

Why Trump's FTC May Not U-Turn On Robinson-Patman

By **Edward Schwartz and Jay Simmons** (February 3, 2025)

Last summer, we learned that the FTC was considering reaching into the deepest recesses of its enforcement toolbox to bring a case under the long-dormant price discrimination provision of the Robinson-Patman Act.[1] This Depression-era law makes it unlawful for a seller to charge higher prices to disfavored retailers that purchase similar goods.[2]

In passing this law, Congress hoped to protect smaller shops, such as food markets, from having their prices undercut by the larger chains with more negotiating leverage and the ability to secure bulk purchasing discounts.[3]

The agency followed through. Its case against wine and spirits distributor, *FTC v. Southern Glazer's Wine and Spirits LLC*, filed in the U.S. District Court for the Central District of California on Dec. 12, was consistent with the Biden administration FTC's expansionist policies, including its shift away from the agency's historic focus on consumer welfare standards and to consider types of competitive harm other than price and output.[4]

And on Jan. 17, in the final days of the Biden FTC and just days before the inauguration — the commission followed up with a second Robinson-Patman case, *FTC v. PepsiCo Inc.*, filed in the U.S. District Court for the Southern District of New York.[5]

These actions are controversial in light of substantial evidence that, rather than promoting lower prices, Robinson-Patman enforcement likely results in higher prices for consumers, at least in some, or many, cases.[6]

Historically, both the courts and the enforcement agencies have taken note of this. As former U.S. Circuit Judge Robert Bork put it in "The Antitrust Paradox: A Policy at War with Itself," Robinson-Patman is predicated on a "wholly mistaken economic theory" that price discrimination categorically harms consumer welfare, and thus constitutes "antitrust's least glorious hour." [7]

From 1937 to 1971, the agencies filed upward of 1,400 Robinson-Patman complaints.[8]

By the mid-1970s, the U.S. Department of Justice had ceased enforcing the act altogether, and issued a report stating that Robinson-Patman is protectionist and has a "deleterious impact on competition." [9]

Meanwhile, FTC leadership, while continuing to enforce the act in a handful of cases, acknowledged that such enforcement benefits small producers, not consumers. [10] Indeed, the commission's case against Southern Glazer's was the first it had filed in over two decades.

The question now is what will President Donald Trump's FTC do with the revived Robinson-Patman enforcement agenda?



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As we look ahead, a clearer picture is emerging of the Trump administration's antitrust priorities. Far from a flash in the pan, the Robinson-Patman enforcement revival may well be here to stay — albeit with some important caveats for businesses caught in the government's crosshairs.

What's Old is New: The FTC's Approach Under the Biden Administration

The FTC's complaint against Southern Glazer's, the largest U.S. wholesaler of wine and spirits, alleges that the company "charged significantly higher prices for identical bottles of wine and spirits to disfavored independent retailers than to favored large chain retailers." [11]

The roots of this action can be traced back to a 2022 policy statement, in which the FTC called out Robinson-Patman enforcement as a means to regulate pricing practices in the healthcare industry. [12]

While this earlier statement focused on using Robinson-Patman as a tool to punish so-called commercial bribery, the FTC's action against Southern Glazer's targets volume discounts directly.

According to the FTC's complaint, Southern Glazer's followed a routine practice of many distributors by entering into exclusive distribution agreements with many of its largest retail partners and offering these retailers scan rebates — i.e., discounts a retailer can provide to customers at the point of sale.

The company also allegedly offered large or cumulative discounts to favored retailers at certain quantity thresholds. That meant only certain retail chain customers could access the discounts, for example, by combining purchases across their many stores or storing the product in warehouses that smaller retailers could not afford.

The FTC's challenge of these practices reflects yet another sharp break under the Biden FTC from decades of FTC and DOJ policy that prioritized consumer welfare in the form of low prices and greater output over other policy goals.

At bottom, the FTC's complaint, and its complaint against PepsiCo, harkens back to the animating concerns that motivated Congress to pass Robinson-Patman: protecting smaller retailers from lower-cost major retailers. [13]

In fact, the FTC's latest case goes even further by challenging not just PepsiCo's use of volume discounts, but also its provision of advertising and promotional allowances to a single, "big box" retailer — i.e., incentives for the large retailer to promote Pepsi products over competing brands — which PepsiCo allegedly failed to make available to smaller competing retailers. [14]

Whiplash? Not so Fast: The FTC's Likely Approach Going Forward

Many are hopeful that the incoming administration will turn tail on the FTC's revival of Robinson-Patman, given the anticipated wholesale embrace of the consumer welfare standard by the FTC and the DOJ Antitrust Division. In the short run, at least, the commission is unlikely to change course on the two filed actions.

Former FTC Chair Lina Khan's resignation as a commissioner was effective Jan 31.

If Trump's pick for FTC commissioner, Kressin Meador Powers LLC partner Mark Meador, is confirmed by the Senate as a commissioner, the FTC will not have a majority to take any further action with respect to the two filed cases. In that vein, it is notable that both actions were approved on a 3-2 party-line vote — with Andrew Ferguson, the FTC's new chairman, filing written dissents in both cases.[15]

Yet, despite both Ferguson's dissents and the expected appointment of Republican Meador, those wishing that the FTC will do a U-turn on Robinson-Patman may be disappointed.

Ferguson's dissenting opinions highlight both the need for agencies to enforce laws on the books in a rule-of-law system and the importance of exercising discretion in identifying price discrimination cases for investigation and enforcement.[16]

Indeed, he has "rejected the prevailing consensus that the government should never enforce the Act," notwithstanding any "misgivings [he] may have with its underlying policy." [17]

Take the Southern Glazer's case, for example. In contrast to the Democratic majority's decision, Ferguson determined that commission staff lacked sufficient evidence that the company had engaged in price discrimination in a manner barred by the act or that any competitors had suffered injury from any differential pricing practices.[18]

Even if such evidence had existed, he would not have brought the lawsuit because commission staff failed to demonstrate that the favored retailers had market power. Without evidence that a favored retailer possesses market power, in Ferguson's view, the Southern Glazer's complaint raises a serious risk of injuring competition and raising consumer prices.[19]

In short, Ferguson has signaled a willingness to enforce the Robinson-Patman Act where (1) the commission has "solid evidence" that a firm violated the act, and (2) the retailer benefiting from the differential pricing has market power "sufficient to pose a danger to competition." [20]

Under this standard, the FTC's recent action against PepsiCo similarly missed the mark. Ferguson concluded the investigation had turned up "no evidence" that PepsiCo "denied to any firm the promotions or services it offered to the big-box store." [21] He went on to write that the FTC's approach in PepsiCo "is not law enforcement," but "politics." Ferguson said this new action set evidence aside and that the commission filed a civil complaint "in the blind." [22]

Perhaps more pointedly, Meador published an article last July about Robinson-Patman, in which he expressed deep concern "by the suggestion that federal law enforcers can decide not to enforce a law simply because they disagree with the policy or outcomes it advances," noting that "[w]hether drug laws or our immigration system, the executive branch is not allowed to ignore the laws passed by Congress because it prefers a different policy." [23]

Enforcement of the Robinson-Patman Act "is no different," in Meador's opinion. [24] While according to Meador, it may be "entirely appropriate to question whether the [Robinson-Patman Act] is good policy," Robinson-Patman "remains the binding policy of the federal government" and "it remains the duty of federal law enforcers to enforce the law as written." [25] Like Ferguson, Meador's take on Robinson-Patman appears to be measured.

He notes that critics must "concede that not all [Robinson-Patman Act] enforcement is harmful to consumers," and argues that the DOJ's 1977 report implicitly reflects this by discussing market distortion caused by discount demands from one seller driving competing sellers to increase prices for or deny discounts to other buyers — colloquially referred to as the waterbed effect.[26]

In some industries, like the grocery sector, Meador contends that due to the waterbed effect, it is reasonable to expect price discrimination to harm consumer welfare — i.e., where markets exhibit high turnovers and low margins, causing sales prices to reflect the cost of goods plus rule-of-thumb markups for particular items. [27]

In that vein, Meador's most recent public statement on the issue suggests that he is at the very least open to "investigat[ing] and bring[ing] [Robinson-Patman Act] cases where [the commission] has evidence that consumers are harmed by price discrimination." [28]

In short, how the pending Republican majority deals with the Southern Glazer's and PepsiCo actions will be telling. But until the commission has a sitting majority, no action can be taken to change course on these cases. It is entirely possible that the Trump FTC may elect to revisit these cases following Meador's likely confirmation.

Indeed, the statements previously cited reflect that these actions do not satisfy the evidentiary standard that Ferguson or Meador would apply to similar claims going forward. That at least raises the possibility that they will be disinclined to commit scarce enforcement resources to further prosecuting the cases going forward.

Conclusion

Although possible, it appears unlikely that Robinson-Patman will disappear back into the recesses of the commission's toolbox in coming years.

That makes it all the more important for companies to review their policies regarding differential pricing, bulk discounting, and advertising and promotional allowances now — with an eye toward what we can reasonably expect from the commission under Ferguson's leadership and a Republican majority.

Those expectations should be calibrated, in particular, based on the analyses contained in Ferguson's filed dissents in Southern Glazer's and PepsiCo, which impose a higher evidentiary standard to file Robinson-Patman claims than the outgoing Democratic majority.

By doing so, companies can more likely avoid a government investigation concerning their use of common distribution practices that may cause concern under the act's price discrimination provision.

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[1] M. Egan, How a Depression-era law could be used to make your booze cheaper (CNN

June 7, 2024), <https://www.cnn.com/2024/06/07/business/depression-era-law-ftc-southern-glazers/index.html>.

[2] See generally 15 U.S.C. § 13 et seq., 49 Stat. 1526 et seq. As a practical matter, the most problematic types of price discrimination policies under the Act are those which discriminate on the prices offered to a disfavored retailer not due to (1) differences in the cost of distributing the products to the respective retailers, or (2) legitimate attempts to meet prices offered to chain retailers by competing distributors.

[3] See *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963) ("[N]either the scope nor the intent of the statute was limited to that precise situation or set of circumstances. Congress sought generally to obviate price discrimination practices threatening independent merchants and businessmen, presumably from whatever source."); D. Daniel Sokol, *Limiting Anticompetitive Government Interventions That Benefit Special Interests*, 17 *Geo. Mason L. Rev.* 119, 128-29 (2009).

[4] See M. Egan, *supra* note 1.

[5] *FTC, FTC Sues PepsiCo for Rigging Soft Drink Competition* (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition>. The action is currently pending in the U.S. District Court for the Southern District of New York. See *id.* PepsiCo is a client of Reed Smith LLP.

[6] D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 *Geo. Wash. L. Rev.* 2064, 2065–66 (2015), available at <https://www.gwlr.org/wp-content/uploads/2016/01/83-Geo-Wash-L-Rev-2064.pdf> (concluding that "[i]n contrast to the goals of the other antitrust statutes, Robinson-Patman protects inefficient competitors rather than consumers," and the "possibility of a suit brought under Robinson-Patman increases the costs of efficient competitors," shifting "the benefit of antitrust from consumers to less efficient competitors"); accord Herbert Hovenkamp, *The Robinson Patman Act and Competition: Unfinished Business*, 68 *Antitrust L.J.* 125, 125 (2000) (noting that "Robinson-Patman jurisprudence has all but evaded the economic revolution in antitrust").

[7] Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* 382 (1978).

[8] D. Daniel Sokol, *supra* note 4 at 2071 & n.59 (citing R. Posner, *The Robinson-Patman Act: Federal Regulation of Price Differences* 30 (1976)). The majority of these filings occurred during the Kennedy and Johnson administrations. *Id.* at 2072 (internal citations omitted).

[9] DOJ, *Report on the Robinson-Patman Act* 6–7 (1977).

[10] See *Recent Efforts to Amend or Repeal the Robinson-Patman Act — Part 2: Hearings Before the Ad Hoc Subcomm. on Antitrust, the Robinson-Patman Act, and Related Matters of the H. Comm. on Small Bus., 94th Cong.* 141 (1975) (statement of Frederic M. Scherer, Director, Bureau of Econ., FTC).

[11] See *Complaint, FTC v. Southern Glazer's Wine & Spirits LLC*, No. 8:24-CV-02684 (C.D. Cal. Dec. 12, 2024), available at https://www.ftc.gov/system/files/ftc_gov/pdf/001-REDACTED-Complaint.pdf [hereinafter "Complaint"].

[12] *FTC, Release No. P221201, Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products* at 5-6 (June 16,

2022), available at https://www.ftc.gov/system/files/ftc_gov/pdf/Policy%20Statement%20of%20the%20Federal%20Trade%20Commission%20on%20Rebates%20and%20Fees%20in%20Exchange%20for%20Excluding%20Lower-Cost%20Drug%20Products.near%20final.pdf.

[13] Complaint ¶ 77 (alleging that Southern Glazer's price discrimination practices have the effect of substantially lessening competition "in the retail sale of wine and spirits" and "prevent[s] competition between such favored and disfavored retailers in the same geographic areas that sell the same products to the same pool of end consumers").

[14] See generally FTC, *FTC Sues PepsiCo for Rigging Soft Drink Competition* (Jan. 17, 2025), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition>.

[15] See https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf; https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southern-glazers-statement.pdf.

[16] See, e.g., https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southern-glazers-statement.pdf at 1 ("The Executive Branch should not categorically and publicly refuse to enforce laws that Congress has passed and the President has signed. The separation of powers forbids the suspension of the laws merely because of a policy disagreement with that law. But the Commission must soundly exercise discretion about when to enforce a law. The Commission exercises its discretion poorly by bringing this case. The Commission is unlikely to prevail even on its own theory of the Act, and it would be an imprudent use of the Commission's enforcement resources even if it were likely to prevail. I therefore respectfully dissent.").

[17] *Id.* at 24 ("[D]isagreement with the protectionist bent of the Robinson-Patman Act is not a ground to decline to enforce it. Congress sets the country's antitrust policy, and the Executive Branch cannot categorically ignore a statute that Congress lawfully adopted."); see also *id.* at 21 ("[T]he Constitution does not permit the Executive Branch to suspend the enforcement of a law on policy grounds."); https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf at 2.

[18] https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southern-glazers-statement.pdf at 24–26.

[19] *Id.* at 27–30.

[20] *Id.* at 30 ("We ought to enforce the Act where it will serve the broad public interest, and bring only those cases we are likely to win.").

[21] https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf at 3 ("I have seen no documents, data, testimony, or declarations from the big-box store. Indeed, to my knowledge, the Commission has not reviewed a single piece of evidence from the big-box store or obtained any evidence from its putative competitors.").

[22] Id.

[23] <https://fedsoc.org/commentary/fedsoc-blog/not-enforcing-the-robinson-patman-act-is-lawless-and-likely-harms-consumers>.

[24] Id.

[25] Id.

[26] Id. (internal citation omitted).

[27] See id.

[28] Id.