The American
Antitrust Institute

THE ROBINSON-PATMAN ACT SHOULD BE REFORMED,

NOT REPEALED

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE

WORKING GROUP ON THE ROBINSON-PATMAN ACT

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2919 ELLICOTT ST, NW • WASHINGTON, DC 20008
PHONE: 202-276-6002 • FAX: 202-966-8711 • [redacted]
www.antitrustinstitute.org

SUMMARY

As many critics have claimed, enforcement of the Robinson-Patman Act can be anticompetitive: by preventing large buyers from inducing and passing on price concessions, Robinson-Patman cases may protect small firms at the expense of competition and consumers. Halting discrimination that is not cost justified, however, can also advance important policy goals: it creates a more level playing field for small business and in many situations benefits consumers. Congress' unwillingness to repeal or sharply cutback the Act, despite being pressed to do so, shows that it values the protection of small business as well as consumer welfare. In order to achieve a better balance of these goals, we recommend that the Antitrust Modernization Commission propose three changes in the statute or its interpretation:

(1) Plaintiffs in secondary line price discrimination cases should be required to prove either that the discriminating seller had market power or that the favored buyer had buyer power. This change would not require that plaintiffs show monopoly power or monopsony power.

(2) Defendants should be allowed to establish the cost justification defense if they can prove that the discriminatory price was reasonably related to cost savings realized in dealing with the favored buyer.

(3) Plaintiffs challenging discrimination in promotional allowances or services should be required to show competitive injury.

These reforms would reduce anticompetitive enforcement of the Act while preserving its ability to halt favoritism that poses a substantial and unjustified threat to small business or consumers.

I. Introduction

The Working Group on the Robinson-Patman Act established by the American Antitrust Institute appreciates the opportunity to comment on this important and controversial policy issue. These comments represent a consensus of the Working Group, but it should not be assumed that all agree with every statement or position. The chair of the Group and the principal author of these comments is John B. Kirkwood (Seattle University).[1] The other members are Joseph P. Bauer (University of Notre Dame), Albert A. Foer (AAI President), Robert A. Skitol (Drinker Biddle and Reath LLP), and Robert L. Steiner (Consultant and AAI Senior Research Fellow).[2]

For many years, critics have argued that the Robinson-Patman Act is a protectionist statute, at odds with the other antitrust laws, and that it should therefore be repealed or at least substantially revised. Yet whenever Congress has considered the issue, small business has fervently supported the Act, and Congress has left it unchanged.[3] To achieve a better balance of these opposing perspectives – both of which have considerable legitimacy – we recommend that the Antitrust Modernization Commission propose reforms that make the Robinson-Patman Act less likely to harm – and more likely to enhance – consumer welfare while preserving its central objective: providing a more level playing field for efficient small businesses. Such a balance is

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[1] Seattle University Law School, P.O. Box 222000, Seattle, WA 98122-1090, 206-398-4065, [redacted]

[2] In the course of these comments, we respond to many of the Commission's specific questions about the Robinson-Patman Act.

[3] *See, e.g.*, Irving Scher, *How the Federal Trade Commission Can Modernize Interpretations of the Robinson-Patman Act*, Apr. 1, 2005 ("a Congressional effort to repeal or amend the statute in 1975 had no success whatsoever, and an effort by the ABA Antitrust Section in 1991 to amend the statute failed to gain enough sponsors even to get a bill introduced").

economically and politically desirable, and should be reflected in national competition policy.

A. Robinson-Patman Enforcement

Enforcement of the Robinson-Patman Act falls into two basic categories: primary line enforcement and secondary line enforcement. Most of the current controversy about the Act relates to secondary line enforcement.

Primary line enforcement addresses discriminations that threaten to injure competition between *sellers*. The classic case arises when a seller charges a high price in a geographic market where it has monopoly power, and a below-cost price in a geographic market where it faces competition. The seller can use the excess profits from the market in which it has monopoly power to subsidize its losses in the competitive market, a strategy that may allow it to drive out competitors and acquire monopoly power in that market as well. The seller's ability to price discriminate, in short, facilitates predatory pricing.

In contrast, secondary line enforcement addresses discriminations that threaten to injure competition between *buyers*. In the classic case, a large buyer induces a price reduction that is neither justified by cost savings nor made available to smaller, competing buyers. The large buyer then uses its unjustified advantage to deprive the disfavored buyers of business or profits, driving some of them out of business. If the proof requirements of the Act are met and no defense is available, both the discriminating seller and the inducing buyer are liable.[4]

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[4] *See* Sections 2(a) and 2(f) of the Robinson-Patman Act, 15 U.S.C. §§ 13(a) & (f). Classic secondary line discrimination differs from two standard economic models of price discrimination. In the most common, a seller with market power separates its customers into two groups with differing elasticities of demand. If the seller can keep each group separate, preventing arbitrage between them, it can charge the

The Act applies not only to discriminations in price but to discriminations in promotional allowances and services as well. The Act's bans on promotional discrimination are stricter than its prohibition of price discrimination, since a disfavored buyer need not show competitive injury, and the discriminating seller cannot offer an efficiency justification.[5] On the other hand, the Act does not impose liability for inducing a discrimination in promotional allowances or services.[6]

B. Reform of Primary Line Enforcement

To a large degree, the Supreme Court has already reformed primary line enforcement. In *Brooke Group*, the Court ruled that primary line discrimination cannot violate the Robinson-Patman Act unless it meets the requirements for predatory pricing under the Sherman Act: below-cost pricing and recoupment.[7] The Court also made clear

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group with the less elastic demand a higher price than the other group. In classic secondary line discrimination, however, favored and disfavored buyers differ primarily in their buyer power – their ability to induce a discriminatory price that is not cost justified. In addition, they are not separated into distinct markets but compete with each other, potentially harming both the disfavored buyers and consumers.

In a second standard model, a buyer with monopsony power discriminates among its suppliers, paying some a lower price than it pays others. In secondary line discrimination, however, the favored buyers do not discriminate among their suppliers but cause one or more of their suppliers to discriminate among competing buyers. As explained below, moreover, the favored buyers induce such discrimination not by exercising monopsony power in the standard way but by wielding bargaining power.

[5] *Cf.* Sections 2(d) and 2(e) of the Act, 15 U.S.C §§ 13(d) and (e), *with* Section 2(a).

[6] Section 2(f) applies only to a "discrimination in price." The courts have allowed the Federal Trade Commission to close this gap in an equitable action under Section 5 of the FTC Act, *see, e.g.,* Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), but small firms injured by a promotional discrimination cannot recover damages from the favored buyer under either the FTC Act or the Robinson-Patman Act. They may be able to recover, however, under state little FTC Acts, statutes patterned after the federal ban on unfair methods of competition.

As part of its review of the Robinson-Patman Act, the Commission should consider whether Section 2(f) should be extended to cover promotional discrimination. The existing limitation is an anomaly, inconsistent with the objectives of the Act, and eliminating it would be more desirable if the Act's ban on promotional discrimination were reformed as we propose.

[7] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).

that primary line enforcement has the same objective as the other antitrust laws; i.e., to promote consumer welfare.[8] While the probability of consumer harm may not be as high in a Robinson-Patman action as in a Sherman Act case, the Court has otherwise brought primary line enforcement in line with enforcement of the other antitrust laws.

Given *Brooke Group*, the Antitrust Modernization Commission need not devote attention to primary line enforcement, with one possible exception. Section 3 of the Act makes it a crime to engage in predatory pricing.[9] Since the tests for predatory pricing – below-cost pricing and recoupment – are difficult to apply even after *Brooke Group*, criminal penalties seem generally inappropriate. Because Section 3 is no longer enforced and probably should not be, we recommend that it be repealed.

C. Reform of Secondary Line Enforcement

As critics have noted, secondary line cases may protect smaller buyers at the expense of market wide competition, reducing consumer welfare. In addition, secondary line enforcement has frequently targeted relatively small sellers, who can least afford to defend themselves, and imposed compliance burdens on all sellers, raising costs. At the same time, secondary line enforcement can advance important policy goals. By

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[8] The Court used consumer welfare, not protection of small business, as the criterion for evaluating its own primary line precedent and for fashioning legal rules for the primary line offense. *See* 509 U.S. at 221 (referring to the "antitrust laws' traditional concern for consumer welfare and price competition"), 224.

[9] Section 3 of the Act, 15 U.S.C. § 13a, prohibits geographic price discrimination "for the purpose of destroying competition, or eliminating a competitor" and selling "goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." Section 3 also makes it a crime for a seller to engage in secondary line price discrimination, but imposes no competitive injury requirement and allows no defenses for cost justification, meeting competition, or changing conditions.

preventing unjustified price discrimination, secondary line strictures create a more level playing field for small business and improve consumer welfare in many situations.[10]

By resisting all prior efforts to abolish or substantially amend the Robinson-Patman Act, Congress has shown that it values the protection of small business as well as consumer welfare. In this context, we do not believe it would be fruitful or constructive for the Commission to recommend repeal or radical revision of the Robinson-Patman Act.[11] Instead, we recommend that the Commission propose three major reforms. These changes would bring the Act more in line with the other antitrust laws without abandoning its fundamental purpose. Indeed, they would refocus secondary line price discrimination cases on their original objective – protecting small firms from price differentials that reflect a large firm's buying power rather than cost savings.[12] More generally, they would put the Act on a sounder economic footing, differentiating more clearly between anticompetitive and procompetitive uses of the Act while preserving its ability to halt discrimination that poses a substantial and unjustified threat to small business or consumers.

Market Power. The first reform would require plaintiffs in secondary line price discrimination cases to prove either that the discriminating seller had market power or that the favored buyer had buyer power. If the market was so competitive that neither the

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[10] As explained below, secondary line enforcement may benefit consumers by enhancing choice, lowering long run price levels, or eliminating inefficiency.

[11] The Commission should not propose, for example, that every Robinson-Patman plaintiff should have to demonstrate injury to competition and consumer welfare.

[12] The Supreme Court noted in *Morton Salt* that Congress' avowed goal in passing the Act was to "protect competition from all price differentials except those based in full on cost savings." FTC v. Morton Salt Co., 334 U.S. 37, 44 (1948).

discriminating seller nor the favored buyer had economic power, the challenged discrimination was likely to be cost justified. In an intensely competitive market, moreover, a small buyer is less likely to be injured by a seller's discrimination, since alternative, nondiscriminating suppliers are more likely to be available. This reform would not require a plaintiff to show that the seller had monopoly power or that the favored buyer had monopsony power. As explained below, a high degree of power is unnecessary for unjustified discrimination to occur and injure disfavored buyers. In these comments market power means the power to price above marginal cost and buyer power means the power to induce a discriminatory price that is not cost justified.[13]

Cost Justification. The second reform would allow defendants to establish the cost justification defense if they can show that the discriminatory price was reasonably related to cost savings realized in dealing with the favored buyer. A "reasonable relationship" test – already the law in the functional discount area – would preclude the courts from denying the defense simply because of minor defects in a defendant's cost study.

Promotional Discrimination. The final reform would require a plaintiff challenging discrimination in promotional allowances or services to establish competitive injury – the same kind of injury that a plaintiff in a secondary line price discrimination case must show. By requiring proof of competitive injury in both contexts, this reform would make it less likely that Robinson-Patman actions would reduce consumer welfare, while continuing to prohibit favoritism that actually distorts competition between large and small firms.

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[13] In order to possess either type of power, a firm must be able to exercise it profitably.

D. Overview

In Section II, we confirm that under current law, secondary line Robinson-Patman enforcement can pose significant threats to price competition and consumer welfare. In Section III, we stress that secondary line enforcement can also promote important policy goals, including fairness, distributional efficiency, and consumer welfare. In Section IV, we explain that these goals would be more difficult to achieve without the Robinson-Patman Act. In Section V, we present our proposed reforms – reforms that would reduce the Act's adverse consequences while maintaining or enhancing its most important benefits.

II. Secondary line enforcement can be anticompetitive.

As many critics have recognized, secondary line cases can be anticompetitive: they can insulate both sellers and buyers from competition with more aggressive rivals even when such competition would benefit consumers. In particular, large buyers can benefit consumers by inducing discriminatory concessions that they then pass on in the form of lower prices, more outlets, or better service. These concessions can be especially beneficial when they ultimately spread to other buyers, causing oligopolistic pricing at the seller level to collapse. When price discrimination is cost justified, moreover, it can enhance economic efficiency as well as consumer welfare, yet court decisions have made the Act's cost justification defense notoriously difficult to satisfy.[14] As a result, it is

[14] In Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 561 n. 18 & 564 n. 21 (1990), the Court referred to the rigorous and exacting standards of the defense and noted that authorities had characterized it as "difficult, expensive, and often unsuccessful," even "largely illusory in practice." *Accord,* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 586 (3rd ed. 2005) (the cost justification defense has been "rigidly construed by courts" and has "not saved many defendants from liability").

widely felt that many secondary line cases have harmed consumer welfare while ignoring Congress' decision to permit discounts based on cost savings.[15]

Secondary line enforcement has also placed significant and sometimes unjustified burdens on sellers. In a study of FTC complaints issued in the 1960s and early 1970s, Scherer and Ross found that "the brunt of the Commission's effort fell upon the small businesses Congress sought to protect."[16] In addition, both large and small sellers have had to devote significant resources to ensuring compliance with the Act's requirements, raising their costs.

The Act's anticompetitive consequences, however, have been limited by its meeting competition defense. This defense allows a seller to grant a discriminatory price or promotional benefit to a large buyer if the seller has a reasonable, good faith belief that the favorable price or promotional benefit was necessary to meet a rival's offer.[17] This defense is often available to sellers granting concessions to large buyers. In the usual discrimination case, a buyer induces a concession not by exercising monopsony power in the textbook fashion – reducing its total purchases from all sellers – since that would simply cause a reduction in the market price, a price available to smaller buyers as well. Instead, a buyer normally obtains a preferential price by using bargaining power – threatening to withdraw or withhold business from a particular seller unless it grants a concession. Because such a threat is more credible if the buyer can plausibly claim it has

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[15] *See, e.g.,* ABA ANTITRUST SECTION, MONOGRAPH NO. 4, THE ROBINSON-PATMAN ACT: POLICY AND LAW (vol. 1, 1980 & vol. 2, 1983).

[16] *See* F.M. SCHERER & DAVID ROSS, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 516 (3rd ed. 1990).

[17] *See* Section 2(b) of the Act, 15 U.S.C. § 13(b).

a better offer from a competing seller, a seller that grants a concession to a large buyer often has a basis for believing it is meeting competition.

Despite the growth of large buyers like Wal-Mart, Barnes & Noble, and Costco, there have been relatively few recent secondary line cases against the sellers who supply these buyers, probably because of the meeting competition defense. There have been even fewer cases against the buyers themselves. Under Supreme Court precedent, a buyer can be held liable for inducing a discriminatory concession only if the seller also violated the Act, which could not happen if the seller had a meeting competition defense.[18]

The Act's adverse consequences have also been limited by the numerous requirements a plaintiff must satisfy in order to establish liability and prove damages. A plaintiff cannot obtain damages for secondary line price discrimination, for example, unless the following requirements, among others, are met:

- The discrimination involved the sale of a commodity, not a service.[19]
- The discriminatory price was not available to the plaintiff. That is, the plaintiff could not have obtained the lower price by making reasonable adjustments in its business or practices.[20]

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[18] *See* Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69 (1979).

[19] Section 2(a) applies only to discriminations between "purchasers of commodities." While this limitation may have made sense in 1936, today, when a large proportion of the economy is devoted to the provision of services, it seems artificial. On the other hand, price discrimination appears to be common in some service sectors (e.g., media advertising), and without a better understanding of the purposes and consequences of such discrimination, we are not ready to recommend an expansion of the Act.

[20] *See, e.g.*, Shreve Equip., Inc. v. Clay Equip. Corp., 650 F.2d 101, 105 (6th Cir.) ("Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or the discrimination is not the proximate cause of the injury"), *cert. denied*, 454 U.S. 897 (1981). *Cf.* Boise Cascade Corp., 107 F.T.C.

- The plaintiff suffered competitive injury. That is, the plaintiff lost money not simply because it paid a higher price than the favored buyer, but because it competed with the favored buyer, who used its lower price to increase advertising, reduce resale prices, or otherwise benefit consumers, taking business from the plaintiff or forcing it to offer comparable benefits.[21]

III. Secondary line enforcement also advances important policy goals.

Despite its costs, secondary line enforcement can further significant policy goals. When a discrimination reflects the power of a large buyer rather than cost savings – that is, when it constitutes true economic discrimination – halting that discrimination serves the original goal of the Act: protecting small buyers from an unjustified competitive disadvantage.

Creating a more level playing field for small business also advances widely shared notions of fairness and may increase distributional efficiency. To many people, it seems unfair that a small buyer has to pay more for an input than a large buyer when the costs of supplying the two firms are the same. This unjustified disadvantage may cause the small firm's owners to lose substantial profits or sometimes their life savings, even though their firm is no more costly to serve than the large buyer. In addition, differences in price that cannot be cost justified can reduce distributional efficiency. When a discrimination is large enough, the favored buyer can take business from the disfavored

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76, 218 ("lower prices are 'unavailable' when a purchaser must alter his purchasing status [e.g., become a wholesaler] before receiving them"), *rev'd on other grounds,* Boise Cascade Corp. v. FTC, 837 F.2d 1127 (D.C. Cir. 1988). For a recent, extended discussion of the availability doctrine, see Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., No. 2:03-CV-30, 2005 WL 1325012 (E.D. Tenn. June 3, 2005).

[21] *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (rejecting "automatic damages" based simply on the size of the differential).

buyers even if the disfavored buyers have lower operating costs. When the favored buyer is less efficient than the disfavored buyers, a non-cost-justified discrimination is likely to raise the total costs of distribution, misallocating resources.[22]

Secondary line enforcement can also enhance consumer welfare. A persistent, non-cost-justified discrimination induced by a large buyer may harm consumers in five ways:

First, it can allow the favored buyer to take business or profits from disfavored buyers, reducing their number or vigor and depriving consumers of the convenient locations, distinctive services, superior selection, or other attractive features they would have offered. If consumers who value those features lose more than other consumers gain from the lower prices (or other enhanced offerings) offered by the favored firm, non-cost-justified discrimination has reduced consumer welfare.

Second, a lower price induced by a large buyer may lead to *higher* consumer prices if the large buyer uses its unjustified advantage to gain so much market share that it acquires market power as a seller. It can then raise prices to consumers, so long as its unjustified advantage or other circumstances create a barrier to entry and expansion. The same result can occur if several buyers exact unjustified concessions and use them to

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[22] Posner characterized this inefficiency as one of the principal economic objections to systematic, non-cost-justified discrimination. *See* RICHARD A. POSNER, THE ROBINSON-PATMAN ACT: FEDERAL REGULATION OF PRICE DIFFERENCES 3 (1976). In his well-known study of an earlier power buyer, Adelman concurred:

> If we desire the competitive process to insure that only the most efficient processes and producers survive, then discrimination serves to distort the system of rewards and punishments of a profit-and-loss system: it means that the survivors will not necessarily be the most efficient.

M.A. ADELMAN, A&P: A STUDY IN PRICE-COST BEHAVIOR AND PUBLIC POLICY 159 (1959).

acquire shared market power. In short, secondary line violations may produce higher prices if they increase concentration in product markets and enable the favored buyers to exercise market power, either individually or collectively.

Third, buyer-induced non-cost-justified discrimination may result in higher prices to consumers when a powerful buyer induces sellers to discriminate not by *lowering* their prices to the favored buyer, but by *raising* them to other buyers. By forcing up its rivals' costs, the favored buyer can, in the presence of entry barriers, acquire market power as a seller and raise its own prices.

Fourth, buyer-induced discrimination may harm consumers by allowing the favored buyer to become less efficient. Because an unjustified concession confers a competitive advantage on the favored buyer, it can use that concession to shelter itself from competition, permitting it to survive when its costs are excessive. These inflated costs not only waste resources but tend to make the favored firm less innovative and less responsive to changing consumer tastes.

Fifth, unjustified discrimination induced by large buyers may harm consumer welfare by reducing the profitability of suppliers and causing them to curtail their investment in the industry. This is most likely to harm consumers if the suppliers were not making excess profits prior to the unjustified discrimination. In that case, future investment may be less than optimal and consumers may eventually pay higher prices or have fewer choices.[23]

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[23] For a more detailed description of these welfare-reducing cases, see John B. Kirkwood, *Buyer Power and Exclusionary Conduct: Should* Brooke Group *Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?* 72 ANTITRUST L.J. 625, 647-51 (2005).

Like its adverse consequences, the benefits of secondary line enforcement are restricted by the meeting competition defense. If the defense is satisfied, discrimination cannot be attacked under the Robinson-Patman Act, even if doing so would promote fairness, increase distributional efficiency, and enhance consumer welfare.

IV. Repeal of the Robinson-Patman Act would make it more difficult to challenge secondary line discrimination.

If the Robinson-Patman Act were repealed, it is unlikely that the remaining sections of the Clayton Act could be used to combat secondary line discrimination, since they address different practices. Section 5 of the Federal Trade Commission Act, which prohibits unfair methods of competition, covers secondary line discrimination, but there is no private right of action under Section 5, and in recent years the FTC has not challenged discriminatory behavior – even under the Robinson-Patman Act – unless it was likely to cause consumer harm.[24]

Similarly, the Sherman Act would not ordinarily reach secondary-line discrimination unless the plaintiff could show that it was likely to reduce consumer welfare. Absent horizontal collusion, neither the granting nor the inducement of a discrimination is per se illegal. And without a per se offense, a plaintiff could not

[24] In its only recent Robinson-Patman case, the FTC found a threat to consumer welfare because the respondent was using secondary line discrimination as a tool to exclude a rival seller and protect its own dominant position. *See* McCormick & Co., FTC Dkt. No. C-3939 (April 27, 2000) (statement of Chairman Pitofsky & Commissioners Anthony & Thompson). Apart from *McCormick*, the FTC has not filed a secondary line case since 1988, when it sued several book publishers, ultimately dismissing these cases without securing relief. *See, e.g.*, Harper & Row Publishers, Inc., 122 F.T.C. 113 (1996). The Justice Department has not enforced the Robinson-Patman Act for many decades.

establish Sherman Act liability, under either Section 1 or Section 2, without evidence of consumer harm.[25]

Even when secondary-line discrimination is likely to cause net consumer harm, Sherman Act liability is not assured. Courts may be reluctant to hold a discriminating seller liable for violating Section 1 unless its contract with the favored buyer requires that it discriminate against competing buyers. Absent such an exclusionary term, a contract that simply calls for a price reduction may not trigger Section 1 liability. The reach of Section 2 is clearly limited. Courts cannot hold an inducing buyer liable for violating Section 2 unless it had monopsony power or its behavior created a dangerous probability of such power. Yet a buyer does not have to command a very large share of purchases – it does not have to be a single-firm monopsonist – in order to cause consumer harm. Substantial but non-dominant buyers, such as Wal-Mart or Costco in the grocery industry, may be able to induce unjustified concessions that injure consumers.[26]

If the Robinson-Patman Act were repealed, therefore, most secondary-line discrimination could not, or would not, be remedied under the federal antitrust laws. Disfavored buyers would have to rely on state antitrust statutes. In most states, a broad antidiscrimination law or little FTC Act is likely to afford adequate protection, but there are two risks. In some states, the antidiscrimination statute does not permit claims for

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[25] *See, e.g.,* SCFC ILC, Inc. v. VISA USA, Inc., 36 F.3d 958, 965 (10th Cir. 1984) ("in the context of section 1, the focus of the procompetitive justifications for the business practice remains the ultimate consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers"); U.S. v. Microsoft Corp., 253 F.3d 34, 58 (D.C. Cir. 2001) ("to be condemned as exclusionary, a monopolist's act must have an 'anticompetitive effect.' That is, it must harm the competitive *process* and thereby harm consumers") (emphasis in original).

[26] *See* Paul W. Dobson, *Exploiting Buyer Power: Lessons from the British Grocery Trade*, 72 ANTITRUST L.J. 529, 554-56 (2005) (British Competition Commission study found that several grocery chains with market shares of approximately 10% received significant price breaks that were not cost justified); Kirkwood, *supra* note 23, at 642-44.

secondary line injury.[27] At the other extreme, repeal of the Robinson-Patman Act could spur a populist backlash, causing states to adopt new laws, or new interpretations of existing law, that are even more protectionist than the Robinson-Patman Act.

V. Three reforms of the Robinson-Patman Act would reduce its undesirable effects while maintaining its ability to prevent substantial threats to small business or consumers.

A. Market Power Requirement for Price Discrimination

We recommend, first of all, that a plaintiff challenging secondary line price discrimination be required to prove either that the discriminating seller had market power or that the favored buyer had buyer power. There are two reasons for this reform. First, if neither the discriminating seller nor the favored buyer had economic power, the contested differential was likely to be cost justified. In an intensely competitive market – on both the seller and the buyer side – sellers do not normally have the ability to discriminate profitably among their customers, unless the discrimination is cost justified. By requiring proof of either market power or buyer power, therefore, this reform would discourage attacks on cost justified discrimination, furthering both the stated objective of the Robinson-Patman Act and sound economic policy.

Second, if neither the discriminating seller nor the favored buyer has economic power, material competitive injury is less likely. If the seller lacks market power, substitute products are likely to be available, and if the favored buyer lacks the power to induce unjustified concessions, those products are more likely to be offered at a nondiscriminatory price. As the Justice Department pointed out in a recent amicus brief, "a disfavored purchaser is unlikely to be harmed by discrimination unless either the seller

[27] ABA ANTITRUST SECTION, ANTITRUST LAW DEVELOPMENTS 636 (3d ed. 1992).

has significant market power of the favored purchaser is significant enough to sellers to demand concessions unavailable to others."[28]

This reform would require plaintiffs to show market power or buyer power, not monopoly power or monopsony power.[29] Neither monopoly power nor its mirror image, a high degree of monopsony power, is necessary for unjustified discrimination. As many authorities have noted, a seller may engage in economic (i.e., not cost justified) price discrimination so long as it has some market power.[30] Likewise, a buyer need not be a single-firm monopsonist to induce a concession that is not cost justified: a substantial but non-dominant buyer may be able to obtain an unjustified price break.[31]

B. Reasonable Relationship Test for Cost Justification

We also recommend that defendants be allowed to establish the cost justification defense by showing that the preferential price was "reasonably related" to cost savings realized when dealing with the favored buyer. This would replace the existing, overly restrictive interpretation of the cost justification defense with a more sensible and practical inquiry. The issue would not be whether the defendant's cost study was free from all defects or whether the defendant had cost-justified the discrimination to the penny, but whether the cost savings were reasonably documented and reasonably

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[28] Brief for the United States as Amicus Curiae Supporting Petitioner, Volvo Trucks North America Inc. v. Reeder-Simco GMC, Inc., Supreme Court Dkt. No. 04-905, May 2005, at 25.

[29] Nor would a plaintiff have to show consumer harm.

[30] *See, e.g.*, DENNIS W. CARLTON & JEFFREY M. PERLOFF, MODERN INDUSTRIAL ORGANIZATION 294 (4th ed. 2005) (for successful price discrimination, a "firm must have some *market power* (the ability to set price above marginal cost profitably)") (emphasis in original); HOVENKAMP, *supra* note 14, at 574 ("persistent price discrimination requires that a seller (or group of sellers) have at least some market power").

[31] *See* note 26 *supra*.

approximated the price differential, and whether the lower price was made available to all buyers that could provide the savings. The "reasonably related" test is already the standard for functional discounts. In *Hasbrouck*, the Supreme Court ruled that a seller's wholesale discounts are immune from Robinson-Patman liability if they are reasonably related to the extra costs that wholesalers incur in performing wholesale functions.[32]

C. Competitive Injury Requirement for Promotional Discrimination

Unlike Section 2(a), Sections 2(d) and 2(e) prohibit discrimination in promotional allowances and services even if the discrimination does not injure competition between the favored and disfavored buyers. Since the omission of a competitive injury requirement from those sections was deliberate,[33] adding such a requirement may depart more sharply from the original legislative purpose than the first two reforms we propose. Nonetheless, we think such a change would be desirable.

Many sellers in many industries provide promotional allowances or services to their customers. When sellers discriminate in the provision of these benefits, that can enhance consumer welfare without injuring competition between the favored and disfavored buyers. The favored buyers may pass on their concessions to consumers, but

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[32] Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 571 (1990) ("a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act"). The Court also indicated that a functional discount might be justified if it was reasonably related to the *value* of the purchasers' functions, but did not decide the issue.

In the functional discount context, a reasonable relationship standard is especially appropriate because the costs in question are *customer* costs – the costs customers incur in performing the desired functions. A seller is unlikely to have detailed knowledge of its customers' costs. In contrast, a seller should have a much better understanding of whether *its own* costs justified a preferential price to a large buyer. Nevertheless, a reasonable relationship test appears appropriate in the cost justification context as well, since it is usually not practical to do a full cost study before deciding whether to meet a buyer's demand for a lower price. One appellate court has already suggested that a defendant would be able to justify a differential if it could show that the price difference was "reasonably related to its differences in costs." Acadia Motors, Inc. v. Ford Motor Co., 44 F.3d 1050, 1059 (1st Cir. 1995).

the disfavored buyers may be sufficiently differentiated – in their locations or services – that they do not actually lose business or profits. Under the Act as written, however, such discrimination is prohibited, unless the seller has a meeting competition defense. It seems inappropriate to sacrifice consumer welfare when the discrimination at issue does not tilt any playing field on which both favored and disfavored buyers compete.

The loss in consumer welfare may be especially great when Sections 2(d) and 2(e) prevent small sellers and new entrants from competing effectively with large incumbents. Allowances and services can often be more potent means for smaller rivals to gain market share than price reductions, yet the Act as written discriminates against this method of competition. By providing more parallel treatment of price and promotional discrimination, this change would also reduce the Act's distortion of business choices. At present, the Act creates an incentive for a seller to reward a large buyer with a price cut rather than additional promotional benefits, even if the latter is more efficient. As noted, Section 2(a) contains a competitive injury requirement and a cost justification defense; Sections 2(d) and 2(e) contain neither. By reducing this disparity, our proposed change would give sellers more flexibility in selecting their means of competition. Moreover, adding a competitive injury requirement should not greatly curtail enforcement of Sections 2(d) and 2(e). The federal antitrust agencies almost never bring a Section 2(d) or 2(e) action, and a private plaintiff cannot obtain damages under either section without showing competitive injury.

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[33] *See* FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959).

D. Implementation

While our third reform would require legislative action, the second should not. The existing, overly restrictive interpretation of the cost justification defense is the product of judicial decisions, not the language of the Act, which simply requires that a price differential make "only due allowance" for cost savings.[34] Since this language is so general, courts should be able to adopt a more reasonable interpretation of it, just as the Supreme Court adopted a reasonable relationship test for functional discounts.

The first reform might also be implemented without amending the Act. Requiring proof of market power or buyer power would strengthen key elements of the statute – the competitive injury requirement and the cost justification defense. Judicial adoption of it would also comply with the Supreme Court's instruction that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."[35]

VI. Conclusion

Our reforms would increase the ability of the Act to differentiate between procompetitive and anticompetitive discrimination. By increasing the plaintiff's burden and reducing the defendant's burden in a price discrimination case, the first two would curtail challenges to cost-justified discrimination, enhancing the avowed purpose of Section 2(a) and making its enforcement more procompetitive. By adding an injury requirement to Sections 2(d) and 2(e), the third reform would allow more procompetitive promotional discrimination, enhancing consumer welfare. All three changes would limit

[34] *See* Section 2(a), 15 U.S.C. § 13(a).

[35] Brooke Group, 509 U.S. at 220, quoting Great Atl. & Pac. Tea Co., 440 U.S. at 80 n. 13. On the other hand, the statutory language is less conducive to the first reform: the Act does not mention market power or buyer power and places the burden of addressing cost justification on the defendant. *See* Sections 2(a) and 2(b), 15 U.S.C. § 13(a) & (b).

the Act's burdens on sellers while preserving its ability to reach discrimination that poses a substantial and unjustified threat to small business or consumers.