June 22, 2021

The Honorable Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Dear Chair Khan:

On behalf of the National Community Pharmacists Association (NCPA), we congratulate you on your confirmation as the Chair of the Federal Trade Commission (FTC) and share your commitment to ensuring "that longstanding laws are keeping pace with new technologies and reflecting current business realities."[1]

NCPA represents America's community pharmacists, including the owners of more than 21,000 independent pharmacies—nearly half of which provide long-term care (LTC) services—who have a critical role in ensuring patients have immediate access to medications in both community and LTC settings. Together, our members represent a $74 billion healthcare marketplace, provide employment to approximately 250,000 individuals, and provide an expanding set of vital healthcare services to millions of patients every day.

NCPA applauds your vigorous review of the antitrust implications of the behaviors of large technology companies on consumers and suggests they are not the only corporate entities exerting oversized influence and engaging in harmful behaviors which have negative impacts on consumers – or in our case - patients. NCPA urges you to consider that one of the first things you do as Chair is to review the effects of consolidation and vertical integration for health insurance plans and pharmacy benefit managers (PBMs), and the resulting impact on independent pharmacies and patients, for anticompetitive conduct that have largely evaded scrutiny in recent years.

A dwindling number of vertically integrated companies now dominate virtually every level of the healthcare sector. According to public sources: the three largest PBMs collectively control 77% of the market;[2] the two largest pharmacy chains command a 50-70% share across the country's largest markets;[3] and the four largest commercial health insurers account for more than 80% of

[1] Testimony of Lina Khan, https://www.commerce.senate.gov/services/files/C6833010-7232-45CF-B1E0-3E8C471B3035
[2] Fein, Adam. "The Top Pharmacy Benefit Managers of 2020: Vertical Integration Drives Consolidation." Drug Channels. April 6, 2021. https://www.drugchannels.net/2021/04/the-top-pharmacy-benefit-managers-pbms.html
[3] Thomas L. Greaney, The New Health Care Merger Wave: Does the 'Vertical Good' Maxim Apply?, 46 J. Law, Medicine & Ethics 918, 921 (2018).

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the country's commercial health insurance business, with the majority of local markets dominated by no more than two insurers controlling over 70% of the market.[4]

In your review, we are confident you will find that vertical integration endangers the community retail pharmacist, raises drug prices, and harms patients. The recent surge in vertical consolidation among PBMs, pharmacy chains, and insurance companies has essentially created an oligopoly of integrated healthcare companies controlling nearly all aspects of the healthcare sector. NCPA believes this consolidation of significant stakeholders and the resulting market power drives much of the anticompetitive behavior within the sector:

- **Anticompetitive Contracting Practices:** In exercising their market dominance, PBMs offer community pharmacies "take it or leave it" contracts with low reimbursements which fail to cover ingredient cost and professional dispensing fees, while offering PBM-owned pharmacies a more advantageous deal. These adhesive contracting practices and low pharmacy reimbursement places community pharmacies at an unfair competitive disadvantage, drives up costs for consumers, and deprives patient choice for their Medicare Part D drugs.

- **Patient Steering:** Because the major health insurers and PBMs have information on the reimbursement rates paid to pharmacies and other providers included in their pharmacy networks, the vertical integration of competing providers creates the opportunity for this confidential information to be exploited to gain an unfair competitive advantage, which cannot be fully addressed through firewalls or other purported safeguards. Having such information allows PBMs to steer patients away from community pharmacies to PBM owned options by excluding community pharmacies from the preferred Medicare Part D networks. Seniors participating in these Part D plans are economically coerced to obtain their prescriptions from PBM owned chains. This behavior also interrupts the pharmacist-patient relationship and strains the ability of the patient to be able to receive the proper care they deserve and need related to their prescriptions.

- **Conflicts of Interest:** PBMs have significant conflicts of interest because of the role they occupy in the supply chain. PBMs contract with all other retail pharmacies to form pharmacy networks that are direct competitors to the PBM-owned pharmacies. PBMs regularly design plans, including plans with preferred networks, that require, coerce, or incentivize patients to use a PBM-owned pharmacy option over another retail pharmacy. Moreover, when a PBM contracts with a retail pharmacy, PBMs have wide latitude in setting requirements for a pharmacy to be included in a network: the PBM determines

[4] *Id.*; *see also* L. Dafny, "Health Insurance Industry Consolidation: What Do We Know From the Past, Is It Relevant in Light of the ACA, and What Should We Ask?" Testimony Before the Subcomm. on Antitrust, Competition Policy, and Consumer Rights of the S. Comm. on the Judiciary, 114 Cong. 5 (2015) *available at*: http://www.judiciary.senate.gov/imo/media/doc/09-22-15%20Dafny%20Testimony%20Updated.pdf.

how much the pharmacy will be reimbursed, which drugs will be covered on the plan formulary, the day supply that the pharmacy can dispense, the patient co-pay, and many other factors which directly affect the success of the business of the pharmacy.

- **Pharmacy Deserts:** PBMs use these anticompetitive practices and the resulting negative impacts as leverage to acquire the struggling community pharmacies and reduce competition in a particular market. They reduce payments to pharmacies that results in pharmacy closures. The result of this is reduced access for patients, increased travel time disproportionately impacting socially vulnerable populations and a general lack of pharmacy services in certain rural and underserved areas of the United States.[5]

We look forward to working with you as the agency continues to investigate the impacts of vertical integration and the conflicts of interest in the healthcare sector. Again, on behalf of America's independent community pharmacists, congratulations on your appointment as the Chair of the FTC. Please do not hesitate to contact me at (703) 838-2648 or doug.hoey@ncpa.org or Matthew Seiler, NCPA's Vice President and General Counsel, at (703) 600-1221 or Matt.Seiler@ncpa.org to further discuss how NCPA can be of assistance to you as you take the helm of FTC.

Sincerely,

B. Douglas Hoey RPh, MBA
CEO, National Community Pharmacists Association

[5] https://www.healthaffairs.org/doi/full/10.1377/hlthaff.2020.01699