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BLOG

A Comeback for RPA Price Discrimination Camouflaged as Kickbacks

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For nearly a year, the FTC has foreshadowed the revival of the previously dormant Robinson-Patman Act (RPA). With enforcement of the Act potentially forthcoming, companies need to be able to identify, address, and ideally avoid risks that may be embedded in complex supply chain relationships.

This is the fourth post in a Competition Corner series discussing recent updates on RPA enforcement, as well as risks and best practices.[1] Recall that Section 2(a) of the RPA prohibits explicit price discrimination[2]—charging different prices to different customers for the same product—while Sections 2(d) and 2(e) target side benefits that may be used as workarounds to explicit price discrimination.[3] Section 2(c) of the RPA—which is the topic of this post—targets another potential workaround to explicit price discrimination.

SECTION 2(C)'S PROHIBITION ON ILLEGITIMATE BROKERAGE PAYMENTS

Concerned that sellers could circumvent prohibitions on price discrimination by making indirect payments to buyers through third parties (such as brokers who would then pay the buyer), Section 2(c) eliminates the use of "dummy" or "fictitious brokerage payments." Fictitious brokerage payments are payments by a seller to a broker who is actually acting for the buyer in a transaction, or discounts offered directly to the buyer in lieu of a brokerage commission. Section 2(c) prohibits payment or acceptance of commissions, brokerage fees, or other compensation except where such payments are for legitimate services rendered in connection with the sale or purchase of goods. Like the rest of Section 2 of the RPA, the prohibition applies only to the sale of goods, not services.

A simple example helps illustrate a likely violation of Section 2(c): suppose Manufacturer A sells a product to Wholesaler B at the same price that Manufacturer A sells that product to all other wholesalers, but Wholesaler B also operates Broker C, which receives a payment from Manufacturer A for "facilitating" the deal. This would be a potential violation of Section 2(c) because Wholesaler B and Broker C are affiliated and ultimately, Wholesaler B benefits from the payment that is made from Manufacturer A to Broker C. However, if Broker C actually provides valuable services as part of the deal, e.g., it handles the shipping and delivery of the product to Wholesaler B, then Broker C is providing valuable services and any fair market value payment from Manufacturer A to Broker C for those legitimate services would not violate Section 2(c).

Section 2(c) may also be implicated when the buyer does not receive the fee even indirectly. Recently, the majority of Section 2(c) cases have related to commercial bribery claims. In those cases, the seller pays an employee of the

buyer to buy from the seller. Courts frequently hold that Section 2(c) applies to commercial bribery because it prohibits any seller of goods from compensating a third party in connection with that sale (e.g., paying a "finder's fee") except where that third party is providing *legitimate* and valuable services.

In order for a payment to be a Section 2(c) violation, the payment from the seller must ultimately be transferred to the buyer or the buyer's representative. As various cases have described the requirement, Section 2(c) applies only if the payment crosses "the seller-buyer line." This most commonly occurs where a large buyer (e.g., a wholesaler or large retailer) also operates a related business (e.g., a broker or a shipping company) and the related business receives favorable terms that ultimately benefit the buyer, without the buyer directly receiving a more favorable price on the product itself.

SECTION 2(C) ENFORCEMENT

Key differences between Section 2(c) and the other sections of the RPA make it easier for the FTC and private plaintiff to bring a Section 2(c) claim.[4] First, unlike Section 2(a), Section 2(c) applies to export sales as well as domestic transactions. Second, if a plaintiff is seeking injunctive relief, it only needs to prove that discounts were provided—the plaintiff does not need to prove that those discounts harmed competition.[5] And finally, the defenses to Section 2(a) price discrimination claims do not apply to Section 2(c) claims (e.g., the defense that the price difference is explained by the seller "meeting competition").

The FTC continues to suggest that it will use Section 2(c) as one of its tools to combat discriminatory pricing. For example, in June 2022, the FTC published a Policy Statement[6] committing to scrutinize the possible Section 2(c) violations related to rebates and fees drug manufacturers pay to pharmacy benefit managers (PBMs) and other intermediaries to favor high-cost drugs.[7]

AVOIDING SECTION 2(C) VIOLATIONS

To avoid potential liability under Section 2(c), both buyers and sellers should ensure that their business arrangements properly document the legitimate basis for commissions, brokerage payments, and the like. When making payments to a third party in a transaction related to selling a product, parties should only make payments through a contract that specifically prohibits the third party from sharing any portion of the payment with the other primary party to the transaction. Additionally, both buyers and sellers should ensure that any payments to a third party regarding a product sale transaction are only for services actually rendered, potentially using itemized invoices detailing the purposes of the payments.

Stay tuned for more Competition Corner posts discussing defenses to RPA claims, compliance issues, and actionable best practices. Winston & Strawn attorneys are always available to help by auditing existing compliance programs, designing new ones, or providing training to your pricing and sales professionals tailored to the needs and challenges of your business, or if necessary, to defend against or prosecute an RPA action.

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[1] The first post in the series overviews the recent resurgence of the RPA and can be found here. The second post walks through the elements of an RPA claim and can be found here. The third post explores promotional service discrimination claims and can be found here.

[2] A previous Competition Corner post explains the elements of an RPA price discrimination claim and can be found here.

[3] The previous post can be found here.

[4] For example, in a June 2023 interview, FTC Commissioner Bedoya emphasized that Section 2(c) is available to regulators, and stressed that it is a far simpler rule than price discrimination under Sections 2(a), (e), and (f). Interview by Teddy Downey of Alvaro Bedoya, Commissioner, Federal Trade Commission (June 15, 2023), Transcript of Interview with FTC Commissioner Alvaro Bedoya - The Capitol Forum.

[5] However, if they are attempting to recover damages, they must show actual injury such as proof of lost sales and the like. *See, e.g.*, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981).

[6] Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower Cost Drug Products | Federal Trade Commission (ftc.gov)

[7] Though the Policy Statement specifically referenced the prescription drug industry, recent FTC investigations in connection with other provisions of the Act make clear that other industries may be subject to RPA scrutiny as well.

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