

# Client Alert

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## The More Things Change, the More They Stay the Same Key Takeaways from the FTC's "Updated" Fred Meyer Guides

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### THE FTC ISSUES AMENDED FRED MEYER GUIDES

On September 24, 2014, the Federal Trade Commission (FTC) approved final amendments to the Fred Meyer Guides ("Guides"). The Guides are intended to help businesses comply with the law regarding promotional allowances and services under the Robinson-Patman Act, 15 U.S.C. § 13 (d) and (e) (RPA or "the Act"). See the FTC's discussion of the changes to the Guides, followed by the amended Guides, at [http://www.ftc.gov/system/files/documents/federal\\_register\\_notices/2014/09/140924fredmeyerfrn.pdf](http://www.ftc.gov/system/files/documents/federal_register_notices/2014/09/140924fredmeyerfrn.pdf).

Summarizing the changes to the Guides takes little time. In addition to inconsequential stylistic revisions, the changes include: references to the Internet and online advertising; new language strengthening the fact that the Guides do not carry the force of law; new but mundane examples of what constitutes a promotional "service" or "facility" under the Act; and an update to the Guides' brief review of customer and third party liability.

What should matter most to companies is not what the amended Guides say — it's what they don't say. Indeed, this latest update can best be described as a missed opportunity. Rather than build on the Supreme Court's efforts to re-shape a body of law that has long been regarded as inconsistent with the goals of competition, the FTC's "modest" amendments do nothing to alter the landscape of RPA jurisprudence in the modern era. See, e.g., *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

The new Guides seem to accept bad law and contentment with its private enforcement. The FTC notes that "its own view" is that "requiring proof of likely injury to competition is sound enforcement policy" and that the FTC will enforce against only those promotional allowances and services likely to harm competition. The FTC, however, explicitly declined to revise the Guides to show how the law could advance this principle.

In essence, nothing has changed.

### THE RPA: A LONGTIME SUBJECT OF CRITICISM

The RPA has long been lambasted for its poor draftsmanship and convoluted language. It has been called "something ranking high on the list of things with which economic nonsense is associated." Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 Fordham L. Rev. 1113, 1114 (1983) (internal quotation marks omitted). Even the Supreme Court has criticized the Act, finding it "complicated and vague in itself and even more so in its context." *Fed. Trade Comm'n v. Ruberoid Co.*, 343 U.S. 470, 483 (1952). While the draftsmanship of the Act as a whole has received almost universal condemnation, Sections 2(d) and (e) have inspired a unique sense of enmity. See, e.g., Hansen, 51 Fordham L. Rev. at 1161 n. 249 (citing Stedman, *Twenty-Four Years of*

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*the Robinson-Patman Act*, 1960 Wis. L. Rev. 197, 218 (“the relationship of sections 2(d) and 2(e) is a hodge-podge of confusion and inconsistency that any competent, order-loving lawyer must find offensive”).

The Act’s afflictions go beyond mere draftsmanship. From an economic standpoint, the RPA has faced criticism not only for its effects, but also the policies it seeks to promote. *Jefferson Cnty. Pharm. Ass’n, Inc. v. Abbott Labs.*, 460 U.S. 150, 170 (1983). Simply put, the RPA is not firmly tethered to the goals of competition; indeed, critics have assailed the Act as “protectionist legislation at odds with Sherman Act policy favoring vigorous price competition.” Paul H. LaRue, *The Robinson-Patman Act: The Great Issues and Personalities*, 55 Antitrust L.J. 135, 136 (1986).

## THE FTC’S MISSED OPPORTUNITY

Instead of providing new insight to cope with these problems, the FTC myopically accepted that the criticism of the Act and much of the case law under it was known at the time of the last revision. The new Guides recap old law. And as part of its effort to reflect “more recent legal developments,” the FTC cites to a case that was argued 13 years ago. Incorporation and analysis of cases like *American Booksellers Ass’n v. Barnes & Noble*, 135 F. Supp. 2d 1031 (N.D. Cal. 2001) does not fully encapsulate the “[d]evelopments in technology, methods of commerce, and the law since the last revision of the Guides.”

The amended Guides purport to reflect changes in technology and methods of marketing that have occurred since 1990, including the emergence of the Internet and widespread online marketing. However, the occasional insertion of “Internet” or “online advertising” to the old Guides does little to help companies effectively utilize these emerging platforms while remaining in compliance with the Act. Notably, the FTC applied the old, restrictive principles to the use of these emerging platforms, rejecting even the use of website postings as one of the means to provide notice to customers of promotional programs on the basis that this would put too much of a burden upon the customer.

## UNCHANGED ENFORCEMENT POLICY

Noteworthy is the Guides’ comment on FTC enforcement policy—that it will require a likely anticompetitive harm. Indeed, for this reason, federal enforcement of the RPA is essentially absent, and the amended Guides offer no indication that this is likely to change. At the same time, however, the amended Guides explicitly offer no insight to protect suppliers who give or receive promotional allowances that may be pro-competitive yet who may be at risk of private actions claiming a violation of the Act, noting that “the Act may be enforced by disfavored customers, among others.”

## LOOKING AHEAD

The most meaningful aspect of the updated Guides is that suppliers do not need to change their compliance policies based on these amendments. Yet suppliers cannot wholly embrace pro-competitive promotional allowance policies if those policies may put them at risk of private suit under the RPA. For now, courts and private parties alike will continue to grapple with the unnecessarily confounding language of the RPA and will be left on their own to push for pro-competitive outcomes, perhaps for another 24 years.

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