c). Large retailers allegedly have agreed with nominally independent brokers who receive commissions from manufacturers and pass them back to the retailers. The retailers, in effect, obtain a discount on their purchases. The analysis involves some of the questions that are raised in connection with the first investigation. If the brokers are providing services for the sellers, could the payments by the sellers to the brokers be permitted under Section 2(c) for services rendered? Even if payments by the sellers to the brokers are legitimate, can the brokers legitimately pass the payments through to the buyers? The pass through to the retailers may be the kind of practice that Section 2(c) was intended to prevent. On the other hand, if the buyers are paying the brokers for their services, then perhaps we have returned to

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[17] FTC v. Henry Broch & Co., 363 U.S. 800 (1960) ("We would have quite a different case if there were such evidence [of buyer services for the seller] and we need not explore the applicability of § 2(c) to such circumstances.").

[18] Herbert R. Gibson, 95 F.T.C. 553, 742 (1980) ("It is unclear whether this exception [for services rendered] applies as between buyer and seller, although Broch . . . suggests that it may.").

the kind of question about services rendered that the courts and the Commission have not fully answered.

A third investigation raises issues of price discrimination and secondary line injury. A large manufacturer of health care products allegedly has been selling to a mass retailer at prices that are significantly lower than what it charges smaller independent retailers. In responding to inquiries from the Commission's staff, the manufacturer has not denied the price differences but has claimed that the differences are necessary to meet competition from low-cost alternatives. One of the issues in the investigation is whether the seller in good faith was meeting an offer when it was competitively necessary to meet it or simply reducing prices in response to a general perception of low-cost competition.

I have a few minutes remaining in which to discuss the Fred Meyer Guides, and I will start once again with a bit of history. The Commission first issued guidelines for compliance with Sections 2(d) and 2(e) of the Act in 1960, when Earl Kintner was chairman. The 1960 guides, written in what historically appears to have been the period of greatest Commission enforcement of the Act, consume a mere seven pages of conventional print. The 1969 guides, issued the year after the Supreme Court's Fred Meyer[19] decision, responded to the Court's invitation to develop

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[19] Fred Meyer, Inc. v. FTC, 390 U.S. 341 (1968).

guidelines. In what I am coming to suspect is a Robinson-Patman tradition, the 1969 guides were accompanied by one dissenting statement, one statement clarifying certain points and one concurring opinion not "wholly free from reservations."

The Guides are advisory interpretations, intended to assist businesses in complying with Sections 2(d) and 2(e) of the Act. These sections of the Act apply to the assistance that a seller offers its customers to help them resell the product to consumers and require that promotional allowances and services be made available to competing purchasers on proportionally equal terms. The provisions complement Section 2(a) of the Act by prohibiting indirect price discrimination in the form of promotional allowances.

The revised Guides were published almost three years ago, and I do not propose to review them section by section. Instead, I will mention a few aspects of the guides that may be of particular interest. One aspect is the treatment under the Act of slotting allowances, which have attracted a great deal of attention in recent years.

Retail shelf space is a valuable commodity. Without shelf space, a manufacturer cannot sell his product to consumers. Slotting allowances are the fees that retailers charge suppliers for access to shelf space. Slotting allowances that suppliers

pay to obtain access to a store in connection with the initial sale by the supplier to the retailer generally are analyzed as plain vanilla discounts from the purchase price under Section 2(a) of the Act. The Commission, in its statement explaining the revisions in the Guides, said that "[p]ayments for shelf space concern the original sale from seller to customer, and do not differ in substance from a price cut, the paradigm application of section 2(a)." A footnote in the 1990 Guides explains that the discriminatory purchase of display or shelf space also may be considered a violation of Section 5 of the Federal Trade Commission Act.

Slotting allowances that suppliers pay for preferential display space within the store, such as a special stand for display or an eye-level shelf on a popular aisle, generally are analyzed as promotional allowances, <u>i.e.</u>, payments that a supplier makes to its customers to assist in reselling the product to consumers. This treatment of slotting allowances results from the term "services or facilities" in Sections 2(d) and (e). The Guides explain that the term applies to services used to promote the resale of the seller's product to the consumer, while services in connection with the original sale to the retailer are analyzed under Section 2(a).

The most important requirement in Sections 2(d) and 2(e) of the Act is proportionality: promotional allowances and payments

to [proportionalize] is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used." Despite this apparent flexibility, the examples of proportionality stated in the Guides have shown remarkable consistency over the years. Three of the four examples in the 1960 guides and five of the six examples in the 1969 guides are among the seven examples appearing in the 1990 Guides.

Given the high degree of continuity in the Guides over the preceding thirty years, it is not surprising that one of the more difficult and controversial issues in connection with the Guides was a proposal to revise the standard for achieving proportionality: The proposal to add "seller's value" as an means of achieving proportional equality generated more comments than any other section.

Under the seller's value standard, proportionality could be based on the effectiveness of the promotional services purchased. The theory was that a seller could make payments according to the effectiveness of a promotion, with effectiveness measured in terms of the additional sales generated by the promotion. Since additional sales attributable to the promotional efforts of individual retailers could be difficult to measure, other evidence could be used, such as circulation figures for magazines or audience size for radio or television.

evidence could be used, such as circulation figures for magazines or audience size for radio or television.

For example, circulation figures might show that a 3-inch ad in Magazine A would reach 5000 readers while the same ad in Magazine B would reach half as many readers. Under an assumption that an ad that reaches twice as many readers is twice as effective, a seller could pay twice as much for the ad in Magazine A as for the ad in Magazine B.

There is some precedent in the law for a seller's value standard. The Commission in a 1953 case permitted different allowances for different media -- one amount for newspaper ads, a lesser amount for handbills and still less for in-store displays -- because newspaper advertising "is more expensive and more effective" and "of more value to" the seller.[20] According to the Commission, the law does not "require a seller to pay at the same rate, per unit of product sold, for types of services that are of unequal cost or value." Such a rule would restrict cooperative advertising "to some type of service that every single customer could furnish" and "would adopt uniformity as its goal rather than proportionality." Instead, the Commission said, "there

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[20] Lever Brothers, 50 F.T.C. 494, 511-12 (1953).

should be a fair and reasonable relation between the amount of the payment and the type of service rendered."[21]

A clear majority of those who commented on the proposed guides objected to the seller's value standard. Many of the commenters were concerned that the seller's value standard was subjective, difficult to enforce and unworkable. They said that the standard would permit sellers to grant more favorable treatment for large buyers without risking liability under the Act. The Commission agreed that the value standard might permit "elastic, expansive measurements of value [that] could help disguise persistent, systematic discrimination, making it more difficult to detect discrimination," and the Commission omitted the value standard from the Guides.

Another proposal for revising the Guides would have engrafted market power principles into Section 2(d) and (e). The theory was that market power is a necessary condition for price discrimination. If markets are competitive, significant price discrimination cannot persist. Therefore, evidence that the market is competitive should be considered as evidence of proportional equality. This approach would have been a

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[21] Id.; see also FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55, 61 n.4 (1959) (citing Lever principle); F. Rowe, Price Discrimination Under the Robinson-Patman Act 404, 409 (1962) (seller need not ignore relative media effectiveness if fair and reasonable equivalent is provided for those that cannot participate).

significant departure from precedent, and the Commission did not pursue it.

Pressures on the Commission to change the Act in fundamental ways have persisted through the years. Commissioner MacIntyre, concurring in the 1969 Guides, apparently alluded to this kind of pressure when he observed with approval that "the Commission has not undertaken to rewrite the law, as some apparently would have the Commission do." As the Supreme Court often has reminded us, "[t]he determination whether to alter the scope of the Act must be made by Congress," not the courts or the Commission.[22]

As I said earlier, the Commission is committed to enforcing the Act and is alert for economically sensible and competitively sound cases. Robinson-Patman cases have been among the most difficult and challenging during my tenure at the Commission. I believe that the Commission is equal to the continuing challenge.

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[22] E.g., Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983).