

Expect An Increase In Robinson-Patman Act Enforcement

By **Daniel Savrin, Noah Kaufman and Caitlin Zeytoonian** (April 29, 2024, 11:57 AM EDT)

On March 28, 16 lawmakers penned an open letter to the Federal Trade Commission urging the agency to revive enforcement of the Robinson-Patman Act. This call to action, coupled with the FTC's recently renewed interest in utilizing the act as a tool to combat price discrimination, should be viewed as a harbinger of increased enforcement in this area.

Background on Robinson-Patman

Congress passed the Robinson-Patman Act in 1936 to stem what was perceived at the time to be the increasingly prevalent practice of price discrimination, whereby larger buyers with significant market power could extract lower prices and more favorable terms from sellers than smaller buyers.

The act is divided into the following sections.

Price Discrimination Claims, Section 2(a)

Section 2(a) prohibits a seller from charging different prices to two or more competing buyers for "commodities of like grade and quality," where the effect is likely to create an adverse effect on competition.

Meeting Competition Defense, Section 2(b)

Section 2(b) sets out the meeting competition defense to price discrimination claims brought under Section 2(a). At a high level, a defendant may utilize this defense if it can successfully demonstrate that it offered a lower price to a particular purchaser in a good faith effort to meet a competitor's price.

Brokerage Payment Claims, Section 2(c)

Section 2(c) generally prohibits a seller from paying to, or receiving from, a buyer "illegitimate" commissions, brokerage fees, or other compensation, including allowances or discounts in lieu thereof.

In practice, Section 2(c) is used to target dummy or fictitious brokerage payments and commercial bribery, wherein a seller makes payments to a broker acting for the buyer in a transaction or a seller



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pays an employee of the buyer to buy from the seller.

Advertising and Promotional Allowances and Services Claims, Sections 2(d) and 2(e)

Sections 2(d) and 2(e) prohibit a seller from discriminating among customers or purchasers by paying allowances or providing advertising or promotional services in connection with the resale of the seller's products, unless equivalent benefits are offered to all competing customers or purchasers.

Liability of Buyer, Section 2(f)

Section 2(f) makes it unlawful for a buyer to knowingly induce or receive a discriminatory price. Buyer liability under Section 2(f) is derivative of seller liability under Section 2(a).

Robinson-Patman Liability Risks

Although Section 2(a) is the most litigated and well-known provision of the RPA, Sections 2(c)-2(f) pose substantial liability risks.

As explained by former FTC Secretary Donald Clark in 1998, "[S]ection 2(a) of the Act requires sellers to sell to everyone at the same price, while section 2(f) of the Act requires buyers with the requisite knowledge to buy from a particular seller at the same price as everyone else." Sections 2(c), 2(d) and 2(e) "prohibit sellers and buyers from using brokerage, allowances, and services to accomplish indirectly what sections 2(a) and 2(f) directly prohibit."^[1]

In recent decades, the RPA has been primarily enforced through private civil litigation rather than by federal regulators. The U.S. Department of Justice issued a report in 1977 announcing that it would no longer enforce the act, and the FTC had not brought an RPA case since 2000.

Increased Enforcement on the Horizon

There are notable recent signs that enforcement under the act is set to increase. The FTC began signaling its interest in reinvigorating the act in 2021 as part of a larger effort to combat rising consumer prices and target price discrimination.

In June 2022, the FTC issued a policy statement indicating that it would invoke the RPA to investigate and stop the use of certain rebates and fees in the pharmaceutical sector that the FTC blames, in part, for rising drug costs.^[2] Shortly thereafter, in September 2022, FTC Commissioner Alvaro M. Bedoya stated publicly that he believed the FTC should resume its enforcement of the act to protect the interests of small businesses.^[3]

Bedoya has indicated a particular interest in renewed enforcement under the act, linking the lack of RPA enforcement with higher prices in rural areas where lower-income consumers are disproportionately impacted. And, in March 2023, FTC Chair Lina Khan indicated that the FTC was preparing to bring an enforcement action under the RPA "in short order."

Most recently, earlier this month, Bedoya reemphasized the need for revitalized RPA enforcement in remarks at the annual American Bar Association Antitrust Spring Meeting, describing his desire to invoke the act where companies with market power are "securing for themselves secret deals that are unavailable to smaller retailers, not because they're efficient, but because they are powerful."^[4]

Bedoya acknowledged the challenge of reinitiating RPA enforcement after a lengthy hiatus, but insisted it was both feasible and an important component in the FTC's efforts to "provid[e] a level playing field."

Thus far, it appears that the FTC has at least two ongoing discriminatory pricing investigations.

In January 2023, Politico reported that the FTC is investigating the pricing practices of two large soda manufacturers, including the prices that those soda manufacturers charge to different retailers.[5]

In another active investigation, the FTC is investigating a wine and liquor distributor on its pricing policies to retailers. In October 2023, the FTC filed a petition in the U.S. District Court for the Eastern District of Virginia to enforce a civil investigative demand that it had served on retailer Total Wine in connection with its investigation.[6]

Finally, late last month, a group of influential lawmakers expressed their support for revival of RPA enforcement in an open letter to the FTC.[7] The letter, whose signees include Sens. Elizabeth Warren, D-Mass., Chris Murphy, D-Conn., Cory Booker, D-N.J., and Bernie Sanders, I-Vt., and Reps. Alexandria Ocasio-Cortez, D-N.Y., and Katie Porter, D-Calif., urged the FTC to revive enforcement of the RPA to address rising food costs and what they describe as consolidation and differential pricing by dominant grocery chains.

These latest developments, coupled with the FTC's sustained interest in reviving enforcement under the act, should be viewed as a harbinger of renewed scrutiny of price discrimination in all industries and a sign that RPA investigations and enforcement actions are likely to continue.

Although the focus thus far appears to have been primarily on the food and beverage sector, it can reasonably be anticipated that the FTC's focus will expand to cover other classes of commodities as well.

Retailers, wholesalers, distributors and others that are potentially subject to the Robinson-Patman Act would be well served to evaluate their pricing practices, refresh their understanding of the act's applicable requirements, and adopt modifications and other risk mitigation strategies where warranted to enable compliance.

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[1] <https://www.ftc.gov/news-events/news/speeches/robinson-patman-act-annual-update>.

[2] https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf.

[3] https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf.

[4] <https://www.law360.com/articles/1824599/ftc-s-bedoya-looking-for-market-power-in-pricing-cases>.

[5] <https://www.politico.com/news/2023/01/09/pepsi-coke-soda-federal-probe-00077126>

[6] <https://www.ftc.gov/news-events/news/press-releases/2023/10/ftc-takes-total-wine-federal-court-enforce-compliance-antitrust-civil-investigative-demand>.

[7] <https://www.warren.senate.gov/imo/media/doc/2024.03.28%20Letter%20to%20FTC%20re%20Robinson%20Patman%20Act1.pdf>.