

FTC's Khan Eyes Old Weapon to Crack Down on New Market Players

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- Robinson-Patman Act may target PBMs, retailers
- Law's age, complexity could hinder future enforcement

The FTC is mulling the use of a rarely used anti-price discrimination law to potentially crack down on dominant companies' unfair use of market power.

The Federal Trade Commission is ramping up enforcement against illegal bribes and rebate schemes involving pharmacy benefits managers, it announced in a June enforcement [policy statement](#). The statement pointed to one of its legal authorities—the Robinson-Patman Act, a Great Depression-era price discrimination law referred to as the “Magna Carta of Small Business”—that could be exercised by the agency.

In April, a bipartisan group of 43 House members sent a letter to the FTC urging it to revisit the law. President Joe Biden also mentioned the law in his July 2021 [executive order](#) to curb anti-competitive behavior across industries.

The return of Robinson-Patman underscores FTC Chair Lina Khan's willingness to leave no stone unturned in combatting anti-competitive behavior. The agency's move also comes on the backdrop of heightened concerns over inflation and price hikes, especially in industries where dominant players have buying power to extract better prices from suppliers.

“At a symbolic level, restoring some level of Robinson-Patman Act enforcement delivers on the promise of the new leadership to give greater protection to small businesses,” said William Kovacic, a George Washington University antitrust professor and former FTC chair. “My expectation is that they will bring a case. I don't know what kind or in what setting, but the short answer is yes.”

Advocates who have called for aggressive investigations of major corporations for allegedly negotiating different prices for the same goods heralded the FTC's inclusion of Robinson-Patman.

“What we have today are enormously dominant firms like Amazon and Walmart that have unprecedented buying power,” said Katherine Van Dyck, senior legal counsel at the American Economic Liberties Project. “The Robinson-Patman Act is a tool that was specifically designed to combat that.”

But attorneys with Robinson-Patman experience cautioned against assuming the move signaled anything more than general agency interest in the law. Courts are unlikely to welcome it given the act's complexity and judicial narrowing of its application over the last few decades, and may question whether the facts of most enforcement cases were likely to support its use, attorneys said.

“It's still unlikely we will see it used in standalone enforcement cases, even in this PBM healthcare context, because there are other tools at their disposal,” said Alicia Downey, an antitrust attorney and the principal of Downey Law. “There's no need to rely on Robinson-Patman alone, when other statutes could help more compelling cases.”

The commission appears willing to explore its options, however.

“The FTC intends to enforce the Robinson-Statute as written,” an FTC spokesperson said in a statement to Bloomberg Law.

Small Business Protection

Congress passed the Robinson-Patman Act in 1936 to protect mom and pop stores that were threatened by major grocery chains using market power to undercut and force out smaller rivals.

Unlike most antitrust law, it's focused on protecting individual competitors and keeping markets fairly open, rather than on upholding competition.

The law focuses on powerful companies who unfairly extract supplier concessions that are not available to smaller businesses, Kovacic said.

The Department of Justice and FTC have rarely enforced Robinson-Patman since the 1980s, in large part because the body of law shifted its focus toward consumer prices rather than the welfare of individual competitors. There's been a consistent, but small amount of private litigation under the law

since then.

Khan has signaled her goal of moving the FTC's antitrust enforcement away from focusing purely on consumer prices and efficiency.

As the FTC instead heightens its scrutiny of market dominance, Robinson-Patman's goal of protecting small businesses and outlawing price discrimination didn't go unnoticed by Khan, attorneys say.

"This news goes along with other indications that the people at the agency — Lina Khan in particular — have an interest in Robinson-Patman being brought back into the FTC's toolbox," Downey said.

In their letter to the FTC, the House lawmakers also argued that Robinson-Patman may be ripe for current competitive enforcement.

"For example, the Robinson-Patman Act reflects Congress's determination that discriminatory treatment among competitors is pernicious and should be prohibited," the lawmakers [wrote](#). "But current enforcement efforts have failed to address these anticompetitive harms, and judges have inappropriately limited the scope of the law despite clear statutory language."

PBMs and Beyond

Using Robinson-Patman to enforce competition in the PBM business may be a logical first step given the role of middlemen and intense drug pricing negotiations. There's also bipartisan interest in lowering pharmaceutical prices.

Section 2(c) of Robinson-Patman would empower the commission to scrutinize whether pharmaceutical companies were paying rebates to PBMs to exclude their competitors' products without the knowledge of insurers or hospitals, said Irving Scher, a senior counsel at Hausfeld.

But other industries soon could receive their share of scrutiny under the law, attorneys said.

Large retailers like Amazon.com and grocery chains like Costco wield the sort of market power Robinson-Patman was designed to probe, said Stephen Calkins, a Wayne State University Law

School professor.

Large chains are likely obtaining discounts and other special deals from suppliers that smaller companies can't obtain, said Sandeep Vaheesan, the legal director of the Open Markets Institute.

Such actions are ripe for Robinson-Patman enforcement, he said. The growth of companies like Target, Walmart and Amazon.com can be partially attributed to the non-enforcement and judicial narrowing of Robinson-Patman over the last four decades, he said.

The law's inclusion in the policy statement should put companies on alert, regardless of how long it takes the FTC to bring an enforcement action.

"This is unmistakably about reminding companies to be compliant," said Kovacic.

But the FTC must follow through if it wants to be taken seriously, he said. "If you say you'll start applying or restoring the law, but don't bring cases or conduct investigations, you're worse off than before you started. You lose credibility," he said.

The law's age — and the dust it's gathered — may be the most significant impediment standing in the agency's way.

"The FTC hasn't brought a Robinson-Patman case since 2000," Kovacic said. "My guess is that there's not a person in the building with the know-how to try a case or do an investigation. All the institutional memory is gone."

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