Robinson-Patman Act: Advertising and Promotional Allowances and Services

A Practical Guidance® Practice Note by
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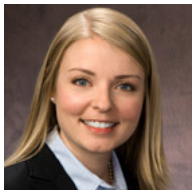

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This practice note will assist readers in understanding Congress's intent for the Robinson-Patman Act (RPA), how Sections 2(d) and 2(e) operate, how enforcement agencies and courts apply these sections, and what claims and defenses manufacturers and resellers can raise. This note also provides guidance to companies that are seeking to comply with Sections 2(d) and 2(e) without appreciable disruption to their businesses.

The RPA prohibits certain forms of pricing and promotion discrimination among competing downstream buyers of a manufacturers products. Sections 2(d) and 2(e) of the RPA regulate promotional allowances and services provided by manufacturers to buyers to aid the buyers efforts to resell the products and are implicated when a downstream reseller requests better pricing, terms, or increased advertising and promotional allowances, or manufacturers offer those opportunities to certain resellers and not others.

For a chart of RPA-related cases, see Robinson-Patman Act Case Chart. For more information on the other provisions of the RPA, see Robinson-Patman Act Section 2(a) Price Discrimination Claims: Defenses, Robinson-Patman Act Section 2(a) Price Discrimination Claims: Elements, Robinson-Patman Act Section 2(c) Brokerage Provision Claims, and Robinson-Patman Act Section 2(f) Buyer Liability.

The Robinson-Patman Act Overview

During the throes of the Great Depression, Congress passed the RPA, 15 U.S.C. § 13, amending the Clayton Act in 1936. Congress designed the RPA to protect smaller retailers from pricing disadvantages that could result from larger retailers leveraging their size to demand better deals from suppliers.

To that end, the RPA prohibits sellers from favoring one buyer over another as to product price, terms of sale, and advertising and promotional support. See Woodman's Food Mkt. v. Clorox Co., 833 F.3d 743, 746–47 (7th Cir. 2016). The RPA also prohibits buyers from inducing a seller to violate the RPA or knowingly participating in a scheme that violates the RPA. See 15 U.S.C. § 13(f).

The RPA has six sections: 2(a)–(f). Section 2(a) prohibits price discrimination by sellers. For more information, see Robinson-Patman Act Section 2(a) Price Discrimination Claims: Defenses and Robinson-Patman Act Section 2(a) Price Discrimination Claims: Elements. Section 2(b) provides an affirmative defense that sellers can raise against claims

of price discrimination. Section 2(c) prohibits granting or receiving commissions or brokerage fees, except for services rendered. For more information, see Robinson-Patman Act Section 2(c) Brokerage Provision Claims. Section 2(d) prohibits sellers from paying or giving allowances to customers for promoting and advertising the resale of the sellers product unless those allowances are offered to competing resellers. Section 2(e) prohibits sellers from offering promotional or advertising services to resellers unless those same services are offered to competing resellers. Lastly, Section 2(f) prohibits buyers from knowingly inducing or receiving a discriminatory price. See Robinson-Patman Act Section 2(f) Buyer Liability.

History and Background of Sections 2(d) and 2(e)

As mentioned, Congress included Sections 2(d) and 2(e) to prevent sellers from favoring a competitive buyer through means other than price discrimination. If a seller paid a favored buyer to promote the product on resale, then fellow competitive buyers could suffer the same competitive disadvantages had the seller simply discriminated based on the original sale price. To permit, this would allow sellers and buyers to circumvent Section 2(a) by disguising price discrimination as advertising and promotional benefits. See Fred Meyer, Inc., 390 U.S. at 350–51. For these reasons, Section 2(a) applies to the original sale of goods, while Sections 2(d) and 2(e) apply to promotional services paid for or offered by the seller to promote goods on resale. See Woodman's Food Mkt., 833 F.3d at 748 (collecting cases).

After the RPAs passage, the Federal Trade Commission (FTC) actively filed enforcement actions against sellers violating these sections. However, over time, the FTC stopped bringing enforcement actions and primary enforcement of the RPA gradually shifted to private litigation. To illustrate, between 1961 and 1968, the FTC filed 518 complaints for violations of the RPA. But between 1993 and 2000, the FTC filed just one complaint. See The Modern Evolution of U.S. Competition Policy Enforcement Norms, 71 Antitrust L.J. 377. The shift away from federal enforcement of the RPA can be explained by the evolving view of who the RPA is meant to protect. At the beginning of the RPA, courts and enforcement agencies were of the mind that the RPA was meant to protect the interests of individual resellers who found themselves competing for sales of identical products, rather than consumers or competition in general. Over time, that view of the RPA and its purpose has evolved. Today, federal enforcement agencies and courts have put an emphasis on interbrand competition—that is competition between brands selling similar products—that directly affects consumers, rather than intrabrand competition that may or may not affect the ability of a consumer to get the best price for a particular good. Because the RPA applies to and focuses on intrabrand competition (competition among resellers of the same products), and because that is no longer a focus of antitrust law generally, enforcement of the RPA as part of the federal governments antitrust playbook has waned. Although companies and resellers still enforce the RPA via private litigation, its enforcement by government agencies is practically nonexistent.

The federal government, however, continues to update its interpretation of the RPA to guide manufacturers and resellers. In recent decades, the FTC has pivoted from enforcement actions to issuing nonbinding regulations on how to comply with Sections 2(d) and 2(e), which are known as the Fred Meyer Guides (Guides), named after the 1968 Supreme Court case, FTC v. Fred Meyer, Inc., 390 U.S. 341. The FTC updated the Guides in 1972, 1990, and 2014, which are set forth as regulations in 16 C.F.R. § 240 et seq.

When Do Sections 2(d) and 2(e) Apply?

Section 2(d) applies if a seller pays a buyer for promotional services to advertise the sellers products on resale and the buyer competes with other buyers of the sellers products. 16 C.F.R. § 240.2(a). Section 2(e) is similar to Section 2(d) except that Section 2(e) applies when the seller directly provides, or furnishes, the promotional service to advertise the sellers products on resale. 16 C.F.R. § 240.2(b). Together, these sections prohibit a seller from paying for or furnishing any promotional service to a reseller unless the payment or furnishing of the service is made available on proportionally equal terms to all resellers with whom the offered reseller competes (discussed and explained further below).

By regulation, the Guides define a "seller" as any manufacturer, distributor, or similar party that sells a product to a buyer and the buyer then resells. The product can be in its finished state or requires further processing. 16 C.F.R. § 240.3. The Guides also define a buyer as "any person who buys a product for resale directly from the seller, or the sellers agent or broker." 16 C.F.R. § 240.4.

Courts have agreed, finding that indirect buyers who purchase goods on terms not controlled by the original seller are not protected by Section 2(d) or 2(e). See Lewis v. Philip Morris, Inc., 355 F.3d 515, 529–30 (6th Cir. 2007). Moreover, the Guides provide a list of examples of buyers who may not be covered by the sections. These include purchasers of distressed merchandise, a retailer purchasing solely from other retailers, purchasers that do not regularly sell the sellers product, or retail stores that do not usually sell the sellers product unless the seller has notice that the store is selling the product. 16 C.F.R. § 240.4.

Courts have not always consistently articulated the exact elements of a Section 2(d) and/or 2(e) claim. Generally, however, the following elements must be present to state a claim:

- Paying for or furnishing a promotional service
- To a competing reseller
- Where the promotional service (or something proportionally equal) is not contemporaneously available to other competing resellers

Even if these elements are met, it is important to note that Sections 2(d) and 2(e) generally do not apply where there is only one sale (i.e., where a manufacturer is selling directly to consumers). The Supreme Court articulated this requirement as part of its interpretation of the purpose of the RPA: "the competition with which Congress was concerned in § 2(d) was that between buyers who competed in resales of the suppliers products." See Fred Meyer, Inc., 390 U.S. at 356. In this context, resale generally means promotional services that primarily promote resale to the buyers customers or benefits that go to the buyers customers. See, e.g., Woodman's Food Mkt. v. Clorox Co., 833 F.3d 743, 748 (7th Cir. 2016).

When Does a Seller "Pay for" Or "Furnish" Promotional Services?

As mentioned, Sections 2(d) and 2(e) apply only when a company pays resellers to provide "promotional services" or the company provides the services themselves, and those promotional services are connected to the resale of the products. 16 C.F.R. § 240.7. A reseller will not have a claim under Sections 2(d) and 2(e) if the promotions are only related to the initial sale. Id. In those instances, the reseller would need to bring a claim under Section 2(a) for price discrimination.

But what does that mean? What is meant by promotional services that are covered by the act? Sections 2(d) and 2(e) cover services or payments that support resale of the products at issue, such as a resellers promotion of the products where the products are offered for sale (e.g., promotional signage on an endcap). Most often, the promotional services that trigger these sections are cooperative advertising budgets and services, handbills, demonstrators and demonstrations, catalogs, cabinets, displays, prizes or merchandise for promotional contests, special packaging, and online advertising. 16 C.F.R. § 240.7. Both the federal regulations and courts have provided examples of promotional services that are covered by the RPA, and the Guides provide a non-exhaustive list of services covered by the RPA. In Example 2 of the Guides, the seller of candy bars offers the buyer special "Halloween-themed packaging" to promote candy bars on resale on behalf of the buyer. This is a promotional service covered by Sections 2(d) and 2(e). Several courts have also provided useful examples of activities that qualify as promotional services covered by the RPA. One court held that advertising funds collected by a seller and made available to buyers qualified as a promotional service. See Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1328–29 (6th Cir. 1983). Another court concluded that rebates paid by a manufacturer to a retailer in order to benefit the retailers customers constituted a promotional service. See R. J. Reynolds Tobacco Co. v. Premium Tobacco Stores, Inc., 1999 U.S. Dist. LEXIS 19641, at *3 (N.D. Ill. 1999).

However, not every activity or service can qualify as a promotional service. There are several examples of services and activities that did not qualify as promotional services covered by the RPA. For example, one court concluded that land leased by the seller to the buyer was not covered by the RPA. See Portland 76 Auto/Truck Plaza v. Union Oil Co., 153 F.3d 938, 948 (9th Cir. 1998). Another court held that incentives offered to a car dealership that promised more of a certain vehicle was not a promotional service because the incentives related to the original sale. See Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 484 F.3d 865, 873 (6th Cir. 2007). Moreover, preferential credit arrangements have been deemed to fall outside the scope of Sections 2(d) and 2(e). See Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1328 (6th Cir. 1983).

Lastly, a court recently found that package size alone is not a promotional service because the package did not include any promotional messaging. See Woodman's Food Mkt. v. Clorox Co., 833 F.3d 743, 749 (7th Cir. 2016). Indeed, covered promotional services must be tied to promotion

or advertising on resale. Otherwise, any service would be covered, which would risk undermining the balance that Congress has struck between the broad reach of Section 2(a) and the narrow reach of Sections 2(d) and 2(e). Woodman's Food Mkt., 833 F.3d at 750.

How Do You Know When Resellers Compete?

In addition to the requirement that the promotional services be connected to the resale of the product, a claim under Sections 2(d) and 2(e) only arises where those services are not offered to all competing resellers, but instead are only offered to certain resellers. Several courts have clarified certain resellers that are not "competitors" under Sections 2(d) and 2(e). These include former resellers and recipients of invitations to negotiate. See Motive Parts Warehouse v. Facet Enterprises, 774 F.2d 380 (10th Cir. 1985); see also Chicago Seating Co. v. S. Karpen & Bros., 177 F.2d 863 (7th Cir. 1949).

To state a claim under Sections 2(d) and/or 2(e), a plaintiff must show that it was a disfavored reseller and that the favored reseller was an actual competitor (i.e., that the favored reseller was in the same geographic market competing for the same resale customers, at the same functional level). See Eastern Auto Distributors, Inc. v. Peugeot Motors of America, Inc., 795 F.2d 329, 335 (4th Cir. 1986). In practice, particularly given the rise in internet sales, the geographic market component of determining who a competing reseller is has not been a focus in recent years. If resellers are competing for the same sales on the internet, regardless of where they are physically located, they likely will be seen as competing resellers.

Proving that a favored reseller competes with a disfavored one may involve the assistance of an economist or market expert to demonstrate or explain the competition at issue. Economic realities, not just the labels placed on the resellers, will determine whether two resellers actually compete. Most recently, the importance of proving that two resellers were actual competitors was highlighted in U.S. Wholesale Outlet & Distribution Inc., et al. v. Living Essentials LLC, et al. (Case No. 2:18-cv-01077, U.S. District Court for the Central District of California). After a trial in October 2019, the jury found that the maker of 5-Hour Energy—Living Essentials LLC—did not violate the RPA when it offered Costco lower wholesale prices and instant rebates that it didnt make available to other resellers because Costco and Living Essentials disfavored customers were not competitors.

Living Essentials was brought by family-owned wholesalers who alleged that 5-Hour Energy was engaging in illegal price and promotions discrimination in sviolation of the Robinson-Patman Act, Sections 2(a) and 2(d). Specifically, plaintiffs expert testified that between 2012 and 2018, Costcos average net price per bottle was $1.13, while other wholesalers had to pay an average of $1.34 per bottle. Plaintiffs claimed that the $0.22 price differential—which was the result of spoilage allowances, early payment discounts, rebates at the point of sale, advertising rebates, and discounts for electronic orders—had the effect of steering consumers to Costco and away from convenience stores, club stores, and drugstores. In defending the claims, 5-Hour Energy engaged multiple experts and presented expert testimony that the differences in pricing and promotions were part of a broader strategy for multichannel marketing across the U.S., and that Costco was in a different market channel and thus not a competitor of plaintiffs. The jury ultimately sided with 5-Hour Energy, finding that because plaintiffs did not compete with Costco, there was no violation of Sections 2(a) and 2(d) of the RPA. Living Essentials highlights the importance of proving the disfavored reseller and favored reseller are actual competitors in a relevant market. It also highlights the need for companies to obtain legal advice when pricing and promoting their products. For more information, see Market Definition.

Despite the requirement that a disfavored reseller demonstrate competition with a favored reseller, a plaintiff under Sections 2(d) and/or 2(e) need not show any injury to competition. As such, the Supreme Court has described Section 2(d) and (e) violations as per se unlawful. This is different from a claim under Section 2(a), where a plaintiff must prove not only that it competes for sales, but also that it was competitively disadvantaged. The practical implication of this is that a claim under Sections 2(d) and/or 2(e) is easier to plead and prove than a Section 2(a) claim. This is especially true where a plaintiff is only seeking injunctive relief, and not monetary damages.

Contemporaneous Availability and Proportionate Equality

To state a claim under Section 2(d) or 2(e), a plaintiff must be able to demonstrate certain characteristics of the advertising or promotional allowance at issue.

Contemporaneous

First, the disparate benefits must be contemporaneous, which means that the favored and disfavored buyers were customers of the seller "within approximately the same

period of time as the award made to the favored buyer." See England v. Chrysler Corp., 493 F.2d 269, 272 (9th Cir. 1974). What constitutes a contemporaneous promotional allowance will depend on the industry. For instance, a promotional allowance a seller offers to one customer on a grocery product in July did not need to be offered to one of the customers competitors in December because promotional allowances in July and December were not reasonably contemporaneous in the groceries market. See Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958); see also England v. Chrysler Corp., 493 F.2d 269 (9th Cir. 1974) (promotional allowances on motor vehicles that were 16 months apart were found to be not contemporaneous because they involved different model years).

Unavailable

In addition to the contemporaneous requirement, for a disparate allowance to be actionable it must be unavailable to the complaining reseller. Promotional allowances are available to a reseller if a company takes reasonable steps to provide notice to all competing resellers that the promotional allowances are available and describe the steps the resellers must take to obtain them. This is also known as functional availability. FTC guidance suggests that the notice should be in a writing and sent directly to the resellers. 16 C.F.R. § 240.10(b). When a company receives notice of a promotional allowance, but does not take advantage of it, they have not suffered an alleged disparate offering. Where promotional allowance are available, but not used, there is no Section 2(d) or 2(e) claim.

Proportionally Equal

Finally, promotions offered to competing resellers must be proportionally equal. They need not be identical, but a manufacturer exposes itself to liability if the promotions it offers to competing resellers are not proportionally equal. A plaintiff can meet the third element if a company offered or paid for promotional services that were not on "proportionally equal terms to all." See Woodman's Food Mkt. v. Clorox Co., 833 F.3d 743, 745 (7th Cir. 2016). The Guides provide more explanation on this term. First, the Guides explain that there is no required method to make allowance offers proportionally equal. 16 C.F.R. § 240.9. However, the Guides list several methods to ensure proportional equality of terms to all buyers. For example, the seller can base the promotional allowance on the dollar volume of sales or quantity of the product purchased during a specified time period.

Promotional Allowances Plan

To avoid potential issues and claims under the RPA, the Guides strongly suggest that promotional allowances be made according to a plan and that the plan be in writing if the allocation of allowances is complicated. 16 C.F.R. § 240.8. For manufacturers, following those suggestions should help provide notice of the promotional allowances to competing resellers and, if necessary, convince a court that the allowances are proportionally equal. It also helps avoid inadvertent violations of the RPA by forcing companies to put extra time and thought into their promotional offerings and allocations.

Who Enforces Sections 2(d) and 2(e)?

The FTC and the Department of Justice (DOJ) have jurisdiction, but neither have actively enforced Sections 2(d) or 2(e) in several decades. Instead of active enforcement, the FTC publishes and updates the Guides and files amicus briefs in private lawsuits advocating for courts to apply certain interpretations of the RPA. For example, in 2015, the FTC filed an amicus brief in Woodmans Food Mkt., Inc. v. Clorox Co. 833 F.3d 743 (7th Cir. 2016) urging the court to narrowly interpret Section 2(e) to cover promotional services and activities and nothing more.

Besides the FTC, the Antitrust Division of the DOJ has enforcement authority. However, the DOJ has not enforced the criminal provisions of the RPA since 1960. And while the Antitrust Modernization Commission recommended that Congress repeal the RPA in 2007 (see here), Congress did not act on that recommendation.

Because the FTC and DOJ have backed away from enforcing the RPA, private plaintiffs through civil lawsuits have become the primary enforcers of the RPA. As it relates to Sections 2(d) and 2(e), plaintiffs can sue for two forms of relief: (1) money damages under Section 4 of the Clayton Act, 15 U.S.C. § 15; and/or (2) injunctive relief under Section 16 of the Clayton Act, 15 U.S.C. § 26. The type of relief sought by a plaintiff significantly impacts the lawsuit. If the plaintiff seeks money damages, then the plaintiff must show an antitrust injury. That is, the discrimination diminished the ability for the buyer to compete with other competitors reselling the products at issue. See Rutman Wine Co. v. E. & J. Gallo Winery, 829 F.2d 729, 737 (9th Cir. 1987). In any event, whether a plaintiff seeks damages or injunctive relief (or both), courts have required plaintiffs to still show injury-in-fact and causation. See Lewis v. Philip Morris, Inc., 355 F.3d 515, 525 n.13 (6th Cir. 2004).

The practical implication of the absence of an injury requirement when seeking injunctive relief is that considerably less evidence from economic experts may be required, and therefore the costs associated with bringing a claim for injunctive relief will be lower. A Section 2(d) or 2(e) case, as a result, will often be easier to plead and prove than a Section 2(a) case, which requires you to prove injury to competition.

What Defenses Can a Seller Raise?

The main defense that a seller can raise against Section 2(d) and 2(e) claims is known as the "meeting competition" defense. The seller can raise this defense if the seller paid for or provided promotional services at a higher rate to compete with similar services offered by a competing seller. See 16 C.F.R. § 240.14; Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961). However, the seller cannot defend against a 2(d) or 2(e) claim by claiming that saving on cost justified the violations. 16 C.F.R. § 240.15. For more information on the "meeting competition" defense, see Robinson-Patman Act Section 2(a) Price Discrimination Claims: Defenses.

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Checklists

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- Robinson-Patman Act Section 2(a) Price Discrimination Elements and Defenses Checklist

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Kara M. Mundy is an associate in the Vorys Columbus office, a member of the antitrust subgroup, and a member of the litigation practice group. Her practice focuses on antitrust advising and litigation, land use and eminent domain litigation, and general complex commercial and business litigation. Kara also has experience representing both plaintiffs and defendants in antitrust class action litigation.

She has significant experience counseling clients on antitrust issues related to price fixing, no-poach, no-hire and non-solicitation arrangements, compliance, competitive bidding, and mergers and acquisitions. As part of her antitrust practice, Kara works with manufacturers and retailers on issues relating to Minimum Advertised Pricing policies and Resale Price Maintenance. She advises clients regarding vertical pricing issues and how business clients can structure their relationships with distributors and retailers to avoid violations of the Sherman, Clayton, and Robinson-Patman Acts. She regularly trains executives and sales teams on competition issues and how companies can structure their business operations and communications to lower their antitrust risk.

As part of her work on behalf of clients who are navigating competition and marketplace issues, Kara represents a Fortune 500 company bringing price gouging and Lanham Act, and state law corollary claims against unauthorized sellers of counterfeit products. She has experience obtaining preliminary and permanent injunctive relief, seizure orders, and judgments against bad actors in the marketplace, particularly those markets that have seen increased activity as a result of the global pandemic.

With respect to Kara's land use and general complex commercial litigation practice, Kara has represented clients and litigated disputes involving real property, zoning approvals and denials, governmental appropriations, complex contracts, and breach of fiduciary duties. She regularly practices in federal and state courts, and has achieved favorable results for her clients in both arenas."