

THE LEGALITY OF DISTRIBUTOR INCENTIVE DISCOUNT PLANS UNDER THE ROBINSON-PATMAN ACT

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We are convinced that . . . there are no overtones of business buccaneering in the Section 2(a) phrase "discriminate in price." Rather, a price discrimination within the meaning of that provision is merely a price difference.¹

The Robinson-Patman Act was intended to provide small businesses with protection from abuses by large, powerful business, but legitimate price competition is not such an abuse. Neither the Act nor any social value compels the sheltering of an individual competitor, at the expense of the public interest, from the competitive process.²

The above quotations illustrate the inherent conflict between the anti-price discrimination provisions of the Robinson-Patman Act³ and the general policy of the antitrust laws favoring aggressive price competition. It is frequently difficult for practitioners and the courts to reconcile the equal treatment of customers mandated by the Robinson-Patman Act with the types of individual pricing policies required in a competitive marketplace.⁴ This difficulty is particularly apparent in the case of sales incentive plans under which a seller grants his distributors varying price discounts in consideration of their achieving certain promotional goals. Although such plans appear to enhance competition by giving each distributor an incentive to aggressively promote the seller's products, the plans are also likely to result in competing distributors receiving different prices for identical goods. The successful maintenance of such an incentive plan thus appears to satisfy several of

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1. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1959).

2. *Pacific Eng'r & Prod. Co. of Nev. v. Kerr-McGee Corp.*, [1977-1] Trade Cas. (CCH) ¶ 61,290, at 70,925 (10th Cir.).

3. 15 U.S.C. §§ 13-13b (1976).

4. See *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63 (1953), in which the Court cautioned against interpreting the Robinson-Patman Act in a manner that might "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."

the substantive prerequisites of a Robinson-Patman Act violation.⁵ This Article will examine whether such sales incentive plans nevertheless may be justified under the "availability" defense which has been judicially engrafted into the Robinson-Patman Act.⁶

I. THE ROBINSON-PATMAN ACT

The Robinson-Patman Act, enacted by Congress in 1936 as an amendment to the Clayton Act, was intended to protect smaller independent merchants against suppliers' discriminatory pricing and promotional practices favoring larger retailers, such as chain stores.⁷ In interpreting the Act, courts and commentators have repeatedly emphasized that Congress' objective was to assure that all buyers, regardless of size, competing directly for the same customers would receive evenhanded treatment from their suppliers.⁸

Section 2(a) of the Act prohibits a seller from discriminating in price

5. See Section I *infra* for a discussion of the substantive elements of a Robinson-Patman Act violation.

6. Although this Article will examine only the legality of sales incentive plans under the Robinson-Patman Act, such plans may also raise questions under other antitrust provisions. A sales incentive plan that requires a customer to purchase all of his requirements from the seller to qualify for a discount may constitute an illegal requirements contract under Sherman Act § 1 and Clayton Act § 3, when the requisite adverse effect upon competition is present. See, e.g., *Standard Fashion Co. v. Margrane Houston Co.*, 258 U.S. 346 (1922) (discount only to customers who agreed not to buy competitive clothing patterns); *Carter Carburetor Corp. v. FTC*, 112 F.2d 722 (8th Cir. 1940) (discount not available to customers who dealt in competitor's product line); *United States v. Linde Air Prods. Co.*, 83 F. Supp. 978 (N.D. Ill., 1949) (discount only to customers who agreed to buy total requirements from seller). See also *In re Penick & Ford, Ltd.*, 14 F.T.C. 261 (1930) (promotional allowances available only to distributors who agreed not to carry competing products). If, however, a customer can qualify for a discount under a sales incentive plan without purchasing all of his requirements for the relevant product from a particular seller, the plan should raise no questions under the Sherman and Clayton Act provisions. See, e.g., *Hammond Ford, Inc. v. Ford Motor Co.*, [1966] Trade Cas. (CCH) ¶ 71,689 (S.D.N.Y.) (no violation when agreement required dealer to develop sales to seller's satisfaction and did not expressly prohibit purchases from competitors); *Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc.*, [1959] Trade Cas. (CCH) ¶ 69,255 (N.D. Ill.) (no violation when dealer required to purchase only portion of its requirements from seller).

7. See C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 6-11 (2d rev. ed. 1959); *Hearings on H.R. 8442, 4995, and 5062 Before the House Comm. on the Judiciary*, 74th Cong., 1st Sess., 5-6 (1935) (comments of Representative Patman); *Hearings Before the Special House Comm. on Investigation of American Retail Federation*, 74th Cong., 1st Sess. (1935).

8. See *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960); *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 63, 73-74 (1953); *FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.); C. EDWARDS, THE PRICE DISCRIMINATION LAW 630 (1959); CONFERENCE ON THE ANTITRUST LAWS AND THE ATTORNEY GENERAL'S COMMITTEE REPORT 177-81

between competing purchasers in contemporaneous interstate sales of goods of like grade and quality if that price discrimination may have an adverse effect upon competition.⁹ To prevail under this section, a complainant must prove, among other things, that there has been a discrimination in price and that the discrimination has caused the requisite anticompetitive effect.¹⁰ Other relevant portions of the Act include the remainder of section 2(a) and section 2(b),¹¹ which provide for various defenses to price discrimination charges, including cost justification¹² and the good faith meeting of competition,¹³ and sections 2(d)¹⁴ and 2(e),¹⁵ which prohibit a seller from granting promotional allowances or services to any customer unless he makes those allowances or services available to all competing customers on proportionally equal terms.¹⁶ Section 2(c) of the Act,¹⁷ which prohibits certain dummy brokerage charges, section 2(f),¹⁸ which prohibits a buyer's knowing inducement of a price concession, and section 3,¹⁹ which provides criminal sanctions for certain predatory price discriminations, should not be applicable to sales incentive plans²⁰ and therefore will not be discussed in this Article.

(1955); Rowe, *Price Differential and Product Differentiation: The Issues under the Robinson-Patman Act*, 66 YALE L.J. 1, 34 & n.141 (1956); 1963 DUKE L.J. 145, 152.

9. The relevant portions of the section provide:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchasers involved in such discrimination are in commerce, where . . . the effect of such discrimination may be substantially to lessen 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

15 U.S.C. § 13(a) (1976).

10. See *Hanson v. PPG Indus., Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964); *Alexander v. Texas Co.*, 165 F. Supp. 53 (W.D. La. 1958).

11. 15 U.S.C. § 13(b) (1976).

12. *Id.*

13. *Id.*

14. *Id.* § 13(d).

15. *Id.* § 13(e).

16. Section 2(d) (15 U.S.C. § 13(d)) prohibits a seller from discriminating in reimbursing buyers for promotional or advertising expenses, and section 2(e) (15 U.S.C. § 13(e)) includes a similar prohibition against the furnishing of promotional or advertising services directly by a seller to his buyers. It is not necessary under either section to prove that the discriminatory promotional allowances or services had an adverse effect upon competition.

17. 15 U.S.C. § 13(c) (1976).

18. *Id.* § 13(f).

19. *Id.* § 13(a).

20. Section 2(f) should not be applicable because it would be unlikely for a seller to imple-

II. THE AVAILABILITY DEFENSE

The availability defense, as developed by the courts, the Federal Trade Commission, and the commentators, precludes a finding of illegality whenever a seller makes the lowest of two or more varying prices equally available to all of his competing customers, regardless of whether those customers actually choose to take advantage of the preferred price.²¹ The defense derives from a recognition that the Robinson-Patman Act was designed to insure equality of treatment of customers and that, provided each customer has been given an equal opportunity to take advantage of a particular price concession, no customer may later complain that he has been illegally discriminated against.²² The availability defense does not appear anywhere in the express language of section 2(a), but instead inheres in the equitable

ment an incentive discount plan of general application in response to the inducement of a particular buyer rather than for independent business reasons. Such an incentive plan also should not be deemed to have been instituted with predatory intent as required by § 3. A good faith incentive discount plan that is generally and consistently applied to all customers and that is instituted for legitimate business objectives should not allow an inference of predatory intent. *Cf.* Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954) (defendant's maintenance of price in interstate transactions while lowering price in intrastate sales supported a finding of predatory intent under § 3 of the Robinson-Patman Act).

21. Another variation on the availability defense precludes a finding of illegality when a buyer is able to purchase a like product from *another* seller at a price at least as low as the seller's preferential price. The argument in such situations has been that the buyer's opportunity to purchase at the lower price from another source negates the "causal nexus" between the seller's price differential and the requisite adverse effect upon competition. *See In re Ark-La-Tex Warehouse Distribs., Inc.*, 62 F.T.C. 1557 (1963). At least one circuit has rejected this argument. *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969). This Article only will consider the defense as it applies to the availability of the favored price from a particular seller, and not from alternate sources.

22. *See FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.) ("the Act . . . requires equality of treatment among purchasers, but it does not require a seller to adopt a single uniform price under all circumstances"); *United Banana Co. v. United Fruit Co.*, 362 F.2d 849 (2d Cir. 1966); *Mowery v. Standard Oil Co. of Ohio*, 463 F. Supp. 762 (N.D. Ohio 1976); *In re National Lead Co.*, 49 F.T.C. 791 (1953); *In re Standard Brands, Inc.*, 29 F.T.C. 121 (1939), *aff'd*, 189 F.2d 510 (2d Cir. 1951). *See generally* C. AUSTIN, *supra* note 7, at 21; E. KINTNER, *AN ANTITRUST PRIMER* 197-201 (1963); W. PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* 16 (1963); Austern, *Presumption and Percipience about Competitive Effect under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773, 797 (1968); Millstein, *The Status of "Availability" under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U. L. REV. 416, 418-19 (1967); Von Kalinowski, *Availability as a Defense to Private Label Marketing*, 39 ANTITRUST L.J. 835, 837-38 (1970); 1963 DUKE L.J. 145, 152 & n.23.

purposes of the Act.²³ As one commentator has stated:

It may be contended that the essence of availability is the fair and honest approach taken by the seller offering the . . . prices to all his customers. Having been offered the . . . prices, it is possible that all of his customers would accept . . . [the lowest price]; hence, there would be no foreseeable discrimination. The fact that two customers might pay different prices would be fortuitous, and would not be the responsibility of the seller.²⁴

The concept of availability has been recognized implicitly by the courts and the Commission since the early days of the Robinson-Patman Act, although the concept has only more recently been expressly referred to as a valid defense under the Act.²⁵ For example, without elaborating upon the conceptual basis of their decisions, the Commission and the courts have consistently held that a seller may offer discounts on invoices paid within an accelerated period, even though many customers may thereby fail to qualify for a price as low as that received by their competitors.²⁶ In certain early cases the Commission also recognized that quantity discounts within the purchasing capabil-

23. Congress expressly provided for the availability concept in § 2(d) of the Act, which prohibits the granting of promotional allowances that are not made "available to all competing customers on proportionally equal terms." 15 U.S.C. § 13(d) (1976). Although § 2(e) of the Act, which deals with promotional services undertaken by a seller on behalf of his customers, does not contain an express reference to "availability," the courts and the Commission have construed the section to include an availability requirement identical to that included in § 2(d). See *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 484-85 (2d Cir. 1962). Similarly, as a rationale for judicial incorporation of the availability defense into § 2(a), some courts have referred to the express wording of § 2(d) as an indication of Congress' intent that nonavailability be considered a necessary element of discrimination in Robinson-Patman actions. See *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964); *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963).

24. Millstein, *supra* note 22, at 447. See also E. KINTNER, *supra* note 22, at 198, where the author, in referring to the availability defense, states that it can be argued "that no one need have been injured by the price difference because it was equally available to all." Another commentator has stated, "If the lower price was available to the complaining purchaser, and if instead he chose to purchase at the higher price, he is the cause of his own misfortune and has only himself to blame." Beringer, *The Validity of Discounts Granted to Dual Function Buyers Under the Robinson-Patman Act*, 31 BUS. LAW. 783, 794-95 (1976). See also Soma, *Functional Discounts: A Legal-Economic Concept Permitting New Experiments in Distribution Systems*, 14 SANTA CLARA L. REV. 211, 227 (1974).

25. The concept of availability was also recognized under the anti-price discrimination provisions of the original § 2 of the Clayton Act, before that provision's amendment by the Robinson-Patman Act. See *Boss Mfg. Co. v. Payne Glove Co.*, 71 F.2d 768 (8th Cir. 1934) (no price discrimination under original § 2 when lower priced product offered for sale to all of manufacturer's customers).

26. See *Craig v. Sun Oil Co.*, 515 F.2d 222 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976); *Diehl & Sons v. International Harvester Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,180 (E.D.N.Y.); *In*

ity of all customers should not violate the Act, even if each customer did not choose to take advantage of the discount.²⁷ More recently, the courts and the Commission have referred expressly to the concept of availability in upholding certain price differentials.²⁸

These recent cases have defined three primary elements of the availability defense. First, for the defense to apply, all competing customers must be notified of the relevant discount and of the conditions under which they may take advantage of the discount.²⁹ Secondly, the prerequisites of the price concession must be objective and consistently applied.³⁰ Finally, all competing customers must be capable of meeting those prerequisites in the ordinary course of their business.³¹ This final

re National Lead Co., 49 F.T.C. 791 (1953); *In re* United States Rubber Co., 28 F.T.C. 1489 (1939).

27. See *In re* American Optical Co., 28 F.T.C. 169, 183 (1939) (upholding graduated quantity discount whose highest brackets were achievable by average retailer). See also *In re* Standard Brands, Inc., 29 F.T.C. 121, 140 (1939), *aff'd*, 189 F.2d 510 (2d Cir. 1951); *In re* Kraft-Phenix Cheese Corp., 25 F.T.C. 537, 543-44 (1937).

28. See *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967); *United Banana Co. v. United Fruit Co.*, 362 F.2d 849 (2d Cir. 1966); *Mowery v. Standard Oil Co. of Ohio*, 463 F. Supp. 762 (N.D. Ohio 1976); *In re* Tri-Valley Packing Ass'n, 70 F.T.C. 223 (1966). In *Mowery* the court noted:

[T]he mere fact that a seller's pricing policies encompasses [sic] the use of discounts, or allowances, does not necessarily mean that he is engaging in actionable price discrimination. A seller may offer discounts, allowances, et cetera, *provided* he makes the same offer to all purchasers. If a seller *offers* the same price to all customers, there is *no* actionable price discrimination, *despite* the fact that a buyer fails to take advantage of any allowance that has been practically available to him.

463 F. Supp. at 776 n.17 (citing 4 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 27.04) (emphasis in original).

29. See *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979) (denying availability defense because seller never notified customer of criteria for qualifying for applicable discount). The type of customer notification required for promotional allowances or services under §§ 2(d) and (e) of the Act has been extensively litigated. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); *Alterman Foods Inc. v. FTC*, 497 F.2d 993, 1001 (5th Cir. 1974); *Flotill Prods., Inc. v. FTC*, 358 F.2d 224, 231 (9th Cir. 1966), *rev'd on other grounds*, 384 U.S. 179 (1967); *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962). The FTC has issued specific guidelines for the manner in which notification should be effected under those sections. See 16 C.F.R. § 240 (1980). Because of the manner in which the availability requirements of §§ 2(d) and (e) have been equated with the availability defense under § 2(a) (see note 23 *supra*), it is possible that observance of the specific 2(d) and (e) notification requirements could be deemed necessary in cases under § 2(a). See notes 85-92 *infra* and accompanying text for a discussion of the specific manner in which customers should be notified of discount plans under § 2(a).

30. See *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963) (denying availability defense because discounts granted by seller on ad hoc, subjective basis that favored established distributors); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979). See also *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946) (illegal under § 2(e) to require customer to perform "indeterminate aggregate of services" in order to qualify for promotional services).

31. See *United Biscuit Co. of America v. FTC*, 350 F.2d 615 (7th Cir. 1965); *Moog Indus.*,

element does not require a seller to make the preconditions of his discount so easily achievable as to be attractive to each of his customers. The availability defense should apply as long as each customer is economically capable of qualifying for a price concession, even though a customer might prefer not to take the steps necessary to do so.³²

III. THE CONCEPTUAL BASIS OF THE DEFENSE

Courts and commentators have generally taken two different views of the conceptual basis of the availability defense. The first view holds that the availability of the preferred price to all interested customers negates any element of discrimination and therefore precludes the applicability of section 2(a) to the price differential.³³ The adherents to this so-called "non-discrimination" theory argue that the basic thrust of the Robinson-Patman Act is directed against inequality of treatment and that "the intent of the Act can best be effectuated by defining price discrimination as a price difference plus unavailability, because inequality of treatment implies lack of availability of the lower price to purchasers paying the higher price."³⁴ Under the nondiscrimination theory, the initial substantive prerequisite of a section 2(a) violation is never met when a preferential price is available to all customers, and it therefore becomes unnecessary to consider the possible presence of the other prerequisites, such as the existence of an adverse effect upon competition.³⁵ This view of availability as a threshold defense is supported

Inc. v. FTC, [1956] Trade Cas. (CCH) ¶ 68,527 (8th Cir.). See generally Austern, *supra* note 22, at 797.

32. See *Hanson v. PPG Indus., Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *United Banana Co. v. United Fruit Co.*, 362 F.2d 849 (2d Cir. 1966); *Corn Prods. Ref. Co. v. FTC*, 144 F.2d 211, 220 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945); *In re American Optical Co.*, 28 F.T.C. 169 (1939); *In re Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937).

33. As one commentator has stated, "[I]mplicit in the concept of 'discrimination' is that a net price which is practically accessible to all is not discriminatory if some do not avail themselves of it." F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 93 (1962). See generally: C. AUSTIN, *supra* note 7, at 21; W. PATMAN, *supra* note 22, at 18; Millstein, *supra* note 22, at 429; Von Kalinowski, *supra* note 22, at 838.

34. E. KINTNER, *supra* note 22, at 68. F.M. Rowe has pointed out during an ABA sponsored panel discussion that a cash discount offered to all customers who pay for a product within ten days has never been considered a "price discrimination" because it implies no inequality of treatment of customers. 37 ANTITRUST L.J. 32, 38 (1967). See also 30 ABA ANTITRUST SECTION 57-61 (1966).

35. See C. AUSTIN, *supra* note 7, at 21; F. ROWE, *supra* note 33, at 97-98.

by the Act's legislative history³⁶ and by some case law.³⁷

The second view of the conceptual basis of the availability defense holds that the availability of the preferred price to all customers negates another substantive prerequisite of a section 2(a) violation, that is, the "causal nexus" between the price discrimination and any injury to competition.³⁸ Proponents of this theory argue that a customer's independent decision not to take advantage of a price concession that has been offered to him, rather than the existence of the price discrimination itself, is the "proximate cause" of any resulting competitive

36. The legislative history indicates that "discrimination" under the Act was intended to cover only those situations in which competing customers were not treated equally. As Representative Utterback, Chairman of the House Conferees, stated to the House of Representatives just before the Bill's passage:

In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning of the word is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other.

80 CONG. REC. 9416 (1936). Rep. Patman agreed. *Id.* at 8114.

37. Several holdings of the Commission and of the courts also lend support to the "nondiscrimination" theory of availability. In *FLM Collision Parts, Inc. v. Ford Motor Co.*, the court stated that price differentials would not constitute a price discrimination when the differentials were equally available to all customers. [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.). Similarly, in *Perma Life Mufflers, Inc. v. International Parts Corp.*, the court stated that when a preferred price was available to all customers "no discrimination in a legal sense is present." [1966] Trade Cas. (CCH) ¶ 71,802, at 82,710 (N.D. Ill.), *rev'd on other grounds*, 376 F.2d 692 (7th Cir. 1967), *rev'd*, 392 U.S. 134 (1968). *See also* *Boss Mfg. Co. v. Payne Glove Co.*, 71 F.2d 768 (8th Cir.), *cert. denied*, 293 U.S. 590 (1934) (construing "price discrimination" language in § 2 of original Clayton Act, predecessor to Robinson-Patman Act; court concluded that no price discrimination occurred when all customers are given equal opportunity to purchase products at lower price). The Commission and the courts also appear to have implicitly recognized that price differentials equally available to all customers are not discriminatory. *See, e.g.*, *Corn Prods. Ref. Co. v. FTC*, 144 F.2d 211, 220 (7th Cir. 1944), *aff'd*, 342 U.S. 726 (1945) (no discrimination when discount related to size of shipping containers available to all customers); *In re National Lead Co.*, 49 F.T.C. 791, 852, 874 (1953) (cash discounts); *In re Standard Brands, Inc.*, 29 F.T.C. 121, 140 (1939), *aff'd*, 189 F.2d 510 (2d Cir. 1951) (minimum purchase requirements).

38. That the price discrimination be the proximate cause of the alleged competitive harm is an express prerequisite of a § 2(a) violation. *See American Oil Co. v. FTC*, 325 F.2d 101, 104, 106 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Shore Gas & Oil Co. v. Humble Oil & Ref. Co.*, 224 F. Supp. 922, 924 (D.N.J. 1963); *Klein v. Lionel Corp.*, 138 F. Supp. 560, 565 (D. Del.), *aff'd*, 237 F.2d 13 (3d Cir. 1956). The courts have denied recovery to complainants in a number of cases on the grounds of a failure of proof that the relevant price discrimination was the proximate cause of the alleged competitive harm. *See Atlas Bldg. Prods., Inc. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 957-58 (7th Cir. 1959), *cert. denied*, 363 U.S. 843 (1970) (injury caused by complainant's own inefficient production and marketing procedures); *United States v. E.I. DuPont de Nemours & Co.*, 118 F. Supp. 41, 231 (D. Del. 1953), *aff'd on other grounds*, 351 U.S. 377 (1956) (competitive harm caused by such "intervening" causes as complainant's poor financial management, inferior merchandise, and less favorable plant locations); *In re Yale & Towne Mfg. Co.*, 52 F.T.C. 1580, 1599 (1956) (customer selection determined not by price but by engineering, design, and technical service of product).

harm.³⁹ The so-called "causal nexus" theory is supported by the equitable consideration that a customer will not be allowed to complain of a price discrimination that he himself could have avoided.⁴⁰

A majority of the commentators who have considered the availability defense espouse the causal nexus theory.⁴¹ The ascendancy of the causal nexus theory among the commentators stems from the broad definition of price discrimination adopted by the Supreme Court in *FTC v. Anheuser-Busch, Inc.*⁴² In that case Anheuser-Busch had lowered its prices for beer in the St. Louis area, while maintaining higher prices in other areas. The Commission alleged that this territorial price differential had adversely affected Anheuser-Busch's competitors and thereby violated section 2(a) in the primary line.⁴³ Anheuser-Busch argued that its lower prices were not discriminatory because they were not "below cost or unreasonably low for the purpose or design to eliminate competition . . ."⁴⁴ The Court rejected that argument and responded that section 2(a) was not directed merely against price differentials instituted with predatory intent:

We are convinced that whatever may be said with respect to the rest of 2(a) and 2(b)—and we say nothing here—there are no overtones of business buccaneering in the 2(a) phrase 'discriminate in price.' Rather, a

39. See *Alexander v. Texas Co.*, 165 F. Supp. 53, 58 (W.D. La. 1958); 30 ABA ANTITRUST SECTION 60 (1966) (comments of Millstein); Austern, *supra* note 22, at 796.

40. The availability defense goes to the point of causation. Though not expressly stated in the Act, it seems apparent that, for the Act to be violated, the price discrimination that is objected to must be the cause of the probable adverse competitive effect that is alleged. If the lower price was available to the complaining purchaser, and if instead he chose to purchase at the higher price, he is the cause of his own misfortune and has only himself to blame.

Beringer, *supra* note 24, at 794-95. See also 30 ABA ANTITRUST SECTION 60 (1966) (comments of Millstein); H. SHNIDERMAN, PRICE DISCRIMINATION IN PERSPECTIVE 11-12 (1977); Austern, *supra* note 22, at 796.

41. See generally H. SHNIDERMAN, *supra* note 40; Beringer, *supra* note 24; Millstein, *supra* note 22. See also E. KINTNER, *supra* note 22, at 198-201; Austern, *supra* note 22, at 796.

42. 363 U.S. 536 (1960).

43. Primary line cases involve situations such as *Anheuser-Busch* in which competition among competitors of the *seller* has allegedly been adversely affected as a result of the price discrimination. By contrast, in secondary line cases the anticompetitive effect is among firms competing with a *buyer* who has received a discriminatory price. In *Anheuser-Busch* the Court pointed out that section 2(a) was directed against discriminatory practices that injure sellers in the primary line as well as against those that injure buyers in the secondary line. See 363 U.S. at 543-44. Section 2(a) also may apply to competitive harm suffered by a buyer's customers at the third level of competition or even by a firm purchasing from a buyer's customer at the fourth level of competition. See note 68 *infra* and accompanying text.

44. 363 U.S. at 546.

price discrimination within the meaning of that provision is merely a price difference.⁴⁵

The Court's equation of a price difference with a price discrimination has led many commentators to conclude that differing prices, even when equally available to all customers, are discriminatory within the meaning of the Act; therefore, the availability defense must be grounded not upon the absence of a price discrimination but upon the absence of a causal connection between the price discrimination and any adverse effect upon competition.⁴⁶

It is possible that the commentators may have exaggerated the impact of *Anheuser-Busch* upon the availability defense. *Anheuser-Busch* held only that territorial price discriminations may be subject to section 2(a) in primary line cases. The availability defense was not considered by the Court and, indeed, was obviously inapplicable because customers outside the favored geographical area had not been offered Anheuser-Busch's preferred price. It is by no means certain that the Court would have equated a price difference with a price discrimination if the favorable price had been equally available to all customers.⁴⁷ It may therefore be argued that the Supreme Court's holding in *Anheuser-Busch* leaves the nondiscrimination theory of the availability defense intact.

This argument is buttressed by the language of the Supreme Court's holding in *FTC v. Borden Co. (Borden I)*.⁴⁸ In that case Borden was selling milk under private label brands as well as under the Borden brand name and was charging a lower wholesale price for the private branded milk than for the Borden branded milk. The Federal Trade Commission alleged that Borden's price differential was unlawfully discriminatory in both the primary and secondary lines. Borden argued that the private branded and Borden branded milk were not "of like grade and quality" as required by section 2(a). The Supreme Court held against Borden on that issue and remanded the case for a determination, among other things, of "whether the differential under attack is discriminatory within the meaning of the Act."⁴⁹ In using that lan-

45. *Id.* at 549.

46. See generally Millstein, *supra* note 22. See also E. KINTNER, *supra* note 22, at 199; Austern, *supra* note 22, at 796.

47. See E. KINTNER, *supra* note 22, at 67-68; Von Kalinowski, *supra* note 22, at 838.

48. 383 U.S. 637 (1966).

49. *Id.* at 646.

guage the Court appeared to imply that all price differences are not necessarily discriminatory. Justice Stewart argued in his dissent that the majority had indeed so held.⁵⁰ Stewart also stated that if Borden could prove on remand that the preferential price for the private branded milk had been made available to all of Borden's customers, "it is unlikely that price discrimination within the meaning of Section 2(a) can be made out."⁵¹

On remand in *Borden II*,⁵² the Fifth Circuit indeed found no violation of section 2(a) in the secondary line on the grounds that the lower priced private branded milk had been available to all of Borden's customers.⁵³ The court appeared to rely on the causal nexus theory, however, rather than on the nondiscrimination theory, emphasizing the *Anheuser-Busch* doctrine that all price differences are discriminatory.⁵⁴

The *Borden I* and *Borden II* decisions indicate that the availability defense remains viable in secondary line cases despite the Supreme Court's broad definition of price discrimination in *Anheuser-Busch*.⁵⁵ The decisions do not, however, completely clarify whether the conceptual basis of the availability defense should derive from the absence of the element of discrimination or the element of causation.⁵⁶ *Borden I*

50. Justice Stewart stated in dissent:

It is not clear that the 'injury to competition' and 'cost justification' issues will be reached on the remand. As the opinion of the Court suggests, . . . the existence of price discrimination is an issue that remains open in the Court of Appeals. If Borden is able to demonstrate that the price differential between its premium and private label brands is not a price discrimination, the inquiry by the Commission is at an end, and no issue of injury to competition or cost justification under 2(a) is reached. Nothing in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, a case concerned only with territorial price discrimination, requires an equation in all circumstances between a price differential and price discrimination.

383 U.S. at 659 n.17 (Stewart, J., dissenting).

51. *Id.*

52. *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967).

53. The court pointed out that no customer who asked to purchase private branded milk was denied the right to purchase it at the lower price. 381 F.2d at 180. See notes 60-62 *infra* and accompanying text for a discussion of the court's primary line holding.

54. 381 F.2d at 177.

55. The *Borden* cases have, in fact, been cited as authority for the legality of a dual pricing system made equally available by a seller to all of his customers. In *FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103, at 69,999 (2d Cir.), for example, the court, in upholding such a pricing system, stated that the Supreme Court had recognized in *Borden I* that "the difference in price would not fall under the Act's ban on price discrimination if all purchasers were given an equal opportunity to purchase the less expensive milk."

56. See 30 ABA ANTITRUST SECTION 57-61 (1966); E. KINTNER, *supra* note 22, at 68.

appears to support the nondiscrimination theory of the defense, while *Borden II* appears to support the causal nexus theory.

A. *Consequences in Primary Line Cases*

The uncertainty of the courts and commentators concerning the conceptual basis of the availability defense may involve more than mere semantics. If "availability" means that there is no discrimination, then there can be no violation of the Act at any competitive level, because the initial requirement for the application of the Act has not been met.⁵⁷ If, however, availability is viewed in terms of disruption of the causal nexus between the price discrimination and competitive harm to a customer who has chosen not to take advantage of a discount, the defense may not apply in the primary line to competitors of the seller who, of course, do not have the opportunity to determine whether the preferred price will be availed of. It may be argued in such a case that no event has occurred in the primary line that would negate the causal nexus between the price discrimination and an adverse effect upon competition in that line.⁵⁸

Borden II and a discussion of the availability defense by Ira Millstein in an influential 1967 article⁵⁹ suggest a method of analysis by which a price differential nevertheless might be justified in primary line cases under the causal nexus theory. In *Borden II* the Fifth Circuit, in addition to upholding the price differential between the private label milk and Borden's own branded milk in the secondary line, also concluded that the price differential did not violate the Act in the primary line.⁶⁰ The court reasoned that any adverse competitive effect in the primary line was not caused by the price difference between the private label milk and Borden's own branded milk.⁶¹ The fact that Borden happened to sell its own branded milk at a higher price had no effect on competition in the distinct private label market. In the absence of any

57. See F. ROWE, *supra* note 33, at 95-98. See also 30 ABA ANTITRUST SECTION 58-59 (1966) (statement of Francis C. Mayer).

58. See *Continental Baking Co. v. Old Homestead Bread Co.*, [1973-1] Trade Cas. (CCH) ¶ 74,433, at 93,951 (10th Cir.), in which the court stated in dicta: "It would appear that the availability doctrine or defense is peculiarly inappropriate or inapplicable to a primary line case such as this . . ." See also 30 ABA ANTITRUST SECTION 60 (1966) (comments of Millstein).

59. Millstein, *The Status of Availability under Section 2(a) of the Robinson-Patman Act*, 42 N.Y.U. L. REV. 416 (1967).

60. 381 F.2d at 180.

61. *Id.*

indication that Borden had used the higher prices for its own branded milk to subsidize the lower prices for the private label milk, the court could find no relationship between Borden's higher and lower prices.⁶² Any injury to competition in the primary line was thus caused not by Borden's price differential, but by its competitors' own inability to compete effectively with Borden in the sale of private label milk.

Millstein argues similarly in his article that a competitor should not be able to prevail in a primary line case unless he can prove that the *difference* in the prices charged by the seller caused competitive harm in the primary line.⁶³ Millstein points out that it would be contrary to the intent of the Act to allow a competitor of the seller to claim competitive harm as a result of the seller's lower prices *alone*, because only price differences are considered to be discriminatory under the Act.⁶⁴ Thus the competitor should be required to prove some relationship between the seller's prices that caused competitive harm, such as the fact that a seller's lower prices to certain customers were subsidized by higher prices to other customers. In that case, the price differential would be responsible for the seller's ability to create an adverse competitive effect in the primary line.⁶⁵ Unless the competitor could show such a relationship between the seller's higher and lower prices, he could only claim competitive injury as a result of the seller's lower prices alone; he could not claim that he had been harmed by the seller's price differential as required by the Act.

It probably would be impossible to infer the requisite relationship between a seller's different prices in a primary line case when a seller makes a discount equally available to all of his customers. In making the discount available, the seller would be indicating his willingness to sell to each customer at the lower price, and that willingness should negate any inference that the seller intended to use his higher prices to

62. *Id.* at 177.

63. Millstein, *supra* note 22, at 443-44. See also Austern, *supra* note 22, at 796, in which the author summarized such a primary line analysis as follows: "Th[e] economic postulate is that where complete availability of the two prices exist, neither the seller's competitor nor the seller's customers are being injured by the discrimination; any injury is attributable to 'the simple fact of the lower price.'"

64. See Millstein, *supra* note 22, at 443-44.

65. See *id.* See also C. AUSTIN, *supra* note 7, at 44. The courts have held that the subsidization must be proven in primary line cases involving geographic price differentials in order to establish a causal link between those differentials and the requisite effect upon competition in the primary line. See *Shore Gas & Oil Co. v. Humble Oil and Ref. Co.*, 224 F. Supp. 922 (D.N.J. 1963).

certain customers to subsidize lower prices to other customers.⁶⁶ It thus appears that, pursuant to the analysis of Millstein and *Borden II*, price discounts equally available to all customers may be upheld in primary line cases even under the causal nexus approach to the availability defense.

The absence of detailed precedent makes it uncertain whether a court inclined toward the causal nexus theory would use such a method of analysis to uphold a particular discount in a primary line case. Nevertheless, the preferred view under any conceptual basis appears to be that, because the Robinson-Patman Act mandates only equal treatment of customers,⁶⁷ a seller who guarantees that equality by making his preferred price equally available to all competing customers does not violate the Act in any line of commerce.⁶⁸

B. *Consequences as to Burden of Proof*

The conceptual basis of the availability defense may be determinative of whether the burden of proof is on the complainant to show the "non-availability" of a preferred price or on the defendant to show the "availability" of such price. In Robinson-Patman cases the complainant generally has the burden of proving each substantive element of a section 2(a) violation, including the existence of a price discrimination and of a causal connection between that discrimination and the alleged competitive injury.⁶⁹ Under the nondiscrimination theory the com-

66. See Millstein, *supra* note 22, at 442.

67. See notes 8 and 22 *supra* and accompanying text.

68. See E. KINTNER, *supra* note 22, at 67-68, 199. The Robinson-Patman Act may apply to competitive harm suffered at the third or fourth levels of competition as well as at the primary and secondary levels. A seller has, for example, been held liable for discriminating in price against one of his direct customers competing on the so-called fourth competitive level with a customer of a customer of the seller's original favored purchaser to whom the preferred price was successively passed along through the distribution chain. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1968). Although there is little precedent construing the availability defense in third or fourth line cases, the defense should protect a seller in these cases when he has made the preferred price available to the complainant. If the complainant has refused to take advantage of such an "available" price, under either conceptual basis of the availability defense, he should be precluded from holding the seller liable for discriminating between him and any direct or indirect customers of the seller at the second, third, or fourth competitive levels.

69. See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49 (1968); *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 957 (7th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *Alexander v. Texas Co.*, 165 F. Supp. 53, 58 (W.D. La. 1958); *In re Yale & Towne Mfg. Co.*, 52 F.T.C. 1580 (1956). In what many commentators and courts have referred to as an "aberrant" doctrine (see *In re General Foods Corp.*, 50 F.T.C. 885, 889 (1954)), the Second Circuit has bro-

plainant arguably has not met the initial burden of proving a price discrimination until he has shown both that a price differential exists and that the preferred price was not available to all customers.⁷⁰ In contrast, under the causal nexus theory all price differentials are considered discriminatory; therefore the complainant arguably needs to allege only the existence of a price differential and the fact that the differential caused the requisite effect on competition. The burden would then shift to the defendant to prove that the "availability" of the preferred price negated the relationship between the price differential and the alleged effect upon competition.⁷¹

Neither the Commission nor the courts have yet considered these arguments regarding the effect of the conceptual basis of the availability defense upon burden of proof. A definitive resolution of the question therefore must await further decisions. In cases under sections 2(d)⁷² and 2(e),⁷³ however, the courts have held that the burden of proving availability should be upon the defendant because the defendant is the party seeking to take advantage of the defense. Several commentators have concluded similarly that the unavailability of a discount under section 2(a) may be inferred from the complainant's proof of the existence of a price differential among competing customers and that, consequently, the burden is on the defendant to rebut the inference by proving the availability of the preferred price.⁷⁴ Under both views, the availability defense constitutes an affirmative rebuttal by the defendant

ken from the uniform holdings of the other circuits and shifted the burden to the defendant to prove that the relevant price differential did *not* have the requisite competitive effect following the complainant's proof of the mere existence of a price differential. *See* Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 460 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *FTC v. Standard Brands, Inc.*, 189 F.2d 510, 515 (2d Cir. 1951); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). The Second Circuit's singular view on burden of proof has been widely attributed to a misreading of the procedural provisions of § 2(b) of the Act as a substantive definition of the elements of a *prima facie* case under § 2(a). *See* F. ROWE, *supra* note 33, at 108-09.

70. *See* E. KINTNER, *supra* note 22, at 67.

71. *See id.*

72. *See* Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1001 (5th Cir. 1974); *R.H. Macy & Co. v. FTC*, 326 F.2d 445, 450 (2d Cir. 1964); *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 486 (2d Cir. 1962); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 838 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959). These cases are relevant to the question of burden of proof under § 2(a) because of the manner in which the availability concept under § 2(d) has been equated with the § 2(a) availability defense. *See* note 23 *supra*.

73. *See* Mueller Co. v. FTC, 323 F.2d 44, 47 (7th Cir. 1963).

74. *See generally* Millstein, *supra* note 22. *See also* C. AUSTIN, *supra* note 7, at 88; Austern, *supra* note 22, at 796.

of the section 2(a) prerequisites of price discrimination or competitive injury.

IV. STANDARD QUANTITY DISCOUNTS UNDER THE AVAILABILITY DEFENSE

The parameters of the availability defense have been defined most fully in cases dealing with the standard quantity discount, under which the seller grants a preferred price to customers in consideration of their purchase of a specified absolute quantity of product.⁷⁵ Availability often constitutes one of a defendant's only possible defenses in standard quantity discount cases, because the statutory defenses of cost justification and meeting competition are difficult to sustain.⁷⁶

In a few early cases the Commission declared quantity discounts illegal on the grounds that they exerted an "inherent tying effect" by encouraging a customer to purchase a portion of his requirements for a particular product from the discounting seller.⁷⁷ Under the Commis-

75. Indeed, the Robinson-Patman Act was intended to preclude the discriminatory use of quantity discounts, (*see* *FTC v. Morton Salt Co.*, 334 U.S. 37, 43-44 (1948); *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674, 676 (2d Cir. 1959); *Moog Indus., Inc. v. FTC*, [1956] Trade Cas. (CCH) ¶ 68,527 (8th Cir.)), and such discounts have been involved in a great number of the cases litigated under the Act.

76. Fixed costs savings resulting from the production of incremental amounts of product purchased by customers pursuant to cumulative quantity discounts may not be used to justify price discounts. In that situation all customers for whom the seller produced the relevant product, and not simply the customers purchasing the incremental amount pursuant to the quantity discount, have contributed to the seller's fixed production costs savings. S. REP. NO. 1502, 74th Cong., 2d Sess. 5-6 (1936). *See* E. KINTNER, *supra* note 22, at 174.

The courts and the Commission also have held in some cases that a seller's meeting of competition is not in "good faith" as required by § 2(b) if the seller is meeting a competitive pricing system as opposed to an individual competitive situation. *See* *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 758 (1945); *In re Surprise Brassiere Co.*, 71 F.T.C. 868 (1967), *aff'd*, 406 F.2d 711, 715 (5th Cir. 1969). Under this rationale sellers have been precluded from using the meeting competition defense to justify general quantity discount plans. *See* *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *In re Edelman Co.*, 51 F.T.C. 978, 1006-07 (1955), *aff'd*, 239 F.2d 152, 156 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). *See also* *In re Knoll Int'l, Inc.*, [1970-73 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,768 (1971) (FTC advisory opinion) (Commission stated that meeting competition defense of § 2(b) would not apply to meeting of competitive quantity discount plan). *But see* *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966) (meeting competitive quantity discount system permissible when complexity of competitive system makes it impossible to predict in advance actual price available in specific transactions).

77. The Commission pointed out that a customer's increasing entitlement to price concessions under a cumulative quantity discount exerted economic pressure tying the customer to the seller and precluding the seller's competitors from obtaining the customer's business. In order to

sion's analysis, such an inherent tying effect would appear to exist even in the case of discount plans with relatively low minimum purchase requirements. Thus, the Commission's early analysis could have resulted in a per se prohibition of quantity discounts.

More recent decisions of the courts and the Commission, however, take the less extreme view that quantity discounts do not exert an impermissible tying effect when, in practice, customers are able to purchase a portion of their requirements from competitive sources and continue to qualify for price preference.⁷⁸ Nevertheless, quantity discounts requiring a customer to purchase all or substantially all of his requirements from a particular seller may still be deemed illegal under section 2(a)⁷⁹ and under other antitrust provisions⁸⁰ because of their

obtain that business the competitors not only would have to match the seller's price, but also would have to indemnify the customer for the built-up discount entitlement he would forfeit if he switched his source of supply. See *In re Simmons Co.*, 29 F.T.C. 727, 742 (1939); *In re Standard Brands, Inc.*, 29 F.T.C. 121, 139 (1939), *aff'd*, 189 F.2d 510 (2d Cir. 1951); *In re Bausch & Lomb Optical Co.*, 28 F.T.C. 186, 198 (1939); *In re American Optical Co.*, 28 F.T.C. 169, 181-82 (1939). This view of the inherent tying effect of quantity discounts was consistent with the Commission's early holdings in primary line cases that the mere shift of business from one competitor to another was sufficient to demonstrate such discounts' adverse effect upon competition under § 2(a). See *In re Samuel H. Moss, Inc.*, 36 F.T.C. 640 (1943), *aff'd*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). Early Commission complaints under the original section 2 of the Clayton Act prior to the Robinson-Patman amendments also reflected the belief that quantity discounts had an inherent tying effect that tended to cause customers to confine their purchases largely or exclusively to a particular seller. See *In re Vacuum Oil Co.*, 3 F.T.C. 436 (1920); *In re Corona Typewriter Co.*, 3 F.T.C. 434 (1920); *In re Underwood Type-Writer Co.*, 3 F.T.C. 434 (1920); *In re Remington Typewriter Co.*, 3 F.T.C. 434 (1920).

78. See, e.g., *Dean Milk Co. v. FTC*, 395 F.2d 696, 711 (7th Cir. 1968). This less extreme approach is consistent with the more recent view of the Commission and the courts that the mere diversion of business from one competitor to another is not sufficient to demonstrate the requisite adverse competitive effect in a primary line Robinson-Patman case. To prevail in such a case, a complainant must now demonstrate a substantial effect on general competition in the primary line, rather than a mere impact upon a single competitor. In several primary line cases this rationale has been used to uphold quantity discounts notwithstanding evidence of diversion of business from a particular seller because of the discount. See *Minneapolis Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 791, 792 (7th Cir. 1951). See also *In re Yale & Towne Mfg. Co.*, 52 F.T.C. 1580 (1956); *In re Electric Auto-Lite Co.*, 50 F.T.C. 73 (1953); *In re General Motors Corp.*, 50 F.T.C. 54 (1953); *In re Champion Spark Plug Co.*, 50 F.T.C. 30 (1953).

79. See *In re General Ry. Signal Co.*, 66 F.T.C. 882 (1964) (FTC complaint charging that quantity discounts based on cumulative annual purchases were illegal under § 2(a) because they were "substantial enough to cause purchasers to buy all or substantially all of their requirements of said products from one respondent in order to qualify for the maximum discounts offered by that respondent" (case settled by consent order)). See *In re Maguire Indus., Inc.*, 55 F.T.C. 306 (1958) (discount conditioned on customer's purchase of quantity of product equal to customer's total requirements for product in previous year illegal under § 2(a)). See also *Herman Miller, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,391 (1978)* (FTC advisory opinion)

inherent tying effect.

Quantity discounts thus are not now regarded as per se violations of section 2(a), but as pricing plans that may be valid if certain conditions are met.⁸¹ Generally, these discounts should be upheld under the availability defense if (1) objective guidelines clearly define the conditions under which customers can take advantage of the discounts, (2) all competing customers are notified of those guidelines and of their ability to qualify for discounts under the guidelines, and (3) all competing customers are capable of qualifying for the discounts in the ordinary course of their business.⁸²

Objective prerequisites for quantity discounts are important not only to give customers clear notice of the standards for qualification but also to insure that the discounts are administered without favoritism to particular customers. The courts have stated that a seller may violate section 2(a) if he selectively grants discounts to certain of his customers who have failed to meet objective promotional goals or to distinguish themselves otherwise from customers who do not receive a discount. To comply with section 2(a), the seller must adopt specific and objective standards for discount qualification and must adhere consistently to those standards in qualifying each of his customers who meet the requisite promotional goals.⁸³

(illegal under section 5 of Federal Trade Commission Act to give discounted price quotations in bid situations only to dealers who agreed not to bid competitive products).

80. See note 6 *supra* and accompanying text for a discussion of how such quantity discounts may be deemed illegal requirements contracts under Sherman Act § 1 and Clayton Act § 3. Furthermore, if a seller conditions a quantity discount upon his customers purchasing more than one of his products, the seller may be deemed to have coerced his customers into accepting a tying arrangement that would be illegal under the Sherman and Clayton Acts. See *Advance Business Sys. & Supply Co. v. SCM Corp.*, 415 F.2d 55, 69 (4th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970). Therefore, a seller probably would violate those acts by offering a quantity discount to "full-line" distributors who carry all of the seller's products while refusing to make the discount available to competing distributors who resell only one or a few of the seller's products.

81. See *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969); *American Oil Co. v. FTC*, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964); *Elgin Corp. v. Atlas Bldg. Prods. Co.*, 251 F.2d 7, 11 (10th Cir.), *cert. denied*, 357 U.S. 926 (1958); *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir.), *rehearing denied*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951); *In re Sun Oil Co.*, 55 F.T.C. 955, 962 (1959), *rev'd*, 294 F.2d 465 (1961), *rev'd*, 371 U.S. 505 (1963).

82. See notes 93-105 *infra* and accompanying text.

83. In *Mueller Co. v. FTC*, 323 F.2d 44, 46 (7th Cir. 1963), the court held that the availability defense would not apply to a discount plan because "[T]here were no objective standards to guide regular jobbers in qualifying . . ." There was evidence that the seller had selectively qualified only his older, more established distributors. See also *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132

The courts also have held that a quantity discount is not "available" to all competing customers unless all customers are notified of the discount and of the conditions under which they may take advantage of it.⁸⁴ The relevant authority indicates that a seller would be well advised to notify his customers in writing of the discount plan, in order to prove that all customers had been informed of the plan.⁸⁵ Notification should occur sufficiently in advance of the plan's effective date to allow customers to take advantage of the plan and should include a specific description of all relevant details of the plan.⁸⁶ The seller should periodically renew his notification efforts if certain later-acquired custom-

(2d Cir. 1946) (promotional services granted only to customers who furnished "indeterminate aggregate" of services to promote seller's products were not "available" to all customers as required by § 2(e)); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979) (discount not "functionally available" unless objective standards exist to guide customers in qualifying for discount).

84. See, e.g., *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 355-56 (E.D. Wis. 1979). The courts and the Commission have specifically defined the manner in which a seller should notify customers of promotional allowances and services to insure the requisite "availability" under §§ 2(d) and (e). *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964); *Muelser Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963). See *Guides for Advertising Allowances and Other Merchandising Payments and Services*, 16 C.F.R. § 240 (1980) [hereinafter cited as *Commission Guides*]. A seller may have to comply with similar notification requirements in order to prevail under the availability defense in a § 2(a) case. See note 29 *supra*. The early 2(d) and (e) cases merely emphasized that promotional allowances and services that had been concealed from customers had not been made "available" as required by the Act. See, e.g., *In re N. Erlanger, Blumgart & Co.*, 46 F.T.C. 1139, 1142 (1950). More recent cases, however, make it clear that a seller has an affirmative obligation to notify his competing customers of the essential details of promotional offers. See *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 485 (2d Cir. 1962); *In re Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050, 1060 (1957); *In re Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (1956); *In re Kay Windsor Frocks, Inc.*, 51 F.T.C. 89, 95 (1954).

85. Some courts have held that it is at least theoretically possible to administer fairly a promotional program that has been orally communicated to customers. See *In re House of Lord's, Inc.*, 69 F.T.C. 44 (1966). The Commission Guides, *supra* note 84, however, implemented under §§ 2(d) and (e), note that written notification of a plan is desirable to prove receipt of the notification by each of a seller's customers. 16 C.F.R. § 240.8(a) (1980). See also Kintner, *Merchandising Allowances and Services, Sections 2(d) and 2(e) of the Robinson-Patman Act*, 41 NOTRE DAME LAW. 364, 366 (1966).

86. See 16 C.F.R. § 240.8(a) (1980). Thus, the Commission Guides stop just short of requiring a seller to make an individual formal offer of his promotional plan to each customer. In *Alterman Foods, Inc. v. FTC*, 497 F.2d 993, 1001 (5th Cir. 1974), the court implied that a seller might be required actually to offer his promotional plan to all customers. After holding that §§ 2(d) and (e) required the seller to take affirmative action to inform his customers of the availability of the plan, the court added: "Thus, while promotional benefits received may be considered in determining proportional equality, the basic question is one of proportionality of offers." (emphasis added). See also *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962); *In re Chestnut Farms Chevy Chase Dairy*, 53 F.T.C. 1050 (1957); *In re Kay Windsor Frocks, Inc.*, 51 F.T.C. 89 (1954).

ers would be unlikely to be adequately informed of the plan by a one-step notification process.⁸⁷

Sellers have been required to notify each of their competing customers of a quantity discount even when it appeared that certain customers would be uninterested in the discount.⁸⁸ The courts and the Commission have excused sellers from this requirement only when notification clearly would have been futile because a customer would have been unwilling to comply with the prerequisites of the discount.⁸⁹

Under the "indirect purchaser" doctrine adopted by the Commission and the courts, competing customers entitled to receive notification of a quantity discount should be deemed to include all customers who compete in the resale of the seller's product at each functional level of the distribution chain in which the seller makes his discount directly available to any customer, regardless of whether those customers purchase the product directly from the seller or indirectly through wholesalers or other intermediaries.⁹⁰ If, for example, a seller offers a quantity discount directly to a retail customer, or allows an integrated wholesaler-

87. See 16 C.F.R. § 240.8(a) (1980).

88. See *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350 (E.D. Wis. 1979).

89. See *id.* at 356.

90. See *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968); 16 C.F.R. § 240.3(b) (1980). Under the "indirect purchaser" doctrine adopted by the Commission and the courts, a seller may have to take extra steps to insure the availability of a discount at any additional distribution levels to which he directly markets his product. If, for example, the seller markets his product directly at the wholesale and retail levels, and makes a discount available only to his direct-buying retailers, he may be deemed to have discriminated against competing retailers who purchase the product at a higher price from one of his wholesale customers. Such retailers have been viewed as "indirect purchasers" of the seller for Robinson-Patman purposes. See *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1968); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968). There is also authority under which a seller could be deemed to have discriminated against a direct-buying retailer competing with another retailer who has been able to purchase the product at a lower price from a wholesale customer of the seller. See *In re Standard Oil Co.*, 41 F.T.C. 263 (1945), *modified*, 43 F.T.C. 56 (1946), *modified and aff'd*, 173 F.2d 210 (7th Cir. 1949), *rev'd and remanded on other grounds*, 450 U.S. 231 (1951). Possibly, therefore, a seller directly distributing his product both at the wholesale and retail level may be required to supervise his wholesalers to insure that (1) the advantages of a retail discount plan are made available to retailers purchasing through the wholesalers, and (2) the wholesalers do not pass a price advantage along to retailers competing with the seller's direct-buying retailers. These requirements may encourage a seller to maintain the resale prices of his wholesalers and thus to commit a violation of the Sherman Act. See *In re Standard Oil Co.*, 49 F.T.C. 923 (1953), *rev'd*, 233 F.2d 649 (7th Cir. 1956), *aff'd*, 355 U.S. 396 (1958). Courts and commentators have criticized this requirement that a seller supervise his distributors to insure that indirect purchasers receive no undue benefit or disadvantage in pricing. See *id.* at 957 & n.1; F. ROWE, *supra* note 33, at 200. Therefore, it is unclear whether a court would actually require a seller to so supervise distributors under a price discount program.

retailer to take advantage of the discount with respect to retail sales, the seller also may be required to offer the discount to all other firms competing with that customer on the retail level, including those retailers who purchased directly from the seller and those who purchased indirectly through his wholesale distributors.⁹¹ If, however, a seller offers a quantity discount only with respect to wholesale sales, and that discount meets the other criteria of "availability" discussed earlier in this Article, the seller should not be required to offer the discount to any retail customers of his wholesale distributors, even though some of those customers may be disadvantaged in purchasing from distributors who choose not to take advantage of the discount.⁹² By limiting a quantity discount to wholesale transactions, a seller therefore may avoid a possible extension of his liability to indirect purchasers at distant distribution levels.

Finally, in order to utilize the availability defense, a seller must demonstrate that each competing customer has the inherent capability to qualify for a quantity discount in the ordinary course of his business. The Commission and the courts have emphasized that, unless a customer has that capability, the offer of a promotional plan is a mere pretense and is tantamount to no offer at all.⁹³

The Supreme Court, in *FTC v. Morton Salt Co.*,⁹⁴ established a framework for analyzing customers' capabilities of qualifying for quantity discounts. In that case only five of Morton Salt's 4,000 customers were able to qualify for a discount determined by the cumulative annual volume of the customers' salt purchases. Morton Salt argued that, in contrast to a system of hidden or special rebates, the discount plan was disclosed to all of its customers and, therefore, was equally available to each. The Court pointed out that mere disclosure of the plan was insufficient to prove availability and held the plan illegal under section 2(a) because it was not accessible on a practical basis to most

91. See note 90 *supra*.

92. In such a case the distributors' opportunity to take advantage of the discount should be deemed either to negate any element of discrimination or to disrupt the causal nexus between the seller's price differential and injury to competition on the retailers' distribution level. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.).

93. For example, in *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 839 (7th Cir. 1958), a case construing the availability of a promotional allowance under § 2(d), the court stated, "An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him."

94. 334 U.S. 37 (1948).

customers. The Court concluded: "[T]heoretically, the discounts are equally available to all, but functionally they are not."⁹⁵

The question of whether a quantity discount is "functionally available" to all competing customers as required by *Morton Salt* has arisen in several cases under section 2(a).⁹⁶ In some cases it was clear on the face of the discount plan that the plan prerequisites were not actually achievable by the seller's average small purchasers. In those situations the Commission concluded that a plan that automatically excludes small purchasers on the basis of the inherent nature of their business does not meet the requirement of functional availability.⁹⁷ The Commission has, for example, invalidated discounts that escalate in accordance with the amount of customers' total requirements for a particular product, emphasizing that customers with lesser requirements necessarily would be precluded from taking advantage of the higher discounts.⁹⁸ Quantity discounts requiring the purchase of amounts of product clearly in excess of the capabilities of smaller purchasers also have been found illegal on a similar rationale.⁹⁹ A discount plan requiring customers to purchase all or substantially all of their requirements from the seller also may be deemed presumptively unavailable to certain customers, particularly if those customers can demonstrate legitimate business reasons for requiring competitive products.¹⁰⁰

95. *Id.* at 42.

96. A similar concept of functional availability has been developed for promotional allowances and services under §§ 2(d) and (e), whose concept of availability has often been equated with the availability defense under § 2(a). See note 23 *supra*. Indeed, the Commission Guides incorporate a requirement of "functional availability" similar to that in *Morton Salt*. The Guides state that a promotional plan must be "usable in a practical sense by all competing customers" and must not by its nature preclude certain customers from participating. See 16 C.F.R. § 240.9(a) (1980).

97. See *In re Standard Brands, Inc.*, 29 F.T.C. 121, 140 (1939), *aff'd*, 189 F.2d 510 (2d Cir. 1951); See *In re American Optical Co.*, 28 F.T.C. 169, 183 (1939). See also C. AUSTIN, *supra* note 7, at 21.

98. See *In re International Salt Co.*, 49 F.T.C. 138 (1952) (discounts based upon amount of customers' purchases from all sources during previous twelve months); *In re Ferro Enamel Corp.*, 42 F.T.C. 36 (1946) (same); *In re Anheuser-Busch, Inc.*, 30 F.T.C. 1209 (1940) (discounts based on customers' monthly requirements of product).

99. In *Standard Motor Prods., Inc. v. FTC*, [1959] Trade Cas. (CCH) ¶ 69,338 (2d Cir.), for example, the court found illegal a discount plan under which the maximum discount was available only on cumulative annual purchases in excess of \$100,000. That quantity clearly exceeded the purchasing capacity of several smaller customers.

100. As discussed in notes 77-79 and accompanying text, *supra*, discount plans requiring a customer to purchase all or substantially all of his requirements for a product from a particular seller have been deemed illegal in the primary line because of their "inherent tying effect" which

In other cases, the practical ability of smaller customers to qualify for a quantity discount has been obvious on the face of the discount plan. On those grounds the courts and the Commission have upheld quantity discounts requiring the purchase of only a negligible amount of product that is obviously within the purchasing range of all customers.¹⁰¹

Frequently, however, it has not been obvious on the face of a quantity discount plan that the discount would be achievable by a seller's average small customers. In those cases the courts and the Commission have examined customers' actual experience under the plan to determine whether the discount was available to them. When a significant percentage of customers did not take advantage of the discount,¹⁰² or when a large number of smaller customers found it necessary to form cooperative buying associations to qualify for the discount,¹⁰³ the courts and the Commission have inferred that the requirements for qualification were in fact too onerous for the plan to be deemed available to all customers. If, however, only a small minority of customers failed to take advantage of the quantity discount, the use of the dis-

tends to direct business to the discounting seller and away from his competitors. Such plans also may be illegal in the secondary line when certain customers are unable to purchase the requisite amount of their requirements from a particular seller because of the inherent nature of their business. In a recent advisory opinion, *Herman Miller*, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,391 (1978), the Commission pointed out that a discount conditioned upon a customer's agreement not to deal in competitive products would not be available to customers who might need to fill a portion of their requirements from competitive sources. The Commission concluded that such a discount therefore would be discriminatory as against such customers.

101. See *Hanson v. PPG Indus., Inc.*, 482 F.2d 220, 235 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974) (upholding discount requiring purchase of at least twenty-four windshields); *In re Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537, 543-44 (1937) (upholding discount available to any customer willing to handle at least five dollars worth of seller's products within two or three week period). See also *In re Sunbeam Corp.*, 67 F.T.C. 20, 26-27 (1965) (upholding under § 2(d) promotional allowance requiring purchase of at least \$440 worth of seller's product).

102. See *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948) (only five customers out of several thousand obtained discount); *National Dairy Prods. Corp. v. FTC*, [1968] Trade Cas. (CCH) ¶ 72,445 (7th Cir. 1967) (more than half of customers received no discount); *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir.), cert. dismissed, 342 U.S. 875 (1951) (98% of customers did not qualify for discount); *In re Atlantic Prods. Corp.*, 63 F.T.C. 2237 (1963) (85-90% of seller's customers did not utilize discount); *In re Shreveport Macaroni Mfg. Co.*, 60 F.T.C. 196 (1962), aff'd, 321 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964) (only two customers received promotional allowances); *In re Bulova Watch Co.*, 48 F.T.C. 971 (1952) (8,000 customers failed to qualify).

103. See *United Biscuit Co. of America v. FTC*, 350 F.2d 615 (7th Cir.), cert. denied, 383 U.S. 926 (1965); *Moog Indus., Inc. v. FTC*, [1956] Trade Cas. (CCH) ¶ 68,527 (8th Cir.). The courts have emphasized in such cases that a quantity discount is not available to a customer when he is required to alter his independent business status in order to receive the discount.

count by the great majority of customers was deemed sufficient to evidence the discount's equal availability to all.¹⁰⁴

This quantitative standard used by the courts and the Commission to determine the legality of quantity discounts is somewhat disturbing. Under the rationale of the availability defense, a seller should not be excused from liability if *any* of his customers is arbitrarily denied a quantity discount by virtue of the customer's business status. Furthermore, a quantity discount whose prerequisites are truly achievable by all of a seller's customers should not be held illegal merely because a significant percentage of customers freely choose not to take advantage of the discount. To avoid this result, if the availability of a quantity discount is not apparent on the face of the discount plan, it would be preferable for the trier of fact to examine the customer's *capability* to qualify for the discount, rather than to view as controlling the actual experience of the majority of customers.

A few cases have indicated that the availability defense may apply to a discount plan that is somewhat unattractive to customers, provided the customers are economically capable by qualifying for the discount plan. A customer may, for example, prefer not to purchase the requisite amount of product from a particular seller or to meet certain other prerequisites of a seller's discount plan. If, however, the customer has the capability to meet those prerequisites, the discount should be deemed to be available to him, regardless of whether the customer considers the promotion attractive enough to take advantage of it.¹⁰⁵ The

104. See *In re Standard Brands, Inc.*, 29 F.T.C. 121, 140 (1939) (favorable price available to "great majority" of customers), *rev'd on other grounds*, 30 F.T.C. 1117, 1136-37 (1940), *aff'd*, 189 F.2d 510 (2d Cir. 1951). See also *In re Surprise Brassiere Co.*, 71 F.T.C. 868, 959 (1967) (upholding under § 2(d) advertising allowance available to all customers "except perhaps a very few with a volume of purchases so small that their . . . exclusion from the plan might be regarded as *de minimus*.").

105. Several cases have upheld the availability of discounts requiring customers to purchase a product in quantities that may have been unattractive to them, but which were nevertheless within their purchasing capabilities. See *Hanson v. PPG Indus., Inc.*, 482 F.2d 220 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136; *In re Sunbeam Corp.*, 67 F.T.C. 20 (1965); *In re American Optical Co.*, 28 F.T.C. 169 (1939); *In re Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). Other cases have validated discounts requiring customers to pay for a product within an accelerated period of time that many customers found inconvenient to meet. See cases cited in note 26, *supra*. In *Corn Prods. Ref. Co. v. FTC*, 144 F.2d 211, 220 (7th Cir. 1944), *aff'd*, 324 U.S. 726 (1945), the Seventh Circuit upheld a discount related to the size of shipping containers, an arrangement which was obviously more attractive to some customers than to others. In *United Banana Co. v. United Fruit Co.*, 362 F.2d 849 (2d Cir. 1966), the price discrimination charge was based on the defendant's offer to load railroad cars for free while continuing to charge a fee for truck loading. The court denied recov-

availability defense should apply if the customer makes the decision not to use the discount on the basis of his own business preferences rather than because of his inability to meet the plan's prerequisites.

The foregoing analysis indicates that a standard quantity discount plan should be upheld under the availability defense if (1) it is offered in writing to all of a seller's direct or indirect purchasers competing on each distribution level to which the seller directly markets his product under the plan, and (2) it includes objective standards for qualification within the capabilities of all those purchasers. Such a discount should be deemed legal on each distribution level regardless of whether several customers fail to take advantage of the discount because it is not sufficiently attractive to them.¹⁰⁶

V. DISTRIBUTOR INCENTIVE DISCOUNT PLANS AND THE AVAILABILITY DEFENSE

Some sellers may wish to employ quantity discount plans that are more flexible than the standard quantity discounts discussed above. Instead of requiring each distributor to purchase the same absolute amount of product regardless of the distributor's size or marketing potential, a seller may want to tailor the prerequisites of his discount plan to each distributor's individual business circumstances. Because such discount plans can be designed to encourage each distributor to devote the maximum effort to the resale of the seller's product consistent with that distributor's marketing capabilities, plans of this nature are often referred to as "incentive discount plans." The prerequisites of an in-

ery because the complainant could have utilized railroad cars, but instead, because of greater speed and economy, chose to ship by trucks. In *Mowery v. Standard Oil Co. of Ohio*, 463 F. Supp. 762 (N.D. Ohio 1976), *aff'd*, 590 F.2d 335 (1978), the court stated in dicta that the availability defense could apply to a discount on dealers' purchases of gasoline available only if the dealers reduced their retail gasoline price by a specified amount greater than the amount of the discount. The plan was obviously unattractive to many dealers. See also *Advisory Opinion Digest No. 94*, 70 F.T.C. 1877-78 (1966), a § 2(d) case, in which a seller offered an alternate promotional plan to those customers unable to employ the primary promotional plan. One customer, capable of using the primary plan, wished to employ the alternate plan for private reasons. The Commission ruled that the seller could refuse to make the alternate plan available to that customer because he could have used the primary plan.

106. As discussed in notes 57 and 58 *supra* and accompanying text, the authorities' disagreement over the proper theoretical basis of the availability defense leaves some question regarding the applicability of the defense in the primary line. The preferred view appears to be, however, that availability should prevent the illegality of a price differential on each competitive level. See notes 59-68 *supra* and accompanying text.

centive discount plan are typically phrased in terms of a formula requiring each distributor to upgrade his resale of the seller's product in a specified manner. The form of these plans may vary widely depending upon a seller's specific marketing goals. Examples include plans requiring a distributor: (1) To increase the amount of his purchases from the seller by a specified percentage over the amount of his purchases during an earlier base period;¹⁰⁷ (2) to purchase a specified percentage of his total requirements from the seller rather than from the seller's competitors;¹⁰⁸ (3) to resell the seller's product to a certain number of applications previously supplied by a competitor;¹⁰⁹ or (4) to reach a particular sales quota negotiated by the seller and distributor.¹¹⁰

The criteria of the availability defense described above in the context of standard quantity discounts should apply equally to incentive discount plans, because such plans are in effect a type of quantity discount.¹¹¹ Both the standard quantity discount and the incentive discount are granted in consideration of a customer's purchase of a particular quantity of product. The two discount plans differ only in the manner in which the applicable quantity is defined. Under the incentive discount the applicable quantity is specified in terms of a formula, while the standard quantity discount requires the purchase of an absolute quantity of product. Because of these similarities, an incentive discount plan, like the standard quantity discounts discussed above, should qualify for the availability defense only if the plan is offered to all competing distributors¹¹² and includes objective qualification standards that all distributors may achieve.¹¹³

The principal advantage of the incentive discount over the standard quantity discount is that its prerequisites need not be diminished as significantly to make the discount achievable by all competing distributors. As discussed in Section IV, a seller often can insure that a standard quantity discount will be upheld on its face under the availability defense only by making the applicable quantities low enough to be ob-

107. See Section VI(a) *infra* for an analysis of the legality of such a plan.

108. See Section VI(b) *infra*.

109. See Section VI(c) *infra*.

110. See Section VI(d) *infra*.

111. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.); *Tosa Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,006 (E.D. Wis.).

112. See notes 84-92 *supra* and accompanying text.

113. See notes 93-104 *supra* and accompanying text.

viously within the purchasing range of his average small customers. Such a discount plan would provide a seller's large distributors with little incentive to aggressively market his product. Nevertheless, reducing the requisite quantities in this manner may be the only way for the seller to prevent a court from using his distributors' actual experience under the plan to measure the discount's legality. Under that standard, a court may find the quantity discount illegal simply because several distributors chose not to take advantage of the discount for private reasons, even though they may have been economically capable of qualifying for the discount.¹¹⁴

Under an incentive discount plan a seller should be able to avoid that result and still impose rather onerous resale requirements upon his distributors. Because the prerequisites of such a plan are specified in a formula rather than in absolute quantities, the seller can more easily tailor the plan's requirements to each distributor's maximum resale capabilities. If the incentive plan requires each distributor to upgrade his resale of the seller's product in a manner that is obviously achievable by the distributor, the plan should be deemed valid on its face, even though it may require the distributor to undertake rather burdensome promotional efforts.¹¹⁵ The flexibility of an incentive discount plan thus allows a seller to aggressively promote his product while avoiding the uncertainties inherent in a court's inquiry into customers' actual experience under a discount plan.

VI. INCENTIVE DISCOUNT PLANS THAT SHOULD BE DEEMED PRESUMPTIVELY LEGAL

The extent to which a seller can insure the presumptive legality of his incentive discount plan will depend upon his marketing objectives under the plan. To qualify for the availability defense,¹¹⁶ each plan

114. See notes 102-04 *supra* and accompanying text.

115. See note 105 *supra* and accompanying text.

116. The availability defense may be the only possible defense for a seller implementing an incentive discount because the cost justification and meeting competition defenses are difficult to sustain in quantity discount cases. See note 76 *supra* and accompanying text. Indeed, those defenses may be even more difficult to sustain under particular incentive discount plans. Because the prerequisites of certain incentive discounts are not phrased in terms of a customer's purchase of an absolute quantity of product, a seller would not know in advance the actual amount of product a customer might purchase pursuant to the plan and would therefore be unable to make the calculations necessary for the cost justification defense. The meeting competition defense also probably would not apply to certain incentive discounts, because most sellers would be more

must include objective qualification standards which are disclosed in writing to all distributors on each competitive level to which the seller markets his product pursuant to the plan.¹¹⁷ The greatest difficulty inheres, however, in devising a plan with prerequisites that meet a seller's promotional requirements yet appear on their face to be equally attainable by all distributors.

A. *Plans Based Upon Relationship Between Current and Prior Purchases*

A seller may wish to base a discount on a distributor achieving a specified relationship between current purchases from the seller and purchases during an earlier base period.¹¹⁸ The seller may, for example, condition the discount upon a distributor achieving a specified percentage increase in current purchases over purchases during the base period. A less aggressive seller concerned merely with avoiding any significant erosion in sales might base the discount on a distributor's success in maintaining current purchases at the base period level or not allowing current purchases to fall more than a specified percentage below the earlier level. Such incentive discount plans have the obvious advantage of encouraging all distributors, regardless of size, to maintain or increase their sales of the seller's product in the specified manner. Discounts may also be more attainable by small distributors under such a plan than under a standard quantity discount, for it may often be easier for those distributors to achieve the requisite relationship between current and base year purchases than to purchase the absolute volumes of product specified under a standard quantity discount.

If an incentive plan requires distributors to achieve relatively large percentage increases in purchases over the base period, however, certain distributors may be able to demonstrate that the discount is not equally available to them. Under such a percentage increase plan,

likely to institute such discounts independently to accomplish their own marketing goals, rather than to copy a competitor's plan.

117. See notes 111-13 *supra* and accompanying text.

118. The requisite relationship between current and prior purchases could be computed either in terms of unit or dollar volume of product. The use of unit volume as a basis for computation has the advantage of protecting both the seller and his distributors against aberrations resulting from price inflation or deflation. If the relationship were based on dollar volume of purchases, the distributor would obviously have an undue advantage when the seller increased the purchase price from the base period purchase price, and the seller would have an undue advantage upon lowering the product's purchase price from the earlier period.

larger distributors would have to increase their sales by a greater absolute amount than smaller distributors to receive a discount.¹¹⁹ Distributors who conduct a general resale business might encounter greater difficulty in focusing their promotional efforts to increase demand for the seller's product by the requisite percentage than would distributors who specialized in the seller's product.¹²⁰ Distributors whose own customers required competitive products consequently might be unable to increase their purchases of the seller's product by the required percentage.¹²¹ Other distributors operating in an area of relatively static demand for the seller's product would be disadvantaged as against distributors in areas experiencing a relatively sharp increase in demand. A similar disadvantage would accrue to distributors whose sales of the product happened to have been abnormally high during the base period from which the requisite percentage increase in purchases is computed.

No clear authority exists regarding the exact percentage relationship between a distributor's current and prior purchases that will be deemed achievable by all distributors in a particular situation. Indeed, the validity of incentive discounts based upon the relationship between a distributor's current and prior purchases has not yet been litigated before the courts or the Commission. Several Commission advisory opinions, however, have indicated that a requirement to achieve extreme percentage increases will be deemed to be beyond the capabilities of most distributors. In those opinions the Commission declared that incentive plans requiring a distributor to achieve a fifty percent increase in purchases over prior periods to qualify for a discount may be illegal.¹²² If it is obvious that a fifty percent increase in purchases is usually too difficult a requirement, a plan requiring a distributor merely to match his purchases during a prior period should be deemed reasonable in

119. See *In re Scott Publishing Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,196 (1973) (Commission advisory opinion declaring illegal graduated discounts based on percentage by which customer's quarterly purchases exceeded purchases from seller one year earlier; Commission pointed out disadvantage to larger distributors).

120. "The general retailer may claim that it is easier for his competition to concentrate his efforts and, thereby, increase his sales of the product involved." E. KINTNER, *supra* note 22, at 200.

121. There is authority that under these circumstances the discount would constitute an illegal price discrimination in the secondary line. See note 100 *supra* and accompanying text.

122. See *In re Baumgold Bros., Inc.*, [1973-1976 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,602 (1974); *In re Scott Publishing Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,196 (1973); 16 C.F.R. § 15.153 (1980).

most circumstances.¹²³ Despite the absence of direct authority, such a plan appears to be consistent with the availability defense. Discounts calculated on the basis of each distributor's own demonstrated purchasing capabilities generally should be achievable by all distributors regardless of their size or market circumstance.

There may be certain unusual market circumstances in which distributors would find it impossible even to match their base period purchases, such as during periods of particularly weak demand for the seller's product. Conversely, during periods of unusually strong demand for the product distributors may be able to achieve a significant percentage increase in their purchases from the seller. A seller can protect himself from the problems of availability raised by such unusual market circumstances by frequently revising the requirements of his incentive plan. For example, in times of general declining demand for the seller's product it may be reasonable for the seller to require distributors to purchase only eighty percent of what they had bought in prior periods, while in times of general increasing demand the seller may require distributors to increase their purchases by twenty percent.

Even in times of increasing demand for the seller's product, circumstances may arise in which the seller may not be able to require all of his distributors to increase their purchases. Percentage increase requirements may, for example, be deemed discriminatory against distributors who already had been purchasing all or substantially all of their requirements from the seller during the applicable base period, because those distributors may not be able to satisfy their occasional need for competitive products and continue to qualify for discounts under the plan.¹²⁴ A seller, therefore, should devise a method for such distributors to participate in his incentive plan, either by reducing the requisite percentage increase or crediting occasional competitive purchases toward the amount of purchases required of the distributors under the plan.

An incentive discount based upon the relationship between distributors' current and prior purchases certainly should be deemed to discriminate against new distributors, who would be excluded by virtue of

123. In *In re Scott Publishing Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,196 (1973), the Commission stated that a "legally inoffensive" incentive program might be devised if all distributors with any increase in volume over a specified earlier period received the same discount.

124. See note 121 *supra* and accompanying text.

having no base period purchases from which the seller could determine their entitlement to a discount. For such a plan to be upheld, therefore, a seller would have to devise a method by which new distributors could participate.¹²⁵ For example, a seller might assign a base period purchase quantity to each new distributor that is comparable to the actual base period purchase quantities of established distributors who are otherwise similarly situated.¹²⁶ Purchases by the new distributor bearing the requisite relationship to the assigned base period purchase quantity would entitle the distributor to a discount under the plan.¹²⁷

An incentive discount plan requiring distributors to maintain or reasonably increase their purchases over a prior period, which takes into account unusual market circumstances, distributors' occasional need to purchase competitive products, and the right of new distributors to participate, should be deemed valid on its face. Despite the absence of direct authority, the general rationale of the availability defense indicates that a seller should be deemed to have treated his distributors as equally as possible under such a plan. Each distributor should have a practical opportunity to qualify for a discount under such a plan in the ordinary course of his business. Each distributor also should be aware at the plan's inception of the risks associated with participation in the plan.¹²⁸ Therefore, no distributor should be able to assert later that the

125. In *In re Scott Publishing Co.*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶ 20,196 (1973), one of the Commission's grounds for concluding that an incentive plan based on increased purchases over a prior period would be illegal was the fact that new customers could not qualify under the plan.

126. A seller might use several methods of assigning a base period purchase quantity to new distributors. One method for distributors who had previously marketed comparable products would be to use the actual amount of competitive products marketed by those distributors during the base period.

127. Assume, for example, that one of the seller's distributors purchased \$100,000 worth of the relevant product in the prior year and must purchase 10% more of the product in the current year to qualify for a discount. It should be acceptable for the seller to assign \$100,000 as the base period purchase quantity for a new distributor of similar size and marketing capabilities, and to require that distributor to purchase \$110,000 worth of product in the current year in order to qualify.

128. An incentive plan that may mislead potential participants as to their ability to qualify for discounts under the plan may be illegal. In one advisory opinion the Commission, in declaring a pyramid-type incentive plan illegal, emphasized the plan's appeal to small distributors who might not understand its risks. Under that plan, discounts were based on the number of new distributors recruited by each distributor participating in the plan. See 16 C.F.R. § 15.155 (1980). See also *National Nut Co. of Calif. v. Kelling Nut Co.*, [1944-1945] Trade Cas. (CCH) ¶ 57,405 (N.D. Ill. 1944) (dicta that discount based on chance, such as one based on a customer sending in additional customers to the seller, would be illegal). In contrast, the risks associated with incentive plans of

plan was unlawful merely because changing economic circumstances made the plan unattractive to him.¹²⁹

B. *Plans Based Upon Requirements Purchases*

Instead of merely requiring his distributors to maintain or increase their resale volume, a seller may wish to encourage his distributors more directly to increase his product's market penetration. One way to accomplish this objective is to base an incentive discount upon a distributor's purchase of a specified percentage of his requirements from the seller. Such a plan should encourage distributors who would otherwise promote competitive products to concentrate a greater portion of their resale activities on the seller's product.

At first glance, incentive discounts based upon requirements purchases appear to raise fewer availability questions than do discounts based upon distributors achieving a specified relationship between current and prior purchases. New distributors generally should not be precluded from participating in requirements incentive plans.¹³⁰ Furthermore, distributors who because of their size or market circumstances find it difficult to achieve the requisite relationship between current and prior purchases might experience less difficulty in changing the overall mix of their purchases from various sources to qualify for discounts under a requirements incentive plan.

A requirements incentive plan nevertheless does have certain disadvantages. First, from a business standpoint, such a plan merely encourages distributors to increase the seller's percentage share of a particular market; the plan does not encourage distributors to expand the size of the entire market. Thus a seller increasing his market penetration under such a plan might be left with a static or even declining absolute

the type described in this Section VI should be readily understood by distributors, because such plans are based upon the distributors' own resale potential.

129. Discounts whose prerequisites have been merely unattractive to customers, as opposed to being beyond their capabilities, are considered "available" to those customers. See note 105 *supra* and accompanying text.

130. If, however, the plan requires distributors to increase the proportion of their requirements purchased from the seller by a specified percentage over the proportion purchased during a prior period, the seller should devise a method to allow new distributors to participate. See notes 125-27 *supra* and accompanying text. The seller might, for example, merely specify a reasonable percentage of total requirements that all new distributors must purchase to qualify for the discount. Such an arrangement would be consistent with the seller's over-all discount plan, because the new distributors obviously would be purchasing a greater proportion of their requirements from the seller than the nonexistent amount they had purchased during the earlier period.

volume of sales in a diminishing market. Further, potential legal problems associated with a requirements incentive plan increase as a seller requires his distributors to purchase a greater percentage of their requirements from him. It is possible, for example, that discounts under a plan requiring distributors to purchase all or substantially all of their requirements from a seller might be deemed to be unavailable to distributors who must purchase a portion of their requirements from the seller's competitors to meet the specifications of their own customers. Commission advisory opinions and consent orders indicate that such incentive plans may violate section 2(a) in the secondary line.¹³¹ In addition, because a requirements incentive plan directly encourages distributors to divert business from the seller's competitors, primary line suits might be particularly likely under such a plan.¹³² Because of the uncertainties in the conceptual basis of the availability defense, a seller might be unable to successfully defend such a primary line suit on the ground that the incentive plan was equally available to all his distributors.¹³³ Finally, if a seller expressly requires his distributors to purchase all their requirements from him under such an incentive plan, the plan may be deemed an illegal requirements contract under section 1 of the Sherman Act or section 3 of the Clayton Act when the requisite adverse competitive effect can be demonstrated.¹³⁴

Therefore, to guarantee the presumptive legality of a requirements incentive discount plan, a seller may be forced to base his discount on a distributor's purchase of less than a substantial portion of his requirements from the seller. This necessity obviously may contradict the seller's marketing goals.

131. See Herman Miller, [1976-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 21,391 (1978) (FTC advisory opinion); *In re Maguire Indus., Inc.*, 55 F.T.C. 306 (1958) (consent order). The Maguire consent order prohibited a seller from discriminating in price by paying a 10% annual rebate to those customers whose purchases from the seller equalled their purchases from all sources during the previous year, a 7½% rebate to those whose purchases equalled 75% of previous requirements, and a 5% rebate to those whose purchases equalled 50% of previous requirements.

132. The Commission has recognized the primary line effects of such quantity discounts in citing the "inherent tying effect" of discounts requiring a customer to purchase all or substantially all of his requirements for a product from a particular seller. See notes 77-79 *supra* and accompanying text.

133. See notes 57 and 58 *supra* and accompanying text. The preferred view appears to be, however, that the availability of the incentive plan to all competing customers should prevent a finding of illegality in any line of commerce. See notes 59-68 *supra* and accompanying text.

134. See note 6 *supra* and accompanying text.

C. *Plans Based Upon Sales Displacing Competitive Products*

A requirements discount plan is not the only type of incentive discount a seller may use to encourage his distributors to increase market penetration. A seller also may base a discount on his distributors entering into individual transactions that have the effect of displacing a competitor's product in favor of the seller's product. One such incentive plan provides for a distributor to receive a discount with respect to each sale made by the distributor for an application in which a competitor's product had been utilized previously. Each of a seller's distributors, regardless of size or market circumstance, should have an equal opportunity to make individual sales for such applications. This type of incentive plan thus avoids the availability problems inherent in other discount plans requiring distributors to purchase certain quantities of products that may exceed their capabilities.¹³⁵ Such plans therefore should be found on their face to be equally available to all competing distributors.¹³⁶ Indeed, in a recent case the Second Circuit expressly found that an incentive discount based upon distributors' resale of the seller's product to certain specified applications should be upheld under the availability defense.¹³⁷

The legality of an incentive discount based on sales displacing competitive products nevertheless may be questionable when, rather than being granted with respect to each qualifying sale, the discount is available only to distributors who meet a threshold requirement for a certain cumulative number of such sales within a specified period. This type of plan is more likely to be deemed unavailable to certain distributors because of market circumstances beyond their control. New dis-

135. See notes 93-104 *supra* and accompanying text.

136. As in the case of requirements incentive plans, however, incentive plans based upon sales displacing competitive products carry a great potential for primary line suits because of their direct impact upon a seller's competitors. The uncertainties in the conceptual basis of the availability defense raise questions concerning a seller's ability to defend such primary line suits on the ground that the incentive plan was equally available to all his distributors. See notes 57-68 *supra* and accompanying text.

137. See *FLM Collision Parts, Inc. v. Ford Motor Co.*, [1976-2] Trade Cas. (CCH) ¶ 61,103 (2d Cir.), in which Ford offered a discount on its dealers' purchases of automobile parts for resale to independent automobile repair shops. The discount was not available on dealers' purchases of such parts for their own use or for resale to wholesalers such as FLM. FLM claimed that the incentive plan violated § 2(a) because Ford sold the same product at different prices to competing dealers depending upon those dealers' resale activities. The court held that the plan did not violate the Robinson-Patman Act because Ford had given all dealers an equal opportunity to secure the discount.

tributors in a particular market area might be unable to locate and solicit the requisite number of favored applications for the seller's product. Established distributors also might be precluded by the nature of their business from sufficiently focusing their marketing efforts to achieve the requisite number of sales to such applications.¹³⁸ Under this type of plan distributors also would be less capable of accurately assessing their chances of qualifying for a discount, for it would be difficult for a distributor to determine in advance the number of applications within his marketing area in which he could replace a competitive product with the seller's product. The uncertain risks associated with participation in the plan may suffice by themselves to prove the plan's illegality under section 2(a).¹³⁹

Although each of the incentive discount plans discussed above offers a seller greater flexibility in encouraging the aggressive resale of his product than does the standard quantity discount, it appears that a seller must still temper his distributors' resale requirements to some extent to guarantee that such incentive discounts will be upheld under the availability defense. Unless a seller does so, his incentive discount plan should not be deemed to be legal on its face, and the seller will be faced with the uncertainty of whether, upon further inquiry, a court will find the favorable market circumstances necessary to prove the plan's equal

138. A distributor engaged in a general resale business, for example, might experience greater difficulty in redirecting his marketing program to solicit the favored accounts than would another distributor who specialized in the resale of the seller's product. A distributor whose marketing efforts traditionally had been directed toward established accounts and who lacked the experience and resources to redirect his marketing program to attract new accounts might have a similar disadvantage.

139. Incentive discounts based on chance or on risks not readily apparent to distributors at the inception of the plan may be considered discriminatory under § 2(a). 16 C.F.R. § 15.155 (1980) states that a discount plan based on distributors' recruitment of additional distributors would be discriminatory because it appealed to distributors who would not be likely to appreciate the risks associated with the plan. Similarly, in *National Nut Co. of Calif. v. Kelling Nut Co.*, [1944-1945] Trade Cas. (CCH) ¶ 57,405 (N.D. Ill. 1944), the court stated in dicta that a discount allowed by chance, such as one based on one customer sending another customer to the seller, would be illegal. Arguably, a requirement to replace a competitor's product with the seller's product in a specified number of applications is more subject to chance and to unknown risks than the other incentive discounts discussed in Section VI, because of: (1) The unlikelihood of the existence of a sufficient number of qualifying applications available for solicitation by a distributor; and (2) a distributor's initial difficulty in assessing the number of potential qualifying applications before entering the incentive plan. In contrast, a distributor should be able to assess with relative ease his opportunity to qualify for a discount under an incentive plan requiring him to achieve a specified relationship between his current and prior purchases, or to purchase a certain percentage of his requirements from the seller.

availability to all distributors. Under each such incentive discount plan, therefore, there is a continuing tension between the provisions necessary to meet the requirements of the Robinson-Patman Act and the provisions necessary to meet the seller's own marketing goals.

D. *Plans Based Upon Sales Quotas*

Incentive discount plans based upon a distributor's achieving a particular sales quota appear to reconcile most completely the tension between the requirements of the Robinson-Patman Act and a seller's need to encourage the aggressive promotion of his product. Under the typical sales quota incentive plan a seller sets a particular volume of product as a sales quota for each of his distributors during a specified period. Each distributor receives a discount if he purchases the product during that period in an amount at least equal to the sales quota.¹⁴⁰ The sales quota may be specified in terms of the number of units or dollar value of the seller's product purchased by a distributor. The seller individually negotiates the particular size of the sales quota with each distributor. The quota therefore may vary substantially in size from one distributor to another.

Although the necessity of individually negotiating a sales quota with each distributor may be burdensome for some sellers, the negotiation process may be the greatest advantage of the sales quota incentive plan from both a business and legal standpoint. A seller who carries out the negotiation process carefully should be able to insure that he receives the maximum possible promotional benefit from his distributors and that his sales quota incentive plan will be deemed valid on its face under the Robinson-Patman Act.

In negotiating a sales quota with each distributor, a seller should consistently attempt to relate the quota to the distributor's maximum resale capabilities. By carefully determining with each distributor his maximum sales potential, a seller can insure that the quotas under his incentive plan are set to reward only those distributors who make the greatest effort to promote the resale of his product. Being aware of the special promotional capabilities and position of each of his distributors in the overall market, the seller can adopt sales quotas that will en-

140. For example, an incentive plan might specify a sales quota of \$100,000 for a particular distributor in the current contract year and allow that distributor to receive a discount or rebate equal to a specified percentage of the value of his total purchases for that year, provided that those purchases equal or exceed \$100,000.

courage each distributor to increase both his absolute volume of resales and the market penetration of the seller's product.

As long as each distributor's sales quota accurately reflects the mutual determination of the seller and distributor of the maximum amount of product which the distributor is capable of selling in his market area during the period of the incentive plan, no distributor should be able to claim that he has been illegally discriminated against under the plan.¹⁴¹ During the sales quota negotiations each distributor should become fully apprised of the risks associated with participation in the plan. Because the distributor has participated in the process by which the sales quota is determined, he should not be able to assert later that the initial quota was set beyond his capabilities.

To insure that the negotiation process produces a sales quota that is truly within each distributor's capabilities, a seller must be flexible in adapting particular sales quotas to the business circumstances of his distributors. This flexibility should allow a seller to eliminate, to the extent possible, the elements of chance that make it difficult for some distributors to qualify for a sales quota incentive discount. For example, a seller may negotiate relatively low sales quotas for smaller distributors, for new distributors establishing themselves in the market, or for other distributors who are unable to sustain large resale volumes of the seller's product because of market conditions beyond their control.

A seller also should avoid adopting sales quotas so high that they require a distributor to purchase all or substantially all of his requirements from the seller. In this way the seller can minimize his exposure to primary line suits,¹⁴² prevent the incentive plan from being deemed to discriminate against distributors who must purchase a portion of their requirements from competitors,¹⁴³ and avoid the construction of the incentive plan as an illegal requirements contract under section 1 of the Sherman Act or section 3 of the Clayton Act.¹⁴⁴

141. If, however, the seller employs a graduated discount plan based upon incremental increases in purchases beyond each distributor's sales quota (*e.g.*, a one percent discount on the value of purchases up to 10% in excess of the sales quota, a two percent discount on purchases up to 20% in excess of the quota, etc.), the discount plan probably will be held illegal on the ground that the highest discounts are not achievable by all distributors because the base sales quota itself is calculated on the projected maximum resale capability of each distributor. Thus, any sales in excess of the quota would be purely fortuitous.

142. See note 132 *supra* and accompanying text.

143. See note 131 *supra* and accompanying text.

144. See note 6 *supra*.

Because of the flexible standard a seller may use to determine each distributor's sales quota, the seller must avoid the appearance that certain distributors have been unduly favored by being granted sales quotas that are more lenient than those to which they would ordinarily be entitled on the basis of their size or market circumstance. A seller can avoid an appearance of favoritism by insuring that each distributor's sales quota constitutes the maximum amount of product that distributor is capable of selling during the period of the incentive program. As long as a seller attempts to do this in good faith, he should not be deemed to have illegally discriminated in favor of distributors whose sales quotas happen to be smaller because of their size or market situation.

To prove good faith in attempting to insure the equal availability of a sales quota incentive discount, a seller would be well advised to offer each of his distributors a written contract specifying the distributor's sales quota and the other conditions of participation in the incentive program.¹⁴⁵ The contract should include a statement indicating that each sales quota represents the mutual determination by the seller and distributor of the maximum amount of the seller's product that the distributor could reasonably resell during the period of the incentive plan. To avoid the problems inherent in requirements incentive plans,¹⁴⁶ the contract also should include a representation by the distributor that he is capable of achieving the sales quota without purchasing all or substantially all of his product requirements from the seller.

The seller should devise a continuing notification program under which he offers the sales quota incentive discount contract to all new distributors.¹⁴⁷ The seller should offer the contract to all competing distributors on each functional level in the distribution chain in which the sales quota incentive discount is available. If, for example, a seller offers a sales quota incentive plan to distributors only for their resale of product in a wholesale capacity, only competing wholesale distributors need be offered the incentive discount. If, however, the seller offers the

145. A seller should be permitted to require his distributors to enter into a contract as a condition of participation in a sales quota incentive plan. As long as the contract has been made available to the distributors, they should not be able to argue that they were discriminated against under § 2(a) merely because they found it unattractive to enter into a formal written agreement with the seller. Several cases have upheld discount prerequisites that, although unattractive to customers, were nevertheless within their capabilities. See note 105 *supra* and accompanying text.

146. See notes 77-80, 131-34 *supra* and accompanying text.

147. See notes 85-87 *supra* and accompanying text.

incentive plan both to wholesalers and to retailers, or to "dual-function" distributors for both wholesale and retail sales, the seller may be required to make the plan available to competing firms on both the wholesale and retail level, regardless of whether those firms purchase directly from the seller or indirectly through his wholesale distributors.¹⁴⁸

A sales quota incentive plan appears to be best suited to a seller who markets his product through a limited number of wholesale distributors. Such a seller should not find it unduly burdensome to negotiate an individual sales quota with each of his distributors and thereby insure that each competing distributor has an equal opportunity to qualify for a discount under the sales quota incentive plan. If a seller implements such an incentive plan in the manner described in this Article, the plan should be found to satisfy the criteria of the availability defense on its face, and to be presumptively valid under section 2(a). Indeed, in a recent district court case a sales quota incentive plan similar to that described above was upheld on the ground that the individually negotiated sales quotas were "available" to each of the seller's distributors.¹⁴⁹

VII. CONCLUSION

The availability defense derives from a recognition by the courts and the Commission that a discount that is made equally available to all competing customers should not constitute a form of illegal price discrimination under section 2(a) of the Robinson-Patman Act. This defense frequently may be used to validate quantity discounts whose prerequisites are within the capabilities of a seller's average small customers. Because the availability defense often requires the trier of fact to examine the particular circumstances of each case to determine whether the discount was in fact achievable by small customers, however, a seller faces some legal uncertainties in attempting to draft a valid quantity discount plan.

Incentive discount plans are a type of quantity discount that appear to offer a seller the greatest flexibility in encouraging aggressive promotion of his product while insuring that the discount will be deemed

148. See notes 90-92 *supra* and accompanying text.

149. *Tosa Chrysler-Plymouth, Inc. v. Chrysler Motors Corp.*, [1974-1] Trade Cas. (CCH) ¶ 75,006 (E.D. Wis.).

available to all his distributors. A seller's marketing goals and his needs for legal certainty can be achieved to varying degrees under incentive discount plans based on distributors' maintaining or increasing their total purchases from the seller, purchasing a specified percentage of their requirements from the seller, or making sales to applications that had previously been supplied by the seller's competitors. A seller's needs apparently can be achieved most completely, however, under an incentive discount plan that requires each distributor to meet an individually negotiated sales quota. A seller can insure in his negotiations with each distributor that all sales quotas are set so as to encourage each distributor to reach the maximum market penetration for the seller's product reasonably achievable by the distributor. Under a sales quota incentive plan the seller thus has the power to guarantee the maximum promotional benefit for his product and the greatest certainty that his incentive plan will be upheld on its face under the availability defense.