

THE FUNDAMENTALS



Book Publishers' Obligations to Book Retailers Under the Federal Antitrust Discrimination Law

The Federal Antitrust Discrimination Law, the Robinson-Patman Act, was enacted to protect the ability of smaller retailers to compete on an equal basis with larger retailers such as national chains. As applied to book publishing, the law prohibits publishers from discriminating in favor of chains both in wholesale pricing and in promotional allowances.

The American Booksellers Association began an intensive investigation of publishers' discriminatory sales practices in 1993; litigation against several publishers commenced the following year. Since then, ABA has often been asked by member booksellers, by publishers and publishers' representatives, by regional booksellers associations, and by the trade and general press for a simple explanation of what publishers must do to comply with the law. These "Fundamentals" are derived from the "Rules for the Application of the Robinson-Patman Act to Book Publishing," which were accepted by major book publisher defendants that have settled in the ABA litigation; the "Rules" are included in the public court-approved settlement documents.

Neither the "Rules," nor these "Fundamentals" that are derived from them, can be considered a comprehensive statement of all of the complex requirements of the Robinson-Patman Act and the practices it addresses. These "Fundamentals," however, will serve as a useful summary of the major aspects of the applicability of the federal antitrust discrimination law to book publishing.

PRICE DISCRIMINATION

- A publisher must sell books at the same price to all competing retailers that purchase the same or similar books. The only exceptions are where:

Lower prices can be "cost justified" by demonstrable savings to the publisher (e.g., for larger-volume orders, but only to the extent that the publisher can show that it is less costly to sell the larger orders);

Lower prices are offered to "meet the competition" from a legitimate offer by another publisher for the same or substantially similar books (i.e., the publisher believes in good faith that: (1) a competitor is offering the lower price, (2) the publisher would lose a significant amount of business if it failed to meet the lower price; and (3) the publisher limits the lower price to the terms of the competing one); or

Lower prices are due to "changing conditions" (i.e., obsolescence of seasonal items about to lose most of their value, a court-ordered sale, or going out of business or out of a line of business).

- "Competing retailers" include all businesses that purchase the same or similar books from publishers to resell to consumers in competition with one another. This includes independent and chain bookstores, online bookstores, department stores, book clubs, warehouse clubs, toy stores, gourmet shops, garden shops, newsstands, catalog sales, TV shopping networks, etc.
- Credit terms, freight terms, book return rights, and other terms of sale must be the same for all competing retailers unless one of the exceptions applies (cost justification, meeting competition, or changing conditions).
- A publisher's price terms must be communicated to all competing retailers so that each has the opportunity to take advantage of all the publisher's offers on a non-discriminatory basis.

PROMOTIONAL ALLOWANCE DISCRIMINATION

- If a publisher offers promotional allowances, they must be proportionally equal for all competing retailers that purchase the same or similar books. The only exception is where:

Allowances are offered to “meet the competition” from a legitimate offer by another publisher for the same or substantially similar books (i.e., the publisher believes in good faith that: (1) a competitor is offering a larger promotional allowance; (2) the publisher would lose a significant amount of business if it failed to meet the offer; and (3) the publisher limits its offer to the terms of the competing one).

- “Competing retailers” include all businesses that purchase the same or similar books from publishers to resell to consumers in competition with one another. This includes independent and chain bookstores, online bookstores, department stores, book clubs, warehouse clubs, toy stores, gourmet shops, garden shops, newsstands, catalog sales, TV shopping networks, etc.
- Any promotional allowances offered must include alternatives that can practicably be used by both smaller and larger competing retailers.
- Any promotional allowances offered must be based upon both the retailer’s direct purchase from the publisher and its indirect purchases of the publisher’s books through wholesalers.
- Administrative requirements to qualify for promotional allowances must be the same for all competing retailers.
- A publisher’s promotional allowance terms must be communicated to all competing retailers so that each one has the opportunity to take advantage of all of the publisher’s offers on a non-discriminatory basis.

QUESTIONS AND ANSWERS

Can a publisher give larger discounts for larger volume purchases by retailers?

Yes, but the volume discounts cannot be established arbitrarily; the publisher must be able to show that it will benefit from actual net cost savings that will equal any higher discount for larger volume purchases. For example, a publisher’s possible lower sales costs from a large purchase by a chain might be offset by possible higher book return rates from the chain than from others such as independent bookstores; higher returns impose significant costs upon publishers.

Can the publisher give a larger discount to compensate a retailer for some additional or unusual cost incurred by the retailer?

No. The publisher can only justify a larger discount to reflect reduced costs of its own. It cannot justify larger discounts on the basis of a retailer’s increased costs.

Can the publisher give better prices to select customers for sales at book fairs or for other “special sales”?

No. If those receiving the “special sales” discounts compete with bookstores for the resale of the books, the bookstores must have the chance to get the same discounts on the same terms.

Can a publisher require one retailer to pay in thirty days and permit a competing retailer to take sixty to ninety days to pay?

No. This is also illegal price discrimination. Arbitrarily granting better payment terms to larger retailers than to smaller retailers is prohibited. Likewise, discrimination in

enforcing credit terms is illegal—the publishers cannot automatically place a small retailer on C.O.D. when its account is overdue but refrain from placing a large retailer on C.O.D. for its overdue account.

Can a publisher give better prices or terms to warehouse discount clubs, toy stores, or gourmet stores that sell books in competition with bookstores?

No. While some publishers have claimed that non-bookstore retailers are in different “markets” and have provided different prices and terms to them for the same or similar books as those sold to bookstores, the practice is illegal because bookstores compete with non-bookstore retailers for the sale of the those books. If non-bookstore retailers are permitted to buy books at larger discounts but on a nonreturnable basis, bookstores must be permitted to do the same.

What about publisher’s deals with book clubs?

It depends. The federal antitrust discrimination law applies only to sales of items; if a book club obtains a legitimate, “arm’s length” license for the right to reprint a publisher’s title and proceeds on its own with the reprinting, there is no sale of an item and the law does not apply; however, if the publisher provides the same or similar printed books to a book club as it provides to bookstores or other retailers in competition with the book club for sales of books, the publisher may not discriminate in prices, terms, or promotional allowances in favor of the book club.

Can a publisher give additional discounts to a “retail distribution center” (“RDC”) operated by a bookstore chain to supply the chain’s bookstores?

The publisher can give additional discounts for each of the functions performed by an RDC if: (1) the publisher can demonstrate actual, commensurate reduced costs to itself for each function performed by the RDC (it cannot base additional discounts on the fact that the RDC incurs additional costs), and if (2) independent bookstores are offered the same discount for each RDC function that they perform (i.e., ordering in carton quantities, taking delivery by long-distance carrier where the publisher is paying for freight, etc.). The publisher cannot legally “bundle” together requirements for RDC functions that do not reduce costs for the publishers (e.g., a requirement that the RDC not be part of a retail store or that the RDC use specified carriers when the publisher does not pay freight) or that independent bookstores cannot perform (e.g., a requirement that the RDC serve at least 10 retail stores) in order to exclude independents from the “bundle” RDC discounts. Note also that publisher’s possible lower costs in selling to chains through the RDCs could also be offset by other costs such as higher book return rates from the chains; this would make it illegal to give any RDC discounts to the extent of the offset.

Are publishers absolved of responsibility for otherwise illegal discrimination if they favor certain retailers because “everybody’s doing it,” i.e., other publishers are discriminating?

No. The “meeting competition” exception applies only to specific, individual transactions under limited and qualified circumstances. Most important, the competition a publisher is purporting to “meet” must itself be legal and non-discriminatory (e.g., if one publisher matched another publisher’s “non-cost-justified” discount or secret promotional allowance, it would not fall under the exception).

Can a publisher “package” two or more books together and offer to favored retailers a greater discount on the “package” than the combined discounts on the same individual books when offered to other retailers?

No. This is illegal price discrimination. The publisher must give all competing retailers an equal chance to buy packages of books offered by the publisher.

Can a publisher favor certain bookstores by shipping new releases earlier than to other bookstores?

No. Particularly for a new release title that receives extensive publicity and for which each day of initial sales gained or lost can be significant, favoring certain stores with earlier shipments is illegal discrimination.

Can publishers permit some bookstores, but not others, to take credit from their outstanding accounts in recognition of an anticipated return of books or for estimated percentages of damaged or short-shipped books?

No. This would be providing illegally discriminatory terms of sale. If one retail account of the publisher is offered such a concession, all competing retail accounts must be offered the same concession.

Can a publisher pay freight for some retailers but not for others that compete with the favored ones?

No. This would be illegal price discrimination because of the unequal terms.

Where the publishers requires a minimum number of books to be ordered to qualify for a higher discount, can it waive the minimum requirement for orders from only some favored retailers (i.e., provide the high-volume discount for low-volume orders)?

No. Again, this is illegal price discrimination.

Is it illegal for publishers to offer additional discounts to bookstores after the books are sold and shipped (i.e., remaindering in place)?

No, as long as all competing retailers are given equal notice at the same time and equal opportunity to utilize the additional discounts.

May a publisher provide wholesale discounts to a wholesaler that is affiliated with (owned by or owns) retailers?

Yes and no. A publisher may provide a wholesaler discount to a wholesaler that is affiliated with retailers, but only on books sold by the wholesaler to retailers not affiliated with the wholesaler. For sales the wholesaler makes to its affiliated retailers, the wholesaler must be provided no more than the same discount that the retailers would get if they bought directly from the publisher.

Can publishers offer larger discounts only to certain retailers that buy books at the end of the print run?

No. If a publisher offers a special discount on purchases of books at the end of a print run, it must offer the special discount to all competing retailers.

How can publishers assure that promotional allowances are offered to competing book retailers on a “proportionally equal” basis?

Most often it is done by basing the size of the allowances on the retailers’ past or current purchases from the publishers.

Are publishers required to offer promotional allowances?

No. It is only if a publisher elects to offer promotional allowances to any retailer that the allowances must be proportionally equal for all competing retailers.

Are retailers obligated to approach publishers about the availability of promotional allowances?

No. The law requires publishers to “make available” promotional allowances, if they do so at all, on a proportionally equal basis to all competing retailers. Publishers must take the initiative to announce to all competing retailers the availability of all promotional allowances.

May publishers limit promotional allowances to activities that only larger retailers can undertake such as national advertising?

No. Publishers must provide alternatives for use of promotional allowances so that they are practicably available on a proportionally equal basis to all competing retailers; publishers must therefore be flexible in the permitted uses of promotional allowances.

Can promotional allowances include payments to retailers for displaying certain titles?

Yes. Placement funds can be provided by publishers as long as they are provided on a proportionally equal basis to all competing retailers.

Can promotional allowances be limited to only direct purchases from the publisher or to only indirect purchases through wholesalers?

No. To be available on a proportionally equal basis, promotional funds must be available to retailers on both direct purchases from the publisher and on indirect purchases of the publisher's books through wholesalers; publishers may require reasonable, non-discriminatory documentation to substantiate indirect purchases through wholesalers before crediting them towards promotional allowances.

Can a publisher pay the retailer a greater amount than the retailer's actual costs when reimbursing for some promotional activity by the retailer, such as an advertisement?

It depends on the circumstances, but usually this practice is illegal. Overpaying for promotional activities ordinarily indicates that the publisher is making disproportionate, and therefore illegal, payments. Alternatively, the overpayment can be viewed as an increased discount. Both of these are illegal unless offered to all competing retailers.

Can the publisher require bookstores to substantiate certain kinds of promotional allowances, such as through the submission of tear sheets for advertisements?

Yes, but the publisher cannot discriminate in favor of some retailers by waiving or reducing the substantiation obligation for them alone. The administrative requirements must be the same for all competing retailers.

Are secret or unannounced promotional allowances illegal?

Yes. Secret or unannounced promotional allowances are simply not available (proportionally or otherwise) to retailers that do not know about them; they are therefore illegal.

Can publishers provide promotional allowances to bookstores in return for additional retail discounting on the publishers' titles?

Yes and no. This practice could be illegal price discrimination unless offered to all competing retailers. If publishers offer promotional allowances for retail discounting, the allowances must be offered to all competing retailers on a proportionally equal basis.

Can publishers permit some bookstores but not others to take credit from the bookstores' outstanding accounts owed to the publishers in recognition of promotional allowances earned by the bookstores?

No. Publishers must administer the availability of promotional allowances on a non-discriminatory basis.