RUM AND COKE: THE FTC TARGETS SOFT DRINKS AND ALCOHOL IN THE REVIVAL OF ROBINSON-PATMAN ACT ENFORCEMENT- WHAT'S NEXT?

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While government enforcement of the Robinson-Patman Act (the Act) was all but forgotten for nearly two decades, the Federal Trade Commission (the FTC) announced a second investigation over potential price discrimination in just the last sixth months, this time against the largest alcohol distributor in the United States, Southern Glazer's Wine and Spirits (Southern Glazer's). This is just months after the FTC launched a similar investigation into Coca-Cola and PepsiCo.

In its June 2022 Enforcement Policy Statement,[1] the FTC explained that Section 2(c) of the Robinson-Patman Act is one of several legal authorities at its disposal to combat the use of rebate and fee agreements offered by prescription drug manufacturers. While the FTC singled out the prescription drug industry in that policy statement, all eyes were on the FTC to see whether the agency's announcement would have ripple effects across other industries. In just a few months, the answer is clear: yes, and it appears no industry is safe.

WHAT IS THE ROBINSON-PATMAN ACT?

The Robinson-Patman Act was enacted in 1936 to protect individual grocery stores competing with grocery chains by ensuring retailers could all buy on equal terms from manufacturers. The Robinson-Patman Act requires manufacturers to sell the same goods to competing resellers on equal prices and terms:

> "Any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . in commerce . . . within the United States.[2]"

At a high level, the Robinson-Patman Act is intended to provide a level playing field amongst resellers by ensuring that smaller resellers pay the same price as larger resellers.[3] The Act applies to both the pricing and any promotional payments or discount programs a manufacturer offers; Sections 2(d) and 2(e).[4]

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FTC FORESHADOWED INCREASED ENFORCEMENT OF ROBINSON-PATMAN ACT

To date, other than limited private enforcement, claims of Robinson-Patman Act violations have been nonexistent. The FTC's last case under the Robinson-Patman Act was against the spice company, McCormick, which settled.[5] Prior to the settlement with McCormick, the agency's most recent case was from 1988 against several book publishers, including Simon & Schuster and Random House, which was ultimately dismissed.[6]

However, in June 2022, the FTC chair, Lina Khan, as well as Commissioner Alvaro Bedoya, foreshadowed increased enforcement under the Robinson-Patman Act, albeit focused on the prescription drug industry. In the FTC Policy Statement, Khan announced:

> "Today's enforcement policy statement should put the prescription drug manufacturers and pharmacy benefit managers on notice that these longstanding FTC statutory authorities may prohibit certain drug practices . . . I am committed to ensuring that the FTC is bringing all our tools to bear on unlawful business practices that may be resulting in Americans paying higher prices for medicines.[7]"

The FTC's announcement marked a renewed interest in Robinson-Patman Act enforcement. However, that the FTC has looked to the Robinson-Patman Act as a "tool" to target consolidating industries is not surprising. Violations of the Robinson-Patman Act are often easier to prove than violations of other antitrust statutes, like the Sherman Act. The Robinson-Patman Act's broad-sweeping liability language provides a hook for government enforcement without the need to consider merger control or having to stretch scant evidence to prove conspiracy.

Following the FTC's announcement, manufacturers and other businesses were put on high alert, as it remained to be seen whether federal agencies, like the FTC, would look beyond the prescription drug industry to other retail markets.

FTC'S INVESTIGATION INTO COCA-COLA AND PEPSICO

Just months after the FTC's June 2022 statement, the answer became clear. The FTC announced an investigation into Coca-Cola and PepsiCo over potential price discrimination in the soft drink market. While the investigation into the soft drink giants is only in its initial stages, the FTC has reached out to large retailers, including Walmart, seeking data and other information on how they purchase and price soft drinks.

At an event in late 2022, FTC Commissioner Bedoya underscored the agency's recent emphasis on Robinson-Patman Act enforcement and its focus beyond the prescription drug industry by connecting the dots between a lack of Robinson-Patman Act enforcement and high food prices in rural areas.[8] "The idea that low prices at the big box store help everybody isn't true in Pine Ridge [South Dakota], where 90 percent of folks don't have cars," he said of the 180-mile round-trip journey to the nearest large grocery store.[9] "I think there's a line you can draw from that law lying fallow, to people in Pine Ridge not being able to buy fruit for their kids because the prices have gone through the roof."[10]

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THE FTC'S INVESTIGATION INTO SOUTHERN GLAZER'S WINE AND SPIRITS

While some wondered whether the FTC would stop there, true to its word, the FTC recently announced another investigation, this time into Southern Glazer's, the largest alcohol distributor in the United States.

The FTC is investigating Southern Glazer's both for violations of the Robinson-Patman Act and for violations of Section 5 of the Federal Trade Commission Act.[11] The FTC's probe includes questions about pricing and benefits Southern Glazer's offers to retailers, including quantity-based discounts, rebates, and promotions, as well as marketing, warehousing, merchandising, and other services.

The investigation is in its initial stages and Southern Glazer's is the only known "target" of the FTC's investigation. However, the FTC is seeking information on wine and alcohol sales by distributors and retailers around the United States.[12] Some of these retailers, like Total Wine & More, have already pushed back on the breadth of the FTC's investigation into Southern Glazer's.[13]

WHAT IT MEANS

With the two back-to-back investigations of Coca-Cola/Pepsi and Southern Glazer's, the FTC has placed the Robinson-Patman Act at center stage. As the major players in certain industries continue to consolidate market power, the discussion surrounding the Robinson-Patman Act, as well as the Sherman Act and other competition laws, will not cease.

The FTC's statements and actions have made clear that it will continue to utilize "all of [its] tools," including the Robinson-Patman Act, to ensure fair competition and equal pricing to resellers and distributors. Further, while the FTC's initial focus was on the prescription drug industry, it has made clear that its target will not be limited.

To be sure, the FTC is not the only threat of Robinson-Patman Act enforcement. With a heightened awareness of the Robinson-Patman Act following the FTC's investigations, disfavored resellers can—and will—tap the Robinson-Patman Act through private actions and likely class actions.

In light of the amplified focus on the Robinson-Patman Act, manufacturers and other businesses—across all industries—must ensure that their pricing, marketing allowances, rebate schemes, discount programs, and other related pricing practices are properly designed to comply with the Robinson-Patman Act. With proper counsel and an understanding of the scope of the Robinson-Patman Act and its recognized defenses and business justifications, manufactures can establish prices and offer discounts and rebates while mitigating risk of Robinson-Patman Act exposure.

For more information, please contact our Policy and Regulatory lawyers.

FOOTNOTES

[1] For an article discussing the June 2022 Policy Statement, please see Christopher S. Finnerty, et al., The FTC's "New" Tool: Greater Enforcement of the Robinson-Patman Act, K&L GATES (July 13, 2022), https://www.klgates.com/The-FTCs-New-Tool-Greater-Enforcement-of-the-Robinson-Patman-Act-7-13-2022.

[2] 15 U.S.C. § 13(a).

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[3] The Act was enacted to "curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power." *F.T.C. v. Henry Broch & Co.*, 363 U.S. 166, 168 (1960).

[4] *See* 15 U.S.C. § 13(d) ("It shall be unlawful for any person engaged in commerce to pay . . . to or for the benefit of a customer . . . as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is *available on proportionally equal terms* to all other customers competing in the distribution of such products or commodities." (emphasis added)); 15 U.S.C. § 13(e) ("It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.").

[5] Press Release, Fed. Trade Comm'n, World's Largest Manufacturer of Spice and Seasoning Products Agrees to Settle Price Discrimination Charges (Mar. 8, 2000), https://www.ftc.gov/news-events/news/press-releases/2000/03/worlds-largest-manufacturer-spice-seasoning-products-agrees-settle-price-discrimination-charges.

[6] Press Release, Fed. Trade Comm'n, FTC Dismisses Its Cases Against Six of the Country's Largest Book Publishers (Sept. 20, 1996), https://www.ftc.gov/news-events/news/press-releases/1996/09/ftc-dismisses-its-cases-against-six-countrys-largest-book-publishers.

[7] Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products (June 16, 2022), https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Chair-Lina-Khan-Regarding-Policy-Statement-Rebates-Fees.pdf.

[8] Josh Sisco, *Pepsi, Coke Soda Pricing Targeted in New Federal Probe*, POLITICO (Jan. 9, 2023), https://www.politico.com/news/2023/01/09/pepsi-coke-soda-federal-probe-00077126.

[9] *Id*.

[10] *Id.*

[11] *Id.*

[12] *See Southern Glazer's Wine and Spirits*, FED TRADE COMM'N, (Apr. 7, 2023), https://www.ftc.gov/legal-library/browse/cases-proceedings/petitions-quash/southern-glazers-wine-spirits.

[13] *See* Retail Services & System, Inc.'s Petition to Limit Civil Investigative Demand, https://www.ftc.gov/system/files/ftc_gov/pdf/2110155retailservicesandsystemptqpublic.pdf ("Simply put, an administrative investigation into a target company does not give the agency free rein to obtain whatever it wants from innocent third parties who transact business with the target company, nor does it reasonably permit an agency intrusion into business transactions with unrelated entities.").

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