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FTC May Waste Time Updating Price-Bias Guide, Attys Say

By **Melissa Lipman**

Law360, New York (November 29, 2012, 9:22 PM ET) -- The Federal Trade Commission sought public comment Wednesday on updating 20-year-old guidelines governing a much maligned price discrimination law, but attorneys questioned whether the antitrust watchdog should bother revising rules for a law it has largely stopped enforcing.

The FTC put its so-called Fred Meyer Guides on how to avoid violating the Robinson-Patman Act up for public consultation as part of its broader review of all its rules and guidelines, asking whether the guides were still needed and how to update them to address the changes the Internet has wrought to the manufacturing and retail industries. The law amended the Clayton Act in 1936 to target anti-competitive price discrimination, with the goal of protecting small retailers and suppliers from larger rivals.

But given how increasingly rare FTC Robinson-Patman cases have become, attorneys said it may not make sense for the agency to invest resources into bringing the guides up to date.

"I don't think the FTC is in the business of writing antitrust guidelines for private parties and courts to use in areas that they themselves don't plan on using for their own enforcement action," Proskauer Rose LLP partner Colin R. Kass said. "In theory they might want to keep them around for that purpose, but usually what they do is have guidelines and want businesses to follow them, and if they don't follow them it may be grounds for enforcement action."

The result of a 1968 U.S. Supreme Court case, the Fred Meyer Guides are designed to help manufacturers and other suppliers understand how to avoid illegal discrimination by giving retailers advertising and promotional allowances and services on "proportionally equal terms."

Though the FTC pursued cases under the law through the 1980s and into the early 1990s, the number of cases the agency has brought under Robinson-Patman has dwindled since it last revised the guidelines in 1990.

Over the same period, economic and legal thinking has largely turned away from the law, with the Antitrust Modernization Commission recommending in 2006 that Congress "finally repeal the Robinson-Patman Act." At the time, the commission, which reviewed U.S. antitrust laws and regulations for Congress, warned that the law "appears antithetical to core antitrust principles ... because the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage."

Not only has the agency largely stopped bringing cases under the law, but the difficulty for plaintiffs to actually prevail on Robinson-Patman claims is also high, attorneys said.

"The amount of Robinson-Patman litigation has decreased in recent years ... it's almost all private damages actions and even those I think are on the decline because ... they're difficult cases to prove," said Mintz Levin Cohn Ferris Glovsky & Popeo PC member Harvey Saferstein. "It's not a very favored law and you'll see that kind of negative reception in a fair amount of federal courts because of the criticisms it's received about whether it's actually helpful to competition."

Because the FTC hasn't seen a strong need to enforce the law itself in recent years, it shouldn't put out new guidelines, according to Kirkland & Ellis LLP of counsel Tefft W. Smith.

"Antitrust practitioners — like myself and others at Kirkland — do not look to the FTC guides at all in counseling clients on advertising, promotional and other marketing issues," he said.

Still, other attorneys said there was some value to keeping the guidelines and bringing them up to date with current practice as long as private litigation continues.

"Private damage actions still exist and the Supreme Court is issuing decisions on Robinson-Patman cases on a pretty frequent basis," Saferstein said. "So I think it's quite helpful to update the guides."

The guidelines do offer businesses a set of standards that they can use to set up their pricing practices and can be helpful in counseling companies, attorneys said.

"Many businesses do spend a lot of time trying to structure a set of pricing programs that they think will pass muster and minimize risk under the Robinson-Patman Act," Kass said. "Having guidelines to that extent does make sense, [but] on the other hand, if there's no successful cases it's hard to say there's a lot of risk."

Moreover, if a conflict is brewing in the distribution chain, guidelines can help businesses take stock of how they can deal with it, according to Crowell & Moring LLP partner Daniel Sasse.

"Oftentimes it happens if there is a strong or dominant manufacturer in the market [and] if the retailers are pushing back, that both the manufacturers and the retailers have a sense of where to draw the line," Sasse said. "It's helpful on the manufacturer side as well as the retailer side."

There is little question of whether the guidelines are outdated. A considerable portion of the FTC's consultation queried how to change the guides to account for the growth of the Internet, including addressing various types of online and mobile ads and what "competing sellers" means when it comes to comparing traditional and online retailers.

"The No. 1 thing is to deal with the Internet in terms of how notices are received and the impact of sales on the Internet," Saferstein said. "It used to be you only thought about whether you were competing with a store across the street. Now you may be competing with a store across the country."

As long as the revisions follow a process similar to the one the federal antitrust agencies used when they updated the horizontal merger guidelines in 2010 and the changes simply make the guides consistent with current law and counseling, putting out a new version probably wouldn't cause a lot of problems for businesses, according to Sasse.

"You just don't hear a lot of people saying, 'Hey, I sure wish the Fred Meyer Guides were updated,'" Sasse said. "But I have to say, I think most people would say guidance is fine. Chances are that guidance from the FTC is probably more helpful here, frankly."

--Editing by Elizabeth Bowen and Andrew Park.

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