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

Statement of Chair Lina M. Khan and Commissioner Alvaro M. Bedoya
In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation
Commission File No. 2210158

January 17, 2025

Congress passed the Robinson-Patman Act to provide a level playing field to all businesses, large and small. While the first part of the Act bans suppliers from discriminating in price among buyers, the Act also prevents suppliers from providing special payments or services to its favored customers.[1] Last month, the Commission issued its first price discrimination complaint in decades.[2] Today, the Commission resurrects two more provisions of the Act, faithfully enforcing the law that helps level the playing field for all retailers.

The focus of the Commission's complaint today is on the disproportionate promotional allowances and services that Pepsi provides a large, big-box retailer, [redacted] to help [redacted] maintain a retail [redacted]. The alleged facts uncovered in staff's investigation establish a clear reason to believe that Pepsi has violated Sections 2(d) and (e) of the Act by giving disproportionate, special [redacted] and [redacted] to [redacted] The alleged facts also establish reason to believe that Pepsi's conduct is harming competition and driving up prices. This action to enjoin Pepsi's continuing violations of the law is thus in the public interest,[3] and it is our duty, pursuant to our oaths to protect fair competition in the economy, to do so.

The complaint alleges that in order to appease its [redacted]—[redacted]—Pepsi provides [redacted] with [redacted] that it does not provide to its other customers, enabling [redacted] to maintain a [redacted] for Pepsi products over competing retailers.[4] Pepsi and [redacted] refer to this as a [redacted][5] [redacted] does not achieve this advantageous [redacted] on its own. At [redacted]'s insistence, as alleged in the complaint, Pepsi deliberately advantages [redacted] over its brick-and-mortar competitors in several ways to achieve and maintain [redacted].[6] This insulates [redacted] from retail price competition, allowing [redacted] to keep marketing its [redacted]

[1] *Compare* 15 U.S.C. § 13(a) (regarding wholesale price discrimination) *with* 15 U.S.C. §§ 13(d) & (e) (regarding indirect price discrimination via promotional allowances and services).
[2] *FTC v. Southern Glazer's Wine and Spirits, LLC*, 8:24-cv-02684, Complaint (C.D. Cal Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/001-REDACTED-Complaint.pdf; Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter In the Matter of Southern Glazer's Wine and Spirits, LLC (Dec. 12, 2024), https://www.ftc.gov/system/files/ftc_gov/pdf/statement-bedoya-joined-by-khan-slaughter-southern-glazers.pdf.
[3] *See* 15 U.S.C. § 53(b).
[4] *See* Compl. ¶¶ 3-6, 10, 35, 37-61, 72-73.
[5] *See id.* ¶¶ 5, 37.
[6] *See id.* ¶¶ 3, 5-6, 8, 10-16, 35-61.

[redacted][7] while making [redacted] more amenable to Pepsi wholesale cost increases.[8] This puts competing retailers at an unfair disadvantage with regard to Pepsi products.[9]

According to the complaint, Pepsi has many tools in its toolbox for maintaining [redacted]. For example, at times it has raised [redacted] on the rest of the market while sparing [redacted][10] Separately, the claims under Sections 2(d) and 2(e) in today's complaint address the disproportionate [redacted] and [redacted] Pepsi provides [redacted] to maintain its [redacted].

Specifically, the complaint alleges that when Pepsi and [redacted] observe a threat to [redacted]—sometimes caused by competing retailers like [redacted] or [redacted] running self-funded promotions on Pepsi products to get customers in the door, thus

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[7] [redacted] (last visited Jan. 9, 2025).

[8] *See* Talmon Joseph Smith & Joe Rennison, *Companies Push Prices Higher, Protecting Profits but Adding to Inflation*, N.Y. Times (May 30, 2023) ("'Companies are not just maintaining margins, not just passing on cost increases, they have used it as a cover to expand margins'…. PepsiCo has become a prime example of how large corporations have countered increased costs, and then some. … The bags of Doritos, cartons of Tropicana orange juice and bottles of Gatorade sold by PepsiCo are now substantially pricier. Customers have grumbled, but they have largely kept buying. Shareholders have cheered."); Andy Larsen, *How Much of Price Inflation Is Due to Corporate Greed*, The Salt Lake Tribune (Dec. 16, 2023) ("[W]hat multiple researchers have consistently found is that those high-leverage companies consistently increased their prices more than their lower-power competitors during the inflationary period from 2021 to 2022. Kraft Heinz, Tyson Farms, General Mills, and PepsiCo are four examples you'll have heard of who were found to have done this."); Dee-Ann Durbin, *PepsiCo's Second Quarter Profits Jump but Customers Slow Their Purchases After Years of Price Hikes*, Associated Press (July 11, 2024) ("PepsiCo reported higher-than-expected earnings in the second quarter … after raising prices every quarter for more than two years…. PepsiCo … has leaned heavily into price increases over the past two years as its costs for ingredients and packaging rose. The fourth quarter of 2023 was the company's eighth straight quarter of double-digit percentage price increases and it hiked prices 5% to start the year, and another 5% in the just-completed quarter."); Steven Hill, *Grocery Prices Keep Rising Because Too Few Companies Dominate the Market*, Pittsburgh Post-Gazette (July 22, 2024) ("In 2021, during the middle of the pandemic, Pepsi raised its prices, blaming it on alleged higher costs. Yet somehow it still raked in $11 billion in profits. Then in 2023, even though the pandemic was over and inflation was dropping, Pepsi still hiked its prices by double digits for the seventh consecutive quarter. Its profits soared another 14%."); Julie Creswell, *PepsiCo Says Revenues Jumped After It Raised Prices*, N.Y. Times (Apr. 26, 2022) ("Thanks to double-digit percent increases for the prices of many of its popular snack and beverage products, PepsiCo saw a big jump in revenues in the quarter. Overall, PepsiCo said on Tuesday, revenues rose 9.3 percent to $16.2 billion in the first quarter. But the bulk of that growth was fueled by price increases in the three months."); Isabella M. Weber & Evan Wasner, *Sellers' Inflation, Profits and Conflict: Why Can Large Firms Hike Prices in an Emergency?*, Review of Keynesian Economics, Vol. 11, Issue 2 (Summer 2023) at 192 ("The Chief Executive Officer of Pepsi, Ramon Laguarta, for example, … commented on the company's approach to price increases: 'So we do that in full coordination with our partners [i.e. retail businesses], trying to make sure that we keep the consumer with us, we keep the shopper coming to the stores.'") (alteration in original); *id.* at 183, 190 (arguing that "the US COVID-19 inflation [wa]s predominantly a sellers' inflation that derive[d] from microeconomic origins, namely the ability of firms with market power to hike prices," and noting as an example, "when asked about 'historically high price' by one of the analysts, PepsiCo Chief Financial Officer Hugh Johnston replied that 'the environment is well set up for pricing to be positive going forward' despite these high levels thanks to 'the right way to compete, which is primarily around innovation and brand building and execution' …. CEO Laguarta added 'obviously with the set of inflation trends that we've seen in some of the commodities and so on, there's probably going to be very little incentive for anybody to break what is a very rational environment that we see today'—where rational environment refers to firms increasing prices in response to cost increases….").

[9] Compl. ¶¶ 4, 7, 17, 45, 61, 72-73.

[10] *See id.* ¶ 15.

lowering their retail prices relative to [redacted][11]—Pepsi utilizes certain [redacted] competitors relative to [redacted].[12] These levers include [redacted], effectively forcing them to stop running deals [redacted].[13]

Pepsi's provision of special [redacted] at targeted points in time to get [redacted] versus its competitors[14] inherently and self-evidently constitutes disproportionate promotional allowance payments and services to [redacted]. As alleged in the complaint, the term for that funding—[redacted]—is the exact same name given to the promotional displays featuring the discounted products for resale.[15] A Pepsi executive testified that displays were the [redacted] item that the company [redacted] in exchange for the [redacted].[16] Under the Commission's own guidance, promotional displays are at the heart of 2(d) and (e) liability.[17]

The services the complaint alleges Pepsi provides [redacted][18]—violate Section 2(e), wholly apart from the disproportionate funding Pepsi pays [redacted] to run [redacted] promotions in violation of Section 2(d).[19] It is difficult to imagine a scheme in greater fundamental contravention of Section 2(e), which forbids suppliers from "discriminat[ing] in favor of one purchaser against another purchaser … by … furnishing … any services … connected with the … sale, or offering for sale of [the supplier's] commodity … upon terms not accorded to all purchasers on proportionally equal terms,"[20] than Pepsi's [redacted][21] [redacted][22] which Pepsi fulfills with [redacted]

The complaint alleges that Pepsi is not, at the same time, giving or offering proportionally equal promotional funding and support to [redacted] competitors, because to do so would be to defeat the purpose of the exercise—to get [redacted] prices down and its market share of Pepsi product sales up relative to its competitors.[23] The complaint alleges this is a

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[11] *See id.* ¶ 44.
[12] *See id.* ¶¶ 6, 12-16, 38, 47-61.
[13] *Id.*
[14] *E.g.*, *id.* ¶¶ 12-13, 51-55.
[15] *See id.* ¶ 9.
[16] *See id.* ¶ 9.
[17] *See* 16 C.F.R. § 240.7 (Fred Meyer Guides providing examples of Section 2(d) "services" and "facilities," including "[d]isplays").
[18] *See* Compl. ¶¶ 11-16, 36-44.
[19] *See id.* ¶¶ 45-46.
[20] 15 U.S.C. § 13(e).
[21] Compl. ¶¶ 5, 37.
[22] *Id.* ¶ 10.
[23] *See id.* ¶¶ 47, 57, 66.

violation of Sections 2(d) and (e) of the Robinson-Patman Act.[24] Disproportionate promotional allowances and services in violation of Sections 2(d) and (e) are per se illegal.[25]

When confronted with the facts set forth in the complaint, Pepsi insisted that the discounts it advances to [redacted] can only be analyzed under Section 2(a) (which is not governed by the per se rule), because Pepsi funds these promotional events through [redacted] In contrast, when Pepsi funds promotional events (e.g., "$3 for 12" deals) at [redacted] competitors, it generally does so through [redacted][26] Commissioners Ferguson and Holyoak, who have voted to allow this conduct to continue, will likely seize on Pepsi's argument, accusing the majority Commissioners of trying to "get around" the more burdensome requirements of Section 2(a) by analyzing Pepsi's [redacted] under Section 2(d).

But the courts have rejected the contention that [redacted] must be analyzed under Section 2(a) as price adjustments and not under Section 2(d) as promotional allowances. Instead, as the Supreme Court explained in the analogous 2(c) context, "the fact that a transaction may not violate one section of the Act does not answer the question whether another section has been violated."[27]

For example, in *American News*, the FTC found that Union News Company, the nation's largest retail newsstand operator, violated Section 5 of the FTC Act by "induc[ing] and receiv[ing] substantial special payments from publishers" that violated Robinson-Patman Act Section 2(d).[28] Union "demand[ed]" and was given "what were generally called 'display promotional allowances' or 'promotional allowance rebates'" from publishers.[29] One publisher gave Union "a 10 per cent sales rebate on the retail price of the magazine"—much akin to the [redacted] that Pepsi gives [redacted].[30]

The Second Circuit affirmed the Commission's finding that Union had unlawfully induced payments that violated Section 2(d). The court rejected Union's argument (similar to Pepsi's here) that "the payments made by the publishers did not contravene § 2(d), because … the allowances paid were price adjustments, not true promotional allowances."[31] This contention "lack[ed] any merit" because, just like in the case of [redacted] and Pepsi, "special display rights were indeed often given to publishers who [like Pepsi] paid the promotional allowances," and, like Pepsi, "[t]he publishers who acquiesced in [Union's] demands for promotional rebates expressed the hope that they would get better display service as a result" and Union "frequently

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[24] 15 U.S.C. §§ 13(d), 13(e).
[25] *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 67-68 & n.13 (1959); F. Rowe, Price Discrimination Under the Robinson-Patman Act 372 (1962).
[26] [redacted]
[27] *FTC v. Henry Broch & Co.*, 363 U.S. 166, 170-71 (1960).
[28] *Am. News Co. v. FTC*, 300 F.2d 104, 107 (2d Cir. 1962).
[29] *Id.*
[30] *Id.*
[31] *Id.* at 108-09.

referred to these payments as 'promotional allowances.'"[32] In any event, the court held, "even if these payments were all no more than disguised price adjustments, as petitioners contend, they would nevertheless violate § 2(d)" because "Section 2(d) was aimed explicitly at promotional allowances which have the effect of price adjustments."[33]

Moreover, far from requiring the exclusive application of Section 2(a), the special manner in which Pepsi pays its promotional allowances to [redacted], as distinguished from the [redacted] methods it uses for [redacted]'s competitors, compels us to analyze them under Section 2(d). This kind of deliberate obfuscation of the true net prices paid by each retail customer is precisely what Congress sought to eradicate with per se liability for Section 2(d) violations: under the statutory scheme, "sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings."[34] If Pepsi had "confine[d] [its] discriminatory practices to price differentials," it would then be straightforward for Pepsi to ensure that at reasonably contemporaneous points in time, no retail customer receives an unfair price advantage. But Pepsi has affirmatively obscured [redacted]

Congress decided that in the face of such gamesmanship, the onus should not be on law enforcement to wade through price, discount, and payment amounts housed in separate databases accounted for in different ways and paid at differing times to divine whether or not a price discrimination occurred and whether, as a result, competition was harmed. Congress instead put the onus on businesses to stop disguised price discriminations in the form of promotional allowances, by making such payments per se illegal.

The investigatory record is replete with evidence that Pepsi has engaged in indirect price discrimination in violation of Sections 2(d) and (e) to the disadvantage of [redacted] competitors. For example, the complaint notes that Pepsi and [redacted][35] As another example, [redacted][36] [redacted][37] [redacted][38]

Our dissenting colleagues may protest that staff have not yet confirmed with additional data analysis that Pepsi "systematically" discriminates in favor of [redacted]. But the documents

[32] *Id.* at 109.
[33] *Am. News*, 300 F.2d at 109 (citing Sen. Rep. No. 1502, 74th Cong., 2d Sess. 7 (1936)).
[34] *Simplicity Pattern Co.*, 360 U.S. at 68.
[35] Compl. ¶¶ 51-55.
[36] *Id.* ¶¶ 58-59.
[37] *Id.* ¶¶ 61, 58.
[38] *Id.* ¶ 61.

and testimony put that issue to rest: there can be no real dispute that Pepsi and [redacted] have an arrangement to enable [redacted] to [redacted], and that they take action to accomplish this objective through [redacted] and [redacted].[39] There can also be no real dispute that Pepsi and [redacted] succeed in accomplishing their objective: when Pepsi takes action to [redacted][40] In the face of this mountain of evidence, it strains credulity to think that [redacted] are explained entirely by [redacted] accepting lower margins than its competitors. The more plausible explanation, to which all of the evidence points, is that Pepsi is, at least in part, [redacted]—as the documents clearly show.

Congress uncovered similar behavior in the retail marketplace in 1935, when "[a] lengthy investigation conducted in the 1930's by the Federal Trade Commission disclosed that several large chain buyers were effectively avoiding [Section] 2 by taking advantage of gaps in its coverage. Because of their enormous purchasing power, these chains were able to exact … competitive advantages," including "'[a]dvertising allowances' [that] were paid by the sellers to the large buyers in return for certain promotional services undertaken by the latter. … Lacking the purchasing power to demand comparable advantages, the small independent stores were at a hopeless competitive disadvantage."[41] The same is true today of the ever-shrinking cadre of regional chain stores—supermarkets like Stater Bros., Meijer, Piggly Wiggly, Woodman's, and Raley's that today provide at least some semblance of competitive diversity in the markets in which they operate. Under its [redacted], Pepsi puts these smaller [redacted] competitors at a "hopeless competitive disadvantage" by taking steps every day to [redacted].

Grocery stores have claimed that they must merge to position themselves to extract the same illegal concessions that [redacted] commands. But a greater capacity to violate the Robinson-Patman Act has never been and never will be a cognizable defense to a merger that threatens to substantially lessen competition. In other words, the answer to one power buyer extracting unlawful price advantages from suppliers is not to create another power buyer that can do the same thing. The answer is to enforce the antitrust laws, including the Robinson-Patman Act.

When antitrust enforcers fail to enforce this valid law based on second-guessing of Congress's wisdom in passing it and speculation that it will lead to higher prices (speculation that this case should put to bed), we may inadvertently encourage competition-reducing mergers—mergers leading to higher prices, lower quality, and reduced wages. By enforcing the

[39] *See id.* ¶¶ 5-6, 10, 35, 37-61.
[40] *See, e.g., id.* ¶¶ 41, 61.
[41] *Simplicity Pattern Co.*, 360 U.S. at 69.

Robinson-Patman Act as Congress intended, we eliminate a major impetus for corporate consolidation.[42]

So long as this Commission, as it must, enforces Section 7 of the Clayton Act, it is incumbent on us to stop suppliers from unfairly disadvantaging the existing power buyers' competitors. Pepsi's [redacted] are "unjust" and must be enjoined because [redacted] as the Robinson-Patman Act draftsmen explained, "deriv[es] from [those promotional allowances] equal benefit to [its] own business and is thus enabled to shift to [its] vendor [Pepsi] substantial portions of [its] own advertising cost, while [its] smaller competitor[s], unable to command such allowances, cannot do so."[43] When Pepsi advances [redacted] specifically to counter those [redacted] lower prices, Pepsi ends up footing the bill.

The documents and testimony point to the same conclusion: Pepsi intends to and does give [redacted] an unfair advantage over its brick-and-mortar competitors for Pepsi products, including by providing [redacted] disproportionate promotional allowances and services in violation of Sections 2(d) and (e). In the face of this investigatory record, Commissioners Ferguson and Holyoak would have staff continue their investigation—in process for nearly two and a half years—essentially because they are not yet convinced that Pepsi has violated Section 2(a). They would have staff spend countless additional months continuing to [redacted] that was not cost justified, and then test whether such price differentials resulted in diverted sales to [redacted]

Given the complexities of Pepsi's processes for paying and accounting for [redacted], this assignment seems designed to yield a preordained outcome: to close the

[42] Commissioners Ferguson and Holyoak will likely contend that the identity of [redacted] competitors as alleged in the complaint—including not only the [redacted] of the world but also, for example, small, independent grocery stores and dollar stores—is inconsistent with the FTC's market definition in *Kroger*. This criticism ignores that entirely different standards govern whether two business are "in competition" for purposes of Clayton Act Section 7 (governing mergers) and the Robinson-Patman Act amendments to the Clayton Act (Section 2). For purposes of mergers, "the relevant market consists of what customers consider to be reasonable substitutes for a company's products. Markets should be drawn narrowly, excluding even functionally interchangeable products that can be used for the same purpose, if only a limited number of buyers will turn to them." *FTC v. Kroger Co.*, No. 3:24-CV-00347-AN, 2024 WL 5053016, at *6 (D. Or. Dec. 10, 2024) (quotation marks omitted). For purposes of the Robinson-Patman Act, two customers of a supplier "are in actual competition with each other" if they "operate[] at the same functional level in the same geographic area." *U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC*, 89 F.4th 1126, 1146 (9th Cir. 2023), *cert. denied sub nom. Innovation Ventures, LLC v. U.S. Wholesale Outlet*, No. 23-1099, 2024 WL 4426552 (U.S. Oct. 7, 2024). In any event, even if we were confined to Section 7 law, "[w]ithin a broad market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *FTC v. Tapestry, Inc.*, No. 1:24-CV-03109 (JLR), 2024 WL 4647809, at *8 (S.D.N.Y. Nov. 1, 2024) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962)). These well-settled principles establish that there is no inconsistency between the existence of a broad set of retailers that operate at the same functional level as and compete in a broader retail market with [redacted] and the existence of a narrower "traditional supermarkets and supercenters" market, *Kroger*, 2024 WL 5053016, at *6, in which they also compete.

[43] H.R. Rep. No. 2287, 74th Cong., 2d Session 16; *see FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 350-51 (1968).

investigation. We will not stand by to this course of inaction. At this highly advanced stage of the investigation, with the survival of competing businesses hanging in the balance, and with the relentless price increases American consumers have had to endure year over year due in part to Pepsi and [redacted] conduct, directing staff to continue to spin their wheels in terabytes of Pepsi data looking for further confirmation of the patently illegal scheme alleged in the complaint would be an abdication of our duty.

For these reasons, today we cast our vote in the affirmative to issue a complaint against Pepsi for violations of the Robinson-Patman Act.

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