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FEDERAL TRADE COMMISSION

16 CFR PART 240

GUIDES FOR ADVERTISING ALLOWANCES AND OTHER MERCHANDISING PAYMENTS AND SERVICES

AGENCY: Federal Trade Commission.

ACTION: Request for public comments.

SUMMARY: The Federal Trade Commission ("Commission") requests public comments on the overall costs and benefits of and the continuing need for its Guides for Advertising Allowances and Other Merchandising Payments and Services ("the Fred Meyer Guides" or "the Guides"), as part of the agency's review of all its current regulations and guides.

DATES: Written comments will be accepted until January 29, 2013**.**

ADDRESSES: Interested parties may file a comment online or on paper, by following the instructions in the Request for Comment part of the **SUPPLEMENTARY INFORMATION** section below. Write "Fred Meyer Guides Review" on your comment. You may file your comment online at *https://ftcpublic.commentworks.com/ftc/fredmeyerguides*, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex B), 600 Pennsylvania Ave., N.W., Washington, D.C. 20580.

FOR FURTHER INFORMATION CONTACT: Neil W. Averitt (202) 326-2885, or Julie A. Goshorn (202) 326-3033, Bureau of Competition, Federal Trade Commission, 600 Pennsylvania Avenue, N.W., Washington, D.C. 20580.

SUPPLEMENTARY INFORMATION:

I. BACKGROUND

The Fred Meyer Guides are intended to help businesses comply with sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act ("the Act"). *See* 15 U.S.C. §§ 13(d)-(e). These sections of the Act generally require a seller to make advertising and

promotional allowances or services available to all competing customers on proportionately equal terms. The Fred Meyer Guides help sellers meet these requirements by providing elaboration and examples of some of the statute's central provisions, such as the definition of "competing customers" and some of the permissible accounting means by which payments can be made proportional.

The Commission promulgated the Fred Meyer Guides under sections 5 and 6 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 45-46, in 1969. Industry guides such as these are administrative interpretations of the law. Therefore, they do not have the force and effect of law and are not independently enforceable. The Guides are intended to reflect and interpret the requirements that courts have imposed upon sellers, in actions brought by private parties as well as by the Government. The Guides were most recently reviewed and amended in 1990. *See* 55 FR 33651 (Aug. 17, 1990).

The Guides contain a total of fifteen sections. The first seven of these consist of definitions and explanations that spell out the general scope of the Robinson-Patman Act and of the Guides themselves. Section 1 describes the purpose of the Guides, and emphasizes that, while they are intended to be consistent with the case law, they do not themselves have the force of law. Section 2 spells out systematically the jurisdictional prerequisites that must be met before 2(d) or 2(e) of the Robinson-Patman Act will apply, including, for example, having a seller of products, engaged in interstate commerce, who either directly or through an intermediary, makes certain payments or provides certain services. Section 3 defines the term "seller," explaining that the term reaches any person making sales for resale, that it includes intermediaries in the distribution chain such as wholesalers and distributors, and includes sales of goods that must be processed before being resold. Section 4 defines the term "customer," clarifying that the term includes indirect purchasers and the headquarters of group buyers, but not the individual stores in such groups. Section 5 defines "competing customers" to include all businesses that compete in the resale of the seller's products of like grade and quality at the same

functional level of distribution (*e.g.,* a seller must offer the same promotion to a retailer that buys through a wholesaler as it offers to a retailer that buys directly from the seller if the two resell within the same geographic area). Section 6 defines "interstate commerce," specifying that firms may be subject to the Robinson-Patman Act if there is any part of their business that in any way crosses state lines. Section 7 defines "services" and "facilities" to cover those that promote the resale of the seller's product by the customer, as distinct from services that relate primarily to the original sale (which are covered by section 2(a) of the Act).

The next three sections interpret the substantive requirements of the Robinson-Patman Act. Section 8 suggests that sellers should provide their promotional payments and services according to a pre-determined plan, and, if the plan is complex, that they would be well advised to put it in writing. Section 9 interprets the reference to "proportionately equal terms" and notes that no single way of proportionalizing is prescribed by law, but suggests that convenient and acceptable techniques for doing so would include providing benefits on the basis of the dollar volume or the unit quantity of the product purchased during a specified period. Section 10 explains that the seller should take reasonable steps to ensure that the benefits are useable in a practical sense by all competing customers, a principle that may require offering alternative forms of benefits for customers of different sizes or customers that use different sales channels.

The last five sections address a variety of administrative issues and affirmative defenses. Section 11 states that a seller may contract with intermediaries, such as wholesalers, to perform its obligations. Section 12 states that the seller should take "reasonable precautions" to ensure that customers expend the allowance solely for its intended purposes. Section 13 deals with the subject of customer liability, and notes that, although sections 2(d) and 2(e) of the Robinson-Patman Act apply only to sellers, the Commission may proceed under section 5 of the FTC Act against customers who induce sellers to violate the Robinson-Patman Act. Section 14 affirms that a "meeting-competition" defense is available to charges under 2(d) and 2(e), provided that the seller acts in good faith to meet those competing offers. Section 15 notes that it is no defense

to a charge that an allowance violates the Act that the payment or service could be justified through savings in the cost of manufacture, sales or delivery (*i.e.,* there is no cost-justification defense to charges of violation of sections 2(d) and 2(e) of the Act).

II. REGULATORY REVIEW PROGRAM

The Commission periodically reviews all of its rules and guides. These reviews seek information about the costs and benefits of the agency's rules and guides, and their regulatory and economic impact. The information obtained assists the Commission in identifying those rules and guides that warrant modification or recision. Therefore, the Commission solicits comments on, among other things, the economic impact of and the continuing need for the Fred Meyer Guides; possible developments in the case law that need to be reflected in the Guides; and the effect on the Guides of any technological, economic, or other industry changes.

III. REQUEST FOR COMMENT

The Commission solicits written public comments on the following questions:

(1) Is there a continuing need for the Fred Meyer Guides?

(2) Have there been changes in the case law that are not, but should be, reflected in the Guides?

(3) How, if at all, should the Guides be revised to account for new methods of commerce introduced as a result of the growth of the Internet since 1990? In particular, how should the Guides address: (a) support for Internet or other electronic promotion in various forms, such as pay-per-click, display ads, targeted ads, mobile ads, or other formats; (b) manufacturer support for different pages within a retailer's website (*e.g.,* support for display on the home or "landing" page of a website, versus support for display on an interior page); (c) general principles for distinguishing between price reductions and promotional allowances in an Internet context; (d) the definition of "competing sellers" as it applies to traditional and Internet retailers; (e) general principles of proportional equality, if any, that should apply to promotional support given to traditional and Internet retailers; and (f) any other aspects of the Guides that might need revision or clarification in light of the development and prominence of e-commerce?

(4) To what extent, if any, should § 240.13(a) of the Guides be revised to reflect cases discussing the possibility that what appears to be a discrimination in promotional allowances may support a private action for inducing or receiving a discrimination in price? *See, e.g.,* American Booksellers Ass'n v. Barnes & Noble, 135 F. Supp. 2d 1031 (N.D. Calif. 2001); *but see* United Magazine Co. v. Murdoch Magazines Distribution, 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001).

(5) What benefits and costs have the Guides had on businesses that grant promotional allowances and services?

(6) What benefits and costs have the Guides had for businesses who receive promotional allowances and services?

(7) What benefits and costs have the Guides had for ultimate consumers?

(8) What changes, if any, should be made to the Guides to increase their benefits to those who use them and to consumers? Are there terms in the statute or concepts in the case law that are not presently addressed in the Guides, and that might benefit from clarification? How would these changes affect the costs that the Guides impose on firms that conform to them?

(9) What changes, if any, should be made to the Guides to reduce the burdens or costs imposed on firms that conform to them? How would these changes affect the benefits provided by the Guides?

(10) Do the Guides overlap or conflict with other federal, state, or local laws or regulations? If so, what changes in the Guides, if any, would be appropriate?

(11) In addition to the issues mentioned in Question (3) above, since the Guides were last amended, what, if any, developments in technology or economic conditions require modification to the Guides? What modifications are required?

(12) What effects, if any, do the Guides have on the costs, profitability, competitiveness and employment of small business entities?

(13) Are there foreign or international laws, regulations, or standards concerning the avoidance of discriminatory allowances and services that the Commission should consider as it reviews the Guides? If so, what are they? (a) Should the Guides be changed to harmonize with these foreign or international laws, regulations, or standards? Why or why not? (b) How would harmonization affect the costs and benefits of the Guides for consumers? (c) How would harmonization affect the costs and benefits of the Guides for businesses, particularly small businesses?

(14) Are there any other problems occurring in the provision of promotional allowances and services covered by the Guides that are not dealt with in the Guides? If so, what mechanisms should be explored to address such problems?

IV. INSTRUCTIONS FOR SUBMITTING COMMENTS

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before January 29, 2013. Write "Fred Meyer Guides Review" on the comment.

Your comment, including your name and your state, will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission website, at http://www.ftc.gov/os/publiccomments.shtm. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission website.

Because your comment will be made public, you are solely responsible for making sure that your comments do not include any sensitive personal information, such as a Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment does not include any sensitive health information, such as medical records or other individually identifiable health information.

In addition, do not include any "[t]rade secret or any commercial or financial information which is . . . privileged or confidential," as discussed in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, do not include competitively sensitive information such as costs, sales statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names.

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you must follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c). In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comments to be withheld from the public record. Your comment will be kept confidential only if the FTC General Counsel, in his or her sole discretion, grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comment online. To make sure that the Commission considers your online comment, you must file it at *https://ftcpublic.commentworks.com/ftc/fredmeyerguides*, by following the instructions on the web-based form. If this Notice appears at *http://www.regulations.gov/#!home*, you also may file a comment through that website.

If you file your comment on paper, write "Fred Meyer Guides Review" on your comment and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex B), 600 Pennsylvania Ave., N.W., Washington, D.C. 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

Visit the Commission website at *http://www.ftc.gov* to read this Notice and the news release describing it. The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The

Commission will consider all timely and responsive public comments that it receives on or before January 29, 2013. You can find more information, including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at *http://www.ftc.gov/ftc/privacy.htm*.

By direction of the Commission.

Donald S. Clark
Secretary.