

Offering Price Support To Your Distributors: Some Do's And Don't's

Manufacturers that sell their products through distribution chains often are asked by their dealers for price support to help land particularly valuable customers.

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This price support can take the form of a reduced charge to the distributor for the company's products

or a direct payment to the distributor or customer to sweeten the deal. Regardless of the form, providing price support may create legal problems for a manufacturer under the antitrust and dealer protection laws when the price support is not made available to others. This article outlines some basic do's and don't's for companies considering offering price support.

While the antitrust laws and state franchise statutes do not bar the use of price support, they do prescribe when and how price support can be doled out. The Robinson-Patman Act prohibits price discrimination, simply defined as the sale of a product to two different buyers at two different prices. State franchise laws, which govern companies' relations with their distributors, generally obligate manufacturers to treat their dealers even-handedly and not to favor one over the other by means of price support. Both the antitrust and state franchise laws recognize, however, that a manufacturer's provision of price support is pro-competitive in that it should lead to lower prices for end users. Manufacturers thus should not be obligated to offer price support either at the distributor or customer level unless failing to do so hurts competition. The question, therefore, is under what circumstances must a manufacturer provide price support

There is No Legal Obligation to Provide Price Support:

For companies that neither have formal price sup-

port programs nor provide informal price support, nothing in the law requires them to offer this benefit to their distributors or end users. A manufacturer that is told by a distributor it will not be able to land a prospect without price support can simply say "no." While this decision may not be in a company's best business interest, there is no legal risk associated with simply telling distributors, or for that matter customers, that the company has made its best price available and is not willing to discount its products further. The requesting distributor may complain that he is not being treated fairly or that his sales efforts are being undermined by the manufacturer's intransigence, but the distributor has no legal basis for asserting a price discrimination claim against the manufacturer as long as price support is not being offered to other distributors.

Price Support Can be Justified on a Case-By-Case Basis:

Even though a company may not provide price support as a regular part of its business, it can elect to do so to help a distributor meet a competitor's price to a particular customer or end user. The Robinson-Patman Act recognizes what is referred to as the "meeting competition" defense to a claim of price discrimination. This defense allows a manufacturer to lower its price via price support if in good faith the company believes that it is necessary to do so to meet (but not beat) a competing offer to a customer. Companies that elect to offer price support should have the requesting distributor document the competitor's price they are trying to meet at a particular account so that there is a written evidence of the company's good faith and to reduce the possibility that the distributor is looking for price support simply to increase its margins, rather than to provide a discount to a customer.

Where Price Support is Given, It Must be Made Available to All Competing Dealers:

If a manufacturer chooses to provide price support to one of its distributors, it may be obligated to provide the benefit to other distributors or at least to communicate the availability of price support to distributors that did not request it. A basic requirement of a price discrimination claim is that the disfavored buyer must be in competition with the buyer favored with price support. In practice, therefore, a manufacturer that knows that two distributors are vying for an account where price support is being offered must make the price support available to both distributors on the same terms. Where the manufacturer has no reason to believe that two distributors are competing for a customer, however, it is not required to offer price support to both. Some illustrations may be helpful here:

- Suppose you are working with your distributors to land a large national account with locations across the country. If you decide to offer price support to one servicing distributor, you probably are obligated to offer it to all distributors who are in a position to service the business, regardless of their location.
- Suppose you utilize exclusive territories and are approached with a request for price support for a customer who is located solely in Distributor A's territory. You can legally offer the price support only to Distributor A where there is no evidence of transshipping and the distributors have adhered to their assigned territories.
- Suppose you provide price support on all sales to a certain segment of the market. Any distributor that is in a position to sell to that segment of the market must be given the opportunity to obtain price support on the same terms offered to other distributors.
- Suppose Distributor A comes to you for price support for a particular customer in connection with a bid process. Distributor B, unbeknownst to you, has decided to bid on the same business but does not request price support to land the account. Are you legally obligated to make sure Distributor B (or any other distributor) knows about the price support you

given to Distributor A? The "answer" is no, although the larger the volume of business at stake, the more significant the price support offered, and the longer the term of support, the greater your exposure to a distributor's claim of discrimination.

Price Support for Customers and End Users that Compete With Each Other:

Although most disputes resulting from the provision of price support come from distributors, in rare circumstances, customers have standing to complain that they were not provided with price support. Just as in the case of complaining distributor, however, a disfavored customer will need to show that the manufacturer's refusal to provide it with price support had a negative impact on competition. To do this, the customer will need to establish (1) it is in competition with the customer or end user given price support and (2) the manufacturer's refusal to grant price support somehow detracts from its ability to compete with the favored buyer. These two requirements usually are fatal to any price discrimination claim brought by a customer, but manufacturers nonetheless should be vigilant when approached for price support to ensure that providing price support to one customer does not injure that customer's competitors.

Price support can be a good way of helping distributors broaden your customer base. However, manufacturers need to proceed with caution in administering a formal price support program or in doling out price support on a case-by-case basis to make sure that the practice does not give rise to claims at the distributor or customer level. Following the basic do's and don't's outlined above should significantly reduce your likelihood of disputes.

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