MARKETING AND DISTRIBUTION:
ANTITRUST CONSTRAINTS ON PRICING CONDUCT

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INTRODUCTION

Antitrust compliance counseling requires a deep understanding of the business landscape in which the client buys from its suppliers and sells to its customers. In addition to understanding the client's industry, business model, and trading relationships, the compliance practitioner should have a good grasp on the competitive dynamics of the markets and market segments in which the client competes and the client's prominence in those markets and submarkets. As modern trade channels and marketing and distribution technology continues to evolve, there may be limited case law or agency authority available to offer guidance. In many instances, therefore, in situations that do not involve per se illegal cartel activity, advising clients about antitrust risk can be more art than science.

This chapter begins in Section I with an overview of the framework of the statute-based antitrust constraints on vertical pricing conduct in the U.S. Section II focuses on how the Sherman Act and its state analogs treat vertical restrictions on minimum resale prices (resale price maintenance or RPM) and minimum price advertising (MAP), and compares that treatment to the approach taken by the competition regimes in Canada, the European Union, and China. Section IV looks at the unique prohibitions against direct and indirect price discrimination imposed by the Robinson-Patman Act, a complex U.S. statute that shapes many day-to-day sales and marketing decisions of companies that manufacture and sell commodity goods in interstate commerce.

I. THE STATUTORY FRAMEWORK

The list of statutes and other sources of legal authority below may at least serve as an initial checklist of potential issues for further research and analysis. Whenever there are perceived antitrust issues arising from a proposed transaction or ongoing business dealings, however, it is advisable to consult with experienced antitrust counsel.

A. Federal Antitrust Statutes

Under U.S. federal law there are several, sometimes overlapping, statutory constraints on pricing conduct.

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 properly-defined relevant product and geographic market, and the firm has willfully acquired or maintained that power through anticompetitive, "predatory," 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. Loyalty discounts or rebates that result in *de facto* exclusive dealing may be subject to challenge under this statute.

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.

In a statement issued in 2015, the FTC explained that it would adhere to the following principles when deciding whether to use its "standalone authority" under Section 5 to challenge unfair methods of competition in the absence of a basis for alleging a violation of another antitrust statute:

- The Commission will be guided by the public policy underlying the antitrust laws, namely, the promotion of consumer welfare;
- The act or practice will be evaluated under a framework similar to the rule of reason, that is, an act or practice challenged by the Commission must cause, or be likely to cause, harm to competition or the competitive process, taking into account any associated cognizable efficiencies and business justifications; and
- The Commission is less likely to challenge an act or practice as an unfair method of competition on a standalone basis if enforcement of the Sherman or Clayton Act is sufficient to address the competitive harm arising from the act or practice.

See FTC Statement of Enforcement Principles (Aug. 13, 2015), *available at* https://www.ftc.gov/news-events/press-releases/2015/08/ftc-issues-statement-principles-regarding-enforcement-ftc-act.

B. State Antitrust Statutes

Most states have enacted legislation with language similar if not identical to that of the Sherman Act, the Clayton Act, and the FTC Act. A small number of states have enacted some version of the Robinson-Patman Act. Most of these state laws, by statutory or judicial mandate, are construed in a manner consistent with the federal courts' and the FTC's interpretation of the federal antitrust laws.

There are some important differences, however, in the manner by which federal and state statutes address certain pricing conduct. With regard to resale price maintenance (RPM) agreements, a handful of states—notably, California, Maryland, and New York—take a more restrictive approach than their federal counterpart, the Sherman Act. In contrast, state laws proscribing predatory pricing and price discrimination, in addition to being limited to the regulation of intrastate commerce, tend to be more narrowly drawn and therefore of less concern than the analogous federal prohibitions.

II. INFLUENCING RESALE PRICES: RPM AND MAP RESTRICTIONS

A. Federal Law and the Rule of Reason

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 rarely the subject of 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 was the focus of the Supreme Court's decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.* 551 U.S. 877 (2007) ("*Leegin"*), which held that minimum RPM agreements would no longer be treated illegal per se but should be assessed under the rule of reason. The rule of reason requires a fact-intensive consideration of relevant market definition and market power, and a balancing of the agreement's procompetitive and anticompetitive effects.

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

- **Protect 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.

- **Enable 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.

- **Encourage 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 could harm competition; these situations would likely be the focus of a rule of reason analysis:

- **Enable 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.

- **Facilitate 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.

- **Enable 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)).

Plaintiffs have been successful in post-*Leegin* cases challenging alleged minimum RPM where the party or parties imposing RPM had market power or there was evidence of actual or potential anticompetitive effects:

- *In re Disposable Contact Lens Antitrust Litigation*, 215 F. Supp. 3d 1272 (M.D. Fla. June 14, 2016) (in denying motion to dismiss, court ruled that class plaintiffs sufficiently alleged a relevant market, where contact lens manufacturers that were allegedly involved in a hub and spoke conspiracy to implement unilateral price policies to protect independent eye care providers from price competition from discount retailers controlled 97% of the contact lens market, and where the eye providers themselves controlled two-thirds of the disposable lens retail market).

- *Costco Wholesale Corp. v. Johnson & Johnson Vision Care, Inc.*, 2015 WL 9987969 * 13 (M.D. Fla. Nov. 4, 2015) (in denying motion to dismiss, court rejected argument that relevant market could not consist of a single branded product allegedly subject to unreasonable minimum resale price agreement imposed by contact lens manufacturer: "Given the market power of JJVC's product, and the unique posture of its availability to consumers via prescriptions written by ECPs, Costco has sufficiently alleged [a relevant product market]…both as to the entire contact lens market, and as a sub-market consisting of contact lenses manufactured by JJVC.").

- *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.

B. Conflicting Treatment of RPM Under Federal and State Law

Despite the change in federal law wrought by *Leegin*, minimum RPM is still per se illegal in some states. In Maryland, the legislature enacted a so-called *Leegin*-repealer bill, which unambiguously makes RPM per se illegal. MD. COMM. CODE § 11-204.

Post-*Leegin*, the California state attorney general brought enforcement actions based on the premise that RPM was per se illegal under state law. These matters were resolved by the entry of consent decrees under which the defendants paid substantial fines and agreed to cease the challenged practices. *California v. Bioelements, Inc*., No. 10011659 (Cal. Sup. Ct. Jan. 11, 2011); *California v. DermaQuest Inc.*, No. RG10497526 (Cal. Sup. Ct., Feb. 23, 2010), 98 Antitrust & Trade Reg. Rep. (BNA) 316 (Mar. 12, 2010). In at least two private actions in California, the courts recognized they were bound to treat RPM as per se illegal under the California Supreme Court's pre-*Leegin* decision holding that RPM was per se illegal under the Cartwright Act. *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)); *Darush MD APC v. Revision LP*, No. 12-cv-10296, 2013 WL 1749539, at *6 (C.D. Cal. Apr. 10, 2013) (similar).

In New York, a state court ruled that under New York General Business Law § 369-a—the state Fair Trade Act repealer—minimum RPM agreements are unenforceable but not per se illegal. *See New York v. Tempur-Pedic International, Inc*., 30 Misc. 3d 986 (N.Y. Sup. Ct. 2011), *aff'd*, 944 N.Y.S.2d 518 (1st Dep't 2012).

C. RPM in Canada, the EU, and China

Canada

Section 76 of the Canadian Competition Act permits the Competition Tribunal to make remedial orders against three types of "price maintenance" conduct, where that conduct has had, is having or is likely to have an adverse effect on competition in a market:

- where a person influences upward or discourages the reduction of the price at which another person supplies, offers to supply or advertises a product within Canada;

- when a person refuses to supply or otherwise discriminates against another person because of the low pricing policy of that person; and

- when a person induces a supplier to refuse to supply a product to another person because of the low pricing policy of that person.

The enactment of these provisions in 2009 decriminalized RPM in Canada, bringing the law more closely in line with the U.S., except that RPM and refusing to deal with discounters are specifically identified as potentially reviewable, albeit no longer criminal, practices.

In 2014, the Competition Bureau issued its *Price Maintenance (Section 76 of the Competition Act) Guidelines*. *See* Canadian Competition Bureau, Price Maintenance (Section 76 of the Competition Act) Guidelines (Sept. 15, 2014).

The Guidelines note that "[a]n important requirement under section 76 is that price maintenance conduct has had, is having or is likely to have an adverse effect on competition in a market, which is only likely to occur in some circumstances." The Guidelines state further that adverse effects on competition due to RPM "may occur, for example, if price maintenance conduct resulted in the exclusion of rivals or new entrant competitors to the supplier or the exclusion of discount or more efficient retail competitors. It may also occur if price maintenance conduct was being used to inhibit competition among suppliers or retailers":

> When examining whether price maintenance conduct is likely to adversely affect competition in a market, market power is a key factor in the Bureau's analysis. In a general sense, market power is the ability of a firm (or group of firms) to profitably maintain prices above the competitive level, or other elements of competition, such as quality, choice, service or innovation, below the competitive level, for a significant period of time. Where price maintenance conduct is unlikely to create, preserve or enhance market power, the conduct is unlikely to have an adverse effect on competition in a market. [*Guidelines*, § 1.]

As a general rule of thumb, in the absence of unusual features in a market, the Bureau is unlikely to find that a company with less than 35% market share has market power. *Guidelines*, § 5.2.

Among other things, the Guidelines state that supplier's suggestion to a reseller of a minimum resale price would be viewed as proof that the reseller has been "influenced" in its pricing, unless the supplier establishes that it made clear to the reseller that it had no obligation to accept the suggestion and would not suffer in its business relations with the supplier or with any other person if it failed to follow the suggestion. *Guidelines*, § 5.2.

Even when it was a criminal offense, RPM was historically a low enforcement priority in Canada, and since the Guidelines issued, there have been no noteworthy cases against which to test whether the outcome would be similar under U.S. law.

European Union

The European Union's complex antitrust regime is shaped by the Treaty on the Functioning of the European Union (TFEU), regulations adopted by the Council or the European Commission, and various notices, guidelines, and other interpretive documents, which explain in more detail the Commission's policies relating to the interpretation of its substantive antitrust rules in the context

of supply and distribution agreements. *See* Office of the European Union, "The Competition Rules for Supply and Distribution Agreements," 2012.

Similar to § 1 of the Sherman Act, Article 101(1) of the TFEU prohibits agreements that appreciably restrict or distort competition. If an agreement appreciably restricts competition, it is null and void according to Article 101(2). Article 101(3) exempts agreements when their benefits outweigh their anticompetitive effects.

Standing alone, the TFEU would require a case-by-case assessment of every vertical restriction to determine whether it appreciably restricts competition and whether its benefits outweigh its anticompetitive effects. The European Commission's so-called "Block Exemption Regulation," however, expressly provides a safe harbor for most vertical agreements by making Article 101(1) inapplicable to vertical agreements in which no party has a market share exceeding 30%. *See* Regulation (EU) No 330/2010.

The Block Exemption Regulation identifies five "hardcore" restrictions for which there is no safe harbor, even when the parties' market shares are below 30%. Minimum RPM is one of those hardcore restrictions. In the case of such agreements, therefore, companies must overcome a heavy presumption of illegality.

To date, there have been no published decisions in which the benefits of RPM have been found to outweigh its presumed anticompetitive effects. Indeed, RPM is a high enforcement priority and a basis for imposing substantial fines on infringing companies. In mid-2018, after a multi-year investigation into e-commerce practices, the EU fined four electronics manufacturers a total of €111 million for restricting the prices that online retailers could charge for their consumer goods. European Commission, Press Release, Antitrust: Commission fines four consumer electronics manufacturers for fixing online resale prices (July 24, 2018), at http://europa.eu/rapid/press-release_IP-18-4601_en.htm

In 2019, the Commission published a detailed report on competition issues raised by digital commerce, available at https://publications.europa.eu/en/publication-detail/-/publication/21dc175c-7b76-11e9-9f05-01aa75ed71a1/language-en/format-PDF/source-search. The report, entitled "Competition Policy for the Digital Era," describes the Commission's understanding of the ways in which EU markets function in the digital era and, the application of EU competition rules to online platforms. In the wake of this report, the EC has continued to take a firm stance against what its rules deem to be unlawful vertical agreements.

China

The Chinese Anti-Monopoly Law expressly prohibits suppliers from fixing resale prices or dictating minimum resale prices. At the same time, other provisions of the law arguably allow a supplier to offer proof that the benefits of its conduct outweigh any anticompetitive effects under the set of exemptions for any agreement (not just RPM) that promotes technological improvement, research and development, efficiency or the public interest.

In recent years, RPM has been a high enforcement priority of Chinese antitrust enforcers, and cases have been brought against a number of companies alleged to have engaged in presumptively illegal RPM. In contrast, in cases where private plaintiffs have challenged alleged RPM—including an influential 2014 decision by the Shanghai High Court—the courts appear to have taken an approach something like the rule of reason, placing a heavier burden of proof on the plaintiff.

In late 2017, in the first case involving judicial review of an agency proceeding against a company for engaging in RPM, the Hainan High People's Court issued a decision that upheld the relevant agency's sanctions under an EU-like "prohibition in general, exemption in individual" standard. *Yutai v. Hainan Provincial Price Bureau*, at http://wenshu.court.gov.cn/content/content?DocID=23889d51-88d8-4e87-aaa4-a85c01845f73&KeyWord=%E9%94%90%E9%82%A6

As the divergence between the standards applicable to agency prosecutions and private actions remains in place, engaging in RPM in China comes with a high degree of risk. As in the EU, however, the use of unilaterally recommended prices is a generally permissible alternative, so long as the reseller is truly free to set its own selling price.

D. Compliance Implications of Divergence in the Treatment of RPM

The divergent approaches to RPM complicate antitrust counseling in this area. 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. In many non-U.S. jurisdictions (e.g., the EU and China), RPM is presumptively illegal. For these reasons, many practitioners advise that the most prudent approach is to forgo RPM altogether.

E. Unilateral Conduct and 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 independent, 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.:

- *In re Disposable Contact Lens Antitrust Litigation*, 215 F. Supp. 3d 1272 (M.D. Fla. June 14, 2016) (denying motion to dismiss, court rule that vertical agreements were established by evidence of communications between non-discount resellers, their distributor, and contact lens manufacturers regarding the enactment, implementation, and enforcement of unilateral price policies, as well as direct evidence of actual negotiations and an "agreement" between one manufacturer and a discount retailer).

- *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. Do the client's internal documents and the policy itself 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?

5 *COLGATE* POLICY "RED FLAGS"

If any of these questions can be answered in the affirmative, the company should engage antitrust counsel to assess and take steps to reduce the potential antitrust risks:

1. Is the supplier adopting the policy at the request or insistence of one or more retailers?

2. Has the supplier solicited input from one or more retailers on the terms of the policy before or after its adoption?

3. Has a retailer provided the supplier with a suggested form of unilateral policy?

4. Are the products covered by the policy mass-marketed consumer goods that require little to no investment in point-of-sale services?

5. Are resellers involved in enforcing the supplier's policy against other resellers?

F. Minimum Advertised Price (MAP) Policies and 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 U.S. 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."); *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).

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 U.S. 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).

MAP programs can be challenged if there is a basis for claiming they impede or eliminate competition. *See, e.g., 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, there is a low risk that a MAP policy or agreement will be actionable as an "unreasonable" restraint on trade. *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.").

Elsewhere in the world, the Canadian Competition Bureau's 2014 *Price Maintenance Guidelines* state that "Subparagraph 76(1)(a)(i) of the Act applies to price maintenance conduct that arises by way of an 'agreement, threat, promise or any like means'. The Bureau considers this element to include any conduct by which a supplier implicitly or explicitly purports to either confer a benefit on a retailer who adheres to the supplier's influence on the retailer's selling or advertised prices, or to impose a penalty on a retailer if the retailer disregards the supplier's influence on its prices." *Guidelines*, § 2.1.2.

Under the Canadian Competition Act, therefore, just as in a case involving RPM, a showing of an adverse effect on competition is required before MAP restrictions may be subjected to scrutiny. As a practical matter, absent market power, unless a particular MAP program effectively facilitates horizontal collusion or the exclusion of rivals to the detriment of a well-defined relevant market, it is unlikely to be challenged.

In China, a MAP restraint alone probably will not violate the Anti-Monopoly Law as long as the reseller remains free to set the actual selling price. It should be noted, however, that Article 14 of the Price Law makes it unlawful for companies to "work collaboratively to control market prices to the detriment of the lawful rights of other undertakings or consumers." To the extent a MAP program might effectively allow the supplier to dictate resale prices or facilitate horizontal price-fixing among competitors, such conduct would likely be prohibited.

EU competition rules make less of a distinction between RPM and MAP restraints. MAP policies may be viewed, particularly in the context of online retailing, as improperly dictating retail prices by limiting the retailer's ability to inform customers of available discounts, thereby removing an incentive for price competition between retailers. *See, e.g.*, European Parliament, Notice to Members, Reply of the European Commission to Petition No 2383/2014 by Norbert Perstinger (Austrian), on the introduction of the Minimum Advertised Price (MAP) in the European Union (Nov. 25, 2015) ("While no case law exists yet, it can be expected that MAPs, when analyzed on their own, would also be considered to constitute (indirect) RPM and thus a [hardcore] restriction."); Lisa Totino, "Recent European Developments in Online Resale Price Maintenance," in *International Antitrust Bulletin*, the newsletter of the International Committee of the ABA Section of Antitrust law (March 2016).

MAP restrictions may be an effective means of supporting a reseller network and protecting the supplier's brand image. In some cases, however, there may be aspects of the product, the market, and the policy terms that make such restrictions less effective. Some general guidelines for designing MAP restrictions include the following:

A 10-POINT CHECKLIST FOR MAP RESTRICTIONS

1. Are the restrictions and the consequences for noncompliance set forth in a standard agreement or written communication addressed to all resellers?

2. Can the restrictions be read and understood by nonlawyers?

3. Do the client's external communications, internal documents, and the restrictions themselves make it clear that the restrictions apply to *advertising* and *advertised prices*, not to prices at which the supplier's goods are actually sold?

4. Is the definition of what constitutes "advertising" clear, and does it address special aspects of online retailing, such as banners, sitewide discounts, prices displayed in

"shopping carts," "member prices" displayed only to individual customers after logging in with a password, etc.?

5. Are there provisions for providing written notice of violations and reasonable cure periods? Do the notice violations use standardized language that is clear and consistent with the language of the restrictions themselves?

6. Are there incentives to reward or encourage compliance, such as cooperative advertising funds?

7. Are the restrictions enforced in good faith and evenhandedly against noncompliant resellers?

8. Are exemptions tailored to the nature of the product and the business, e.g., allowing noncompliant advertising for goods nearing their "sell-by date," discontinued products, etc.?

9. Are there increasing penalties for uncured violations so that a supplier is not faced with the decision to terminate a reseller upon a first violation?

10. Are amendments to the restrictions announced in advance, with a reasonable time allowed for resellers to comply?

III. 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 a "disfavored" purchaser—i.e., a firm that has paid higher prices than another, "favored" purchaser—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. For all practical purposes, however, that criticism may be overblown. In its most recent decision addressing the scope of the Act, the Supreme Court reiterated its longstanding directive that the Robinson-Patman Act should be narrowly construed and that the lower courts should 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) (typically referred to as Section 2(a), i.e., of the enacting legislation), 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) and distinct from the concept of "competitive harm" within the framework of the rule of reason standard governing potential violations of the Sherman Act.

Moreover, 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 even 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 sought is limited to injunctive relief. Regardless of the merits, however, 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.

A. The Essential Elements of Price Discrimination

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

(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, within the same time period. 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. *Crossroads Cogeneration Corp. v. Orange & Rockland Util., Inc.*, 159 F.3d 129 (3d Cir.1998); *Sioux City Truck & Trailer Inc. v. Ziegler, Inc.*, 2016 WL 7106519 (N.D. Iowa 2016).

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., Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016) (holding that price discrimination claims were properly dismissed where long-term contract pricing differed from prices charged for spot sales: "[u]nlawful secondary-line price discrimination exists only to the extent that the differentially priced product or commodity is sold in a 'reasonably comparable' transaction"); *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).

Since the Ninth Circuit issued its opinion in *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171 (9th Cir. 2016), it has affirmed the dismissal of a §2(a) claim on the grounds that material differences in terms under which plaintiffs and its competitor purchased from defendant precluded a finding of price discrimination. *Two Brothers Distributing, Inc. v. Valero Marketing & Supply Co.*, 2019 WL 1758478 (9th Cir. 2019) (unpublished).

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. *Metro Comms. Co. v. Ameritech Mobile Comms., Inc.*, 984 F.2d 739 (6th Cir. 1993) (apply dominant-nature test to transactions involving sale of goods and services together, but no when goods and services are sold separately); *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989); *Mathew Enterprise, Inc. v. Chrysler Group LLC*, 2015 WL 6471175 (N.D. Cal. 2015) (to satisfy "commodities" element, plaintiff only had to allege facts establishing that "the dominant purpose" of challenged agreement between motor vehicle dealer and manufacturer was "to discount vehicles, a good, rather than rent, a service.").

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*, 562 U.S.837 (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).

In a 2017 federal case, a group of wholesale distributors brought suit under the RPA against the manufacturer of 5-Hour Energy drink, claiming that club store retailer Costco paid lower prices than they did. In denying summary judgment, the court ruled there were genuine issues of fact regarding whether the plaintiffs actually competed with Costco for 5-hour Energy sales and that they experienced substantial price discrimination over a significant period of time. *ABC Distributing, Inc. v. Living Essentials* LLC, 2017 WL 3838443 (N.D. Cal. 2017). The case settled shortly before going to trial.

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 (1963); *Falls City Indus.*, 460 U.S. at 437-38 & n.8). *See Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 4 F. Supp. 3d 1123 (D. Ariz. 2014) (price-discrimination claim could not be based on difference between prices of parts sold to independent repair service provider and airlines that performed repair services in-house), *aff'd on other grounds*, 836 F.3d 1171 (9th Cir. 2016).

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. *Falls City Indus.*, 460 U.S. at 435; *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 minimis* 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) *Napleton's Arlington Heights Motors, Inc. v. FCA US LLC*, 2016 WL 5792402 (N.D. Ill. 2016) ($1,600 price difference for one year established *Morton Salt* inference). *Mathew Enterprise, Inc. v. Chrysler Group LLC*, 2016 WL 4269998 (N.D. Cal. 2016) (2.3% price difference for 11 months established *Morton Salt* inference). The inference may be inapplicable, however, when a sustained price difference is actually a legitimate functional discount that represents "reasonable reimbursement for the purchasers' actual marketing functions." *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 571 (1990); *Mathew Enterprise, Inc. v. Chrysler Group LLC*, 2017 WL 1408010 (N.D. Cal. 2017).

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. Centers, LLC v. Car Sound Exhaust Syst., Inc.*, 723 F.3d 1019 (9th Cir. 2013); *Feesers, Inc. v. Michael Foods, Inc.*, 591 F.3d 191, 208-09 (3d Cir. 2010).

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*, 723 F.3d at 1022-23 ("[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*).

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.

The interpretation of Sections 2(d) and 2(e) is the subject of detailed written guidance that was first issued by the Federal Trade Commission in 1969 and revised most recently in late 2014. *See generally* FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 79 Fed. Reg. 58,245 (Sept. 29, 2014) (amending 16 C.F.R. § 240).

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. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959) (fabric stores competed with variety stores in sales of dress patterns); *Orologio of Short Hills, Inc. v. The Swatch Group (U.S.), Inc.*, 653 Fed. Appx. 134, 142-143 (2016) (unpublished decision) (denying summary judgment where plaintiff's expert identified competitors in plaintiff's geographic market area that received allegedly discriminatory co-op advertising assistance); *Eastern Auto Distrib. v. Peugeot Motors of Am., Inc.*, 795 F.2d 329 (4th Cir. 1986).

2. Proportionally Equal Terms

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; *Orologio of Short Hills, Inc. v. The Swatch Group (U.S.), Inc.*, 653 Fed. Appx. 134, 143-44 (3d Cir. 2016) (unpublished decision) (summary judgment was precluded by factual questions regarding whether seller gave adequate notice of the availability of tagged ads and slotting fees), *Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 1001 (5th Cir. 1974). 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.

4. Special Packaging as a Promotional Service

In a complaint for declaratory and injunctive relief filed in late October 2014—less than one month after the newly revised *Fred Meyer Guides* were announced—Woodman's Food Market, a regional grocery chain based in Wisconsin, alleged that Clorox violated Section 2(e) by refusing to sell large-sized packages of various consumer products to Woodman's while selling them to warehouse clubs such as Sam's Club, Costco, and BJ's Wholesale Club. Woodman's alleged that the large packs that Clorox refused to supply constituted "special packaging" that was a promotional service within the meaning of Section 2(e) because the package size offered a convenience—i.e., the ability to stock up with one trip to the store and at lower cost—that "promoted" sales of the product to the general public.

In moving to dismiss, Clorox argued that package size by itself is not a "service," and that Clorox could not be held liable for merely refusing to sell a particular product to a particular retailer. *See Woodman's Food Market, Inc. v. The Clorox Co*., 2015 WL 420296, *3 (W.D. Wis. Feb. 2, 2015), citing *Harper Plastics, Inc. v. Amoco Chemicals Corp.*, 617 F.2d 468, 470 (7th Cir. 1980) (Section "2(e) does not prohibit a seller from choosing its customers and from refusing to deal with prospective purchasers to whom, for whatever reason, it does not wish to sell").

The district court ruled, however, that Woodman's stated a viable claim on the basis of two mid-20th century Federal Trade Commission decisions—*In re General Foods Corporation*, 52 F.T.C.

798 (1956) and *In re Luxor, Ltd.*, 3l F.T.C. 658 (1940)—and on the newly-issued 2014 *Fred Meyer Guides*, which had expressly reaffirmed the FTC's view that package size could constitute a promotional service.

In Clorox's appeal to the Seventh Circuit, the FTC itself filed an amicus brief declaring that its *Luxor* and *General Foods* "decisions contradict modern antitrust doctrine and should no longer be followed. Properly understood, Section 2(e) does not generally require manufacturers to sell the same package sizes to all buyers who demand them; instead, it prohibits discrimination only in genuinely promotional services or facilities distinct from the product itself." FTC Brief at 1-2.

When *is* package size a "genuinely promotional" service covered by Section 2(e)? According to the FTC, "to trigger Section 2(e), the seller must offer the special package size *primarily to convey a promotional message*, not simply to meet demand from retailers or consumers for desirable product attributes or a lower unit price." FTC Brief at 3 (emphasis added).

The Seventh Circuit agreed, and on that basis reversed the district court's ruling. *Woodman's Food Market, Inc. v. The Clorox Co.* 833 F.3d 743, 750 (7th Cir. 2016).

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.

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