

AN FTC GUIDE TO PRICE DISCRIMINATION AMONG BUYERS

ROBINSON-PATMAN VIOLATIONS

A SELLER CHARGING COMPETING BUYERS DIFFERENT PRICES for the same “commodity” or discriminating in the provision of “allowances”—compensation for advertising and other services—may be violating the Robinson-Patman Act. This kind of price discrimination may give favored customers an edge in the market that has nothing to do with their superior efficiency. Price discriminations are generally lawful, particularly if they reflect the different costs of dealing with different buyers or are the result of a seller’s attempts to meet a competitor’s offering.

The Supreme Court has ruled that price discrimination claims under the Robinson-Patman Act should be evaluated consistent with broader antitrust policies. In practice, Robinson-Patman claims must meet several specific legal tests:

1. The Act applies to commodities, but not to services, and to purchases, but not to leases.
2. The goods must be of “like grade and quality.”
3. There must be likely injury to competition (that is, a private plaintiff must also show actual harm to his or her business).
4. Normally, the sales must be “in” interstate commerce (that is, the sale must be across a state line).

Competitive injury may occur in one of two ways. “Primary line” injury occurs when one manufacturer reduces its prices in a specific geographic market and causes injury to its competitors in the same market. For example, it may be illegal for a manufacturer to sell below cost in a local market over a sustained period. Businesses may also be concerned about “secondary line” violations, which occur when favored customers of a supplier are given a price advantage over competing customers. Here, the injury is at the buyer’s level.

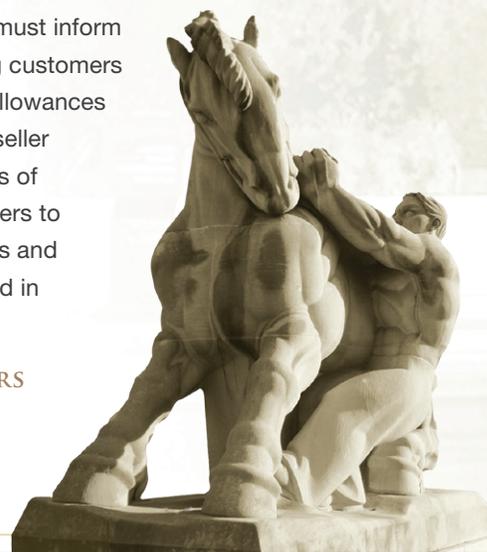
The necessary harm to competition at the buyer level can be inferred from the existence of significant price discrimination over time. Courts may be starting to

limit this inference to situations in which either the buyer or the seller has market power, on the theory that, for example, lasting competitive harm is unlikely if alternative sources of supply are available.

There are two legal defenses to these types of alleged Robinson-Patman violations: (1) the price difference is justified by different costs in manufacture, sale, or delivery (e.g., volume discounts), or (2) the price concession was given in good faith to meet a competitor’s price.

The Robinson-Patman Act also forbids certain discriminatory allowances or services furnished or paid to customers. In general, it requires that a seller treat all competing customers in a proportionately equal manner. Services or facilities covered include payment for or furnishing advertising or promotional allowances, handbills, catalogues, signs, demonstrations, display and storage cabinets, special packaging, warehousing facilities, credit returns, and prizes or free merchandise for promotional contests. The cost justification does not apply if the discrimination is in allowances or services furnished. The seller must inform all of its competing customers if any services or allowances are available. The seller must allow all types of competing customers to receive the services and allowances involved in

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a particular plan or provide some other reasonable means of participation for those who cannot use the basic plan. A more detailed discussion of these promotional issues can be found in the FTC's *Fred Meyer Guides*.

Under certain circumstances, a buyer who benefits from the discrimination may also be found to have violated the Act, along with the seller who grants the discrimination, if the buyer forced, or "induced," the seller to grant a discriminatory price.

Although proof of a violation of the Robinson-Patman Act often involves complex legal questions, businesses should keep in mind some of the basic practices that may be illegal under the Act.

These include:

- » Below-cost sales by a firm that charges higher prices in different localities, and that has a plan of recoupment;
- » Price differences in the sale of identical goods that cannot be justified on the basis of cost savings or meeting a competitor's prices; or
- » Promotional allowances or services that are not practically available to all customers on proportionately equal terms.

Under the Nonprofit Institutions Act, eligible nonprofit entities may purchase—and vendors may sell to them—supplies at reduced prices for the nonprofit's own use, without violating the Robinson-Patman Act. The Health Care Services & Products Division issued a recent advisory opinion discussing the application of this exemption to pharmaceutical purchases by a nonprofit health maintenance organization.

Q: I OPERATE TWO STORES THAT SELL COMPACT DISCS. MY BUSINESS IS BEING RUINED BY GIANT DISCOUNT CHAINS THAT SELL THEIR PRODUCTS FOR LESS THAN MY WHOLESALE COST. WHAT CAN I DO?

A: Discount chains may be able to buy compact discs at a lower wholesale price because it costs the manufacturer less, on a per-unit basis, to deal with large-volume customers. If so, the manufacturer may have a "cost justification" defense to the differential pricing and the policy would not violate the Robinson-Patman Act.

Q: ONE OF MY SUPPLIERS IS SELLING PARTS AT ITS COMPANY-OWNED STORE AT RETAIL PRICES THAT ARE BELOW THE WHOLESALE PRICE THAT IT CHARGES ME FOR THE PARTS. ISN'T THIS ILLEGAL?

A: The transfer of parts from a parent to its subsidiary generally is not considered a "sale" under the Robinson-Patman Act. Thus, this situation would not have the required element of sales to two or more purchasers at different prices.

