

ALERT



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Robinson-Patman Act Realities: The Risks *vs.* Benefits of Price Discrimination

Everyone “price discriminates.” Airlines do it. Car salesmen do it. Manufacturers of all kinds, selling to national accounts and local distributors, do it.

But is it legal to charge different prices to different customers? What restraints does the law place on a company’s ability to decide what prices to charge, to whom, and when?

The answers are – in important part – informed by the Robinson-Patman Act, a turn-of-the-century (20th, *not* the 21st) “populist” law designed to protect small “mom-and-pop” grocery stores from being crushed by A&P and the other then-emerging supermarket chains. But, over the past several decades, the obvious benefits to consumers, from the lower prices resulting from the wide-spread “Walmartization” of retailing, has lead many people – including many federal judges and the antitrust enforcement agencies (the Department of Justice’s Antitrust Division and the Federal Trade Commission) – to view the Robinson-Patman Act as itself – potentially – “anticompetitive,” leading to *higher* rather than lower prices, hurting rather than benefiting consumers.

“Consumer welfare” is widely accepted as the core purpose of the antitrust laws. To that end, the antitrust laws have increasingly been interpreted in ways that promote free and open competition, which is likely to lead to *lower* prices. There is a concern with interpretations of the antitrust laws that may “chill” price competition, something that the Robinson-Patman Act is *intended* to do.

The tension between the Robinson-Patman Act and accepted antitrust policy has resulted in hostility in the courts – often shared by juries – to Robinson-Patman claims made by unhappy customers and competitors. Notably, with but one anomalous exception, over the last decade, there has been *no* government challenge to any company’s “price discrimination” under the Robinson-Patman Act.

What enforcement does occur – and hence the primary *legal* risk – comes from private plaintiffs’ antitrust lawyers, primarily on behalf of smaller, disfavored *direct and indirect* customers, complaining about the “better prices, terms and conditions” given to their larger competitive rivals. Even the number of those challenges has diminished in recent years, reflecting the poor record of success that Robinson-Patman Act claims have experienced in recent years.

That said, the Robinson-Patman Act has not been – and is unlikely to be – repealed by Congress, given the political clout of “small businessmen.” The realities are that Robinson-Patman Act claims are still brought; *occasionally* damages are awarded by juries; and *some* jury verdicts have been sustained by the federal appellate courts. (Because the Robinson-Patman Act was enacted as an “antitrust law,” any damages awarded are *trebled* and a prevailing plaintiff also recovers all of its attorney fees and litigation expenses.)

With this perspective on Robinson-Patman Act “litigation realities,” the following discusses the governing legal principles, the key statutory defenses for sellers and the practical hurdles that complaining customers must overcome in order to succeed on a Robinson-Patman Act claim.

The **bottomline message** is that the Robinson-Patman Act is a fact of life that companies must be mindful of in making pricing decisions. Cases are brought; they are expensive and time-consuming to defend, and sometimes plaintiffs actually prevail.

BUT the technicalities of the Robinson-Patman Act are *not* (and should not be) the beginning or the end of any analysis. The focus *can* (and *should*) be on whether the proposed lower price to a specific customer (or class of customers) makes good, long-term *business sense*. Net/net, will total revenues *and* – most importantly – profits be enhanced?

If it makes business sense under such an analysis, practical suggestions and examples are offered as to what – in consultation with the legal staff – to do to document the legitimate reasons why it makes sense and should *not* run afoul of the Robinson-Patman Act. If a company decides to price discriminate, it must be prepared to present and defend the legitimate reasons why any price differential is legal under the Robinson-Patman Act.

A. Governing Legal Principles.

It is now widely recognized – as observed by Judge Posner, the most respected antitrust jurist on the bench today, that the ability of a company to charge different prices to different customers, *i.e.* to “price discriminate,” implies some “market power.” Or why would customers pay different prices for the same goods? *In re Brand Name Prescription Drugs*, 186 F.3d 781 (7th Cir. 1999).

That does *not*, however, mean that a company must be a “monopolist” like Microsoft to be able to charge different prices to different customers. Many firms have just enough market power to price discriminate even if their share of the market for that product is quite low, *e.g.* when firms sell a

unique or specialized product. The development of a brand name often suffices to allow a firm to price discriminate. Firms possessing such “pockets” of market power have the incentive – and often the ability – to charge *not* just what the “market will bear,” but the most that each customer (or class of customers) will pay.

Is this a bad thing? *Arguably*, “Not at all!!”

In fact, preventing a firm from price discriminating blocks transactions that would make everyone – the seller, the consumer, and society – happy, through the efficient allocation of goods. Yet, if some consumers would benefit from price discrimination, while the vast majority of other customers are forced to pay “higher” prices, that is – *arguably* – a “bad” thing.

Enter the Robinson-Patman Act. To protect *any* customer from being “gouged,” the Robinson-Patman Act generally imposes a “one price” requirement. And so, the Act makes it “unlawful for any person ... to discriminate in price between different purchasers of *commodities of like grade and quality* ... where the effect of such discrimination may be substantially to *lessen competition* or tend to create a monopoly in any line of commerce, or to injure ... competition with any person who ... knowingly receives the benefit of such discrimination.” 15 U.S.C. § 13(a).

B. Does the Price Discrimination Make Good Business Sense?

So, if this law is really as far reaching as it is broadly-worded, then why do so many companies “price discriminate.”

They do so for many reasons but most frequently because of the belief that it will make them “more competitive” in getting and retaining customers for their products. Competitive markets demand that companies remain flexible and that they lower prices in order to make sales that are likely to yield increases in total revenues and enhance the firm’s profitability.

A firm’s “profit-maximizing” incentives can – and should – outweigh “Robinson-Patman Act concerns,” *provided* that the company is smart about it and has fully assessed the *total* business consequences of any decision to “price discriminate” in favor of one customer (or class of customer) to the detriment of other customers.

In short, does it make *good business sense* to give a customer a “better” price, *i.e.* will more sales be gained, both in the *long* as well as the *short* run by giving the discount than will be lost – in the *long* run – because of the adverse reaction of those “disfavored” buyers who do *not* receive the discount.

If you do discriminate, the reality is that disfavored customers will find out.

Given that reality, if the answer to the question of whether granting the better price makes business sense is “yes,” then the next questions that should be asked are: which of those disfavored customers are *likely* to sue and, if they do, what defenses are there to their Robinson-Patman Act claim?

There are many *potential* defenses depending upon: the nature of the product; the market share of the seller in that product; the function of the respective buyers in the marketplace; the totality of the relationships between the seller and the favored *vs.* the disfavored customers; the conduct of the seller’s competitors; and a variety of other factors, described hereafter.

C. Commodities of Like Grade and Quality.

Many cases fail because the plaintiff simply cannot prove “price discrimination” within the coverage of the Robinson-Patman Act. Indeed, the Act does *not* apply to the most common forms of price discrimination: discrimination among *services*.

The Robinson-Patman Act governs only the contemporaneous, discriminatory sale of “*commodities of like grade and quality.*”

Thus, in addition to services, the Act does *not* apply to: mere offers, as opposed to sales; sales consummated at *different* times or reflecting *changed* market conditions; or the sale of meaningfully *different* versions of a product.

Airlines, real-estate agents, lawyers, and service industry consultants are all largely outside the Act’s reach. Even firms that resell parts as an aspect of providing service – *e.g.*, auto mechanics and information technology consultants – *probably* fall outside the scope of the law *if* the “dominant nature” of their business is the provision of *services*, *not* the resale of any *products* sold.

Moreover, the Robinson-Patman Act covers only the sale of *products* “of like grade and quality.” How much variation is needed to constitute a “different” product?

As always, “it depends.” But, generally, the answer will turn on how the product is *marketed* by the company and how it is *perceived* by customers in the marketplace. It is clear that merely changing a product’s branding, even from branded to private label, without significantly changing the underlying formula or features, is *not* sufficient to avoid Robinson-Patman Act applicability.

D. Meeting Competition.

The best defense against Robinson-Patman Act liability is the one that is the most sensible reason to discount prices in the real world: “meeting competition.”

The Act has a specific “meeting competition” defense. The meeting competition defense has several technical requirements that must be met in order to protect against liability. Most notably, the defense applies only to prices that are established – in “good faith” – to *meet, but not beat*, the lower price of a competitor, offered to that same customer.

“Good faith” requires due diligence and discipline by the seller seeking to invoke the meeting competition defense. Vague claims of needing to lower prices to prevent “lost sales” is *not* sufficient. A seller discriminating in favor of one customer must show that it is offering this lower price in good faith to prevent losing that sale to a *specifically identified competitor*.

The best way to ensure satisfaction of these “good faith” requirements is to *document* the specific facts prompting a decision to lower an existing price to a specific customer. (It is *always* permissible to lower prices to *all* customers.)

Documentation demonstrates a firm’s good faith commitment to adhere to the Act, and provides a *contemporaneous* record of the facts underlying the pricing decision. Experience teaches that it is often difficult to recreate the facts supporting a decision, frequently several years after the event, when a suit is brought by an unhappy customer or competitor.

Pricing decisions are often complex, including many variables, *e.g.*, when competitive pricing is based on “shelf space” for a line of products, rather than the mere sale of a single product.

In such cases, questions arise such as:

Does the meeting competition defense apply if your average price for the entire line is higher than your competitor’s, but prices for certain products within the line are lower?

Does the defense apply if you would still be able to retain some of the customer’s business, but lose (potentially prominent) shelf space?

Does the defense apply if your competitor sells an inferior product, and you lower your price to eliminate the “premium” your product historically has commanded?

Does the defense apply *if the buyer lied* about the existence, or terms, of a competing offer?

These are questions for which there are *no* clear answers. The “good faith” requirement is a “flexible and pragmatic, *not* a technical or doctrinaire, concept.” It is designed to reflect the needs of a “prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.” *In re Continental Banking Co.*, 63 F.T.C. 2071 (1963).

Generally, *sellers* should be able to lower price “*in good faith*” to keep or make the sale, but courts are less tolerant when they believe the lower price is offered in response to the *buyer’s* market power, *not* the existence of a particular competing offer.

“Good faith” is all the easier to establish, the more aggressive and multi-sourced is the competition that the seller faces. Even lowering price throughout a region to reflect different competitive pressures might be permissible, so long as the seller “reasonably believes” that the competing lower price is generally available.

BUT – be careful!!! Take the time to train the sales force as to the legitimate reasons for granting a favorable price. Otherwise, the documentation generated may create a record, *e.g.*, how flimsy the evidence of the “competing offer” was. Was it really an “apples-to-apples” comparison? Did the buyer provide any credible proof of the actual receipt of a competing offer and at what price?

Of course, the sales force should be firmly reminded that “**good faith verification of a competing offer**” *cannot be achieved by calling a competitor* to determine whether any such offer was actually made by the competitor. And any call or other contact *from a competitor* seeking to determine whether the company has made a particular offer to a customer (or class of customers) should *not* be responded to, but should be reported – *immediately* – to the Law department.

Any such price communication conduct amongst competitors will be presumed to be an effort at *price-fixing* by the antitrust authorities and can be severely prosecuted as a felony – a criminal violation of the antitrust laws – by both the company and the individuals involved. It is well to remember that the Department of Justice seeks *jail* time in every price fixing case and that the potential sentence is now *10 years*, based on the belief that “fixing prices is like selling drugs to school children.”

E. Cost Justification, Functional Discounts, and Promotional Payments.

But what if a seller wants to *beat* its competitors’ price?

What options does it have?

In recent years the “cost-justification” defense – and its more flexible variant, the “functional discount” defense – have been used to justify – *preferential* – price discounts.

Economists recognize that *no* inference of market power can be drawn from differential pricing *unless* the cost of serving customers is the same. If it costs a seller less to sell to one customer than another, then prices – even in a competitive market – *should* reflect those lower costs.

The law agrees. Under Section 2(a) of the Robinson-Patman Act, a seller may “make ... *due allowance* for *differences in the cost* of manufacture, sale or delivery resulting from the differing methods or quantities ... sold” to different customers. 15 U.S.C. § 13(a).

BUT – unlike the meeting competition defense (which has been expansively interpreted), the cost-justification defense has been *strictly* construed. The burden is placed squarely on the seller to prove that its prices are – in fact – lower when selling to the favored rather than disfavored customer. And the seller must also establish that the cost differential *fully* accounts for the price difference.

To that end, it is – again – wise to document the fact of and reasons for the cost difference *prior* to offering a “cost-justified” discount. Indeed, some manufacturers have commissioned detailed cost studies so they can use them to support differential pricing schedules.

Because the cost-justification defense is often difficult to establish, companies – and the courts – have developed a variant, called the “functional discount” defense. This is a “judge-made” defense initially designed to address situations in which a manufacturer sells to a distributor for a different (usually higher) price than it sells to a direct-buying retailer.

Because the direct-buying retailer (usually a large chain) competes with the mom-and-pop customers of the distributor, the Robinson-Patman Act applies. But the distributor and the direct-buying retailer often perform different functions, which in turn can – in most instances – justify giving these two different “classes” of customers, differential pricing.

Courts allow sellers to pay (in the form of discounts) for the services that only certain customers provide. So long as the lower net price reasonably reflects either the sellers’ cost-savings of not having to perform the additional function itself or the customer’s expense in performing that function, “injury to competition” is unlikely and the functional discount defense will be satisfied.

What functions qualify for this defense? It is not an issue often litigated. So there are no clear legal precedents. Warehousing, inventory handling, transportation, and the like will usually qualify. Less clear is the treatment of promotional payments, such as payment for large retailers' Sunday ads.

Certainly, promotional discounts must be reasonably tied to the cost of such services. If the discounts are "inflated," courts may treat it as a disguised price discount and may presume competitive injury.

But even where the discounts are reasonably tied to the cost of the promotional services, those discounts should be offered to the companies other customers who are competitors of the favored customer, on a "proportionally equal" basis.

Indeed, when Congress passed the Robinson-Patman Act, it recognized that its strictures against price-discrimination could be easily evaded if sellers were allowed to disguise price breaks by giving favored customers "promotional discounts" or valuable "promotional services." Rather than ban these practices, Congress simply required sellers to offer all competing customers "proportionally equal" benefits. See 15 U.S.C. §§ 13(d), (e).

F. Reasonably Proportionate Availability.

Certain customers can be more valuable to a seller than others. For example, a large retailer may provide the seller with benefits that other retailers are too small to provide. Some retailers may have large databases of information at their disposal, and provide sales analysis or other marketing benefits. Some retailers can offer promotional benefits such as a neatly-stacked "wall" of product or an "end-cap" display. Still other retailers may decide to purchase or promote the seller's products "exclusively."

The law recognizes these differences, and addresses the seller's desire to reward the "better" customer through the "reasonably proportionate availability" defense. The defense permits sellers to create programs benefiting *participating* retailers.

If a retailer chooses not to participate, and hence does not receive the program's benefits, the retailer has no credible complaint of a "Robinson-Patman Act injury" from the benefits afforded to the "favored" retailer.

The availability defense applies, however, only if the offer is made *known* to all applicable buyers. Obviously, a discount cannot be "available" if the disfavored buyer does not even

know of its existence.

The benefits afforded by the seller do not have to be "dollar-for-dollar" equal but, by the same token, the qualifications for participation should *not* be set so that only one or a few customers can meet them. Rather, any such program for functional discounts or promotional payments and services should be offered on a "proportionately equal" basis to smaller retailers.

G. Volume Discounts and Growth Incentives.

"Volume discounts" are regularly granted by sellers but are *not* specifically sanctioned under the Robinson-Patman Act. Indeed, they can be illegal unless the foregoing suggestions are followed on making other customers aware of the availability of "reasonably proportionate" volume discounts. A program in which only the largest one or two buyers can practically participate will *not* be saved just because it is nominally available to smaller retailers.

"Growth incentives" are an effective, legal tool for incentivizing potentially more valuable customers. Big and small retailers alike can be offered the opportunity to qualify for additional discounts when a retailers' year-over-year sales increase. The availability defense would immunize giving retailers that grow the seller's business better pricing than retailers' whose sales are stagnant or declining.

Notably, however, it is typically *not* a good idea to tie growth to a percentage of the retailer's purchasers, *e.g.* an additional discount if 75% of the retailer's purchases of that product are from the seller. That can be viewed – particularly as to a seller with a significant market presence (*e.g.*, having a 35% or more market share) – as an effort to exclude competition.

In any event, it is difficult to enforce such a "minimum market share" condition without demanding competitively sensitive information about the customer's purchases from the seller's competitors.

That said, there can be legitimate reasons – for both the seller and the retailer – for "exclusive" distribution arrangements. The larger the seller's market share in the product, the more careful it must be in entering into exclusive sales arrangements. Protection is greatest whenever it can be documented that any such exclusive arrangement is entered into at the retailer's behest rather than the seller's.

H. Injury to Competition.

A core reason why there are so few successful Robinson-

Patman Act claims is that the law requires – as an essential element for Robinson-Patman Act liability – that there be a showing of an “injury to competition” in the resale of the product.

Indeed, the Robinson-Patman Act was designed to protect the ability of small mom-and-pop grocery shops to compete against their larger supermarket rivals. Thus, discrimination practiced directly upon end-using individual *consumers* (as opposed to resellers), is not covered by the Robinson-Patman Act, since individual consumers do not compete against each other.

However, “mom-and-pops” acquiring their product through distributors and dealers, do compete against large, direct-buying retailers. And they are the one’s most likely to bring a claim and to garner the widely recognized jury sympathy for the “underdog.”

There is Robinson-Patman Act case law – old, but never reversed – that says that an “injury to competition” may be *presumed* if a manufacturer handicaps smaller competitors by giving their larger rivals prolonged and substantially better pricing. See *FTC v. Morton Salt*, 334 U.S. 37 (1948) (injury to competition is established *prima facie* by proof of a *prolonged* and *substantial* difference in price between competing purchasers).

BUT, some courts have looked beyond the *Morton Salt* presumption to assess whether “competition” (rather than a “competitor”) has been harmed. These courts have focused on the basic antitrust principle that “the antitrust laws [and the Robinson-Patman Act is an antitrust law] are designed to protect competition, not competitors.” *Boise Cascade Corp. v. FTC*, 837 F.2d 1127 (D.C. Cir. 1988); *but see Chroma Lighting v. GTE Products Corp.*, 111 F.3d 653 (9th Cir. 1997) (rejecting *Boise* and following Third Circuit in holding that the Robinson-Patman Act was also designed to protect competitors).

Thus, the typical “injury to competition” analysis goes on to assess whether there are other reasons – beyond sheer size – that certain customers receive better pricing. And the analysis also extends to the question of whether the price difference on the specific product – in fact – diminishes the “disfavored retailers” actual ability to compete.

Many complaining customers – particularly those selling multiple, low-valued products (e.g. department stores) *vs.* single product sellers (e.g. heavy duty equipment dealers selling a few high valued products) – fail the “competitive injury” requirement because they cannot credibly prove that their “injuries” (typically “lost profits”) are causally related to the

“price discrimination,” as opposed to “other factors.”

Often a key “other factor” is that different sellers serve different customer bases, with different price-sensitivities for the end-using consumers they serve. For example, cigarettes sold at a bar and restaurant cost more than those sold at a convenience store which, in turn, cost more than those sold through a cigarette outlet.

Even though the same product is being sold, it commands different pricing because some consumers are willing to pay more for convenience. Those less price-sensitive customers typically patronize more convenient channels of trade.

The issue is whether the disfavored and favored customers compete with each other. An easy example is when a product serves two distinct purposes. For example, a pharmaceutical drug may have human and veterinary uses. Because doctors and veterinarians do not compete, discriminating between the two would be permissible as such discriminatory pricing would *not* “injure competition.”

The lines become more blurred in most retail situations. In the cigarette example above, a customer seeking to stock-up may choose the discount outlet over other retailers because of lower prices. The convenience store could credibly claim that it would have increased sales (and profits) had it received the lower price and been able to compete for those customers.

The bar owner, however, would have more difficulty making this claim. Because the bar owner’s customers are not there primarily to buy cigarettes, the bar owner would have a difficult time proving that it competes with the discount outlet for the sale of cigarettes to the same customer.

Some sellers have created complex pricing schedules giving different prices to different “channels of trade.” That can involve some risk under the *Morton Salt* decision, earlier noted. The burden will always be on the seller to demonstrate that the various channels either do *not* compete or that the differential pricing did *not* cause the disfavored channel to lose sales.

Again – the facts supporting the lack of competition and other factors likely to explain why a price differential should have an inconsequential effect can (and should) be contemporaneously *documented*.

I. Proof of Damages.

Yet another – and difficult – hurdle that the courts have created for Robinson-Patman Act plaintiffs is the need to prove that any claimed damages were actually *caused* by the price

discrimination. The Supreme Court expressly rejected the argument that damages can be established merely by proving the amount of the price discrimination, without showing that the favored pricing *caused* the disfavored buyer to lose business. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981).

The damage causation analysis can be complex. For example, luxury stores charge higher prices, not because manufacturers charge them higher prices, but because their clientele are less price-conscious. If they lower price to compete with the discount stores, then they forego the high margins they would have earned from their more traditional clientele.

This market reality is more likely the cause of their “lost profits” than is the manufacturer’s differential pricing. As stated in *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), “[i]n the absence of direct evidence of displaced sales, this inference [of an injury to competition] may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.”

* * *

As all the foregoing should underscore, there are many challenges that a disgruntled customer must overcome and many Robinson-Patman Act defenses available to a seller faced with an Robinson-Patman Act claim. Thus, there should be ample flexibility for a seller to tailor its pricing to meet legitimate business objectives and to respond to actual competitive pressures.

While the Robinson-Patman Act is a law that must always be considered, it is *not* one that should be feared. The focus should be on the key question: does this discount make long term business sense?

If, in consultation with the Law Department, it makes business sense, then contemporaneously document the legitimate business reasons and competitive realities prompting the decision to grant a customer (or class of customers) a lower price or more favorable promotional allowances or terms.

* * * *

What follows are a few commonly asked questions that may assist in understanding the practical implications of the Robinson-Patman Act.

Discriminatory Sales.

Q. *Can I offer the same price to two competing buyers if I know one has lower costs?*

A. Yes. The Robinson-Patman Act is only triggered when the seller makes two sales of a similar product at *different* prices.

Q: *If two customers are bidding for a specific project, which only one of them will win, can I offer them different prices?*

A. Yes. *Offers* for sale are outside the reach of the Act. Thus, there must be two *actual sales* made at discriminatory prices. Where there will only be one sale (presumably to the winning bidder), then the Act does not apply.

Q: *Can I charge different prices to customers who are located across the country from each other?*

A: It depends. If the two customers do not compete with each other for the same customers, there is no requirement that they receive equal pricing. On the other hand, if they do compete, then they should receive equal pricing regardless of their location.

Pricing Differentiated Products.

Q: *Can I sell two similar, but not identical, products at different prices that do not reflect the differences in value between them?*

A. It depends on the differences. If products are so different that they are not “of like grade and quality,” then price discrimination is permissible. In that case, the price differential does not need to reflect any subjective opinion concerning their relative intrinsic value. If product differences are minor, however, then the prices may need to be the *same*, subject to all the foregoing discussions about the defenses to and challenges for a successful Robinson-Patman Act claim.

Meeting Competing Offers.

Q: *Our competitor has been very aggressive lately at a few of our major accounts. Can I match my competitors’ prices to retain those accounts without lowering prices to my other customers?*

A. Yes. If the proper procedures are followed (such as documenting the existence of the competing offer, *e.g.*, by using a “meeting competition form”), a seller may selectively lower the price in good faith to meet, but not beat, a competitor’s equally low price. It does not matter if the reason is to maintain an existing business relationship or to garner new business. But

it should be remembered “good faith” requires that you reasonably believe that, but for the discount, the buyer could, and would, purchase a nearly identical item from your competitor at the same or lower price.

Q: I believe my customer may be exaggerating the terms of a competing offer. Can I call my competitor to verify the offer, and if not, may I still give the customer the better price?

A: It is *never* appropriate to discuss your prices with a competitor, as it may subject you to criminal and civil price fixing charges. Nor does the meeting competition defense require you to engage in such discussions.

The “meeting competition” defense may apply even if there is, in actuality, no better competing offer. Rather, the Act requires only that you act in “good faith.” If you doubt the veracity of your customer, then you may satisfy the “good faith” requirement by asking to see the competing offer or by asking the customer to set forth in writing or otherwise provide reasonable proof of the existence and terms of the competing offer. But ultimately, you should feel comfortable that your pricing is designed to keep a sale by matching a price you truly believe was offered by your competitor.

If you believe your customer is lying, why would you give a lower price, in any event?

Volume Discounts.

Q: I want to encourage sales by implementing a volume discount. Can I do this?

A: It depends. There is no statutory or judicially implied defense for pure volume discounts. (This is a common misconception, perhaps because “volume discounts” are so prevalent today). Volume discounts are permitted because, and only to the extent, one of the other recognized defenses apply.

The safest way under the Act to encourage increased sales is to offer growth – not volume – incentives. Such growth incentives are pro-competitive, and if available to all customers, would not subject you to liability under the Act.

Volume discounts may also be permitted under the Act, if (i) you can document actual cost savings justifying the volume discount, or (ii) the discount is designed to meet a competitor’s equally low, but lawful, competing offer on a nearly identical item.

Some companies also try to justify volume discounts by arguing that they are “available” to all competitors. It is unclear whether that defense will immunize you from liability, but the risk will be lower if the volume discounts are “feathered” so that (i) there are many levels of small discounts, rather than a few levels of large discounts, and (ii) most customers would not have to significantly change their business structure to obtain the same relative pricing as their competitors.

Channel-Based Pricing.

Q: Can we segment our customers into different “channels of trade” and charge each channel different prices?

A: It depends. In general, channel pricing will create less risk if: (i) customers who closely compete with one another are all placed in the same channel; (ii) in setting prices and terms for each channel, closer channels (in terms of competition between them) receive closer pricing; and (iii) there is a review mechanism for dealing with disgruntled customers who believe they have been wrongly classified.

Discriminatory Services and Promotional Discounts.

Q: I want to provide inspection services to a large customer. Am I under any obligation to offer these services to my smaller customers?

A: It depends. Whether you must provide inspection services to all customers depends on whether inspection services constitute a service provided “in connection with” the resale of the product. If it does, the Act requires that the service be made available to all competing customers on a proportionally equal basis. If the services are not provided in connection with the resale of the product, then the Act imposes no obligation to make them equally available.

Q: A large retailer has offered to perform inventory management analysis for my product, which is a service I typically must perform for my small customers. Can I give the large retailer a price break reflecting this added service?

A: Yes. But the discount must reflect either your cost-savings in not having to perform this function, or the buyer’s costs in doing it. In addition, if the service is provided “in connection with” the resale of the product, the discount must be provided to other sellers who are willing to provide similar services on a “proportionally equal” basis.

Should you have any questions about the Robinson-Patman Act or pricing issues,
please contact the following Kirkland & Ellis authors or the Kirkland & Ellis attorney you normally contact.



Tefft W. Smith
tsmith@kirkland.com
(202) 879-5212



Colin R. Kass
ckass@kirkland.com
(202) 879-5172

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