

Morgan Lewis

A BUSINESS GUIDE TO  
THE ROBINSON-PATMAN ACT

MARK P. EDWARDS

MORGAN, LEWIS & BOCKIUS LLP

1701 Market Street | Philadelphia, PA 19103-2921

Direct: 215.963.5769 | Main: 215.963.5000 | Fax: 215.963.5001

medwards@morganlewis.com | www.morganlewis.com

## A BUSINESS GUIDE TO THE ROBINSON-PATMAN ACT

---

### **OBJECTIVES OF THE GUIDE**

- (1) To present an overview of those aspects of the laws governing price discrimination that are most relevant to manufacturers' operations.
- (2) To provide a basis for an evaluation of manufacturers' current pricing structures.

### **PURPOSE OF THE ROBINSON-PATMAN ACT**

The Robinson-Patman Act (the "Act") generally prohibits a manufacturer from discriminating in prices and promotional allowances and services between competing resellers of its goods, if such discrimination is likely to create an adverse effect on competition. The purpose of the Act is to assure that resellers operating on the same functional level stand on equal competitive footing with regard to pricing and promotional support they receive from the same manufacturer.

## **VIOLATIONS OF THE ROBINSON-PATMAN ACT**

- ▲ Direct Price Discrimination Results When Competing Resellers Pay The Same Manufacturer Different Prices For The Same Goods
  
- ▲ Indirect Price Discrimination Results When Competing Resellers Do Not Receive Proportionately Equal Promotional Allowances Or Services From The Same Manufacturer
  - ▲ Payments/reimbursements for services or facilities must be proportionately equal
  - ▲ Services or facilities offered by the manufacturer also must be proportionately equal

## **THE ELEMENTS OF DIRECT PRICE DISCRIMINATION**

The Robinson-Patman is a highly technical statute, with numerous elements that must be satisfied by the plaintiff in order to prevail. The Act prohibits a manufacturer from discriminating in price between competing resellers of the same goods, if such price discrimination is likely to substantially lessen competition between those resellers or create a monopoly.

### **Direct Price Discrimination**

The following elements all must be established if the plaintiff is to prove a violation of the Robinson-Patman Act:

1. one seller,
2. sells (the Act does not apply to most leases),
3. goods of like grade and quality (the Act does not apply to sales of services or to intangible property),
4. in interstate commerce,
5. for resale or use within the United States or a U.S. territory (the Act does *not* apply to price differences in export sales),
6. to two or more different *competing* resellers,
7. at two different prices, and
8. the sales are reasonably contemporaneous, and
9. the price differential may have the effect of substantially lessening or injuring competition among either those resellers or those resellers' customers.

## OVERVIEW OF DIRECT PRICE DISCRIMINATION

<b>Price:</b>	<p>Price discrimination generally means any price difference. The term “price” refers to the “net price” – the invoice price minus any discounts, offsets or allowance. Not all price differences violate the Robinson-Patman Act. Only those price differences that injure competition among the manufacturer’s competing resellers are prohibited.</p>
<b>Competition:</b>	<p>The Act only protects resellers that are in competition with one another. In order to be “competitors,” the resellers must compete with each other (i) at the same functional level, i.e., wholesale, retail, etc., (ii) in the same geographic market, (iii) during the same time period and (iv) with regard to the same goods.</p>
<b>Goods:</b>	<p>The Act only applies to sales of goods of like grade and quality. The Act places no prohibition on discrimination in base, non-price terms, the sale price of services (for example, telephone service) or the sale price of intangible property (for example, insurance contracts or mutual fund shares).</p> <p>Goods that have bona fide <i>physical</i> differences that affect their marketability are not of “like grade and quality.”</p> <p>Economic factors inherent in brand names or national advertising are not considered when determining whether the products are of “like grade and quality.”</p>

continued....

**Injury of the Disfavored Purchaser:** The disfavored purchaser must show “injury to competition” in order to prove a violation of the Robinson-Patman Act. “Injury to competition” may be proved indirectly by showing that the disfavored purchaser had to pay the manufacturer more for its goods than the favored purchase did over a substantial period of time. In order to rebut that inference, the manufacturer would have to show that its price differentials did not cause the disfavored purchaser to lose sales or profits. Proof that, for example, the disfavored purchasers did not actually compete against the favored purchaser or that the favored purchaser never lowered its price to customers below that of the price that the favored purchaser charged its customers would rebut the inference of injury to competition.

**Injury of the Disfavored Purchaser’s Customers:** The Act also covers competitive injury two tiers lower in the chain of distribution, and thus reaches the competitive injury suffered by customers of the disfavored purchaser who compete against customers of the favored purchaser. Those claimants can also sustain their burden of proving harm to competition merely by showing that the price discrimination was substantial over an extended period of time.

## **RECOVERING DAMAGES FOR DIRECT PRICE DISCRIMINATION**

- ▲ Proving a violation of the Robinson-Patman Act is not sufficient to entitle a disfavored reseller to recover damages from the manufacturer.
- ▲ A disfavored reseller *cannot* recover as damages the amount of the manufacturer's overcharge.
- ▲ Instead, a disfavored reseller must prove that it suffered some competitive injury as a result of the direct price discrimination in order to qualify for a damages award.
- ▲ To prove competitive injury, the disfavored reseller usually must show that it actually lost sales because the favored reseller was able to undersell it.
- ▲ A disfavored reseller that (1) can prove a violation of the Robinson-Patman Act and (2) can prove that it suffered competitive injury as a result of that violation receives as damages three times its actual losses, plus its attorney's fees.

## Examples of What Is (And Is Not) Direct Price Discrimination

- Ex. 1. Pennsylvania Manufacturer M sells hand drills to Distributors X and Y, who are competitors of one another, and are located in New York City. X and Y resell the drill under the national brand name “The Power Drill” to New York retailers. M sells “The Power Drill” to X at 5% below invoice price, which is sufficient to cause retailers to buy from X, and not from Y. M does not offer this discount to Y.
- VIOLATION:** This constitutes direct price discrimination. Manufacturer M is selling the same drill to two competing purchasers at two different prices, causing injury to Distributor Y.
- Ex. 2. Pennsylvania Manufacturer M sells hand drills to Wholesaler W, located in Juneau, Retailer R, located in New York City, and Consumer C, located in Juneau. M sells “The Power Drill” to W at 5% below invoice price. M does not offer this discount to R or C.
- NO VIOLATION:** W and R are not competitors because they are not located in the same geographic market and are not operating on the same functional level. C does not even re-sell the drills. Therefore, the price differential would not violate the Act.
- Ex. 3. Pennsylvania Manufacturer M sells hand drills to Distributor A in New York City and Distributor B in San Francisco. A and B both resell the drills over the Internet to various retailers throughout the United States. M sells the drill to A at 5% below invoice price, which is sufficient to cause retailers to buy from A, and not from B. M does not offer this discount to B.
- VIOLATION:** This constitutes direct price discrimination. Although A and B happen to be located a continent apart, they compete against one another for sales over the Internet and thus compete in a national market.

## Are The Goods Sold of “Like Grade and Quality”? – Examples

Pennsylvania Manufacturer M sells hand drills to Distributors X and Y, who are located in New York City and are in competition with each other. X and Y resell the drills under the national brand names “The Power Drill” to New York retailers.

Ex. 1. M sells the same drill to Distributor Z, who also is located in New York City, at a lesser price because Z sells the drill under a private label called “The Drill.” The drills that M sells to X, Y and Z are all manufactured from the same raw materials, under the same process, in the same factory. No physical or functional differences exist between the drills.

**VIOLATION:** Although Z sells the drill under a private label, the drills purchased by X, Y, and Z are of like grade and quality because they contain no bona fide physical differences that affect their marketability. Therefore, the price differential could violate the Act.

Ex. 2. M sells essentially the same model of “The Power Drill” to Z at a lesser price than those sold to X and Y. The two models differ only in handle color and logo size.

**VIOLATION:** The handle color and logo size do not constitute bona fide physical differences for purposes of the Act. Therefore, since the sales are of goods of like grade and quality, M’s price differences will subject it to liability under the Act.

Ex. 3. M sells “The Power Drill” to Z at a lesser price than those sold to X and Y. Unlike the models sold to Z, those sold to X and Y weigh 5 pounds lighter and are battery-operated.

**NO VIOLATION:** The models sold to X and Y contain bona fide physical differences that enable M to sell such models at a different price than those sold to Z.

## **INDIRECT PRICE DISCRIMINATION -- DISPROPORTIONATE PROMOTIONAL ALLOWANCES, SERVICES OR FACILITIES**

---

The Robinson-Patman Act has two additional provisions that prohibit indirect price discrimination, i.e., discrimination in the guise of services, facilities and advertising and promotional allowances that are afforded by a manufacturer to one reseller but not to a competing reseller.

Specifically, the Robinson-Patman Act addresses two situations involving the awarding of promotional allowances: 1) the manufacturer reimburses a favored purchaser for promotional services it performs, but does not do the same for the disfavored purchaser, and 2) the manufacturer actually furnishes promotional services to the favored purchaser, but not to the disfavored purchaser.

### **Payments/Reimbursements for Promotional Services or Facilities**

The following constitutes indirect price discrimination in violation of the Robinson-Patman Act:

1. a seller of goods,
2. in interstate commerce,
3. discriminates by paying or reimbursing a purchaser,
4. for services or facilities furnished by that purchaser,
5. in connection with the resale of the seller's product,
6. such payment is not made available on proportionally equal terms, and
7. to all of the seller's other purchasers who compete against the favored purchaser and who buy products of like grade and quality.

## Furnishing Promotional Services or Facilities

The following are the elements of an *indirect* price discrimination violation of the Robinson-Patman Act:

1. a seller of goods,
2. in interstate commerce,
3. discriminates by furnishing,
4. services or facilities to a purchaser,
5. in connection with the resale of the seller's product,
6. such services or facilities are not made available on proportionally equal terms, and
7. to all the seller's competing purchasers who buy products of like grade and quality.

## OVERVIEW OF INDIRECT PRICE DISCRIMINATION

**Proportionally Equal:** The manufacturer must make its promotional allowances, services and facilities available on *proportionally equal terms* to all of its competing resellers. This “proportional equality” does not require mathematical equality, *i.e.*, paying exactly the same total allowance payment to all competing purchasers. Rather, the allowance should have some fixed relation to the particular amount of purchases made by each of the competing resellers from their common manufacturer. For example, if a manufacturer were to give all competing resellers 50 cents for each case of product purchased in order to help pay the resellers’ cost of promoting the manufacturer’s product, the manufacturer would achieve “proportionally equal” promotional allowances.

A manufacturer is also well-advised to implement a definite and specific plan for the payment of promotional allowances or the provision of promotional services that is applicable to all of the manufacturer’s competing customers. It should not engage in *ad hoc*, individually negotiated arrangements with each competing reseller. Once a definite and specific plan is made available to all competing resellers, the manufacturer should not deviate from the plan for individual resellers, unless it does so in order to match another manufacturer’s promotional allowances or services.

continued . . . .

**Additional Obligations of a Manufacturer That Provides Promotional Allowances and**

**Services:** Under the Robinson-Patman Act, the manufacturer has an affirmative obligation to (i) inform all of its competing resellers of the terms of its available promotional plans, (ii) inform all of those resellers of their right to participate in the plan, and (iii) offer a plan with sufficient alternatives so that all competing resellers have the ability to participate, regardless of their size or the volume of their purchases.

**No Need To Prove Injury to Competition:** Unlike the rules governing direct price discrimination, those governing discriminatory promotional allowances do not require the disfavored reseller to show that there is a likelihood of “injury to competition” as a result of the disproportionate promotional allowances or services.

**Prospective Customers:** Only actual purchasers from the manufacturer may complain of its alleged discriminatory promotional allowance payments and services. *Prospective* customers -- those who have not actually purchased goods from the manufacturer -- have no standing to assert a claim under the Robinson-Patman Act for alleged discriminatory promotional payments and services.

## Examples of Indirect Price Discrimination

Pennsylvania Manufacturer M sells a cleaning fluid to Distributors A, B, C and D, who are all located in New York. These Distributors are in competition with one another, and resell the product under the national brand name the “Super Cleaner” to New York retailers.

- Ex. 1. M offers A a trained demonstrator to perform on-site demonstrations of the “Super Cleaner” for all of A’s customers for two weeks. M does not make this offer to Distributors B, C and D.

**VIOLATION:** M violates the Act by furnishing only A with the services of the trained demonstrator and by not making those services available to all of A’s competitors.

- Ex. 2. Distributor A trains and employs a demonstrator to perform on-site demonstrations of the “Super Cleaner” for A’s customers for two weeks. Manufacturer M pays Distributor A \$500 to help cover the costs of the demonstrations. B similarly trains and employs a demonstrator, but M does not offer to pay for this expense. C and D do not train and employ a demonstrator, and M does not offer to help them pay for one.

**VIOLATION:** M violates the Act by reimbursing only A for the services performed by the demonstrator and not making this reimbursement offer sufficiently available to all competing resellers.

continued . . .

Ex. 3. M offers all of its Distributors a trained demonstrator to perform on-site demonstrations of the “Super Cleaner” for their retail customers for two weeks. The total cost of the demonstration is \$1,000, and M offers to pay \$800 of this total cost. A and B accept the offer. C and D decline the offer based on reasons other than an inability to pay the \$200 difference of the cost.

**NO VIOLATION:** M’s offer is sufficiently available on proportionally equal terms to all competing purchasers, and they are all aware of the offer.

Ex. 4. M offers the four Distributors a trained demonstrator to perform on-site demonstrations of the “Super Cleaner” for their customer for two weeks. M offers to pay \$800 of the total \$1,000 cost of the demonstration. M does not make this offer to its New York Retailer nor to its Los Angeles Distributor.

**NO VIOLATION:** Assuming that the four New York distributors are not in competition with either the Los Angeles distributor or the New York retailer, M’s actions do not violate the Act. The offer was made sufficiently available to all of the resellers who do compete against one another.

## **Which Promotional Allowances Are “Proportionally Equal”?**

Pennsylvania Manufacturer M sells replacement automobile tires to Distributors A, B, C and D, who are located in New York. Those Distributors are in competition with one another and resell the tires under the national brand name the “Safe Rider” to local New York retailers.

- Ex. 1. M offers to pay for 30% of the local advertising costs for one year for each Distributor who purchases 2,000 or more “Safe Rider” tires over a specified 6 month period. A and B each purchase an average of 4,000 tires every 6 months, while C and D have smaller businesses and purchase an average of 500 tires every 6 months.

**VIOLATION:** M’s offer is not sufficiently available to all competing resellers on proportionally equal terms, and M does not offer sufficient alternatives to allow lower-volume resellers to participate in the program. C and D do not have the ability to take advantage of the offer.

- Ex. 2. M sends all of the Distributors copies of a promotional plan in which M offers to pay 30% of the local advertising costs for each Distributor for one year up to 5% of the dollar volume of each Distributor’s overall purchases during a specified 6 month period.

**NO VIOLATION:** M’s offer enables all of its Distributors to take advantage of the offered promotion on proportionally equal terms because it is based on the same *percentage* of each Distributor’s purchases from M. This method of reimbursement is formulated upon a fair and reasonable basis, and is available to all competing resellers.

continued . . .

- Ex. 3. Manufacturer M offers to reimburse each of the Distributors up to \$2 per tire purchased for the cost of promoting resales of the “Safe Rider” in any of the following ways:
- (i) advertising M’s drills in local newspapers, television or radio stations;
  - (ii) direct mailing of promotional material to actual or potential customers;
  - (iii) providing point-of-sale promotional material for use on customer’s premises.

**NO VIOLATION:**

**M’s offer enables each Distributor to take advantage of the offered promotion, irrespective of the size of its business, by providing the same allowance for each tire purchased. This method is formulated on a fair and reasonable basis, and is available to all competing resellers.**

## DEFENSES TO THE ROBINSON-PATMAN ACT

Even if a manufacturer commits a prima facie violation of the Robinson-Patman Act, it still can avoid liability if it can sustain one of the available affirmative defenses. The manufacturer would, however, bear the burden of proving that one or more of those defenses did apply to its conduct. The four affirmative defenses to price discrimination are as follows:

- ▲ “GOOD FAITH MEETING COMPETITION” DEFENSE
- ▲ “COST JUSTIFICATION” DEFENSE
- ▲ “FUNCTIONAL DISCOUNT” DEFENSE
- ▲ “AVAILABILITY” DEFENSE

## THE “GOOD FAITH MEETING COMPETITION” DEFENSE

A manufacturer that has discriminated in the prices at which it sells its product to competing resellers, or discriminated in the provision of promotional allowances or services, may escape liability under the Robinson-Patman Act by showing that it did so in order to avoid losing that customer’s business to one of its competitors. the manufacturer can avoid liability with proof that:

**the lower price or the furnishing of allowances, services or facilities was made in good faith to meet an equally low price or equally generous offer of promotional allowances, services or facilities furnished by a competitor.**

The manufacturer’s lower price or disproportionately greater promotional allowances, services or facilities is excused under the following circumstances:

- ▲ The manufacturer offered the lower price, greater allowance or more generous services available to the favored reseller in *good faith* – that is, under the circumstances, a reasonably prudent person would believe that the granting of a lower price or the furnishing of more generous promotional allowances, services or facilities would be necessary to meet those made available by a competitor.
- ▲ The offer must be made in response to an offer made to that reseller by the manufacturer’s competitor(s).
- ▲ The offer must be tailored so as to extend no farther than the relevant geographic market and last no longer than the time period that the competitor’s offer to the reseller is in place.
- ▲ The offer must not intentionally beat the competitor’s price.
- ▲ The offer may be made to secure new customers or retain old ones.

## What is “Good Faith”?

The following factors are among those considered when determining whether a manufacturer has lowered its prices or furnished promotional allowances in “good faith” to meet a competitor’s offer:

- ▲ whether the manufacturer’s customer has informed the manufacturer of the competitor’s offer
- ▲ whether the manufacturer’s customer has threatened to terminate its purchases if the manufacturer does not match the competing offer
- ▲ whether the manufacturer has made efforts to corroborate the reported competing offer with either documentation provided by the customer or available market data (the manufacturer may **not** contact its competitor to determine whether it has made such an offer)
- ▲ whether the manufacturer’s has sufficient past experience with the customer who reported the competitor’s offer, or the customer has a sufficiently solid reputation in the industry, that reliance on the customer’s word is reasonable
- ▲ whether the claimed competing offer seems reasonable or plausible in light of then-existing competitive circumstances in the marketplace

## Examples of “Good Faith” Meeting Competition

Manufacturer X has been selling its hand drills to Distributor A, a reputable distributor, for 10 years. X sells to A at an invoice price of \$15 per drill. Manufacturer Y offers to sell A a comparable drill for \$10 per drill and to provide free warehousing. Distributor A tells Manufacturer X about Manufacturer Y’s offer, and indicates that it may order its drills from Y. X also discovers that Y has made this offer to B and C, two of X’s other longtime distributors. A, B and C are competitors located in New York.

Ex. 1. X lowers its invoice price to \$10 per drill and provides free warehousing for A, B and C.

**NO VIOLATION:** X lowered its price and provided warehousing in good faith to meet the price and services offered by its competitor, Y.

Ex. 2. X lowers its invoice price to \$7 per drill and provides free warehousing for A, B and C.

**VIOLATION:** Manufacturer X intentionally lowered its price to beat the prices offered by Manufacturer Y.

Ex. 3. X lowers its invoice price to \$7 per drill not only for A, B and C but also for some (but not all) of its distributors in California. The California distributors are not served by Manufacturer Y.

**VIOLATION:** X not only intentionally lowered prices to beat those of its competitor, Y, but X’s offer to selected California distributors was not made in response to lower prices offered by a competitor.

continued . . .

Manufacturer X is looking for prospective distributors for its hand drill. X is particularly interested in 3 Vermont distributors. X sells drills to its California distributors at an invoice price of \$15 per drill. After careful investigation, X discovers that the Vermont distributors buy similar drills from Manufacturer Y at an invoice price of \$10 per drill with free warehousing.

Ex. 4. X offers to sell its drills to the Vermont Distributors for \$10 per drill with free warehousing, but continues to charge its California distributors \$15 per drill.

**NO VIOLATION:** X lowered its price and provided free warehousing in good faith to meet competition in a distinct geographic market.

Ex. 5. X offers to sell its drills to the Vermont Distributors for \$10 per drill with free warehousing. X did not know that, 4 days earlier, Y had increased its price to \$11 per drill.

**NO VIOLATION:** X lowered its price and provided free warehousing in good faith intending to meet and not beat its competition.

Ex. 6. X offers to sell its drills to the Vermont Distributors for \$9 per drill with free warehousing.

**VIOLATION:** X intentionally lowered its prices to beat those offered by its competitor.

continued . . .

Ex. 7. In attempt to expand its market, Manufacturer X offers to sell its drills to A, a newly formed distributor, for \$15 per drill. Distributor A tells X that it can get the same product from Manufacturer Y for \$10 per drill. Relying only on A's information, X lowers its price to \$10 per drill. In fact, Manufacturer Y quoted Distributor A a price of \$15 per drill.

**VIOLATION:** Because Distributor A is new to the business, and Manufacturer X has not dealt with A before, A's reputation is uncertain. Therefore, X should have investigated A's comments further, rather than relying solely upon them.

## THE “COST JUSTIFICATION” DEFENSE TO DIRECT PRICE DISCRIMINATION

A manufacturer who discriminates in price between competing resellers may also avoid liability under the Robinson-Patman Act by showing that

**the price differential equals or nearly equals the actual savings in costs of manufacture, sale, or delivery that the manufacturer realizes when dealing with the favored purchaser.**

### The “Cost Justification” Defense

- ▲ The manufacturer’s actual costs of serving various resellers may differ based on the volume purchased or the differing transportation or warehousing costs incurred.
- ▲ The seller may charge a lower price to one customer and not to another if such discount is justified by a savings in the seller's actual costs of manufacture, delivery or sale.
- ▲ All of the seller’s customers must be afforded an equal opportunity to purchase the seller’s products under the same terms and conditions as the favored customers.
- ▲ The seller is subject to a rigid accounting when justifying its actual cost savings.
- ▲ The seller may establish this defense based upon cost data developed from a particular class of customers who resemble each other on the essential points of costs, rather than justifying every price discrepancy between customers.
- ▲ This defense is not available when the seller has discriminated in its payment/reimbursement for or furnishing of promotional services and facilities.

## Examples of Cost Justified Discounts

Ex. 1. Pennsylvania Manufacturer M sells glass to Distributors A and B who are located in New York and are competitors of one another. Distributor A purchases standard-size glass from M, while B purchases standard sizes and some nonstandard sizes that are specially cut. M charges Distributor B a higher price than A for the same amount of glass.

**NO VIOLATION:** M may charge B a higher price as long as the price reflects the added costs involved in cutting the glass to customized sizes.

Ex. 2. Pennsylvania Manufacturer M sells glass to Distributors A and B who are located in New York and are competitors of one another. The “busy” season for glass distributors is from June 1 through August 31. Distributor A orders from “hand to mouth” during the busy season, and demands quick delivery of its orders. Distributor B, by contrast, prepares for its busy season in advance by ordering the bulk of its needs before June 1. During the “busy” season, Manufacturer M charges A a higher price than B for the glass.

**NO VIOLATION:** If M can show that the higher price charged to A reflects overtime labor and expensive raw materials (due to shortages experienced during the busy season), then it may charge the higher price to A. M should document the cheaper off-season labor rates and raw material costs applicable to the glass purchased by Distributor B.

continued . . .

Ex. 3. Pennsylvania Manufacturer M sells glass to Distributors A, B and C who are all located in New York and who are competitors. A, B and C purchase the same types, sizes and amounts of glass from M. Distributor A insists that its order be delivered directly from M's factory to A's warehouse, where it is Manufacturer M's responsibility to unload the shipment. Distributor B and C pick up their orders from M's warehouse, located in New York. M charges B and C a lower price for the exact same order purchased by A.

**NO VIOLATION:** If M can show that the price differentials reflect the different costs created by the differing methods of delivery, then M will not be liable under the Act.

Ex. 4. Pennsylvania Manufacturer M sells glass to Distributors A and B, who are located in New York and who are competitors. A and B place the same order. M charges A a lower price than B because A pays for its order up front in cash while B purchases its order on credit.

**NO VIOLATION:** If M can show that the price differentials reflect the higher costs involved in selling glass on credit, then M will not be liable under the Act.

## THE “FUNCTIONAL DISCOUNT” DEFENSE

A manufacturer who discriminates in price between competing resellers may escape liability under the Robinson-Patman Act by showing that:

**the price differential constitutes a reasonable reimbursement for the cost of the marketing services or functions performed by the favored reseller for the manufacturer.**

“The functional” is available if

- ▲ it acts as compensation for some distribution or wholesale function actually performed by the favored reseller for the benefit of the manufacturer, and
- ▲ the discount is reasonably related to the manufacturer’s cost savings or the favored reseller’s costs

Functional discounts are permissible because they are not believed to threaten harm to competition. If the discount approximates the additional cost assumed by the favored reseller, that additional cost ought to consume the discount received from the manufacturer. Since there are no remaining savings that the favored reseller has left to pass on to its customers, the disfavored reseller should not find itself at a price disadvantage in competition with the favored reseller.

## Examples of Functional Discounts

New Jersey Manufacturer M sells hand drills to W, a New York Wholesaler, and to R, a New York Retailer. W and R are competitors because W sells directly to consumers. M sells its drill to W at a lower price than it sells the drill to R.

Ex. 1. W actually fulfills a wholesale function by relieving M of risk, storage, transportation, administration, invoicing, etc. R does not fulfill any of those functions.

**NO VIOLATION:** M's discount serves to compensate W for its actual wholesaling functions.

Ex. 2. Although W may, at certain times, provide limited storage facilities for M, it does not perform any other wholesale functions, such as invoicing, transportation and administration.

**VIOLATION:** Because W does not regularly fulfill wholesale functions, M will be unable to show that the lowered price represents compensation for services actually performed by W.

## THE “AVAILABILITY” DEFENSE

**No violation of the Robinson-Patman Act occurs when the manufacturer can show that the lower price paid by the favored reseller was also made available to the disfavored reseller, who could have satisfied the conditions for receiving the discount but chose not to do so.**

A manufacturer can avail itself of the “availability” defense if

- it has made all competing resellers aware of the discount, as well as the terms on which it is available, and
- all or virtually all of the manufacturer’s competing resellers can, as a practical matter, qualify for the discount, given their particular financial resources, warehousing capabilities, or other circumstances affecting their ability to purchase at the required level.

A manufacturer can avail itself of the “availability” defense if

- it has made all competing resellers aware of the discount, as well as the terms on which it is available, and
- all or virtually all of the manufacturer’s competing resellers can, as a practical matter, qualify for the discount, given their particular financial resources, warehousing capabilities, or other circumstances affecting their ability to purchase at the required level.

## **When Is A Discount “Available” To Competing Resellers?**

The following factors are considered when determining whether a discount has truly been made available to competing purchasers, and thus whether a particular reseller’s failure to obtain the discount does not violate the Robinson-Patman Act:

- All competing resellers have been notified by the manufacturer of the discount and the terms on which it can be obtained.
- All or nearly all competing resellers can, as a practical matter, purchase the volume that the manufacturer may establish as the minimum necessary to achieve the top-tier discount.
- The financial resources, size of customer base and warehousing capacity of each competing reseller are sufficient to make the top tier of discounts achievable.
- The disfavored reseller has decided not to avail itself of the available discount for reasons within its control, such as poor credit history, a decision not to hold any inventory or particular marketing strategies.
- Is the total customer base for the manufacturer’s product in the resellers’ geographic market sufficiently large that is practical for all competing resellers in that market to achieve the sales necessary to qualify for the discount? If so, the discount is “available” within the meaning of the Robinson-Patman Act.

## Examples of “Available” Discounts

Pennsylvania Manufacturer X has sent written notice to Distributors A, B and C that X will extend a 5% discount off of invoice to any distributor who purchases at least 500 cases of its beer each month. Distributors A, B and C are all located within a four-block radius of one another in Philadelphia, and are competitors of one another.

- Ex. 1. A is the largest of the three distributors, has warehouse capacity of 30,000 beverage cases, and routinely purchases and resells 750 cases or more of X’s beer each month. Distributor A requests and receives the 5% discount from Manufacturer X. Distributor B is the second largest distributor, has a warehouse capacity of 20,000 beverage cases, but usually purchases no more than 400 cases from X each month. Distributor B prefers to carry a wide selection of beers, and chooses to emphasize the promotion and sale of German and Australian beers. B believes it cannot continue to feature the sale of imported beers and increase its purchases from X. B, therefore, chooses not to increase its purchases from Manufacturer X, and does not earn the 5% discount. Distributor C is the smallest of the three competing distributors, yet still has a warehouse capacity of 7,000 beverage cases. Distributor C currently purchases only 250 cases each month from Manufacturer X, and would like to increase those purchases and earn the discount. Manufacturer X has placed C on a C.O.D. payment basis because it is a slow paying account, C does not want to pay X the small fee it charges for delivery, C can pick up at X only once a month, and its pick-up van can carry no more than the 250 cases it currently purchases each month.

**NO VIOLATION: Distributors A, B and C could all qualify for the 5% discount offered to them by Manufacturer X, however, only A receives the discount for reasons beyond X’s control. B has made a strategic business decision not to increase the number of cases of domestic beer it keeps on hand for sale, wishing instead to give priority to certain imported brands. As a result, B does not receive the 5% discount from Manufacturer X. Distributor C would like to increase its purchases from X in order to qualify for the 5% discount, but it does not have good enough credit to purchase that many cases, and is only willing to make the trip to Manufacturer X each month. Distributor C cannot haul as many as 500 cases in its van at one time in order to meet the 500 case minimum.**

continued...

Ex. 2. Manufacturer X offers a 10% discount off of invoice to all of the three competing distributors, if they purchase at least 1,000 cases of its beer each month. Distributors A, B and C all have more than sufficient warehouse capacity, credit and hauling capacity to purchase at least 1,000 cases each month, and all three want to receive the 10% discount. Distributor A usually purchases and resells 1,100 cases of X's beer each month, B purchases and resells 600 cases each month, and C purchases and resells 500 cases each month. Manufacturer X has never sold, however, more than 2,500 cases of its beer in any given month in the entire city of Philadelphia.

**VIOLATION: The top discount is not practically available to all three distributors because the customer base they serve is too small to sustain sales of 3,000 cases per month of X's beer. Under these circumstances, the volumes set by Manufacturer X to achieve the 10% discount are not commercially reasonable.**