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THE ROBINSON-PATMAN ACT REVIVAL: FIVE CONSIDERATIONS FOR BUSINESSES

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The Federal Trade Commission (FTC) recently opened a preliminary investigation of PepsiCo and Coca-Cola Co. for potential price discrimination by the companies in violation of the Robinson-Patman Act (the RPA). The investigation marks the first major step in the FTC's revival of the RPA, which the agency hasn't enforced in decades. The FTC began signaling in 2021 that reviving RPA enforcement was one of its top priorities.¹ Now, with the FTC's renewed enforcement of the RPA underway, businesses should be mindful of RPA's prohibitions on pricing discrimination and should review their pricing and marketing strategies policies to ensure compliance.

What is the Robinson-Patman Act?

The Robinson-Patman Act is a U.S. antitrust law that was enacted in 1936 to address the growing power of large chain stores. The RPA seeks to curb "unfair" business practices that prevent smaller retailers from competing with their larger competitors that are arguably in a better position to obtain low prices and special incentives from sellers.

Under the RPA, sellers of goods and commodities are principally prohibited from:

1. Engaging in price discrimination between purchasers of goods of like grade and quality, and
2. Discriminating among customers in the provision of advertising, promotional, or merchandising services in connection with the resale of the seller's goods.

Though the RPA's prohibitions may seem straightforward, its enforcement is notoriously challenging. The RPA sets forth several complex requirements for claims to succeed and provides sellers with a variety of defenses.

Price Discrimination. To establish price discrimination under the RPA, (1) the relevant sales of goods must have been made in interstate commerce; (2) the seller must have discriminated in price between purchases of goods of "like grade and quality;" and (3) a competitive injury must have resulted from the price discrimination.

Establishing competitive injury can be an uphill battle for RPA enforcement. The two most common types of injury giving rise to an RPA claim are: (1) primary line injury (predatory pricing

¹ See Fed. Trade Comm'n, [Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act](#) (July 9, 2021); see also Josh Sisco, [The FTC's Newest Commissioner Speaks](#), Politico (Dec. 30, 2022).

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that injures competition between sellers), and (2) secondary line injury (price discrimination that injures competition among the discriminating seller's customers, typically referring to "favored" and "disfavored" customers). Secondary-line injury requires *actual competition* between the seller's favored and disfavored customers, which can only be established if the purchasers compete contemporaneously at the same functional level for the same customer.

Even if the FTC establishes the requisite elements of price discrimination, a seller can defend itself from liability under the RPA if it can show: (1) the price differences are justified by a difference in costs; (2) the lower price was offered by the seller to meet competition; (3) the price changes were the result of changed market place conditions; or (4) the lower price was functionally available to all purchasers.

Advertising and Promotional Discrimination. A seller may also be liable under the RPA for discriminating among customers in the provision of advertising, promotional, or merchandising services in connection with the resale of the seller's goods. For example, a seller may offer special packaging and marketing support to its favored customer that it does not offer to its disfavored customer. Proof of *actual competition* between the favored and disfavored customers is required.

A seller can defend itself from a discriminatory advertising and promotional services claim by showing the advertising and promotional services were offered to meet similar services offered by the seller's competitor.

Why reinvigorate RPA enforcement now?

On July 9, 2021, President Biden announced the Executive Order on Promoting Competition in the American Economy, which outlines numerous directives and policy changes "to promote the interests of American workers, businesses, and consumers."² Among these directives is one calling for the FTC Chair and Secretary of Agriculture to report practices violating the RPA to the White House Competition Council, specifically violative practices in the food industry.³

FTC leaders under the Biden Administration have also signaled their intent to revive the RPA to address the Commission's areas of concern and focus. FTC Commissioner Alvaro Bedoya has argued unequivocally that the RPA should be "reactivate[d]" as part of a larger "return to fairness" in antitrust enforcement.⁴ FTC Chair Lina Khan, who once wrote critically about the "FTC all but entirely abandon[ing] Robinson-Patman Act cases,"⁵ has recently identified the RPA as one of the essential enforcement tools in the FTC's toolbox to address commercial bribery and corporate espionage.⁶ The FTC has also issued a policy statement authorizing the agency's use of the RPA to target rebates and fees used in the pharmaceutical industry to oust competing generic drugs.⁷

Now, the question for many is which industries may the RPA's revival impact.

² [Exec. Order No. 14036](#), 86 F.R. 36987 (July 9, 2021), (hereinafter "The Executive Order").

³ *Id.* at Section 5.i.iv.

⁴ U.S. Fed. Trade Comm'n, [Returning to Fairness: Prepared Remarks of Commissioner Alvaro M. Bedoya](#) (Sept. 22, 2022).

⁵ Lina M. Khan, [Amazon's Antitrust Paradox](#), 126 YALE L.J. 710, 727 (2017).

⁶ U.S. Fed. Trade Comm'n, [Policy Statement Regarding the Scope of Unfair Methods of Competition Under Section 5 of the Federal Trade Commission Act](#) 15 n.87 (Nov. 10, 2022).

⁷ U.S. Fed. Trade Comm'n, [Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products](#) (June 16, 2022) (hereinafter "Policy Statement on Pharmaceutical Rebates").

What industries are the FTC focused on for RPA enforcement?

Although the FTC has expressed a general interest in RPA enforcement, the FTC's recent activities and statements from leadership indicate that the Commission may be initially focused on two broad industries: food and beverage and pharmaceuticals.

President Biden's Executive Order specifically directs the FTC to enforce violations of the RPA in the food industry. Commissioner Bedoya has also remarked that the FTC may use the RPA as a tool to protect smaller grocery stores.⁸ The FTC's preliminary investigations of Coke and Pepsi confirm that the food and beverage industry is at the head of the line in the FTC's renewed enforcement efforts.

The pharmaceutical industry is also a likely target of an RPA enforcement effort. In a 2022 policy statement, the FTC specifically called out rebates and fees paid in the pharmaceutical industry as an area where RPA scrutiny is appropriate.⁹

What does this mean for your business?

Given the FTC's renewed efforts to enforce the RPA, businesses that sell goods and commodities should review their pricing and marketing strategies to ensure compliance. Businesses undertaking this review should ask five threshold questions:

1. Does my business offer different prices to customers who compete?

Example: I sell the same or similar goods to Store A (a large "big-box" store) and Store B (a local "mom-and-pop" shop). Store A and Store B compete for the same customers (i.e., they are in the same geographical area, operate at the same functional level, etc.). Do I offer a lower price to Store A than I offer to Store B?

2. Does my business offer different advertising and promotional services in connection with the resale of my goods and commodities to customers who compete?

Example: I sell the same or similar goods to Store A and Store B. Store A and Store B compete for the same customers (i.e., they are in the same geographical area, operate at the same functional level, etc.). Do I offer advertising and promotional products and services (i.e., displays, catalogs, special packaging, promotional merchandise, marketing support, etc.) to Store A that I do not also offer to Store B?

3. If my business offers different prices to customers who compete, can I show that the price differences are the result of changed market conditions or are justified by differences in cost?

Example: Are the differences in the prices I offer to Store A and Store B justified by different manufacturing or delivery costs? Are the price differences the result of a changed market condition, such as a seasonal good that is or will soon become less popular or relevant on the market?

4. If my business offers different prices or special advertising and promotional services to customers who compete, were those different prices or advertising and promotional services offered in response to a good faith belief that my business was meeting competition?

⁸ Prepared Remarks of Commissioner Alvaro M. Bedoya, *supra* note 4.

⁹ Policy Statement on Pharmaceutical Rebates, *supra* note 7, at 5.

Example: Did I offer lower prices or advertising and promotional services to meet the prices or services offered by my competitor?

5. If my business offers lower prices or special advertising and promotional services to customers who compete, are the lower prices or advertising and promotional services functionally available to all my business's customers?

Example: Are my lower prices and advertising and promotional services made known to all my customers? Are my lower prices and advertising and promotional services obtainable to all my customers (i.e., can any customer obtain catalogs and posters to use in connection with the resale of my goods?)?

These five questions should help businesses initiate discussions regarding probable areas of RPA issues, if any, in their current pricing and marketing policies and models.