

Strengthening Enforcement of the Robinson-Patman Act (“RPA”)

Issue Background

The Energy Marketers of America (EMA), along with the National Grocers Association (NGA), and other business-focused associations, formed the Main Street Competition Coalition (MSCC) to promote competition by strengthening enforcement of the Robinson-Patman Act (“RPA”). The RPA is the only federal price discrimination law to ensure a level playing field for the benefit of both businesses and consumers. Additional members of the MSCC also include the National Community Pharmacists Association, American Beverage Licensees, Protect Our Restaurants, Organic Farmers Association, Western Growers Association, National Beer Wholesalers Association and the National Association of Truck Stop Operators.

Small and medium-sized energy marketers are an essential source of competition in increasingly concentrated markets. These businesses compete on price, quality, service and convenience, and often serve as anchors in local communities. Economic discrimination reduces or eliminates that competition. Today, dominant companies wield unprecedented economic power—too often with little or no antitrust oversight or enforcement. As a result of unprecedented levels of concentration, small and medium-sized businesses are increasingly subject to discriminatory terms and conditions, including less favorable pricing and price terms, less favorable supply, less favorable retail packaging, and sometimes an inability to access products in short supply that are available to their competitors.

Specifically, EMA’s convenience store retailers are concerned about the discrimination practices of food and beverage suppliers in their sales to convenience stores. This discrimination favors, among others, super stores and big box retailers who are regarded by suppliers as being in a different class of trade from their smaller to medium-sized competitors. In other words, convenience stores are at a competitive disadvantage when compared to other channels, be it big box, grocery or dollar stores, which often offer less expensive food and beverage products at retail than convenience retailers can obtain from the wholesale level. Some convenience store retailers have tried to purchase items at big box retailers since it can be cheaper than the wholesale price. Unfortunately, convenience store retailers receive retaliatory action from food and beverage suppliers and producers.

While the RPA authorizes private enforcement by retailers, the obstacles to successful enforcement (many of which were fashioned by the federal courts) make private enforcement too difficult and time-consuming, and ultimately too risky from a success standpoint to justify the enormous costs of such litigation. The only viable means of enforcing the law, therefore, is to encourage enforcement of the RPA by the Federal Trade Commission (FTC). The RPA prohibits price discrimination when the effect of the discrimination is to lessen or destroy competition. The objective of MSCC is to breathe life back into the RPA law.

The FTC Should Promote and Enforce Fair Price Competition

The FTC should use its authority under the RPA to bring enforcement actions against anticompetitive economic discrimination. Unfortunately, the FTC has not brought a case under the RPA in more than 20 years. The FTC should investigate anticompetitive vertical conduct between retailers and suppliers to determine whether monopolistic behavior of dominant firms results in economic discrimination that harms smaller rivals and consumers. This should include the important issue of whether “channels of trade” distinctions are being used to evade laws against economic discrimination.

In this and other inquiries, the FTC should look beyond price effects to include other dimensions of competition, including impacts on quality, service and convenience as a result of economic discrimination and increasing

consolidation. The FTC should also use its authority under the Robinson-Patman Act to bring enforcement actions against anti-competitive economic discrimination. Please go to www.mainstreetcompetition.com for more information.

“THE ASK”

Congress should pursue rigorous oversight of the antitrust enforcement agencies to ensure that existing laws are being enforced. The law is clear: The federal government should not allow dominant players to manipulate markets to the detriment of competition. Congress should consider legislative reforms to existing antitrust laws that restrain buyer-side market power, prohibit anti-competitive economic discrimination and reflect a holistic consumer welfare standard.

(Committees: House Judiciary, Senate Judiciary)

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