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## Note

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NOTE — SECTIONS 2(D) AND 2(E) OF THE ROBINSON-PATMAN ACT —  
SUMMARY, CONCLUSIONS AND RELATED PROVISIONS

I. Introduction

Sections 2(d) and 2(e) of the Robinson-Patman Act were enacted as part of the overall congressional plan to eliminate price discrimination in any form.<sup>1</sup> The two sections specifically prohibit discrimination in payments for promotional<sup>2</sup> services and in the rendering of promotional services and/or facilities by a supplier to a favored customer or customers. The sections are as follows: 2(d):

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.<sup>3</sup>

and 2(e):

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, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.<sup>4</sup>

This note hopefully will serve to highlight some of the points made by Messrs. Kintner and Mezines in the preceding articles, to summarize briefly what every supplier should know about these sections, and to consider certain problems caused by the relationship of 2(d) and 2(e) with other antitrust provisions.

1 The Court of Appeals for the Third Circuit, in *P. Lorillard Co. v. FTC*, 267 F.2d 439, 443 (3d Cir. 1959), summed up the purpose of section 2(d) as follows: "The purpose of the section here involved was to eliminate all discriminations under the guise of payments for advertising or promotional services, and Congress employed language that would cover any evasive methods." The court then quoted a statement by Congressman John Utterback, chairman of the House Judiciary Subcommittee which considered the act prior to its adoption in 1936:

The existing evil at which this part of the bill is aimed is, of course, 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 accomplished, and it prohibits payment for such services or facilities, whether furnished "in connection with the processing, handling, sale, or offering for sale" of the products concerned. 80 CONG. REC. 9418 (1936).

2 ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 376 (1962): "[T]he legislative purpose and governing judicial rulings confine these provisions to cooperative promotional arrangements between the supplier and customer in connection with the customer's resale of the particular product."

3 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1964).

4 49 Stat. 1527 (1936), 15 U.S.C. § 13(e) (1964).

The wording of section 2(d) differs a great deal from the wording of 2(e) and this fact alone has been the cause of much confusion and judicial interpretation of almost every word of the two sections.<sup>5</sup> The sections differ in that a 2(d) violation occurs when the buyer performs or obtains the services or facilities and receives payment from the supplier, while, under 2(e), the supplier himself furnishes the services or facilities to or for the buyer for his use in the resale of the goods in question.<sup>6</sup> However, despite the wide variation in the language of the sections, they do complement each other and are often referred to as "sister sections." In fact, many of their differing terms have been given the same meanings. For instance, "customer" in 2(d) and "purchaser" in 2(e) carry the same meaning; the phrases "competing in the distribution of such products and commodities" and "engaged in commerce," of 2(d), have been read into the 2(e) section although they do not appear therein; and, finally, "available" in 2(d) has been given the same meaning as is "accorded" in 2(e).<sup>7</sup>

The concepts of "availability," "on proportionately equal terms," and "competing customers" have been considered and ably discussed by Mr. Kintner and Mr. Mezines in their papers and therefore merit further comment, in summary here, only because of their extreme importance. "Available," as used in the sections under discussion, means that it is the supplier's duty to make certain that all competing customers are made aware of any promotional plan which is offered. This duty is an active and affirmative one and it is therefore not a good defense to a 2(d) or 2(e) charge for a supplier to say that the plan was available if only the customer had asked for it. As both Mr. Kintner and Mr. Mezines point out, a supplier must, in effect, offer the plan, or, in other words, communicate the fact of its availability to the customer.

No statutory standard exists for "proportionally equal terms." The word "proportional" naturally prompts the inquiry: "Proportional to what?" Unfortunately, Congress has not seen fit to provide a statutory answer to this question. Despite the lack of a standard in the statute, the FTC and case law indicate, as Mr. Mezines points out, that the wisest course for a supplier to take is to make his promotional allowances, services and/or facilities available to all customers *in proportion to the dollar volume of their purchases of the product in question.*

Each case must be considered in the light of its peculiar circumstances — e.g., geographical and time factors — in deciding whether or not customers are competing.<sup>8</sup>

A prima facie violation of section 2(d) or 2(e) is not difficult to prove. The plaintiff need only show that discrimination exists in promotional allowances and/or in services or facilities from the defendant-supplier to a favored

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5 Fisher, *Sections 2(d) and (e) of the Robinson-Patman Act: Babel Revisited*, 11 VAND. L. REV. 453, 467 (1958).

6 *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499, 500 (D.C. Cir. 1961).

7 For a full discussion of these constructions, see Fisher, *supra* note 5, at 466-82.

8 See Hickey, *The Fred Meyer Case — Its Implications Under Section 2(d) of the Robinson-Patman Act*, 9 ANTITRUST BULL. 255, 260-70 (1964), for a general discussion of the three concepts of "availability," "on proportionately equal terms," and "competing customers."

customer among competing customers.<sup>9</sup> These sections are called *per se* sections and are to be contrasted with the more-difficult-to-prove section 2(a) violation. This contrasting feature will be discussed further below. Once a prima facie case has been made out against a supplier, his defenses seem to be limited to two: first, that the allowance, service, or facility was, as a matter of fact, made available on proportionally equal terms to the competing customers; or secondly, that the allowance, service, or facility, even though not made available on proportionally equal terms, was made in the good faith meeting of competition under the provisions of section 2(b).<sup>10</sup>

Sections 2(d) and 2(e) are generally enforced<sup>11</sup> by the FTC through cease and desist orders.<sup>12</sup> However, it is possible to bring about their enforcement through a private suit for treble damages<sup>13</sup> or through a criminal action.<sup>14</sup>

## II. *The Relationship of Section 2(d) to Section 2(a)*

Section 2(a)<sup>15</sup> is the general price discrimination provision of the Robinson-Patman Act. It prohibits discrimination in price by a supplier "either directly or indirectly" to various purchasers if such discrimination tends to have a harmful effect on competition. A prima facie case tending to show a 2(a) violation may be rebutted by showing that the price discrimination is justified by cost or that it was made in the good faith meeting of competition.

Several observations might be made concerning the problems which arise when section 2(a) is considered in relation to section 2(d).

There seems to be a legislative distinction between an indirect price discrimination under 2(a) and a discriminatory promotional allowance under 2(d) even though, from a common sense point of view, it would seem that a discriminatory promotional allowance is a form of indirect price discrimination. Perhaps the above distinction is one without a difference when there is only a *purported* promotional allowance paid by a supplier to a customer where the customer does no actual advertising or promoting of the supplier's product. Is such a purported promotional allowance an indirect price discrimination under 2(a) or rather a 2(d) violation in the form of "payment . . . as compensation or in consideration for any services or facilities furnished by or through such

9 See Fisher, *supra* note 5, at 463: "[T]o establish a 2(d) or (e) violation, it is necessary to show that services or allowances granted to one, or some, were not granted to all in competition. . . ."

10 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964); BAUM, THE ROBINSON-PATMAN ACT, 58-59 (1964). Even though the language of section 2(b) does not seem to provide the good faith meeting of competition defense for a section 2(d) violation, it was held in *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C.Cir. 1961), that the defense does apply to 2(d). However, the cost justification defense and the defense of no probable harmful effect on competition, available in a 2(a) action, do not apply to sections 2(d) and (e). *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

11 Fisher, *supra* note 5, at 454-55 (1958).

12 Federal Trade Commission Act § 11, 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (1964). See, *e.g.*, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Corn Products Refining Co. v. FTC*, 324 U.S. 726 (1945).

13 Clayton Act § 4, 38 STAT. 731 (1914), 15 U.S.C. § 15 (1964). See, *e.g.*, *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962); *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 258 F.2d 831 (7th Cir. 1958).

14 Clayton Act § 14, 38 Stat. 736 (1914), 15 U.S.C. § 24 (1964).

15 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

customer. . . ?” A literal reading of 2(d)’s “services or facilities *furnished* by or through such customer” (emphasis added) would tend to support the proposition that where no services or facilities are rendered by the customer in return for the purported allowance there is no 2(d) violation but only a 2(a) violation. Indeed, the Second Circuit in *R. H. Macy & Co. v. FTC*<sup>16</sup> so stated: “Admittedly, it might be difficult to read the language of Section 2(d) to encompass a payment by a vendor to a buyer who did nothing but put the money in his pocket; that would seem to be a Section 2(a) price discrimination.” Even so, one writer points out that “the Commission [FTC] persists in the view that it may opt between the strict requirements of Section 2(d) and those of Section 2(a) where, in fact, no services are performed.”<sup>17</sup>

It is more difficult to prove a prima facie case under section 2(a) than it is under 2(d) and, moreover, more and better defenses are available to counter a 2(a) action than are available as defenses against a 2(d) charge. Therefore it is not surprising that, if the Commission has a choice, it prefers to bring an action under section 2(d) rather than under section 2(a). To prove a prima facie 2(d) violation, the FTC, or the private plaintiff in a treble damage suit, must show only that promotional allowances were granted to some but not to all of the defendant-supplier’s competing customers.<sup>18</sup> The only defenses which the supplier can raise are that the allowances were available to all competing customers on proportionally equal terms or that the discriminatory allowances were made in the good faith meeting of competition. On the other hand, a section 2(a) violation is more difficult for the FTC, or any plaintiff, to prove since, in addition to showing a discrimination in price, it must also show that,

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. . . .

Moreover, in addition to a denial of price discrimination and/or harmful effect on competition, a supplier-defendant has available as defenses, among others, that the price discrimination was “cost justified” and/or that it was made in the good faith meeting of competition. Thus, when and if the facts permit a choice by the FTC or private plaintiff, to bring either a 2(a) or 2(d) action, 2(d) will be preferred.

The Commission’s position that it may choose between the more stringent requirements of 2(a) and those of section 2(d) where no services are performed, probably stems from the general policy of the Robinson-Patman Act and from the legislative history of section 2(d) as discussed in *American News Co. v. FTC*.<sup>19</sup> There the Court of Appeals for the Second Circuit stated that though a payment is no more than a disguised price discrimination it can be prosecuted under

16 326 F.2d 445, 449 (2d Cir. 1964) (dictum).

17 BAUM, *op. cit. supra* note 10, at 52.

18 Fisher, *supra* note 5, at 463.

19 300 F.2d 104 (2d Cir. 1962).

2(d) since the latter section was enacted for the purpose of eliminating "promotional allowances which have the effect of price adjustments."<sup>20</sup> Relatively recent Commission decisions have, however, held that suit must be brought under section 2(a) and not 2(d) where there is *no* promotional effort on the part of the favored customer.<sup>21</sup>

One able commentator has interpreted the cases as drawing the line not at whether or not promotional activity was *actually* performed by the favored customer but rather at whether or not such activity is *contemplated* by the seller when he makes the allowance.<sup>22</sup> Thus, the test becomes a more difficult *subjective* one of intent than otherwise would be the case. This approach seems highly impractical if not improper. It is a difficult or impossible task to determine exactly what is within the contemplation of a corporation — often the supplier in question — which is made up of its stockholders, guided by its directors, and operated by its management. It is a difficult enough task to inquire into the mental processes of an individual without attempting to create a fictitious corporate brain so that it may be examined to discover what is within its contemplation.

This particular area — i.e., relationship between sections 2(a) and (d) on the question of "purported" promotional allowances — is ripe for legislation, as is the whole Robinson-Patman Act, but unless and until such legislation is enacted, the best approach would appear to be to follow the literal language of section 2(d), "any services *furnished* by or through such customer," (emphasis added) and to require that a quid pro quo be actually "furnished" before section 2(d) can be invoked. Admittedly, this approach reaches the absurd result that a supplier who exacts a return for his money, albeit discriminatorily, is assaulted under a more stringent statutory provision — *viz.* 2(a) — than the supplier who exacts nothing but who merely labels his discriminatory payment a "promotional allowance." This, nonetheless, is the result the statute calls for by its language and adherence to the statutory terminology is the only practical way in which the courts can enforce the statute without launching a fruitless effort to look toward the "intent" of a supplier.

### III. *The Other Side of the Coin — Buyer Inducement and/or Knowledgeable Acceptance of Discriminatory Promotional Allowances, Services or Facilities*

Sections 2(d) and 2(e) are, by their terms, directed against the supplier who discriminates among his customers by not making available to his com-

<sup>20</sup> *Id.* at 108-09. See also *P. Lorillard Co. v. FTC*, 267 F.2d 439, 443 (3d Cir. 1959): "The purpose of the section here involved [2(d)] was to eliminate all discriminations under the guise of payments for advertising or promotional services. . . ."

<sup>21</sup> E.g., *Fred Meyer*, No. 7492, FTC, March 29, 1963; *Yakima Fruit & Cold Storage Co.*, No. 7718, FTC, Oct. 19, 1960.

<sup>22</sup> *Rowe*, *op. cit. supra* note 2, at 386 (Supp. 1964):

Although the thin line between a Section 2(d) promotional payment and a Section 2(a) indirect price discrimination wavers, Section 2(d) comes into play only where the seller contemplates *some* promotional quid pro quo for his money, and Section 2(a) probably applies when the seller's "promotional" concession is an outright grant with no expectation of promotional performance by the recipient.

peting customers advertising allowances and/or services or facilities on proportionally equal terms. However, what of the big buyer who induces or even, perhaps, coerces this kind of discrimination? Are his activities sanctioned by the Robinson-Patman Act?

Section 2(f) of the act states: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."<sup>23</sup> If violations of sections 2(d) and 2(e) are construed to constitute "discrimination in price," as the legislative history of the act would seem to indicate,<sup>24</sup> then section 2(f) applies to buyers who "knowingly" induce such violations.<sup>25</sup> The FTC and the courts,<sup>26</sup> however, have not utilized section 2(f) in 2(d) and 2(e) situations. Rather they have proceeded against the buyer under another statute, section 5 of the Federal Trade Commission Act which prohibits generally "unfair methods of competition."<sup>27</sup> The rationale of this approach is that Congress inadvertently neglected to word section 2(f) to cover buyer inducement of 2(d) and 2(e) violations, but that, since the spirit of the Robinson-Patman Act has been violated by the buyer and since the act is directed against various forms of price discrimination — a type of unfair competition — it is reasonable to invoke the general prohibitions of section 5 of the FTC Act against him.<sup>23</sup> In opposition to this rationale it has been said that, by the use of section 5, the Commission has "arrogate[d] to itself the legislative powers of Congress whenever there appears a field which Congress has not covered but which the Commission believes should be covered by legislation of its own making."<sup>29</sup>

The reasons which have prompted the Commission to proceed against greedy buyers under section 5 rather than under section 2(f) are not entirely clear. As mentioned, it is possible to construe section 2(f) to encompass *any form* of "price" discrimination thereby including inducements of 2(d) and 2(e) violations. This would seem to be a more reasonable and rational approach rather than resort to the general provisions of section 5 of the FTC Act. However, as noted above, this is not the course on which the law has proceeded.

23 49 STAT. 1527 (1936), 15 U.S.C. § 13(f) (1964).

24 80 CONG. REC. 9419 (1936). See ROWE, *op. cit. supra* note 2, at 435-36: "[T]he legislative history views promotional concessions as variants of the 'indirect' price discrimination reprobated by the express provisions of the Robinson-Patman Act."

25 ROWE, *op. cit. supra* note 2, at 432: "Although the FTC and the courts once adjudged buyers' receipts of discriminatory promotional allowances under Section 2(f), a later viewpoint spread that no promotional transactions were reachable under this provision."

For an opinion which assumes that section 2(f) applies, see *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916, 922 (5th Cir. 1962).

The Supreme Court expressly reserved this question in *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73, n. 14 (1953): "We of course do not, in so reading § 2(f), purport to pass on the question whether a 'discrimination in price' includes the prohibitions in such other sections of the Act as §§ 2(d) and 2(e)."

26 FTC 1960 GUIDES FOR SECTIONS 2(D) AND 2(E): "16. . . . [A] customer who knows or has reason to know that he is receiving payment or service granted or furnished when the seller violates Section 2(d) or (e) may also be proceeded against by the Commission under Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition." See also, *R. H. Macy & Co. v. FTC*, 326 F.2d 445 (2d Cir. 1964); *American News Co. v. FTC*, 300 F.2d 104 (2d Cir. 1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

27 Federal Trade Commission Act § 5, 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45(a) (1964).

28 *Grand Union Co. v. FTC*, 300 F.2d 92, 96-98 (2d Cir. 1962).

29 *Id.* at 101 (Moore, J. dissenting).

One writer has suggested a plausible reason for use of section 5 rather than 2(f). He states that the FTC has possibly taken a narrow view of 2(f)'s "discrimination in price" so that it would not be put into a position of virtually admitting "that price could relate to advertising allowances," or, in other words, that discriminatory allowances, services, or facilities are really a form of price discrimination, and, consequently, that the defenses of section 2(a) (no effect on competition and cost justification) ought to be available to a supplier in a 2(d) or 2(e) action.<sup>30</sup>

The confusion in this area could be remedied by the adoption of a replacement for section 2(f) which was introduced in the House of Representatives in 1961:

That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to receive, directly or indirectly, *a price, payment, or allowance, service or facility prohibited by subsections (a), (d), or (e)* of this section where such person knows, should know, or has reason to believe that such price, payment, allowance, service or facility is prohibited by such subsections.<sup>31</sup> (Emphasis added.)

Unfortunately, however, section 2(f) remains unchanged.

#### IV. Conclusion

It has been stated that:

Sections 2(d) and (e) perhaps provide the best example to be found anywhere of the ineptitude of statutory draftsmanship. Almost every word has been the subject of litigation, and yet the meaning of the words is still not clear because it is impossible to determine the meaning of the construction of the words by the courts.<sup>32</sup>

Moreover not only are the terms of the sections themselves not clear, but the relationship of those terms with the other sections of the act is also hazy. The answer to the many interpretive problems of sections 2(d) and 2(e), and of their related provisions, as discussed here, lie with Congress rather than with the FTC or with the courts.

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<sup>30</sup> BAUM, *op. cit. supra* note 10, at 67.

<sup>31</sup> H.R. 124, 87th Cong., 1st Sess. § 2(f) (1961). See PATMAN, A COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 165 (1963).

<sup>32</sup> Fisher, *supra* note 5, at 467.