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OVERPAYMENTS IN SUPPLIER PROMOTIONAL PROGRAMS: THE FTC SOLUTION*

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I. INTRODUCTION

ON AUGUST 4, 1972, the Federal Trade Commission (Commission) revised the *Guides for Advertising Allowances and Other Merchandising Payments and Services* (Guides or amended Guides),¹ which interpret sections 2(d) and 2(e) of the Robinson-Patman Act (Act).² Section 2(d), in order to eliminate the opportunity for unfairness and disguised price discrimination which might otherwise exist, re-

* The views herein expressed are only those of a member of the Federal Trade Commission Staff. They do not purport to be and are not to be construed as representative of Federal Trade Commission policy.

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1. *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. §§ 240.1-17 (1973) [hereinafter cited as *Guides*].

These *Guides* supplanted the 1969 *Guides*, 34 Fed. Reg. 8285 (1969), also known as the *Fred Meyer Guides*, after the case which prompted their promulgation. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). That decision required suppliers who made promotional payments available to direct buyers to make them available on comparable terms to indirect buyers (through wholesalers, etc.) with whom the direct buyers were in competition. *Id.* at 358. The 1969 *Guides* expanded the previous 1960 *Guides* to allow practical implementation of this decision. 34 Fed. Reg. 8285 (1969). The present article involves changes made unrelated to the *Meyer* case or the problem with which it dealt.

2. Section 2(d) provides that:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d) (1970).

Section 2(e) provides that:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing,

quires that suppliers make promotional allowances available to buyers on "proportionally equal terms." The Guides were promulgated to indicate a course of conduct that would avoid the risk of law violation and possible Commission prosecution.³

The type of promotional allowance under consideration is that given by manufacturers to their customers subject to the performance of specified promotional activities. For a given allowance, such customer activities might include advertising in local newspapers, setting up store displays, and maintaining adequate supplies — all for the benefit of the manufacturer's product. Frequently the allowance is offered on a volume basis, as a per case discount, with the amount of discount predicated upon the service to be performed.⁴

The draftsmen of the amended Guides recognized that when all buyers obtain the same allowance for the same promotion from their common supplier, larger buyers, who have the ability to indulge in some promotions at a lower cost, might receive excess funds.⁵ They further recognized that some buyers received considerably greater allowances than other buyers for performing the same task, irrespective of cost savings.⁶ The drafters have attempted to eliminate any such excesses by, *inter alia*, inserting the phrase "cost or approximate cost"

handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionately equal terms.

Id. § 13(e).

Since only section 2(d) concerns promotional allowances, this article will deal solely with that subsection.

3. See 34 Fed. Reg. 8385 (1969). It should be noted at this point that the Commission Guides do not have the force of law, but rather are suggestive of methods of doing business which will avoid the risk of Commission prosecution. Thus, they are an expression of what the Commission *thinks* the law is:

Industry guides are administrative interpretations of laws administered by the Commission for the guidance of the public in conducting its affairs in conformity with legal requirements. They provide the basis for voluntary and simultaneous abandonment of unlawful practices by members of industry. Failure to comply with the guide may result in corrective action by the Commission under applicable statutory provisions. Guides may relate to a practice common to many industries or to specific practices of a particular industry.

16 C.F.R. § 17.1(a) (1973). *But see* Alterman Foods, Inc., 82 F.T.C. 298 (1973), wherein the Commission de-emphasized a specific example in the Guides to find the respondent in violation of section 2(d) through section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970). 82 F.T.C. at 340-41.

4. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 189 (1955). See also Millstein, *Cooperative Advertising*, 7 ANTI-TRUST BULL. 873, 894-96 (1962). The discount serves, in essence, as a fund from which promotional expenses are drawn. The "fund" is not necessarily intended to cover all anticipated promotions.

5. For example, a high-volume advertising grocery chain may receive preferential rates from the local newspaper over its single store counterpart for comparable advertising. See Guide 7, example 7.

6. For example, a typical plan under the old reading would be to allow a 10c per case discount for any customer who places a 3-inch ad in the local newspaper. The overpayment is clear when it is considered that a 50-store chain could comply with the requirement at the same or lower cost as its single-store counterpart, yet be vastly overpaid due to its greater purchases.

wherever the phrase "cost or value" had appeared in the 1969 Guides.⁷ For example, the Guides now provide that:

Allowances that have little or no relationship to *cost or approximate cost* of the service provided by the retailer may be considered to be in violation of section 2(d) or subject to the prohibitions of section 2(a) of the amended Clayton Act⁸

Previously, suppliers argued that if they compensated all customers who complied with their promotional programs on "proportionally equal terms" from their own perspective, they were within the law. This was because the value of the promotion to the supplier would not vary with the economies or buying power of his customer. Further, larger payments to larger buyers could be justified because those buyers accounted for more sales of the supplier's product, and thus large buyer promotions were of greater value to the supplier. The "proportionally equal" method of compensation probably made the supplier's bookkeeping simple because only one formula for payments had to be maintained. In addition, it limited the supplier's need to investigate to ascertain if the allowances were properly used.⁹ However, this method also permitted the supplier to favor indirectly and/or inadvertently his larger purchasers, whose economies or leverage with local media sellers allowed them to perform the promotions more cheaply than could his smaller buyers or whose higher purchases allowed them greater excesses. Section 2(a) of the Robinson-Patman Act, by its own broad terms, was designed to prevent *direct* price discrimination exercised in favor of (large) buyers.¹⁰ However, such apparent discrimination could continue to exist because suppliers and their counsel construed "value," as used in the Guide's interpretation of the narrower section 2(d), to mean value to them. Thus, some large buyers had the capacity to benefit from the allowance, irrespective of, and in addition to, benefiting from the promotion itself.

The 1972 Amendments evidence the Commission's conclusion that minimizing excess payments to some buyers is of greater importance than preserving to sellers the right to an administratively simpler promotional program which happened to provide excess funds to one buyer but not to another. The Commission clearly viewed the opera-

7. Guide 9 n.2 and Guide 11 were so modified. See 37 Fed. Reg. 15,700 (1972). Guide 7, example 7, which attempts to rectify the situation described in note 5 *supra*, demonstrates the impact of this alteration.

8. Guide 9 n.2. Another change ends the supplier's exposure to liability if he has taken reasonable steps to verify that the buyer has complied with other sections of the Guides, even though the buyer "has retained an allowance in excess of the cost or approximate cost, if the actual cost is not known, of services performed" Guide 11(b).

9. See 34 Fed. Reg. 8288 (1969).

tion of such programs from the small buyer's perspective in order to give meaning to proportional equality.¹¹

On April 12, 1973, a paper delivered at the ABA Antitrust Section Spring Meeting characterized this and other revisions in the amended Guides as "stiff, commercially unrealistic and . . . administrative overkill."¹² It also condemned the revisions for extending the prohibitions of the Robinson-Patman Act beyond existing precedent.¹³ While this position may not be without merit as to workability, it did not fairly address the supportable legal and philosophical bases for the amended Guides' implementation. This article will attempt to make the case for the "cost or approximate cost" approach to assessing advertising allowances and other merchandising payments and services.

II. LEGISLATIVE HISTORY

While no one will dispute the cloudy history of the Robinson-Patman Act, at least this much is uncontroverted: the Act was intended to curb the power of giant purchasers to receive preferential prices from manufacturers and, at the same time, to protect the smaller purchasers who lacked that buying power.¹⁴ As if a general prohibition of discriminatory practices were not enough, the framers antici-

11. As a direct consequence of the amended Guides, the Commission, on October 25, 1973, countermanded 12 advisory opinions which had been issued between 1966 and 1971. 38 Fed. Reg. 28270, 28272, 28273, 28277 (1973).

The Commission had embraced this viewpoint before 1968, as indicated by the 1960 Guides, predecessor to the 1969 amendments, which stated *inter alia*:

A seller may not properly pay nor may a customer properly receive and retain any amount in excess of that actually used by the customer to perform the service.

Guides for Advertising Allowances and Other Merchandising Payments and Services: Compliance with Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act (May 19, 1960). For the full text of the 1960 Guides, See E. W. KINTNER, AN ANTITRUST PRIMER 258-63 (1964 ed.). For a discussion of the 1960 Guides, see generally Comment, *Recent Problems Under Section 2(d) of the Robinson-Patman Act*, 29 U. CHI. L. REV. 160 (1961).

12. Applebaum, *Promotional Allowances and the Fred Meyer Guides*, 42 ANTI-TRUST L.J. 355-56 (1973).

13. *Id.* at 363.

14. This is amply demonstrated by the following passage extracted from the House floor debate made by the bill's co-sponsor, Representative Wright Patman:

What are the objectives of this bill? Mr. Chairman, there has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstances and for the same quantities of goods. Is that right or wrong? It is wrong.

80 CONG. REC. 8111 (1936). The draftsman of the bill, H.B. Teegarden, also shed some light on the bill's direction.

[The Seller] must not . . . be permitted to bleed part of his customers for the benefit of the others, and if any of his customers have the power to compel him to do so, that power constitutes the evil against which this bill is directed.

Hearings Before the House Judiciary Comm. To Amend the Clayton Act, 74th Cong.,

pated some of the devices sellers and buyers might use to avoid the law and attempted to block those escape routes. One such attempt produced section 2(d), forbidding "pseudo-advertising allowances," which was intended to be enforced on a per se basis, as opposed to its progenitor, section 2(a), which required a showing of anti-competitive effect.¹⁵

Despite the strict prohibitions of section 2(d), its standard for specific enforcement was left "provocatively vague."¹⁶ Prior to its passage, Congressman Utterback, Chairman of the House Conferees, stated on the House floor in reference to section 2(d):

The existing evil at which this part of the bill is aimed is . . . the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves. The prohibitions of the bill, however, are made intentionally broader than this one sphere, in order to prevent evasion in resort to others by which the same purpose might be accomplished¹⁷

Frederick Rowe concluded in his outline of the legislative history of the Act that the House Judiciary Committee condemned, *inter alia*, payments made by manufacturers to a buyer which were "greatly in excess of his actual services."¹⁸ This statement is itself "provocatively vague," leaving unanswered the question of in whose eyes these "services" are to be measured.

To demonstrate the confusion, one need only juxtapose the report of the Senate Judiciary Committee chaired by Senator Logan with his subsequent remarks made on the floor of the Senate. The report stated:

[A]n allowance becomes unjust when the service is . . . rendered . . . and . . . the payment is grossly in excess of its value¹⁹

Later, the Senator stated:

Legitimate allowances for advertising and matters of that nature may be made, but allowances must not be made for the *purpose* of giving the purchaser an opportunity to buy goods at a lower price than others similarly situated may buy them.²⁰

15. W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 129 (1963). See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959).

16. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 370-72 (1962).

17. 80 CONG. REC. 9418 (1936).

18. F. ROWE, *supra* note 16, at 369.

19. S. REP. NO. 1502, 74th Cong., 2d Sess. 7 (1936).

20. 80 CONG. REC. 6282 (1936) (emphasis added).

Reasoning from the latter statement leads to the conclusion that given the requisite "purpose," any advertising allowance which exceeds the advertising *cost*, provides an excess which, in fact, reduces the price of the goods. The first passage, on the other hand, evidences an intent to measure excess allowances in terms of *value*.²¹ It is doubtful that this confusion is by design. The history of the Act is silent regarding the difference between cost and value, the nature of quantity promotional discounts, or the ability of larger buyers to secure preferential advertising rates.²²

To obtain any guidance from the history then, the analysis should be moved back one step to look at the general, rather than specific, goals of the section. Since there is lingering doubt that value to the seller was the desired measure, it is helpful to ascertain whether this provision was aimed at preventing discrimination against smaller buyers or at preventing larger buyers from extracting unreasonable allowances from helpless sellers.²³ If it were directed more towards helping the former, then the appropriate measure must be one which sets a ceiling on allowances to (large) buyers and allows them no post-promotional surplus, *i.e.*, a cost measure. If section 2(d) were

21. A more stark conflict in the legislative history is demonstrated by the following passages. First:

Where . . . a manufacturer grants to a particular chain distributor an advertising allowance of a stated amount per month per store in which the former's goods are sold, a competing customer with a smaller number of stores, but equally able to furnish the same service per store, and under conditions of the same *value to the seller*, would be entitled to a similar allowance on that basis.

Second:

Such an allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value, or when in any case the customer is deriving from it equal benefit to his own business and is thus enabled to shift to his vendor substantial portions of his own advertising cost, while his smaller competitor, unable to command such allowances, cannot do so.

H.R. REP. NO. 2287, 74th Cong., 2d Sess. 16 (1936) (emphasis added). The former statement supports the position that value to the seller should be the standard, while the latter would reject that standard where competing buyers could not both benefit by the allowance. This accepts the buyer's point of view, wherein any payment over the costs of one buyer favors him, *vis-à-vis*, the buyer with higher costs, or here pointedly where one buyer can accept the promotion and another cannot. This arguably goes beyond the question of mere availability.

22. Perhaps the fact of unequal advertising rates was not apparent in the 1930's, and thus the matter of overpayments was also not apparent. One commentator has stated:

The statute employs a confusing combination of interrelated sections to regulate a method of doing business — mass merchandising — that was only vaguely understood at the time the bill was enacted.

E. KINTER, A ROBINSON-PATMAN PRIMER 14 (1970).

23. The specific proponents of the "value" standard, whose interest is apparently in not reducing the outlay of promotional allowances, are by no means "helpless." For example, one of the most active forces favoring the retention of the "value" approach was the Grocery Manufacturers of America, an association whose Board of Directors include the Chairmen of Coca-Cola, Bristol-Myers, Kellogg, and Colgate-Palmolive. See Letter from Grocery Manufacturers of America to Ernest G. Barnes (GMA Letter), June 30, 1971, regarding Proposed Amendments to the Guides for Advertising Allowances and Other Merchandising Payments and Services (copy on

directed towards the latter objective, then the standard used should set a ceiling on the amounts sellers would be compelled to pay and thus prevent powerful buyers from securing more than the promotion's worth to the seller.

While by no means clearly resolving this dilemma, a thorough reading of the history of the Act is persuasive that the primary purpose of section 2(d) is the protection of small competitor buyers. Congressman Patman's statement made in the House debate best demonstrates this conclusion:

One great concern in America last year compelled manufacturers to pay it \$8,000,000 in pseudo-advertising allowances and pseudo-brokerage charges. That amount of benefits the independent merchants of the country were not entitled to receive from the same manufacturers, purchasing the same quantity under the same conditions. You [Mr. Chairman] are in favor of giving the citizens the same right as the corporations in this country, and that is *all* that we are asking in this bill.²⁴

Even if this position be doubted, but it be conceded that small competitor protection was *a* primary purpose of section 2(d), then the sought-for interpretation would still protect sellers, and the protection of sellers' interests must constitute the only other possible "primary" purpose of that section. If the seller can pay no more to the buyer than the cost of the service to the buyer, then unreasonable allowances could not be exacted from the seller. Thus, both legislative motives would be fulfilled. It is enough to say, then, that *a* primary purpose of the Act was to end small buyer discrimination, a position which can be easily defended.²⁵ The present interpretation fulfills both legislative motives by protecting both purposes, whereas a reading which allows the seller to decide "value" protects but one.²⁶

24. 80 CONG. REC. 8111 (1936) (emphasis added). This expands on a similar remark made the year earlier in the House committee hearings by Representative Patman: "This bill is asking you to give the independents the same rights and benefits as the chains." *Hearings Before the House Judiciary Comm. to Amend the Clayton Act*, 74th Cong., 1st Sess. ser. 10, at 14 (1935).

25. Cf. *Hearings Before the House Judiciary Comm. to Amend the Clayton Act*, 74th Cong., 1st Sess. ser. 10 (1935), wherein H.B. Teegarden, the section's draftsman and representative for the United States Wholesale Grocers' Association, noted that "buying power is the source of the evil. The seller is merely an innocent victim." *Id.* at 31. This might suggest that the bill was designed *primarily* to aid sellers. Yet, only a few lines down the page, Teegarden noted that the thrust of the bill is to "prohibit discrimination between customers generally." *Id.* See E. W. KINTNER, AN ANTITRUST PRIMER 60-61 (2d ed. 1973).

26. The Supreme Court has stated generally that:

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power.

FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960); *accord*, FTC v. Fred Meyer, Inc., 390 U.S. 341, 350-52 (1968). See C. EDWARDS, THE PRICE DISCRIMINATION LAW 157 n.7 (1959).

III. CASE LAW AND OTHER PRECEDENT

The cases in this area are not alien to the adoption of the "cost" limit. Where use of the word and concept "value" is found, it is seemingly based less on a response to a felt need to consider the seller's interest than on an inability to flatly apply the "cost" alternative to promotional functions incapable of precise measure. Where measurable promotional activities have been involved, the courts have not missed the opportunity to advocate the stricter cost standard.

In *R.H. Macy v. FTC*,²⁷ the respondent exacted from selected sellers \$1000 each to finance its 100th anniversary promotion. None of the money was used directly to promote the seller's products.²⁸ Presented with no measurement difficulties, the Second Circuit stated:

[O]ne of the evils that Congress made clear that it was condemning under Section 2(d) was an advertising or promotional allowance exacted by a large buyer to achieve indirect price discriminations, either through shifting the buyer's advertising costs to his vendors, or through simply *pocketing the difference between an inflated allowance and that amount actually spent to advertise or promote the vendor's product*.²⁹

The buyer in *Vanity Fair Paper Mills, Inc. v. FTC*,³⁰ persuaded the respondent seller to contribute to its anniversary promotion. The buyer's promotion included newspaper advertising, displays, and "personal enthusiasm." However, the buyer's schedule, from which Vanity Fair selected a promotional option, was geared directly to the circulation and size of any newspaper advertisements placed.³¹ Although the case directly concerned the limited availability of the promotion, the Second Circuit noted interstitially that the offending respondent's "policy did not require it to pay a uniform proportion of the *cost* but only 'an amount reasonably related' thereto,"³² and that the benefit to the seller was not sufficient to determine the legitimacy of the program.³³

27. 326 F.2d 445 (2d Cir. 1964).

28. *Id.* at 446. This fact alone required some progressive interpretation to place the practice in the ambit of section 2(d), rather than section 2(a) of the Act.

29. 326 F.2d at 448 (emphasis added).

30. 311 F.2d 480 (2d Cir. 1962).

31. *Id.* at 483. This was undoubtedly measured by the standard rates for such advertisements.

32. *Id.* at 487 (emphasis added).

33. *Id.* at 486-87. The court did suggest that some varying benefits to the seller might mitigate the circumstances of the discrimination between competitor buyers, but refused to consider and measure any such variations. Thus, it advanced to the determination that the payment of allowances in amounts widely varying from "a uniform proportion of the [promotional] cost" borne by each competitor constituted a violation of

In the Ninth Circuit's treatment of *Fred Meyer, Inc. v. FTC*,³⁴ the payment of promotional allowances in excess of promotional costs was a significant issue.³⁵ Fred Meyer, a grocery chain, solicited \$350 each from many of its suppliers in payment for pages in a promotional coupon booklet. The payment approximated the proper share of the booklet's cost for each supplier.³⁶ Some suppliers furthered the promotion by giving additional volume reductions, and by redeeming customer discount coupons from the booklet. The court held that the excesses paid over the cost of the provided services constituted a violation of section 2(a) of the Robinson-Patman Act. While the court did not hew tightly to the line of the *cost* of services rendered approach,³⁷ its proscription of some promotional payments which were probably correlated with the value of services received by the supplier is indicative of its adoption of this perspective.³⁸ Specifically, discounts given that related to the higher volume of sales generated by the booklet promotion were to some extent a measure of the value of the promotion to the seller, and were voided by the court.³⁹

Two cases, often relied upon to denote putative court or Commission acceptance of the value standard, manifest the difficulties in the calculation of promotional expense and the nonexistence of cost evidence at the Commission level.⁴⁰ In *Lever Brothers Co.*,⁴¹ one of the so-called *Soap Cases*,⁴² some of the promotional allowances offered at the small business side of the marketing spectrum were, at best, imprecisely measurable. For example, the price of handbills, in-store

34. 359 F.2d 351 (9th Cir. 1966), *rev'd in part*, 390 U.S. 341 (1968).

35. *Id.* at 362. The Supreme Court did not review the lower court's finding on this issue. 390 U.S. at 344 n.3.

36. 359 F.2d at 355-56.

37. The court stated in part:

[W]hile . . . services rendered need not be shown precisely to equal promotional payments received, . . . the relationship between payments received and promotional services rendered cannot be unreasonable

Id. at 362.

38. The court concluded there was a violation of section 2(a), "[i]n view of such substantial disparities between receipts and *proved* allocable expenses . . ." *Id.* (emphasis added). It would appear that this is merely another way of saying *cost*.

39. *Id.* The greater the amount of the suppliers' products that was sold, the greater the value of the promotions must necessarily have been to them.

The court's analysis is admittedly vitiated in part by its failure to characterize the repayment as a violation of section 2(d) proper. See note 38 *supra*. The court stated that there was "some support" for such a finding, but concluded that it was "not necessary" to make it, in light of the obvious existence of the overpayment, which allowed a direct finding of a section 2(a) violation. *Id.* Cf. *American Cooperative Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907, 913 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946) (payment in excess of advertising cost is a violation of section 2(a)).

40. *Giant Food, Inc.*, 58 F.T.C. 977 (1961), *aff'd as modified*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); *Lever Brothers Co.*, 50 F.T.C. 494 (1953).

41. 50 F.T.C. 494 (1953).

42. The other two *Soap Cases*, *Proctor & Gamble Distributing Co.*, 50 F.T.C. 513 (1953), and *Colgate-Palmolive-Peet Co.*, 50 F.T.C. 523 (1953), presented the same issues and were decided the same day as the *Lever Brothers* case.

displays, and feature sales could have been difficult and cumbersome for some merchants to calculate under the "cost" alternative. Thus, the Commission appeared to adopt the "value to the supplier" standard.⁴³ However, the Commission specifically found that a hearing examiner's ruling, which forbade the introduction of evidence on the relationship between the *costs* of the services and the allowances given, was "too restrictive."⁴⁴ The failure of complaint counsel to make a record for appeal, however, was held to waive any error.⁴⁵ It is not clear what effect such cost evidence would have had if the Commission had been exposed to it. If the "value to the seller" theory were truly accepted, it would have eclipsed any need to prove costs at all in that case, as the issue involved the fairness of varying payments to different competing customers. If the acceptable standard of fairness was determined from the seller's viewpoint, the customer's costs should have been irrelevant. This inconsistency in *Lever Brothers* and the other *Soap Cases* underscores the difficulties the Commission was having with the "cost or value" interpretation in general.⁴⁶

In the second case, *Giant Food, Inc. v. FTC*,⁴⁷ the services performed, which the Commission attempted to relate to allowances paid,⁴⁸ were incapable of valuation and, therefore, the aspect of the complaint relating to overpayment was dismissed.⁴⁹ The case involved allowances which were paid for media advertising, the costs of which

43. 50 F.T.C. at 511-12.

44. *Id.* at 511.

45. *Id.*

46. The Commission also stated:

Section 2(d) permits payments for services or facilities actually furnished. Certainly, payments for services or facilities not furnished are not authorized. The same would be true of payments *grossly* in excess of the cost or value of the services rendered.

Id. (emphasis added). Syntactically, the first two sentences stand as distinguished from the third by use of the words: "The same would be true . . ." Therefore, that third sentence either supports or rebuts those preceding; it does not modify them. In this context, it is likely that the sentence is meant as support. Yet, the sentences espouse two *different* standards. One would find a violation in effect, where payment exceeded various furnished elements; the other would find a violation where cost or value was "grossly" exceeded. Thus, assuming "value" is equal to "services of facilities . . . furnished," two different lines are drawn to determine the violation — one *at* value, the other well above it. Even though both lines are beyond the cost standard, the fact of this obvious inconsistency must stand as testimony to the failure of the Commission to truly come to grips with the rule in 1953.

47. 58 F.T.C. 977 (1961), *aff'd as modified*, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963).

48. The second count of the complaint specifically charged that the respondent: [F]ailed to expend the entire amount of money received from each supplier for advertising to be done in promoting his products and diverted substantial amounts of such payments to its own use.

Id. at 1005. The case was brought against the buyer, Giant Food, Inc., under section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1970), although the underlying policy was derived from section 2(d) of the Robinson-Patman Act. 58 F.T.C. at 1005-10.

49. 58 F.T.C. at 1010. To be precise, the count was dismissed because of a failure of proof. *Id.*

were calculable, and allowances which were paid for "in-store promotion" and "supervisory services for assuring prominent display of the suppliers' wares," the costs of which were not calculable.⁵⁰ Since the Commission conceded the absence of information which would allow complete valuation, its espousal of a value to the seller approach, while admittedly unhelpful to the instant thesis, was not relied upon and was, therefore, empty as a holding.

In two other cases, the seller's value standard was embraced but little support for the position can be derived therefrom.⁵¹ In *General Foods Corporation*,⁵² the respondent, in an effort to boost its lunch wagon business, gave price discounts to proprietors in exchange for their agreement to perform numerous promotional and quasi-promotional duties.⁵³ The Commission dismissed the section 2(d) count since all services were not likely to have been performed by all the merchants, although payments nevertheless were made to them, and because some of the services could not be valued.⁵⁴ The opinion contains an apparent contradiction⁵⁵ in that the clear cost test of rules promulgated for another industry was juxtaposed with, and given as support for, the proposition that there must be a relationship between the allowance and "cost or reasonable value."⁵⁶ The Commission further stated that each type of service, to fall within section 2(d), "must be capable of having a price or value tag put on it."⁵⁷ If these statements are to be reconciled, one would have to presume that perhaps the Commission has not perceived any difference between

50. *Id.* at 1009-10. Further, the contracts for allowances were either vague or silent as to how monies earmarked for normally well-defined advertising activities were to be spent. *Id.* at 1008.

51. *American News v. FTC*, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); *General Foods Corp. v. FTC*, 52 F.T.C. 798 (1956).

52. 52 F.T.C. 798 (1956).

53. These duties included: maintaining adequate stocks, offering services offered by competitors, and arranging for display of products and promotional material. *Id.* at 819-20.

54. *Id.* at 823. In other words, the payments were not true promotional allowances.

55. The only way to avoid this contradiction would be to read "value" as meaning value to the buyer.

56. Specifically, the Commission stated:

The *same thought* was expressly in the rules promulgated for the Corset, Brassiere and Allied Products Industry:

"Note 1: Industry members giving advertising allowances to competing customers must exercise precaution and diligence in seeing that all of such allowances are used in accordance with the terms of their offers.

Note 2: When an industry member gives allowances to competing customers for advertising in a newspaper or periodical, the fact that a *lower advertising rate* for an equivalent space is *available to one or more, but not all, such customers*, is *not* to be regarded by the industry member as *warranting the retention* by such customer or customers of *any portion* of the allowance for *his or their personal use or benefit*."

There must be a discernible relationship between the amounts paid and the cost or *reasonable value* of the services rendered. In other words, each type of service must be capable of having a price or *value tag* put on it.

52 F.T.C. at 823 (emphasis added).

“cost” or “value,” except that the latter denotes intangible services which are incapable of being priced.

In *American News Co. v. FTC*,⁵⁸ an inability to measure the cost of prominently displaying national magazines perhaps accounted for the Second Circuit’s complete abandonment of the concept of cost, with *total* reliance placed upon value.⁵⁹ However, this case focused on buyer exaction of excessive allowances from sellers. Thus, it could be convincingly argued that the (value to) seller perspective was adopted for the limited purpose of showing that the allowance was in *no* event fair to the seller. The Commission’s acceptance of seller valuation in advisory opinions, now rescinded, may have been attributable, at least in the past, to measurement uncertainties as well as to its failure to *directly* address the problem.⁶⁰

A recent section 2(d) case, though not directly germane, nevertheless provides further support for the propriety of the cost standard. *Colonial Stores, Inc. v. FTC*,⁶¹ involved allowances given to Colonial by its suppliers to promote their products in a special promotional booklet and to defray the costs of free promotional distribution of some of the suppliers’ products. The costs of both were probably calculable. Finding a violation of section 2(d), the Fifth Circuit stated:

Some minimal effort to proportionalize in good faith must be made, and while promotional benefits received may enter into the calculation, they cannot obliterate entirely the fact that the fundamental relationship is one of proportionality among offers. *To hold otherwise would result in widely varying promotional payments in amounts almost directly related to the size and mercantile prowess of the individual payee, a consequence which § 2(d) was enacted to preclude.*⁶²

While not expressly rejecting a suppliers’ value basis, this passage makes clear that benefits to the buyer were not to be predicated on his size or power — a position which is consistent with the instant premise.⁶³

It would seem then that the earlier cases suggest that a breakdown, as in *Giant*, or a nonexistence, as in *General Foods*, of cost measurement criteria led to an elevation of the value method as an appropriate alternative. Yet, the case with the clearest measurement,

58. 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962).

59. *Id.* at 109.

60. See note 11 and accompanying text *supra*.

61. 450 F.2d 733 (5th Cir. 1971).

62. *Id.* at 743-44 (emphasis added; emphasis of the court omitted).

63. Since the case was primarily concerned with the unavailability of similar offers to competitors, it might be argued that the court’s remarks should be interpreted no further than to require that smaller buyers have the opportunity to receive generally the same promotional payments as larger buyers.

R.H. Macy, did not even mention "value" in passing. Nor has the Commission hesitated to lay down a cost standard in promotional areas in which concrete criteria have been available. The Trade Practice Rules for the Hosiery Industry (Hosiery Guides)⁶⁴ provide an excellent example. These rules state, in pertinent part:

Note 1: Industry members giving allowances for advertising or sales promotion must . . . exercise precaution and diligence in seeing that *all* such allowances are used by the customers for such purpose. Customers receiving such allowances must not use same for any other purpose.

. . . .

Note 2: When an industry member gives allowances to competing customers for advertising in a newspaper or periodical, the fact that a lower advertising rate for equivalent space is available to one or more, but not all, such customers, is not to be regarded by the industry member as warranting the retention by such customer or customers of any portion of the allowance for his or their personal use or benefit.⁶⁵

Note 2 specifically covers one of the prime abuses indirectly visited upon small buyers by virtue of large buyer power, and one of the reasons a clearer cost standard might have been promulgated in 1972.

IV. COMMENTATORS

A number of commentators on this subject, many of them attorneys in the private bar, favor a "value-to-seller" test when forced to a choice. The reasoning behind their choices should be examined. Ira Millstein, for example, advocates "*at least a limited 'value received' concept . . . not necessarily keyed to volume.*"⁶⁶ He then uses media advertising, ironically, the very abuse about which the Hosiery Guides and Rowe's legislative history were so specific,⁶⁷ as an instance where he would like the "value received" standard to be used.⁶⁸

64. Trade Practice Rules for the Hosiery Industry, 16 C.F.R. §§ 152.1-101 (1973). See 16 C.F.R. § 17.1(b) (1973).

65. 16 C.F.R. § 152.14(d) (1973) (emphasis added). Rowe's comments about the Hosiery guides, which are strongly applicable to a cost test in general, are:

The Commission's requirements would inhibit collusive arrangements whereby inflated promotional rate claims are submitted by distributors to a winking supplier. Thus the supplier may be billed for advertising expenditures at higher rates than the customer actually pays to the advertising medium — due to savings by discounts or through local display rates lower than the national rate which the supplier defrays.

F. ROWE, *supra* note 16, at 410.

66. Millstein, *Sections 2(d) and (e) Robinson-Patman Act — Compulsory Universal Reciprocity?*, 37 ANTITRUST L.J. 77, 94 (1968) (emphasis added).

67. See notes 64 & 65 and accompanying text *supra*.

68. Millstein, *supra* note 66, at 94.

Millstein's position can be understood best by viewing the genesis of his thoughts. In a 1962 article⁶⁹ he proposed a "value received" approach as a refinement of the more widely adopted "volume" approach, whereby a percentage discount per unit was allowed, regardless of seller's value, to purchasers who promoted in the prescribed method. This latter method had led to seller overpayments which were regarded as intolerable even to sellers. Hence, Millstein offered the "value received" approach as a method by which sellers could obtain their money's worth for promotional activities for which they paid, and also suggested means by which the approach could be implemented. Apparently, the reluctance at that time to use this method was based on the relative difficulty of measurement.⁷⁰ Despite the difficulties with overpayments, the per unit discount approach had been favored because of its facile implementation.⁷¹ Thus, in 1962 Millstein did not focus on a legal examination of the present proposition at all and in 1968 he did so only slightly;⁷² both times, he focused more on the practicalities of his plan.

Frederick Rowe's advocacy of a "value-to-seller" test does not flow smoothly from the argument he makes for it.⁷³ On the one hand, he notes that reimbursement for "actual cost outlays" would be inadequate because other distributor costs would be ignored. He then jumps to the notion that *all* elements of promotional *value* must be included to measure the worth to the supplier.⁷⁴ There are perhaps two arguments presented here: one, that value to the supplier is a shorthand method of measuring cash outlay, plus any elusive "internal costs"; the other, that since "*worth* to the supplier" is the main concern, "*value* to the supplier," its natural synonym, is the logical measuring stick to use. Under this latter approach, any discussion of costs, (*e.g.*, "internal costs"), appears unrequired.

The first argument fails by virtue of the experiential limits of its truth. It is no doubt true that value *may* equal direct plus indirect costs. But substantial quantity discounts are commonly found in

69. Millstein, *supra* note 4.

70. *Id.* at 894-95.

71. *Id.* at 889-96.

72. Millstein, *supra* note 66, at 93.

73. Specifically this commentator states:

[U]nless the disparity between the supplier's contribution and the value of the promotion rendered by the distributor is fraudulent or grossly excessive, the "fair and reasonable" standard of the *Soap* cases should apply. The worth to the supplier of the distributor's promotional performance is not realistically measurable solely by reference to the distributor's actual cash outlays to an advertising medium, which would ignore the distributor's internal costs, but derives from *all* elements of promotional value. Above all, value to the supplier, not merely cost to the distributor, must be the crucial test.

F. Rowe, *supra* note 16, at 411 (emphasis supplied).

advertising. Such discounted media compliance, when joined with indirect costs, which must vary among customers, may only randomly equal supplier's value.⁷⁵ Another example of imprecise valuation is the practice of sellers to inflate promotional value by "calculating" the prestige which (prominent) buyers lend to advertising their product. Even if objective measurement of this intangible could be accomplished, it too might be found to be only casually related to seller's value.⁷⁶

The second argument assumes that the primary intent of the Robinson-Patman Act was to prevent the overpayment of advertising allowances by sellers at the mercy of large buyers, in terms unfavorable to the sellers, *i.e.*, in excess of the promotional value. This assumption is neither fully supported nor elsewhere adopted by Rowe, and this Article has attempted to demonstrate that this was not the primary intent of section 2(d). It is contrary to the history of this section to ignore the plight of smaller buyers, for whom a supplier's value standard may still be discriminatory.

Another commentator, Paul Warnke, flatly states that:

[A] buyer in all likelihood may safely accept a promotional payment that more than compensates him for the cost of rendering the service.⁷⁷

He first notes that the Commission has approved the payment of graduated allowances for graduated promotions, but then suggests that a flat allowance for graduated promotions would probably never be challenged. The reason given is that there is no prohibition against permitting *all* customers to "earn the same overpayment."⁷⁸ Warnke is accurate on this point if the supplier's allowance is then a pro tanto across-the-board per unit price cut.⁷⁹ If the promotion requirements are nonexistent or evanescent, then such an allowance

75. Further, Rowe might argue that the operation of an advertising department, which only large buyers would have, of course, is a "cost," which a broad "value-to-supplier" standard best measures. But, even the cost of such departments must be spread over the buyer's entire advertising output, some of which is unsubsidized. Therefore, these indirect costs may, in fact, constitute only a nominal portion of the total cost of any *one* advertisement for which the supplier compensates the purchaser.

76. This practice, needless to say, normally rewards only the largest buyers. Its arbitrariness makes the "value" standard an empty gesture for maintaining "proportionally equal terms" between buyers. Absent *any* measurement criteria, the discrimination inherent in the "value" approach may be cognizable under section 2(a). *Cf.* *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part*, 390 U.S. 341 (1968).

77. Warnke, *Advertising and Promotional Allowances Under Federal Trade Laws*, in *MANUAL OF FEDERAL TRADE REGULATION AFFECTING RETAILERS* 25, 34 (J. Bliss & I. Millstein ed. 1963).

78. *Id.* at 33.

79. Or, at worst, such an allowance would constitute a cut which benefits small buyers for whom a flat overpayment will constitute a greater per unit discount from their smaller purchases. Query whether discrimination favoring smaller buyers constitutes a violation of the Act.

is not for promotion at all and must be viewed as a price cut.⁸⁰ However, if the supplier imposes promotional requirements with which even one buyer is unable to comply, although he would like to, then the entire cost machinery must be wheeled into place.

Corwin Edwards, in a dispassionate analysis of this subject, approaches advertising allowances from two "rival conceptual views"; as a "concealed discount" and as "a price paid for a legitimate advertising service."⁸¹ While he questions why the Commission, as of 1959, had not committed itself to one or the other direction, the Commission, in fact, had addressed itself to section 2(d) from the former standpoint. Even the *Soap Cases* are forthright in their position that section 2(d) does not authorize a form of overpayment.⁸² Payment for any legitimate service would seem to have no place conceptually in a discussion of "overpayment."

Edwards' view of concealed discounts, however, begins at a level "substantially in excess of the value of the service rendered."⁸³ Nevertheless, faced with the revised *cost* threshold, Edwards' analysis could support the soundness of the "cost or approximate cost" position. Speaking on a related matter — proportional equality in general — he states:

[T]he respondent under Section 2(d) cannot excuse his special allowance by showing that it is justified by considerations of economy or efficiency.⁸⁴

The disparity between cost and value is commonly related to such economies or efficiencies as may be enjoyed by larger buyers. It is, therefore, logical to suppose that if a supplier cannot absolutely select one buyer in lieu of another because of economies, then similarly he cannot *relatively* advantage one over the other.⁸⁵

80. Warnke's example tracked the promotions at issue in the Giant Food case which required, among other things, only that the buyer continuously stock the product for a specified period, without specifying any amount necessary. This is not a true *promotional* requirement. Warnke, *supra* note 77, at 33-34.

81. C. EDWARDS, *supra* note 26, at 158. The gist of the latter view is that a supplier could be oblivious to proportional equality if he simply procures advertising through his customer, qua agent, much as he would procure a raw material. *Id.* at 158-59. The legislative history evidences recognition that this might occur and indicates that any such advertising must in no way refer to the local business of the buyer/agent selected. See 79 CONG. REC. 9079 (1935) (remarks of Representative Patman); *Hearings Before the House Judiciary Comm. to Amend the Clayton Act*, 74th Cong., 1st Sess., ser. 10, at 38-39 (1935) (statement of H.B. Teegarden). This probably restricts the freedom of any such agent to advertise for his own benefit, even secondarily, in connection with the supplier's product.

82. See, e.g., *Lever Brothers Co.*, 50 F.T.C. 494, 511 (1953).

83. C. EDWARDS, *supra* note 26, at 159 (emphasis added).

84. *Id.* at 164.

85. Cf. REPORT OF THE ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION 99 (separate statement of Richard A. Posner) (1969). Posner would seek modification of section 2(d) to permit allowances to be paid which are disproportionate, due to varying customer efficiencies. *Id.*

V. PRACTICALITIES

Even if the foregoing legal analysis be accepted, the proponents of the old value standard would still assert that the practical inability to implement the new "cost or approximate cost" standard is reason to preserve the value standard.⁸⁶ One commentator, Harvey Applebaum, has stated that even "a team of CPA's" could not estimate the costs of in-store displays or merchandising promotion for a substantial variety of customers, including indirect retailers.⁸⁷ The Grocery Manufacturers of America (GMA), representing a group of manufacturers whose generic name it bears, described numerous practical difficulties in their comments submitted to the Commission prior to implementation of the amended Guides.⁸⁸ They asserted generally that the added burdens imposed by the changes would limit the ability of suppliers to engage in allowance programs.⁸⁹

The first substantive criticism presented by the GMA was that some forms of promotion, such as in-store displays, do not lend themselves to cost analysis. Such analysis, the GMA stated, leads to figures which "are not only irrelevant, but misleading, and . . . would lead to inequitable results."⁹⁰ Second, the GMA criticized the Commission for offering no guidance as to the measurement of cost, questioning specifically how labor and materials and rental space for a store display should be calculated: Should rental space be included at all? Should the allowance be based on the total area given to the display or just for the increment over that area normally designated for the supplier's product?⁹¹ Third, the GMA argued that even when calculable, such figures can be the subject of "fraud and gross irregularities" since they are so "highly subjective."⁹² Fourth, GMA submitted that customers may not wish to provide "detailed cost information" to their suppliers, as such data would not only be costly to compile, but also might expose the customer to antitrust risks by providing the appearance of collusion, and would make available to the supplier matter

86. See GMA Letter, *supra* note 23; Applebaum, *supra* note 12, at 364; Shniderman, *Collateral Discrimination Under the Robinson-Patman Act — Section 2(c), (d) and (e)*, in 17 A.B.A. ANTITRUST SECTION 410, 418-20 (1960). In fact, Shniderman, offered no legal objection to the cost standards.

87. Applebaum, *supra* note 12, at 364. The indirect retailers were a group included within the Act's protection as a direct result of the *Fred Meyer* decision. See note 1 and accompanying text *supra*.

88. GMA Letter, *supra* note 23.

89. *Id.* at 2.

90. *Id.* at 3.

91. *Id.*

which could "jeopardize the security of . . . [the buyer's] confidential business information."⁹³

Fifth, the GMA believed that smaller retailers would be more adversely affected than larger retailers, since the former take the greatest advantage of in-store displays, for which cost is difficult to calculate, while the latter utilize media promotional alternatives the cost of which is presumably easier to calculate.⁹⁴ Since the programs traditionally utilized by smaller retailers would be more difficult to implement, the GMA suspected that manufacturers could not comply with proportional equality and would, therefore, withdraw such programs entirely.⁹⁵

Sixth, regarding newspaper advertising rates, the GMA said that "unreasonable and unworkable" burdens would be imposed on sellers who, it was claimed, would be required to know both where the advertisement was being placed and the line rate that the newspaper would charge a specific buyer.⁹⁶ The GMA asserted that paying retailers the same amount for advertising in the same newspaper "is from the manufacturer's viewpoint" as non-discriminatory as an offer could be. The GMA further implied that if a seller were required to pay the promoting buyer his "local rate," he could not give him additional compensation for overhead costs.⁹⁷ Finally, the GMA did not think the manufacturer "should be held responsible . . . because one customer is capable of performing such services more efficiently or for a lower cost than another."⁹⁸

93. *Id.* at 3-5. The GMA Letter offered *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953), as demonstrative of the legal risks involved in the sharing of a seller's cost information with its buyer. GMA Letter, *supra* note 23, at 5. Reliance on this case however, is misplaced. First, *Automatic Canteen* concerned buyer inducements under Section 2(f) of the Robinson-Patman Act. Second, it involved *seller's* costs, not *buyer's* promotional costs. The difference is crucial. Knowledge by a buyer of the costs of various sellers would materially affect the ability of the latter to fairly dispense their goods in competition with each other. Knowledge by a seller of his buyer's promotional cost, *e.g.*, how much he pays for labor, or for rental space per square foot (if such be required), would not handicap the buyer in dealing with his seller, since it bypasses critical information, such as buyer volume and profit, more often used to measure competitive performance. In fact, under a "value to the seller" approach, a proliferation of buyer volume figures has been necessitated by past plans. See, *e.g.*, FTC Administrative Opinion, Tripartite Promotional Assistance Plan, 16 C.F.R. § 15.367 (1973). Peripheral overhead information would seem to offer limited insight into a buyer's operation. Cost figures might, in any event, be estimated or be approximately calculable by reliance on third-party sources.

Automatic Canteen does demonstrate, however, that in the past the Commission has required rigid proof of cost information in Robinson-Patman cases. 346 U.S. at 68 n.6. Hopefully, such rigidity will be left out of future section 2(d) enforcement actions with respect to the measurement of "cost".

94. GMA Letter, *supra* note 23, at 4.

95. *Id.*

96. *Id.* at 5.

97. *Id.*

98. *Id.* at 4.

In response to the GMA's complaints, it can be fairly stated that they are directed more to the implementation of the changes than to their legitimacy.⁹⁹ The assertions that certain activities are difficult to measure only demonstrates the usefulness that the "approximate cost" alternative should have and the flexibility that, without question, must be inherent in its use.¹⁰⁰ That inequity *could* be attached to a cost basis for promotions is a certainty, but there was no showing by GMA that inequity was in any way *lacking* under the "value" standard.

Second, the failure of the Commission to provide measurement criteria is no greater than their failure to provide similar criteria for the measurement of value in its early stages. It is the task of manufacturers and others to seek advisory opinions as they have in the past. Hence, the GMA's concern about whether a calculation of rental space cost should be made at all is itself a straw man. Surely, obvious measurement criteria like rental cost for the space occupied by a given display could not be opposed, provided, of course, that the rental cost was determined by the worth of the building, not the worth of the tenant. Sound accounting procedure allocates costs to the use of any such space in a retail business and the Commission is not likely to turn its back on requests to consider its objective inclusion as an element of cost.

Third, to suggest that "fraud and gross inequities" could result from a "subjective" determination of cost is to suggest apparently that the manufacturer would have no hand in establishing *objective* criteria for cost measurement and conducting checks to assure that abuses are not occurring. It also assumes that *approximate* cost information might not be available from third-party sources. All of these assumptions made by the GMA require empirical proof.

Fourth, the information which the buyer will need to make available to the seller may be substantially less extensive than the GMA suspects. Of course, the seller will establish the criteria to be first used. For a given display, for example, the seller might indicate that it will occupy 7 square feet of space and 1 man-hour to assemble and maintain. It is doubtful that much information would be required to estimate the cost. The buyer would probably be disclosing little vital information by reporting a figure calculated as a percentage of his

99. The letter does make a short legal argument, as well. *Id.* at 4-5.

100. Guide 11 suggests that the need for flexibility has already been anticipated. It states that:

[W]hen customers may have different but closely related costs in furnishing services that are difficult to determine, such as the cost for distributing coupons from a bulletin board or using a window banner, the seller may furnish to each customer the same payment if it has a reasonable relationship to the cost of providing the service or is not grossly in excess thereof.

rent plus overheard and a valuation of 1 hour of a clerk's or stock-boy's time. Furthermore, information which could be deemed more vital has been required by programs under the "value" standard in the past. It is also doubtful that the disclosure by a buyer of bits and pieces of his operating information would result in any antitrust law vulnerability.¹⁰¹

Fifth, the GMA's claim that smaller retailers will be more adversely affected than larger retailers is proved fallacious by GMA's conclusion that promotional programs would have to end since "proportional equality" could not be achieved. It is difficult to understand how no program at all could do more harm to smaller than to larger retailers.¹⁰²

While newspaper advertising rates would be difficult for a manufacturer to discern in *every* case, there is no suggestion in the amended Guides that this be a requirement. To be relieved of liability, the manufacturer is only required to take in good faith "reasonable and prudent measures to verify the performance of his competing customers."¹⁰³ No "unreasonable and unworkable" burden could be fairly read into a "reasonable and prudent" standard. However, the manufacturer would no doubt be required to spot check customers objectively suspected to be the most likely beneficiaries of advertising discounts.

As to the GMA's assertion that a cost standard might not allow the payment of the overhead expenses associated with advertising, the same might have been said of the predecessor value standards. Presumably, buyers who received no media discount under the value theory had no excess to devote to overheard at all. It seems particularly unfair, then, that some buyers might have had their overheard costs defrayed while others did not. If a supplier chooses to cover his customer's overhead expense, he can designate funds specifically for that purpose.

The key to the GMA's analysis is that predictably it has looked at the problem from a manufacturer's viewpoint. Their comments on the amended Guides contained not a word detailing the relative disadvantages (or advantages) some smaller buyers received due to promotional programs under the old value standard. It is possible that a fair weighing of benefits and liabilities might favor their position; however, the Commission has chosen to recognize the small buyer's

101. See note 93 and accompanying text *supra*.

102. See text accompanying note 95 *supra*. It could be argued that even under prior interpretation, smaller buyers were disfavored. For example, they would be less likely to avail themselves of display allowances than larger buyers due to their lack of space to accommodate such displays.

103. Guide 11.

apparent plight perhaps, in part, because cogent argument disproving that plight has been lacking.¹⁰⁴

VI. IMPLEMENTATION

The criticism presented by GMA at least justifies some explanation of how the revised Guides are to be enforced. While there is no way of guessing how vigorously the Guides will be enforced, the decrease in the numbers of Robinson-Patman Act complaints issued in recent years¹⁰⁵ may provide some clue as to the extent of enforcement to be expected under the new guidelines. Nevertheless, the mere fact that the resources were expended to amend the Guides suggests that some clarification of the law, by way of its enforcement, may be forthcoming.

The Commission appears firm in its resolve to conform its historical record with the amended Guides as evidenced by its decision in late 1973 to revoke 12 advisory opinions.¹⁰⁶ But this act of rescission may create confusion in the minds of some counsel who advise their clients on these matters. If an entire advisory opinion is cancelled, is it possible that each and every element in a once approved plan now conflicts with the amended Guides? Probably not. With respect to the newly adopted "cost or approximate cost" standards, the offending sections in the previously accepted plans stand out clearly. For example, one advisory opinion allowed a promotion in the grocery field to make:

[p]ayments to stores . . . calculated in terms of the number of ads installed, the rate per ad to vary with the monthly traffic in the store, the minimum payments to be \$4.25 per month per ad.¹⁰⁷

It is apparent that this plan was defective both because varying the payment according to traffic volume bears no relationship to cost, and because a flat-rate payment is a direct reflection of value received, but not necessarily of cost. If it could be demonstrated that the cost of *no* advertisement was less than \$4.25 for *any* customer, and that the plan included some form of equalization to those paying in excess,

104. GMA, in its comments on the amended Guides, provided no information negating a presumption of small buyer disadvantage. See GMA Letter, *supra* note 23.

105. According to this author's count, there were 58 consent orders and 29 complaints issued under the Act in 1962. In 1963, these figures rose to 229 consent orders and five complaints. In the years 1967 to 1973, the decline was more noteworthy: in 1967, seven consent orders and three complaints; in 1968, six consent orders and no complaints; in 1972, one consent order and three complaints; and in 1973, one consent order and no complaints. Hence, in a little over 10 years, the number of actions initiated by the Commission under the Robinson-Patman Act dropped from 234 in 1963 to one in 1973.

106. 38 Fed. Reg. 28270, 28272, 28273, 28277 (1973).

107. FTC Administrative Opinion, Tripartite Promotional Plan in the Grocery Field, 16 C.F.R. § 15.387(a) (1973).

then this minimal payout would probably be unobjectionable.¹⁰⁸ However, in any event, traffic volume has no bearing on cost of performance.

A second example is presented by the *Don Odessky* case,¹⁰⁹ wherein display areas for supplier promotion would be offered, "on the basis of 1/2 cent per display area for each person entering the store each week."¹¹⁰ The express purpose of this plan was to tie the payment to the traffic coming in to the store. The figure was measured by requiring the customer to provide figures showing the *number* of sales made per week.¹¹¹ This figure too related not to cost, but to the value of the promotion to the supplier. The greater the exposure of the display, the greater its value to the seller. Thus, the end of the value standard has made presumptively illegal this method of repayment.

VII. CONCLUSION

The "approximate cost" substitution for "value" is apparently designed to squeeze the excesses out of payments presently made to buyers under the "value" test. It is not as rigid a measure as its partner "cost." Rather, it is a recognition of the frequent difficulties of measuring promotional efforts and the practicalities of obtaining perfect information, especially related to indirect costs, both of which have drawn the Commission and courts into numerous confusing decisions. "Approximate cost" in some instances will prove to be identical to value. As a matter of evidence, the value the seller places on a

108. One question that is unanswered by all the foregoing is whether "cost or approximate cost" restrictions are applicable when *less* than the full advertising cost is paid, *i.e.*, when there is no overpayment, but a "value" basis is used. For example, assume this improbable promotion is offered by a publisher to all its customers in Boston. The publisher will pay 50 per cent of the going rate of \$200 per month toward the use of a billboard to promote a new book. This is the minimum requirement that must be met for a customer to receive the allowance. If some recipients are department stores who use billboards often and who receive 25 per cent discount off the cost of each, those department stores will spend \$50 for the promotional billboard, while their bookstore counterparts must spend \$100. Those who argue the "value" approach might say that since there is no overpayment, there is no violation. However, the economic chips have fallen in precisely the same places as before, namely, the department stores have been favored to the tune of \$50 due to the reduction in the cost of the billboard. The Commission could hardly justify deducting the entire discount from the payment, but it should require the publisher to form a plan which reduces the payment to the department stores by \$25, *i.e.*, the half billboard discount surplus effectively received by the department stores as overpayment for the half rental.

It could be argued that if one promotion would require different outlays by two different buyers, then it is not "available on proportionally equal terms." See Guide 7. If the higher costs to one buyer dictates his failure to act, then the plan is, for practical purposes, simply not available to all, which would, of course, be a violation. Guide 9. The legislative history of the Act speaks to this very point: it viewed the availability standard in terms of comparative benefits, regarding plans which lacked an equal opportunity to participate as "unjust". S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

109. FTC Administrative Opinion, Four Point Tripartite Promotional Advertising Plan, 16 C.F.R. § 15.418(b) (1973).

110. *Id.*

111. *Id.*

program may accurately outline a nebulous blur of activities with some costs to a buyer and may then be relied upon for measurement.

However, "approximate cost" differs in one major respect from "value." The touchstone of the concept is buyers, not sellers. Only where the difference between approximate cost and value is substantial, will complaints be heard. At this point the Commission in its amended Guides has made the policy decision that it is more concerned with discriminatory effects against small business from excessive payments to big business, than with the likelihood of big business exaction of payments in excess of their value to sellers.¹¹² Indeed, adherence to the "cost or approximate cost" standard protects the sellers, as well as the buyers, but the converse is not the case.¹¹³

112. This was summed up well by one commentator:

Those whose interests lie with big business like to talk about ultimate value of a given type of service to the seller. . . . The champions of small business think only in terms of value to the buyer.

Fisher, *Sections 2(D) and (E) of the Robinson-Patman Act: Babel Revisited*, 11 VAND. L. REV. 453, 468-69 n.50 (1958).

113. The proponents of the value approach may still have hope. A former Assistant Director of the Federal Trade Commission, Bureau of Competition has stated:

[W]e do not believe the additional burdens placed on suppliers, intermediaries or newspapers will prove unreasonable. If the Guides do prove unworkable, after a reasonable period of time they can be amended. We are not intractably intransigent on this subject.

Address by Ernest G. Barnes to Grocery Manufacturers Association 11, Sept. 14, 1972 (copy on file at the *Villanova Law Review*).