



Office of Commissioner  
Alvaro Martin Bedoya

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 it. And yet one in four Americans with diabetes cannot afford the insulin they need. One in four Americans ration their insulin.<sup>2</sup>

Many of them are dying. A 47-year-old ~~ser~~ from Dayton, in between jobs and one week away from starting a new one. A 26-year-old restaurant manager from the Twin Cities, uninsured, three days from his payday. 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.<sup>5</sup>

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, middlemen between drug manufacturers, insurers, and your pharmacy.<sup>6</sup>

<sup>1</sup> Staff of S. Finance Comm., 116 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 for Lilly insulin products from 2014 to 2018) (available at [Grassley-Wyden Insulin Report \(FINAL 1\).pdf \(senate.gov\)](#)) at 23 (showing €30.9 6 g -0.00 Tw 24.0u02

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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,” 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.

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 that 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 that alleges, in detail, how “PBMs have come up with numerous ingenious methods to hide... renamed Manufacturer Payments in order to keep them for themselves.”

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. In 2021, a federal court in New Jersey took up a 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 would claim standing.<sup>1</sup> This suggests that courts may be ripe 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 roundtable that the Commission held on this subject. I was struck by the statements of Nicole Smith, Anna Squires, and Ty Beringer – people who lost family to insulin rationing, or who themselves live at the mercy of insulin prices.

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

<sup>8</sup> See, 15 U.S.C. 13(c).

<sup>9</sup> Complaint at 88-92, *Arkansas v. Eli Lilly et al.*, No. 22-2976 (Ark. Pulaski County Ct. filed May 19, 2022) (a24ady(19)-5.8B).

