



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

STATEMENT OF COMMISSIONER REBECCA KELLY SLAUGHTER
*Regarding the Policy Statement of the Federal Trade Commission on Rebates and Fees in
Exchange for Excluding Lower-Cost Drug Products*

June 16, 2022

I'm pleased to support the Commission's Policy Statement on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products ("Statement"). This Statement affirms the Commission's commitment to use its full authority under the FTC Act to help tackle the illegal practices that result in high drug prices or reduced innovation.

I won't rehash the Statement, but I'd like to emphasize three points:

First, insulin is a case study in the constellation of challenges that surround America's health care crisis – access, equity, intermediaries, interchangeability, and patent evergreening, to name a few. The stories we have heard about diabetics risking their lives by forgoing pricey insulin are nothing short of horrifying. Exorbitant insulin pricing is even more disturbing from a racial and health equity standpoint. In 2020, the Center for Disease Control and Prevention reported that non-Hispanic Black people and people of Hispanic origin respectively had a 50 percent and nearly 100 percent higher incidence of diabetes compared to non-Hispanic white people.¹ In addition, the un- and under-insured are disproportionately people of color. This means that high cash prices, high copays, high deductibles, and the Medicare Part D coverage gap exacerbate problems for these populations in particular, including reduced access and adherence to medication. Layered on top of existing health inequities, the resulting reality of untreated diabetes leads to higher medical costs as well as greater risk of complications, hospitalization, and death for these vulnerable populations.

Yesterday, at the Pharma Task Force Workshop, we heard compelling commentary from Raksha Kopparam of the Washington Center for Equitable Growth about health inequity, systemic racism in healthcare, and the disproportionate harm high drug prices can have on vulnerable and underserved communities. Insulin is only one example of the markets I think the FTC should prioritize in addressing harms that disproportionately affect communities of color.

Second, as we work to unpack the potential legal issues related to rebating, the FTC should consider theories that encompass the full breadth of the FTC's authority, both competition and consumer protection related. On the competition side, this includes conduct that violates Section 5's prohibition on unfair methods of competition, or that may violate the Robinson Patman Act.

¹ CTR. FOR DISEASE CONTROL, NATIONAL DIABETES STATISTICS REPORT (2020), [cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf](https://www.cdc.gov/diabetes/pdfs/data/statistics/national-diabetes-statistics-report.pdf).

We may also find that our authority to stop unfair or deceptive acts and practices maps onto misconduct in pharmaceutical pricing practices. For example, when we sued Martin Shkreli for his anticompetitive scheme to hike the price of Daraprim, I wrote that our unfairness authority could apply in that or other cases where conduct causes substantial injury to consumers, the injury is not reasonably avoidable, and there are no countervailing benefits to competition or consumers.² In addition, as the FTC and FDA committed in a 2020 statement, both agencies will work together, using their respective authorities, to take appropriate steps to address false or misleading statements and promotional communications by biological product manufacturers.³

While we need to be thorough in finding ways to tackle high insulin prices through enforcement, I want to be clear to the public about expectations. Investigations take time. It's important that staff has the time and space to follow the facts where they lead. The FTC can scour all the relevant documents and take hours of the testimony, but at the end of the day we need legal theories and sufficient evidence to support them. Unlike enforcement investigations that are non-public, the Commission can undertake studies using our 6(b) authority and present the results to the public.⁴ As a result, the PBM 6(b) orders that the Commission authorized last week will serve as an important complement to our enforcement authority in this space by helping the agency and the public understand the opaque and complex web of challenges that are pervasive in the U.S. pharmaceutical market.

Finally, the path to untangling the problem of high drug prices is paved with multiple entities that play a role in the underlying cost structure and resulting prices stakeholders pay.⁵ While today's Commission Statement focuses on PBMs, I want to be clear that pharmaceutical manufacturers and other market participants are not off the hook if they have violated the law.

I'm proud of the Commission's efforts to better understand PBMs and pharmaceutical pricing. Patients of insulin and other life-saving prescription drugs, as well as their healthcare providers, will benefit greatly. I look forward to working with the FTC's staff and my colleagues on these issues.

² *Statement of Commissioner Rebecca Kelly Slaughter in the Matter of Vyera Pharmaceuticals*, Federal Trade Commission (Jan. 27 2020), https://www.ftc.gov/system/files/documents/public_statements/1564517/2020_01_27_final_rks_daraprim_concurring_statement.pdf.

³ *See* FED. TRADE COMM'N, JOINT FDA-FTC STATEMENT REGARDING COLLABORATION TO ADVANCE COMPETITION IN THE BIOLOGIC MARKETPLACE (Feb. 3, 2020) https://www.ftc.gov/system/files/documents/public_statements/1565273/v190003fdaftcbiologicsstatement.pdf.

⁴ *See* 15. U.S.C. § 46(f).

⁵ *See* STAFF OF H.R. COMM. ON OVERSIGHT AND REFORM, DRUG PRICING INVESTIGATION (Dec. 10, 2021) <https://oversight.house.gov/sites/democrats.oversight.house.gov/files/DRUG%20PRICING%20REPORT%20WITH%20APPENDIX%20v3.pdf>; STAFF OF S. FIN. COMM., INSULIN: EXAMINING THE FACTORS DRIVING THE RISING COST OF A CENTURY OLD DRUG (Jan. 14, 2020) <https://www.finance.senate.gov/chairmans-news/grassley-wyden-release-insulin-investigation-uncovering-business-practices-between-drug-companies-and-pbms-that-keep-prices-high>.