

ANTITRUST UPDATE



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PACKAGING EXCLUSIVITY – A NEW RECIPE FOR ANTITRUST LIABILITY

Few companies sell a product that comes in a single size. And companies often strategically seek to use the variety in their packaging as a way to provide lower prices to certain customers – for example, by offering a special multi-pack of eight units to their largest customers at a price per unit that is lower than the price of the single-unit package that is available to their remaining customers. In light of recent developments suggesting that such strategies often will be illegal, any company that offers a product in differing packaging (whether multi-packs v. single-packs, or different sizes such as 5-lb. and 10-lb. bags) will want to review its current packaging and pricing strategies to be sure those strategies are legally compliant.

The Federal Trade Commission (FTC) recently issued revised **guidelines** regarding the offering of advertising and promotional allowances in compliance with Sections 2(d) and (e) of the Robinson-Patman Act. One of these guidelines advises that “packaging” is a service which must be offered to *all* competing customers *if* the packaging is designed primarily to promote the resale of the product. Because the FTC implied that almost any package will be designed primarily to promote the resale of the product (its example of a package not primarily designed to promote resale was a special package requested by a retailer that could be stacked efficiently on retail shelves), **sellers in most cases will not be able to offer special package sizes as a vehicle to give selected customers lower unit prices**; either the package will have to be offered to all competing customers *or*, if offered to only some, it will have to be offered at the same unit price as is being offered to the remaining customers.

Although many thought the FTC Guidelines would have little impact – after all, the FTC brings few Robinson-Patman Act cases – one supplier has already been sued for refusing to supply multi-packs developed exclusively for membership clubs to

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a grocery store. And within the last week, the court declined to dismiss that **suit**. The suit is a clear sign that the antitrust plaintiffs' bar, as well as smaller retailers and distributors who currently are not able to purchase lower unit-cost, large packages, have noticed the revisions to the FTC Guidelines and are going to exploit them.

Consequently, sellers of packaged products would be well advised to review their pricing and packaging practices to see if any customers have been offered packages that are unavailable to their competitors as a way for the seller to provide lower per-unit prices to the customer. If so, they may need to offer such packages to all the competing customers or adjust the price so there is no unit-cost advantage to these packages.

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Amid the current highly competitive marketplace or demanding negotiations of a merger, acquisition or joint venture, companies face the risk of high-stakes antitrust litigation, which can be an additional drain on valuable financial and human resources. Companies need experienced counsel that knows how to dismantle a plaintiff's antitrust claims without undermining the company's business operations or proposed business change.

Shook, Hardy & Bacon has worked with numerous industries to develop an in-depth understanding of how antitrust laws affect individual markets. Our antitrust team takes particular pride in the scope of its services, which cover substantive and procedural issues, as well as its relationships with government regulators both in the United States and abroad.

Our antitrust and trade regulation attorneys have defended numerous multidistrict litigation proceedings, class actions, individual actions, and state attorney general cases in state and federal courts nationwide. We have managed complex price fixing and monopolization cases; indirect purchaser and direct purchaser matters; parens patriae actions; consent decree modifications and terminations; tying, distribution and exclusive-dealing matters; and criminal antitrust prosecution. We have also handled suits brought by private plaintiffs challenging mergers, acquisitions and joint ventures before the Federal Trade Commission; grand jury investigations; civil investigative demands, third-party subpoenas; and the filing of amicus briefs in significant antitrust cases.

