Terms Pushback Strategy (TPS) Meets the Robinson-Patman Act (RPA): Does Granting Extended Terms for One Customer Mean Granting Extended Terms for All within the Class?

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Abstract

Recently, I considered how vendors providing goods can use the Robinson-Patman Act to rebuff a customer's request for extended terms or, alternatively, use the Act's "Meet the Competition" exception to limit extended terms to just the requesting customer. Where that article focused on a vendor's response to a customer's request for extended terms (and where the customer may or may not have been an indispensable account), this article focuses on a situation in which (1) a customer unilaterally rolls out a TPS across its entire customer base, (2) no RPA exceptions are available, and (3) the vendor cannot afford to lose the customer's business. Given this fact pattern, this article considers whether agreeing to the customer's TPS requires the vendor to offer comparable extended terms or favorable pricing to all of its similarly-situated customers.

A Refresher on the RPA

Proving Competitive Injury

There are three separate levels of discrimination actionable under the RPA (Primary Line, Secondary Line and Tertiary Line), but this article is geared towards resellers and is thus focused on Secondary Line injuries, which occur where a vendor offers more favorable pricing to certain customer(s) without extending comparable pricing to all competing customers. There are two key considerations here: (1) what is pricing under the RPA, and (2) how is competition established between customers

Pricing
Pricing includes price and credit terms as well as vendor concessions, such as credits, rebates, promotional allowances and early pay discounts. The RPA is limited to the sale of tangible goods and does not cover services.

Establishing Competition
In order to establish a Secondary Line injury, a customer-plaintiff must prove that there is a reduction in competition, over a sustained period of time, in the marketplace where the supplier's disfavored customer(s) compete with the allegedly favored customer(s).

The RPA, however, does not expressly define what factors establish competition, instead leaving that determination for the courts. Courts have tended to approach each allegation of discriminatory pricing as a unique factual inquiry (leaving little discernable precedent), but the following four factors appear to be the most consistently considered:

- The timing of the allegedly discriminatory sales (the sales must be contemporaneous and sustained over a period of time);
- The customer's functional level (wholesaler? retailer?);
- The type of product the customer purchases (i.e. grade and quality); and
- The geographic region in which the customer does business (the favored and the disfavored customers' sales territories must overlap).

As a best practice, suppliers should class their customers according to the above four factors. While courts may consider additional factors, these four provide suppliers with a reliable benchmark for determining their potential liability under the RPA.

Exceptions

The RPA provides for several exceptions. Specifically, the RPA may allow price reductions and/or terms changes when:

- The pricing difference is intended, in good faith, to match the offer one of its competitors made to the mutual customer (Meet the Competition);
- The pricing difference is the result of differentials in the cost of manufacture, sale and/or delivery (Functional Discount) ; and
- Changing conditions affect the market for, or marketability of, the goods in question (Deterioration of Perishable Goods, Obsolescence of Seasonal Goods and Distress Sales).

These exceptions can be powerful tools for credit teams facing a TPS request, but, for reasons explained below, may be unavailable in a unilateral TPS setting.

Penalties

The RPA is a civil statute that may be enforced by the Federal Trade Commission (FTC), states' Attorney Generals and private parties (i.e. disfavored competitors). Private plaintiffs may bring both individual and class action lawsuits against alleged violators, seeking injunctive relief (where a competitive injury may occur) as well as treble damages (where actual evidence of a competitive injury is proffered).

Unilateral TPS, Multiple Competitors and RPA Compliance

The Problems with a Unilateral TPS

Customers do not always request extended terms. Some customers (usually large ones) may rollout a TPS across their entire supplier base to improve capital and increase working capital. Proctor & Gamble Co., for example, extended all of its vendor payment terms from 45 days to 75 days. Unilateral TPS rollouts present two primary problems for vendors: (1) rather than a request, which may be a negotiation, unilateral rollouts are akin to take it or leave it, as the customer believes it has the trade leverage; and (2) because they are rolled out across the customer's entire supplier base, rather than in response to one of the vendor's competitors offering more favorable pricing, it is unlikely that the extended terms will qualify for a meet the competition exception. Vendors face a larger problem when the customer rolling out the unilateral TPS is an indispensable account. Despite the increased DSO, management and the sales team value the customer's volume and product mix and deem the customer as one to keep notwithstanding the TPS.

RPA Compliance

Where the customer adopting the TPS does not directly compete with another, the vendor can agree to extended terms and still comply with the RPA. When that customer competes with one or more of the vendor's other customers, however, then the pricing falls under the RPA. In this setting, if the vendor accepts the unilateral TPS, then it must consider offering extended terms to all directly competing customers. Absent an RPA exception, when the vendor accepts extended terms from one customer, it is to offer comparable pricing to all competing customers within the RPA classification (whether in the form of extended terms, discounts or promotional allowances).

Facing a Unilateral TPS? The Credit Team's Response

Step 1: Complying with the RPA via Avoidance of Competitive Injury

As a starting point, the essence of price discrimination is that two or more competing customers are charged differing prices for the same commodity. Therefore, the customer-plaintiff(s) must identify some commonality in the proof of competing buyers and anticompetitive effects. Thus, the credit team's first step is attempting to classify its customer base. There is no RPA liability where the customer pushing the unilateral TPS does not directly compete with any of the

vendor's other customers. Where there are multiple competitors, however, the RPA applies.

Step 2: Finding Middle Ground via Price Increase

Despite the general "take it or leave it" nature of unilateral TPS rollouts with solvent customers, vendors facing terms extensions for multiple like-classed customers should attempt to negotiate a price increase with the customer pushing out the unilateral TPS (while keeping the other like-classed customers at their original price and terms). The price increase helps the vendor in two ways:

- The increased price helps the vendor offset the negative effect on the TPS on its DSO and cash flow; and
- The price increase keeps the extended terms customer proportionally equal to the other like-classed customers and does not result in any competitive injury, thereby complying with the RPA. The customer gets its extended terms in exchange for a price increase, while the vendor offsets the TPS' negative effects and avoids multiple terms extensions.

Though it remains unlikely a customer will be willing to negotiate its unilateral TPS on an individual-vendor-basis, this request is low risk/high reward and should be pursued by all vendors facing a unilateral TPS rollout.

Step 3: Reconsidering Future Sales via Profit/Loss Evaluation

If negotiations are unsuccessful and the unilateral TPS customer does not consent to a price increase, thereby forcing the vendor to offer comparable terms extensions to all like-classed customers, then the credit team's next step is performing a profit and loss evaluation with each customer to determine how multiple terms extensions will affect the vendor's cash flow and DSO. While the vendor may be able to carry the additional A/R for one customer (especially an important one), can it carry extended terms for multiple customers? Or does the aggregate added cost make keeping the crucial account cost-prohibitive? Where the cost of carrying A/R for multiple parties outweighs the value derived from the crucial relationship, the vendor may decline the extended terms.

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