

Robinson-Patman Act Enforcement in the Direct-Selling Industry: A Clearer Look

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At the 2025 Annual Multi-Level Marketing (MLM) Conference,^[1] keynote speaker and former Director of the Federal Trade Commission's (FTC) Bureau of Consumer Protection Samuel Levine outlined four proposals to better protect MLM workers that he believes fall within the FTC's authority: (1) "Ban Deceptive Earnings Claims and Increase Penalties for Violations," (2) "Stop MLMs from Silencing and Deplatforming Workers," (3) "Ensure MLM Workers Can Compete," and (4) "Challenge Illegal Price Discrimination."^[2] When addressing illegal price discrimination,^[3] he stated that "[i]n many MLMs, workers at the bottom already face extraordinary disadvantages. They're less experienced, have smaller networks, and often lose money. Add unlawful price discrimination to the mix, and it becomes structurally harder for them to succeed."^[4]

Levine's call to "Challenge Illegal Price Discrimination" revives a statute that once dominated antitrust enforcement: the 1936 Robinson-Patman Act (RPA). The RPA prohibits price discrimination: charging competing buyers different prices for the same products.^[5] At the time of passage, the law was a response to the anticompetitive practice of manufacturers allowing big-box stores to purchase goods at lower prices than smaller retailers, thus requiring smaller retailers to charge their consumers higher prices than chain stores. From its enactment through the next four decades, the RPA "was a staple of the Federal Trade Commission's enforcement agenda."^[6]

A HISTORY LESSON: KOSCOT AND THE PYRAMID PLAYBOOK

One of the most prominent and instructive cases in this context is the FTC's action against Koscot Interplanetary, Inc. (Koscot), which not only highlighted the vulnerabilities of direct selling schemes to price discrimination but also set important precedents for future enforcement. In 1972, the FTC filed a complaint against Koscot and others, alleging that the defendants operated as an illegal pyramid scheme, deceived distributors with exaggerated earnings claims, and engaged in illegal price fixing and price discrimination.^[7] With respect to illegal price discrimination, the FTC alleged:^[8]

Respondent Koscot Interplanetary, Inc. discriminates in price, directly or indirectly, between different purchasers of its products of like grade and quality by selling said products at lower prices to some purchasers than to other purchasers, many of whom have been and now are in competition with the purchasers paying the higher price. For example, director-distributor purchases his products directly from

respondent corporation at approximately: (a) 22.2 percent discount as compared with the cost to a supervisor-distributor, (b) 41.7 percent discount as compared with the cost to a beauty advisor.

The FTC further argued that the effect of the discrimination in net price “may be substantially to lessen competition, . . . or to injure, destroy, or prevent competition between the favored and nonfavored purchasers or with the customers of either of them.”^[9]

The case inspired the “Koscot Test,” which characterizes a pyramid scheme as a program in which participants pay money to a company in exchange for the right to (1) sell a product and (2) receive rewards—unrelated to product sales made to ultimate users—for recruiting other participants. Though *Koscot* is often cited for its pyramid scheme analysis, its RPA holding—price discrimination hurts lower-rank distributors—is equally important.

The discounts described above allowed distributors at higher ranks, such as directors, to make higher profits from the sale of the same product than distributors at lower ranks, such as supervisors.^[10] Accordingly, in the initial decision on March 20, 1975, the court found that, because all ranks “performed the same function in the sale and distribution of Koscot products” and there was competition between all ranks in both direct sales to consumers and recruitment of new distributors (and sales to those new distributors), price differences would result in injury to competition.^[11] Therefore, the price discriminations constituted violations of the RPA.^[12] The defendants were ordered to cease and desist from their practices of both price fixing at the suggested retail price and price discrimination.^[13]

WHY TIERED DISCOUNTS STILL MATTER

Today, some direct selling companies continue to offer different prices for the same product to different distributor ranks. We have reviewed several direct selling companies’ compensation plans that offer such varying prices. Unlike *Koscot*, these direct sellers do not require their distributors to sell products at fixed retail prices. While distributors’ ability to set the retail price may benefit consumers (who can choose to purchase products from a distributor offering the lowest price), it may have adverse effects on lower-ranked distributors working in compensation plans where the wholesale discount varies across the ranks. Consider, for example, a stylized compensation plan in which product discounts range from 20% off the suggested retail price at the lowest rank to 40% off at the highest rank. If both the lower-ranked distributors and the higher-rank distributors chose to resell products at the suggested retail price, the lower-ranked distributors would earn a profit margin of 20% and the higher-ranked distributors would earn a profit margin of 40%. However, in the race to get more consumers, both distributor groups have the option to lower the prices at which they resell products. If both distributor groups aimed to earn, for example, a 5% profit margin, the lower-ranked distributors could only offer a 15% discount to the potential consumer, while the higher-ranked distributors could offer a 35% discount. Of course, any rational consumer would choose to purchase the same product from the distributor offering a higher discount.^[14]

Notably, the FTC has insisted that in legitimate MLMs, retail profits should be a key part of distributors’ compensation: **“If the MLM is not a pyramid scheme, it will pay you based on your sales to retail customers, without having to recruit new distributors.”**^[15] Lower discounts for lower-ranked distributors would inevitably lower the potential profit margin on these retail sales for entry-level distributors, further limiting the income distributors can earn from retail sales. In typical compensation plans, distributors earn not only the retail profit, but also commissions, rank advancements, and other benefits, setting the higher-ranked distributors at an even stronger advantage, and crowding out lower-ranked distributors.

THE RPA REVIVAL

While the FTC and Department of Justice largely pulled back from enforcing the RPA starting in the 1980s’ period of wider deregulation,^[16] the last few years have seen more discussion and interest around the RPA. Alvaro Bedoya, a former FTC Commissioner, was “an outspoken proponent of Robinson-Patman enforcement” during the Biden Administration,^[17] and in December 2024, former FTC Chair Lina Khan filed the FTC’s first claim alleging an RPA violation in more than two decades.^[18] The claim accused Southern Glazer’s Wine and Spirits, the largest alcohol distributor in the United States, of “unjustifiably charging higher prices to small businesses and limiting their ability to compete with big chains.”^[19] This revival of RPA enforcement has continued across administrations, as current FTC

Chair Andrew Ferguson has “affirmed that RPA is not a dead letter, and can and should be enforced when the facts support it.”^[20] In April, the Southern Glazer’s Wine and Spirits complaint was sustained.^[21]

Private companies continue to bring claims alleging RPA violations, too. Power Buying Dealers USA, Inc., a gas station distributor, recently brought a claim against Juul Labs, an e-cigarette company, accusing Juul Labs of giving a rival wholesaler “price advantages . . . at the expensive of Plaintiff in the same channels and territories.”^[22] The court dismissed the case and plaintiffs’ accusations against Juul Labs in June 2025, after finding that the plaintiff had not defined the relevant geographic market, preventing an accurate assessment of competition among distributors.^[23] Although dismissed on market-definition grounds, the suit shows private plaintiffs are testing RPA theories.

KEY TAKEAWAYS FOR DIRECT-SELLING FIRMS

1. Uniform Wholesale Pricing: Offering the same product at different prices to competing distributors invites scrutiny.
2. Cost Justifications and Documentation: Volume discounts can be lawful, but the seller must prove real, pro-rated cost savings. Firms should preserve evidence that any price differences stem from bona fide cost or competitive-meeting defenses, not favoritism.
3. Competitive Injury: When higher-rank distributors can undercut lower ranks, the FTC can infer injury to competition—especially where retail profit is supposed to anchor earnings.

LOOKING AHEAD

The FTC’s renewed focus on price discrimination, coupled with high-profile speeches and litigation, suggests the Robinson-Patman Act is no relic. Direct-selling companies with rank-based wholesale tiers should audit their pricing now. Otherwise, they risk becoming the next test case in the agency’s bid to level the playing field for every seller—from the entry-level beauty advisor to the seasoned director.

If you have any questions regarding this briefing or related subjects, or if you otherwise need assistance, please contact the authors of this article or your Winston & Strawn relationship attorney.

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[1] *Multilevel Marketing: The Consumer Protection Challenge* (May 8–9, 2025), <https://www.mlmconference.com/>.

[2] Samuel Levine, *Freedom to Earn, Freedom to Speak, and Freedom to Compete: Protecting MLM Workers in a Perilous Economy*, Yale J. on Reg. (June 15, 2025), <https://www.yalejreg.com/nc/freedom-to-earn-freedom-to-speak-and-freedom-to-compete-protecting-mlm-workers-in-a-perilous-economy-by-samuel-levine/> (“Levine (2025)”).

[3] Price discrimination refers to the practice of selling different units of the same product at different prices with the possible effect of injuring competition. FTC, *Price Discrimination: Robinson-Patman Violations*, <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/price-discrimination-robinson-patman-violations> (“Price Discrimination: Robinson-Patman Violations”). Broadly, it occurs when price differences cannot be explained by differences in marginal costs (i.e., firms do not set prices according to the costs of supplying the product). See George J. Stigler, *The Theory of Price* (Macmillan 1987) (1946). When firms engage in price discrimination, consumers may pay more or less than the equilibrium price for a product. Those charged higher prices are harmed in the process.

[4] Levine (2025).

[5] Clayton Act, § 2(a) (codified at 15 U.S.C. § 13(a)). RPA price discrimination claims, as decided by the Supreme Court of the United States, must apply to purchased commodities (rather than services and/or leases) of “like grade and quality.” The competing purchasers must have been charged different prices during the same time period, the sales must have been made in interstate commerce, and the price differential must have “the reasonable possibility of injury to competition.” The FTC lists several legal defenses to allegations of RPA violations, including (1) “the price

difference is justified by different costs incurred by the seller in manufacture, sale, or delivery (e.g., volume discounts),” or (2) “the price concession was given in good faith to meet a competitor’s price.” (Price Discrimination: Robinson-Patman Violations.)

[6] Stacy Mitchell, *The Great Grocery Squeeze*, Atlantic (Dec. 1, 2024), <https://www.theatlantic.com/ideas/archive/2024/12/food-deserts-robinson-patman/680765/> (“Mitchell (2024)”).

[7] Complaint, *In re Koscot Interplanetary, Inc.*, 86 F.T.C. 1106, 1106-16, Docket 8888 (May 24, 1972).

[8] *Id.* ¶ 6(6) (“Director” is a higher rank than “Supervisor,” which is a higher rank than “Beauty advisor.”).

[9] *Id.* ¶ 16.

[10] The Koscot contract with distributors required that distributors would sell Koscot products to consumers only at Koscot’s suggested retail prices. Initial Decision ¶ 142, *In re Koscot Interplanetary, Inc.*, Docket 8888 (Mar. 20, 1975) Though difficult to enforce, this price fixing theoretically allowed directors, who earned a 65% discount off retail prices, to earn a profit margin of 65% on retail sales to consumers. It allowed supervisors, who earned a 55% discount off retail prices, to earn a profit margin of only 55% on retail sales to consumers. (*Id.* ¶¶ 36, 145(a).

[11] *Id.* ¶ 145(c)–(d).

[12] *Id.* Conclusions ¶ 10.

[13] Final Order § IV, *In re Koscot Interplanetary, Inc.*, Docket 8888 (Nov. 18, 1975).

[14] Former Director Levine noted in his speech that “[i]n a recent FTC complaint, the agency alleged that lower-level distributors could purchase products at a 35% discount, distributors one rung up could purchase at a 42% discount, and distributors closer to the top could purchase products at a 50% discount.” Levine (2025).

[15] FTC, *Multi-Level Marketing Businesses and Pyramid Schemes* (July 2022), <https://consumer.ftc.gov/articles/multi-level-marketing-businesses-pyramid-schemes>.

[16] Mitchell (2024).

[17] *Id.*

[18] Danielle Kaye, *F.T.C. Sues Largest U.S. Alcohol Distributor for Illegal Pricing*, N.Y. Times (Dec. 12, 2024), <https://www.nytimes.com/2024/12/12/business/ftc-alcohol-lawsuit-illegal-pricing.html> (“Kaye (2024)”); Complaint, *FTC v. Southern Glazer’s Wine & Spirits, LLC*, No. 8:24-cv-02684 (C.D. Cal. Dec. 12, 2024).

[19] Kaye (2024).

[20] Levine (2025).

[21] Order Denying Defendant’s Motion to Dismiss, *FTC v. Southern Glazer’s Wine & Spirits, LLC*, No. 8:24-cv-02684 (S.D. Cal. Apr. 17, 2025).

[22] Third Amended Complaint, Introduction, *Power Buying Dealers USA, Inc., v. Juul Labs, Inc. & HS Wholesale, Ltd.*, No. 21-cv-03154 (N.D. Ill. Mar. 12, 2025).

[23] While there is no law requiring the definition of a relevant geographic market in RPA cases, this practice has precedents. Opinion and Order, § III *Power Buying Dealers USA, Inc., v. Juul Labs, Inc. & HS Wholesale, Ltd.*, No. 21-cv-03154 (N.D. Ill. June 4, 2025); Jonathan Capriel, *Juul Faces Possible Revival of Price Discrimination Suit*, Law360 *Power Buying* (June 26, 2025). Plaintiffs have asked the court to reconsider dismissing the case.

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