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It's Time to Freshen Up the Fred Meyer Guides: A Survey of the Comments Submitted to the FTC on Whether (and How) to Update the Guides to Advertising Allowances and Other Merchandising Payments and Services

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In a November 28, 2012 press release,[1] the U.S. Federal Trade Commission announced it was seeking written public comments regarding the agency's Guides for Advertising Allowances and Other Merchandising Payments and Services (the "Fred Meyer Guides"), codified at 16 CFR 240.1–15.[2] The Fred Meyer Guides address the scope and application of Sections 2(d) and 2(e) of the Robinson-Patman Act ("RPA," 15 U.S.C. §§ 13(d)–(e)), which require sellers of commodity goods to provide advertising and promotional allowances and services to all competing customers on proportionally equal terms.[3]

Sections 2(d) and 2(e) are intended to prohibit hidden, indirect price discrimination in the form of payments, allowances, and resale merchandising and promotional services offered or provided on a discriminatory basis. The provisions are 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* to the customer. A notable feature of these provisions is that, unlike the price discrimination prohibitions set forth in Section 2(a), likelihood of harm to competition goes unmentioned in Section 2(d) or 2(e).

The FTC issued the Fred Meyer Guides in 1969 after the Supreme Court interpreted Section 2(d) in *Fred Meyer, Inc. v. FTC*, 390 U.S. 341 (1968) (holding that a supplier provides allowances to a direct-buying retailer must make the same allowances available on comparable terms to those buying through wholesalers, if those buyers compete with the direct buyer in resales of the product). In recent decades, however, government enforcement of the RPA has all but ceased. The last time the FTC amended the Guides was in 1990—long before the advent of personal computers, e-commerce and the proliferation of complex multichannel distribution systems.

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[1] Available at http://ftc.gov/opa/2012/11/fredmeyers.shtm

[2] Available at http://ftc.gov/bc/docs/16cfr240.shtm

[3] For a detailed overview of the RPA, including Sections 2(d) and 2(e), see Chapter 5 of *ABA Section of Antitrust Law, Antitrust Law Developments* (7th ed. 2012).

A news article published the day after the FTC's announcement reported that some practitioners felt that "given how increasingly rare FTC Robinson-Patman cases have become . . . it may not make sense for the agency to invest resources into bringing the guides up to date."[4] It is true that for all intents and purposes the only risk of noncompliance with the RPA is private litigation. Some may question whether it is appropriate or desirable for the Commission to develop guidance in an area in which it does not intend to enforce the law.

Yet the Robinson-Patman Act remains on the books. And recent cases illustrate that suits brought under the RPA may impose significant discovery burdens and defense costs, even when defendants ultimately prevail.[5] The expense, disruption, and potential loss of goodwill resulting from RPA litigation persuade many product manufacturers and distributors that it is worthwhile to ensure that sales and marketing personnel understand and comply with the requirements of Sections 2(d) and 2(e) when designing and implementing promotional and incentive programs in support of retail sales. To the extent that the Fred Meyer Guides have been useful in promoting compliance and reducing the risk of private litigation, they have likely allowed the FTC to devote its resources to higher enforcement priorities. That fact alone may be sufficient reason to revise the Guides so they can be of maximum utility to sellers, buyers, and their counsel.

After the January 29 deadline for comments expired, the Commission posted just six responsive submissions on its website.[6] The commenters include the ABA Section of Antitrust Law (the Section), American Antitrust Institute (AAI), Food Marketing Institute (FMI), National Automobile Dealers Association (NADA), National Community Pharmacists Association

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[4] Melissa Lipman, "FTC May Waste Time Updating Price-Bias Guide, Attys Say," *Law 360*, Nov. 29, 2013.

[5] *See, e.g., Volvo Trucks North Am. 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); *Williams v. Duke Energy Int'l, Inc.*, 681 F.3d 788 (6th Cir. 2012) (remanding for further proceedings after reversing judgment dismissing RPA claim 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); *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 (Oct. 4, 2010).

[6] Available at http://ftc.gov/os/comments/fredmeyerconsent/index.shtm.

(NCPA), and the estimable Richard M. Steuer, a Mayer Brown partner and former chair of the ABA Section of Antitrust Law, who also provided input on the Section's comment.

None of the commenters propose that the Guides be withdrawn altogether. All agree that the Guides have been and remain relevant as an aid to compliance counseling and judicial interpretation in private suits. Despite differences in the themes and level of detail in the commenters' proposals, there is consensus that the Guides should be updated to reflect more recent case law and modern business practices, especially the prevalence of Internet advertising and retailing. Below is a brief summary of each submission and a consolidated, section-by-section review of the commenters' proposals for revisions to the Guides.

ABA Section of Antitrust Law:
Revise the Guides to Conform with the Broader Policies of the Antitrust Laws

The Section of Antitrust Law's comment was a group effort organized by the current chair of the Pricing Conduct Committee, Robert Hubbard. Participants in the drafting included committee vice chair Deena Schneider, former Section chair Irv Scher and former Robinson-Patman Act Committee[7] chair Chris MacAvoy, with additional input from former Section chair Harvey Applebaum and another former Robinson-Patman Act Committee chair, Barbara Bruckmann. The comment draws heavily upon the Section's previous analyses of the RPA, including the detailed critique it submitted in 2006 to the Antitrust Modernization Commission and the ABA Report to the House of Delegates #105 (1987), in which the ABA officially adopted the Section of Antitrust Law's position that Sections 2(d) and 2(e) of the RPA be amended to require proof of competitive injury.

Accordingly, the prevailing theme of the Section's comment is that, notwithstanding the absence of an express competitive injury requirement in Sections 2(d) and 2(e), the Commission should heed the Supreme Court's repeated admonitions that the RPA be interpreted in a manner consistent with the overall goal of other antitrust laws to protect competition, not individual competitors.[8] To that end, the Section recommends that the Guides be revised to "emphasize that

[7] The Robinson-Patman Act Committee was the predecessor of the Pricing Conduct Committee.

[8] *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 181 (2006) ("Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition.*") (emphasis in original); *Great Atl. & Pac. Co. v. FTC,* 440 U.S. 69, 80 (1979) (interpretations should not "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 anti-trust legislation"); *Automatic Canteen Co. v. FTC,* 346 U.S. 61, 74 (1953) (The Act should be construed so as to ensure its coherence with the "broader antitrust policies that have been laid down by Congress.").

the Commission's concern is not on an advertising or promotional discrimination alone, but . . . 'the perceived harm to competition occasioned by powerful buyers' as a result of significant discriminations."[9] Further, based on subsequent case law and commercial reality, the Section urges the Commission to revisit its 1990 rejection of the proposition that proportional equality may be measured by the value to the seller of the marketing functions performed by the reseller, regardless of the cost of the service. In particular, notes the comment, the rationale underlying the Supreme Court's approach to functional discounts in *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990), supports revising the Guides to provide that "a seller should be able to satisfy the proportionality standard based either on the cost of the services performed or their reasonable value to the seller."

As reflected below in the consolidated list of suggested revisions, many of the Section's proposals are designed to promote consideration of the overall goals of the antitrust laws in interpreting Sections 2(d) and 2(e), while others are more squarely aimed at updating the Guides to reflect the impact of the Internet and other technological developments on modern distribution and retailing.

Food Marketing Institute: Don't Scrap the Guides, Revise Them and Clarify Buyer Liability for Inducing or Receiving Discriminatory Promotional Allowances or Services

The Food Marketing Institute works on behalf of nearly 1,250 food retail and wholesale companies in the U.S. and elsewhere, including large multi-store retail chains, regional firms and independent operators. As do several of the other commenters, FMI begins with the premise that the RPA should be construed in harmony with other antitrust laws, to promote interbrand competition, not protect existing competitors. What follows, for the most part, are practical suggestions geared toward ensuring that the Guides maintain their usefulness while taking into account changes in the methods and technologies of product distribution and marketing since 1990. To that end, as summarized below, FMI makes more than a dozen suggestions for improving the Guides, several of which echo or overlap with the proposals submitted by other commenters, including the Section's call to allow sellers to measure proportionality based on either the cost or the value of the services provided.

Of particular concern to FMI is buyer liability for inducing discriminatory promotional allowances and services. Section 2(f) of the RPA makes it unlawful for a buyer knowingly to induce or receive a discriminatory price; a necessary prerequisite of liability under Section 2(f) is a violation of Section 2(a). In contrast, there are no provisions in the RPA expressly making it unlawful to induce or receive discriminatory promotional assistance. FMI notes that courts have

[9] ABA Section of Antitrust Law, *Comments in Response to the Federal Trade Commission's Request for Public Comment Regarding Its Guides for Advertising Allowances and Other Merchandising Payments And Services (the "Fred Meyer Guides")* (Jan. 29, 2013), at 2 (quoting *Volvo Trucks N. Am., Inv. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 180-81 (2006).

consistently rejected attempts by private plaintiffs to bring such claims, except when the buyer performed no promotional services or when payments from the seller grossly exceeded the cost of the promotional services provided by the buyer.[10] In such cases, the sham promotional allowances may be treated as price offsets subject to Sections 2(a) and 2(f). To clarify the standard for buyer liability in such cases, FMI suggests that the Commission state that "Sections 2(a) and 2(f) may apply to ostensible promotional allowances for which *no* services are performed in return, or where the payments are not reasonably related to the customer's cost of performance *or the value of the promotional service to the supplier*." (Emphasis in original.)

FMI also addresses the Commission's authority under Section 5 of the FTC Act to proceed against buyers for inducing or receiving discriminatory promotional assistance. FMI takes issue with the holding of a 1962 court opinion that the Commission need not prove injury to competition in such cases.[11] "[I]n the interests of sound antitrust enforcement policy," FMI argues, the Commission should clearly state that the presence or absence of likely harm to competition will be "of paramount concern" in interpreting and enforcing Sections 2(d) and 2(e). Correspondingly, FMI proposes that Guide 13(a) be revised to make it clear that the Commission will not proceed against a buyer for inducing or receiving discriminatory promotional assistance absent evidence of likely harm to competition.

Richard M. Steuer: Add Guidance Stating that it is Lawful to Charge Different Prices and Provide Different Promotional Assistance if the Combined Value to Each Customer is Equal

In response to the FTC's call for comments, former Section of Antitrust Law chair Dick Steuer submitted his 2012 *Antitrust* magazine article, *Crossing the Streams of Price and Promotion Under the Robinson-Patman Act*.[12] In his article, Steuer notes that in the absence of clear agency guidance or case law directly on point, suppliers have been needlessly chilled from offering customers different bundles of price discounts and promotional assistance, even when the aggregate value of the bundle to each customer is equal. As Steuer points out, "Suppliers that sincerely want to treat all competing dealers equitably can face impossible situations when one discrete offer on price and a second discrete offer on promotional assistance do not fir the conflicting needs of all competing dealers, leaving some dealers better able to compete than

[10] *See, e.g., American Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F. Supp. 2d 1031 (N.D. Cal. 2001).

[11] *See Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

[12] The title of Steuer's article derives from two memorable scenes in the classic movie comedy, *Ghostbusters* (Columbia Pictures Industries, Inc. 1984). In the first scene early in the story, the Ghostbusters are warned that to cross the energy streams from their proton packs would result in "all life as you know it stopping instantaneously and every molecule in your body exploding at the speed of light." Later in the film, the Ghostbusters are forced to "cross the streams" in their climactic battle against Gozer the Destructor. Miraculously, they survive.

others." At the same time, dealers themselves view price concessions and promotional assistance as fungible, so there is little practical reason for maintaining strict legal distinctions between price discounts and promotional assistance.

In Steuer's view, modern business realities, the language of the Act, and recent case law support a reading of the RPA that would allow suppliers to "cross the streams," i.e., to comply with the Act by equalizing the value to each customer of differing bundles of discounts and promotional assistance. Using the same reasoning, Steuer also makes a good case for applying the "meeting competition" defense (see Guide 14[13] and Section 2(b) of the Act), when a supplier meets a competitive offer with a combination of discounts and promotional assistance that differs from the competitor's offer, as long as the combined value is the same as (but not greater than) the value of the competitor's offer.

American Antitrust Institute: New Business Practices Warrant Changes to the Guides

The American Antitrust Institute's stated mission is "to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws." The primary theme of AAI's comment is the need for the Commission to take into account significant changes to industry practices that have taken place in recent decades, which AAI suggests may be inadequately addressed by the existing Guides. These changes include:

- Decreased use of direct media advertising and consumer promotions and increased use of trade promotion, i.e., "incentives directed toward members of the distribution channel to induce them to buy a product or encourage them to sell it," including pay-for-performance programs. AAI suggests the Guides be updated so that it is clear that these forms of trade promotion are within the scope of Sections 2(d) and 2(e) and that the Commission consider them in formulating revisions to various sections of the Guides, including the definitions of "services" and "facilities" and the recommendation that sellers put promotional "plans" in writing.;

- Market convergence, in which reseller customers who did not previously compete with each other find themselves in competition for the same sales as a result of the Internet, globalization of trade, socio-economic changes, deregulation, etc. In AAI's view, market convergence supports taking a fresh look at the definition of "competing customers" in the Guides.;

[13] Guide 14 (16 C.F.R. § 240.14) provides, in part: "A seller charged with discrimination in violation of sections 2 (d) and (e) may defend its actions by showing that particular payments were made or services furnished in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller."

- Multichannel distribution and innovations in reseller formats, whereby the same product may reach consumers through brick and mortar retailers, company-owned stores, telemarketing agents, Internet resellers, catalogs, kiosks, vending machines, home shopping networks, etc. AAI asserts that the development of these new and diverse distribution channels likewise has important implications for the definition of "competing customer."

- Increased magnitude and diversity of slotting allowances and fees, in conjunction with new Financial Accounting Standards Board (FASB) treatment of such allowances and fees. AAI urges the Commission to consider the widening scope of what constitutes a slotting allowance in addressing the definitions of "services" and "facilities."

- AAI notes that the rise of the merchandising service industry, in which third parties assist with trade promotion and related in-store marketing and merchandising, has implications for the provisions of the Guides that address third-party performance of seller obligations.

- Increased retailer buying power aided by information technology, shifting the balance of power from suppliers to retailers in negotiating discounts, promotional support, and potentially discriminatory payments for display or shelf space. AAI suggests that the Commission bear in mind the increasing power of retailer customers when considering revisions to the section of the Guides that discusses customer liability.

AAI offers no specific language to address the new and diverse business practices discussed in its comment, but leaves it to the Commission to decide whether and how to address the issues they raise.

National Automobile Dealers Association: Update the Guides to Recognize Smaller Dealers' Utilization of Internet Advertising Platforms

The National Automobile Dealers Association, which represents nearly 16,000 new car and truck dealers, argues that there is a definite, continuing need for the Guides to (a) protect smaller dealers from being driven out of business; (b) prevent abuses by manufacturers by inducing them to give proportionally equal allowances to all dealers; and (c) increase manufacturers' attention to compliance with the RPA, absent which, "non-compliance would be higher, perhaps minimally so or perhaps significantly so," making it far more likely that disfavored dealers would resort to litigation to enforce the Act. Recognizing the prevalence of Internet-based promotion and advertising, NADA specifically suggests that the examples of "services" and "facilities" in § 240.7 of the Guides be updated to include websites and other online advertising—a "sensible update" that would allow manufacturers to recognize the varied

advertising and other promotional platforms utilized by smaller dealers. In closing, NADA argues that making significant changes to the Guides in the absence of any pressing need would send "an unmistakable message" that compliance is not necessary.

National Community Pharmacists Association:
Preserve the Guides and Step Up Enforcement

The National Community Pharmacists Association consists of more than 23,000 independent pharmacists in the United States, dispensing nearly 40% of all retail prescriptions. NCPA's submission, like that of NADA, advocates against rescinding or otherwise "weakening" the Guides. Alluding to pending litigation, NCPA asserts that major drug manufacturers have favored hospitals, universities, large pharmacy chains and mail-order pharmacies with substantial discounts, rebates, and advertising and promotional allowances not offered to independent pharmacies. NCPA states that this price discrimination is "real and longstanding, is largely uncontested at this point, and has had a dramatic negative impact on our industry," as the number of independent pharmacies has sharply declined, leading to the loss of an "economic anchor" that provides jobs and health care information to underserved rural or inner city communities. NCPA urges the Commission to recall the original purpose underlying the RPA—to protect small businesses from "large powerful buyers extracting favorable concessions from their suppliers to the detriment of smaller competitors"—and submits that not only is there a continuing need for the Guides, but "beyond that, for the Commission to bring its expertise and resources to bear in assuring that the core purposes of the [RPA] are still honored."

Consolidated List of Revisions Proposed in Comments Submitted to the FTC

The Guides are currently organized into fifteen sections. Below is a section-by-section look at the commenters' specific suggestions for revisions:

240.2 Applicability of the law. Clarify that the Guides apply to "trade promotion" and "trade deals" designed to induce distribution channel members to provide support for, and marketing effort to, the manufacturer's products and brands. (AAI)

240.3 Definition of seller. Revise to exclude entities offering digital products for downloading; such intangibles are not "commodities" subject to the RPA. (Section of Antitrust Law)

240.4 Definition of customer.

- Revise to exclude an Internet retailer that is merely acting as an agent for some other reseller of the product. (Section of Antitrust Law)

- Revise Note to Guide 4 to clarify that retailers purchasing from other dealers or making only sporadic resales do not fall within the definition of "customer," and, accordingly, delete the existing proviso "unless the seller has been put on notice that such retailer is selling its product." (Section of Antitrust Law; FMI)

240.5 Definition of competing customers. Consider the implications of new forms of distribution, including the Internet, market convergence, and Internet retailing. (AAI)

240.6 Interstate commerce. Revise to be consistent with the interstate commerce requirements applicable to Section 2(a), by limiting the application of Sections 2(d) and 2(e) to advertising and promotional assistance relating to transactions in which at least one of the sales crosses state lines. (Section of Antitrust Law; FMI)

240.7 Services or facilities.

- The word "primarily" is ambiguous and contrary to current legal interpretations and should be deleted from Guide 7, stating that "services or facilities be used *primarily* to promote the resale of the seller's product by the customer" and that [s]ervices or facilities that relate *primarily* to the original sale are covered by section 2(a)." (Emphasis added.) (Section of Antitrust Law)

- Delete "[s]pecial packaging, or package sizes" from the list of examples of promotional services covered by Section 2(d), to reflect established law that a refusal to sell particular products in a product line to certain resellers is not covered by the RPA. (Section of Antitrust Law)

- Update to include websites and other online advertising as examples of services or facilities. (NADA)

- Clarify that the seller has the ability to determine what constitutes Internet "advertising" eligible for cooperative advertising funds. (Section of Antitrust Law; FMI; *cf.* NADA)

- Consider updating to incorporate trade promotion and new practices with respect to slotting allowances and fees. (AAI)

240.8 Need for a plan.

- Specify that the recommendation of a written promotional plan will be satisfied by posting the plan on the seller's website where it is accessible to resellers. (Section of Antitrust Law; FMI)

- Clarify that a plan is sufficient as long as a customer can take advantage of some of the plan's offerings, and do not require the seller to make alternative offerings available to customers that cannot take advantage of all of the plan's offerings. (Section of Antitrust Law; FMI)

- Consider how diverse trade promotion programs are designed and implemented and the extent to which resellers participate in such plans. (AAI)

240.9 Proportionally equal terms.

- Revise examples to reflect case law holding that proportionality may be satisfied in a variety of ways, including through "tailoring of services and facilities to meet the needs of two classes of customers." (Section of Antitrust Law; *cf.* Steuer)
- Clarify that allowances do not violate the RPA as long as they recognize the value to the seller of the marketing functions performed by the reseller, regardless of the cost of the service. (Section of Antitrust Law; FMI; *cf.* Steuer)
- Delete Example 4 that suggests that sellers must offer "tagging" (i.e., naming specific customers in advertisements) to all competing customers where alternatives are offered. (Section of Antitrust Law; FMI)
- With respect to a footnote 1 to Example 5—noting that the discriminatory purchase of display or shelf space may violate the RPA and may be considered an unfair method of competition under Section 5 of the FTC Act—consider post-1990 studies of practices related to slotting allowances and fees and related practices, e.g., category management. (AAI)
- Clarify footnote 1 to Example 5 to reflect the Commission's stated view that slotting allowances will be analyzed on a case-by-case basis. (FMI)

240.10 Availability to all competing customers.

- Revise to note that a seller may limit participation in a promotional program to customers willing to meet certain conditions that are within the practical reach of most competing customers. (Section of Antitrust Law; FMI)

- Revise to indicate that a seller may tailor available advertising or promotional media (including the Internet) to the manner in which the particular retailer advertises or does business or to the forms of advertising or promotion that provide the greatest value to the seller. (Section of Antitrust Law; FMI; *cf.* Steuer; *cf.* NADA)

- Revise Guide 10(b) to state that notice of available services and allowances may direct customers to the seller's website for details of the offer. (Section of Antitrust Law; FMI)

- Revise to clarify that a website posting is not only an acceptable method of notification of an offer but that a retailer that claims it did not receive notice of an offer because it failed to look at the seller's website is foreclosed from later claiming that the seller's program was not available to it. (Section of Antitrust Law)

240.11 Wholesaler or third party performance of seller's obligations.

- Add new language indicating that when intermediaries contract to perform some or all of a seller's obligations, the intermediaries may be held responsible under Section 5 of the FTC Act for failing to perform. (Section of Antitrust Law)

- Consider drawing on the knowledge and experience of third party merchandising service providers. (AAI)

240.12 Checking customer's use of payments. Consider the increased use of sophisticated technology to aid manufacturers in verifying how resellers make use of promotional payments. (AAI)

240.13 Customer's and third party liability.

- Clarify that Sections 2(a) (and consequently Section 2(f), when the buyer's conduct is at issue) should apply only of the promotional payment "substantially exceeds any legitimate measurement, including a value- or cost-based measure." (Section of Antitrust Law; *cf.* FMI)

- Revise to make it clear that the Commission will not proceed under Section 5 of the FTC Act against a buyer for inducing or receiving discriminatory promotional assistance absent evidence of likely harm to competition. (FMI)

- Delete Example 1, because retailers and suppliers should not be discouraged from developing special or exclusive programs as part of the supplier's overall promotional program for customers. (FMI)

- Delete Example 2, because suppliers should be permitted to "fine-tune" in-store services to particular channels or customers as long as alternative services are made available. (FMI)

- Consider the implications of the increased power of large buyers to induce payment of discriminatory promotional allowances. (AAI)

240.14 Meeting competition. Clarify that a supplier can meet the competition offered by a lower-priced brand when the customer threatens to reduce or eliminate promotional services it provides to the seller if the seller does not agree to offer the allowance or service demanded by the customer. (Section of Antitrust Law; *cf.* Steuer)

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