

THE JOURNAL OF FEDERAL AGENCY ACTION

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Editorial Office

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Articles and Submissions

Direct editorial inquiries and send material for publication to:

Steven A. Meyerowitz, Editor-in-Chief, Meyerowitz Communications Inc.,
26910 Grand Central Parkway, #18R, Floral Park, NY 11005, smeyerowitz@
meyerowitzcommunications.com, 631.291.5541.

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David Nayer, Publisher, Full Court Press at david.nayer@vlex.com or at
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Customer Service

Available 8 a.m.–8 p.m. Eastern Time

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Federal Trade Commission's Robinson-Patman Case Against Pepsi Goes Flat. Will Its Push for Robinson-Patman Act Enforcement Fizzle Out?

Sonia Kuester Pfaffenroth, Matthew Tabas, Wilson D. Mudge, and Annette Cremata Day*

In this article, the authors examine the Federal Trade Commission's dismissal of its Robinson-Patman Act case against PepsiCo, Inc.

The Federal Trade Commission (FTC) has voted 3-0 to dismiss without prejudice the Robinson-Patman Act (RPA)¹ case it initiated on January 17, 2025, against PepsiCo, Inc., in the U.S. District Court for the Southern District of New York. The FTC's dismissal of its case against Pepsi—first filed just weeks after the FTC filed its first RPA case in over 20 years against Southern Glazer's Wine and Spirits, LLC—raises questions about the scope and direction of the FTC's renewed RPA enforcement.

For industries that use tiered pricing and volume-based discounts, the FTC's dismissal of its case against Pepsi may potentially signal lower government enforcement risk, but it does not signal abandonment of government enforcement, as the FTC's RPA case against Southern Glazer's remains active. Private RPA enforcement remains a risk regardless of government enforcement priorities, and private RPA litigation against Pepsi relating to packaged snacks remains pending.² But we believe it would be a mistake to see dismissal of the Pepsi RPA case as a retreat from the FTC's broader endeavor to revitalize RPA enforcement, and risks of government enforcement remain.

Background

Historically, the FTC actively enforced the RPA, a New Deal-era statute, designed to prevent price discrimination that favors large

buyers at the expense of smaller competitors. Passed in 1936 as an amendment to the Clayton Act, the RPA was fueled by a concern that powerful suppliers were offering favorable pricing to large retail chains, undermining small businesses' ability to compete. Policymakers at the time feared that such practices would lead to market concentration and threaten core American values of economic opportunity and fairness. From the mid-twentieth century through the 1970s, the FTC pursued a steady stream of RPA cases, reflecting a clear commitment to maintaining competitive parity in retail markets.

However, Chicago School enforcement stalled in the 1980s, with only one RPA case brought by the FTC during the Clinton administration—until its revival in the waning days of the Biden administration. This shift was driven by evolving economic thinking that questioned the policy underlying the RPA and a focus on the welfare of small retailers rather than low prices that benefit consumers. The Neo-Brandeisian rejection of a focus on low prices led the Biden FTC to bring the first RPA case in decades against Southern Glazer's in 2024, soon followed by the action against Pepsi. These cases were seen as a significant policy reversal, indicating the FTC's intent to reinvigorate the RPA as a means to address perceived inequities in buyer-supplier relationships and to promote "fairer" competition, especially for smaller businesses.

The cases against Southern Glazer's and Pepsi, however, did not come as a complete surprise. There had been ongoing speculation for some time that the FTC was planning a revival of RPA enforcement. In July 2021, for example, President Joe Biden issued an executive order directing the FTC to scrutinize the food industry through the lens of the RPA.³ In June 2022, the FTC announced in a policy statement that it intended to use the RPA to combat allegedly improper rebates and fees from drug manufacturers to pharmacy benefit managers.⁴ In April 2024, it was reported that then-FTC Commissioner Alvaro Bedoya noted he wished to take the RPA "car out of the garage."⁵

What the RPA Prohibits

The RPA generally prohibits sellers of goods from charging different prices to purchasers of those goods who compete with each other. A violation arises when a seller offers materially

identical products to different competing buyers at different prices at approximately the same time and the pricing disparity results in competitive harm—with a presumption that discrimination causes competitive harm.⁶ Discriminatory practices in promotional allowances may also constitute a violation.

Furthermore, a buyer can also be liable along with the seller if the buyer knowingly induces and receives discriminatory pricing or promotional allowances.⁷ However, the RPA does not act as an absolute prohibition on differential pricing of goods. A price difference does not violate the RPA if it is justified by differences in cost incurred by the seller, or if the lower price was offered to meet a competing seller's price.⁸

The FTC'S RPA Case Against Southern Glazer's

The FTC revived RPA enforcement in December 2024 when it announced its case against Southern Glazer's, the largest wine and spirits distributor in the United States.⁹ This marked the FTC's first RPA case since 2000.

The complaint alleges that Southern Glazer's repeatedly discriminated in price between disfavored independent purchasers and favored large chain purchasers of wine and spirits in violation of Section 2(a) of the RPA. The FTC alleges that Southern Glazer's discriminatory prices to favored chain customers are effectuated through a variety of mechanisms, including through large, high-volume quantity discounts and scan rebates. The FTC further alleges that Southern Glazer's discriminatory prices to favored chain customers involve substantial price differences between competing customers, disguising discounts with post-delivery, off-invoice discounts, delayed price increases for favored retailers and retroactive price reductions on inventory already held by favored large chain customers, channel and special pricing for favored chain retailers, and sensitive internal documents describing protecting large customers' pricing.

The FTC voted to file the lawsuit against Southern Glazer's in a 3-2 party-line vote, with Republican then-Commissioner Andrew Ferguson and Republican Commissioner Melissa Holyoak dissenting on the grounds that the suit was unlikely to succeed and would be a suboptimal use of the FTC's resources even if successful.¹⁰ Notably, Commissioner and now FTC Chair Ferguson claimed in

a dissenting statement that the “mammoth case” would likely fail to clear legal hurdles and would represent an unnecessary drain on resources.¹¹ He further argued that Southern Glazer’s did not possess the market power of the “large independent department stores or chain operations that animated Congress to pass the Act in 1936.”¹²

Holyoak dissented even more vigorously and said the case targets “innocuous” conduct and would increase prices.¹³ She emphasized in her dissenting statement that the FTC had failed to show competitive harm in the form of higher prices or reduced output, and rejected the idea that simply showing pricing differences was sufficient to prove an RPA violation.

Despite dissenting, Ferguson and Holyoak acknowledged that the FTC is obligated to enforce the RPA as long as it has not been repealed, particularly where enforcement is consistent with the broader goals of the antitrust laws. By voicing support for RPA enforcement, they signaled a clear departure from the long-standing view that the government should avoid enforcing the statute.

The FTC’S RPA Case Against Pepsi

The FTC reaffirmed its renewed commitment to RPA enforcement in January 2025 when it sued Pepsi for alleged RPA violations.¹⁴ In its complaint, the FTC accuses Pepsi of providing a large, big box retailer with favorable terms and promotional payments not offered to other retailers, while charging higher prices to competing retailers and customers in violation of Sections 2(d) and 2(e) of the RPA. Notably, the complaint against Pepsi is based on different RPA provisions than the case against Southern Glazer’s. The FTC accuses Pepsi of violating Sections 2(d) and 2(e), which prohibit price discrimination in the form of advertising and promotional allowances favoring large customers over smaller ones. Unlike Section 2(a), Sections 2(d) and 2(e) are per se violations and do not require evidence of competitive harm to prove an RPA violation. This eliminates a significant obstacle for enforcers and private plaintiffs.

Just as in *FTC v. Southern Glazer’s Wine and Spirits, LLC*, the FTC voted to file the lawsuit against Pepsi in a 3-2 party-line vote, with newly appointed Chair Ferguson and Commissioner Holyoak dissenting in strongly worded statements denouncing the

then-Democratic majority's flurry of actions taken only a few days before President Donald Trump's inauguration.

Holyoak called the FTC's suit against Pepsi "the worst case [she has] seen in [her] time at the Commission."¹⁵ She emphasized what she considers the complaint's lack of evidence, its failure to meet any of the elements of RPA Sections 2(d) and 2(e), and the then-majority's attempts to "disguise" a theory of harm that should be evaluated under Section 2(a) of the RPA as unlawful allowances and services under Sections 2(d) and 2(e), intentionally sidestepping 2(a)'s requirement that plaintiffs show competitive harm. She argued that even if such discounts could be categorized as promotional payments, they cannot fall within Sections 2(d)'s and 2(e)'s scope because they are not made in connection with the resale of Pepsi's products by the retailer. Instead, she argued that such discounts are meant to ensure that original sales from Pepsi to the retailer continue, rather than facilitate the retailer's resale of Pepsi products. This would remove Pepsi's conduct from the RPA's reach.¹⁶

Ferguson largely echoed Holyoak's dissenting statement, but also emphasized the alleged political nature of the "Democratic majority's" revival of the RPA without regard to the law or the facts gathered during the Pepsi investigation.¹⁷ He called the complaint "deficient on its face" and argued that the FTC had no evidence of the disparate treatment required to prove an RPA violation and reaffirmed that he is willing to enforce the RPA where, unlike here, the FTC has solid evidence.¹⁸

FTC Statements in Support of Dismissing the Case Against Pepsi

Chair Ferguson's and Commissioner Holyoak's joint statement in support of dismissing the case against Pepsi reiterates the criticisms outlined in their earlier dissents, emphasizing concerns about the action's alleged political origins and lack of substantive legal and evidentiary support.¹⁹ Commissioner Mark Meador concurred with the decision to dismiss the case and his statement aligns with Ferguson's and Holyoak's in condemning the case as politically motivated and in applauding efforts to "revive RPA enforcement."²⁰ Their statements collectively underscore a commitment to principled enforcement of antitrust laws, generally, and the

RPA specifically, cautioning against cases perceived as politically motivated or lacking in evidentiary support.

What Happens Next?

The FTC's unanimous dismissal of its RPA case against Pepsi—and the sharp criticism from all three sitting commissioners—casts doubt on the FTC's near-term appetite for aggressive RPA enforcement, at least under its current leadership. The continuation of the FTC's case against Southern Glazer's underscores that the FTC may still pursue RPA enforcement in certain circumstances, particularly where it believes there is clear evidence of harm to competition and consumers. The clear message from the FTC is that any future enforcement must be grounded in rigorous legal and economic analysis, free from perceived political motivations.

Companies operating in industries characterized by significant wholesale pricing disparities between large and small retailers should closely monitor the developments in the FTC's case against Southern Glazer's: the political winds at the FTC can shift, state attorneys general may still pursue RPA-like claims under state laws, and private plaintiffs can and do sue under the statute. In addition to monitoring these developments, such companies should continue to review pricing practices and policies, document justifications such as “meeting competition” or cost to serve where such pricing differences exist, educate teams about the risks of discriminatory pricing and the conditions under which differences are lawful, and review their promotional allowances, and other non-pricing terms.

Notes

* The authors, attorneys with Arnold & Porter Kaye Scholer LLP, may be contacted at sonia.pfaffenroth@arnoldporter.com, matthew.tabas@arnoldporter.com, wilson.mudge@arnoldporter.com, and annette.cremataday@arnoldporter.com, respectively.

1. 15 U.S.C. § 13.

2. See *Alqosh Enterprises, Inc. and NMRM, Inc. v. PepsiCo, Inc. and Frito-Lay North America, Inc.*, 2:25-cv-1327 (C.D. Cal). On February 17, 2025, private plaintiffs filed their first RPA case against Pepsi since the FTC announced its RPA case against Pepsi in January 2025. On April 21, 2025, plaintiffs filed their first amended complaint. While the theory here is like

the FTC's case, plaintiffs, independently owned convenience stores, accuse Pepsi and its subsidiary Frito-Lay of engaging in price discrimination and promotional payments, allowances, and services in the resale of their snack chips to favored big box retailers in violation of Sections 2(a) and 2(d) of the RPA and of California's Unfair Practices Act and Unfair Competition Law.

3. The White House, Executive Order on Promoting Competition in the American Economy (July 9, 2021), <https://bidenwhitehouse.archives.gov/briefing-room/presidential-actions/2021/07/09/executive-order-on-promoting-competition-in-the-american-economy/>.

4. Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products, 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.

5. See Law360, FTC's Bedoya Looking for Market Power in Pricing Cases (Apr. 11, 2024), <https://www.law360.com/articles/1824599/ftc-s-bedoya-looking-for-market-power-in-pricing-cases>.

6. 15 U.S.C. §13(a); *FTC v. Morton Salt Co.*, 334 U.S. 37, 50-51 (1948) (harm to competition presumed from lengthy, substantial price discrimination between competitors).

7. 15 U.S.C. §§13 (c)-(e).

8. 15 U.S.C. §13(a).

9. See Press Release, Fed. Trade. Comm'n, *FTC Sues Southern Glazer's for Illegal Price Discrimination* (Dec. 12, 2024); *FTC v. Southern Glazer's Wine and Spirits, LLC*, 8:24-cv-02684 (C.D. Cal.), <https://www.ftc.gov/news-events/news/press-releases/2024/12/ftc-sues-southern-glazers-illegal-price-discrimination>.

10. Notably, on March 13, 2025, the FTC under the new administration opposed dismissal of the case. Later, on April 17, 2025, the U.S. District Court for the Central District of California denied Southern Glazer's motion to dismiss the case. Generally, the court in its written order held that the FTC sufficiently alleged each element of a secondary-line RPA discrimination claim against Southern Glazer's.

11. Dissenting Statement of Commissioner Andrew N. Ferguson In the Matter of Southern Glazer's Wine and Spirits, LLC Matter Number 211-0155, https://www.ftc.gov/system/files/ftc_gov/pdf/ferguson-southernglazers-statement.pdf.

12. *Id.*

13. Dissenting Statement of Commissioner Melissa Holyoak In the Matter of Southern Glazer's Wine & Spirits, LLC Commission File No. 2110155, https://www.ftc.gov/system/files/ftc_gov/pdf/holyoak-statement_southern-glazers.pdf.

14. See Press Release, Fed. Trade. Comm'n, FTC Sues PepsiCo for Rigging Soft Drink Competition (Jan. 17, 2025); *FTC v. PepsiCo, Inc.*, 1:25-mc-00033 (S.D.N.Y.), <https://www.ftc.gov/news-events/news/press-releases/2025/01/ftc-sues-pepsico-rigging-soft-drink-competition>.

15. Dissenting Statement of Commissioner Melissa Holyoak In the Matter of PepsiCo, Inc. Commission File No. 2210158, https://www.ftc.gov/system/files/ftc_gov/pdf/pepsi-holyoak-dissenting-statement.pdf.

16. *Id.*

17. Dissenting Statement of Commissioner Andrew N. Ferguson In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation Matter Number 2210158, https://www.ftc.gov/system/files/ftc_gov/pdf/dissenting-statement-commissioner-ferguson-regarding-non-alcoholic-beverages-price-discrimination-investigation.pdf.

18. *Id.*

19. Statement of Chairman Andrew N. Ferguson Joined by Commissioner Melissa Holyoak In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation Matter Number 2210158, https://www.ftc.gov/system/files/ftc_gov/pdf/Pepsi-Dismissal-Ferguson-Statement-05-22-2025.pdf.

20. In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation Matter Number 2210158, https://www.ftc.gov/system/files/ftc_gov/pdf/Meador-Pepsi-Statement-05-22-2025.pdf.