

simplification of distribution channels may lessen confusion. But there is a grave question whether the resulting more rigid structure of business will not prove dangerously unadaptable to both secular and cyclical changes. Particularly does this probability appear disturbing in view of the likelihood that the groups which have sponsored this legislation, still pursuing the will-o'-the-wisp of security, will in the not distant future insist on hedging about the price system with further restrictions.

#### APPENDIX

The social situation which gave rise to the Robinson-Patman Act is understandable. Present political realities, furthermore, make repeal or drastic modification of this Act unlikely. Consequently, with a view to the possibility of making the Act more workable and to bringing it into closer accord with economic and marketing realities, the writer, in collaboration with Professors Isaacs, Learned, and Teele of the Harvard Graduate School of Business Administration, has drafted the suggested amendments shown below. The purposes of these amendments are as follows:

- (1) To make the Act approach more closely the original purpose of the Clayton Act, namely, to protect the general principle of competition.
- (2) To lessen the emphasis on cost as a basic criterion of discrimination.
- (3) To permit classification of customers in accordance with distributive functions performed.
- (4) To drop out the criminal (Borah-Van Nuys) section, which does not belong in the Act anyway, not having been a part of the original Robinson-Patman Bill.
- (5) To make good faith and absence of subterfuge the governing principle with respect to the propriety of brokerage fees, advertising allowances, and other collateral arrangements.
- (6) To relieve business of the dangerously severe threats of suits for triple damages in cases where the practices complained of do not tend to monopoly.

New matter is printed in italics. Matter to be deleted is enclosed in brackets.

#### ROBINSON-PATMAN ACT

[Public—No. 692—74th Congress]

[H. R. 8442]

#### AN ACT

To amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," approved October 15, 1914, as amended (U. S. C., title 15, sec. 13), is amended to read as follows:

Sec. 2. (a) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities [of like grade and quality], where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof

or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, [and] where the effect of such discrimination may be substantially to lessen competition, to tend to create a monopoly in any line of commerce, or substantially to disable, destroy, or prevent competition between the seller and his competitors or between and among customers of the said seller and their competitors, and either where such commodities are of like grade, quality, and quantity, or where the discrimination in price is excessive in that it is grossly out of proportion to the differences in grade, quality, or quantity put forward as the basis of such discrimination and not justified by the probable saving or other advantage to the seller resulting from differences in the grade, quality, or quantity, or method of sale or manufacture in any given case: Provided, That in determining quantities reference may be had to total quantities purchased during a season or other reasonable unit of time, and consideration need not be limited to single transactions. [competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established.] And provided further, That nothing herein contained shall prevent differentials that make only reasonable allowance for the different functions performed by the purchasers in commerce on behalf of the seller: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

COMMENT. The definition of the effects which a discrimination must have to render it unlawful has been redrafted to make certain that it is injury to competition, and not injury to competitors, which the law is designed to cover and to insure that the effect upon competition must be material, so that an inconsequential "injury" to competition will not suffice to sustain a complaint. The provision designating the persons between whom the affected competition shall be has been redrafted to achieve greater clarity without, it is submitted, restricting in effect the scope of the section. Instead of a proviso permitting quantity discounts where justified, the definition of a discriminatory price has been redrafted to prohibit excessive differentials in price, based not solely on differences in quantity but also on differences in grade and quality, thereby closing a door to evasion. Moreover, the justification for price differentials is made to rest not exclusively on savings in costs, which often may be not susceptible of proof, but on other advantages which the seller may be able to demonstrate results from the questioned transaction. The first proviso expressly authorizes functional discounts, an open question under the present Act that is discussed in the article to which these proposals are appended. The proviso authorizing the Federal Trade Commission to establish maximum quantity limits for price differentials is deleted on the grounds that the need for this provision has not been demonstrated and that the exercise of the power conferred by it might destroy opportunities for realizing economies of large-scale production.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been *such* discrimination in price or services or facilities furnished *as would be unlawful under this section if justification therefor were not proved*, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however, That [nothing herein contained shall prevent] a seller charged with unlawful discrimination may justify his conduct [rebutting the prima-facie case thus made] by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.*

COMMENT. The first change in the foregoing paragraph is for the purpose of removing any doubt that the burden of proof is on the Federal Trade Commission to show that a discrimination complained of is not merely *any* discrimination but is one which falls within the purview of the Act. The second change is for the purpose of permitting a seller to use the fact of meeting competition as a substantial defense, not merely as a means of shifting the burden of proof.

(c) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant *to any purchaser directly or indirectly, or for any purchaser directly or indirectly* to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except *it be in good faith for services actually rendered*. [for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.]

COMMENT. The changes in this paragraph are partly for the purpose of clarification and partly for the purpose of broadening the scope of "services actually rendered" and at the same time introducing good faith or absence of subterfuge as a criterion of judgment.

(d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is *made in good faith for services actually rendered or facilities actually furnished*. [available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.]

COMMENT. The purpose of the change in this paragraph is to substitute the test of services actually rendered in good faith for the ambiguous and unrealistic test of "proportionally equal terms."

(e) That it shall be unlawful for any person to *make indirectly such discriminations as are forbidden in Sec. 2. (a) [discriminate]* in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or-furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased; *and that where such services and facilities are not made available on request to all purchasers in reasonable proportion to the quantities purchased by them, the burden of proof shall be on the seller to show that there has not been indirectly a discrimination within the meaning of Sec. 2 (a)*. [upon terms not accorded to all purchasers on proportionally equal terms.]

COMMENT. Changes are made in this paragraph for the purpose of reinforcing the prohibition against indirect discrimination and of making the defenses in the case of such alleged discrimination the same as those provided in Section 2 (a), at the same time making absence of reasonable proportion to the quantities purchased a basis of placing the burden of proof on the seller.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

Sec. 2. (This section provides that the Act shall not affect actions taken or pending under Section 2 of the Clayton Act. However, a proviso, drawn with a view to the *Goodyear* case, authorizes the Commission to reopen proceedings where it had issued cease and desist orders and to issue supplementary complaints charging violations of Section 2 as amended where it believes such to have taken place since the effective date of the amendments. No change in this section is proposed.)

[Sec. 3. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.]

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both.]

Sec. 4. Nothing in this Act shall prevent a co-operative association from returning to its members, *whether they be* producers, *merchants*, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to or through the association.

COMMENT. The change here is for the purpose of permitting cooperative associations of merchants to enjoy equal status with cooperative associations of producers or consumers with respect to any exemptions under the Act.

#### CLAYTON ACT

Sec. 4. Violation of Antitrust Laws—Damages to Persons Injured. That any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee: Provided, however, *That only compensatory damages shall be allowed for violation of Sec. 2 as amended where such violation does not tend to create a monopoly in any line of commerce or substantially lessen competition: And provided further, That such compensatory damages shall, in the absence of proved loss of profits or other proved substantial damages, be calculated to be the amount of the proved discrimination against the injured party.*

COMMENT. A change has been made in this section, first, for the purpose of removing the threat of triple damage suits under the Robinson-Patman Act and, second, to provide a basis for the calculation of compensatory damages in the event of inability to prove to the satisfaction of the court loss of profits or other substantial damages.