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Edwin S. Rockefeller

Robert L. Wald

ARTICLES

ANTITRUST ENFORCEMENT BY THE FEDERAL TRADE COMMISSION AND THE DEPARTMENT OF JUSTICE: A PRIMER FOR SMALL BUSINESS

BY EDWIN S. ROCKEFELLER* AND ROBERT L. WALD**

It is a truism of contemporary business that almost every phase of industrial and commercial activity is subject to some form of government regulation or restriction. Much of this regulation consists of the administration and enforcement of the antitrust and trade regulation laws. For the most part, these laws do not distinguish between large and small companies nor focus on the intent behind a particular practice. Except for the most virulent forms of predatory activity, such as attempted monopolization or destructive price cutting, it is solely the effect of a given practice on competition[1] which determines whether it is in violation of law. Thus, the impact of these laws must be of continuing concern to every businessman operating in interstate commerce.[2]

While the antitrust and trade regulation laws may be catalogued in a variety of ways, it is useful to divide them as follows: (1) those administered

* A.B., 1948, LL.B., 1951, Yale University; member, Connecticut and District of Columbia Bars; member, Wald, Harkrader & Rockefeller, Washington, D.C.; Assistant to the General Counsel, Federal Trade Commission, 1958-1959; Executive Assistant to the Chairman, Federal Trade Commission, 1959-1961.

** A.B., 1947, Harvard College; LL.B., 1951, Yale Law School; member, Massachusetts and District of Columbia Bars; member, Wald, Harkrader & Rockefeller, Washington, D.C.; Assistant to the General Counsel, Federal Trade Commission, 1955-1956.

1. It is important to bear in mind that the fundamental purpose of the antitrust and trade regulation laws is to promote competition. It has been stated:

> The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements. . . . In an effectively competitive market, the individual seller cannot control his rivals' offerings, and those offerings set narrow limits on his discretion as to price and production. . . . REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 320 (1955).

2. Note that commercial activity, to be violative of the Sherman Act, need not actually constitute interstate commerce, but need only *affect* interstate commerce to some substantial degree. Hence, a business entirely intrastate in scope may nevertheless offend the Sherman Act if interstate commerce can be shown to be affected by its operation. "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." United States v. Women's Sportswear Manufacturers Ass'n, 336 U.S. 460, 464 (1948).

by the Antitrust Division of the Department of Justice; (2) those administered by the Federal Trade Commission; (3) those as to which both agencies have concurrent responsibilities; and (4) those governing private antitrust litigation.

Dramatic prominence has recently been given to criminal proceedings brought by the Antitrust Division against a number of our largest corporations, but the activities of the Federal Trade Commission, as a general rule, will have the greatest potential impact upon small business. The jurisdiction of the Commission is exceedingly broad, reaching into virtually every corner of interstate commercial activity. Awareness of the Commission's regulatory functions, more than ever, is essential in 1962, when the Commission's staff and appropriations—and hence its ability to act—will be the greatest in history.

THE PRINCIPAL STATUTES

The Sherman Act[3] declares unlawful restraints of trade and monopolization of trade. Section 1 of the Act prohibits "every contract, combination . . . or conspiracy" in restraint of interstate or foreign commerce. It has been interpreted to bar so-called "per se" restraints of trade such as price-fixing agreements,[4] group boycotts,[5] agreements to divide markets,[6] agreements to limit production,[7] and tie-in agreements.[8] Beyond these practices, it bars contracts, combinations or conspiracies which are shown unreasonably or unduly to have restricted trade.[9] Section 2 of the Act bars monopolization or attempts to monopolize any part of interstate or foreign commerce. The final test in the cases brought under this section of the law has not been the size of the company or even its dominance of a particular market, but whether the company possessed power to control price and to exclude competitors from access to the market.[10]

3. 26 Stat. 209, 210 (1890), as amended, 15 U.S.C. §§ 1-7 (1958).

4. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Trenton Potteries, 273 U.S. 392 (1927).

5. Radiant Burners v. Peoples Gas Co., 364 U.S. 656 (1961); Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originators Guild v. FTC, 312 U.S. 457 (1941).

6. United States v. Consolidated Laundries Corp., 291 F.2d 563 (2d Cir. 1961); United States v. White Motor Co., 194 F. Supp. 562 (N.D. Ohio 1961).

7. United States v. Socony-Vacuum Oil Co., *supra* note 4; Standard Oil Co. v. United States, 283 U.S. 163 (1931).

8. Northern Pacific R.R. v. United States, 356 U.S. 1 (1958); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); International Salt Co. v. United States, 332 U.S. 392 (1947); *but cf.* United States v. Jerrold Electronics Corp., 187 F. Supp. 545 (E.D. Pa. 1960), *aff'd per curiam*, 365 U.S. 567 (1961); Dehydrating Process Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir. 1961).

9. United States v. Columbia Steel Co., 334 U.S. 495 (1948); Fashion Originators Guild v. FTC, *supra* note 5.

10. United States v. Griffith, 334 U.S. 100 (1948); American Tobacco Co. v.

The Clayton Act[11] declares unlawful a number of specific practices which may injure competition. Sections 2(a) through 2(f) of the Act, otherwise known as the Robinson-Patman Amendment, prohibit discriminations in price and in services and facilities by sellers and the knowing receipt or inducement of price discriminations by buyers. Section 3 prohibits a variety of exclusive dealing arrangements. Section 7 prohibits certain stock and asset acquisitions, consolidations and mergers. Section 8 prohibits interlocking directorates among competing corporations.

No single trade regulation or antitrust statute is of more concern to small business than the Robinson-Patman Amendment to the Clayton Act. Of all the antitrust laws, this one is most likely to present problems to the small manufacturer, distributor, or buyer. For this reason, in the latter portions of this antitrust primer, we discuss at length the pervasive effect of the Robinson-Patman Amendment on the day-to-day marketing decisions of business.

The Federal Trade Commission Act,[12] which is not strictly an "antitrust law,"[13] declares unlawful "unfair methods of competition in commerce" and "unfair or deceptive acts or practices in commerce." Congress left to the Federal Trade Commission the responsibility to define with particularity the unfair practices covered by the statute.[14] The statute's ban on unfair methods of competition has been held to include practices which violate the Sherman Act,[15] the Clayton Act,[16] and the "policy"[17] or "spirit"[18] of those Acts. The Act has also been construed to cover a broad range of unfair trade practices which have not yet matured into Sherman Act or Clayton Act violations but which, if permitted to continue, might reach such magnitude.[19] In addition, the prohibition of unfair and deceptive acts and practices has

United States, 328 U.S. 781 (1946); Standard Oil of New Jersey v. United States, 221 U.S. 1 (1911).

11. 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1958), as amended, 15 U.S.C. §§ 13, 21 (Supp. II 1961).

12. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958), as amended, 15 U.S.C. § 45 (Supp. II 1961).

13. The listing of "Antitrust Acts" in the Federal Trade Commission Act itself (15 U.S.C. § 44) does not include this Act, which is more aptly described as a trade regulation law.

14. In FTC v. Motion Picture Advertising Service Co., 344 U.S. 392 (1952), the Supreme Court noted that the Federal Trade Commission Act was designed to supplement the Sherman and Clayton Acts, and "to stop in their incipiency acts and practices which, when full blown, would violate those Acts. . . ." *Id.* at 394, 395. The Court also indicated that the "unfair effect" of a particular practice is properly evaluated by the Commission, and not by the courts. *Id.* at 396.

15. FTC v. Cement Institute, 333 U.S. 683 (1948).

16. FTC v. Motion Picture Advertising Service Co., *supra* note 14.

17. Fashion Originators Guild v. FTC, *supra* note 5; FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922).

18. The Grand Union Co., No. 6973, FTC (1960).

19. See note 14, *supra*.

been used to attack hundreds of types of specific deceptions[20] including false and misleading advertising, fictitious pricing, pre-ticketing, lottery devices, false disparagements of competitors' products, failure to make material disclosures as to products, and removing, obscuring or altering lawfully required marking. Congress, when it passed the Federal Trade Commission Act, noted that "there is no limit to human inventiveness"[21] in devising unfair schemes, and the Commission's administration of the Act has reinforced this view.

ADMINISTRATION

The Sherman Act is enforced by the Antitrust Division of the Department of Justice either through civil or criminal suits against the alleged offender brought by the Department in the Federal District Courts[22] with rights of appeal thereafter to the Courts of Appeals and to the Supreme Court.

The Clayton Act (including the Robinson-Patman Amendment) is enforced both by the Antitrust Division of the Department of Justice through suits brought in the District Courts,[23] and by the Federal Trade Commission through administrative proceedings initiated and decided by the Commission itself with a right of appeal thereafter by the respondent company to the Federal Courts of Appeals and, in some instances, to the Supreme Court.[24] As a general rule, the Justice Department has taken a hands-off policy with respect to violations of the Robinson-Patman Act, leaving the administration of that Act largely to the Federal Trade Commission.[25]

The Federal Trade Commission Act is administered by the Federal Trade Commission through administrative proceedings[26] similar to those exercised under the Clayton Act.

The Department of Justice has no compulsory investigative powers in civil antitrust matters. The F.B.I. conducts the investigations, but has no power to compel a file search or to require the turning over of documents. In these cases it depends wholly upon the cooperation of the company being investigated.[27] In investigations into alleged criminal antitrust offenses, it is

20. See Annot., 65 A.L.R.2d 225 (1959).
21. H.R. Rep. No. 1142, 63d Cong., 2d Sess. 19 (1914).
22. 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1, 2, 4 (1958).
23. 38 Stat. 736 (1914), 15 U.S.C. § 25 (1958).
24. 73 Stat. 243 (1959), 15 U.S.C. § 21 (Supp. II 1961).
25. During the period from 1936, when the Robinson-Patman Act became law, through 1957, only eight proceedings under this act were instituted by the Department of Justice. See EDWARDS, THE PRICE DISCRIMINATION LAW 682 (1959).
26. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958), as amended, 15 U.S.C. § 45(f) (Supp. II 1961).
27. In April, 1961, the Attorney General stated, "At present, we are virtually powerless when a firm flouts our request for information about a merger or about a possible civil violation of the Sherman or Clayton Acts." Department of Justice Press

customary to convene a Grand Jury in order to obtain information. There is currently pending in Congress legislation designed to give the Department so-called "civil investigative demand" powers, which would be roughly the equivalent of compulsory subpoena powers.[28]

A civil antitrust suit brought by the Department of Justice under the Sherman or Clayton Act may result in a court decree or injunction halting the violation and subjecting the company to other prohibitions designed to bar a recurrence of the violation.[29] Conviction in a criminal suit brought by the Antitrust Division under the Sherman Act may result in a fine and, if individuals are named as defendants, imprisonment as well.[30]

Any person or company injured because of a violation of the antitrust laws may bring a private action therefor.[31] A final judgment or decree in any prior suit brought by the government involving the same charges will be considered *prima facie* evidence of violation in the private suit. If the private party prevails, he is entitled to recover treble damages and a reasonable attorney's fee.[32] In these suits the courts may also issue injunctions barring recurrence of the practice.[33]

A Federal Trade Commission proceeding under either the Clayton Act or the Federal Trade Commission Act begins with the issuance of a formal complaint and may result in a cease and desist order which operates much like a court injunction, stopping the particular practice and barring related practices as well.[34] If the Commission thereafter determines that there has been a violation of its order to cease and desist, it may certify the facts of the violation to the Attorney General, who may proceed in a District Court for the recovery of civil penalties. In such a proceeding the court has discretionary authority to assess penalties of up to $5,000 per violation.[35] Where a Federal Trade Commission cease and desist order has been affirmed

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Release, April 25, 1961. See also, statement of the Attorney General to the Antitrust Subcommittee, House of Representatives, August 23, 1961, carried in full text in 7 Antitrust and Trade Reg. Rep. X-1 (1961) (hereinafter cited as ATRR).

28. H.R. 6689 and S. 167, 87th Cong., 1st Sess. (1961). The bills are analyzed at 11 ATRR B-1 (1961).

29. 26 Stat. 209 (1890), 15 U.S.C. § 4 (1958); 38 Stat. 736 (1914), 15 U.S.C. § 25 (1958).

30. "Whenever a corporation shall violate any of the penal provisions of the antitrust laws, such violation shall be deemed to be also that of the individual directors, officers, or agents of such corporation who shall have authorized, ordered, or done any of the acts constituting in whole or in part such violation, and such violation shall be deemed a misdemeanor. . . ." 38 Stat. 736 (1914), 15 U.S.C. § 24 (1958).

31. Such a private action may be brought in a District Court "without respect to the amount in controversy. . . ." 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

32. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

33. 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958).

34. 73 Stat. 243 (1959), 15 U.S.C. § 21(b) (Supp. II 1961); 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(b) (1958).

35. *Ibid.*

in the courts, the Commission, alternatively, may proceed in an action for criminal contempt in the appropriate Court of Appeals, a procedure which could result either in a money fine, imprisonment, or both.[36]

A company being investigated[37] by the Federal Trade Commission need not submit to an unlimited file search and may deal with the investigators through counsel. As an ordinary rule, the investigator will appear at the offices of the company without prior notice, explain the purposes of his investigation, and request an opportunity to examine documentary evidence relating to the matters under investigation. It is important to realize, however, that he has no absolute legal authority to make an unlimited file search (what the courts have termed a "fishing expedition").[38] In many cases the failure of companies under investigation reasonably to assert their right to limitation of the investigation and to require an orderly course of procedure conducted through counsel, has severely prejudiced the companies and has permitted investigators to obtain information to which they might not otherwise be entitled.[39]

In recent years the Commission has made aggressive use of its inquisitorial powers. In a series of cases, the courts have sustained the Commission's broad subpoena powers and its authority to require corporations to file sworn reports and answers in writing to specific questions.[40] In particular, the Commission has enthusiastically adopted this latter investigative device. Following recommendations of a Robinson-Patman Act Task Force, the Commission, in 1960, made the first extensive use of its authority to require special reports from corporations to assemble information of possible violations of the trade regulation laws.[41] In a statement to the

36. See, *e.g.*, In Re Whitney & Co., 273 F.2d 211 (9th Cir. 1959).

37. The Federal Trade Commission has broad powers of investigation and inquisition. See 38 Stat. 721, 722 (1914), 15 U.S.C. §§ 46, 49 (1958). Its compulsory investigative processes parallel in authority the power possessed by a grand jury. The Commission has the power to issue investigative subpoenas and to compel companies to file reports reaching into almost every aspect of the company operations. These compulsory processes are enforceable in the federal courts and may result in heavy money penalties for non-compliance.

38. While the protection available to a corporation against unreasonable searches and seizures may be less than that available to individuals, nevertheless, investigations into company matters must meet the test of reasonableness. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable." Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186, 208 (1945); United States v. Morton Salt Co., 338 U.S. 632 (1949); Tractor Training Service v. FTC, 227 F.2d 420 (9th Cir. 1955).

39. *Cf.* Tractor Training Service v. FTC, *supra* note 38, at 424.

40. St. Regis Paper Co. v. United States, — U.S. —, 82 Sup. Ct. 289 (1961); United States v. Morton Salt Co., *supra* note 38; Menzies v. FTC, 242 F.2d 81 (4th Cir. 1957), *cert. denied*, 353 U.S. 957 (1957); FTC v. Reed, 243 F.2d 308 (7th Cir. 1957); FTC v. Tuttle, 244 F.2d 605 (2d Cir. 1957), *cert. denied*, 354 U.S. 925 (1957).

41. Payment of illegal brokerage in the citrus industry was thoroughly investigated by mail through the use of this reporting authority. More than 100 reports were ordered

Section on Antitrust Law of the American Bar Association in August, 1961, Chairman Paul Rand Dixon, who took office in March, 1961, said:

> We expect to save a good deal of professional manpower, money, and time by using the United States mails to help us get the facts. We are going to continue, for example, to require the filing of special reports under the authority granted to us by Section 6 of the Federal Trade Commission Act. This method of investigation is not only efficient and inexpensive, but it is also, in certain circumstances, the only practicable way to bring about such fairness as may come from relatively simultaneous industry-wide enforcement.[42]

On January 25, 1962, speaking to the Section on Antitrust Law of the New York State Bar Association, Mr. Dixon said, "The mails shall be seeing more Section 6 questionnaires addressed to business in 1962."[43]

Although the Commission's basic authority to require reports from corporations has now been upheld, litigated cases may place some limitations upon the specific use of the authority. In some situations, it is possible that the form of the questionnaire itself may be an abuse of the authority granted to the Commission. For example, a requirement by the Commission that a company supply a copy of every label for every type of product sold or distributed during an 18-month or 2-year period might be found by the courts to be a burdensome and unreasonable request.

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and received, resulting later in over forty formal complaints. The Commission also launched an extensive investigation of discriminatory allowances by food suppliers to food chains, directing orders to more than 400 corporations in the food industry. Looking toward enforcement proceedings, the FTC required reports of suppliers as well as the chains.

42. 19 A.B.A. ANTITRUST SECTION 254 (1961). It is clear that the Commission intends to make unprecedented use of its authority to require special reports from corporations. In June, 1961, the Commission announced that letters were being sent to more than one hundred manufacturers of hemorrhoid products to determine whether their advertising might be exaggerating the efficacy of their products. The Commission's press release stated that on the basis of information initially supplied, "those concerns whose advertising appears to be questionable will be required by Section 6 orders to submit more detailed information pertaining to their claims."

In August, the Commission announced an investigation "to ascertain whether drug manufacturers and distributors are giving unlawfully lower prices and other preferential treatment to any customers and are using deceptive promotional material." Orders to file special reports were mailed to thirty-seven manufacturers and distributors requiring the respondents to furnish within forty-five days advertising and labels and detailed information concerning prices, classification of customers, and related items. The questionnaire is an exhaustive one.

In September, 1961, the Commission announced an investigation designed to determine whether fifty-eight publishers and national distributors of magazines, comics, paperbacks and hardback books are illegally discriminating among competing customers in price allowances, discounts, rebates and services.

43. 29 ATRR p. A-3 (1962). True to this prediction, in February, 1962, the Commission sent compulsory questionnaires to approximately 250 suppliers of apparel to department and specialty stores seeking to determine whether they had illegally discriminated in making promotional payments and in offering discounts, rebates and services.

Recipients of a questionnaire have several opportunities to seek limitations upon the Commission's initial demand. Upon receiving an order to file a report, a company may seek a modus vivendi with the Commission's staff. Secondly, the firm may petition the Commission to modify its order. Thirdly, the company may seek a declaratory judgment and injunction against enforcement of the order.[44] Fourthly, it will have an opportunity to defend in any suit by the United States for penalties for violation of the order.[45] The Administrative Procedure Act, the fourth amendment's proscription against unreasonable searches and seizures (if it applies to corporations), and the fifth amendment's due process clause will provide standards for judicial review of Federal Trade Commission investigative action.

In December, 1961, the Commission made a further unprecendented move in the use of its investigational powers. Following the Supreme Court's decision upholding the Commission's power to demand retained file copies of manufacturer census reports, the Commission convened an investigational hearing.[46] Subpoenas directed to six corporation officers were returnable before the full Commission at a public hearing. Counsel for respondents were permitted to be present and advise the witnesses, but not to participate in the proceedings, and the witnesses were directed to produce subpoenaed documents under hazard of possible criminal action for non-compliance.[47] In January, Chairman Dixon stated: "Section 9 allows public investigational hearings where facts may be promptly ascertained. This method, too, one may safely predict, will be more in evidence in 1962."[48]

In addition to formal procedures resulting in enforceable cease and desist orders, the Commission uses several other techniques to encourage and obtain voluntary complance with the law. Where the violation of law has been inadvertent or has been of a minor character, the Commission may close the matter upon receipt of written assurances of discontinuance by the company involved.

To achieve voluntary compliance and cooperation on an industry-wide basis the Commission uses its Trade Practice Conference procedures.[49]

44. St. Regis Paper Co. v. United States, *supra* note 40.

45. *Ibid.*

46. 24 ATRR A-9 (1961); 25 ATRR A-9 (1962).

47. 38 Stat. 723 (1914), 15 U.S.C. § 50 (1958) provides:

Any person who shall neglect or refuse to attend and testify, or to answer any lawful inquiry or to produce documentary evidence, if in his power to do so, in obedience to the subpoena or lawful requirement of the commission, shall be guilty of an offense and upon conviction thereof by a court of competent jurisdiction shall be punished by a fine of not less than $1,000 nor more than $5,000, or by imprisonment for not more than one year, or by both such fine and imprisonment. . . .

48. Statement of Chairman Paul Rand Dixon to Section on Antitrust Law, New York State Bar Association, January 25, 1962.

49. See Subpart C, Part 2 of Subchapter A of the Commission's Procedures, 16 C.F.R. §§ 2.21-2.32 (1960).

Where appropriate the Commission will call a conference of an entire industry to review and consider all types of unfair methods of competition and unfair or deceptive practices which are, or may be, employed in the industry. The Commission will then draw up Trade Practice Rules which are, in effect, rules of fair trade practice for the industry. These rules are worked out jointly with representatives of the industry, and public hearings are held prior to adoption, with opportunity for interested parties to be heard. All views are then considered by the Commission and final Trade Practice Rules for the industry promulgated. These rules cannot be enforced through formal court proceedings. Their value depends upon voluntary compliance by the industry concerned.

In recent years the Commission has also adopted a related procedure for encouraging voluntary compliance through the use of Trade Practice Guides. These are administrative rules or guides issued by the Commission relating to particular practices where widespread abuses have been found, setting forth what the Commission believes are guidelines to lawful conduct. To date, seven sets of guides have been promulgated by the Commission. These include guides for cigarette advertising, tire advertising, deceptive comparative price advertising, bait advertising, advertising allowances and services, deceptive advertising of guarantees, and advertising of fallout shelters.[50]

Most recently, Commissioner Everette MacIntyre has proposed the extensive use of substantive rule-making powers as a supplement to enforcement through adjudicative proceedings. Mr. MacIntyre's provocative proposal would have the Commission issue substantive rules relating to specific unlawful practices prevalent throughout an entire industry.[51] This proposal is now receiving serious consideration by the Commission and has been publicly endorsed by Chairman Dixon.[52]

50. The Guides are published in pamphlet form by the Commission. They are also included in 2 TRADE REG. REP. ¶¶ 7893-7900.

51. Last December he explained his proposal as follows:

> Rule-Making procedures would be limited to a narrow range of practices which the Commission had reason to believe were in violation of law. In contrast to Trade Practice Conference Rules, the results—after full hearing, and subject to appropriate judicial review—would be conclusive, so far as the issue of lawfulness was concerned. Subsequent adjudicative proceedings could then be instituted against particular respondents charged with violation of the rule, and the rule would carry with it the same sanctions as would the statute itself. Thus, these rule-making proceedings would not be aimed at a generalized restatement of the law as applied to a particular industry or at solving every industry problem in one package, but, rather, would be focused upon critical competitive problems in a particular industry as they arose. In this respect, the results would be more like Internal Revenue Service tax rulings than like our present Trade Practice Rules or Industry Guides. Statement of Commissioner Everette MacIntyre to Winter Conference, American Marketing Association, New York City, December 1961. See 25 ATRR A-3 (1962); 12 ATRR A-1 (1961).

52. Statement of Chairman Paul Rand Dixon to Antitrust Section, New York State Bar Ass'n, New York City, January 1962. See 29 ATRR A-3 (1962).

THE ROBINSON-PATMAN ACT

As noted earlier, no single trade regulation or antitrust statute is currently of more concern to business, large and small, than the Robinson-Patman Amendment[53] to the Clayton Act. Of all the antitrust laws, this one is most likely to present problems to the small manufacturer, marketer, or purchaser of commodities for resale. For this reason, Robinson-Patman deserves extended treatment in a primer of this sort.

At the present time, Federal Trade Commission enforcement activity has reached an historical high. In 1960 the Commission issued 130 formal complaints alleging violations of the statute and had pending several hundred investigations. Up to the Commission's reorganization in July, 1961,[54] formal complaints had exceeded those at a like period last year. There is reason to believe that investigative activity has materially increased since that time, and that many new complaints in a number of industries are contemplated. The problems posed by this stepped-up enforcement activity are compounded by the fact that the statute is ineptly worded, confusing and inconsistent. In a leading decision under the law, the Supreme Court once said, "[P]recision of expression is not an outstanding characteristic of the Robinson-Patman Act."[55]

Section 2 of the original Clayton Act,[56] enacted in 1914, was aimed broadly at predatory price discriminations by large sellers designed to injure or destroy smaller competitors. In practice, the Act proved deficient in halting price discriminations and related discriminations which favored large buyers and resulted in injury to competition at the buyer level. In 1936, Congress enacted the Robinson-Patman Amendment to Section 2, designed to stiffen the Act's sanctions against these discriminatory practices at either the seller or buyer level of competition.

Section 2 is now divided into six subsections: Section 2(a) prohibits unlawful price discriminations; Section 2(c) prohibits certain types of discriminatory brokerage payments by sellers; Section 2(d) prohibits discriminatory payments or allowances by sellers for promotional services rendered by buyers; Section 2(e) prohibits the granting of discriminatory services or facilities to buyers; Section 2(f) prohibits the knowing receipt or induce-

53. 49 Stat. 1526 (1936), 15 U.S.C. § 13 (Supp. II 1961).

54. The Commission's staff structure was completely reorganized. See FTC News Release dated June 25, 1961, and organizational chart, 28 ATRR C-4 (1962).

55. Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953). Dean Landis, in his recent report on the Federal Trade Commission to the President, referred to the Act as "an extremely poorly drafted statute" and a "melange of generalities qualified by proviso upon proviso." See Landis, Report on Regulatory Agencies to the President-Elect 51 (1960).

56. 38 Stat. 730 (1914).

ment of price discriminations by buyers; and Section 2(b) provides a limited "meeting competition" defense for certain types of discriminations.

Section 2(a)—Price Discrimination

Section 2(a) provides that:

> It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .[57]

This section then continues with several defensive provisos, including the "cost justification" defense.[58]

Any person who sells products "of like grade and quality" in interstate commerce to at least two purchasers at different net prices has technically discriminated in price within the meaning of the statute. The critical question, however, is whether the discrimination is one which is prohibited, that is, one which has the adverse effect on competition barred by the statute and which is not justified under one of the statutory defenses.

Ordinarily, a discrimination will be charged either in the "primary" or "secondary" line of commerce. Primary line cases involve injury to competition between the seller and his competitors. To bring the Robinson-Patman Act into play, the seller must offer different prices to different buyers, but there need not be any competition or relationship between the buyers. The crux of the charge is this: by offering one buyer a lower price than he offers other buyers, the seller may divert the favored buyer's purchases from a competitor and to that extent injure competition with the competitor.[59]

The most usual form of primary line case involves "territorial" price discrimination. In this situation, a seller cuts his price in one territory while maintaining his price level in all other territories with the effect of injuring or destroying a competitor in the cut-price market.[60] The economic

57. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (Supp. II 1961).

58. This defense is available for "differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery. . . ." Section 2(a) also provides that sellers may "[select] their own customers in bona fide transactions and not in restraint of trade." Furthermore, Section 2(b) provides for a "meeting competition" defense where it can be shown that a "lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

59. See, *e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929).

60. *Ibid.*

theory behind the charge is that the seller can subsidize his lower price in the one area with higher prices exacted elsewhere, and, using these resources, can eventually seriously injure or wipe out his local competitor who is unable to meet the price reduction.

Secondary line cases involve injury to competition among *buyers* of the same seller.[61] The seller offers two different prices to two different customers who compete in the resale of the product, and the favored buyer can then theoretically either sell at a lower price than his competitor or use his price advantage in some other manner to injure competition between them.

Whether products are of "like grade and quality" is not always a simple matter to determine, and the Commission and the courts have not always been consistent in the factors which they have considered controlling. Where products are functionally interchangeable, the determining factor has usually been the degree of physical differentiation between the products, and, while it is clear that non-identical products may still be of "like grade and quality," the more the products differ in physical properties and appearance, the less likely they will be considered of "like grade and quality." The most difficult question (one which has been inconsistently answered) is presented when a private-label product is sold to one customer at a lower price than the seller's brand product is sold to competing customers, when both products are the same physically.[62]

In order to constitute an illegal secondary line price discrimination, the two prices must tend to produce a competitive injury as between the favored and disfavored customer.[63] While, technically, the burden of proving injury is upon the Commission, in the case development over the years an almost automatic presumption of probable secondary-line injury has arisen from the *fact* of two different prices to competing customers. In a number of cases, the fact that the disfavored customers have testified that they were not injured by the discrimination has not proven determinative, and even in the face of this testimony the Commission has found a "probability" of

61. See, *e.g.*, FTC v. Morton Salt Co., 334 U.S. 37 (1948).

62. See Borden Co., No. 7129, FTC (Dec. 14, 1961); 25 ATRR A-11 (1962); Sylvania Electric Products, Inc., 51 F.T.C. 282 (1954); United States Rubber Co., 46 F.T.C. 998 (1950); United States Rubber Co., 28 F.T.C. 1489 (1939); Hansen Inoculator Co., Inc., 26 F.T.C. 303 (1938).

63. In Corn Products Refining Co. v. FTC, 324 U.S. 726, 738 (1945), the Supreme Court stated: "It is to be observed that § 2(a) [of the Robinson-Patman Act] does not require a finding that the discriminations in price have in fact had an adverse effect on competition. The statute is designed to reach such discriminations 'in their incipiency,' before the harm to competition is effected. It is enough that they 'may' have the prescribed effect." The Court then noted that the use of the word "may" means that discrimination, to be unlawful, must "probably" (rather than merely possibly) cause the proscribed consequences. See Standard Motor Products, Inc. v. FTC, 265 F.2d 674 (2d Cir. 1949).

injury.[64] In one of the leading cases,[65] the Supreme Court held that even a small price differential in the sale of one of many products stocked by a grocer might result in competitive injury, since each individual article in a retail store is protected by the Robinson-Patman Act, "whether the particular goods [constitute] a major or minor portion of his stock."[66]

Defenses to Section 2(a)

Technical price discrimination may nevertheless be justified under the law if it reflects only "differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities"[67] in which the products are sold or delivered. In practice, this has proven a highly complex defense, one which has been sustained in a relatively few formal cases.[68] To the extent that any of these costs are greater for one customer than another, a seller is justified in selling to the latter at a lower price which approximately reflects the cost difference. It is always desirable, where price differences are based on differing costs, to document in as much detail as possible the justification for these differences in terms of the cost differences to the two customers. This documentation is then readily available in the event the price differences are later challenged.

The second major defense under the Act is the "meeting competition" defense of Section 2(b), which provides that a seller may defend against a challenged price discrimination on grounds that his lower price "was made in good faith to meet an equally low price of a competitor."[69] Again, as in the case of the cost justification defense, sellers have only rarely made out a meeting competition defense.[70]

As the law has developed, a number of strict limitations have been placed on the availability of this defense. The defense is valid only in "defensive" situations to retain a customer, and not for the purpose of gaining a new customer.[71] The defense has further been held to be available only in "individual competitive situations" and not to justify a "general pricing system."[72] In meeting the competitor's lower price, it has been held that the seller may not validly undercut that price (he may only meet, not beat, the

64. Standard Motor Products, Inc. v. FTC, *supra* note 63.
65. FTC v. Morton Salt Co., *supra* note 61.
66. *Id.* at 49.
67. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (Supp. II 1961).
68. See Rowe, *Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 COL. L. REV. 584 (1959).
69. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (Supp. II 1961).
70. Leading cases construing the defense are Standard Oil Co. (Indiana) v. FTC, 340 U.S. 231 (1951) and FTC v. Staley Mfg. Co., 324 U.S. 746 (1945).
71. Standard Motor Products, Inc. v. FTC, *supra* note 63; Sunshine Biscuits, Inc., No. 7708, FTC, CCH TRADE REG. REP. ¶ 15,469.
72. Standard Motor Products, Inc. v. FTC, *supra* note 63.

price), and the price met must be the competitor's price for an equal quantity of goods.[73] The Commission has also held that a seller has not acted in good faith if the competitor's price is not a "lawful" price, and that the defense is available only to meet a lower price to the *seller's* own customers, not to enable the *customer* to meet lower prices available to his customer.[74]. A Court of Appeals, however, has recently differed with the Commission on this latter requirement.[75]

Whenever a seller relies upon a meeting competition defense, he should seek, wherever possible, to document his competitor's price.[76] The success of his defense very often will depend upon the accuracy and reliability of this documentation.

Section 2(c)—Brokerage

In addition to these price discrimination prohibitions, the Act provides sanctions against other forms of discrimination. Section 2(c)[77] prohibits the payment by a seller, or the receipt by a buyer or anyone acting on behalf of the buyer, of anything of value as a commission, brokerage or other compensation or any allowance or discount in lieu thereof, incidental to a sale. This section was designed to close one of the broadest loopholes in the old Clayton Act, wherbey a seller would disguise a price discrimination to a favored buyer by paying him a sham brokerage fee. The Robinson-Patman Amendment as now interpreted permits brokerage payments only to true brokers representing the seller and acting for him. It has been construed to bar payments to "independent" brokers purchasing for their own accounts,[78] and payments to brokers acting for or on behalf of the buyer or controlled by the buyer.[79] Moreover, even though an apparent exception in the Act permits the payment to a buyer of brokerage fees "for services rendered," it has been held that payments to the buyer for such services as warehousing

73. FTC v. Standard Brands, Inc., 189 F.2d 510 (2d Cir. 1951); Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945).

74. Sun Oil Co., 55 F.T.C. 955, 977 (1959), *rev'd*, Sun Oil Co. v. FTC, 294 F.2d 465 (5th Cir. 1961); 3 ATRR X-1 (1961).

75. Sun Oil Co. v. FTC, *supra* note 74. The court, in setting aside an FTC cease and desist order, held that a gasoline supplier was justified in granting a price reduction to a dealer in order to allow the latter to meet competition from a nearby gasoline station. The court placed great stress on the fact that no competition exists in the supplier-to-retailer gasoline sales situation, because "a filling station operator carrying a brand-name gasoline does not buy from several competing oil companies." *Id.* at 472.

76. See statement of Jerome Garfinkel, Attorney, Division of Discriminatory Practices, Federal Trade Commission, to Briefing Conference on Antitrust & Trade Regulation Law, Washington, D.C., January 1962.

77. 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (Supp. II 1961).

78. Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir. 1945).

79. See Modern Marketing Service, Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943); Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir. 1940), *cert. denied*, 310 U.S. 638 (1940).

and sales promotion, rendered after sale of the goods, do not fall within the exception.[80]

Sections 2(d) and 2(e)—Discriminatory Promotional Allowances, Services and Facilities

Sections 2(d) and 2(e) proscribe other indirect methods of price discrimination: the former is concerned with payments by the seller to the buyer for services or facilities furnished by the buyer in connection with the sale; the latter prohibits the seller from furnishing similar services or facilities to the buyer. These are companion sections of the law, and although their wording varies, the courts have generally held these language variations to be merely another example of the inept draftsmanship of the law and have interpreted the two sections in parallel fashion.[81]

These sections pose a problem for the seller who wishes to provide advertising and promotional services, such as demonstrations, catalogues and display cabinets (or the seller who wishes to reimburse his buyers for providing like services) to buyers who may in turn be competing with one another. If the seller, in furnishing payments or services to buyers in competition with one another,[82] does not accord "proportionally equal terms" to each, he will have run afoul of these sections.

What constitutes "proportionally equal terms" has been considered in

80. In Southgate Brokerage Co., Inc. v. FTC, *supra* note 78, at 609-611, petitioner asserted that, as buyer, he had received payment, for services rendered, including "promoting, offering for sale, selling, ordering, receiving, adjusting shortage or damage claims, handling, warehousing, distributing, invoicing, collecting, assumption of credit risks." However, in affirming the Commission's cease and desist order, the court stressed "[t]he crucial fact . . . that all of the services upon which [the petitioner] relies are services rendered in connection with its own purchase, ownership or resale of the goods; and these services it renders, not to those from whom the goods are purchased, but to itself," and concluded: "For sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity."

81. Section 2(d) applies only to those persons "engaged in [interstate] commerce" who furnish the proscribed payments to "customers competing in the distribution of such products or commodities." Section 2(e), on the other hand, contains no requirement that the offender be engaged in interstate commerce, nor that the "purchasers" furnished the unequal services be in competition with each other. The "commerce" and "competing" requirements of Section 2(d) have nonetheless been read into Section 2(e), and "customers" (2(d)) have been equated with "purchasers" (2(e)). See Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945). *Cf.* Corn Products Refining Co. v. FTC, *supra* note 63.

82. A determination of whether two customers of the seller are, in fact, in competition will require an analysis of the location of the customers, their methods of operation, the trade to which they sell, and similar factors. Generally, the courts have given a broad definition to the requirement of competition and have held that two customers purchasing the same product and selling to the same class of customers—whether or not their methods of operation are entirely different—are, for purposes of the statute, in competition. See FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).

a variety of cases and not always consistently. It has been held, however, that every feature of a promotional plan need not be furnished to all of the seller's customers so long as alternative benefits of reasonably equal value are available.[83]

Under Sections 2(d) and 2(e) there is no requirement, as under Section 2(a), that the disproportionate treatment of competing customers result in a probable adverse effect on competition. The offense is considered a *per se* violation—the fact of the treatment constitutes the offense. Moreover, the Commission on a number of occasions has held that when a buyer fails to perform the service for which payment is made, or if payment is grossly in excess of the value of the service as rendered, a violation of law may occur.[84]

Section 2(f)—Buyer Liability

Section 2(f) bars the knowing receipt or inducement of a price discrimination by a buyer.

This section of the law has only sparingly been used. The Supreme Court in an early case ruled that in order to prove a violation it must be shown that the buyer knew that he had received a discrimination in price *and* knew that that price concession was not within one of the seller's defenses under the statute, such as cost justification or meeting competition.[85] This burden of proof was considered by the Commission to be almost insurmountable until several recent cases held that such knowledge could be inferred from the buyer's knowledge of trade conditions generally and from the fact that he was receiving a discriminatory advantage.[86]

An additional question arises as to whether the knowing receipt or inducement of a disproportionate payment, service or facility by the buyer in violation of 2(d) or 2(e) is a violation of Section 2(f). The Federal Trade Commission holds that this practice does not come within the provisions of Section 2(f), although the Supreme Court has left the question open.[87] However, the Commission overcomes this self-imposed limitation by attacking such buyer inducements under the catch-all provisions of the

83. See Elizabeth Arden, Inc. v. FTC, *supra* note 81; Lever Bros. Co., 50 F.T.C. 494 (1953); Procter & Gamble Distributing Co., 50 F.T.C. 513 (1953); Colgate-Palmolive Peet Co., 50 F.T.C. 525 (1953); REPORT OF THE ATTORNEY GENERAL'S COMMITTEE TO STUDY THE ANTITRUST LAWS 189 (1955).

84. See, *e.g.*, Lever Bros. Co., 50 F.T.C. 494 (1953).

85. Automatic Canteen Co. v. FTC, *supra* note 55.

86. Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961); American Motor Specialties, Inc. v. FTC, 278 F.2d 225 (2d Cir. 1960), *cert. denied*, 364 U.S. 884 (1960).

87. Automatic Canteen Co. v. FTC, *supra* note 55, at 73.

Federal Trade Commission Act.[88] An increasing number of such suits have been brought in recent years against large buyers such as Grand Union,[89] Union News,[90] and Giant Food.[91] These cases are subject to further review in the courts.

CONCLUSION

The basic purposes of this article, coupled with limitations of time and space, have necessarily precluded the extended treatment which the subjects discussed (and others excluded altogether) deserve. However, it is hoped that a primer of this sort may serve as a springboard for detailed study of the antitrust laws, which must continue to condition the thinking and actions of businessmen to an ever-increasing degree. The trends are clear—the breadth of these laws and the activities of the agencies enforcing them, it may safely be predicted, will increase with the years. Small business must be alert to developments in the law, to avoid innocent transgressions which may nevertheless result in penalties, and to assure the full measure of protection which the law affords to the diligent.

88. 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-58 (1958), as amended, 15 U.S.C. § 45 (Supp. II 1961).

89. No. 6973, FTC (1960), Grand Union Co. v. FTC, — F.2d — (2d Cir. 1962), 31 ATRR X-6 (1962).

90. No. 7396, FTC (1961), American News Co. v. FTC, — F.2d — (2d Cir. 1962), 31 ATRR X-1 (1962).

91. No. 6459, FTC (1961).