What to Ask Your Corporate Lawyer About Robinson-Patman

BY DECK MURRAY

TODAY'S IS A BUSINESS CLIMATE THAT THE AUTHORS OF ROBINSON-PATMAN NEVER ENVISIONED.

The Robinson-Patman Act was created in 1936 to ensure that manufacturers provide fair and equitable treatment for their customers, by prohibiting price discrimination. While the actual law is not lengthy, it is complex, open to interpretation and not fully understood by many sales managers. In addition, the consumer packaged goods industry (along with most other industries) has evolved from a "one size fits all" sales structure with nationally managed promotions, into a world of blurring trade classes, a more limited number of powerful customers and custom-developed products and promotions. Today's is a business climate that the authors of Robinson-Patman never envisioned. Thus, the changing face of today's retail marketplace has made it even more difficult to follow the letter, and sometimes the spirit of the law.

Dechert-Hampe & Company works with a wide variety of companies on the development of trade funds strategies and the management of trade funds programs. In our experience, we have found that nearly all senior sales executives are struggling to find appropriate tactics to efficiently build their businesses, including the use of customization and partnering. However, these tactics sometimes mean working with top customers at the expense of smaller customers. These sales executives are often either unfamiliar with the details of their specific obligations under the law or are uncertain how to apply the Robinson-Patman principles to their business in today's marketplace. Too frequently, uninformed decisions are being made. Some decisions are fairly risky under the law while other decisions are so conservative as to preclude efficient business building.

Compliance

Your corporate attorneys, and/or outside counsel are in the best position to understand your particular company's trade practices. This article will point out specific issues and questions regarding the Robinson-Patman Act that you and your corporate attorneys should address for your business, to help you comply with the law.

What is your price?

The age old saying, "figures lie and liars figure" has an interesting relevance to Robinson-Patman. While you certainly can't "lie" about your prices, there are many ways to "figure" pricing and, for better or worse, wholesale prices in consumer products can be open to interpretation. Based on Robinson-Patman litigation cases, price has generally been defined as the amount a buyer actually paid for goods received; in other words, the invoice price less any discounts and/or allowances. Additionally, the courts have held that payment and credit terms are an inseparable part of price.

As you work to define your company's prices, you need to consider how off-invoice allowances, market/customer development funds, slotting allowances, new item distribution allowances, freight

This article is intended for general information purposes only and does not constitute legal advice. Readers should not act upon this information without seeking professional counsel for legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

ABOUT THE AUTHOR Deck Murray is a Managing Director at Dechert-Hampe & Company. He works with clients on sales and trade marketing projects, including trade funds management, strategic account management and sales organization development. Prior to joining Dechert-Hampe, his career included Vice President and managerial sales positions with Pantone, Inc, Tambrands, Inc and Procter & Gamble.

allowances, damaged goods allowances, and allowed deductions are factored into your true price. You also need to consider how your deduction and slotting allowance practices are enabling you to continue to be fair to all customers.

In essence, your decisions regarding a definition of "price" coupled with your trade funds policies, procedures and business practices should result in pricing and promotion actions that are relatively consistent across your entire customer base.

What are your legal means of pricing differentiation?

There are three generally accepted occasions when offering different prices to different customers is permissible.

There are many ways to "figure pricing" and wholesale prices in consumer products can be open to interpretation.

1 *Cost Justification/Quantity Discount* – This law permits wholesale price differences that are based on differences in the cost of manufacture, sale, or delivery resulting from quantity purchasing. This aspect of the law has lead to the creation of bracket pricing, quantity discount and backhaul programs that are offered by numerous companies.

Likewise, it is also permissible for a seller to have different pricing structures if some of its customers perform some distribution services. For example, because wholesalers can perform some of the distribution functions that would otherwise have to be performed by the manufacturer, certain functional discounts are appropriate. Thus, it may be permissible to charge different (lower) prices to some wholesalers than to some retailers to account for differences in distribution services performed.

While the law is relatively clear on the treatment of wholesalers, it is not as clear on the treatment of other trade classes. How does this aspect of the law affect your pricing policies with club packs (where per unit manufacturing costs are often less than more conventional packs)? How should pricing be established on pallets, powerwings or pre-packed displays?

When varying prices are offered and they are based on cost justifications, the price differentials need to be supported by concrete and specific evidence that the cost savings do result from larger orders. However, mathematical specificity and cost accounting certainty can be difficult to achieve. Most companies have managed cost justified pricing differences successfully through consistent policies applied equally across all customers, e.g., bracket pricing for a specific size shipment offered to any and all customers.

In addition, when the courts have examined defenses based on this clause, they have looked more favorably on companies that have justified their actions with rigorous, before the fact accounting procedures and analysis. Analysis taken after the fact to justify a pricing decision have been looked on far less favorably.

2 *Meeting Competition* – The Act also permits a seller to "lower" its price to meet an equally low price being offered by a competitor. In order to be able to "meet competition," a seller must be able to establish that it has lowered its price in good faith only in order to remain competitive.

You might also be asking, can we "meet competition" selectively? Let's suppose that one of your competitors offers a program to Wal-Mart, Kmart and Target. You decide you would like to "meet competition." Are you obligated to offer the program to each of the three retailers, or can you choose to offer the program to only one or two of the customers? Most interpretations of the law allow you to lower prices in one geographic area without requiring you to meet competition universally. Also, keep in mind that the law permits "meeting" competition, not "beating" a competitor's lower price.

It is generally recommended that a seller take reasonable steps to confirm and verify that the other lower price has in fact been quoted, to document such verification and have a good faith belief that the low price being met is a legal price. Sellers must be careful, however, in this verification process. For example,

Robinson-Patman Act Historical Perspective

The U.S. Congress passed the Robinson-Patman Act in 1936 to supplement the Clayton Antitrust Act. The Robinson-Patman Act forbade any person or firm engaged in interstate commerce to discriminate in prices offered to different purchasers of the same commodity when the effect would be to create price discrimination, to lessen competition or to create a monopoly. Sometimes called the Anti-Chain-Store Act, this act was directed at protecting the independent retailer from chain-store competition. It was also strongly supported by wholesalers eager to prevent large chain stores from buying directly from the manufacturers at lower prices.

Source: The Columbia Encyclopedia, 6th edition, 2001.

What to Ask Your Corporate Lawyer About Robinson-Patman

a seller is allowed to ask its buyer for evidence of the lower price quote from a competitor. However, a seller is not allowed to make such inquiry of its competitor, an action that could be construed as price fixing.

When acting under this clause, you are outside the primary focus of the law (fair and equitable treatment), but within a secondary focus of the law (retaining competitive advantage). It would be good counsel to operate with your highest degree of due diligence when attempting to meet competition.

3 *Changing Market Conditions* – Price differences are generally allowed based on "changing conditions." The primary purpose of this defense is to permit a seller to dispose of goods where economic losses would result from product deterioration or perishability, obsolescence, distress sales, etc. Price differences in products resulting from technological obsolescence also fall within this defense, along with perishable fresh foods and seasonal goods.

INFO AND INSIGHTS

Universal Retail Code For Marketing Activity, Data Integration and Synchronization

Key to information driven marketing and strategy is the ability to view customers the way the customers view themselves. Additionally, when information from multiple layers of transactions are consistently aligned, the resulting data can be mined for insights and actions that would otherwise be out of reach. Account specific marketing, co-marketing, data warehousing and electronic commerce all share a common requirement for success – a consistent way of organizing store, account and market level data.

Trade Dimensions believes the answer lies in adopting a consistent scheme for organizing the data based on a common set of unique store location codes. They market TDLinx™, a universal language of stores and accounts. Up until now, a store could have as many as five different addresses and several hundred designators given to it by each supplier. TDLinx™ assigns every store its own unique identifier so that everyone can refer to the same store in the same way.

Dechert-Hampe & Company became the first consulting firm among TDLinx™ many alliance partners because we believe that it was a key enabler for CPG companies. Opportunities in current applications include trade promotion evaluation and CPFR...but the truly exciting stuff lies ahead in the area of store level micro-marketing and measurement.

TDLinx™ provides codes for every supermarket, mass merchandiser, drug store, club, liquor and convenience store. Codes exist for every level of the retail hierarchy-account, buying office, grocery supplier, grocery distribution center, chain, corporation and holding company.

TDLinx™ allows users to:

- Maintain account and parent hierarchies and links to buying offices
- Organize and manage an internal customer master file
- Link shipment and consumption data to improve forecasting and inventory management
- Integrate customer data with micro-marketing, scanner, promotional and marketing information
- Communicate internally between systems, departments, and divisions
- Execute seamlessly with trading partners and service providers

TDLinx™ clients include leading consumer packaged goods companies, and the promotion, merchandising and marketing services companies that serve them.

For additional information about TDLinx™, contact Ben Ball, Senior Vice President, Dechert-Hampe & Company at 847.559.0490.

WHAT IS A SIGNIFICANT DIFFERENCE IN PRICE? – The term "de minims" describes something that is so small that it is essentially inconsequential. Is a penny inconsequential? Is a dollar? The answer will likely depend on a number of factors, including the product being sold and the competitive nature of the product. The courts have found that price differences as little as 2% can be considered consequential in some cases. Since each industry and category has its unique characteristics, it may be necessary to determine your own definition of "significant."

Companies have managed cost justified pricing differences through consistent policies applied equally to all customers.

WHAT IS THE ROLE OF TIMING WITHIN THE LAW? – The law states that prices must be offered "contemporaneously" (at the same time). But, consider the following situation: Retailer X has a big annual program every March while Retailer Y has a big annual program every September. Both retailers would like you to participate in their programs with aggressive promotional funding. During March, you aggressively support Retailer X, and during September you support Retailer Y. As a result, over the course of the whole year, you have essentially charged the same "effective" price to both retailers. Are you at risk?

While the definition of contemporaneous is not specific, the court's interpretation of timing would probably not, in all likelihood, support a difference as wide as our example. Many companies

have instituted policies that do allow promotional windows to be moved from one period to another. To best protect your company, your trade policies should explicitly state that this practice is allowed and your controls should ensure that there is adequate and appropriate documentation of each decision made in this area. It is generally a good idea to have your corporate counsel review these policies to ensure compliance with the Robinson-Patman Act.

WHAT ARE YOUR OBLIGATIONS RELATING TO INDIRECT CUSTOMERS? – In general, the manufacturer bears the responsibility for ensuring that promotional programs are also offered fairly and equitably to indirect buying groups and small, direct-buying customers. Indeed, the very genesis of the Robinson-Patman Act was designed to protect the smaller retailers from the power of the bigger customers. This area is one of the hardest requirements to execute, however, given a sales force's natural desire to want to focus on the largest opportunities. You must provide proportionate focus on the smallest customers as well in order to provide your company with the most protection from risk.

As you assess this area of risk for your trade funds practices, ask the following questions. Do you have policies and procedures that adequately cover your indirect buying customers? What obligations do you have to ensure that retailers who purchase from a wholesaler receive fair and equitable offers as compared to your direct buying customers? Where do your responsibilities end and where do the responsibilities of the wholesaler begin?

HOW SHOULD YOU HANDLE THE DIFFERENCES IN NEGOTIATION SKILLS AND SUCCESS? – Let's assume that your company is taking a promotional program to market and offering it on a fair and equitable basis. In the marketplace, however, one salesperson negotiates outstanding performance, while another salesperson settles for negligible performance. The first customer sells through 100 percent of their "on-deal" purchases and is quickly back purchasing "list price" product. Their competitor, however, only sells through 50 percent of their "on-deal" purchases. When all the analysis are completed, the forward buying by the 50 percent sell-through customer results in a lower effective price versus the 100 percent sell-through customer. Would it be acceptable to go back to the 100 percent sell-through customer and offer an incremental program (not offered to the 50 percent sell-through customer) with the intention of reducing their effective price accordingly?

Manufacturers must provide proportionate focus on the indirect and small direct buying customers as well.

Good faith may be your best guide in this situation. To give one customer an oversize allowance because they are efficient and effective is probably inappropriate.

ARE TRADE ADS AND NOTICES ON SHIPPING CASES NEEDED? – Some suppliers place ads in trade journals stating, "XYZ Corporation regularly makes promotional allowances available…." Some manufacturers stamp their shipping cases with the same type notices. In theory, these ads communicate the availability of promotional allowances to all retailers. But, while these notices advise your customers of the availability of promotional offers, they do not necessarily ensure that you are offering your programs fairly and equitably. Typically, the mere existence of these notices will not provide any real protection, if appropriate policies and business practices do not also exist.

WHAT IS THE ROLE OF YOUR LAWYERS? – Your attorneys should be considered as key members of your trade funds strate-

For more information on Robinson-Patman:

The exact language of the act can be found at www4.law.cornell.edu/uscode/15/13.html. In addition, the entire Sherman Anti-Trust Act can be viewed at www4.law.cornell.edu/uscode/15/ch1.html.

A Corporate Counsel's Primer to the Robinson-Patman Act is available from Business Laws, Inc. at www.businesslaws.com in the archive of online samples.

Additional history and In The News items concerning Robinson-Patman and price discrimination can be found at:

www.ftc.gov/speeches/other/spring98.htm contains a speech entitled: "The Robinson-Patman Act: Annual Update", given by Donald S. Clark, Secretary Federal Trade Commission before the Robinson-Patman Act Committee (Forty-Sixth Annual Spring Meeting) in April 1998.

http://www.lawmall.com/rpa/index.html covers a wide range of topics related to the Robinson-Patman Act including information on recent Robinson-Patman suits as well as questions and answers on Robinson-Patman issues. This site was first published in 1997 and is updated on a regular basis.

www.ftc.gov/bc/compguide/discrim.htm gives a general explanation of price discrimination.

What to Ask Your Corporate Lawyer About Robinson-Patman

gic team. As discussed, your corporate attorneys are in an excellent position to understand your company's trade practices and to help you follow both the spirit and the letter of the law.

HOW DO YOU KNOW IF YOU ARE IN VIOLATION? – It is important to understand that, under Robinson-Patman, both the seller engaging in price discrimination and the buyer who has received lower prices are liable for monetary damages. The factors listed below are often used as a "litmus test" when reviewing Robinson-Patman issues. *To be found in violation of the Robinson-Patman Act, ALL of the following conditions must occur:*

- There must be two actual and contemporaneous sales from a single seller to at least two different purchasers. The Robinson-Patman Act applies to tangible products and not, at the federal level, to leases, licenses, advertising, real estate, insurance, etc. However, many state versions of Robinson-Patman do apply to intangible goods and services.

- The products must be of "like grade and quality." Products that are physically and chemically identical have generally been found to be of like grade and quality, even if they are labeled differently or appeal to different consumer segments. On the other hand, products that compete head-to-head but which are physically dissimilar may not be found to be of like grade and quality. These determinations are highly in-dividualized in nature and specific to circumstances.

- The "effective" prices must be different. The issues associated with price differences were discussed in detail in this article.

- Competitive injury must occur. Assuming that all of the conditions listed above do apply, the inquiry will shift to determining whether the pricing practices result in competitive injury. Robinson-Patman does not prohibit all price differences, but only those discriminatory practices that have a negative effect on competition. Under the Act, price differences become suspect whenever the effect of those differences may be substantially to lessen competition, or tend to create a monopoly.

It is also important to note that, generally, the test is not whether the pricing practices have injured a particular competitor, but rather whether the overall level of competition in a particular market or industry has been impacted. Thus, in a highly fragmented market characterized by many buyers and many sellers, with no true dominant player, it would be difficult (at least using current economic analysis methods) to establish a violation of Robinson-Patman.

Other Considerations

The Robinson-Patman Act deals exclusively with price, and makes the assumption that price alone determines the competitive nature of a marketplace or the relationship between manufacturers or customers. In today's world, however, this is an incorrect assumption. We know that factors such as product quality, new product development time, speed of delivery and pre/post sales service can also be key differentiators. With or without the Robinson-Patman Act, small independent firms will find it increasingly difficult to compete with business giants based on price alone. Smaller businesses must often now compete by additionally offering unique services and/or specialty products in niche markets.

As we have stated, the Robinson-Patman Act was originally designed to "protect the small guys" and to help small businesses compete on an economically level playing field with larger competitors. Over the years, Robinson-Patman has been continuously used to ensure that there is fair and equitable treatment between the big and small customers. But it has also been used to ensure that there is fair and equitable treatment among the large customers as well.

Summary

An effective trade funds management strategy must be built on a solid legal foundation. Robinson-Patman should be considered an important part of your company's pricing decisions and strategy. Understanding applicable pricing laws, especially Robinson-Patman, and ensuring that your company's policies are executed with an understanding of the spirit of the law, will help you minimize any legal risks you might face as you build sales through your customers.

This article is intended for general information purposes only and does not constitute legal advice. Readers should not act upon this information without seeking professional counsel for legal advice specific to their enterprise and circumstances in connection with each of the topics addressed.

REFERENCES
"Are Your Pricing Policies In Compliance With Robinson-Patman?" Michael, Best & Friedrich LLP, Attorneys at Law; "Rate Discrimination" by James A. Calderwood, Zuckert, Scoutt & Rasenberger, LLP; "Antitrust Part II: The Robinson-Patman Act" by George Cooper, *Business Credit Journal*, May 2000; "The Industrial Buyer and the Robinson-Patman Act", *International Journal of Purchasing and Materials Management*, Winter, 1996; "The Robinson-Patman Act: General Principles, Commission Proceedings, and Selected Issues" by Donald S. Clark, Secretary, FTC presentation to The Ambit Group, June 1995; "The Robinson-Patman Act – U.S. Code Collection", Legal Information Institute; "The Robinson-Patman Act", www.newrules.org; "Corporate Counsel's Primer on The Robinson-Patman Act", Business Laws, Inc., www.businesslaws.com; "Promoting Competition, Protecting Consumers: A Plain English Guide to Antitrust Laws - Price Discrimination", Federal Trade Commission