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MARKETING AND DISTRIBUTION: ANTITRUST CONSTRAINTS ON PRICING

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I. INTRODUCTION

Every business entity sets a price on its goods or services. This article identifies and explains the antitrust risks under U.S. law that arise from price-setting, whether unilaterally or as part of a vertical agreement between parties at different levels of the distribution chain.

The antitrust rules applicable to unilateral pricing conduct and price agreements between non-competing entities are complicated and nuanced. The level of antitrust risk depends on many factors and may require extensive data-gathering and expertise in economics to analyze fully. Courts diverge in their approach to certain conduct and in some instances there is little useful case law or other guidance for assessing a firm's legal exposure to antitrust liability.

The discussion below begins with an overview of the relevant statutes with a primary focus on federal law. Next is an examination of vertical price and price-related agreements that may trigger antitrust concerns, including minimum resale price maintenance (RPM) and restraints on price advertising. After reviewing the unique legal restraints imposed on price discrimination under the Robinson-Patman Act, the article looks at the antitrust treatment of predatory pricing, predatory purchasing, bundled pricing, and loyalty discounts and rebates.

II. THE STATUTORY FRAMEWORK

From an antitrust standpoint there are several, sometimes overlapping, statutory constraints on pricing conduct, including:

1. Section 1 of the Sherman Act prohibits agreements that unreasonably restrain trade in interstate or foreign commerce. *See* 15 U.S.C. § 1. In Section 1 cases, vertical agreements are analyzed under the fact-intensive rule of reason, which analyzes the effects of the agreement on prices, output, and consumer choice in a properly-defined relevant market, the procompetitive justifications for the agreement, the extent to which those procompetitive benefits might be achieved through less restrictive alternatives, and whether the procompetitive benefits are outweighed by its anticompetitive effects.

2. Section 2 of the Sherman Act makes it unlawful to monopolize, attempt to monopolize, or conspire to monopolize any part of trade in interstate or foreign commerce through anticompetitive conduct. *See* 15 U.S.C. § 2. A monopolization claim may arise when a firm has market power, i.e., the ability to control prices, output, and consumer choice in a relevant product and geographic market, and the firm has willfully acquired or maintained that power through anticompetitive or "exclusionary" conduct, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

3. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, prohibits predatory pricing, price discrimination and the discriminatory provision of promotional funds and services to competing buyers. *See* 15 U.S.C. § 13.

4. Section 3 of the Clayton Act prohibits anticompetitive exclusive dealing and tying agreements for

sales of commodity goods. *See* 15 U.S.C. § 14. Exclusive dealing is usually assessed in light of the extent to which competitors are foreclosed from entering or competing in the relevant market and the resulting harm to competition, if any, in the form of higher prices, lower output, quality, or consumer choice. Tying involves different legal elements, but as a general rule there is little antitrust risk where the seller engaged in tying lacks market power in the market for the tying product.

5. Section 5 of the FTC Act authorizes the Federal Trade Commission to bring actions to prevent “unfair methods of competition” in interstate or foreign commerce. *See* 15 U.S.C. § 45. The FTC Act allows the Commission to investigate and bring an action to enjoin practices that may not rise to the level of a full-blown antitrust violation but that pose a sufficiently substantial threat to competition.

6. There are state analogs to the Sherman Act, the Clayton Act, the FTC Act, and the Robinson-Patman Act, many of which are, by statutory or judicial mandate, construed in a manner consistent with the federal courts’ and the FTC’s interpretation of the federal antitrust laws.

7. Many states have industry-specific statutes, including, for example, state dealership and franchise laws, which prohibit conduct such as discriminating among dealers in pricing or providing promotional incentives and support.

8. Although a detailed survey of non-U.S. law is beyond the scope of this article, the competition laws of most foreign jurisdictions may be significantly more restrictive with respect to pricing conduct than U.S. antitrust law. Global companies may never assume, therefore, that agreements and practices that comply with U.S. law necessarily comply with the law of other jurisdictions.

In assessing the antitrust risk of particular pricing conduct, practitioners should use the above as an initial checklist of potential legal constraints for further research and analysis. If there are any perceived antitrust issues arising from a potential transaction or ongoing business dealings, it is always advisable to consult with experienced antitrust counsel.

III. RESALE PRICE MAINTENANCE (RPM)

A. Under U.S. Federal Law, the Rule of Reason Standard Determines Whether RPM Agreements Are Unlawful Restraints on Trade

Under a vertical resale price maintenance (RPM) agreement, the supplier of a product and its downstream dealer or distributor agree on the price at which the dealer or distributor may resell the product to its customers.

Maximum RPM agreements ensure that resale prices remain at or below a certain level. Maximum RPM agreements are evaluated under the rule of reason, as they may be more likely to benefit, rather than harm, consumers. *State Oil Co. v. Khan*, 522 U.S. 3 (1997). As a practical matter, maximum resale price constraints are unlikely to be the subject of federal law-based legal challenges or regulatory action.

A minimum RPM agreement prohibits a reseller from pricing a product below a certain price. Some minimum RPM agreements mandate selling at a fixed price, while others may require the reseller to ensure that any discounting does not exceed a certain percentage off the supplier's resale price list. The treatment of minimum RPM under U.S. antitrust law has drawn considerable attention since the Supreme Court's majority decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007) ("*Leegin*") held that minimum RPM agreements would no longer be treated illegal per se but should be assessed under the rule of reason.

Thus, in addition to focusing on whether conduct reflects a price-fixing agreement (or, e.g., merely a unilateral pricing suggestion), practitioners must now engage in a fact-intensive consideration of relevant market definition and market power, and a balancing of the agreement's procompetitive and anticompetitive effects.

In the years since *Leegin* was decided, both houses of Congress have repeatedly introduced legislation to repeal the decision by declaring vertical minimum price-fixing per se unlawful, with no success to date and none anticipated in the near future.

The Supreme Court majority in *Leegin* identified three situations where minimum RPM could be procompetitive:

- **Protects dealers against free riding by deep discounters.** Minimum RPM may be deployed by a supplier to eliminate intrabrand price competition and thereby encourage retailers to invest in consumer services or promotional efforts that help the supplier compete against its rivals. Without RPM, retailers might be reluctant to make such investments because of the risk that they will lose sales to discounting "free riders" that offer few or no such services.

- **Enables dealers to offer new products.** RPM may promote interbrand competition to the extent it facilitates market entry for new brands by ensuring that retailers will earn high margins to invest in promoting an unknown product.

- **Encourages dealer investment in competition-enhancing activities.** Even where free riding is of less concern, RPM may induce retailers to perform services or promotions that they otherwise would not perform.

The majority identified three situations in which minimum RPM may harm competition; these are likely to be the focus of a rule of reason analysis:

- **Enables collusion among competing suppliers in a concentrated market.** The Court said that "the number of manufacturers that make use of the practice in a given industry can provide important instruction." If a market is controlled by only a few manufacturers and they all implement RPM, there is a greater potential for an adverse impact on overall competition, as well as a greater prospect of collusion among them.

- **Facilitates collusion among competing retailers.** "The source of the restraint may be an important consideration," particularly if the restraint was adopted as a result of pressure from retailer collectives. If retailers (or even a single large retailer) are pressuring their supplier to impose minimum resale prices and the supplier has little or no procompetitive rationale or desire to independently adopt that strategy, there is an enhanced prospect that the agreements will be viewed as serving only to avoid price competition.

- **Enables a dominant supplier or retailer to enhance market power sufficient to foreclose competition.** Finally, "that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power." Looking at the supplier's market power requires an analysis of the relevant market, including barriers to entry.

In dual distribution situations—in which the supplier may be in competition with its own dealers for retail sales of the supplier's product—RPM would ordinarily viewed as a vertical price restraint, not as a horizontal price-fixing conspiracy, as long as the supplier, and not a combination of competing resellers, was the source of the restraint. *See Spahr v. Leegin Creative Leather Prods., Inc.*, 2008 WL 3914461, **6-7 (E.D. Tenn. 2008) (rejecting claim that accessories manufacturer's dual distribution system transformed its resale price agreements into per se unlawful horizontal price-fixing agreements) (citing *International Logistics Group, Ltd. v. Chrysler Corp.*, 884 F.2d 904, 906 (6th Cir. 1989), *cert. denied*, 494 U.S. 1066, (1990)).

*B. Post-*Leegin *Cases Illustrate the Rule of Reason Approach to Minimum RPM*

Cases decided since *Leegin* reflect the difficulty of establishing that an alleged RPM agreement constitutes an antitrust violation under the rule of reason in the absence of sufficient threshold allegations of harm to competition in a properly-defined relevant market.

- *Bel Canto Design, Ltd. v. MSS HiFi, Inc.*, 2012 U.S. Dist. LEXIS 86628 (S.D.N.Y. June 20, 2012) (granting motion to dismiss counterclaim that failed to establish counterclaim-defendant's market power in a relevant product market or any harm to interbrand competition).

- *Jacobs v. Tempur-Pedic Int'l, Inc.,* No. 4:07-CV-02, 2007 WL 4373980 (N.D. Ga. Dec. 11, 2007) (rejecting claim that relevant market could be limited to "visco-elastic foam mattresses"; absent a cognizable market definition, plaintiffs could not challenge alleged minimum RPM agreement), *aff'd*, 626 F.3d 1327 (11th Cir. 2010).

- *PSKS, Inc. v. Leegin Creative Leather Products, Inc.*, No. 2:03 CV 107. 2009 WL 938561 (E.D. Tex. Apr. 06, 2009) (on remand, dismissing the complaint for failure to state a claim on the grounds that plaintiff's market definition of "wholesale sale of brand-name women's accessories to independent retailers" was deficient and rejecting theory that "artificially" high prices established the requisite anticompetitive effects), *aff'd,* 615 F.3d 412 (5th Cir. 2010), *cert. denied*, U.S., No. 10-635 (Feb. 22, 2011).

- *Spahr v. Leegin Creative Leather Products, Inc.*, No. 2:07-CV-187, 2008 WL 3914461 (E.D. Tenn. 2008) (dismissing retailer's complaint for failure to adequately define the relevant market and anticompetitive effects and ruling that under Tennessee antitrust statute, alleged RPM agreement would be assessed under rule of reason), *appeal dismissed*, No. 08-6165 (6th Cir. Nov. 20, 2008).

Plaintiffs have been more successful in a handful of other post-*Leegin* cases where there was evidence of actual or potential anticompetitive effects:

- *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc*., 530 F.3d 204, 225 (3d Cir. 2008) (vacating order granting judgment as a matter of law where at trial, "Toledo presented direct evidence that Mack agreed with its dealers to support their anticompetitive [price-fixing] agreements and that it did so by, among other things, refusing to offer sales assistance to dealers who sought to sell outside their [areas of responsibility]", and where there was also evidence that the agreement had anticompetitive effects in the relevant product and geographic markets).

- *Babyage.com, Inc. v. Toys "R" Us, Inc.*, 558 F. Supp. 2d 575 (E.D. Pa. 2008) (denying motion to dismiss class action complaints brought by Internet retailers and consumers alleging that defendant, in order to eliminate competition from Internet discounters, abused its dominance as a retailer to coerce suppliers of various baby care products into adopting RPM policies and terminating non-complying retailers in violation of the Sherman Act, Sections 1 and 2 and Pennsylvania common law), *consumer class certified in McDonough v. Toys "R" Us, Inc.,* 638 F. Supp. 2d 46 (E.D. Pa. 2009). In March 2011, Toys "R" Us agreed to pay $17 million to settle the consumers' action, $5 million to settle the retailers' action, and a $1.3 million civil penalty to settle a related FTC investigation.

C. Conflicting Treatment of RPM Under Federal and State Law

Notwithstanding the change in federal law wrought by *Leegin*, minimum RPM is still per se illegal in some states, including California:

- *California v. DermaQuest Inc.*, No. RG10497526 (Cal. Sup. Ct., Feb. 23, 2010). In February 2010, the California Attorney General filed an action under alleging that a beauty products manufacturer violated the Cartwright Act by entering into minimum RPM agreements with resellers, which the complaint alleged were per se illegal under the relevant state law. DermaQuest entered into a Consent Decree less than a month later, in which it repudiated the agreements at issue, agreed not to enter into future RPM agreements, and paid $120,000 in civil penalties and legal costs. *See* 98 Antitrust & Trade Reg. Rep. (BNA) 316 (Mar. 12, 2010).

- *California v. Bioelements, Inc*., No. 10011659 (Cal. Sup. Ct. Jan. 11, 2011). In another California enforcement action, the attorney general's complaint alleged that Colorado-based cosmetics manufacturer Bioelements entered into *per se* illegal RPM contracts with Internet resellers. The stipulated judgment required Bioelements to permanently refrain from fixing resale prices, to notify resellers that it will not enforce existing RPM contracts, and to pay $51,000 in civil penalties and costs.

- *Darush MD APC v. Revision LP*, No. 12-cv-10296, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) ("Under current California Supreme Court precedent, vertical price restraints are per se unlawful under the Cartwright Act. . . . Until the California Supreme Court has given a persuasive indication that it will, the Court cannot simply disregard its decision." (citations omitted)).

- *Alsheikh v. Superior Court*, No. B249822, 2013 WL 5530508, at *3 (Cal. App. 2 Dist. Oct. 7, 2013), *review denied* (Jan. 15, 2014) ("We also note that if there were vertical price fixing, that would, under *Mailand v. Burckle* . . . be a per se violation under the Cartwright Act, notwithstanding a change of law under the Sherman Antitrust Act . . . . We are bound to follow the law set forth by our Supreme Court applying state law." (citations omitted)).

- MD. COMM. CODE § 11-204. In a direct response to the *Leegin* decision, a 2009 amendment to the Maryland state antitrust statute declared minimum RPM *per se* illegal, expressly providing that "a contract, combination, or conspiracy that establishes a minimum price below which a retailer, wholesaler, or distributor may not sell a commodity or service is an unreasonable restraint of trade or commerce." The statute authorizes civil damages and injunctive relief actions by the state Attorney General as well as any person or business injured (or threatened with an injury) as a result of a violation. Willful violations of the law are punishable with criminal fines of up to $500,000 and up to six months imprisonment.

In New York, minimum RPM agreemnts are unenforceable but *not* per se illegal. *See New York v. Tempur-Pedic International, Inc.*, 30 Misc. 3d 986 (N.Y. Sup. Ct. 2011). The New York Attorney General's action against Tempur-Pedic alleged that the company's unilateral suggested retail pricing policy and minimum advertised price (MAP) agreements amounted to per se illegal RPM in violation of N.Y. General Business Law § 369-a, the state Fair Trade Act repealer, which provides that "contracts" between manufacturers and retailers fixing resale prices are merely "unenforceable."

In 2012, an appellate court affirmed the lower court's decision. *New York v. Tempur-Pedic Int'l, Inc.*, 944 N.Y.S.2d 518 (1st Dep't 2012). The record showed that under its suggested retail price policy, Tempur-Pedic had announced that retailers were free to charge whatever price they wished for Tempur-Pedic products, but that Tempur-Pedic would not sell its products to retailers who chose to depart from its manufacturer's suggested retail prices. The trial court denied the Attorney General's petition on the grounds that the evidence failed to establish a price-fixing "contract" between Tempur-Pedic and its retailers, and furthermore, had there been such an agreement, Section 369-a only made such contracts "unenforceable"; it did not make them "illegal."

Kansas law governing RPM underwent a dramatic shift in a short period of time. In its decision in *O'Brien v. Leegin Creative Leather Prods., Inc.*, 277 P.3d 1062 (Kan. 2012), the Kansas Supreme Court held that provisions of the Kansas Restraint on Trade Act ("KRTA"), Kan. Stat. Ann. § 50-101, § 50-102, § 50-112, expressly declared vertical price-fixing agreements to be per se illegal. The Court declined to read the provisions in question as applicable only to "unreasonable" agreements, an interpretation that would have aligned the KRTA with the Sherman Act.

The Kansas legislature subsequently amended the KRTA, however, to provide that the rule of reason applies to, among other vertical agreements, RPM. 2013 Kan. Sess. Laws, page 504. Since those amendments went into effect on April 18, 2013, Kansas law and federal law have been consistent in their treatment of such conduct.

D. Compliance Implications of Federal/State Divergence in the Treatment of RPM

The divergent approaches to RPM under state and federal law complicate antitrust counseling in this area. The reality for compliance counseling—both before and after *Leegin*—is that poorly-articulated written and oral communications between a supplier and its resellers make it easier to infer that the supplier sought and the reseller communicated—whether willingly or under economic duress—its agreement or acquiescence, i.e., the meeting of the minds required to find and agreement, on minimum resale pricing.

Federal constraints on such agreements have loosened significantly but, in some states (e.g., California), in some industries (e.g., mass-marketed consumer goods), and in some circumstances (e.g., where disgruntled retailers lodge complaints), the establishment of a resale price agreement may expose the supplier to disruptive private claims and public enforcement efforts. For these reasons, many practitioners advise that the more prudent approach for companies with legitimate reasons to discourage downstream discounting is to adopt and administer a unilateral anti-discounting policy, discussed in more detail below.

E. Unilateral Conduct **a***nd the* **Colgate** *Doctrine*

A large body of pre- and post-*Leegin* case law, starting with *United States v. Colgate & Co.*, 250 U.S. 300 (1919), addresses when a threat to terminate or a refusal to deal with price discounters is permissible unilateral conduct, and when such conduct evidences a resale price agreement. In *Colgate*, the Supreme Court upheld a supplier's right to "exercise his own independent discretion as to parties with whom he will deal." Thus, it is not unlawful to refuse to deal with or, in the absence of some other legal constraint, to terminate relationships with discounters, as long as the refusal to deal or termination is the result of supplier's own unilateral decision-making.

This principle was reaffirmed and expanded upon in *Monsanto Co. v. Spray-Rite Serv. Co*., 465 U.S. 752 (1984):

> [T]he fact that a manufacturer and its distributors are in constant communication about prices and marketing strategy does not alone show that the distributors are not making independent pricing decisions. A manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market. Moreover, it is precisely in cases in which the manufacturer attempts to further a particular marketing strategy by means of agreements on often costly non-price restrictions that it will have the most interest in the distributors' resale prices. The manufacturer often will want to ensure that its distributors earn sufficient profit to pay for programs such as hiring and training additional salesmen or demonstrating the technical features of the product, and will want to see that "free riders" do not interfere. Thus, the manufacturer's strongly felt concern about resale prices does not necessarily mean that it has done more than the *Colgate* doctrine allows.

465 U.S. at 762-63. Independent acts to influence minimum resale prices—when the supplier has not sought or accepted an agreement from its retailers—do not amount to a RPM contract:

> The concept of "a meeting of the minds" or "a common scheme" in a distributor-termination case includes more than a showing that the distributor conformed to the suggested price. It means as well that evidence must be presented both that the distributor communicated its acquiescence or agreement, and that this was sought by the manufacturer. [*Id.* at 764 n.9.]

Some cases in which courts have distinguished between unilateral conduct and RPM agreements include, e.g.:

- *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960) (rejecting defendant's claim that it acted unilaterally and holding that there was sufficient evidence of an agreement where wholesalers were directed by Parke Davis "to stop the flow of Parke Davis products to the retailers, thereby inducing the retailers' adherence to its suggested retail prices").

- *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228 (10th Cir, 2008) (no RPM agreement established where distributor agreement reserved the supplier's right to terminate distributor for failure to comply with the supplier's unilateral minimum RPM policy; further, "[t]he agreements specifically state that 'ETS does not request and will not accept Distributor's agreement to comply with any such suggested price . . . .").

- *Acquaire v. Canada Dry Bottling Co.*, 24 F.3d 401 (2d Cir. 1994) ("[e]vidence of pricing suggestions, persuasion, conversations, arguments, exposition, or pressure is not sufficient to establish the coercion necessary to transgress § 1 of the Sherman Act"; no RPM agreement established by supplier's conditioning participation in a promotional discount program on distributors' adherence to suggested retail prices and use of supplier's invoicing form disclosing to retail customers both the suggested resale price and wholesale price).

- *Jeanery, Inc. v. James Jeans, Inc.*, 849 F.2d 1148 (9th Cir. 1988) ("putting pressure on a retailer," including a threat not to deliver goods, is "consistent with the privilege of independent action permitted a manufacturer under *Colgate*").

- *Isaksen v. Vermont Castings, Inc*., 825 F.2d 1158 (7th Cir. 1987) (no RPM agreement is established merely by providing suggested price list to distributors, but evidence of threats to "mix up" retailer's orders if it did not raise prices, followed by compliance, could support finding the requisite agreement).

- *Jack Walters & Sons Corp. v. Morton Bldg., Inc.,* 737 F.2d 698, 707 (7th Cir. 1984) (direct advertising of suggested resale prices by manufacturer engaged in dual distribution was "perfectly lawful").

- *See also State of New York v. Tempur-Pedic Int'l*, 2011 WL 198019 **5-6 (N.Y. Sup. Jan. 14. 2011) (ruling that proof of an RPM contract was lacking, where supplier communicated its unilateral minimum price policy to retailers, but evidence failed to show "that interactions between Tempur-Pedic and its retailers amounted to a meeting of the minds or consisted of harassment, threats to harm business, or concerted acts between Tempur-Pedic and its retailers to harass other noncompliant retailers"), *aff'd*, 944 N.Y.S.2d 518 (1st Dept. 2012).

The checklist below identifies some of the key elements of a unilateral *Colgate* policy:

A *COLGATE* POLICY 10-POINT CHECKLIST

1. Is the policy set forth in a standardized written communication addressed to all resellers?

2. Does the policy recite credible procompetitive reasons for minimum pricing (or maximum discounts), such as maintaining a premium brand image and consumer goodwill, encouraging dealer investments in promotion and services, discouraging free riding, or otherwise promoting interbrand competition?

3. Does the policy expressly state that it is the supplier's unilateral policy, subject to unilateral amendment or withdrawal at the supplier's sole discretion?

4. Does the policy reiterate that resellers may set their own resale prices? (*E.g.*, "This Policy is not a restriction against selling at any particular price. You are free to establish the prices at which you sell our Products and we will neither seek nor accept any agreement with respect to such resale prices.")

5. Does the policy disclose that the consequences for noncompliance will be discontinuance of sales to the noncompliant reseller?

6. Is the policy enforced in good faith, and are all related communications truthful and, ideally, reviewed by counsel before sending?

7. Is the policy reviewed and recirculated to resellers on at least an annual basis?

8. Does the policy state that no employee of the supplier is authorized to negotiate or vary the terms of the policy?

9. If there are written reseller agreements, do the termination provisions of those agreements allow unilateral termination or nonrenewal by the supplier without cause upon written notice to the reseller?

10. Does the policy designate an appropriate company contact to whom all questions or concerns regarding the policy should be directed in writing?

F. Minimum Advertised Price (MAP) Agreements

Minimum advertised price (MAP) agreements govern the advertising or display of price information by resellers, but do not control the actual resale price. For this reason, MAP agreements are treated under the antitrust laws as non-price vertical restraints, which are subject to the rule of reason. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55 (1977) ("Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason.").

MAP programs under which retailers must adhere to price advertising restrictions (i.e., advertising resale prices at or above a fixed minimum or no prices at all) in order to receive cooperative advertising funds from the supplier have long been upheld by courts and the FTC. *E.g., In re Nissan Antitrust Litigation*, 577 F.2d 910 (5th Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Clinique Lab., Inc.*, 116 F.T.C. 126 (1993); FTC Statement of Policy Regarding Price Restrictions in Cooperative Advertising Programs, 6 Trade Reg. Rep. (CCH) ¶ 39,057 (FTC, May 21, 1987).

There have been cases and agency actions in which MAP programs were challenged on the grounds that they effectively eliminated the retailer's practical ability to set its own price (and were therefore per se illegal RPM agreements) or because they otherwise impeded or eliminated competition. *See, e.g.*:

- *WorldHomeCenter.com, Inc. v. Franke Consumer Prods., Inc.*, 2011 WL 2565284, at *5 (S.D.N.Y. 2011) (dismissing complaint alleging that unilateral MAP policy that did not set minimum selling price and permitted lower prices to be communicated to customers by various other mean was illegal RPM).

- *WorldHomeCenter.com, Inc. v KWC Am., Inc.*, 2011 WL 4352390, 2011 US Dist. LEXIS 104496 (S.D.N.Y. 2011) (following *Franke, supra*, dismissing complaint alleging that unilateral MAP policy effectively fixed Internet retailer's actual selling price, where supplier's policy allowed retailer to communicate lower prices by telephone, email, or purchase confirmation).

- *Blind Doctor, Inc. v. Hunter Douglas, Inc.*, No. C-04-2678 (MHP), 2004 WL 1976562 (N.D. Cal. Sept. 7, 2004) (recognizing that price advertising restrictions must be assessed under the rule of reason)

- *In re Time Warner*, Commissioners' Statement at http://www.ftc.gov/os/2000/05/cdstatement.htm (explaining that music distributors' MAP policies, while not amounting to RPM agreements, were nonetheless unlawful under a rule of reason analysis, where the five distributors together accounted for over 85% of the market, and each had market power in that no music retailer could realistically choose not to carry the music of any of the five major distributors; MAP policies were adopted by each of

> the distributors for the purpose, and in fact had the effect, of stabilizing retail prices with consequential effects on wholesale prices, ending price competition that had previously existed, compliance with the MAP policies effectively eliminated the retailers' ability to communicate discounts to consumers and financial incentives ensured that retailers had little incentive to actually sell product at a discount).

Where a supplier's MAP restrictions expressly permit the retailer to sell at prices set by the retailer, and where in fact discounted sales actually do take place, the risk that a MAP policy or agreement will be deemed to be RPM in disguise is low. *See U.S. Pioneer Elecs. Corp.* 115 F.T.C. 446 (FTC 1992) ("Unilaterally terminating a dealer for advertising below suggested prices is less competitively threatening to interbrand competition than unilaterally terminating a dealer for failing to follow a suggested resale price."). A sample unilateral MAP policy, which reflects the drafters' effort to reduce antitrust risk while preserving the right to refuse to deal with policy violators, is set forth in the Appendix.

IV. PRICE DISCRIMINATION

The Robinson-Patman Act of 1936, 15 U.S.C. § 13, prohibits direct and indirect price discrimination. Because of the specific protections it affords to "disfavored" purchasers, the Act is often criticized for being at odds with the fundamental purpose of the other U.S. antitrust laws to protect competition, as opposed to individual competitors. Indeed, in its most recent decision addressing the scope of the Act, the Supreme Court reiterated its longstanding view that the Robinson-Patman Act be interpreted in a manner consistent with the other federal antitrust laws, and that the lower courts avoid any "interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo Trucks North Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) (emphasis in original).

The Robinson-Patman Act's core prohibition lies in 15 U.S.C. § 13(a) (sometimes referred to as Section 2(a), i.e., of the Clayton Act), which constrains sellers of commodity goods from engaging in price discrimination "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."

The requirement to show that the conduct at issue may substantially "lessen competition," "create a monopoly," or otherwise "injure, destroy, or prevent competition" is a unique feature of Section 2(a). In spite of the Supreme Court's guidance in *Volvo Trucks*, this competitive injury requirement has been interpreted by courts differently in different circumstances.

Section 2(a) distinguishes among at least three situations involving price discrimination:

- *Primary-line* price discrimination involves a discriminating seller and its own immediate competitors, e.g., manufacturers might sue a rival producer for selling to downstream customers at ultra-low, "predatory" prices. As discussed further below, the Supreme Court has held that the elements of an actionable claim for predatory pricing under Section 2(a) of the Robinson-Patman Act and Section 2 of the Sherman Act, 15 U.S.C. § 2, are substantially identical. *Brooke Group v. Brown & Williamson Tobacco Corp.* 509 U.S. 209, 222, 224 (1993).

- *Secondary-line* cases are concerned with the effect of price discrimination on the ability of the seller's customers to compete in the downstream resale of the seller's product, e.g., when an upstream supplier favors a large wholesaler with discounts not offered to a smaller rival wholesaler. Courts in secondary-line discrimination cases have generally considered harm to individual purchasers as satisfying the competitive injury requirement of Section 2(a). Secondary-line competition is also the focus of the prohibitions of Sections 2(d) and 2(e) of the Act, concerning the discriminatory provision of funds and services to buyers in connection with their resale of the seller's goods.

- There may be price discrimination cases involving *tertiary-line* effects, in which resellers who purchased from disfavored buyers may complain that certain price disadvantages were passed on to their level in the distribution chain.

There has been no significant federal agency enforcement of the Robinson-Patman Act in recent decades. For all intents and purposes, the biggest risk of noncompliance is private litigation. Class action suits under the Act are extremely rare but possible where the conduct at issue is a uniform practice and the remedy is limited to injunctive relief.

A. Elements of Unlawful Price Discrimination

Counseling clients on compliance with the Robinson-Patman Act requires an understanding of the distinct elements required to establish a prima facie claim:

(1) at least two contemporaneous sales of

(2) commodities

(3) of like grade and quality

(4) to competing buyers

(5) at different prices

(6) in interstate commerce

(7) that may injure competition.

Each of these elements has been the subject of judicial interpretation and is addressed in turn below.

1. Two Contemporaneous Sales

To establish discrimination by comparing different selling prices, there must have been at least two sales, to different purchasers, at different prices. Actual *sales* are required for purposes of comparing prices; prospective customers, terminated customers, lessees, licensees, parties to swap agreements, or consignees may not bring claims under the Act.

Because prices inevitably change over time, the subject sales must have been reasonably contemporaneous, measured at the time of contracting, not the date of delivery. *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572 (N.D. Ga. 1992) ("[c]ontracts which contemplate contemporaneous delivery, but which are entered into at different times, are not 'reasonably contemporaneous' for purposes of the Act and are not the proper subject of a price discrimination claim"). Whether the subject sales are reasonably contemporaneous depends on such factors as industry-specific sales patterns and practices and the contractual relationships between the seller and the favored and disfavored buyers. *See, e.g., B-S Steel of Kansas, Inc. v. Texas Indus., Inc.* 439 F.3d 653 (10th Cir. 2006) (steel purchases eight months apart were not reasonably contemporaneous); *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir. 1993) (the Act does not "prohibit price differences between spot sales and long-term contract sales that reflect different market conditions"); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380 (10th Cir. 1985) (terminated dealer could not base price discrimination claim on sales to new dealer at better prices).

2. Commodities

The Act governs sales of tangible commodities or goods, not services, real estate, securities, intellectual property licenses, or other intangibles. *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012) (reiterating that electricity is a commodity for RPA purposes, because it is "produced, sold, stored in small quantities, transmitted, and distributed in discrete quantities," in contrast to cellular telephone service, which is not a commodity because it "cannot be produced, felt, or stored, even in small quantities. The plaintiffs do not buy a quantity of it, store it, and resell it their customers.").

If a sale involves a mixture of goods and services, the court determines the "dominant nature" of the subject of the transaction based on the facts of each case.

3. Like Grade and Quality

The sold commodities must have been of "like grade and quality," which pertains to the physical characteristics of the products in question. If the products are physically identical, then mere differences in labeling, packaging, branding or warranties will not defeat this element. *FTC v. Borden Co.*, 383 U.S. 637, 645-46 (1966) (economic factors inherent in brand names and national advertising are not relevant to "like grade and quality" test).

4. Competing Purchasers

Different—i.e., discriminatory, prices—must have been obtained from two different purchasers, unrelated to the seller, and direct competitors of each other.

Sales from a parent to a wholly owned or controlled subsidiary will ordinarily not fall within the scope of Act. *See, e.g., Caribe BMW, Inc.*, 19 F.3d at 748-51.

The two purchasers must have been competing, head-to-head, for sales to the same customer. *Feesers, Inc. v. Michael Foods*, 591 F.3d 191 (3d Cir. 2010) (holding that parties competing in a bid market were not competing purchasers where the competition for sales to prospective customers occurred *before* the sale of the product for which the RPA violation was alleged), *cert. denied*, __ U.S.__, 131 S. Ct. 160 (2010)*; see also Volvo Trucks North Am. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (liability for secondary-line price discrimination under the Robinson-Patman Act requires a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer).

5. Different Prices

The existence of different prices is established by comparing the net prices, after all discounts and rebates, for which the subject goods were actually sold. Benefits such as preferential credit terms, freight allowances, and "sham" promotional allowances in excess of the value of promotional services rendered by the buyer may be viewed as facilitating indirect price discrimination.

6. Interstate Commerce

The interstate commerce element is easily satisfied in most cases. Although both sales must occur within the United States or its territories, only one of the requisite two contemporaneous sales must involve transporting the subject commodity across a state line. *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974). *See also Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir. 1993) (product at issue must physically cross state line in at least one of the subject sales).

In more complicated cases, in which goods originate from out of state, but are stored, perhaps processed, sold, and delivered in-state, courts use a fact-intensive "stream of commerce" analysis, which considers whether the subject goods were stored for a short period of time before being sold to specific local customers known to the seller, or whether, in contrast, the goods were finished products produced locally from raw materials originating out of state. The latter fact pattern is less likely to satisfy the interstate commerce element.

7. Injury to Competition

Unlike a claim brought under the Sherman Act, proof of actual harm to competition is not required as an element of price discrimination liability, only "a reasonable possibility that a price difference may harm competition." *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983). "A hallmark of the requisite competitive injury" is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. *Volvo*, 546 U.S. at 177 (citing *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 518-19 (1963); *Falls City Indus.*, 460 U.S. at 437-38 & n.8). Conversely, to the extent that an otherwise unjustified instance of price discrimination is fleeting or *de minimis*, the competitive injury element may not be satisfied. *See Drug Mart Pharmacy Corp.*, 2012 WL 3544771 at **10-14 (granting summary judgment on the grounds that "a Robinson-Patman claim requires a showing of substantial competitive injury" and *de minimus* discriminatory sales "are insufficient to establish such an injury").

In cases where the price discrimination is substantial and persists over time, the disfavored buyer may rely on a rebuttable inference that competition has been injured. *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948). "[T]his inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits." *See Falls City Indus.*, 460 U.S. at 435. It may also be overcome when the price difference is a legitimate functional discount, i.e., "reasonable reimbursement for the purchasers' actual marketing functions." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 571 (1990).

B. Statutory and Judicial Defenses to Liability for Price Discrimination

1. Meeting Competition

Section 2(b) of the Act expressly permits price differences when a seller is acting "in good faith to meet an equally low price of a competitor." 15 U.S.C. § 13(b). The Supreme Court has defined good faith as "a flexible and pragmatic . . . concept. The standard is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." *Falls City Indus.*, 460 U.S. at 441.

The defense is not limited to customer-specific responses, but rather is "intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them," only for as long as the competitive circumstances justifying it, as reasonably known by the seller, persist. *Falls City Indus.*, 460 at 448, 450.

POINTS OF CAUTION

- In matching a competitor's offer, the seller's objective must be to meet, not beat competition. *Falls City Indus.*, 460 U.S. at 445.

- To avoid engaging in price collusion, the seller should never directly ask a competitor to verify or explain its lower offer. *United States v. U.S. Gypsum Co.*, 438 U.S. 422 (1978).

- It is common for companies to require sales personnel to fill out "meeting competition" forms to document a customer's request to match a competitor's offer. At the very least, the form should indicate the date of the request, the name of the requestor, and as much detail about the competing offer as the company's representative can elicit from the customer, as well as any additional steps taken to corroborate the offer.

There are several factors that courts may view as relevant in determining the seller's "good faith," including whether the seller: (1) received reports of similar discounts from customers; (2) was threatened with termination of purchases if the discount was not met; (3) made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data; and (4) had past experience with the buyer. *See, e.g., Reserve Supply Corp. v. Owens Corning Fiberglass Corp.*, 971 F.2d 37 (7th Cir. 1992); *Callaway Mills Co. v. FTC*, 362 F.2d 435, 441-43 (5th Cir 1966).

> **Example:** Michelle, a sales rep for paper company ABC Co., got a call from her contact at ABC's biggest customer, who told her that XYZ Inc. was offering the same grade and quality of paper at a price that was 10% lower than ABC's price, and asked whether ABC would match the price. Michelle asked the customer whether XYZ's offer was in writing but was told it wasn't. From past conversations with her customers, Michelle knew that XYZ had at various times offered prices that ranged between 5% and 15% lower than ABC's prices. In order to win the sale, Michelle agreed to offer a 10% discount. In fact, the customer misspoke, and XYZ's actual offer was 5%, not 10% lower than ABC's price. ***Can ABC still claim the meeting competition defense?***

Answer: Yes, assuming Michelle had no reason to believe her customer was being untruthful. It is not necessary that the seller be certain that its price concession will meet the lower price. A seller can assert the defense even if, unknowingly but in good faith, it offered a price that not only met but also beat the competition. *Great Atlantic*, 440 U.S. at 82-83; *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1045 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

2. Cost Justification

Section 2(a) of the Act allows price "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." 15 U.S.C. § 13(a).

In order for the "cost justification" defense to be successful, the seller must show that its price concessions match the actual cost differences arising from differing methods or quantities in which the commodities in question are sold or delivered. The seller may not simply rely on the theory that delivering commodities in larger quantities is cheaper than delivering the same commodities in smaller quantities. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 561 n.18 (1990); *FTC v. Morton Salt Co.*, 334 U.S. 37, 48 (1948); *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050 (1st Cir. 1995).

3. Changing Market Conditions

Section 2(a) allows different prices 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." 15 U.S.C. § 13(a).

Qualifying market condition changes must fall within the enumerated conditions identified in the statute or be sufficiently similar as to fall within its scope. *See Comcoa, Inc. v. NEC Tels., Inc.*, 931 F.2d 655, 661 (10th Cir. 1991) (permitting discounts when certain telephone systems became obsolete and difficult to sell); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988) (recognizing perishability defense where eggs were perishable commodity with short shelf life), *aff'd on other grounds,* 881 F.2d 1936 (7th Cir. 1989), *cert. denied,* 494 U.S. 1019 (1990).

4. Functional Availability

There are numerous cases in which courts have recognized that price discrimination claims may be rejected on the grounds that the more favorable price was practically, or "functionally," available to the allegedly disfavored purchaser:

> Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury. [*Shreve Equipment, Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied,* 454 U.S. 897 (1981).]

To avail itself of the practical availability "defense," the seller may show that buyers were informed how to obtain the lower price and that they had a realistic opportunity to purchase at the lower price. *Caribe BMW, Inc. v. Bayerische Motoren Werke A.G.*, 19 F.3d 745 (1st Cir. 1994); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1992) (triable issue on availability on some sales, because plaintiff had no feasible way of learning about lower prices); *Morton Salt*, 334 U.S. at 42 (quantity discounts not functionally available when only largest customers could feasibly qualify).

C. Buyer Liability for Inducing Unlawful Price Discrimination

Section 2(f) of the Act prohibits buyers of goods from knowingly inducing or receiving discriminatory prices prohibited under Section 2(a) of the Act. *See, e.g.*, *Great Atl. & Pac. Tea Co., Inc. v. FTC*, 440 U.S. 61, 76 (1979); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 62 (1953); *see also Gorlick Distrib. Ctrs. LLC v. Car Sound Exhaust Sys. Inc.*, No. 10-36083, 2013 U.S. App. LEXIS 14635 (9th Cir. July 19, 2013).

To establish a prima facie case under Section 2(f), the evidence must first establish a Section 2(a) violation by the seller. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1147 (D.C. Cir. 1988) ("For there to be a guilty buyer, there must be a guilty seller."); *Harbor Banana Distrib., Inc. v. FTC*, 499 F.2d 395, 399 (5th Cir. 1974) ("A prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f)"); *Retail Service Assoc. v. ConAgra Pet Prod. Co.*, 759 F. Supp. 976, 980 (D. Conn. 1991) ("A section 2(f) violation is derivative in nature and must be accompanied by a section 2(a) violation").

Thus, a buyer is not liable for receiving or even inducing discriminatory prices if the price differential is justified by any defense available to the seller under the Act, even if the defense was unknown to the buyer at the time of sale. *Great Atl. & Pac. Tea*, 440 U.S. at 78 ("Congress did not provide in § 2(f) that a buyer can be liable even if the seller has a valid defense"); *Automatic Canteen*, 346 U.S. at 71.

The claim requires a further showing that the buyer knew or should have known that the discriminatory prices it received were prohibited under the Act. *Automatic Canteen*, 346 U.S. at 74; *Gorlick Distrib.*, 2013 U.S. App. LEXIS 14635 ("[T]he Robinson-Patman Act doesn't prohibit buyers from haggling for a better deal. To put a buyer at risk of liability any time he asks for a lower-than-listed price would do enormous damage to the 'sturdy bargaining between buyer and seller for which scope was presumably left' by our antitrust laws.") (citing *Automatic Canteen*, 346 U.S. at 73, 74).

D. Illegal Brokerage

Section 2(c) of the Act was enacted to address payments to fictitious or "dummy" brokers accepting commissions, i.e., *de facto* discounts, for the benefit of the buyer. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960) ("One of the favorite means of obtaining an indirect price concession was by setting up 'dummy' brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay 'brokerage' to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.").

Unlike traditional price discrimination claims, neither the statutory defenses (e.g., cost justification, meeting competition), nor the requirement of harm to competition at large, are applicable to a Section 2(c) claim. *Metrix Warehouse, Inc. v. Daimler-Benz A.G.*, 716 F.2d 245 (4th Cir. 1983); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938). From a compliance standpoint, therefore, if a broker is appointed, the brokerage contract should generally prohibit the broker from passing on any part of its commission to the buyer.

An exception in Section 2(c) permits payments "for services rendered," which a few courts have applied in particular factual circumstances. *E.g.*, *Burge v. Bryant Public Sch. Dist.*, 658 F.2d 611 (8th Cir. 1981) (school district could receive commissions for providing space and assisting with scheduling of student photographs); *Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 713 F. Supp. 937, 942-43 (E.D. Va. 1989) (same), *aff'd*, 903 F.2d 988 (4th Cir. 1990).

E. Discriminatory Provision of Promotional Allowances and Services

Sections 2(d) and 2(e) of the Robinson-Patman Act are both intended to prohibit hidden price discrimination in the form of payments, allowances, or services in compensation for resale merchandising services, when they are offered or provided on a discriminatory basis. Sellers may not pay allowances or furnish services to a buyer for the buyer's assistance in promoting the resale of the seller's product, unless the allowances or services are offered to all competing buyers on "proportionally equal" terms. *See generally* FTC Guides for Advertising Allowances and Other Merchandising Payments and Services ("*Fred Meyer Guides*"), 16 C.F.R. §§ 240 *et seq.*, available at http://www.ftc.gov/bc/docs/16cfr240.shtm.

In counseling clients about potentially discriminatory promotional practices, it is important to recognize that a prima facie claim under Section 2(d) or 2(e) does not require any showing of actual or potential harm to competition.

The *Fred Meyer Guides* list the different elements of Section 2(d) and Section 2(e) violations as follows:

> Section 2(d) applies only to:
>
> (1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Pays a customer for promotional services or facilities provided by the customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(b) Section 2(e) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Furnishes promotional services or facilities to a customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

16 C.F.R. § 240.2. The two provisions are thus complementary, as Section 2(d) applies to *payments* for promotional services or facilities provided by the customer, while Section 2(e) prohibits discriminatory provision by the seller of *promotional services or facilities*.

1. Competing Customers

The *Fred Meyer Guides* define "competing customers" as follows:

> all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

This definition requires a showing that favored and disfavored customers compete with each other in the same geographic area and at the same functional level, i.e., for the same resale customers. *Eastern Auto Distrib. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329 (4th Cir. 1986); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (fabric stores competed with variety stores in sales of dress patterns).

2. Proportionally Equal Terms

Proportional equality is "the crux of Sections 2(d) and 2(e)." FTC, *Reasons for Changes in Guides*, 55 Fed. Reg. 33,651 (1990). Courts and the FTC have encouraged flexible approaches to determining whether payments, services or facilities are being offered on proportionally equal terms. 16 C.F.R. § 240.9 (2003); *Simplicity Pattern*, 360 U.S. at 61 n.6. The *Fred Meyer Guides* suggest that compliance "can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period." 16 C.F.R. § 240.9(a).

3. Defenses

Ensuring the functional availability of a promotional program to all competing customers on "proportionally equal" terms will defeat claims based on Sections 2(d) and 2(e). 16 C.F.R.

§ 240.10. To meet competition, a seller may offer promotional payments, services, or facilities in a good faith effort to match payments, services, or facilities offered by competitors. 16 C.F.R. § 240.14. Cost justification, however, is not available as a defense under Section 2(d) or 2(e). 16 C.F.R. § 240.15.

F. Exemption for Non-Profit Institutions

A statutory exemption to the Robinson-Patman Act, enacted in 1938 as the Non-Profit Institutions Act, provides that the Act shall not "apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." 15 U.S.C. § 13c. Qualifying for this exemption requires a showing of a purchase of supplies for its own use by a non-profit institution (or a part of an institution). The exemption is strictly construed. A purchase by a commercial distributor for purposes of resale to charitable institutions, for example, even with the intent to resell at cost, would not fulfill either part of the test.

G. RPA Litigation Risks

Regardless of the merits, given the fact-intensive nature of the elements of the prima facie violations of the RPA, well-pleaded RPA claims may be highly resistant to dismissal before, and sometimes even after, discovery. *See Alarmax Distribs., Inc. v. Honeywell Int'l, Inc.*, 2015 WL 3645259 (W.D. Pa. June 9, 2015) (denying motion to dismiss complaint alleging that defendant knowingly induced and received illegally discriminatory prices in violation of RPA); *Woodman's Food Market, Inc. v. The Clorox Co*., 2015 WL 420296 (W.D.Wis. Feb. 2, 2015) (denying motion to dismiss complaint alleging that supplier violated RPA in selling specially-packaged product to club stores but not plaintiff, where packaging could be "promotional service" under Section 2(e)); *Western Convenience Stores, Inc. v. Suncor*

Energy (U.S.A.), Inc., 970 F. Supp. 2d 1162 (D. Colo. 2013) (ruling that disputed facts precluded summary judgment on plaintiff's RPA price discrimination claim).

Several reported decisions illustrate how suits brought under the Act have imposed significant discovery burdens and defense costs, even when the defendants ultimately prevailed:

- *Gorlick Distrib. Ctrs. LLC v. Car Sound Exhaust Sys. Inc.*, No. 10-36083, 2013 U.S. App. LEXIS 14635 (9th Cir. July 19, 2013) (affirming summary judgment disposing of Section 2(f) claim of inducing unlawful price discrimination on the ground that there was insufficient evidence that defendant buyer knew both that (1) it was receiving a lower price than its competitor and (2) seller had "little likelihood of a defense" for offering that price; the opinion notes that the parties submitted supplemental briefs below and on appeal).

- *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012) (reversing judgment dismissing RPA cause of action and holding that plaintiffs, who purchased electricity from defendant, had sufficiently alleged they suffered a competitive disadvantage as a result of the rebates provided to favored purchasers), *cert. denied*, __ U.S. __, 133 S. Ct. 933 (2013). In 2014, the district court granted a motion for certification of a class of competitors of businesses favored by the defendant's discriminatory rebate scheme. *Williams v. Duke Energy Corp.*, No. 1:08-cv-46 (S.D. Ohio March 13, 2014) (commonality requirement was satisfied where class sought only injunctive and declaratory relief under the RPA, which did not require showing of competitive injury), citing *Mad Rhino, Inc. v. Best Buy Co., Inc.,* No. 03-5604 GPS, 2008 WL 8760854 (C.D. Cal. Jan. 14, 2008) and

American Booksellers Ass'n v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1036 (N.D. Cal. 2001).

- *Feesers, Inc. v. Michael Foods*, 591 F.3d 191 (3d Cir. 2010) (summary judgment granted by district court was reversed on first appeal to Third Circuit; after plaintiff prevailed in a bench trial, the Third Circuit vacated the judgment, holding that in a secondary line price discrimination case, parties competing in a bid market cannot be competing purchasers where the competition for sales to prospective customers occurs *before* the sale of the product for which the RPA violation is alleged), *cert. denied*, __ U.S.__, 131 S. Ct. 160 (2010).

- *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) (reversing Eighth Circuit's judgment affirming jury verdict and award of $1.3 million in damages, trebled, in favor of the plaintiff, and holding that a manufacturer may not be held liable for secondary-line price discrimination absent a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer).

- A series of summary judgment decisions issued over a five-year period disposed of RPA claims for damages and injunctive relief. *Drug Mart Pharmacy Corp. v. American Home Products Corp.*, 2012 WL 3544771 (E.D.N.Y. Aug. 16, 2012) ("plaintiffs have undertaken an extensive, costly and time-consuming effort to trace the customers they claim to have lost to favored purchasers because of price discrimination, but have essentially come up empty"); *Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp.*, 2007 WL 4526618 (E.D.N.Y. Dec. 20, 2007); *Drug Mart*

> *Pharmacy Corp. v. Am. Home Prods. Corp.*, 472 F.Supp.2d 385, 420–21 (E.D.N.Y. 2007).

Given the complexity of modern marketing practices, proving damages under the Robinson-Patman Act can be difficult. In *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981), the Supreme Court rejected the theory that price discrimination damages should be based on the difference between what the plaintiff and favored buyer each paid in the transactions at issue. *See DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993) ("Robinson-Patman damages must be measured by what the disfavored buyer suffered, not by what the favored buyer gained.").

Damages attributable to price discrimination must be proven—in the same manner as damages are proven in other antitrust cases—by calculating the profits that the disfavored plaintiff would have earned in a violation-free environment, i.e., the "but-for" world in which no discriminatory prices were granted to a favored buyer or buyers. Future lost profits are not recoverable so long as the plaintiff remains in business as a potential customer, but if the price discrimination caused the plaintiff to go out of business, the plaintiff may seek either its going-concern value as of the date it went out of business or projected future lost profits—not both. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 175 F.3d 18 (1st Cir. 1999).

V. PREDATORY PRICING, PREDATORY PURCHASING, BUNDLING, AND LOYALTY DISCOUNTS

A. Predatory Pricing

One of the operating principles of antitrust law is that "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition." *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990). Thus, the Supreme Court has "carefully limited the circumstances under which plaintiffs can state a Sherman Act claim by alleging that prices are too low." *Pacific Bell Tel. Co. v. linkLine Communications, Inc.*, 555 U.S. 438, 129 S. Ct. 1109, 1120 (2009).

A predatory-pricing scheme is one in which "the predator reduces the sale price of its product (its output) to below cost, hoping to drive competitors out of business. Then, with competition vanquished, the predator raises output prices to a supracompetitive level." *See Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 318 (2007) (citing *Matsushita Elec. Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 584-85, n.8 (1986)). "For the scheme to make economic sense, the losses suffered from pricing goods below cost must be recouped (with interest) during the supracompetitive-pricing stage of the scheme." *Id.* (citing *Matsushita*, 475 U.S. at 588-89; *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 121-22, n.17 (1986)).

Thus, two distinct elements are required to establish predatory pricing. First, the plaintiff must show that "the prices complained of are below an appropriate measure of its rival's costs." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-24 (1993)). "To sell at cost, as opposed to below cost, however, does not violate 15

U.S.C. § 13(a)." *Johnny Prescott & Son Oil Co. v. Rymes Heating Oils, Inc.*, 2014 WL 2557120 *2, No. 1:13cv00437-LM (D.N.H. June 6, 2014) (dismissing RPA allegations that failed to allege that defendant sold at below some measure of its own cost). *See also Felder's Collision Parts, Inc. v. All Star Advertising Agency, Inc.*, No. 14-30410 (5th Cir. Jan. 27, 2015) (affirming dismissal of predatory pricing claim where manufacturer rebates made allegedly predatory sales by OEM auto part dealers profitable).

Courts vary in their determination of the "appropriate measure" of costs for purposes of determining whether the element of below-cost pricing has been satisfied. *E.g., United States v. AMR Corp.*, 335 F.3d 1109 (10th Cir. 2003) (affirming use of average variable cost, but stating, "Because there may be times when courts need the flexibility to examine both AVC as well as other proxies for marginal cost in order to evaluate an alleged predatory pricing scheme, we again decline to dictate a definitive cost measure for all cases."); *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 478 (5th Cir. 2000) (average variable cost); *Rebel Oil Co., Inc. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1092-93 (9th Cir.) (discussing various standards), *cert. denied*, 525 U.S. 1017 (1998).

"The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Brooke Group*, 509 U.S. at 224. Without recoupment, "predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers." *Id.*

The *Brooke Group* opinion makes it clear that the legal assessments of primary line price discrimination under Section 2(a) the RPA and predatory pricing under Section 2 of the Sherman Act are effectively indistinguishable and demand a high hurdle of proof. As a result, the number of predatory pricing cases in which plaintiffs have prevailed has diminished substantially. *See* Ryan Luchs, Tansev Geylani, Anthony Dukes, & Kannan Srinivasan, *The End of the Robinson-Patman Act?: Evidence from Legal Case Data*, 56 MGMT. SCI. 2123, 2128-30 (Dec. 2010) (summarizing empirical study of RPA case law data showing significant decrease in the probability of plaintiff success in RPA primary line cases after *Brooke Group*).

B. Predatory Purchasing

In *Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 127 S. Ct. 1069 (2007), the Supreme Court addressed the antitrust treatment of predatory purchasing—i.e., bidding at above-market prices in order to deprive other buyers of access to a necessary input—under Section 2 of the Sherman Act. The Court held that the predatory pricing test announced in *Brooke Group* applies to predatory bidding, too, as the claims essentially mirror each other in significant ways:

> A predatory-pricing plaintiff alleges that a predator cut prices to drive the plaintiff out of business and, thereby, to reap monopoly profits from the output market. In parallel fashion, a predatory-bidding plaintiff alleges that a predator raised prices for a key input to drive the plaintiff out of business and, thereby, to reap monopsony profits in the input market. Both claims involve the deliberate use of unilateral pricing measures for anticompetitive purposes. And both claims logically require firms to incur shortterm losses on the chance that they might reap supracompetitive profits in the future.

549 U.S. at 322.

Thus, to establish a claim for predatory bidding, a plaintiff must show that the alleged predatory bidding led to below-cost pricing of the defendant's outputs, i.e., that the defendant's bidding caused the cost of the relevant outputs to rise above the revenues generated by sales of those outputs. *Id.* at 325. In addition to showing the defendant's below-cost output pricing,

> [a] predatory-bidding plaintiff also must prove that the defendant has a dangerous probability of recouping the losses incurred in bidding up input prices through the exercise of monopsony power. . . . As with predatory pricing, making a showing on the recoupment prong will require "a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market."

Id. (quoting *Brooke Group*, 509 U.S. at 226).

C. Use of Bundling and Loyalty Discounts to Enhance Market Power

1. Bundling

Bundled discounts apply to a package of products and services sold for a price that is less than the total would be if the buyer bought each individual product or service separately. Under federal antitrust law, a bundled pricing agreement can be alleged as an unreasonable restraint on trade in violation of Section 1 of the Sherman Act, or as exclusionary conduct that facilitates unlawful monopolization or attempted monopolization under Section 2 of the Sherman Act. Bundled discounts on commodity goods that are conditioned on anticompetitive exclusive dealing may also support a claim under Section 3 of the Clayton Act.

The Supreme Court has not defined a clear standard under which to assess whether particular bundled discount practices violate the antitrust laws. At present, two circuit courts—the Third and Ninth Circuits—have addressed the issue, and they diverge in their approach.

In *LePage's Inc. v. 3M*, 324 F.3d 141 (3d Cir. 2003) (*en banc*), the Third Circuit declined to adopt a bright line test and held that a showing of exclusionary effects was sufficient to establish a Section 2 claim based on the plaintiffs' use of bundled discounts, loyalty rebates, and other incentives to drive its nearest competitor in one particular product line out of business. Under the Third Circuit's test, it does not matter whether a discount results in below-cost pricing of one or more of the competitive products being bundled.

In *LePage's*, the plaintiff, a manufacturer of private label transparent tape, asserted that 3M used its monopoly over its Scotch branded products to gain a competitive advantage in the private label tape segment of the transparent tape market in the United States. 3M did so through a multi-tiered bundled rebate structure, which offered higher rebates when customers purchased products in a number of 3M's different product lines, in addition to large lump-sum cash payments to customers, promotional allowances and other cash incentives to encourage customers to enter into exclusive dealing arrangements with 3M. LePage's could not offer competitive discounts because it did not offer as diverse an array of products. The jury found that 3M's conduct violated Section 2, and 3M appealed.

Citing *Brooke Group*, 3M argued that its bundled rebate structure was legal because it never priced below cost. The Third Circuit rejected that argument, instead focusing on the evidence of 3M's intent to drive competitors out of the market and the harm to LePage's done by 3M's conduct. *LePage's*, 324 F.3d at 161-62. The Supreme Court subsequently denied certiorari, 542 U.S. 953 (2004), and

LePage's therefore stands as the governing law in the Third Circuit.

In contrast, the Ninth Circuit adopted a more objective approach and held that a bundled discount may be unlawfully exclusionary only if, after allocating the full amount of the discount to the competitive product or service, the resulting price is below the defendant's average variable cost of producing that product or service. *Cascade Health f/k/a McKenzie Willamette v. PeaceHealth*, 502 F.3d 895, 913-14 (9th Cir. 2007), *amended*, 515 F.3d 883 (9th Cir. 2008); *see also Masimo Corp. v. Tyco Healthcare Group L.P.*, 2009 WL 3451725 (9th Cir. Oct. 28, 2009) (bundled discount was not anticompetitive where plaintiff did not show bundled prices were below incremental cost).

In the *PeaceHealth* case, the defendant operated three hospitals in Lane County, Oregon, with 465 beds in the aggregate. The defendant's hospitals offered primary and secondary hospital services as well as more complex services known as tertiary care. The plaintiff was the only other provider of hospital services in Lane County, with a 114-bed hospital offering only primary and secondary services. The jury found, and on appeal the parties did not dispute, that the relevant market was the market for primary and secondary services in Lane County, of which PeaceHealth held a 75% percent share.

The plaintiff alleged that PeaceHealth froze McKenzie out of the market for primary and secondary services by offering significant discounts on tertiary services to insurance companies that agreed to purchase *all* hospital services—i.e., primary, secondary and tertiary services—exclusively from PeaceHealth. The plaintiff could provide primary and secondary services at a lower cost than PeaceHealth, but because it did not provide tertiary services it could not match the bundled discounts offered by PeaceHealth.

At trial in the district court, the jury instructions were based on *LePage's*, which did not require the jury to consider whether PeaceHealth had priced below cost. On appeal, the Ninth Circuit rejected the reasoning of *LePage's* and instead, adopted a discount allocation standard that required a showing of pricing below cost. On the basis of deficient jury instructions, the Ninth Circuit vacated the judgment and remanded the case for further proceedings.

The Ninth Circuit's approach to bundling has been followed by lower courts in other circuits. To date, the Third Circuit's *LePage's* decision has been less influential, although it remains controlling law in that circuit.

2. Loyalty Discounts

Loyalty discounts differ from bundling in that they are designed to incentivize buyers to buy more from the supplier, on the condition—or with the practical effect—that the buyer purchases substantially less or nothing from the supplier's competitors. A common form of loyalty discount is the market share discount contingent on the buyer's agreement to purchase a higher percentage of its requirements from the supplier. As a reward, the buyer receives a discount on the incremental purchases that exceed the minimum. Another type of loyalty discount rewards the buyer with lower pricing on all of its purchases, so long as the buyer agrees to purchase at least a certain percentage of its requirements from the supplier.

When loyalty discounts are conditioned on or result in the buyer purchasing all or nearly all of its requirements from the supplier, they may be analyzed as *de facto* exclusive dealing arrangements. *See, e.g.*, *ZF Meritor LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), *cert. denied*, 133 U.S. 2025 (2013) (holding that supply agreements containing substantial discounts tied to market-penetration and purchasing targets, which caused OEMs to buy most of their transmissions from

Eaton and effectively locked Meritor out of the market should be assessed as *de facto* exclusive dealing agreements under the rule of reason).

One of the issues before the Third Circuit in *ZF Meritor* was whether the defendant's loyalty discounts should be assessed not under the rule of reason, but under the legal framework applicable to predatory pricing: the so-called "price-cost" test set forth in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). Under this framework, a firm may avoid liability for pricing practices that do not involve below-cost prices. The advantage to the price-cost test is that firms with significant market share can more easily and predictably tailor their conduct to avoid antitrust risk. The Third Circuit rejected this approach in *ZF Meritor* because it did not view the case before it as one in which price was the "predominant" means of excluding rivals.

Then-FTC Commissioner Wright argued against applying the "price-cost" test to loyalty discounts. *See Simple but Wrong or Complex but More Accurate? The Case for an Exclusive Dealing-Based Approach to Evaluating Loyalty Discounts*, Speech by FTC Commissioner Joshua D. Wright (June 3, 2013), available at http://www.ftc.gov. In a split decision by the FTC in a matter involving alleged collusion and exclusionary conduct through the use of loyalty rebates, the same commissioner, pointing to the lack of evidence of harm to competition as opposed to harm to individual rivals, dissented from the majority's determination that the respondent's conduct constituted unlawful monopolization in violation of Section 2 of the Sherman Act because it foreclosed competitors from accessing a "substantial" share of distributors. *See* Dissenting Statement of Commissioner Joshua D. Wright, *In re: McWane*, Docket No. 9351 (F.T.C. 2014), available at http://www.ftc.gov.

Taken to an extreme by a supplier with significant market power, loyalty discounts can be the basis of antitrust liability and regulatory actions, as they were in *ZF Meritor*, *supra*, *Masimo Corp. v. Tyco Healthcare Group L.P.*, 2009 WL 3451725 (9th Cir. Oct. 28, 2009) (upholding liability verdict as supported by evidence that "substantial" market foreclosure was due to defendant's 90% market share requirement for loyalty discounts), *McWane*, *supra*, the FTC's action against Intel Corporation (FTC Docket No. 9341, Final Decision and Order (Nov. 2, 2010)), available at , available at http://www.ftc.gov), and the Antitrust Division's action against United Regional Health Care System (Case No. 7:11-cv-00030-O, Final Judgment (Sept. 29, 2011 N.D. Tex.)), available at http://www.justice.gov.

In all these cases, the discounts were significant, available over a prolonged period of time, offered in conjunction with other strategies designed to deter or even coerce buyers from dealing with the defendant's competitors, and could not feasibly be matched or beaten by equally efficient competitors. The loyalty discounts were shown or alleged to have led to substantial harm to competition in the form of higher prices, reduced output, or more limited consumer choices.

Where one or more of these factors is absent, loyalty discounts by themselves are less likely to pose significant risk. *See, e.g.*:

- *Allied Orthopedic Appliances v. Tyco Health Care Group*, 592 F.3d 991 (9th Cir. 2010) (affirming lower court's ruling that defendant's market-share discount agreements and sole-source agreements did not create an unreasonable restraint on trade because hospitals' commitments under the agreements were "voluntary and [could] be ended at any time, and hospitals [were] thus free to switch to more competitively priced generics").

- *Virgin Atlantic Airways v. British Airways*, 257 F.3d 256 (2d Cir. 2001) (affirming summary judgment dismissing claims that defendant airline's incentive agreements that rewarded travel agents and corporate customers with discounts for certain air travel purchases, where purchasers were not locked into buying from defendant or otherwise restricted from buying from other airlines).

- *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039 (8th Cir. 2000) (reversing judgment entered on jury verdict where evidence showed that customers to whom defendant offered loyalty discounts were willing and able to, and in fact did, switch to other suppliers and plaintiffs failed to establish high barriers to entry in the relevant market).

The foregoing may be useful when counseling firms on loyalty discounts or rebates that incentivize exclusive or near-exclusive dealing. But recent discussions by courts and commentators reflect that the legal standards remain far from clear and in some cases it may be difficult to predict whether to apply the more defendant-friendly price-cost test or the rule of reason. *See Eisai Inc. v. Sanofi-Aventis U.S. LLC*, 2014 WL 1343254 *26 (D.N.J. Mar. 28, 2014) (ruling that under defendant's loyalty-discount contracts, price was the predominant mechanism of exclusion and therefore price-cost test applied); Richard M. Steuer, *Loyalty Discounts Becoming More Complicated Than Ever*, Mayer Brown Antitrust and Competition Review Spring 2014, available at http://www.mayerbrown.com; Steven J. Cernak, *Why the FTC's* McWane *Opinions Raise More Questions Than They Answer*, Schiff Hardin AntitrustConnect (Feb. 11, 2014), available at http://antitrustconnect.com.

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APPENDIX

KWC America
INTERNET ADVERTISING POLICY
EFFECTIVE February 1, 2012

This policy applies to all KWC America branded and HANSA branded products distributed by KWC America, Inc (hereinafter "KWC America").

KWC America believes that its product advertising goals require a commitment from accounts to provide superior service, aggressively promote the KWC America premium brand image and focus on product performance, features and benefits. We likewise believe that KWC America's image and the investment that KWC America and its direct customers make in the introduction and marketing of new products are undermined by accounts that engage in unfair advertising practices or advertise KWC America's products on the Internet at significant price discounts.

To address these issues, KWC America has adopted this Internet Advertising Policy (the "Policy"). KWC America has unilaterally determined that it will sell its products only to those accounts that:

1 Properly represent and promote the quality image and superior goodwill associated with KWC America's products.

2 Do not sell or market KWC America products in any way that disparages or injures KWC America or its products or the products or services of any other company.

3 Do not engage in any form of advertising or advertising practices that violate any federal, state or local laws or ordinances, including without limitation "bait and switch."

4 Sell KWC America products only to public end users (i.e., consumers and to the trade).

5 Comply with KWC America's standard sales policy, as set forth on the reverse side of each invoice.

6 Clearly identify the specific model being advertised (e.g., KWC America SUPRIMO®).

7 Do not use the Internet (including, but not limited to, business-to-consumer and other web sites, auction sites, electronic bulletin boards, browsers, portals, and on-line services and service providers) to advertise KWC America products to the general public at a price that is more than thirty percent (30%) below the list price set forth in the effective KWC and HANSA Price Books (such discounted prices referred to herein as the "Minimum Advertised Price"), whether such advertising is done through any "dollar off," "percentage off," "rebate" or similar sales language. If a discount or giveaway is advertised via the Internet to the general public in conjunction with KWC America products, the discount or giveaway value of the other product will be considered as a discount off the KWC America product for the purposes of this Policy. KWC America may change the list prices for the KWC and HANSA branded products in its sole discretion from time to time upon notice to accounts.

a. The requirements set out in this Section No. 7 apply to all levels/pages on a website, other than pages associated with an intent to purchase. Actual prices charged customers may be provided by telephone, e-mail response, and product purchase confirmation webpages or communications.

b. Specifically regarding auction sites, offers made to "buy it now," or comparable offers, advertising instant purchase at a price below the

> Minimum Advertised Price constitute violations of the Policy. Auction sites advertising sale of KWC America products to the highest bidder are acceptable under the Policy.

This Policy applies only to advertised prices and does not apply to actual resale prices. This Policy does not apply to print, in-store point of sale advertising, or to advertising that was distributed prior to July 1, 2008. The Policy will remain in force for one year from the effective date listed on the first page of this notice and will automatically be renewed for successive one year periods, unless amended, withdrawn or replaced by KWC America, which it may do in its sole discretion. KWC America will terminate its business relationship with any account that violates this Policy.

The Policy is a unilateral statement of KWC America's preferences concerning the type of account to which KWC America chooses to distribute the products that are subject to the Policy. It is not the intent or purpose of this Policy to restrict, coerce, force or reach agreement with a retailer to charge a particular price for any KWC America product. The Policy is not a contract or an offer to form a contract, agreement or any other form of mutual understanding. Rather, the Policy describes the terms under which KWC America may, in its sole discretion, choose to sell the products subject to the Policy to its accounts. KWC America does not ask for, and will not accept, any agreement to comply with the Policy.

KWC America representatives and employees are strictly prohibited from discussing the Policy or retail pricing practices with any account. KWC America representatives and employees also are strictly prohibited from seeking or accepting any assurances of any account's compliance with the Policy. All inquiries regarding the Policy should be directed in writing to:

[Omitted]

KWC America does not and will not discuss the business dealings of any retail account with any other account. KWC America does not seek and will not accept any complaints or comments about the advertising or pricing policies of any other account. KWC America reserves the right to change or discontinue the Policy at any time, and no account has the right to rely on the continued existence of the Policy or KWC America's enforcement of the Policy. KWC America reserves the right to choose any retail accounts with which it will do business and reserves the right to accept or reject any purchase order from any account at any time.