



Office of Commissioner
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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ALVARO M. BEDOYA
*Regarding Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange
for Excluding Lower-Cost Drug Products*

June 16, 2022

We live in the wealthiest country in the world. The companies who make insulin, and the middlemen who control our access to insulin, make billions off of it.¹ And yet one in four Americans with diabetes cannot afford the insulin they need. One in four Americans ration their insulin.²

Many of them are dying. A 47-year-old nurse from Dayton, in between jobs and one week away from starting a new one.³ A 26-year-old restaurant manager from the Twin Cities, uninsured, three days from his payday.⁴ A 22-year-old from Cincinnati, working two jobs, who *was* insured – but who still could not afford the insulin she needed on her high deductible plan.⁵

In a competitive market, companies compete to lower their prices. It appears that in the insulin market, companies compete to *raise them*. At least that is the conclusion of a recent years-long investigation by the Senate Finance Committee led by Senator Chuck Grassley of Iowa and Senator Ron Wyden of Oregon. That study laid a significant part of the blame on rebates demanded by pharmacy benefit managers, the middlemen between drug manufacturers, insurers, and your pharmacy.⁶

¹ Staff of S. Finance Comm., 116th Cong., *Insulin: Examining the Factors Driving the Rising Cost of a Century Old Drug* (“Grassley-Wyden Report”) at 18 (showing \$22.4 billion in net sales of Eli Lilly insulin products from 2014 to 2018) (available at: [Grassley-Wyden Insulin Report \(FINAL 1\).pdf \(senate.gov\)](#)); *ibid* at 23 (showing €30.9 billion in net sales of Sanofi diabetes products from 2014 to 2018). Revenue statistics for pharmacy benefit managers (PBMs) are more difficult to identify but in 2018, certain manufacturer rebates to PBMs for sales of insulin surpassed 50%. *Id.* at 7.

² Darby Herkert, et al., *Cost-related Insulin Underuse Among Patients with Diabetes*, 179 *JAMA Intern Med.* 112 (Jan. 2019). [Cost-Related Insulin Underuse Among Patients With Diabetes | Clinical Pharmacy and Pharmacology | JAMA Internal Medicine | JAMA Network](#).

³ Ken Altucker, *Struggling to stay alive: Rising insulin prices cause diabetics to go to extremes*, *USA Today* (Dec. 19, 2019), <https://www.usatoday.com/in-depth/news/50-states/2019/03/21/diabetes-insulin-costs-diabetics-drug-prices-increase/3196757002/>.

⁴ Bram Sable-Smith, *Insulin’s High Cost Leads to Lethal Rationing*, *NPR* (Sept. 1, 2018), <https://www.npr.org/sections/health-shots/2018/09/01/641615877/insulins-high-cost-leads-to-lethal-rationing>.

⁵ Amy Eskin, ‘Make It Free’: Inside the Rising Insulin Price Crisis That Diabetics Say Is Putting Them on the Edge of Life or Death, *People* (June 7, 2019), <https://people.com/politics/rising-insulin-prices-deadly-consequences-for-diabetics/>.

⁶ See generally [Grassley-Wyden Report](#).

For those of you who are not lawyers, what the Commission is saying today boils down to this: *We will use every tool we have to investigate what's going on with drug manufacturers, pharmacy middlemen, and insulin prices.*

I want to highlight one of those legal tools – the commercial bribery provisions of the Robinson-Patman Act. For decades, this law has fallen into disfavor and disuse. But for decades before that, the law was referred to as the “Magna Carta of Small Business,”⁷ and while it may be flawed, it was nonetheless a cornerstone of antitrust enforcement.

We have not forgotten about Robinson-Patman. While the law is best known for addressing price discrimination – charging one price to one customer and another price to a different one – an equally critical part of the Act outlaws commercial bribery.⁸

If buyers (say, an insurer and their insured customers) use an agent (say, a PBM) to negotiate on their behalf, and that agent takes payment from the seller (say, a drug manufacturer), this may create a conflict of interest. It may also be commercial bribery violating Robinson-Patman.

If those words – “commercial bribery” – sound too strong, I urge you to review a complaint filed last month by the State of Arkansas. It alleges, in detail, how “PBMs have come up with numerous ingenious methods to *hide*... renamed Manufacturer Payments in order to keep them for themselves.”⁹

Federal courts have also recognized Robinson-Patman commercial bribery claims against PBMs and drug manufacturers. In 1998, a federal court in Delaware sustained a generic manufacturer’s Robinson-Patman claims against a branded drug manufacturer for alleged kickback payments made to PBMs and others.¹⁰ In 2021, a federal court in New Jersey took up drug wholesaler’s Robinson Patman claims against PBMs and drug manufacturers for a similar scheme involving alleged kickbacks for insulin. Although the court dismissed, without prejudice, the wholesaler’s claim for lack of antitrust standing, it cited several other parties who *could* claim standing.¹¹ This suggests that courts may be open to Robinson-Patman claims involving PBMs and drug manufacturers. The FTC may be in the best position to bring those claims.

Now, I went back and watched the roundtables that the Commission held on this subject. I was struck by the statements of Nicole Smith-Holt, Anna Squires, and Ty Beringer – people who lost family to insulin rationing, or who themselves live at the mercy of insulin prices.¹²

⁷ Joseph P. Bauer & Earl W. Kintner, *The Robinson-Patman Act: A Look Backwards, a View Forward*, 31 Antitrust Bulletin 571 (1986).

⁸ See, 15 U.S.C. 13(c).

⁹ Complaint at 88-92, *Arkansas v. Eli Lilly et al.*, No. 22-2976 (Ark. Pulaski County Ct. filed May 11, 2022) (emphasis added).

¹⁰ *In re Warfarin Sodium Antitrust Litigation*, 1998 WL 883469 (D.Del 1998).

¹¹ *In re Direct Purchaser Insulin Pricing Litigation*, 2021 WL 28886216, at *7-8 (D.N.J. 2021).

¹² See Transcript of FTC Open Commission Meeting (Oct. 21, 2021) at 14-18 (available at [ftc.gov/system/files/documents/public_events/1597522/20211021opencommissionmeetingtranscript.pdf](https://www.ftc.gov/system/files/documents/public_events/1597522/20211021opencommissionmeetingtranscript.pdf))(remarks of Ms. Smith-Holt and Ms. Squires); Transcript of FTC and Justice Department Listening Forum on Firsthand Effects

What I noticed is that they did not focus their criticisms on PBMs; they focused on drug manufacturers, the companies that make insulin.

I want to send a message to Ms. Smith-Holt, Ms. Squires, and Mr. Beringer, and everyone in a similar situation: Today’s statement may appear to focus on pharmacy middlemen – PBMs – but the statement very much focuses on both PBMs and manufacturers.

On that note, I’ll share one last thing that I noticed in preparing for this meeting. In 2019, the leading insulin manufacturers went before Congress and disclaimed responsibility for price increases. They told Congress: Their hands were forced. They had to increase prices or their placements on formularies would be “in jeopardy,” they said.¹³

And yet, when the Grassley-Wyden investigation obtained the board room records for those companies, they told a different story. They showed those companies profiting handsomely from those price increases. They also showed that increased revenue was a key reason for their decision to increase prices. Let me make this clear: The Grassley-Wyden team literally found a “Pros” and “Cons” list from a manufacturer weighing an insulin price increase. And the first item on the “Pros” list was not “retain formulary placement,” but rather “Financial Upside” – \$40 million more in money.¹⁴

And so for me, while last week’s 6(b) investigation into PBMs was an important first step, this Policy Statement takes the critical next step in underscoring our interest in looking at what’s happening with drug manufacturers as well.

of Mergers and Acquisitions: Health Care (Apr. 12, 2022) at 9] at 9 (remarks of Mr. Beringer). [October 21, 2021 Open Commission Meeting Unofficial Transcript](#) at 14-18 (remarks of Ms. Smith-Holt and Ms. Squires); [April 2022 FTC/DOJ Listening Forum on Effects of Mergers in Health Care Industry](#) at 9 (remarks of Mr. Beringer). ril 2022 FTC/DOJ Listening Forum on Effects of Mergers in Health Care Industry] (remarks of Mr. Beringer).

¹³ *“Priced Out of a Lifesaving Drug: Getting Answers on the Rising Cost of Insulin”*: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. On Energy & Commerce, 116th Cong. 49-50 (unofficial transcript available at <https://www.congress.gov/116/meeting/house/109299/documents/HHRG-116-IF02-Transcript-20190410.pdf>) (“[Y]ou would lose your position on the formulary if you lowered your price?” “We believe that we would be in jeopardy of losing those positions.”); *ibid* at 1201-1202 (“We have to provide rebates in order... so people can use our insulin.”) (emphasis added).

¹⁴ [Grassley-Wyden Report](#) at 61.