The Robinson - Patman Act

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1. HISTORY OF THE ACT
   a. Enacted in 1936, as an amendment to Section 2 of the Clayton Act, which had been the first federal statute to expressly prohibit certain forms of price discrimination.
   
   b. Operative principle: “to assure, to the extent reasonably practicable, that businessmen at the same functional level would stand on equal competitive footing so far as price is concerned.”

   c. The Act itself is not criticized by many as anti-competitive, and government enforcement has been rare. Enforcement has primarily been by disfavored customers in private suits.

2. BASIC REQUIREMENTS
   a. Section 2(a) – sellers are required to sell to customers at the same functional level at the same price.
   
   b. Section 2(f) – buyers “with the requisite knowledge” are required to buy from a particular seller at the same price as everyone else.

   c. Sections 2(c), 2(d) and 2(e) make it illegal to use brokerage, allowances or services to indirectly accomplish what is prohibited by 2(a) and 2(f).
3. **JURISDICTIONAL PROVISIONS**

   a. two or more consummated sales

   b. reasonably close in time

   c. of commodities (tangible products, not services)

   d. of like grade and quality

   e. with a different price

   f. by the same seller

   g. to two or more purchasers

   i. for use, consumption or resale within the US or any territory

   j. which may result in competitive injury

   k. in commerce

4. **ELEMENTS OF SECTION 2(A)**

   a. competitive injury includes:
      
      i. lessening competition in any line of commerce

      ii. tending to create a monopoly in any line of commerce

      iii. injuring, destroying or preventing competition with any person who grants or knowingly receives the benefit of the discrimination, or with the customers of either of them.

   b. **Primary line injury** – injury to competitors of the seller – requires predatory pricing as an element

   c. **Secondary line injury** – injury to competitors of the buyer or favored customer. Can be proven by displaced sales, or inferred by proof of substantial price discrimination over time. Injury may be disproven by evidence that the buyers were not in competition with each other for geographic or other reasons, or were in different levels in the distribution chain, or that there were many competing sellers, or that the lower price was a bona fide introductory offer.
5. DEFENSES TO ALLEGATIONS OF SECTION 2(A) VIOLATIONS

a. Price differentials that make only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities in which the commodities are sold or delivered. Must be established by detailed and rigorous accounting. Such circumstances should be carefully documented at the time the sale is made.

c. Price differentials that are a bona fide response to conditions in the market, such as deteriorating perishable goods, obsolescence of seasonal goods, or going out of business sales. Such circumstances should be carefully documented at the time the sale is made.

d. Price differentials that represent a good faith effort to meet competition – meeting the competitor’s lower but lawful price. Such circumstances should be carefully documented at the time the sale is made. Do not call the competitor to verify – this will be presumed to be price-fixing! Price differentials to meet competition need not be restricted to a customer-by-customer basis, but may be applied on a market basis.

6. BUYER LIABILITY UNDER SECTION 2(F)

a. Requires a seller violation as a predicate.

b. Requires that buyer “knowingly induce or receive a discrimination in price.

7. FUNCTIONAL DISCOUNTS

a. Selling to distributor at a lower price than to a retailer, or to a retailer at a lower price than to a consumer. The functional discount defense is not available when the favored and disfavored purchasers compete at the same functional market level.

b. Must be justified by savings incurred by the seller due to marketing functions performed by the favored purchaser. The savings should be contemporaneously documented.

c. Texaco v. Hasbrouck, 496 U.S. 543 (1990) held that price differentials to distributors of gasoline which also engaged in retail sales were not justified by savings and constituted a 2(a) violation.
8. VOLUME AND PERFORMANCE DISCOUNTS

a. Not sanctioned under the Act, and present risks to the seller. Because volume discounts are not sanctioned, they must be justified under one of the other provisions of the Act.

b. Volume discounts are generally justified based on actual documented cost savings, or to meet lower but lawful competition.

c. Must be made known to all customers, and be reasonably proportionate.

d. Recent authority in the 6th and 7th Circuits confirms that discounts can be conditioned on performance by the buyer, such as merchandising and marketing support, product positioning, signage and display, so long as the seller’s efforts are in furtherance of interbrand competition.

9. DAMAGES

Damages in a private Robinson-Patman Act suit must be proven and may be trebled, pursuant to Section 4 of the Clayton Act.

10. FINAL CAUTION

Sellers faced with these issues should obtain competent legal advice.