

The Return of Price Discrimination Enforcement: What Every Business Needs to Know

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The rumors of the death of price discrimination enforcement may have been greatly exaggerated. The Robinson-Patman Act (“RPA”),¹ enacted in 1936, prohibits price discrimination by producers and resellers of goods between similarly situated purchasers. Government enforcement of the RPA has been infrequent during the last half-century, and non-existent since 2000. In 2007, the Antitrust Modernization Commission, a bipartisan group established by Congress to review federal antitrust laws, recommended repeal of the RPA, concluding that it disincentivized discounting and thereby harmed consumer welfare.

RPA enforcement, however, seems to be making a comeback. Antitrust enforcement under the Biden Administration has largely rejected the “consumer welfare standard”—which equates competition with harm to consumers, typically in the form of increased prices—in favor of a broader focus on excessive consolidation of private power and its longer-term economic implications. The RPA, enacted to protect smaller retailers from a competitive advantage that benefited chain stores and other larger competitors able to obtain lower wholesale prices, is consistent with this approach.

Recent press reports suggest the Federal Trade Commission (FTC) may be on the verge of an RPA enforcement action. These reports follow public statements by both FTC Chair Lina Khan and Commissioner Alvaro Bedoya emphasizing the RPA and indications that the FTC has opened at least two RPA investigations under Khan’s leadership. In March 2024, a group of 16 lawmakers, including some of the most prominent supporters of the Biden Administration’s enforcement agenda, urged the FTC to “revive enforcement” of the RPA in connection with consolidation and high prices in the food industry.²

Moreover, the RPA remains enforceable through private actions. While such actions have been rare, and successful actions even more so, a federal court in California last month affirmed a jury verdict in favor of wholesalers of eye drops against distributors who were found to have sold the drops to Costco and Sam’s Club at a lower price than the plaintiffs received. In addition to the jury’s damages award, the court granted injunctive relief.³ Revived agency enforcement would likely lead to an increase in private actions as well.

Accordingly, businesses that sell and purchase goods should be familiar with the key provisions of the RPA:

- The RPA prohibits discrimination in price between at least two consummated sales to different purchasers. Mere offers to sell at a particular price or refusals to sell at all to a particular purchaser do not trigger RPA liability. Moreover, the RPA is limited to “commodities,” i.e., tangible goods sold for use, consumption, or resale within the United States. Services are excluded from the RPA’s ambit.

¹ 15 U.S.C. § 13.

² [https://www.warren.senate.gov/imo/media/doc/2024.03.28 Letter to FTC re Robinson Patman Act1.pdf](https://www.warren.senate.gov/imo/media/doc/2024.03.28%20Letter%20to%20FTC%20re%20Robinson%20Patman%20Act1.pdf).

³ *L.A. Int’l Corp. v. Prestige Brands Holdings, Inc.*, 2024 WL 2272384 (C.D. Cal. May 20, 2024).

- The two sales must be reasonably contemporaneous, and the goods involved must be of “like grade and quality.”
- At least one of the sales must be in interstate commerce, i.e., across state lines.
- Prohibited discrimination includes the furnishing of services or facilities in connection with the sale of the commodity; any such services or facilities must be made available to all purchasers on proportionally equal terms. If a seller compensates its customer for services or facilities furnished in connection with the sale, such as marketing or promotion, it must make those payments available on proportionally equal terms to other purchasers that compete to distribute the same product.
- However, the RPA does not prohibit price differentials that merely allow for the differing methods or quantities in which the goods are sold or delivered to the respective purchasers or that result from a response to changing conditions affecting the saleability of goods (such as deterioration of perishable goods or obsolescence of seasonal goods).
- And there is no actionable price discrimination if the lower price was functionally available to the disfavored purchaser, provided that the disfavored purchaser was aware of the availability of the lower price and that such availability was not merely theoretical. For example, a volume-based discount might be facially available to all customers, but if the requisite volume threshold is higher than certain purchasers can realistically meet, it may not be considered functionally available to all purchasers.
- Unlike other antitrust statutes, the RPA does not require a showing of marketwide injury to competition. Rather, it is sufficient to show that the discrimination harmed a company’s ability to compete with the grantor of the discriminatory price, any person who knowingly received the benefit of the discriminatory price, or with customers of either. While the competitive injury ordinarily will occur at the buyer’s level, the RPA also permits claims for harm to competition between sellers, between customers of the favored and disfavored purchasers, or between customers even further downstream.
- A seller who is alleged to have discriminated in violation of the RPA may establish, as an affirmative defense, that it granted a lower price to the favored purchaser in order to meet (but not beat) the price of a competitor.
- Liability is not limited to sellers; the RPA also imposes liability on purchasers who knowingly induce or receive a favorably discriminatory price.
- A standalone provision of the RPA prohibits parties to a sale from granting or receiving any compensation, or any allowance or discount in lieu of compensation, except for services rendered.

The RPA is an oft-overlooked component of antitrust compliance, largely due to its infrequent enforcement. However, every company’s antitrust compliance program should include a review of its relationships with customers and suppliers to ensure that its pricing plans and pricing decisions comply with the RPA and that the reasons for any deviations from price, such as meeting competition, are well documented.

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