



Insight

# FTC Prepares Robinson-Patman Enforcement Action

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## Executive Summary

- The Federal Trade Commission is reportedly preparing to file a lawsuit against America's largest alcohol distributor, Southern Glazer's Wine and Spirits, for pricing practices that allegedly violate the Robinson-Patman Act (RPA).
- The RPA generally prohibits sellers from engaging in price discrimination of commodities of like grade or quality where the effect may be to substantially lessen competition.
- Federal enforcement of the RPA has long been dormant as its effect is often at odds with the decades-old consumer welfare standard that puts consumer interests over those of competitors.

## Introduction

The Federal Trade Commission is [reportedly](#) preparing to sue the country's largest alcohol distributor, Southern Glazer's Wine and Spirits, alleging the company's pricing practices violate the Robinson-Patman Act (RPA) of 1936. The depression-era law prohibits sellers from direct or indirect price discrimination among different purchasers where the effect may be to substantially lessen competition.

President Biden's [executive order on Promoting Competition in the American Economy](#) called for more aggressive antitrust enforcement, including with the use of the RPA. The lawsuit would mark the first federal RPA enforcement action in more than two decades. The nation's antitrust enforcers have been reluctant to enforce the law as its intent is often at odds with the consumer welfare standard – which puts the interest of consumers above those of competitors – that has guided antitrust enforcement for nearly 50 years.

Relying on the provisions of the RPA would certainly indicate that the enforcement agencies are returning to an era of antitrust largely focused on the size of firms and harm to competitors, rather than consumer welfare. While proponents of the RPA have vowed to enforce the law, any success would likely come with higher prices for consumers.

## The Robinson-Patman Act

The RPA outlaws direct or indirect price discrimination between purchasers of commodities of like grade and quality where the effect may be to substantially lessen competition.

As [previously detailed](#) in an American Action Forum, Congress passed the RPA in 1936 in response to a new, growing business model that threatened to transform the supply chain relationship among manufacturers, wholesalers, and producers. Large chain stores, most notably in groceries, began to side-step wholesale middlemen to purchase goods directly from the manufacturer. [Purchasing directly from manufacturers](#) in large, predictable quantities introduced an efficiency that enabled large retailers to better negotiate more favorable

exchange terms that small competitors – still reliant on wholesalers – could not match. These cost savings were passed along to the consumer. The innovative approach to the high-volume and low-margin retailing model that removed costly middlemen from the supply chain pushed many small “mom-and-pop” shops out of the market.

In response, small retailers and the displaced middlemen turned to Congress, which passed the RPA to protect these small retailers and re-establish the traditional supply chain that included wholesalers, even though it would increase prices for the end consumer.

[There are two types of injury](#) defined under the statute. Primary-line injury is when a manufacturer lowers a price only in one of its markets to undercut the price of local competitors. This type of injury is consistent with predatory pricing under the Sherman Act. The RPA is primarily concerned with secondary-line injury, in which the manufacturer’s price difference affects downstream competition among their customers. Mom-and-pop retailers and wholesalers were most concerned with the secondary-line injury.

The [RPA did not ban all variations](#) in selling prices and discounts. Defendants can assert several affirmative defenses of price differences when:

1. It is largely available to all purchasers;
2. It is a result of different costs of manufacturing, sales, or delivery;
3. It is offered to meet an equally low price of a competitor; or
4. It reflects changes in market conditions or the marketability of the goods, such as perishable or seasonal goods; or a discontinuance of business in the goods.

With no details of the pending lawsuit yet available, it is unclear which avenue Southern Glazer’s Wine and Spirits will take to mount its defense.

## **RPA Criticisms and Revival**

For decades, the RPA was condemned by enforcers and practitioners because it was viewed as inconsistent with antitrust enforcement that focused on the welfare of consumers. The core of the RPA conflates harm to competitors with harm to competition. The last RPA enforcement action was in 2000, as regulators, recognizing this inherent conflict between the welfare of consumers and the welfare of competitors, have been reluctant to enforce the law’s provisions.

The [2007 report from the Antitrust Modernization Commission](#) called for the repeal of the RPA, arguing that the 1936 law “appears antithetical to core antitrust principles.” It was not the first time the Commission made this recommendation. The report noted that “Its repeal or substantial overhaul [was] recommended in three prior reports, in 1955, 1969, and 1977.” The reasoning was that the RPA “protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage.”

President Biden’s executive order on Promoting Competition in the American Economy called for more aggressive antitrust enforcement, including with the use of the RPA. Since then, numerous [statements](#) by FTC commissioners and [policy statements](#) issued by the agency suggested that RPA enforcement is imminent. In January 2023, the FTC initiated an investigation into [Coca-Cola and PepsiCo](#) for alleged violations of the RPA, the first such investigation in over 20 years.

Some members of Congress have also joined the chorus of calls to revive RPA enforcement. Senator Elizabeth Warren (D-MA), along with 15 other members of Congress, [wrote a letter](#) to FTC Chair Lina Khan urging her to investigate “potential RPA violations” and “bring lawsuits under the RPA to protect small business, farmers, workers, and consumers.” Consistent with criticism of the RPA, the letter conflates harm to competition with harm to competitors.

## **Conclusion**

The FTC’s potential lawsuit against Southern Glazer’s Wine and Spirits would be the first enforcement action of the RPA in more than 20 years. It would be another indication that the enforcement agencies are returning to an era of antitrust largely focused on the size of firms and harm to competitors rather than consumer welfare.

Despite the recommendations of past enforcers, practitioners, and the findings of congressionally charged commissions, the RPA remains on the books as valid law. Proponents of the RPA have vowed to enforce the law. Any success would likely come with higher prices for consumers.