

Alert | Antitrust Litigation & Competition Regulation



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Fairness Over Efficiency: FTC Breathes New Life Into Robinson Patman Act Enforcement

In a speech in Minneapolis on Sept. 22, the Federal Trade Commission (FTC)'s newest commissioner, Alvaro Bedoya, stressed the need for a return to fairness over efficiency for small businesses, as efficiency was never the goal of the U.S. antitrust laws. "Today, it is axiomatic that antitrust does not protect small business. And that the lodestar of antitrust is not fairness, but efficiency," Bedoya said. "How did this happen? ... I think it is time to return to fairness," he said. "The idea took hold within enforcement agencies [in the 1970s and 80s] that mergers, particularly vertical ones, were presumptively good for the economy and good for consumers," Bedoya continued. "This idea was given the greatest weight for vertical mergers, the kind of mergers that help make it so that a pharmacy middleman has an interest in steering a patient to their own pharmacy." As a result, Bedoya said, patients are denied easy access to necessary medicine at local pharmacies, often having to wait for larger pharmacy benefit managers to ship medicine. The FTC issued a policy statement in June that promised more intense scrutiny on prescription drug pricing through, among other methods, aggressive enforcement of the Robinson Patman Act.

Bedoya's comments went further than the June policy statement, however. He echoed Chair Lina Khan's call to reinvigorate and increase enforcement of the Robinson Patman Act across all industries. The Act, passed in the 1930s to protect small business against suppliers charging different prices for the same products based on, among other factors, volume purchases, has not been enforced by the FTC or the Department of Justice for decades. Private plaintiffs have had some success in bringing Robinson Patman

Act claims in the recent past, however, demonstrating that the Act can still prove useful in protecting competition through protection of small businesses from larger, more powerful competitors.

Bedoya's comments further evidence the progressive bent of the FTC under the leadership of Chair Khan, who has for years spoken about the need to limit the power of large corporations. The impact the pandemic has had on supply chains, resulting in large suppliers giving the best discounts and access to their largest, best customers, often to the detriment of small business and rural communities, has further fueled the FTC's desire to rein in the power of large corporations. An aggressive Robinson Patman Act enforcement policy is another arrow in the FTC's quiver in this fight.

An active, aggressive enforcement of the Robinson Patman Act by the FTC may lead to an increase in private litigation as well, especially if the FTC begins to secure a string of wins or settlements. Manufacturers and large suppliers should include a review of pricing plans and pricing decisions to ensure compliance with the complex requirements of the Act.

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