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Is the Robinson-Patman Act Alive and Kicking?

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For the last 20 years, government enforcement of the Robinson-Patman Act (RPA), the Depression-era statute that bars price discrimination, has been virtually nonexistent. In 1977, the U.S. Department of Justice announced that it would no longer enforce the RPA, and the Federal Trade Commission (FTC) has not brought an RPA case since 2000. Although private plaintiffs do bring occasional RPA claims, they are rare, disfavored by most courts, and often dismissed. Many economists roundly criticize the RPA as anticompetitive and in 2007, an Antitrust Modernization Commission recommended that Congress repeal the statute altogether because it "appears antithetical to core antitrust principles" and "punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage."

Given the above, businesses may not have focused on RPA compliance as a critical component of your antitrust compliance program, but should perhaps rethink that approach, in light of recent developments that suggest the RPA is still alive and may soon be kicking.

Renewed Interest in the RPA

FTC Chair Lina Khan and Commissioner Alvaro M. Bedoya are eager to revive government enforcement of the RPA. Here is what we know:

In recent months, it has been publicly reported that the FTC is investigating the pricing practices of two large soda manufacturers and (separately) a wine and liquor distributor – and considering bringing RPA actions. On March 27, Khan disclosed that the commission is preparing to bring RPA enforcement actions in "short order." The next day, on March 28, a group of federal legislators expressed their support for renewed RPA enforcement in an open letter to the FTC. And on April 11, Bedoya emphatically stressed the importance of the RPA in protecting rural small businesses in a session of the American Bar Association's antitrust spring meeting in Washington, D.C.

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Neil Schur of Anderson Kill

Increased FTC enforcement of the RPA appears imminent.

What Is the RPA?

Congress passed the RPA in 1936 to protect small businesses from having their prices undercut by larger chain stores that could demand lower prices because of market power and volume purchasing.

The RPA's most frequently litigated provision, Section 2(a), prohibits sellers from "discriminating in price between different purchasers of commodities of like grade and quality … 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." To summarize key takeaways, as outlined by the FTC:

- The RPA applies to commodities, but not to services, and to purchases, but not to leases.

- The goods must be of “like grade and quality.”
- Normally, the sales must be “in” interstate commerce (that is, the sale must be across a state line).
- There must be likely injury to competition (that is, a private plaintiff must also show actual harm to his or her business). Showing the delta between the prices and the number of units purchased is not sufficient to establish this injury.
- Competitive injury may occur in one of two ways.
  - “Primary line” injury occurs when one manufacturer reduces its prices in a specific geographic market and causes injury to its competitors in the same market.
  - “Secondary line” injury occurs when favored customers of a supplier are given a price advantage over competing customers, causing injury at the buyer’s level.

Many businesses find the RPA counterintuitive because negotiating the lowest (or highest) price possible for each customer seems like a pure example of capitalism at work. Critics argue, among other things, that the RPA was intended to punish large chains (monopsonists) demanding price discounts but its most frequently used section (Section 2a) punishes the seller, that the small and mid-sized businesses the RPA was intended to protect have been the ones most often targeted under the RPA, that price differences can benefit consumers, and that price differences (based perhaps on efficiencies) are not the same as price discrimination. There are three main legal defenses to a Section 2(a) claim:

(1) The price difference is justified by different costs in manufacture, sale, or delivery (e.g., volume discounts) (known as the “cost justification” defense); (2) The price concession was given in good faith to a specific buyer to meet a competitor’s price (known as the “meeting competition” defense); or (3) The same discount was made functionally available to all customers on proportionately equal terms (known as the “functional availability” defense).

The first is difficult to prove, the second is possible but usually requires detailed records, and the third is hard to establish if a smaller customer cannot realistically sell the volumes needed to obtain a discount.

The other sections of the RPA are important as well:

- Section 2(b) provides for the meeting competition defense discussed above, if the seller can show its concession “was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.”
- Section 2(c) makes it unlawful for a seller “to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods.”
- Sections 2(d) and 2(e) prohibit sellers from paying advertising or promotional costs of a buyer related to processing, handling, reselling or offering for resale the seller’s commodities “unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.”
- Section 2(f) makes it unlawful for a buyer “knowingly to induce or receive a [prohibited] discrimination in price.”

The Bottom Line: Businesses Need to Revisit RPA Compliance

Given the developments described above and the FTC’s renewed interest in the RPA, retailers, wholesalers, distributors, and manufacturers should evaluate their pricing practices, revisit their antitrust compliance program, and consult antitrust counsel to ensure compliance.

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