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## BROKERAGE UNDER THE ROBINSON-PATMAN ACT: TOWARD A NEW CERTAINTY

James F. Rill\*

Prior to the Supreme Court's first *Broch* decision,<sup>1</sup> the application of the "brokerage" provision of the Robinson-Patman Act<sup>2</sup> could be determined by the mere statement that the payment of a brokerage fee or an allowance reflecting brokerage by a seller to a buyer or to the latter's agent was an absolute violation.<sup>3</sup> In the five years that have elapsed since that decision, however, there has been a great deal of confusion regarding both the object and the implementation of the "brokerage" provision. This confusion resulted from the Supreme Court's concentration on the discriminatory<sup>4</sup> advantage that a brokerage concession had accorded a large buyer whose qualifications for preferential treatment through services rendered or other considerations had not been demonstrated.<sup>5</sup> In the *Broch* case the Court, in passing, expressed disapproval of the implications which some observers had derived from traditional interpretations that the "for services rendered" clause of the statute was a dead letter and that discrimination was not an element of violation.<sup>6</sup>

It appears that extensive and intricate analysis of the Court's ruling, sub-

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1 *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960). Prior to the *Broch* decision, the author of a complete work on the Robinson-Patman Act asserted:

The Section of the Robinson-Patman Act that has to do with the payment of brokerage is the only one the meaning of which has been adequately tested by litigation. Eight of the orders of the Federal Trade Commission under this section were appealed to the Courts. In the resulting decisions, judicial interpretation of this part of the law became clear.

EDWARDS, *THE PRICE DISCRIMINATION LAW* 92 (1959). See AUSTIN, *PRICE DISCRIMINATION* 106 (2d ed. 1959), where it is stated that "it is the only section as to which no important question of interpretation remains to be settled." Compare the following post-*Broch* introduction to the subsection by another eminent authority: "In the wake of the Supreme Court's 1960 *Broch* decision new uncertainty swirls around previously settled applications of Section 2(c)'s vague ban on 'brokerage' or Commission payments by one side to the other in a sales transaction." ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 330 (1962).

2 The "brokerage" subsection, § 2(c) of the Clayton Act, as added by the Robinson-Patman Amendment, provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

38 Stat. 730 (1914), as amended, 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

3 Although the subsection similarly proscribes payments by the buyer (or his agent) to the seller (or his agent), the chief enforcement impact has been on payments or allowances directly or indirectly made by the seller. This policy comports with the act's general concern with abuses of buying power. Moreover, although a literal reading of the subsection would appear to prohibit all forms of compensation passing between buyer and seller, it has been implemented to reach only payments, allowances or discounts reflecting brokerage or commission services and other similar services. See AUSTIN, *op. cit. supra* note 1, at 107.

4 363 U.S. 166, 175, 176 (1960).

5 *Id.* at 177, n.19.

6 *Ibid.* See, e.g., ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 188 (1955); AUSTIN, *op. cit. supra* note 1, at 108-09.

sequent decisions by the FTC and the courts and other administrative interpretations have now made it both timely and possible to undertake a new framework for analysis of those practices which fall within the prohibitory scope of 2(c). However, any endeavor to reassess the bounds of the statute must comport with the legislative purpose underpinning 2(c) without doing unwarranted violence to some of the early appellate court decisions interpreting it. In addition, the recent evaluations of the provision have indicated that future enforcement must clearly establish a direct link between a payment or discount and brokerage consideration and, if this is accomplished, must demonstrate that the payment or discount represented a discriminatory "abuse" of the brokerage function. It is submitted that clear, objective tests are available whereby these preconditions to violation might be proven, and that 2(c) would then occupy its appropriate and significant position in the Robinson-Patman fabric.

### I. The Roots of Re-evaluation — The Supreme Court's View of Legislative Purpose

Before considering the recent developments making possible a reorientation of 2(c), we should assess the foundation of these interpretations and the legislative history upon which the *Broch* decision expatiated. What should be apparent — that section 2(c) is a corollary provision of an antidiscrimination statute — must be emphasized at the outset. The Robinson-Patman Act was itself in large measure an outgrowth of the FTC's Chain Store Investigation and the concern therein expressed over the efforts of large buyers to exact discriminatory concessions in many forms from their suppliers — and the frequency with which this effort was successful.<sup>7</sup> In expressing the general objectives of the full measure, the House Committee stated:

The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them. Such discriminations are sometimes effected directly in prices, including terms of sale; and sometimes by separate allowances to favored customers for purported services or other considerations which are unjustly discriminatory in their result against other customers. The bill is accordingly drawn in six lettered subsections, of which the first four, (a), (b), (c) [brokerage] and (d), contain substantive measures directed at the more prevalent forms of discrimination.<sup>8</sup>

The Committee explanations of the brokerage provision further focused on the coercive power brought to bear by large buyers to obtain preferences, and again the evil of discrimination was stressed:

<sup>7</sup> FTC, Final Report on the Chain Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess. (1935). The Commission evidenced substantial concern with the asserted practice of large chains to exact brokerage concessions from suppliers especially through chain-owned brokerage firms. FTC, *supra* at 24-28, 62, 63.

<sup>8</sup> H.R. REP. No. 2287, 74th Cong., 2d Sess. 7 (1936). See S. REP. No. 1502, 74th Cong., 2d Sess. 3 (1936).

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases, or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made.<sup>9</sup>

*Broch* was the first 2(c) matter heard by the Supreme Court, and its lengthy and elaborate opinion indicates that the opportunity to set forth its views on the foundations and purposes of the statute was not missed. The case was brought by the Commission against a broker who had agreed with his principal, the seller, to accept a reduced fee, permitting the reduction to be passed on to a large buyer as a portion of a reduced price. The central issue appears to have been whether the broker violated 2(c) by participating in such an arrangement. The Court answered in the affirmative and concluded that the practice effected the same economic result as though the broker had, by agreement with the seller, paid part of his fee to the buyer.<sup>10</sup> From this seemingly narrow issue, the Court proceeded to consider the purpose of the subsection, noting that the chief objective of the act was prohibition of all means whereby large buyers could obtain discriminatory preferential treatment. The Court observed:

One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases, rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act. But it was not the only means by which the brokerage function was abused and Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other methods by which brokerage could be used to effect price discrimination.<sup>11</sup>

The fact that discrimination is an element of a 2(c) offense is emphasized in the full course of the opinion. This term or its concomitants "preference" and "concession" appeared at no less than nine other places in the opinion all in relation to the brokerage provision. In sum, the Court's perspective of the provision is in harmony with the legislative objectives which produced 2(c).

The Supreme Court did not, however, suggest that all *discriminatory* broker-

9 H.R. REP. No. 2287, 74th Cong., 2d Sess. 15 (1936). The Senate Committee Report more explicitly identified the type of practice with which Congress was concerned:

But to permit [a brokerage] payment or allowance where no such service is rendered, where, in fact, if a "broker," so labeled, enters the picture at all, it is one whom the buyer points out to the seller, rather than one who brings the buyer to the seller, is but to permit the corruption of this function to the purposes of competitive discrimination.

S. REP. No. 1502, 74th Cong., 2d Sess. 7 (1936).

10 It is noteworthy that the *Broch* case was not brought against the large buyer involved, J. M. Smucker Co., especially in view of the Commission's expressed policy of centering enforcement activities on such firms. See *Max Factor & Co.*, 3 TRADE REG. REP. ¶ 16992 (F.T.C. July 22, 1964). The Court suggested that the buyer may not have known of the character of the concessions granted and that this factor might be relevant in a proceeding against it. *Scienter* may be, therefore, an element of a § 2(c) case. *But see* *Thomasville Chair Co.*, 55 F.T.C. 2076 (1959); *BAUM, THE ROBINSON-PATMAN ACT: SUMMARY AND COMMENT* 43 (1964). Compare *Eidson Produce Co.*, 60 F.T.C. 1 (1962); *Exchange Distrib. Co.*, 61 F.T.C. 1 (1962).

11 363 U.S. 166, 169 (1960).

age payments or allowances would violate the act. Referring to the "for services rendered" clause, the Court stated:

There is no evidence that the buyer rendered any services to the seller or to respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence and we need not explore the applicability of § 2(c) to such circumstances.<sup>12</sup>

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We need not view this administrative practice [the buying broker cases] as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the "savings" in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment.<sup>13</sup>

The Court's analysis thus prepared the way for a rededication of section 2(c) to the basic theme of the statute — prohibition of discriminatory practices but only those which are sufficiently without justification to constitute an "abuse" of the brokerage function.

The emphasis on unjustified discriminations as the central element of the offense is not the only aspect of the case which has stimulated developments further illuminating the test of illegality. In the opinion of some leading observers, the FTC had for a number of years increasingly turned to the brokerage provision as the principal instrument for enforcement of the Robinson-Patman Act.<sup>14</sup> A series of early appellate court decisions had held that the defenses of cost justification and meeting competition cognizable in a section 2(a) proceeding were not available to a party charged with violating 2(c).<sup>15</sup> The courts held that it was unnecessary for the Commission to prove capacity for competitive injury.<sup>16</sup> In *Southgate Brokerage Co. v. FTC*<sup>17</sup> the court held that a discrimination need not be established. The Commission has been accused of maximizing its use of the subsidiary per se provision and paradoxically dealing with overt price discriminations as though they were concealed brokerage concessions.<sup>18</sup> Implicitly disapproving this practice, the Supreme Court stressed

12 *Id.* at 173.

13 *Id.* at 177, n.19.

14 See ROWE, *op. cit. supra* note 1, at 538-40.

15 It is an absolute defense to a § 2(a) complaint that the discrimination involved makes "... only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964). It is also an absolute defense that the lower price was "... made in good faith to meet an equally low price of a competitor." 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964). There are cases holding these defenses inapplicable to § 2(c) cases. *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39 (9th Cir. 1959) (meeting competition); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940) (cost defense). See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67 (1959) (dictum as to availability of defenses in § 2(c) matters).

16 *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939).

17 *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945), *cert. denied*, 326 U.S. 772 (1946). The Supreme Court cited *Southgate* in the *Broch* opinion but only for the proposition that a price reduction may constitute an allowance in lieu of brokerage. 363 U.S. 166, 173 (1960). See *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39, 44 (9th Cir. 1959).

18 For example, see Commissioner Elman's dissenting opinion in *Central Retailer-Owned Grocers, Inc.*:

It seems to me that the Commission's decision stretches Section 2(c) . . . far beyond the limits of its language and manifest purpose, to a point where it now

the need directly to relate a 2(c) charge to the brokerage function with the following admonition:

This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case.<sup>19</sup>

The broad *Broch* guidelines have been implemented to a substantial degree so that 2(c) may emerge from its immediate post-*Broch* uncertainties. These developments bear both on the identification of a brokerage payment or allowance and on the criterion of unjustified discrimination.

## II. Identification of Brokerage Payments or Allowances

Traditionally, in those instances where existence of a brokerage payment or allowance has not been conceded, the Commission has tended to attack under 2(c) virtually any price paid by a direct purchaser which was lower than the price at which similar merchandise was being sold to other purchasers through brokers.<sup>20</sup> Early support for this policy might be inferred from the *A & P* case,<sup>21</sup> wherein, as a result of enactment of the Robinson-Patman Act, respondent abolished its controlled brokerage concern and instructed its buyers to seek concessions, equal to the amount of the brokerage theretofore paid, in the guise of quantity discounts. The administrative practice was rapidly extended to reach much less imposing firms.<sup>22</sup>

Several decisions antedating the *Broch* opinion, however, cautioned against the reckless selection of 2(c) as a felicitous vehicle for attacking all discriminations under the act. In *Main Fish Co.*<sup>23</sup> the Commission refused to condemn such price differentials under the brokerage provision in the absence of specific proof of their relationship to the customary brokerage fee. A perishable product and a market characterized by frequent price fluctuations were involved. The complaint was dismissed because of the absence of mathematical equivalence between price difference and normal brokerage and doubt as to similarity of product bought by each class of customers. Thus, it appears that erratic price concessions in a volatile market would normally be beyond the reach of the brokerage provision. Irregular grants of such concessions point to a competitive market characterized by changing price levels, whereas the adjudicative experience with allowances "in lieu" of brokerage has been largely with discounts

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threatens to swallow up much of the territory covered by the more general statutory provisions which it was intended to supplement.

60 F.T.C. 1208, 1241-42 (1962) (dissenting opinion), *rev'd*, 319 F.2d 410 (7th Cir. 1963).

<sup>19</sup> 363 U.S. 166, 175-76 (1960).

<sup>20</sup> The question of identifying a particular allowance or discount as "brokerage" inevitably arises under the "in lieu of" phase of the subsection, not in connection with sales fees to "brokers" which resell for their own account.

<sup>21</sup> *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3rd Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

<sup>22</sup> See, e.g., *Union Malleable Mfg. Co.*, 52 F.T.C. 403 (1952); *Ramsdell Packing Co.*, 32 F.T.C. 1187 (1941).

<sup>23</sup> *Main Fish Co.*, 53 F.T.C. 88 (1956).

to direct buyers consistently reflecting the amount of normal brokerage. The Commission implicitly recognized that erratic prices are the lawful characteristic of perishable markets in evaluating such conditions under 2(a) in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry.<sup>24</sup> Under such circumstances, the advantage, if any, is neither hidden nor concealed but appears on the face of the invoice and, if competitive consequences warrant, can be dealt with under section 2(a). This does not suggest that only those allowances or discounts which are equal to customary brokerage are within the ambit of 2(c), since the *Broch* case itself represented an instance where the reduced price reflected both a portion of the broker's fee and other concessions by the seller. Moreover, in *Thomasville Chair Co.*<sup>25</sup> the Commission was probably correct in assigning a portion of a price differential to volume buyers to savings in fees paid commission salesmen.<sup>26</sup>

Even where such mathematical equivalence was present, the Ninth Circuit refused to conclude that an interpacker discount constituted a brokerage allowance, although it was labeled "brokerage" by the parties to the transaction. According to the court:

None of the documents refers to the 5% discount to Wendt as an "interpacker" discount. On the contrary, it was three times noted as "brokerage." But even if the documents had referred to the allowance as an interpacker discount, this would not have been conclusive as to its true character. . . . If it serves the same purpose, has the same effect, and enjoys no economic justification which entitled it to be distinguished, a so-called interpacker

<sup>24</sup> Example No. 3 in § 74.1(c) of the Trade Practice Rules for the Fresh Fruit and Vegetable Industry, 30 Fed. Reg. 5332 (1965), illustrates a practice which does not violate § 2(a) as follows:

*Example No. 3.* A large number of sellers and buyers are continuously engaged in bargaining for what is, from their standpoint, the best possible price for a particular commodity. Numerous transactions take place with great rapidity, usually consummated through telephone conversations. On occasion, one buyer may purchase from a seller goods at a lower price than another buyer may purchase goods of like grade and quality from the same seller. On a subsequent day or within a series of subsequent transactions on the same day, the situation is reversed. While on any given day discriminations are likely to exist, there is not likely to be a violation of paragraph (a) of this section if:

1. The discriminations are not the result of a plan or formula whereby a particular buyer or class of buyers receives a relatively consistent advantage, and
2. The discriminations do not, in fact, afford a relatively consistent advantage to a particular buyer or class of buyers, and
3. The discriminations are not of such size or extent as to be likely to cause or threaten injury to buyers or classes of buyers which purchase from the same seller but do not receive any benefit from the discriminations, and
4. The discriminations are not of such a nature as to cause or threaten competitive injury to competing sellers.

<sup>25</sup> *Thomasville Chair Co.*, 58 F.T.C. 441 (1961), *rev'd*, 306 F.2d 541 (5th Cir. 1962), *dismissed*, 3 TRADE REG. REP. ¶ 16624 (F.T.C. Oct. 22, 1963).

<sup>26</sup> *Thomasville Chair* should nevertheless have been initiated under § 2(a). A volume discount was involved which was, according to the Commission, in part attributable to savings in commission expense. Whether such savings are cognizable under the § 2(a) cost justification defense has been considered and answered in the negative by the Commission. *Borden Co.*, 3 TRADE REG. REP. ¶ 16191 (F.T.C. Nov. 28, 1962), *rev'd on other grounds*, 339 F.2d 133 (5th Cir. 1964). For a brief discussion of the interrelationships between this issue and the "for services rendered" clause of § 2(c), see Note, *Unfair Trade Practices—Robinson-Patman Act—Savings Realized on Salesmen's Commissions Cognizable Under Section 2(c)*, 30 GEO. WASH. L. REV. 137 (1961).

discount ought to be regarded as an allowance in lieu of commission or brokerage — but not otherwise.<sup>27</sup>

According to the First Circuit, termination of all brokerage services, conversion to direct sales and reduction in price to customers by the amount of former brokerage will not suffice to establish a seller's violation of 2(c). Its decision in *Robinson v. Stanley Home Prods. Co.*<sup>28</sup> appeared to turn primarily on the intent of the party charged. The court stated: "while a reduction in price to the buyer could fall within this definition, obviously not every one would do so. The question must be, what was the purpose of, or the reason for, the reduction."<sup>29</sup>

Since the *Broch* case, additional interpretations have further narrowed the type of discounts or allowances which might be considered "in lieu" of brokerage. The Commission's *Hruby* decision firmly established FTC acceptance of the Ninth Circuit's statement that terminology will not supersede fact.<sup>30</sup> In the *Hruby* case, it was held that what was essentially a functional discount to an intermediary occupying the same position as a broker in the distributive channel would not be considered a brokerage allowance although so styled by respondents:

The occasional characterization of these allowances to Hruby as "brokerage", or their listing by a producer in a Section 6 questionnaire under "discounts in lieu of brokerage", reveals nothing more than the not surprising fact that businessmen, in describing their actions, do not talk like lawyers expert in the niceties of the Robinson-Patman Act.<sup>31</sup>

The effect of the *Hruby* decision in connection with the identification of brokerage allowances is, therefore, to re-emphasize the virtual irrelevance of nomenclature — if a concession is in fact attributable to functional or other considerations, it should not fall victim to the broad enforcement trap of 2(c).

In the *Central Retailer-Owned Grocers* case,<sup>32</sup> the Seventh Circuit had occasion to evaluate a discount labeled a promotional allowance on the basis of which a 2(c) order had been imposed against a purchasing organization for a number of independent retail grocers. Reversing the Commission, the court impugned the validity of the mathematical equivalence test, which it considered the sole basis for the order, and commented:

The substantial evidence in the record, considered as a whole, lends no support to the inference drawn by the Commission to the effect that

27 *In re Whitney & Co.*, 273 F.2d 211, 215 (9th Cir. 1959). Conversely, as indicated by the court, the fact that a brokerage concession is designated by some other title does not conclude its true character. See *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581 (1951).

28 272 F.2d 601 (1st Cir. 1959). This case was cited with approval by the Supreme Court in the *Broch* case, 363 U.S. 166, 176, n.18 (1960).

29 *Id.* at 603. The Commission's opinion in *Venus Foods, Inc.*, 57 F.T.C. 1025 (1960), presents an interesting conflict. There a seller who ceased doing business through brokers in one section of the country and reduced prices by the amount of the usual brokerage in that area was found to have violated § 2(c). Consideration of whether or not the arrangement was discriminatory would doubtless have produced a different result.

30 *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962).

31 *Id.* at 1449. The ramifications of the *Hruby* decision on the incorporation of discrimination as a precondition to violation is analyzed in text accompanying notes 44-46 *infra*.

32 *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963).

Central received or accepted price concessions "in lieu of brokerage". It is obvious that, without any facts to support this inference, counsel for the Commission made a mathematical comparison between brokerage, if it had been paid by suppliers on sales through brokers, and the savings accomplished by Central for its members, in its direct dealings with the suppliers. . . . [W]e doubt whether this synthetic method of proving a violation of § 2(c) is warranted, in the face of abundant, concrete evidence in the record showing that this proceeding is directed against an inherently legitimate enterprise.<sup>33</sup>

The court concluded that the allowances to Central were based not on brokerage but on assured volume, assumption of credit risks, reduction in billings and commitments on future sales.

The Commission, in its memorandum dismissing the *Thomasville Chair* case, implicitly recognized the specificity with which the link between brokerage and a discount must be established when it stated:

We read the Court of Appeals' decision as holding that the Commission, in a case in which it is alleged that a seller has violated Section 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced price.<sup>34</sup>

The Commission added that it did not necessarily agree with much of the court's dicta.

The most recent Commission ruling on this issue occurred in *Flotill Prods., Inc.*,<sup>35</sup> where a majority of two found that a canner of fruits and vegetables had violated 2(c) by making payments designated "promotional allowances" to a large customer. Chairman Dixon, writing for the Commission, after determining that there was no coincidence in time between the termination of sales to the customer through brokers and the inception of the allowance, searched for other factors indicative of a brokerage allowance. The decisive factors were found to be: (1) mathematical equivalence; (2) testimony of a former employee of the customer that brokerage savings were discussed in negotiating the payment; (3) the "promotional allowances" were attributable to private label merchandise supplied by others as well as respondent; and (4) the payments deviated from Flotill's normal promotional allowance procedures both in amount and in its failure regarding this customer to call for a regular accounting of advertising services rendered.

If supported by substantial evidence, some of these elements of proof may be useful, together with the authorities already discussed, for the identification of allowances in lieu of brokerage. It is submitted that the following considerations are appropriate:

<sup>33</sup> *Id.* at 415.

<sup>34</sup> *Thomasville Chair Co.*, 3 TRADE REG. REP. ¶ 16624 (F.T.C. Oct. 22, 1963) memorandum accompanying dismissal order).

<sup>35</sup> *Flotill Prods., Inc.* 3 TRADE REG. REP. ¶ 16970 (F.T.C. June 26, 1964). A petition for review is currently pending in the Ninth Circuit. No. 19521.

- 1) Sales made by a seller to direct buying customers at prices lower, by approximately the amount of the customary brokerage fee, than that paid by customers in the same market area who buy through the brokers,<sup>36</sup> would establish an inference that an allowance or discount in lieu of brokerage had been granted.<sup>37</sup>
- 2) This inference could be overcome by evidence that the allowances or discount were in fact based on other considerations, such as:
  - a) volume discounts, an assertion which could be corroborated by proof that the customer received preferential treatment even on occasions when he purchased through a broker, either from the same seller or another seller;<sup>38</sup>
  - b) cost savings other than savings in brokerage;<sup>39</sup>
  - c) promotional allowances or services, supported by proof that the purchaser in fact rendered valuable advertising or other promotional services to the supplier; and
  - d) other considerations, such as the purchaser's prompt payment, willingness to accept lower quality merchandise or reasonable rejection policy.

In connection with the suggested types of defensive evidence which would overcome a brokerage inference, it may be suggested that other subsections of the act might come into play. Nevertheless, section 2(c) is under discussion. The same unique accounting methodology and precision would not be required to overcome a 2(c) charge as to establish a 2(a) cost defense, and the same showing of availability of advertising and promotional allowances on proportionally equal terms as required under 2(d)<sup>40</sup> need not be made. As has been stated, "Section 2(c) is narrowly drawn to condemn the practice of exchanging brokerage between buyer and seller, whether the exchange be by an open payment or disguised as a discount or allowance."<sup>41</sup>

<sup>36</sup> This standard derives from the conclusion that discrimination is essential to a 2(c) violation. See text accompanying notes 44-57 *infra*.

<sup>37</sup> Of course, if there is credible and reliable testimony that an allowance or payment was founded on brokerage considerations, the extrinsic proof necessary to establish a *prima facie* case will not be so comprehensive.

<sup>38</sup> This is a logical corollary of the statement in the Trade Practice Rules § 74.2(e) that:

(e) A discount or allowance by an industry member is *in lieu of brokerage* if it is attributable to a reduction or elimination of brokerage fees in connection with the sales transaction involved.

(1) A discount or allowance granted by an industry member to some but not all customers would not under ordinary circumstances be considered in lieu of brokerage if —

(i) The industry member granting same makes no sales through brokers to any of his customers, or

(ii) The industry member makes all of his sales through brokers to any of his customers at the same brokerage rate.

(2) The actual basis for a discount or allowance *at the time it was granted* will indicate whether or not such was in lieu of brokerage.

<sup>39</sup> 30 Fed. Reg. 5333 (1965).

<sup>40</sup> Thomasville Chair Co., 55 F.T.C. 2076 (1959).

<sup>41</sup> 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1964).

<sup>41</sup> *Western Fruit Growers Sales Co. v. FTC*, 322 F.2d 67, 69 (9th Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

The selection of these standards would involve rejection of at least one other possible test which has been suggested. In the *Stanley Home Prods.* case,<sup>42</sup> the First Circuit centered its attention upon the purpose and design of the discount involved and suggested that the intent of the parties to the transaction would be controlling as to the character of the consideration. Such a criterion, while supportable in theory, would be administratively unworkable and could result in evisceration of the subsection. Moreover, as the Commission has stated, "intent" is irrelevant to a violation of 2(c).<sup>43</sup> Under this proposed test, both "mathematical equivalence" and nomenclature standing alone would be accorded little or no weight.

### III. Section 2(c) and Discrimination

The post-*Broch* enforcement policy adopted by the Commission plainly indicates that it has acceded to and implemented the Supreme Court's conclusion that there is an essential nexus between discriminatory preferential treatment and illegal "brokerage." In the landmark *Hruby*<sup>44</sup> decision, the Commission evaluated respondent's operations against those which the act was designed to prevent:

Hruby is clearly not a "dummy" broker controlled by a large buyer to whom he passes on phony brokerage payments. Equally clearly, he is not himself a powerful wholesaler or retail chain exacting from his suppliers false brokerage payments, *to the competitive disadvantage of his smaller competitors*. And, finally, it is clear that the discounts received by Hruby are not granted because on sales to him sellers could dispense with brokerage services regularly required on their sales, thus effecting savings of usual brokerage fees.<sup>45</sup> (Emphasis added.)

The Commission found that the discounts to Hruby, though labeled "brokerage," were in fact functional discounts to a distributor operating at the same level of distribution as that occupied by a broker in negotiating purchases from shipping point for redistribution to wholesale accounts, and hence were neither brokerage fees nor discriminatory.

In a letter interpreting the *Hruby* decision shortly after its issuance, Chairman Dixon wrote:

The crucial question in every Section 2(c) case, brought against either the buyer or the seller, is whether the alleged competitive advantage accorded or received by the buyer actually involves preferential treatment in the form of a direct price discrimination cognizable under Section 2(a). And in every such case, the answer to this question must be determined by an examination of all the facts, including the normal business operations of the buyer and seller, the relationships of these parties to each other and to their customers and suppliers, and the circumstances, it appears that the situation involves the use of one or more of the devices at which Section

42 *Robinson v. Stanley Home Prods., Inc.*, 272 F.2d 601 (1st Cir. 1959).

43 *Thomasville Chair Co.*, 55 F.T.C. 2076 (1959). *But see* note 10 *supra*.

44 *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962).

45 *Id.* at 1447-48.

2(c) was aimed, i.e., "dummy" brokerage setups, in which purchases are made through fictitious brokers to whom brokerage is paid by the sellers; "false" brokerage payments to some but not all of a seller's competing customers; price discounts based on direct sales allegedly resulting in savings to sellers of brokerage fees customarily paid to brokers whose services are dispensed with; or some variation of these devices, the case is one for disposition under Section 2(c), with the well-settled interpretations applicable. If, on the other hand, none of these indicia is present and an analysis of the circumstances precludes as a logical conclusion the concept or hypothesis of brokerage, or allowances in lieu of brokerage, then the case is one for treatment under Section 2(a), involving the additional burdens of proof and questions of justification and defense for which the statute provides. . . .<sup>46</sup>

In its most recent 2(c) adjudication, the Commission affirmed the examiner's findings and order against respondent, because:

Here, as in *F.T.C. v. Henry Broch & Company*, 363 U.S. 166, 173 (1960), "there is no evidence that the buyer rendered any services to the seller[s] . . . nor that anything in its method of dealing justified its getting a discriminatory price" as "brokerage" or discounts in lieu thereof. On the basis of the findings of fact, the examiner was correct in concluding that the payments received by respondent violated Section 2(c) of the Clayton Act, as amended.<sup>47</sup>

It thus appears that the Commission will consider violative of 2(c) only those "brokerage" concessions which effect a discrimination. This additional incubus of proof imposed on FTC counsel should be analyzed. Before the present line of administrative interpretation, it was widely thought that introduction of invoices or similar documentary evidence denoting a reduction for "brokerage" or other distributive services, together with proof that the recipient was in fact buying for his own account, would suffice to establish a violation.<sup>48</sup> Now it appears that there must be proof that competitors of the firm alleged to have benefitted from discriminatory brokerage payments or allowances were in fact paying the suppliers a higher net price for similar merchandise.

Two categories of such proof are involved: (1) evidence of actual transactions at higher prices between the seller involved and other customers at or about the time of the asserted discrimination;<sup>49</sup> and (2) evidence that the dis-

46 Letter From Chairman Paul Rand Dixon to Mr. Watson Rogers, Feb. 13, 1963, in 5 TRADE REG. REP. ¶ 50180, at 55191.

47 *Garrett-Holmes & Co.*, 3 TRADE REG. REP. ¶ 17209 (F.T.C. Feb. 26, 1965) (final order). Commissioner MacIntyre concurred in the result, but asserted that "the Majority, in holding that the brokerage payments were discriminatory prices unjustified by services rendered to the seller, applies a Section 2(a) test where it does not belong and misinterprets through misapplication here the Supreme Court's *Broch* decision . . ." *Garrett-Holmes & Co.*, *supra* at 22280 (concurring opinion).

48 See *Custom House Packing Corp.*, 43 F.T.C. 164 (1946); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941); *Albert W. Sisk & Son*, 31 F.T.C. 1543 (1940); *C. F. Unruh Brokerage Co.*, 31 F.T.C. 1557 (1940); *C. G. Reaburn & Co.*, 31 F.T.C. 1565 (1940); *William Silver & Co.*, 31 F.T.C. 1589 (1940); *H. M. Ruff & Son*, 31 F.T.C. 1573 (1940); *Thomas Roberts & Co.*, 31 F.T.C. 1551 (1940); *American Brokerage Co.*, 31 F.T.C. 1581 (1940).

49 The examiner's comment in *Garrett-Holmes* — that other customers *might* have purchased from the suppliers involved, but for the preferences accorded to respondent — appears to be wholly inappropriate under any concept of discrimination, and especially in view of the § 2(a) proviso that nothing in the act shall prevent customer selection not in restraint of trade. *Garrett-Holmes & Co.*, 3 TRADE REG. REP. ¶ 17081 (F.T.C. Sept. 29, 1964) (initial order).

advantaged purchasers were in fact in competition with the recipient of "brokerage." The ruling in *FTC v. Anheuser-Busch*<sup>50</sup> to the effect that a discrimination means only a price difference and need not involve different purchasers in the same market, arose in a 2(a) primary line case (injury to competitors of the discriminating seller). In secondary line issues (discrimination among *competing* customers), there should be a showing of entitlement to equal treatment.<sup>51</sup>

It should not be burdensome for Commission counsel to assemble the documentary evidence showing that the beneficiary of brokerage concessions in fact purchased at lower prices than other companies in the same market, and indeed such proof might be called for to make a threshold showing that brokerage was involved at all.<sup>52</sup> In any event, proof of specific transactional discriminations has been called for by the Commission to support an allegation that promotional allowances are not made available on proportionally equal terms to competing customers. The general statements of witnesses are inadequate. As the Commission has perceptively appreciated:

Antitrust cases, and in particular, Robinson-Patman cases require a meticulous attention to minute details. When dealing with prices, allowances and goods of like grade and quality, the Commission may not indulge in assumptions, for those matters are susceptible of exact proof and this is the type of showing which must be made.<sup>53</sup>

The question of whether or not disadvantaged enterprises are "in competition" with the preferred customer raises more complex issues. At the very least, of course, it should be established that the favored and disfavored customers are located in the same geographic market. But, in addition, must they operate at the same functional level in seeking to convey merchandise to the same trade for there to be a discrimination? Such an interpretation of 2(d) has been suggested by the Ninth Circuit,<sup>54</sup> although the Commission has taken a different view in its collateral enforcement of section 5.<sup>55</sup> The independent character of 2(c) militates in favor of a broader interpretation which would cover all brokerage concessions which effect a price discrimination among purchasers effectively competing in the redistribution of the seller's merchandise. Thus, the provisions would reach preferential brokerage treatment accorded a large wholesaler but not to other customers, whether wholesalers or retailers, in the same market.

One other element of proving discrimination deserves attention. The goods involved must be of like grade and quality. In an earlier case involving circumstantial evidence of brokerage concessions, the Commission appeared to accord

50 363 U.S. 536 (1960).

51 As stated during debate by Congressman Utterback, the House floor manager, "Underlying the meaning of the word [discrimination] is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage on the other." 80 CONG. REC. 9416 (1936). It is, of course, not inconceivable that hidden brokerage concessions could be employed to lessen competition or create monopoly in the primary line. In this event, the *Anheuser-Busch* rationale should apply in a § 2(c) proceeding.

52 See discussion in text accompanying notes 21-42 *supra*.

53 J. Weingarten, Inc., 3 TRADE REG. REP. ¶ 16349 (F.T.C. March 25, 1963).

54 Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 709-10 (9th Cir. 1964).

55 Fred Meyer, Inc., 3 TRADE REG. REP. ¶ 16368 (F.T.C. March 29, 1963).

with this view.<sup>56</sup> Nevertheless, the lately intensified controversy surrounding the meaning of the term<sup>57</sup> is relevant to the issue here, especially since 2(c) enforcement has been substantially concerned with trading in perishable commodities, as to which slight variations in size and grade can result in marked price differences.

#### IV. Section 2(c) and Discriminatory "Abuses" of the Brokerage Function

In line with the suggestion in the *Broch* case, not all discriminatory brokerage payments or allowances will violate 2(c). The Supreme Court in the *Broch* case spoke not only in terms of discrimination but also of "abuses" of the brokerage function,<sup>58</sup> the fact that it would be a different matter had services been rendered,<sup>59</sup> and the possibility that some purchasers might qualify even for discriminatory brokerage concessions.<sup>60</sup> Simultaneously, the Court stressed that it should not be interpreted as fusing the provisions of 2(c) with those of 2(a) and that the 2(a) cost defense would not be available to a party charged with violating the brokerage provisions. The Commission, in the *Garrett-Holmes* case,<sup>61</sup> quoted *Broch* both as to discrimination and to support its finding that respondent had not rendered services justifying preferential treatment.

Notwithstanding the Supreme Court's express statement that 2(c) was not to be linked with 2(a) in all respects, the Fifth Circuit very closely approximated attaching the cost defense to 2(c). Relying on *Broch* for its authority, the court stated:

However, as we read it, the Court's opinion says that a reduction in price, giving effect to reduced commissions paid by the seller, are violations of Section 2(c) only if such reduction in price is "discriminatory." We read that to mean "without justification based on actual bona fide differences in the costs of sales resulting from the differing methods or quantities in which such commodities are sold or delivered."<sup>62</sup>

This holding appears inconsistent with, rather than interpretive of, the Supreme Court's ruling. Moreover, it may be inappropriate to breathe new life into the "for services rendered" clause through administrative interpretation rather than remedial legislation. A new interpretation may be desirable but the provision's inapplicability to brokerage services rendered the seller by the buyer seems too entrenched to be so conveniently dislodged.<sup>63</sup>

It is submitted that there is an alternative test available for arrangements constituting an abuse of the brokerage function. Once again, recourse to those

56 *Main Fish Co.*, 53 F.T.C. 88 (1956).

57 *Borden Co. v. FTC*, 339 F.2d 133 (5th Cir. 1964), *cert. granted*, 382 U.S. 807 (1965).

58 363 U.S. 166, 169 (1960).

59 *Id.* at 173.

60 *Id.* at 177, n.19.

61 *Garrett-Holmes & Co.*, 3 TRADE REG. REP. ¶ 17209 (F.T.C. Feb. 26, 1965).

62 *Thomasville Chair Co. v. FTC*, 306 F.2d 541, 545 (5th Cir. 1962).

63 *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940). See also cases cited *supra* notes 15, 16 & 17. See ATT'Y GEN. NAT'L COMM. ANTI-TRUST REP. 192, 193 (1955).

practices at which the act was aimed points the way. According to Commissioner Elman:

The first was the practice of using "dummy" brokers. A buyer would designate one of his employees as a broker and insist that the seller pay this "broker" a specified "brokerage" fee. The "broker" then would remit the fee to his employer without having performed any brokerage services. The second practice with which Congress was concerned was closely related. A large buyer, rather than set up a "dummy" broker and require payment of brokerage to him, might simply demand a discount or allowance respecting or "in lieu of" brokerage. Like the first practice, this was a method for extorting a brokerage fee or commission from the seller, not on account of brokerage services actually rendered, but as an indirect form of price discrimination. Congress sought, in Section 2(c), to deal with the first practice by forbidding brokerage payments to a party on the other side of the transaction where no brokerage services were rendered, and with the second by forbidding "any allowance or discount in lieu" of brokerage where such discount or allowance was not justified by any services rendered.

\* \* \* \*

The third type of transaction is that involved in the *Broch* case. There a broker was actually used in a transaction in which a discriminatory price concession was granted by seller to buyer; and the broker, by accepting a reduction in the brokerage due him on the sale from the seller, helped defray the concession. The vice in such an arrangement is that if a seller is free in this manner to shift the burden of a discriminatory concession to another person, the broker, he obviously has less incentive to resist a powerful buyer's demand for preferential price treatment. If, on the other hand, the seller is absolutely forbidden to recoup such a discount or allowance from his broker, he is likely to put up more resistance in the importunings of large buyers seeking discriminatory price concessions. Section 2(c) closes the easy and inviting route to price discrimination which would be wide open if the seller could shift the cost of discrimination to a third person, the broker.<sup>64</sup>

Although this exposition was in a separate opinion, there is a clear parallel between this analysis and the standards described in Chairman Dixon's letter commenting on the *Hruby* case.<sup>65</sup> Commissioner Elman concluded:

Thus, Section 2(c) has only a limited though important role to play in the enforcement of the Robinson-Patman Act. It is not a general regulation of brokers or other intermediaries, or of methods of distribution. It was not intended to freeze the brokerage function at what it may have been in 1936, or to tell brokers whether they may buy and resell on their own account, or to prevent buyers from performing brokerage functions, or otherwise discouraging changes or innovations in traditional forms of distribution. It is not concerned with legitimate, bona fide transactions at all, but strictly with phony, unearned brokerage. The common characteristic of all transactions prohibited by 2(c) is that brokerage or other legitimate and valuable services in distribution are not performed.<sup>66</sup>

<sup>64</sup> *Flotill Prods., Inc.*, 3 TRADE REG. REP. ¶ 16970, at 22045-47 (F.T.C. June 26, 1964) (Comm'r Elman, concurring opinion).

<sup>65</sup> Letter From Chairman Paul Rand Dixon to Mr. Watson Rogers, Feb. 13, 1963, in 5 TRADE REG. REP. ¶ 50180, at 55191.

<sup>66</sup> *Flotill Prods., Inc.*, 3 TRADE REG. REP. ¶ 16970, at 22046 (F.T.C., June 26, 1964).

A possible means of relegating 2(c) to its legitimate role without arbitrarily freezing the brokerage function and discouraging new methods of distribution may be suggested by once again borrowing from the central subsection's concept of discrimination. Under 2(a), a price difference will not be considered illegal if the disfavored customer could reasonably have qualified to purchase at the most advantageous price offered. As the Ninth Circuit has recently concluded:

The probability of competitive detriment on the buyer level presupposes a causal link between the seller's prices and the impact on customers competition. . . . To be more specific, if the lower price would have been available to the nonfavored buyer in the same market where the favored buyer made his purchase, the probability of competitive injury due to the fact that the nonfavored buyer paid more for the product is not the result of price discrimination, but of the nonfavored buyer's failure to take advantage of the opportunity equally available to him, of buying at the same low price.<sup>67</sup>

Although the question of availability would have a limited application to a 2(c) proceeding, it would at least give latitude to developing methods of distribution provided by intermediary firms which serve a brokerage function and offer other services as well. There is no reason why brokerage consideration cannot be given a firm which operates at the same level and performs the same function as a broker in addition to taking title, arranging for transportation, assuming credit risks and storing and redistributing merchandise in small lots to warehouse receivers. The act does not compel such an economically stultifying result. The solution need not rest on the ground that the consideration is a functional discount because the commission rationale of functions is incomplete, providing less than realistic cognizance of actual functions performed.<sup>68</sup>

Under the proposed test, a shipper could announce a policy that discounts would be available either for rendition of the traditional brokerage service or for the performance of similar services *and* other distributional functions in effecting delivery to warehouse receivers specified by the shipper. There would be nothing to prevent any independent intermediary from qualifying for the discount by tailoring his practices to the specifications. Any discriminations resulting from the program would not constitute an abuse of the brokerage function, even in the unlikely event that some intermediaries were financially unable to provide the investment necessary to furnish the prescribed facilities, since the increased costs to those who did would produce an economic parity.

67 *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 703-04 (9th Cir. 1964). One writer has commented that:

Discrimination in prices under Section 2(a) means more than difference in prices only in the respect that unequal price treatment implies lack of availability of the lower price to purchasers paying the higher price. A schedule of quantity discounts offered to all customers, the highest bracket of which is within the purchasing range of the average small purchaser, is not discriminatory even though some purchasers may buy only in the lower quantity brackets, since in such a case there is no inequality of treatment.

AUSTIN, *op. cit. supra* note 1, at 21.

68 See the myopic view of functional discounts set forth in § 74.1(a)(5), note 3, of the Trade Practice Rules. 30 Fed. Reg. 5331-32 (1965). Compare ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 207 (1955).

To be consistent with the act's purpose of preventing subterfuge in the awarding of unjustified preferential treatment, the additional services called for must be of substantial value to the seller, and the announced policy must be consistently followed. It is not, however, intended that the word "value" would contemplate proof identical to that which would be required to establish the cost defense of 2(a). Fortunately, the Commission has had recent experience under that principal subsection with warehousing and redistribution discounts<sup>69</sup> and could, where it has reason to believe that economies are not fully justified, entertain an action under that provision. The very proliferation of such cases under 2(a) indicates its appropriate statutory context.<sup>70</sup>

Thus, the proposed rationale would comport with the act's overall purpose of preventing unwarranted injury at the buyer level, while allowing room for competitive adjustment to new efficiencies in distribution.<sup>71</sup> In the words of Commissioner Elman:

Who, in this case, are the favored, and who the unfavored, buyers? Who is, or could be, injured by the . . . method of doing business? Where is there any threat to competition, or danger of monopoly? . . . To hold this system unlawful would impede, not advance, the policies of the Robinson-Patman Act.<sup>72</sup>

Response to Commissioner Elman's question evokes reanalysis of the practices which 2(c) seeks to reach. No "dummy brokerage" operation controlled by a large wholesale distributor, chain, cooperative or voluntary group would qualify for the discount since no services in redistribution would be performed. The proposal seeks to recognize the services of the independent distributor who serves as a middleman between shipper and such purchasers rather than those who redistribute merchandise to retail stores. Consequently, brokerage allowances made directly to the latter class of customers to whom no distributional services are rendered — the second practice covered by the act — would likewise be prohibited. It follows that the third type of practice — preferential treatment similar to that involved in the *Broch* case accorded one not shown to have qualified therefor through the joint action of the seller and his broker — would obtain no sanction under the suggestion.

## V. Conclusion — Reanalysis and Precedent

One of the factors most recommending the adoption of the proposed test

<sup>69</sup> *E.g.*, *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963).

<sup>70</sup> *Cf.* *General Auto Supplies, Inc. v. FTC*, 346 F.2d 311, 317 (7th Cir. 1965); *Monroe Auto Equip. Co. v. FTC*, 347 F.2d 401 (7th Cir. 1965).

<sup>71</sup> One may ask why a test taking into account services other than brokerage services would be relevant under the brokerage section at all. See Trade Practice Rules § 74.2(f), Example No. 3, 30 Fed. Reg. 5333 (1965). Cognizance under this provision is necessary because the allowance is frankly for brokerage, but for brokerage plus other services and facilities. Hence, whereas the allowance is for services rendered, a *pro tanto* resurrection of the "for services rendered" clause as once urged is not called for, since other services would be necessary to qualify.

<sup>72</sup> *Flotill Prods., Inc.*, 3 TRADE REG. REP. ¶ 16970, at 22048 (F.T.C. June 26, 1964). Commissioner Elman was discussing the field broker aspect of the *Flotill* case, wherein the intermediaries did not take possession of the merchandise involved. Nevertheless, the same questions pertain to the instant proposal.

is that it is in a logical sequence of judicial interpretations of 2(c), including *Broch*, and that it preserves the per se status of the subsection. Early decisions under the act have been misinterpreted as standing for the proposition that once the passage of brokerage between seller (or his agent) and buyer (or his agent) has been established, there is an end to the matter, without regard for discrimination or competitive consequences.

In the oft-cited *A & P* case, however, both the Commission and the court concluded that the practice effected competitive injury and the court appraised 2(c) as dealing "in particular with a trade practice which has frequently resulted in price discriminations and unfair competition."<sup>73</sup> In both the *Oliver*<sup>74</sup> and *Biddle*<sup>75</sup> cases, the appellate courts centered on concessions and discriminations which conveyed unmerited advantages to certain purchasers. And in *Herzog*, the Second Circuit found that the challenged practice ". . . result[ed] in a price discrimination in favor of the retailers who do business with the respondents, and contrary to the purpose and language of the statute. . . ."<sup>76</sup> The case which made a clear determination that discrimination is not an element of the statute was *Southgate Brokerage Co. v. FTC.*<sup>77</sup> In view of the congressional intent, the analysis thereof in other early decisions and, more important, the recent evaluations of the act, reassessment and rejection of the broad rule proposed in *Southgate* is overdue.

It is noteworthy also that the approach recommended herein does not effect a marriage of the provisions of 2(a) with those of 2(c). A respondent under the latter subsection will still not be permitted to raise the cost justification or meeting competition defenses, nor will the Commission be compelled to prove competitive injury as in a 2(a) proceeding.<sup>78</sup>

It is possible to reject the proposed solution for a new clarification of 2(c), or any other proposals which stress a flexible approach, on the basis that 2(c) is an absolute provision. The subsection would thereby be relegated to an era when cases were determined by incantation of the talismanic litany of per se. Conceivably, the argument could be made that brokerage abuses had been so flagrant prior to adoption of the Robinson-Patman Act that the only remedy available to Congress was a structural rigidification of the brokerage function in order to limit market power arbitrarily. The short answer to such a contention is that the Robinson-Patman Act is aimed not at curbing the conditions of market, but its abuse, not at structure but at behavior. As stated in the House Committee report:

In conclusion, your committee wishes to correct some important misapprehensions, and even misrepresentations, that have been broadly urged

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73 *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667, 677 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

74 *Oliver Bros. v. FTC*, 102 F.2d 763, 771 (4th Cir. 1939).

75 *Biddle Purchasing Co. v. FTC*, 96 F.2d 687, 692 (2d Cir. 1938).

76 *FTC v. Herzog*, 150 F.2d 450, 452 (2d Cir. 1945).

77 *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945).

78 The author prefers a statutory framework in which competitive injury and the cost defense would be standards in any matter involving a direct or indirect (brokerage) price discrimination. Nevertheless, in light of the wash of history he agrees with the report of the Attorney General's Committee that legislative redress is necessary.

with regard to the probable effect of this bill. There is nothing in it to penalize, shackle, or discourage efficiency, or to reward inefficiency. There is nothing in it to fix prices, or enable the fixation of prices; nor to limit the freedom of price movements in response to changing market conditions.

Any physical economies that are to be found in mass buying and distribution, whether by corporate chain, voluntary chain, mail-order house, department store, or by the cooperative grouping of producers, wholesalers, retailers, or distributors—and whether those economies are from more orderly processes of manufacture, or from the elimination of unnecessary salesmen, unnecessary travel expense, unnecessary warehousing, unnecessary truck or forms of delivery, or other such causes—none of them are in the remotest degree disturbed by this bill. Nor does it in any way infringe the seller's freedom to give a part or all of the benefit of the saving so effected to others with whom he deals, whether in higher prices paid to the producer from whom he buys his raw materials, or in higher wages to those who labor in production or handling of his goods, or in lower prices to the customer, including the ultimate consumer who buys them.<sup>79</sup>

It is high time that 2(c) be clearly and explicitly identified with its legislative foundations and with broader antitrust goals;<sup>80</sup> other statutes are available to proceed against supposed structural affronts to a competitive economy.

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79 H.R. REP. NO. 2287, 74th Cong., 2d Sess. 17 (1936).

80 *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953).