

IN THE MATTER OF

MAX FACTOR & CO.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATION OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT AND
SEC 2(d) OF THE CLAYTON ACT

Docket C-3201. Complaint, Oct. 15, 1986—Decision, Oct. 15, 1986

This consent order requires, among other things, a Stamford, Conn. cosmetics company to make promotional allowances available on proportionally equal terms to all of its customers, and in particular, to make alternatives, such as handbills or other in-store promotional activities, available to customers for whom its basic promotional plans are not usable or economically feasible. Respondent is required to notify all its customers that the promotional payments and alternatives are available.

Appearances

For the Commission: *Paul R. Roark.*

For the respondents: *Steven C. McCracken, Gibson, Dunn & Crutcher, Newport Beach, Calif.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission, having reason to believe that Max Factor & Co. has violated Section 5 of the Federal Trade Commission Act, as amended (15 U.S.C. 45), and subsection (d) of Section 2 of the Clayton Act, as amended (15 U.S.C. 13(d)), and it appearing to the Commission that a proceeding by it in respect thereof would be in the public interest, hereby issues its complaint stating its charges in that respect as follows:

PARAGRAPH 1. Respondent Max Factor & Co. is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

PAR. 2. Respondent is now and for many years has been engaged in the manufacture, sale, and distribution of cosmetic products.

PAR. 3. In the course and conduct of its business, respondent has engaged and is now engaging in commerce, as "commerce" is defined in the Clayton Act and the Federal Trade Commission Act, having

sold and shipped its cosmetic products or caused them to be transported from its previous principal place of business in California and its current principal place of business in Connecticut to customers located in other States of the United States and in the District of Columbia.

PAR. 4. In the course and conduct of its business in commerce, respondent paid or contracted for the payment of credits or sums of money, hereinafter referred to as "promotional allowances," either directly or indirectly by way of discounts, allowances, rebates, or deductions, as compensation or in consideration for promotional services or facilities, including advertising in various media such as newspapers, furnished by customers in connection with the sale or offering for sale of respondent's cosmetic products.

PAR. 5. In granting promotional allowances, respondent discriminated against particular customers in that respondent did not make such promotional allowances functionally available, on proportionally equal terms, to all customers competing in the sale and distribution of respondent's cosmetic products. Respondent failed to offer alternative terms and conditions to customers for whom respondent's basic promotional allowances were not usable and suitable.

PAR. 6. The acts and practices of respondent set forth in Paragraphs 4 and 5 above violate Section 5 of the Federal Trade Commission Act, as amended, and Section 2(d) of the Clayton Act, as amended. The acts and practices of respondent, as herein alleged, may recur in the absence of the relief herein contemplated.

Chairman Oliver and Commissioner Strenio dissented.

DECISION AND ORDER

The Federal Trade Commission having initiated an investigation of certain acts and practices of the respondent named in the caption hereof, and the respondent having been furnished thereafter with a copy of a draft of complaint which the Los Angeles Regional Office proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge respondent with violation of the Federal Trade Commission Act and the Clayton Act; and

The respondent, its attorney, and counsel for the Commission having thereafter executed an agreement containing a consent order, an admission by the respondent of all the jurisdictional facts set forth in the aforesaid draft of complaint, a statement that the signing of said agreement is for settlement purposes only and does not constitute an admission by respondent that the law has been violated as alleged in such complaint, and waivers and other provisions as required by the Commission's Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that the respondent has violated the said Acts, and that complaint should issue stating its charges in that respect, and having thereupon accepted the executed consent agreement and placed such agreement on the public record for a period of sixty (60) days, and having duly considered the comment filed thereafter by an interested person pursuant to Section 2.34 of its Rules, now in further conformity with the procedure prescribed in Section 2.34 of its Rules, the Commission hereby issues its complaint, makes the following jurisdictional findings and enters the following order:

1. Respondent Max Factor & Co. is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 50 Gatehouse Road, Stamford, Connecticut.

2. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the respondent, and the proceeding is in the public interest.

ORDER

I.

It is ordered, That for the purposes of this order, the following definitions shall apply:

A. The term *cosmetic products* shall mean cosmetics, fragrances, toiletries, and beauty aids.

B. The term *respondent's cosmetic products* shall include: (a) all cosmetic products advertised, offered for sale, sold, or distributed by respondent; (b) all cosmetic products bearing any of respondent's trademarks that are advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent; and (c) all cosmetic products advertised, offered for sale, sold, or distributed by respondent's corporate parent or a division or subsidiary of such parent as part of a program in which cosmetic products bearing any of respondent's trademarks are also advertised, offered for sale, sold, or distributed.

II.

A. *It is further ordered,* That respondent Max Factor & Co., a corporation, and its officers, directors, agents, representatives, and employees, and its successors and assigns, directly or indirectly or

through any corporation, subsidiary, division or other device, shall cease and desist from paying or contracting to pay to or for the benefit of any customer anything of value as compensation or in consideration for advertising or promotional services or facilities furnished by or through such customer in connection with the advertising, offering for sale, sale, or distribution of respondent's cosmetic products in or affecting commerce, as "commerce" is defined in the Clayton Act, as amended, or the Federal Trade Commission Act, as amended, unless:

1. Respondent makes such compensation or consideration available on proportionally equal terms for alternative services or facilities that are usable and economically feasible for all customers who compete in the distribution or resale of respondent's cosmetic products and for whom respondent's basic promotional plans are not usable or economically feasible; *provided*, that with respect to respondent's cooperative advertising and drive plans, such alternative services or facilities may include handbills and circulars in amounts not less than 1,000, or other in-store promotional activities acceptable to respondent; and

2. All customers who compete in the distribution or resale of respondent's cosmetic products are informed in the manner provided in Paragraph II.B. of this order of the availability of such compensation or consideration.

B. *It is further ordered*, That respondent shall inform those retailers who purchase respondent's cosmetic products, including retailers who do not purchase directly from respondent, of the availability of its promotional plans, as required by Paragraph II.A. of this order, as follows:

1. Respondent shall imprint on the smallest shipping container used for respondent's cosmetic products the legend, "Promotional allowances are periodically made available by Max Factor & Co. to all retailers. To obtain information about these promotional opportunities contact your Sales Representative or call [Mary O'Brian at our Headquarters office (212) 856-6664]"; and

2. For each promotion respondent shall cause copies of "offer letters" or similar materials explaining the availability of alternative methods of participation in respondent's advertising or promotional program or plan to be supplied to all direct purchasing retailers, and to its wholesalers or distributors in sufficient quantity for presentation or delivery by such wholesalers or distributors to each customer of such wholesaler or distributor, and shall request such wholesalers and distributors to present or deliver such materials to such customers.

C. *Provided, however*, That nothing herein contained shall be con-

strued or interpreted to abridge or otherwise restrict respondent's entitlement to avail itself of the "Meeting Competition Defense," the provisions of which are contained in Section 2(b) of the Clayton Act, 15 U.S.C. 13(b), as amended.

III.

It is further ordered, That respondent shall deliver, within thirty (30) days of the date of service upon it of this order, a copy of this order to all current sales management and sales personnel who are engaged in the sale of any of respondent's cosmetic products within the United States, and shall for a period of five (5) years thereafter deliver a copy of this order to all such future sales management and sales personnel within thirty (30) days of their employment in such positions.

IV.

It is further ordered, That respondent shall, within sixty (60) days after the date of service upon it of this order, file with the Commission a report, in writing, setting forth in detail the manner and form in which it has complied with this order.

V.

It is further ordered, That respondent shall notify the Commission at least thirty (30) days prior to any proposed change in respondent such as dissolution, assignment or sale resulting in the emergence of a successor corporation, the creation or dissolution of subsidiaries doing business in the United States, or any other change in respondent that may affect compliance obligations arising out of the order. Chairman Oliver and Commissioner Strenio dissented.

DISSENTING STATEMENT OF CHAIRMAN DANIEL OLIVER

In a decision that ignores the interests of American consumers, a majority of the Commission has determined to accept a consent order in this matter arising out of charges that respondent Max Factor violated Section 5 of the Federal Trade Commission Act, and Section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act. Specifically, the Commission's complaint issued with this consent alleges that Max Factor engaged in unlawful discriminatory promotional allowances. For the reasons stated below, I dissent from the issuance of an order in this matter.

As a matter of both statutory law and decisional precedent, the

Commission has a responsibility to justify—on public interest grounds—any action it takes. Section 5(b) of the FTC Act provides that the Commission shall issue a complaint only when it appears that a proceeding “would be to the interest of the public. . . .” As long ago as 1929, the Supreme Court held that “to justify the Commission in filing a complaint under §5, the purpose must be protection of the public,” and concluded that “[i]n determining whether a proposed proceeding will be in the public interest the Commission exercises a broad discretion.”¹

The Robinson-Patman Act, violations of which are also alleged here, does not require a specific finding that enforcement action will serve the public interest.² The case law interpreting that section, however, makes clear that the Commission has the same broad discretion as with Section 5 of the FTC Act in choosing how it will deploy its resources.³

Within the past year, this principle respecting agency discretion has been reaffirmed by the Supreme Court:

[A]n agency decision not to enforce often involves a complicated balancing of a number of factors which are peculiarly within its expertise. Thus, the agency must not only assess whether a violation has occurred, but whether agency resources are best spent on this violation or another, whether the agency is likely to succeed if it acts, whether the particular enforcement action requested best fits the agency's overall policies, and indeed, whether the agency has enough resources to undertake the action at all. An agency generally cannot act against each technical violation of the statute it is charged with enforcing.⁴

Ignoring its obligation to act in the public interest, the majority has opted instead to impose an anticompetitive order on a notion that there has been a technical violation of the law.⁵ Such a course of

¹ *FTC v. Klesner*, 280 U.S. 19, 27, 28 (1929). See also *FTC v. Royal Milling Co.*, 288 U.S. 212 (1933); *Exposition Press, Inc. v. FTC*, 295 F.2d 869 (2d Cir. 1961), cert. denied, 370 U.S. 917 (1962).

² Indeed, a literal reading of the statute might suggest the contrary. Clayton Act Section 11(b) provides that “[w]hensoever the Commission or Board vested with jurisdiction . . . shall have reason to believe that any person is violating or has violated any of the provisions of sections 2, 3, 7, and 8 of [the] Act, it shall issue . . . a complaint. . . .” Section 2 of the Clayton Act is, of course, the Robinson-Patman Act.

³ In *Moog Industries, Inc. v. FTC*, 355 U.S. 411, 413 (1958), for example, the Court held in a Robinson-Patman case that “the Commission alone is empowered to develop that enforcement policy best calculated to achieve the ends contemplated by Congress and to allocate its available funds and personnel in such a way as to execute its policy efficiently and economically.”

⁴ *Heckler v. Chaney*, 470 U.S. 821, 105 S.Ct. 1649, 1656, 84 L.Ed. 2d 714 (1985). Although the argument can be made that entry of this order consumes few additional resources, the great bulk of the expenditures necessary to prosecute this action already having been spent, I find such reasoning to be unpersuasive. The fact that many resources may have been misallocated in the past does not justify waste of some future resources. Moreover, entry of this order will necessitate future expenditures in the form of compliance costs. Any enforcement proceedings similarly would entail further resources.

⁵ The majority apparently infers that Max Factor committed a technical violation, based in part, it seems, on its willingness to sign a consent decree. Yet it is unclear to me that any violation was committed. Our past precedents indicate that proportionality can be based on value to the seller, *Lever Bros. Co.*, 50 F.T.C. 494 (1953), an approach that has been approved by the Supreme Court. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 61 n.4 (1959).

The record does not indicate whether or not Max Factor's payments were proportional to value. In addition, promotional allowances do not violate the Robinson-Patman Act if they are made to meet competition, *Exquisite*

action is, in my view, regrettable and inconsistent with established precedent.

I can find no basis, and none has been suggested to me by staff or the Commission majority, for concluding that any public interest is served by entry of this consent order.⁶ To the contrary, the far more likely result of today's action will be decreased consumer welfare by forcing Max Factor to operate at less than maximum efficiency and at a competitive disadvantage relative to other firms in the industry.

I reach this conclusion on the basis of certain critical facts that are not in dispute. First, the cosmetics industry is intensely competitive. Although there may be disagreement regarding precise market shares, all agree that there are numerous competitors in each segment of the overall cosmetics market.

Second, there has never been the hint of a suggestion from any quarter that any of Max Factor's practices had an adverse impact on competition.⁷ Max Factor is but one of a large number of cosmetic suppliers, none of which appears at any point to have possessed the power to raise prices or dictate the terms of purchase.

Third, Max Factor is clearly a declining firm in a competitive industry. The record suggests that in terms of market share and sales, Max Factor has suffered severe declines both recently and during the period that it allegedly engaged in discriminatory promotional activities (the late 1970's).

Fourth, it has now been nearly seven years since the occurrence of the practices that gave rise to this action. In the interim, Max Factor has undergone four changes in ownership and management. Moreover, its corporate headquarters has moved from Los Angeles to Stamford, Connecticut, resulting in a wholesale change in management.

From these undisputed facts, certain conclusions are inescapable. First, even the limited record before us demonstrates that because the cosmetics industry is intensely competitive, the market will not allow

Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962). In light of Max Factor's market share, it appears probable that its allowances were driven by competitive necessity rather than an exercise of economic price discrimination.

⁶ It has been suggested that the public interest in Robinson-Patman cases is not with advancing consumer welfare but with protecting the vitality of small businesses. Even assuming, for the sake of argument, the validity of such a theory, this order does not serve even that interest. In the first place, Max Factor is a minor and struggling player in the intensely competitive cosmetics industry. The purported beneficiary has become instead the prey. Moreover, to the extent the public interest is defined as encouraging protection of small buyers, there is no basis for entering this order. This proceeding was not initiated as the result of buyer complaints, and no buyer—small or large—was shown by the staff's evidence to have been placed at a competitive disadvantage as a result of any alleged conduct.

⁷ I am aware that the weight of authority currently accords virtual *per se* status to Sections 2(d) and 2(e) of the Robinson-Patman Act, and that a showing of competitive injury is not required to prove a violation. Although there is authority to the contrary (e.g., *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17, 24-25 (1st Cir. 1981)), that issue need not be reached in the setting of the present case. Regardless of what the result would be if the issue arose in the context of a full scale trial on the merits, we are presented with a very different situation: the issues here are (a) whether in the proper exercise of prosecutorial discretion the Commission should devote scarce enforcement and compliance resources every time a technical violation of the statute is alleged, even though there is absolutely no proof of injury to competition or consumers, and (b) whether the Commission is compelled to issue an order it can predict will be anticompetitive.

price or service discrimination of any systematic or persistent sort. Prices among buyers will tend to reflect cost differences, and promotional expenditures among buyers will in any meaningful sense tend to be proportionally equal. As noted above, the staff has uncovered no evidence that any allegedly disfavored buyer lost sales or was placed at a competitive disadvantage as a result of any conduct engaged in by Max Factor.

Second, the existence of a competitive market suggests that Max Factor, already a declining firm, will be disadvantaged by the order, relative to its competitors. When competition prevails, promotions or discounts are offered only if the supplier perceives that it is efficient to do so; i.e., the supplier receives equivalent value in exchange for the promotion or discount. Thus, to the extent the order requires payments to those not previously offered such, it forces discrimination in their favor. Such a result is inefficient, decreases consumer welfare, and is not in the public interest. Moreover, entry of the majority's order will subject Max Factor to higher penalties and significantly more stringent record-keeping compliance obligations than its competitors. This undoubtedly will have a chilling effect on Max Factor's marketing, including its competitive pricing decisions. It can also be expected to result in a sales decline and a decrease in consumer satisfaction. Can this result be in the public interest?

Third, the several changes in ownership and the complete overhaul in management, coupled with evidence that Max Factor has implemented an extensive Robinson-Patman Act compliance program, suggest that there is little cognizable danger of any recurring law violation. In these circumstances, it is incumbent on the Commission, in the exercise of its discretion, to close the investigation.⁸ The unlikelihood of recurrence is further suggested by the extended length of time since the period of the alleged violations.⁹

In addition, the unusually broad scope of the order raises very real concerns. The majority order applies to cosmetic products not only of Max Factor or bearing Max Factor trademarks, but also those of its "corporate parent or a division or subsidiary of such a parent," if the products of both Max Factor and its parental affiliate are sold "as part of a program."

Although the meaning of that somewhat vague quoted term is not further defined by the order, one need not possess extraordinary power to understand the attendant problems that may arise. Owner-

⁸ *Borg-Warner Corp. v. FTC*, 746 F.2d 108 (2d Cir. 1984); *International Harvester Co.*, 104 F.T.C. 949, 1069-70 (1984) (no order warranted because, *inter alia*, "Harvester's voluntary notification program has already provided all the relief that could be expected from a Commission order" and Harvester was unlikely to "return to its earlier violation"); *Chesebrough-Pond's Inc.*, 66 F.T.C. 252 (1964); *Paxton & Gallagher Co.*, 59 F.T.C. 1089 (1961) (changes in respondent's ownership and management vitiated Commission concern with resumption of unlawful conduct).

⁹ *Great Southwestern Land Co.*, 73 F.T.C. 440 (1968); *Simon & Schuster, Inc.*, 71 F.T.C. 1490 (1968).

ship of Max Factor has turned over several times in the recent past. There is no evidence to suggest that this trend has run its course. Entry of this order, however, could impose tremendous costs in the form of inefficiencies on a subsequent purchaser—in particular one already part of the cosmetics industry.

Specifically, to avoid falling within the burdensome umbrella of the order, an acquiring company might have to structure the transaction in a manner that is less than efficient. Moreover, the post-acquisition entity would be inclined to shy away from such potentially efficient practices as common sales forces or collective advertising.

An equally unfortunate result will be the inevitable chilling effect felt by new owners discouraged from engaging in aggressive or innovative marketing schemes that are potentially pro-competitive. Less vigorous and more expensive marketing admits of only one consequence—higher costs passed through in the form of higher prices to consumers. It is difficult, to say the least, to divine the public interest served.

As Commissioner Strenio notes in his dissenting statement (p. 2), the majority has determined to issue a perpetual order against Max Factor. The majority's mistake, enshrined for the ages, serves as a compelling reminder why orders should be limited to finite terms.

This Commission's record in enforcing the Robinson-Patman Act does not commend the Commission to the American consumer. Its prior interpretations and enforcement actions have worked staggering injury on consumers, to say nothing of small businesses such as Max Factor. The Commission majority today has let slip an opportunity to undo some of that harm. By insisting on an order that is certain to have anticompetitive consequences—with no conceivable offsetting benefits to competition and consumers—the Commission majority turns and retreats away from rational antitrust enforcement. The American consumer deserves better. I had understood this Commission's mandate to be the promotion of consumer welfare through the fostering of competition. I dissent from the majority's refusal to carry out that charge in this case.

SEPARATE STATEMENT BY COMMISSIONER ANDREW J. STRENIO, JR.

I regret that I cannot join in the majority decision. Weighing all the factors in this case, I have concluded that the issuance of this particular consent order is not in the public interest. Instead, I would have directed staff to renegotiate the consent to more carefully tailor it to fit the circumstances revealed on the record.

In order to place this case in context, it is worth noting several factors. To begin with, the violations alleged occurred over six years

ago and the management of Max Factor has changed hands several times in the interim. More importantly, we have no evidence that Max Factor's conduct over six years ago harmed competitors, retailers or consumers.

For example, based on the dated record before us, we have no reason to conclude that Max Factor—a relatively small competitor in an intensely competitive industry—possessed the market power necessary to engage in economic price discrimination or the offering of discriminatory allowances. We have no reason to conclude that smaller retailers received less than a competitive level of promotional allowances. Indeed, we have no reason to conclude that Max Factor had any incentive to harm efficient smaller accounts or to “overpay” larger accounts, since either action would have been directly contrary to Max Factor's interests.

We do, however, have reason to fear that this consent order could harm smaller retailers and consumers. For instance, Max Factor has argued that its promotional efforts to ensure the association of its products with the most upscale stores had a “spillover benefit” of enhanced sales at smaller stores as well. If, because of the order, Max Factor now cuts back its promotional allowances to the most upscale stores, then smaller stores may be hurt by a corresponding reduction in any such spillover benefits. Moreover, if Max Factor is unable to compete [2] vigorously as a consequence of the order, then consumers will ultimately lose as well.¹

Despite all the above, the Commission's unquestionable duty to enforce the Robinson-Patman Act and the strong evidence of at least a technical violation those six years ago may, nonetheless, provide a basis for securing an appropriate consent order from Max Factor. But this consent order is seriously deficient in two regards.

First, the terms of the order are overly broad. For example, Paragraph II(B)(2) of the order requires Max Factor to provide direct notice of all promotional plans to specified retailers in perpetuity through an expensive and cumbersome process. But effective notice could be provided through a number of alternative mechanisms, such as by adequately advertising in trade publications and the like. Specifying forever a single, costly process for notifying retailers seems unneces-

¹ I have considered the proposition that neither the Robinson-Patman Act nor the Supreme Court's decision in *Simplicity Pattern Co. v. F.T.C.*, 360 U.S. 55 (1959) preclude some examination of efficiency justifications or overall competitive effects of questioned conduct. A number of Supreme Court cases that postdate *Simplicity* state that rigid application of a *per se* rule in Sherman Act cases is not appropriate in every circumstance. For example, to avoid condemning potentially pro-competitive conduct, the Supreme Court in *GTE Sylvania, Inc. v. Continental T.V., Inc.*, 433 U.S. 36 (1977), characterized the *per se* rule as a “demanding standard”, *id.* at 50, and stated that “any departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than . . . formalistic line drawing.” *Id.* at 58-59. While I have not reached a firm conclusion on the issue, it may be appropriate for the Commission to consider whether and how modern Supreme Court decisions on *per se* analysis under the Sherman Act should affect our analysis in cases under Sections 2(d) and 2(e) of the Clayton Act, as amended by the Robinson-Patman Act.

sarily harsh without a showing that either the law or enforcement considerations mandate such a result.²

Second, the order is disturbingly vague because it requires Max Factor to make promotional compensation or consideration available on "proportionally equal terms" without defining what [3] that means. This is important because of Max Factor's claim of spillover benefits from its promotional activities. Again, the claim is that although certain upscale stores may have received higher direct promotional allowances, the assertedly less-favored accounts benefitted indirectly by a resulting general increase in demand for Max Factor products. In turn, Max Factor may have received greater value in increased sales per promotional dollar spent at certain stores.

If this case had been litigated, a major question would have been whether proportionality must be measured solely by the direct cost to Max Factor or whether the value received by Max Factor could be an allowable standard. The answer is not entirely clear. In 1972, the Commission, with no in-depth explanation, appeared to reverse considerable precedent that sustained a value-based approach to proportionality.³ In effect, the Commission modified its Fred Meyer Guides to require apparently that sellers must provide equal allowances to all buyers based upon cost alone, regardless of the value received by the seller from those expenditures.⁴ The law is not completely clear because the Fred Meyer Guides are "guides," not exact prescriptions. On the one hand, the "guides" state that allowances that have little or no relationship to cost or approximate cost of the service provided by the retailer "may be considered to be in violation" of the law⁵ while, on the other, "[n]o single way to proportionalize is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used."⁶ One commentator generally sympathetic to the Robinson-Patman Act has noted that there has been no judicial explication of the Commission's 1972 modification, either [4] accepting it or attempting to interpret its limitations.⁷ I think that the Commission could and should have clarified the scope of the 1972

² For one commentator's view see Rowe, *Price Discrimination Under the Robinson-Patman Act* 414 (1962). Rowe states that the original text of Section 2(d) requiring that proportionally equal treatment be "offered" to all customers was modified to provide only that it be "available." Thus, he argues that mandatory personal solicitation departs from the text (and purpose) of the Act.

³ The Commission's "reasonableness approach," in which value to the seller could be taken into account, "was echoed in the courts and the Commission for years." ABA Antitrust Section, Monograph No. 4, II The Robinson-Patman Act: Policy and Law 66 (1983). See also III E. Kintner & J. Bauer, *Federal Antitrust Law* 557-66 (1983) for a discussion of the change in the Commission's approach.

⁴ An example of a value-based approach to proportionality is found in *Lever Bros.*, 50 F.T.C. 494 (1953).

⁵ 16 CFR 240.9, Example 1, n.2 (1985) (emphasis added).

⁶ 16 CFR 240.7 (1985). Kintner states that the legislative history is ambiguous on this issue. Kintner, *supra*, at 558 n.130.

⁷ Kintner, *supra*, at 565-66. Kintner argues that a strict "cost" standard would make implementation of legitimate promotional plans "cumbersome and expensive." *Id.* at 566.

modification before issuing this order.⁸ Instead, the majority's approach forces Max Factor to guess the answer—with the prospect of heavy civil penalties for a wrong guess, and considerable uncertainty and legal expenses even for a correct guess.

For all these reasons, I respectfully disagree with the majority's decision to issue this specific consent order. It is indeed ironic that this order may prove to be yet another instance where the Robinson-Patman Act is enforced in a manner that penalizes, rather than protects, smaller competitors.

⁸ After all, it may be contended that requiring equal payments to all buyers regardless of the value received by the seller is really a disguised price concession to the buyers who provide the least value. If so, the order could have the effect of forcing Max Factor to engage indirectly in economic price discrimination, which may be contrary to the purpose of Section 2 of the Robinson-Patman Act.

IN THE MATTER OF
ORKIN EXTERMINATING COMPANY, INC.

Docket 9176. Interlocutory Order, Oct. 16, 1986.

NOTICE OF INTENT TO RELEASE *IN CAMERA* INFORMATION

This is to advise Orkin Exterminating Company that, consistent with Section 21(d)(2) of the Federal Trade Commission Act, 15 U.S.C. 57b-2(d)(2)(1982), and Commission Rule 3.45(a), 16 C.F.R. 3.45(a) (1986), the Commission intends to include in the public decisional documents in this proceeding certain information that the Administrative Law Judge received into the *in camera* record. The information that will be made public appears in those portions of the Initial Decision currently filed on the *in camera* record of this proceeding.

In making a determination to release *in camera* information in the course of an adjudicative proceeding, the Commission must balance the potential harm of such release to the protected party against the substantial interest in the public's having available the factual background underlying a Commission decision. Public knowledge of such information permits both improved evaluation of the fairness and wisdom of a given Commission decision and provides clearer guidance to affected parties. See *RSR Corp.*, 88 F.T.C. 206 and 88 F.T.C. 734 (1976).

Here we have concluded that the potential harm to Orkin Exterminating Company from release of the limited information cited above is slight and is outweighed by the value of making the basis of Commission decisions public to the greatest extent possible. In addition, most of the information in question already appears in the public binders of this proceeding rather than, or in addition to, the binder containing *in camera* material. The figures are at least two years old and do not appear to provide sufficient information to competitors to conclude that their release would impose a "clearly defined, serious injury" on Orkin. *H.P. Hood & Sons, Inc.*, 58 F.T.C. 1184, 1188 (1961). See also *Bristol-Myers Co.*, 90 F.T.C. 455, 456 (1977), as modified by *General Foods Corp.*, 95 F.T.C. 352, 355 (1980).

The information reflected in the portions of the Initial Decision cited above will be placed on the public record of this proceeding no sooner than ten calendar days from service of this notice upon counsel for Orkin Exterminating Company.