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FTC Petition Highlights Renewed Focus on Price Discrimination Under Long-Ignored Robinson-Patman Act

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News of a recently-filed Federal Court petition against Total Wine & More (“Total Wine”) has brought renewed focus on aggressive actions by the Federal Trade Commission (“FTC”) to enforce antitrust laws; even at great expense to industry participants and where the laws they seek to enforce have not been meaningfully applied in decades. The Total Wine matter stems from an investigation into price discrimination under the Robinson-Patman Act (“RPA”), which the FTC and DOJ have left dormant for decades. Participants in the retail industry in particular may want to assess whether this enforcement pattern calls for reevaluation of distribution and discounting policies.

Enacted in 1936, the RPA is a U.S. antitrust law that prevents sellers from charging competing buyers different prices for the same goods, commonly referred to as price discrimination. The RPA was designed to protect smaller, often independent, businesses whose ability to compete is threatened by their relative purchasing power compared to a larger rival that may be able to negotiate large discounts. The RPA applies to commodities and to purchases, but not to services and leases. The goods must be of like grade and quality and the sales must be contemporaneous. Though the RPA had not been enforced by the government in nearly two decades, the FTC has revived this Great Depression-era Act in two recent enforcement actions. In January 2023, the FTC launched a price discrimination investigation into two major providers of soft drinks, and more recently announced an RPA investigation into the largest alcohol distributor in the U.S., Southern Glazer’s Wine and Spirits (“Southern Glazer’s”).

The FTC’s investigation into Southern Glazer’s relates to the distribution of wine and liquor. The FTC reportedly initiated the investigation after receiving complaints from participants in the alcohol production, distribution, and retail industry. While no action has yet been filed, the FTC appears to be investigating whether Southern Glazer’s sales practices may discriminate against smaller companies in violation of the RPA—potentially meaning that Southern Glazer’s could have offered higher discounts to some of its distributors. Such actions could also theoretically violate Section 5 of the FTC Act, which prohibits unfair or deceptive acts or practices.

While Southern Glazer’s is the only known target of the investigation, the FTC has issued a number of Civil Investigative Demands to third party’s seeking information relevant to this investigation. One such recipient of a Civil Investigative Demand was Total Wine, which challenged the Civil Investigative Demand as overly burdensome, particularly insofar as it sought information allegedly unconnected to the Southern Glazer’s relationship with Total Wine. Indeed, Total Wine’s counsel alleged that the FTC

asked for every document in the company, and that even the FTC's offers to modify the scope would have placed a substantial burden on a third-party to the FTC's investigation. While the FTC is usually able to negotiate third-party discovery by minimizing burdens, the agency, evidently, was unable to reach any common ground with Total Wine, resulting in a breakdown in discussions and now a Federal Court case.

In its petition, the FTC noted that:

[Their] staff is investigating whether Southern may be discriminating in price by selling wine and spirits of like grade and quality to small independent retailers at prices higher than the prices it extends to large, favored chain retailers, such as Total Wine, in violation of Section 2(a) of the Robinson-Patman Act.¹

The FTC also noted it is investigating whether Total Wine and other large chain retailers might be receiving illegal, discriminatory non-price services, such as shelf stocking or free marketing or labor support, from Southern Glazer's that it does not provide to smaller, independent retailers. These allegations point to the challenges in RPA enforcement, since such allegations, even if true, likely resulted in lower prices to many consumers. Collaboration between Total Wine and Southern Glazer's on marketing efforts might arguably be procompetitive, anticompetitive, or competitively neutral.

While the resurrection of the RPA faces criticism, FTC Chair Lina Khan has been signaling that it is coming. In June 2022, she stated, in connection with the prescription drug industry, that:

Section 2(c) of the Robinson-Patman Act, which courts have interpreted as prohibiting commercial bribery, makes it illegal to compensate anyone who owes a duty to another party in connection with the purchase or sale of goods, except as payment for legitimate services... 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.²

Similarly, in September 2022, FTC Commissioner Alvaro Bedoya echoed the call for heightened enforcement under the RPA. "Certain laws that were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman—directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them."³ The FTC's RPA investigations into Southern Glazer's and the soft drink providers are yet another example of the antitrust agencies taking heed of President Biden's 2021 call to action for increased antitrust enforcement. The Total Wine petition raises two important considerations, particularly for those in the retail industry. First, the FTC is seemingly willing to invest heavily in challenging price discrimination practices, so participants in the distribution chain should be cognizant of areas where differential treatment (whether through discounts, price concessions, marketing allowances, or some other means) might draw FTC scrutiny. For some, this might mean modifying practices that might raise RPA questions. For others, it might mean thinking through places where they are being disadvantaged and raising those for FTC consideration. Second, companies that are now on the receiving end of FTC discovery requests—an ever-growing set—need to expect increased rigidity in negotiating responses with agency staff, who may be more bold to make demands today than they have been in the past.



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- ¹ *Federal Trade Commission v. Retail Services & Systems, Inc. d/b/a Total Wine & More*, FTC Petition of the Federal Trade Commission for a Show Cause Hearing, Case 1:23-mc-00028 (E.D.Va. October 20, 2023)
 - ² 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.
 - ³ Alvaro M. Bedoya, Commissioner, Fed. Trade Comm'n, "Returning to Fairness" Prepared Remarks of Commissioner Alvaro M. Bedoya (September 22, 2022) https://www.ftc.gov/system/files/ftc_gov/pdf/returning_to_fairness_prepared_remarks_commissioner_alvaro_bedoya.pdf

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