

# Businesses Should Prepare For FTC Use Of Robinson-Patman

By **Christopher Finnerty, Michael Murphy and Jack Brodsky** (July 20, 2022)

While, historically, government enforcement of the Robinson-Patman Act has been virtually nonexistent, the Federal Trade Commission recently announced its intention to dust off the oft-forgotten act to encourage competition, with an apparent initial focus on the prescription drug industry.

In its June 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.

These arrangements have come under scrutiny of late, as they have been used to incentivize "intermediaries to steer patients to higher-cost drugs over less expensive alternatives," the FTC said in its statement.[2]

While the prescription drug industry is the starting point, the FTC's announcement will likely create ripple effects across other industries where increasingly dominant players have leveraged their market power to get most favored nation status from suppliers, which is precisely the conduct that the Robinson-Patman Act was designed to prohibit.

## History and Structure of the Robinson-Patman Act

The Robinson-Patman Act was enacted in 1936 to protect individual grocery stores competing with grocery chains by ensuring all retailers could buy on equal terms from manufacturers.

At its core, the Robinson-Patman Act requires manufacturers to sell the same goods to competing resellers on equal prices and terms:

[A]ny 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.[3]

In short, the Robinson-Patman Act is intended to provide a level playing field among resellers by ensuring that smaller resellers pay the same price as larger resellers.[4]

The Robinson-Patman Act not only applies to the pricing a manufacturer offers, but also when a manufacturer provides promotional payments or a discount program under Sections 2(d) and 2(e).[5] And while there are justification defenses to a disparity in pricing between competing resellers, they are not simple pro forma panaceas to a discount structure.

But instead, these justifications require careful documentation to provide a true defense.

To date, the Robinson-Patman Act has seen little enforcement, whether through private litigation or FTC action. The tide seems to be turning, however, as over the past five years, more than 100 Robinson-Patman Act cases have been filed in various industries, including



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cases against automobile manufacturers, consumer products companies, and others.

Further demonstrating this shift in Robinson-Patman Act focus, President Joe Biden specifically referenced the act in a July 2021 executive order aimed at encouraging competition in the United States.[6]

In addition, as the FTC announced last month, discussed below, it intends to use the Robinson-Patman Act to protect competition in the prescription drug industry and elsewhere.

### **FTC's Recent Announcement**

In its June enforcement policy statement, the FTC announced its decision to "ramp up enforcement" of the Robinson-Patman Act to forestall "illegal bribes and rebate schemes that block patients' access to competing lower-cost drugs." [7] The announcement stems from the FTC's concern that certain rebate practices may lead to increased prices of insulin and other prescription medications.

Specifically, "the [FTC] has received complaints about rebates and fees paid by drug manufacturers to pharmacy benefit managers (PBMs) and other intermediaries to favor high-cost drugs that generate large rebates and fees that are not always shared with patients." [8]

In turn, "[t]hese rebate and fee agreements may incentivize PBMs and other intermediaries to steer patients to higher-cost drugs over less expensive alternatives." [9]

To curtail this rebate practice, the FTC announced that it would employ several legal authorities at its disposal, including, Section 5 of the FTC Act, Section 3 of the Clayton Act, the Sherman Act and, notably, Section 2(c) of the Robinson-Patman Act. In reference to the Robinson-Patman Act, the FTC explained:

[P]aying or accepting rebates or fees in exchange for excluding lower-cost drugs may violate Section 2(c) of the Robinson-Patman Act, which prohibits payments to agents, representatives, and intermediaries who represent another party's interests in connection with the purchase or sale of goods. At least one court has held that this provision may reach rebates paid by drug manufacturers to PBMs. The Commission has a long history of addressing commercial bribery and will continue to do so.

FTC Chair Lina Kahn announced that the policy statement "should put the prescription drug manufacturers and pharmacy benefit managers on notice that these longstanding FTC statutory authorities may prohibit certain drug practice," adding that she was "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." [10]

### **What It Means**

Certainly, the Robinson-Patman Act is taking the spotlight more than it has in decades. As dominant firms continue to consolidate market power in a number of industries — not only in the prescription drug industry, but across retail and other markets — the discussion surrounding the Robinson-Patman Act, as well as the Sherman Act and other competition laws, will intensify.

What remains to be seen, however, is how agencies, like the FTC, as well as courts faced

with private actions, employ these pro-competition statutes. Only time will tell whether the FTC and disfavored resellers tap the Robinson-Patman Act or resort to more common competition laws.

Regardless, manufacturers and other businesses must be aware of the heightened focus on the Robinson-Patman Act and must ensure that their pricing, rebate schemes, discount programs and other related practices comport with the act's requirements.

Armed with a basic understanding of its principles and defenses sounding in legitimate business purposes, manufacturers can establish prices and services while mitigating Robinson-Patman Act risk.

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[1] FTC, "Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products," June 16, 2022, available at: <https://www.ftc.gov/legal-library/browse/policy-statement-federal-trade-commission-rebates-fees-exchange-excluding-lower-cost-drug-products> (hereinafter, FTC Policy Statement).

[2] FTC Policy Statement, at 4.

[3] 15 U.S.C. § 13(a).

[4] 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).

[5] 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.").

[6] President J. Biden, Executive Order on Promoting Competition in the American Economy,

July 9, 2021, available at: <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

[7] FTC, "FTC to Ramp Up Enforcement Against Any Illegal Rebate Schemes, Bribes to Prescription Drug Middlemen That Block Cheaper Drugs," June 16, 2022, available at: <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-ramp-up-enforcement-against-illegal-rebate-schemes>.

[8] FTC Policy Statement, at 1.

[9] FTC Policy Statement, at 4.

[10] FTC, Remarks of Chair Lina M. Khan Regarding Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products, June 16, 2022, available at: [https://www.ftc.gov/system/files/ftc\\_gov/pdf/Remarks-Chair-Lina-Khan-Regarding-Policy-Statement-Rebates-Fees.pdf](https://www.ftc.gov/system/files/ftc_gov/pdf/Remarks-Chair-Lina-Khan-Regarding-Policy-Statement-Rebates-Fees.pdf).