

**Comments of the Section of Antitrust Law
of the American Bar Association
in Response to the
Antitrust Modernization Commission’s
Request for Public Comment
Regarding Robinson-Patman Act Study Issues**

April 2006

The Section of Antitrust Law (“Antitrust Section”) of the American Bar Association (“ABA”) is pleased to submit these comments to the Antitrust Modernization Commission (the “Commission”) in response to its request for public comment dated May 19, 2005 regarding specific questions relating to the Robinson-Patman Act (“RPA” or the “Act”) adopted for study by the Commission. The views expressed herein are being presented on behalf of the Antitrust Section only. With the exception of the ABA policy regarding the RPA referenced below, these views have not been approved by the House of Delegates or the Board of Governors and, accordingly, should not be construed as representing the policy of the ABA.

I. SUMMARY OF RECOMMENDATIONS

A. Should the Robinson-Patman Act be repealed in whole or in part, or otherwise be modified?

In 1987 the ABA House of Delegates adopted a policy recommending various amendments to the RPA. These recommendations, described in detail in ABA Report to the House of Delegates #105, reproduced in Appendix A hereto, call for repeal of Sections 2(c) and 3 of the Act, and amendment of Sections 2(d) and 2(e) so as to incorporate the same competitive injury test applicable to secondary line price discrimination under Section 2(a). At the time these recommendations were adopted, they were offered as a means by which to achieve “more internal consistency within the Robinson-Patman Act, promote greater harmony with antitrust principles expressed in other statutes and repeal a vague criminal statute that has not been invoked in any prosecution for more than 20 years.”¹ In the Section’s view, despite the passage of almost twenty years, the arguments supporting these recommendations retain their cogency and are preferable to other legislative proposals discussed below. The Commission is therefore urged to give serious consideration to advancing desirable and feasible reforms.

B. Should Section 3 of the Robinson-Patman Act (providing for criminal penalties) be repealed?

¹ ABA Report to the House of Delegates #105 at 1 (1987) (“Report 105”). Although only the “Recommendation”—and not the related “Report”—section of Report 105 constitutes official ABA policy, the Report contains useful background information and analysis that is generally consistent with the Recommendation.

As noted above, ABA Policy recommends repeal of Section 3, a position that the Section continues to endorse. For decades, enforcement officials, practitioners, and scholars have viewed the provisions of Section 3 as anachronistic, vague, confusing, and possibly unconstitutional. Indeed, there appears to be near-unanimous support in the antitrust community for repealing Section 3.

II. COMMENTS

A. THE 1987 ABA POLICY RECOMMENDATIONS

In February 1987, the Section of Antitrust Law submitted its Report on Resolution #105 to the ABA's House of Delegates for approval. All three of the Section's recommendations were adopted as, and remain today, official ABA policy. Pursuant to that policy, the ABA and the Section of Antitrust Law recommend the following legislative reforms:

*Amend Sections 2(d) and 2(e) of the Act by integrating into them that part of the language of Section 2(a) describing the secondary line competitive injury requirement.*² This change was intended to eliminate the *per se* rule applicable to cooperative promotional allowances and services, in favor of subjecting discrimination in the provision of promotional allowances and services to the same standard applicable to price discrimination under Section 2(a). Report 105 points out that this is a “modest proposal” and not a radical change, given the existing requirements that promotional benefits be practically available on proportionally equal terms.

The proposed reform would expressly require individual plaintiffs alleging violations of these sections to establish proof of a likelihood of adverse overall competitive impact, not merely the fact of discrimination. Report 105 notes that with billions of dollars of promotional expenditures being made openly by suppliers, “suppliers are left with a confusing tangle of regulations intended to control an evil that simply does not exist. After 50 years of enforcement, it is clear that there is no legitimate basis for applying drastically different standards to Sections 2(d) and 2(e) from those applied to price discrimination generally.”³ Thus, under the proposed amendments, “if actual displacement of sales is not shown, an inference of injury could be made only if a supplier's promotional program provides substantial competitive benefits on a discriminatory basis for a period of time deemed sufficient to give rise to” the inference of secondary line competitive injury permitted under the Supreme Court's decision in *FTC v. Morton Salt*, 334 U.S. 37 (1948).

² Report 105 does not suggest specific legislative amendments to implement this recommendation. The full competitive injury language from Section 2(a) is as follows: “. . . and 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.” Consistent with the purpose of Sections 2(d) and 2(e), which apply only to funds and services provided in connection with the resale of commodities, the proposed amendment would integrate only the secondary line injury portion, which could be accomplished by several different means.

³ Report 105 at 2.

Repeal Section 2(c), which prohibits the payment or receipt of brokerage, or discounts in lieu thereof, to or from the other party to a transaction, except for services rendered. Report 105 notes that this provision now stands apart from the balance of the Act as “a self-contained trade practice prohibition” that apparently does not require either a showing of discrimination or competitive injury.⁴ The result, as reflected in the review of Section 2(c) cases and agency actions cited in Report 105, is “a legacy of untoward consequences and a body of jurisprudence that has been less than salutary.”⁵ Changes in distribution practices since the section was enacted have rendered it an unneeded anachronism, a potentially anticompetitive deterrent against innovative distribution practices. Furthermore, Section 2(a) already addresses “indirect” price discrimination, while undue influence of company agents, *i.e.*, “commercial bribery,” is addressed under state tort law or self-policed through adoption of specific company policies.

Repeal Section 3, which authorizes criminal suits attacking, inter alia, predatory sales below cost or at unreasonably low prices. Report 105 calls the case for repeal of Section 3 “compelling.”⁶ Several prior studies of Section 3, including studies in 1955, 1969, and 1975 by the Attorney General, the White House, and the DOJ, respectively, support the conclusion that this provision is vague, confusing, and possibly unconstitutional. Moreover, as a practical matter, the agency charged with enforcing the statute long ago indicated an unwillingness to do so, resulting in a *de facto* repeal.

B. BACKGROUND DISCUSSION OF SOME ALTERNATIVE APPROACHES TO “MODERNIZING” THE RPA

While in the process of formulating these Comments, the Section considered various positions on potential reform of the RPA, including repeal. These positions are not incorporated into the 1987 ABA Policy, nor do they reflect the official views of the Section of Antitrust Law. They are summarized, but only as background information relevant to certain issues raised by the Antitrust Modernization Commission with respect to the RPA. They do not represent any course of action recommended by either the ABA or the Section.⁷

In the end, the Section believes that the ABA Policy substantially responds to the Study Questions posed by the Commission. The changes recommended by the ABA attempt to cure

⁴ *Id.* at 6.

⁵ *Id.* at 5.

⁶ *Id.* at 10.

⁷ The background discussion below is not by any means an exhaustive review of every approach to “modernizing” the RPA. Indeed, given the ABA Policy recommendations calling for at least some legislative changes in the RPA, the following discussion does not focus on the case for expansion of the existing statute’s reach and increased government enforcement. The Section is aware, however, that such approaches have been urged in testimony before the Commission. *See* Bruce V. Spiva, *Comments of the American Booksellers Association to the Antitrust Modernization Commission Robinson-Patman Act Panel* (July 28, 2005) (advocating against repeal); *Statement of J.H. Campbell, Jr. on Behalf of the National Grocers Association Before the Antitrust Modernization Commission on the Robinson-Patman Act* at 11-17 (July 28, 2005) (urging that the Commission recommend extending coverage to services, greater enforcement by the FTC).

the most glaring internal inconsistencies of the Act while moving its antidiscrimination provisions more closely in line with the procompetition goals of antitrust law. The various alternative approaches described below reflect longstanding concerns about the role of the RPA in antitrust law. The difficulty, however, is in reaching consensus, within a large and diverse group of practitioners, scholars, and government enforcers, as to the most effective and prudent way to address those concerns. Although many in the antitrust community have advocated and continue to advocate for more radical legislative and nonlegislative reforms or for outright repeal, the ABA and the Section of Antitrust Law continue to believe that the 1987 Policy recommendations are at the present time the most feasible approach and deserve consideration by the Commission.

1. Arguments for Repeal of the Secondary-Line Provisions of the RPA

Proponents of repeal begin with the premise that the antitrust laws are interpreted to enhance and protect consumer welfare.⁸ The RPA, of course, arose from a different set of concerns: “[w]elfare losses caused by price discrimination were not on the mind of Congress in 1936. Rather, they were concerned that small businesses, particularly small retailers, were rapidly losing market share to large ‘chain stores’ that were able to underbuy and thus to undersell the small operators.”⁹ Thus, low prices, not discriminatory prices, are the chief “evil” condemned by the Act. For that reason, repeal proponents contend, the RPA cannot be understood as designed to encourage allocative efficiency or maximize consumer welfare. It was designed instead to protect small businesses from larger, more efficient businesses. A necessary result, they contend, is higher consumer prices.”¹⁰ They maintain that repeal would allow for any problems of secondary line price discrimination to be analyzed in an evolutionary way, in the context of the Sherman Act or Federal Trade Commission Act.¹¹

Repeal advocates note that, insofar as it applies to competition between buyers of the same seller (“secondary line” price discrimination), the RPA’s buyer-level provisions have been criticized by government and bar association task forces, legal scholars, economists and business executives for being inconsistent with basic competition policy, distributive efficiencies, and marketplace realities. They point to the early case for repeal found in the Department of Justice’s 1977 Report on the Robinson-Patman Act, which incorporates the criticisms of many economists and scholars. They also note that for its part, the FTC, which until approximately 1970 devoted the bulk of its competition-mission resources to enforcement of the Robinson-Patman Act, has brought very few actions in the last thirty-five years.

⁸ See *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (affirming that the Sherman Act is “‘conceived of primarily a remedy for the people of the United States as individuals,’ especially consumers, and thus the treble damages provision of the Clayton Act ‘opens the door of justice to every man’”).

⁹ HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 14.6a1 (3d ed. 2005).

¹⁰ *Id.*

¹¹ See RICHARD A. POSNER, THE ROBINSON-PATMAN ACT, FEDERAL REGULATION OF PRICE DIFFERENCES 52-53 (1976).

To be sure, those who support repeal recognize that significant developments in RPA enforcement policies and jurisprudence have mitigated some adverse effects of earlier judicial and agency decisions. Their concern is that, notwithstanding such progress, arguments that secondary line injury should involve either proof of injury to competition (instead of merely to the plaintiff) or injury to the competitive process, have had limited success.¹²

Those urging repeal would discourage the Commission from recommending legislative reforms short of repeal. They believe that the inherent complexities of distribution systems and efficient marketing practices make it impossible to draft a statute to protect distributive equity without seriously impairing allocative efficiency. They claim that either the statute must be written in such a simplistic fashion as to severely constrain efficient firm behavior, or in such a complicated fashion as to defy consistent and meaningful interpretation. They also believe that the cost of litigation is exceedingly high and that even lawful behavior under a price discrimination statute may be deterred to the extent that uncertainties in the law exist.¹³

Judge Posner has criticized the Act for being at odds with the economic concept of price discrimination. “Price discrimination,” as the RPA defines it, is simply a price difference. Thus, “price discrimination” as a term of legal art significantly differs from price discrimination as an economic concept.¹⁴ What should be the role of antitrust policy with respect to economic price discrimination? On this question there has been considerable discussion and debate,¹⁵ but no serious suggestion (repeal advocates say) that a separate statute or amended RPA should be framed to identify and deal with problematic economic price discrimination.¹⁶ Indeed, those supporting repeal contend that none of the situations where economic price discrimination may

¹² See ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 479, fn. 154-55 (5th Ed. 2002) (“ANTITRUST LAW DEVELOPMENTS V”).

¹³ See ABA ANTITRUST SECTION, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW (Vol. I) 37 (1980) (“ABA MONOGRAPH NO. 4”). See also U.S. DEPT. OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT 9-37 (1976) (“1976 DOJ REPORT”).

¹⁴ POSNER, *supra* note 11, at 3 (“To an economist price discrimination means making two (or more) sales at prices that are not in the same proportion to the marginal cost of each sale.”).

¹⁵ Economic objections to price discrimination include: (a) “a price difference not justified by a difference in cost may distort competitive relationships and impair efficiency at the customer level;” (b) it “is a symptom of and, more important, a condition fostering monopoly cartel pricing at the seller level.” *Id.* at 3-4.

¹⁶ “Some commentators have argued that price discrimination should not be an antitrust concern because it does not produce losses in output as other monopolistic practices do.” [Others have argued, however, that] only perfect price discrimination maintains output at the competitive level [and that] [u]nder imperfect price discrimination output is always lower.” HOVENKAMP, *supra* note 9, at § 14.5a. It has also been argued that “price discrimination can generate substantial social losses, equivalent to the efficiency losses that can result from all forms of monopoly” because of (a) “deadweight loss caused by reduction in output” from real-world imperfect price discrimination; (b) “exclusionary practices: the actions that the price-discriminating monopolist takes in order to obtain or maintain its market power”; and (c) “the expense of identifying different groups of customers who have different reservation prices, segregating them, perhaps creating different distribution systems, and disguising the product in such a way as to prevent arbitrage.” *Id.*

be problematic “suggests that price discrimination should be an antitrust offense, although a few courts have condemned price discrimination under § 2 of the Sherman Act.”¹⁷

Another concern expressed by proponents of repeal is that the RPA very often implicates pricing practices that under the Sherman Act would be considered purely intrabrand vertical nonprice restraints, which are rarely unlawful. When a supplier makes an independent choice to charge higher prices to smaller, less aggressive or more poorly placed dealers, they say, it should not be presumed that the supplier is acting so as to make its distribution function in a less competitive manner.¹⁸ In the view of many businesspeople, the best way to encourage dealers to sell more is to give them financial rewards and to promote the product most aggressively in the more successful outlets. Professor Hovenkamp has noted that financial rewards often take the form of a price reduction, whether in the form of a discount, rebate, or similar form of favorable treatment. Repeal advocates argue that this is precisely the type of conduct that the RPA condemns when the favored and disfavored dealers are in competition with each other, without assessing any market power requirement, and, in the majority of decisions, without any finding whatsoever of an effect on competition.

The case for repeal addresses the most important current argument advanced in support of the Act—that it forestalls monopoly or oligopoly in distribution and promotes diversity of choice in the retail sector—by arguing that distribution is a vibrant area of the American economy, characterized by a variety of choices open to consumers. Those promoting repeal claim that the ease of entry into various sectors of distribution makes it unlikely that a firm could obtain monopoly power in any branch of distribution, and in any event, there is no evidence of widespread monopoly abuses in retailing or distribution.

Although one cannot rule out the possibility that concessions in price or other terms represent an exercise of buyer power, the preferable approach, some proponents of repeal argue, may be to address any such exercise of buyer power (and the complicated issues involved in any assessment) within the framework of the Sherman Act, where differing views on underlying questions such as proof of market power and anticompetitive effects can be assessed.¹⁹ Put another way, this view holds that the RPA is the wrong remedy for a problem (*i.e.*, truly anticompetitive exercises of market power by a buyer), because its legislative “solution” is not fitted to the particular problem and involves disadvantages far outweighing its advantages.

¹⁷ *Id.* (“As a general matter, a monopolist may lawfully set its profit-maximizing price, and price discrimination is not itself an ‘exclusionary’ practice.”). Moreover, the costs of preventing price discrimination without any accompanying exclusionary conduct would almost certainly outweigh any benefits, particularly if the market is competitive or oligopolistic. “[M]onopolistic price discrimination must be properly identified. Often price discrimination results from little more than the modest power that results from product differentiation. In addition, price differences often reflect no more than differences in risk, transaction terms, or other market features.” *Id.*

¹⁸ See Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 126 (2000) (emphasis added).

¹⁹ Indeed, “[i]t is especially noteworthy that the Federal Trade Commission’s exhaustive study of chain-store practices, the study that was ostensibly behind the Robinson-Patman Act, largely exonerated the chains from the charges of wrongdoing that had been leveled against them.” POSNER, *supra* note 11, at 26 (footnote omitted).

The arguments for repeal includes a “laundry list” of the actual and potential harms imposed by the enforcement of and ongoing compliance with the RPA’s secondary line provisions. Many of these asserted harms have troubled RPA critics for decades; they can be briefly summarized as follows:

- **“Enforcement of the RPA Accomplishes Little to Protect Small Businesses as a Group.”** The RPA specifically does not condemn refusals to deal. It is argued that when faced with a choice between risking RPA liability and simply refusing to sell to small business, many firms do the latter. A firm with a substantial base of larger purchasers can more readily sell to them alone, rather than include small transactions, which introduces the threat of legal liability. Or it can refuse to deal with smaller purchasers with respect to different product lines, or offer different SKUs for products in the same category to smaller and larger purchasers (so that the “like grade and quality” element of a Section 2(a) claim cannot be met). “In any event, there is no empirically proven or even intuitively compelling theory relating price discrimination to the degree of big business dominance or the level of concentration in American industry.”²⁰
- **“The RPA Contributes to Price Rigidity.”** The Act by definition imposes an inhibition of price-cutting unless a recognized legal justification for the price difference exists. It has often been argued that the constraints imposed on a firm’s strategic options by such pricing requirements results in price rigidity and decreased market efficiency.²¹ The problem is aggravated, the argument goes, because the applicability of the statute’s pricing requirements in practice is often uncertain, when the burden of justifying a price difference is heavy, or when the litigation costs associated with establishing lawful behavior are substantial. Such problems are said to be inherent in price discrimination legislation, and the RPA in particular is charged with having these problems in the extreme.²²
- **“The RPA Aids Price-Fixing Efforts and Oligopolistic Behavior.”** Proponents of repeal argue that a price discrimination statute that inhibits individually tailored

²⁰ *See id.*

²¹ *See* 1976 DOJ REPORT, *supra* note 13, at 63; REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, 411 ANTITRUST & TRADE REG. REP. (BNA) (May 27, 1969), *reprinted* in 1 J. REPRINTS ANTITRUST L & ECON. 633 (1969), and *reprinted* in 2 ANTITRUST L. & ECON. REV. 11 (1968-69) [hereinafter NEAL REPORT] 85; Philip Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 WASH. L. REV. 1, 9 (1966); Wesley J. Liebler, *Let’s Repeal It*, 45 ANTITRUST L. J. 18, 28-29 (1976); Harry L. Shniderman, *The Impact of the Robinson-Patman Act on Pricing Flexibility*, 57 NW. U. L. REV. 173 (1962). *See also* ABA MONOGRAPH NO. 4, *supra* note 13, at 27-28.

²² *See* ABA MONOGRAPH NO. 4, *supra* note 13, at 28. *See also* Shniderman, *supra* note 21, at 173; CORWIN D. EDWARDS, *THE PRICE DISCRIMINATION LAW* 630-31 (1959); 1976 DOJ REPORT, *supra* note 13, at 40-58, and sources listed therein.

transactions only reinforces socially undesirable pricing behavior.²³ Markets with an oligopolistic structure may be characterized by sticky prices thought to be noncompetitive. Opponents of the RPA say that these prices may be made more fluid and the general price level in the market lowered, if suppliers can vigorously pursue selected buyers with discounts and if major purchasers can use their countervailing bargaining power to seek price concessions.²⁴ The problem is exacerbated, they argue, to the extent that buyers who receive illegal discriminatory prices are also liable under Section 2(f).

- **“The RPA Discourages Market Entry.”** It has also been argued that a price discrimination statute that inhibits a supplier from granting price concessions to large purchasers may foreclose to the new entrant the possibility of obtaining the few large accounts required for entry.²⁵ Even if a price discrimination necessary to new entry were justified under the statute, the argument goes, the burden of proof and the associated litigation costs to demonstrate its legality may be so great as to preclude the potential entrant from the differential pricing.²⁶
- **“The RPA Fosters Inefficient Distribution Schemes.”** A price discrimination statute that helps to protect competition below the primary line has been charged with inhibiting the optimal structuring of distribution systems.²⁷ Even if “functional discounts” are not expressly prohibited by the Robinson-Patman Act, at least two problems are claimed to be inherent in any price discrimination statute that inhibit the implementation of efficient distribution systems.²⁸ First, it is argued, there is a fundamental conceptual difficulty in determining what “function” a middleman performs or at what “level” it operates, so that a lawful discount may be granted. The Robinson-Patman Act, as arguably would any price discrimination statute, has sometimes been interpreted by invoking simple rules designed for the convenience of judicial administration, not market efficiency. Second, as distribution systems grow in complexity, they are said to become harder to understand, much less explain, and an efficient distribution system may

²³ HOVENKAMP, *supra* note 9, at § 14.5b (“A policy against price discrimination, such as the Robinson-Patman Act, may prevent a firm from negotiating different contract prices with different buyers. In the process, the Act may serve to make non-cooperative oligopolies more stable, just as it makes cartel cheating more difficult.”).

²⁴ See ABA MONOGRAPH NO. 4, *supra* note 13, at 29. See also 1976 DOJ REPORT, *supra* note 13, at 63-64; Morris A. Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1300, 1331-32 (1948).

²⁵ See ABA MONOGRAPH NO. 4, *supra* note 13, at 30-31; 1976 DOJ REPORT, *supra* note 13, at 70-74, and sources cited therein.

²⁶ See ABA MONOGRAPH NO. 4, *supra* note 13, at 31.

²⁷ See *id.*; 1976 DOJ REPORT, *supra* note 13, at 79-90; NEAL REPORT, *supra* note 21, at 40-41; Liebler, *supra* note 21, at 31-35.

²⁸ See ABA MONOGRAPH NO. 4, *supra* note 13, at 31-32.

in fact be so complex that no one person understands its working completely. Such system complexity is blamed for increasing the possibility of nonfrivolous claims of price discrimination, as well as the cost of defense once a claim is brought.

- **“The RPA Encourages Inefficient Product Distribution and Less Retail Diversity.”** One solution to avoid RPA liability is to introduce physical differences into products sold at different prices. However, product differentiation that has been introduced without competitive pressure merely in an effort to avoid price discrimination liability is viewed by opponents of the RPA as a wasteful practice that should not be encouraged.²⁹ Another solution to avoid liability is to cease dealing with certain customers, rather than charge different prices. The end result, repeal advocates argue, is that fewer wholesale or retail outlets are used than would have otherwise been utilized.
- **“The RPA Imposes an Undue Regulatory Burden on Businesses.”** A separate price discrimination statute like the RPA has been accused of creating enormous uncertainties in the law and forcing business executives to balance the savings of a more efficient distribution system against the costs of compliance. This “regulatory burden” is viewed as unjustified for two reasons. First, as noted above, the more traditional antitrust laws, particularly Section 2 of the Sherman Act, are said to provide adequate protection against any socially undesirable behavior a separate price discrimination is designed to address. Second, in light of inherent conceptual limitations in drafting and design, any equity gains to society from the protection of small business are viewed by opponents of the RPA to be far outweighed by efficiency losses the statute entails.³⁰

In sum, proponents of repeal like to point out that the near disappearance of FTC prosecution of the Act, occurring through Democratic and Republican administrations alike, belies any argument that the economy is beset with rampant anticompetitive exercises of market power by buyers requiring a separate statute designed to nip the exercise of such power in the bud. They maintain that attempts to justify the Act’s secondary line prohibitions because of their capacity to correct abuses of “buyer power” ignore (a) the existence of the Sherman Act to address such concerns when they are in fact troublesome from a consumer welfare standpoint, and (b) the prevailing language and interpretation of the RPA, which ensnare or potentially ensnare a wide range of procompetitive price-cutting behavior. They believe that to the extent Congress believes small business warrants special protection, Congress should consider other legislative approaches that do not directly affect the everyday pricing decisions of many firms.

The ABA Policy calls for some significant changes in the RPA, which would address or ameliorate various concerns expressed by those advocating complete repeal of the Act, but

²⁹ ABA MONOGRAPH NO. 4, *supra* note 13, at 33. See 1976 DOJ REPORT, *supra* note 13, at 76-79.

³⁰ See ABA MONOGRAPH NO. 4, *supra* note 13, at 33.

without going so far as to call for repeal. While the ABA Policy does not advocate or consider the option of repeal, reasons for the less drastic approach embraced in that Policy may be found in the next section.

2. Arguments for Maintaining the Legislative Status Quo

Certain proponents of maintaining the RPA do recognize a widespread modern consensus rejecting the “Jeffersonian” view, occasionally expressed in judicial opinions over the years, that the antitrust laws should protect small business as such, regardless of its effect on consumers or economic welfare. At the same time, they argue, modern courts continue to recognize that competitive markets have social as well as economic benefits worth preserving.³¹ Among these are the “Jacksonian” virtues of equality of economic opportunity that represents a foundation of American economic values. This is reflected, they contend, in what they find is a pillar of competition policy: conduct is undesirable if it impairs the economic opportunities of rivals in a manner that is unrelated to efficiencies and does not further competition on the merits.³²

RPA proponents argue that a statutory competition scheme that is a “consumer welfare prescription” is incomplete if it does not protect a vibrant retail market for consumers by prohibiting arrangements that confer an economic advantage on larger retailers or intermediate distributors, for reasons unrelated to efficiency or competition on the merits.³³ A vibrant retail market, it is contended, requires the flexibility and innovation that comes from diverse firms, low entry barriers, and the maximization of consumer choice. The latter is reflected in a number of ways, including not only price but also convenience, variety of personal service, willingness to extend credit, etc. Diversity is essential, this position goes, in order to assure consumers that when existing firms fail to serve their needs, “market retribution will be swift.”³⁴

Many of the status quo proponents believe that the prohibitions on collusive conduct contained in Section 1 of the Sherman Act, monopolization contained in Section 2 of the Sherman Act, and specific tying and exclusivity arrangements contained in Section 3 of the Clayton Act are insufficient to protect retailers against the non-collusive exploitation—as opposed to acquisition or maintenance—of economic power by large retailers or intermediaries. Indeed, they urge that the paradigmatic case that the Act was designed to proscribe was an unjustified discount granted to a large chain store, even though there was no serious concern that the large chain stores were colluding among themselves to demand unjustified discounts. Furthermore, in 2005, as in 1936 (when the RPA was enacted), most “powerful” retailers, while able to exercise a significant degree of market power, do not possess “monopoly” or “monopsony” power under modern definitions of those terms.

³¹ See, e.g., *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 53 n.21 (1977).

³² *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 n.32 (1985).

³³ See Elman, *supra* note 21, at 5 (“the policy of the Robinson-Patman Act is rooted in a justifiable ethic: that it is unfair to competitors and injurious to competition for large buyers to use their power to exact discriminatory price concessions not available to smaller and weaker rivals.”).

³⁴ *Valley Liquors, Inc. v. Renfield Importers, Ltd.*, 678 F.2d 742, 745 (7th Cir. 1982) (Posner, J.).

In short, arguments for keeping the statute intact reflect to some degree a philosophical belief held by supporters of the RPA in the business and antitrust communities that the Act still retains some merit in promoting or protecting small business and diversity in retailing, apart from any consumer welfare considerations.³⁵ Believing that such an intent was the primary impetus for the Act, status quo advocates believe that the RPA still has vitality and is worth preserving—even in its weakened state.

a. The Argument That the Asserted Burdens and Costs of Compliance May Be Exaggerated

Those advocating against substantial amendment or repeal question some of the assumptions underlying criticism of the RPA. It is said that the Act inhibits hard bargaining by large chain store buyers and that this leads to price rigidity by sellers. But, these advocates respond, court and agency decisions have made Section 2(f) buyer liability for inducing discriminatory pricing virtually impossible to prove. That has been true for many years.³⁶ Similarly, they claim that while the Act has been consistently interpreted (with one minor exception) as only prohibiting inducement of price discriminations illegal under Section 2(a), but not improper promotional allowances or services under Sections 2(d) and (e),³⁷ there is no evidence that such disparity has caused so-called “power buyers” to insist on promotional programs over price discounts because of that difference in liability potential.

Opponents of the Act say that it leads to the adoption of inefficient distribution schemes (e.g., the Act leads major sellers to cut off or refuse to deal with small retailers because of potential liability). However, proponents of the status quo counter, it could also be said that this last example shows a weakness in the Act, not an inefficiency caused by it. In other words, if critics of the Act are willing to concede that the protection of small retailers is its legitimate purpose, then logically the Act should cover instances where small retailers are cut off or refused product to avoid subjecting the seller to price-discrimination exposure.

The most common criticism of the Act surrounds the “compliance” costs—the record-keeping and difficulties caused when, e.g., salespeople lobby for permission to make price cuts and are met by requests for justifications and records to back it up—usually to ensure that a “meeting competition” defense can be justified. Presumably, any kind of prohibition on discrimination carries a compliance price—just as do laws that forbid employment discrimination based upon race, gender, or ethnicity. Modern business has adjusted, the pragmatists say. Indeed, the basic data needed to “comply” with the Act—prices and customers—are invariably kept in detail by any modern business. They also assert that documenting the reasons for price discounts has also

³⁵ It may well be that determining, on an empirical basis, whether the Act actually helps small business would be a challenging task. The increasing rise of mega-retailers and national chains has so changed the landscape of American retailing that it might be difficult to determine who the “small” retailer is, much less how that entity is being helped if at all, by the Act.

³⁶ See, e.g., *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1969).

³⁷ See, e.g., *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870 (9th Cir. 1982).

been a staple of most sellers for many years, since Supreme Court’s decision in *Falls City Industries v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). While they concede that generating such “paperwork” is both inefficient and burdensome, conversely, proponents maintain it could be argued that such “compliance” costs are not that burdensome and may often be part of good day-to-day management that is already second nature to many sellers.

Proponents of the legislative status quo argue that there are no known empirical studies that attempt to quantify the actual costs—much less the “excess” costs—of compliance with the RPA, and that, indeed, it is unknown how compliance costs caused by the Act compare to costs imposed by scores of other economic, tax, environmental, customs, safety, and employment regulation. The absence of such data, for proponents of the status quo, equates to an absence of any compelling reason to risk reforming the RPA through legislation.

Of course, the retail landscape has changed considerably since the days of Representative Wright Patman. For example, note proponents of the status quo, the Internet probably decreases some of the compliance costs of the Act—especially in promotional allowances and services—where customers can now be informed immediately of all offers and programs. The Internet it is said, has also had an impact on pricing, since discounts at the wholesale and retail level are much more likely to be observed and known, and both the small retailer and the megastore—whether in New York City or in Omaha, Nebraska—must take into account the fact that their customers can “surf the net” and determine if their price is competitive with a national Internet retailer such as Amazon.com. The Commission might decide that, before recommending repeal or substantial modification of the RPA, more information is needed about how this new technology has affected the behavior of buyers and sellers.

b. The Argument that Judicial and FTC “Reform” of the Act Has Been Effective and Should Continue to be Effective

A number of status quo proponents have observed that over the years the Supreme Court and lower federal courts, as well as the Federal Trade Commission, have interpreted the Act to weaken or ameliorate supposed problem areas. Insofar as the Act has been seen as inconsistent with mainstream antitrust thinking, the courts have adjusted their constructions of the Act. (In this regard, the Supreme Court recently rejected an expansive interpretation of the RPA. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860, 872 (2006)(a manufacturer may not be held liable for secondary-line price discrimination under the RPA in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer; “[e]ven if the Act’s text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*.”) Accordingly, it is argued, the need for repeal or radical legislative surgery is quite weak, and some would argue, actually less compelling than when the ABA Policy recommendations were adopted.

Proponents of the status quo note that the FTC has, in effect, stopped enforcing the Act. This leaves any enforcement to private treble damage lawsuits. The FTC’s “hands off” policy may have even led to more risk-taking by suppliers.

c. The “Prudent Strategic Considerations” Against Repeal

Proponents for no legislative change admit that most modern courts interpret the antitrust laws to reflect the views of academics and leading practitioners in the antitrust community that the statute should maximize consumer welfare as that concept is informed by principles of the economics of industrial organization. It is argued, however, that historically and today, political support for the economic regulation of industry comes from voters who decry business conduct they perceive as fundamentally unfair and exploitive.

Consequently, certain proponents urge, a competition policy that fails to protect against abuses of economic power is likely to engender a backlash of specific regulatory legislation that will be far less efficient than the existing price discrimination statute. At the same time, the latter would follow in the footsteps of prior antitrust legislation in serving the socially valuable function of channeling popular discontent into sound prohibitions on the exercise of power in ways unrelated to efficiency.

A leading concern is that Congressional action in this somewhat controversial and politically volatile area may not result in the kind of reform that legislative reform or repeal proponents may desire. Moreover, many believe that RPA proponents could successfully persuade state legislatures to fill the void, should the federal prohibitions be substantially weakened or eliminated. Proponents of the status quo point out that it is unlikely that Congress would or could develop “pre-emptive” bans on state price discrimination laws. In the view of many, the continued “reform” of the Act by the courts and FTC is the safer, albeit, slower and less predictable course. Specific areas that have been advanced for further nonlegislative reforms are set forth in more detail in the following section.

While not calling for total repeal, the ABA Policy does reflect a dissatisfaction with certain statutory provisions for the reasons explained above and does call for statutory change along the lines outlined above rather than reliance solely on the courts and the FTC to make the necessary reforms..

3. Proposed Areas for Nonlegislative Reform

As noted above, some hold the view that any effort to repeal or substantially modify the RPA will result in considerable potential controversy and unpredictable results. Legislation is not needed where the courts have tended to interpret the Act in a procompetitive fashion for at least the past twenty years, thus lessening the need for radical legislative solutions. The Supreme Court continually has instructed the lower courts that Robinson-Patman Act interpretations

should not extend beyond the prohibitions of the Act, and that it should be interpreted consistent to the policies of the Sherman Act.³⁸

a. Reform Through FTC Initiatives or Judicial Interpretation

Some proponents of nonlegislative reform would urge the Antitrust Modernization Commission to recommend that the FTC reconsider and restate its position concerning certain outdated decisions and policies that have restricted, or even prohibited, procompetitive pricing practices such as those that reward customer efficiencies. They argue that this could be done through: (a) FTC Policy Statements and Section 2(a) Guidelines, (b) further revisions to the FTC’s Sections 2(d) and 2(e) Guidelines, and (c) *amici curiae* briefs in selected cases in which plaintiffs rely on discredited FTC decisions and policies that do not represent contemporaneous thinking at the agency. The Commission could further recommend that, even apart from FTC efforts, that the courts develop RPA law along certain lines.³⁹ Some of these suggestions or positions relate to subject areas of the ABA recommendations (and are less sweeping than the ABA recommendations); to the extent that they conflict with ABA Policy, the Section believes that the changes proposed by the ABA are a preferable way of resolving the problems at which the changes are aimed. To the extent these suggestions or positions neither address nor conflict with the subject matter of the ABA Policy, they are set forth below solely as background, and without any recommendation by the ABA or the Section.

³⁸ *Great Atl. & Pac. Co. v. FTC*, 440 U.S. 69, 80 (1979) (interpretations should not “extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other anti-trust legislation”); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 74 (1953) (The Robinson-Patman Act should be construed so as to ensure its coherence with the “broader antitrust policies that have been laid down by Congress.”); see also *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978) (quoting *Automatic Canteen*).

³⁹ Many of these, and other suggestions for FTC initiatives to reform the RPA, are described in greater detail in a recent paper by Irving Scher, *How the Federal Trade Commission Can Modernize Interpretations of the Robinson-Patman Act*, presented at the 2005 ABA Section of Antitrust Law Spring Meeting, Washington, D.C. (April 1, 2005), available from the ABA Section of Antitrust Law.

(1) Secondary-Line Injury to Competition: Suggestions for Modifying or Overruling the *Morton Salt* Doctrine

One area that has been debated at some length is whether the FTC should modify or restate the *Morton Salt* inference (see *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47, 50-51 (1948)). In *Morton Salt*, the Supreme Court held it “self-evident” that there is a reasonable possibility that competition may be adversely affected where manufacturers sell their goods “to some customers substantially cheaper than they sell the goods to the competitors of those customers,” and thus such a showing is sufficient to justify a finding of injury to competition. In *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), the Court stated that *Morton Salt* stood for the proposition that “injury to competition is established prima facie by proof of substantial price discrimination between competing purchasers over time.” The Court stated, however, that “this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.”

One suggestion has been made that the inference should arise, as it did in *Morton Salt*, only when the challenged price discrimination is substantial (*i.e.*, that it affects resale prices), sustained, exists between competing purchasers who operate in a market with low profit margins and keen competition, and involves goods resold in the same form as purchased.⁴⁰

Professor Andrew Gavil has argued that the *Morton Salt* inference can be viewed as two inferences: (a) injury to a disfavored purchaser, from a persistent difference in price over time; and (b) from the injury to a competitor, infer “injury to competition.”⁴¹ He suggests that only the second inference is mandated by the RPA, but that the first inference—that injury to a competitor can be inferred from persistent price differences over time—was a creation of the Supreme Court in *Morton Salt*. By de-coupling the two *Morton Salt* inferences, it is possible to preserve the clear mandate of the language and history of the RPA (*i.e.*, that injury to a competitor should be condemned as incipient injury to competition), while at the same time recognizing the possibility that what constitutes “injury to a competitor” can be further refined in light of more contemporary antitrust principles.

Professor Gavil’s approach would require courts to focus on the conditions under which a disfavored buyer might suffer significant exclusionary injury. He argues that there are at least three plausible settings in which significant intrabrand exclusionary injury could arise: “(1) when the seller has market power; (2) when there is a widespread industry practice of price discrimination covering available substitute products, and the disfavored purchaser falls within an apparent class’ of disfavored purchasers; or (3) when alternative, equally-low priced substitutes are available, but as a consequence of information or switching costs the seller effectively possesses market power.” He contends that “[i]n each of these three circumstances, price discrimination by the seller presumptively would place the disfavored purchaser at a significant but unwarranted competitive disadvantage” and “[a]s a practical matter, the purchaser

⁴⁰ *Id.* at 5.

⁴¹ Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save it, Let It Go*, 48 Emory L.J. 1057 (1999).

would be unable to turn to substitute supplies and would be forced to shoulder the higher costs occasioned by the price discrimination.”⁴²

Yet another approach is to treat *Morton Salt* as overruled in light of the Supreme Court decision in *Brooke Group*, a primary line price discrimination case, indicating that a plaintiff has to establish conditions likely to produce generalized injury to competition.⁴³ If extended to secondary line cases, this approach would require a plaintiff to prove competitive effects according to standards similar to those used in Sherman Act cases. The judicial trend, however, has been to reject the invitation to extend *Brooke Group* to secondary line cases.⁴⁴ Indeed, some cases hold that in secondary-line cases, the inference of competitive injury to individual buyers resulting from the *Morton Salt* inference of injury to a competitor may not be overcome by proof of no harm to competition.⁴⁵

Professor Hovenkamp takes issue with these cases, claiming that the statutory language added to Section 2(a) in 1936, with its more aggressive injury standard, was intended to apply to both primary- and secondary-line situations. Thus, the Court’s reading of general competitive concerns of the antitrust laws into the primary-line interpretation of the RPA requires the same

⁴² See, in this regard, the majority’s statement in connection with the consent order in *In the Matter of McCormick & Co., Inc.*, No. C-3939, 2000 WL 521741 (F.T.C. Apr. 27, 2000). The majority appeared to rely on a market power screen, maintaining that the case for use of the *Morton Salt* inference “is strengthened” by the combination of the discriminating seller’s market power and its concurrent use of exclusivity with its customers.

⁴³ *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (“the Robinson-Patman Act is one of the antitrust laws, and it is axiomatic that the antitrust laws were passed ‘for the protection of competition, not competitors’”).

⁴⁴ See *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136 (2d Cir. 1998); *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 137 (9th Cir.), cert. denied sub nom. *Osrsm Sylvania Prods., Inc. v. Von Der Ahe*, 522 U.S. 943 (1997); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1532-35 (3d Cir. 1990), cert. denied, 499 U.S. 921 (1991); *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990). But see *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 420 (8th Cir. 1986) “analysis of the injury to competition focuses on whether there has been a substantial impairment to the vigor or health of the contest for business”; *Black Gold Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 626 (10th Cir.) (injury unlikely where resale market not competitive), cert. denied, 469 U.S. 854 (1984).

⁴⁵ The RPA’s “idiosyncratic and harmful idea of what constitutes competition” between dealers in the same brand was the subject of the Ninth Circuit’s decision in *Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653, 654 (9th Cir. 1997). Considering that decision, Professor Hovenkamp declared that it held that “in secondary-line Robinson-Patman cases, the . . . inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition. . . . The plaintiff attempted to rebut [the *Morton Salt*] presumption by showing that competition in the relevant market remains healthy, but the court found such evidence irrelevant, concluding that the Robinson-Patman Act amendments shift[ed] the focus of the statute from protecting competition to protecting individual disfavored buyers from the loss of business to favored buyers. . . . The court, however, did not explain how Sylvania could profit by injuring the competitiveness of its own distribution system. Instead, without any explanation, the court followed *Morton Salt*’s factual supposition that competition itself is presumptively harmed by price differentials among competing resellers of the manufacturer’s product. *This supposition is not merely false, it is nonsense.* Nevertheless, as a proposition of law it continues in full force.” Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 ANTITRUST L.J. 125, 129 (2000) (emphasis added).

revision of secondary-line interpretation.⁴⁶ He believes that “to impose Robinson-Patman Act liability when significant buyer power is lacking is to go beyond the concerns of the Congress that passed the statute.”⁴⁷ He contends that “when Congress finally approved statutory language, the results did not condemn an injury to a competitor as such, but rather injury to a competitor’s ability to compete with a rival when such injury can reasonably be viewed as a prerequisite to the ‘larger, general injury’ with which the statutory language is ultimately concerned.”⁴⁸ In his view, “a prerequisite to secondary-line recovery should be a showing that the supplied market is not performing competitively, and dealer buying power, rather than manufacturer reward, explains the price discrimination under consideration.”⁴⁹

In its recent *Volvo* decision, the Supreme Court decided that the *Morton Salt* inference did not apply to the alleged price discrimination. It remains to be seen whether language toward the end of the majority opinion⁵⁰ will lead to acceptance by lower courts of arguments for reshaping the contours of the *Morton Salt* inference or for a more expanded view of what evidence can successfully be used to rebut that inference.

The ABA Policy, while advocating that the competitive injury standard for Section 2(a) also apply to Section 2(d) and Section 2(e), does not take any position with respect to what should be the nature and scope of the competitive injury standard .

⁴⁶ See generally Hovenkamp, *supra* note 45.

⁴⁷ *Id.* at 141.

⁴⁸ *Id.* at 137.

⁴⁹ *Id.* at 138-39.

⁵⁰ The Court stated in part IV of its opinion (126 S.Ct. at 872-73):

Interbrand competition, our opinions affirm, is the “primary concern of antitrust law.” *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 51—52, n. 19 (1977). The Robinson-Patman Act signals no large departure from that main concern. Even if the Act’s text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier’s selective price discounting fosters competition among suppliers of different brands. See *id.*, at 51—52 (observing that the market impact of a vertical practice, such as a change in a supplier’s distribution system, may be a “simultaneous reduction of intrabrand competition and stimulation of interbrand competition”). By declining to extend Robinson-Patman’s governance to such cases, we continue to construe the Act “consistently with broader policies of the antitrust laws.” *Brooke Group*, 509 U.S., at 220 (quoting *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 80, n. 13 (1979)); see *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 63 (1953) (cautioning against Robinson-Patman constructions that “extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation”). (*Id.* at 872-73, footnotes omitted.)

(2) Functional Allowances

Some nonlegislative reform proponents would urge the FTC to disavow early restrictive decisions concerning the permissibility of functional allowances, in light of the Supreme Court decision in *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990). (This too is a subject that is not addressed by the ABA Policy recommendations.) They argue that *Hasbrouck* made three points clear:

- a. While a supplier should notify all competing customers of the availability of functional allowances, it need only offer such allowances to those customers both willing and able to perform the required services;
- b. Such customers should be offered the allowances regardless of their level of trade; and
- c. The allowances need not be cost-justified if reasonably related to the value to the supplier of the services involved.

It is argued that, to be consistent with *Hasbrouck*, cases relying on the FTC's so-called *Mueller* doctrine, under which a supplier may not limit functional allowances to customers *able* to perform the required services, *e.g.*, warehousing, should specifically be overruled.⁵¹

It has been further argued that *Hasbrouck* also requires FTC overruling of its improperly restrictive early decisions prohibiting allowances provided to group buying organizations owned by their customers, despite their performance of value-added distribution services.⁵²

Similarly, some have taken the position that contrary to early FTC decisions, "dual functioning customers," *e.g.*, customers performing both as distributors and dealers, should receive functional allowances offered for value-added services, to the extent that they perform such services for their independent customers as well as for their downstream affiliates.⁵³

⁵¹ See *Mueller Co v. FTC*, 323 F.2d 44, 45-48 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *Monroe Auto Equip. Co. v. FTC*, 347 F.2d 401, 403-04 (7th Cir. 1965), *cert. denied*, 382 U.S. 1009 (1966); see also *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988) (reaffirming *Mueller*).

⁵² See, *e.g.*, *National Parts Warehouse*, 63 F.T.C. 1692 (1963), *aff'd sub nom General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir. (1965)); *Purolator Prods., Inc.*, 65 F.T.C. 8 (1964), *aff'd*, 352 F.2d 74 (6th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1966). Compare *White Indus., Inc. v. The Cessna Aircraft Co.*, 845 F.2d 1497, 1499-1500 (8th Cir.), *cert. denied*, 488 U.S. 856 (1988) (allowing functional allowances to separately incorporated distributor reselling to its owned dealers).

⁵³ See *Sherwin-Williams Co.*, 30 F.T.C. 25 (1943) (certification should be obtained from dual functioning distributors to justify functional allowances provided in connection with their dealings with independent customers only). Compare *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1023 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) ("Act does not prohibit the seller from offering different prices to each of its purchasers, such as

(3) Functional or Practical Availability

Another “nonlegislative reform” that has been suggested is FTC disavowal of its past functional availability rulings that are inconsistent with *Hasbrouck*. In this regard, it has been argued that a lower price should not be actionable if it is within the economic reach of an allegedly disfavored customer, *e.g.*, by joining a buying group to which the lower price is offered. (The FTC previously rejected such a defense on the ground that a buyer should not be required to change its “method of doing business” to obtain a better price.)⁵⁴

Proponents of this approach also contend that, contrary to the FTC’s stated view in its *Boise Cascade* decision that it is “irrational” to permit a defense that a lower price was available from competing sellers, the Circuit Courts of Appeal have all ruled that the availability of a lower price from a competing seller negates the inference of secondary-line injury.⁵⁵ For this reason, the Commission would be urged to recommend that courts and the FTC consider such a defense, which promotes interbrand competition.

(4) Section 2(c) Prohibitions on Brokerage

The FTC has ruled that Section 2(c) does not require any showing of discrimination. The courts are split on this issue.⁵⁶ Nonlegislative reform proponents would urge the FTC to declare that a showing of discrimination is required in a Section 2(c) suit other than one involving commercial bribery.

The FTC has not issued a decision or guidelines for many years addressing the Section 2(c) “services rendered” defense.⁵⁷ The courts have applied the defense when services rendered by a

one price when he functions as a retailer and a lower price when he functions as a wholesaler, provided all competing purchasers are treated equally.”)

⁵⁴ See *National Dairy Prods Corp. v. FTC*, 395 F.2d 517, 523 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *Dayton Rubber Co.*, 66 F.T.C. 423, 470-71 (1964), *rev’d on other grounds sub. nom. Dayco Corp., v. FTC*, 362 F.2d 180 (6th Cir. 1966). Compare *Edward J. Sweeney & Son v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981) (allowance need not be offered to distributor that did not meet reasonable condition for obtaining allowance).

⁵⁵ See, *e.g.*, *Tri-Valley Packing Ass’n v. FTC*, 329 F.2d 694, 703-04 (9th Cir. 1964) (allowing defense of availability from competing seller); *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220, 227 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974) (same). Compare *Boise Cascade Corp.*, 107 F.T.C. 76 (1986), *rev’d on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988) (characterizing such an argument as “irrational”).

⁵⁶ Compare *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1962) (requiring showing of discrimination); *Empire Rayon Yarn Co. v. Am. Viscose Corp.*, 364 F.2d 491, 493 (2nd Cir. 1965) (*en banc*), *cert denied*, 385 U.S. 1002 (1967) (same) with *Metrix Warehouse Co., Inc. v. Daimler-Benz Aktiengesellschaft*, 716 F.2d 245 (4th Cir. 1983) (not requiring a showing of discrimination); *Herbert R. Gibson*, 95 F.T.C. 553 (1980), *aff’d*, 682 F.2d 554 (5th Cir. 1982) *cert. denied*, 460 U.S. 1068 (1983) (same).

⁵⁷ See, *e.g.*, *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1962); *but see Thomasville Chair Co.*, 63 F.T.C. 1048 (1963) (FTC refusal to acquiesce in *Thomasville Chair* decision).

buyer or its agent have provided cost-savings to a seller, thereby justifying a price difference.⁵⁸ Nonlegislative reform proponents recommend that the FTC explicitly announce that the “services rendered” defense applies in such instances, and to be consistent with *Hasbrouck*, that the defense should be based on the value to the seller of the services rendered.

The ABA Policy recommends that Section 2(c) be repealed for the reasons given above; such an approach is preferable to waiting for the uncertain prospects of legal interpretation under existing Section 2(c).

(5) Proposed Reforms Clarifying the Scope of Sections 2(d) and 2(e)

The ABA Policy advocates statutory changes to Sections 2(d) and 2(e) for the reasons stated above, so as to include a competitive injury element to any claim based on those sections. The Section believes that this approach is needed and desirable. There are some who believe that, regardless of whether the statute is amended, the legal principles governing the current Sections 2(d) and 2(e) should evolve along certain lines. In this regard, it has been fifteen years since the FTC last revised its *Guides for Advertising Allowances and Other Merchandise Payments and Services*, 16 CFR pt. 240 (“Guides”). While these Guides do not have the same legal effect as trade regulation rules, both industry and the courts have generally relied on them as though they are legal authority. Although nonlegislative reform proponents believe other revisions would also be appropriate, the most important proposals for revision are summarized below:

(a) Proposed Revisions to Guide 4—Definition of a customer

A Note in this Guide provides that a retailer purchasing solely from other retailers, making only sporadic purchases from a seller, stocking only a few isolated items in a product category, should not be considered a “customer,” “*unless the seller has been put on notice that such retailer is selling its product.*” Proponents for change argue that this last clause should be deleted because such a retailer should not be considered a competitor of those customers that actively sell the applicable products.

(b) Proposed Revisions to Guide 7—Service or facilities

“Special packaging or package sizes” are considered to be promotional services within Section 2(e). This was considered to be a “close call” when the Guides were last revised in 1990, apparently based on a 1940 decision, *Luxor, Ltd.*, 31 F.T.C. 658, 664-65 (1940). Since 1940, the law has become clear that partial refusals to deal are not covered by the statute.⁵⁹ Accordingly, this example of a “service” subject to the statute has also been noted as a candidate for reform.

⁵⁸ See, e.g., *Leonard v. J.C. ProWare, Inc.*, 64 F.3d 657 (4th Cir. 1995) (not for publication) (commissions paid to licensee in return for guarantee of payment by sub-licensees were “for services rendered”); *Burge v. Bryant Public School Dist.*, 658 F.2d 611 (8th Cir. 1981) (school’s provision of space to photograph students, and its use of school employees to schedule sittings for photographer, within “services rendered” defense).

⁵⁹ See, e.g., *Purdy Mobile Homes, Inc. v. Champion Home Builders Co.*, 594 F.2d 1313, 1318 (9th Cir. 1989); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 682-83 (10th Cir.), cert. denied, 469 U.S. 854 (1984); *L & L Oil*

(c) Proposed Revisions to Guide 9—Proportionally equal terms

While no single way to proportionalize is prescribed by law, the only approved methods in the Guides are based on the dollar volume or quantity of goods purchased during a specified period.

Some advocates for change believe the FTC should now harmonize its view of proportionality under Sections 2(d) and 2(e) with the Supreme Court’s view of functional allowances in *Hasbrouck*, by recognizing the reasonable value to the seller of promotional services as a measure of proportionality.

In support of their position, those pressing for changes in the Guides to recognize proportionalization based on value argue that the courts have provided more flexibility to proportionality than the Guides. They note that the Supreme Court indicated as long ago as 1959, that there is a “relatively broad scope to the standard of proportional equality,” and that “tailoring of services and facilities to meet the different needs of two different classes of customers” may constitute proportionality.⁶⁰ And the Sixth Circuit has given virtually total freedom to a seller to devise any method of proportionality it desires so long as it “does not discriminate in favor of the larger volume buyer.”⁶¹

(d) Proposed Revisions to Guide 10—Availability to all competing customers

Those advocating nonlegislative reform encourage the FTC to include a provision or Example in the Guides making it clear that a seller can limit participation in a promotional program to customers willing to meet certain conditions that are within the practical reach of most competing customers, such as a minimum purchase requirement or an agreement to provide special marketing services for a promoted product.⁶² In view of the rise of the Internet as an advertising medium, a supplier should now be allowed to

Co. v. Murphy Oil Corp., 674 F.2d 1113, 1120 (5th Cir. 1982); *Mullis v. Arco Petroleum Corp.*, 502 F. 2d 290, 294 (7th Cir. 1974).

⁶⁰ *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 61, n.4, n.6 (1959).

⁶¹ *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1329 (6th Cir. 1983). See also *L.S. Amster & Co., v. McNeil Labs., Inc.*, 504 F. Supp. 617, 625 (S.D.N.Y. 1980) (customers need not be offered equal promotional opportunities so long as they are able to participate to a significant degree).

⁶² See *Bouldis*, 711 F.2d at 1329 (upholding program with “modest” minimum purchase requirement that was within the practical reach of the “average” customer); *L.S. Amster.*, 504 F. Supp. at 625 (seller met practical availability requirement even though condition required to participate could only be met in 10% of the particular plaintiff’s outlets); *Ford Motor Co.*, 104 F.T.C. 1732, 1737 (1983) (consent order) (seller allowed to limit assistance to auto rental firms that purchased 20 or more automobiles annually); *Sunbeam Corp.*, 67 F.T.C. 20, 56-57 (1965) (\$440 minimum purchase requirement to receive reimbursement for electric shaver advertisement met practical availability requirement since customer “would have to stock at least that amount of merchandise to satisfy demand” generated by advertisement).

tailor available advertising or promotional media to the manner in which a particular retailer does business or generally advertises or, applying the principles of *Hasbrouck*, to the forms of advertising or promotion that provide the greatest value to the supplier with respect to the channel of trade involved.⁶³

(e) Proposed New Standard Requiring “Significant”
Competitive Harm

While a plaintiff need not establish statutory “injury to competition” in a case under Sections 2(d) or 2(e), those advocating change argue that the FTC should add to the Guides a statement that a valid suit under Section 2(d) or 2(e) requires a showing of “something more” than an occasional or sporadic failure to meet the requirements of the provisions (or perhaps even a systematic failure to do so).⁶⁴

(6) Meeting Competition

The Supreme Court has said that the Section 2(b) meeting competition defense “may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers.” *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 83 n.16 (1979). The Court thereafter stated, in *Falls City Industries, Inc. v. Vanco, Inc.*, 460 U.S. 428, 441 (1983), that the defense should be “flexible and pragmatic,” rather than “technical or doctrinaire,” and should be based on the facts and circumstances of the particular case, not abstract theories. Proponents of nonlegislative reform believe it is time that the FTC explicitly responded to these precedents. (The ABA Policy does not address this subject.)

(a) “Lawful-Unlawful” Dichotomy

One suggestion is for the FTC to clarify the law on this point and declare that the “lawful-unlawful” dichotomy, *i.e.*, a seller may only meet *lawful* competitive offers, applies only to situations when a seller knew (or should have known) that the price it is meeting is unlawful under the Sherman Act. This was the situation in the case that established the “lawful-unlawful” dichotomy, *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945).

⁶³ In addition, in view of the ubiquitous use of websites by sellers, there should be no need any longer to require a notification of an advertising offer to include “enough details of the offer in time to enable customers to make an informed judgment whether to participate.” The Guidelines should clearly state that it is sufficient for the notice to direct customers to the seller’s website for details of the offer. Similarly, website notification should be added to the list of permissible methods of notification. *See Scher, supra* note 39.

⁶⁴ *See Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 25 (1st Cir. 1981) (Breyer, J.) (“We believe that § 2(e), like the rest of the Robinson-Patman Act, is aimed at significant harm to competition; and therefore the injury suffered from its violation must be something more than a failure to obtain a sporadic advantage once made available to a single competitor.”).

(b) “Premium-Popular” Distinction

In 1957, the FTC declared, in *Anheuser-Busch, Inc. v. FTC*, that when customers are willing to pay a premium for a company’s product, matching the prices of a “popular” price brand constitutes the improper “beating” of competition. However, this view was not affirmed by the 7th Circuit, which reversed the FTC’s ruling on different grounds both before and after the Supreme Court decision in the case.⁶⁵ Subsequently, the FTC was reversed in two later efforts it made to establish the “premium-popular” distinction in meeting competition situations, although neither court referred to the distinction.⁶⁶

In the Supreme Court’s opinion in *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-50 (1951), which established that meeting competition was an absolute defense, the Court declared that a seller should have “a substantial right of self-defense against a price raid by a competitor. [It may be] essential, as a matter of business survival, to meet the price rather than to lose the customer.” Thereafter, in both the Supreme Court’s *A&P* decision, and in *Callaway Mills* in the Fifth Circuit, it was stressed that self-defense was a principal purpose of the meeting competition defense.

Accordingly, some support a proposed reform by the FTC that would acknowledge that any “premium-popular” distinction should be disregarded when the seller of a “premium” priced product faces the loss of a customer’s business, unless it meets the price of a “popular” priced competitor’s product.

(7) Cost justification

There have been no guiding cost justification principles issued by the FTC (a subject on which the ABA Policy takes no position) since it published an Advisory Committee Report in 1956 that itself offered no specific guidance.⁶⁷

Nonlegislative reform proponents believe that without any FTC safe harbor, companies hesitate to institute costly and complex cost studies, since there is no confidence that the study would be acceptable in litigation. Accordingly, they urge the FTC to study the cost justification defense, to ascertain whether at least some guidelines might be provided to the business community.⁶⁸

⁶⁵ See *Anheuser-Busch, Inc., v. FTC*, 54 F.T.C. 277, 301 (1957), *rev’d*, 265 F.2d 677 (1959), *rev’d and remanded*, 363 U.S. 536 (1960), *on remand*, 289 F.2d 835 (7th Cir. 1961).

⁶⁶ *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964); *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966).

⁶⁷ See Advisory Comm. to FTC, *Report on Cost Justification* (1956).

⁶⁸ A suggested standard that the FTC is urged to consider, in Scher, *supra* note 39, is that enunciated by the First Circuit in *Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050 (1st Cir. 1995), holding that the district court was correct in determining that a valid cost justification was established by showing that differences in defendant’s pricing of the applicable products were “reasonably related to its differences in costs.” *Id.* at 1059.

III. CONCLUSION

As noted earlier, the changes recommended by the ABA Policy attempt to cure the most glaring internal inconsistencies and problematic features of the Act while moving its antidiscrimination provisions more closely in line with the procompetition goals of antitrust law. The various alternative approaches described herein reflect longstanding concerns about the role of the RPA in antitrust law, and debate about those concerns. Within a large and diverse group of practitioners, scholars, and government enforcers, it is challenging to arrive at consensus as to the most effective and prudent way to address those concerns. Although many in the antitrust community have advocated and continue to advocate for more radical legislative and nonlegislative reforms or for outright repeal, the ABA and the Section of Antitrust Law continue to believe that the 1987 Policy recommendations strike an appropriate balance between total repeal and nonlegislative reforms and deserve consideration by the Commission.