Statement for the Record: The National Community Pharmacists Association (NCPA)

United States Senate Committee on the Judiciary
Subcommittee on Competition Policy, Antitrust, and Consumer Rights

Hearing: " A Prescription for Change: Cracking Down on Anticompetitive Conduct in Prescription Drug Markets"

July 13, 2021

Chairwoman Klobuchar, Ranking Member Lee, and Members of the Subcommittee:

Thank you for conducting this hearing on the impacts of anticompetitive behavior and consolidation in the healthcare sector impacting the cost of prescription drugs. In this statement, the National Community Pharmacists Association (NCPA) will offer support and suggestions on a number of policy considerations that would assist in achieving this goal using authorities granted to the Federal Trade Commission (FTC) and other federal agencies with jurisdiction over mergers.

NCPA represents America's community pharmacists, including more than 21,000 independent community pharmacies. Almost half of all community pharmacies provide long-term care services and play a critical role in ensuring patients have immediate access to medications in both community and LTC settings. Together, our members represent a $74 billion health care marketplace, employ approximately 250,000 individuals, and provide an expanding set of health care services to millions of patients every day and witness the impacts of rising drug costs on our customers.

NCPA and its members are directly impacted by the wave of consolidation that is transforming the U.S. healthcare system, which is now largely controlled by a dwindling number of vertically integrated for-profit companies. Several of these companies have affiliated pharmacy benefit managers (PBM) which handle pharmacy services for insurance plans. The PBMs are tasked with managing pharmacy reimbursement and establishing the drugs that are available under a plan. These vertically integrated entities engage in business practices which put our members and consumers at an economic disadvantage. NCPA believes that this consolidation, and the resulting impact on patients, demands vigorous antitrust enforcement, including for anticompetitive vertical transactions that have largely evaded scrutiny in recent years.

U.S. Agencies with Enforcement Authority Should Consider Vertical Integrated Mergers Have Led to Decreased Competition

Over the past several decades, the U.S. healthcare system has undergone a transformational reorganization, with a small number of vertically integrated for-profit businesses now exerting extraordinary influence on the quality of care that our most vulnerable populations receive. In the

pharmacy sector, the three largest PBMs now control 77% of the market.[1] And each of these PBMs have merged with other, equally powerful companies in the healthcare value chain. In the past two years alone, CVS Caremark, which was already both the single largest pharmacy chain in the country and the second largest PBM, acquired Aetna, the third-largest health insurance company in the country. Express Scripts, the largest PBM, was acquired by Cigna, another of the so-called "big-five" health insurers. Additionally, OptumRx is already affiliated with UnitedHealthcare, the single largest health insurer in the country. This surge in vertical consolidation has essentially created an oligopoly of integrated healthcare companies controlling nearly all aspects of healthcare. As one healthcare antitrust scholar observed, "the nation is only a few mergers away from having a very small contingent of vertically integrated middlemen responsible for insurance, benefit structure, and provider contracting across the entirety of public and private health care in the United States."[2]

Amid this rapid and accelerating consolidation, the federal antitrust agencies have focused their enforcement efforts almost exclusively on *horizontal* theories of harm – anticompetitive effects flowing from the loss of direct, head-to-head competition between the merging parties. For example, the U.S. Department of Justice (DOJ) successfully challenged the proposed mergers between four of the "big five" health insurers.[3] And the FTC has brought a series of enforcement actions challenging proposed mergers and acquisitions involving hospitals, physician groups, pharmaceutical companies, medical device manufacturers, and other healthcare organizations.

At the same time, both agencies have consistently declined to exercise their antitrust enforcement authority over equally anticompetitive transactions involving primarily *vertical* combinations of large and dominant healthcare organizations. Indeed, even in mergers with significant vertical components, the agencies have limited their enforcement actions to the narrow horizontal aspects of those transactions. In CVS/Aetna, for example, the Department of Justice challenged only the combination of the companies' Medicare Part D prescription drug plans, failing to take any action to remedy anticompetitive effects stemming from the combination of a dominant pharmacy chain and PBM with one of the country's largest health insurers.[4] And the FTC cleared Cigna's acquisition of Express Scripts without requiring *any* relief.

As NCPA has emphasized in other communications during the review of these mergers, these and other major transactions are likely to cause serious anticompetitive effects, particularly for the most vulnerable patients living in underserved areas.[5] Like the DOJ, the FTC's healthcare merger enforcement

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[1] 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

[2] Thomas L. Greaney, "Navigating the Backwater: Vertical Mergers in Healthcare," CPI Antitrust Chronicle at 3 (May 2019).

[3] *See United States v. Anthem, Inc.*, 236 F. Supp.3d 171, 178-79 (D.D.C. 2017), *aff'd* 855 F.3d 345, 349 (D.C. Cir. 2017) (enjoining the merger of Anthem and Cigna following a challenge by the Department of Justice); *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 99 (D.C. Cir. 207) (enjoining the merger of Aetna and Humana following a challenge by the Department of Justice).

[4] Complaint, *United States v. CVS Health Corp, and Aetna Inc.*, Doc . No. 1, 18-cv-02340, at 1-2 (D.D.C., Oct. 10, 2018) (alleging that the proposed merger of CVS and Aetna would substantially lessen competition between CVS and Aetna for Medicare Part D Prescription Drug Plans in 16 geographic regions). The FTC's healthcare merger enforcement efforts have also been laser-focused on horizontal mergers, to exclusion of potential vertical anticompetitive effects. *See, e.g.*,); *St. Alphonsus Med. Ctr. V. St. Luke's Health Sys. Ltd.*, 778 F.3d 775, 782 (9th Cir. 2015) (challenging a health system's acquisition of a leading independent medical group solely on horizontal grounds, despite private plaintiffs alleging vertical theories of anticompetitive harm).

[5] *See, e.g.*, NCPA CVS /Aetna Comment at 3; National Community Pharmacists Association Statement for the Record, United States House Subcommittee on Antitrust, Commercial, and Administrative Law Hearing: "Diagnosing the Problem: Exploring the Effects of Consolidation and Anticompetitive Conduct in Health Care Markets," at 1 (March 7, 2019) [hereinafter "NCPA House Statement"], available at: http://www.ncpa.co/pdf/ncpa-statement-healthcare-consolidation.pdf; Letter from Ronna Hauser to the Federal Trade Commission Regarding Comments to the Federal Trade Commission's (FTC) 21st

efforts have also been laser-focused on horizontal mergers, to the exclusion of potential vertical anticompetitive effects.[6]

A growing body of research evidence, including from current and former agency officials, shows that vertical consolidation in healthcare has led to increased prices without offsetting improvements in quality.[7] As one recent literature review (focusing on evidence from hospital-physician vertical integration) explained, empirical evidence undermines the theoretical underpinnings for a laissez-faire approach to vertical merger enforcement:

> Rapid consolidation in health care markets has sparked renewed interest in understanding the effects of vertical integration. . . . [W]hile neoclassical economic theory suggests that vertical integration in most circumstances cannot increase prices, alternative theories suggest integration may serve as a vehicle for firms to achieve competitive advantages and foreclose rival competition. . . . [T]he literature we reviewed finds that *vertical integration generates higher prices, higher spending, and ambiguous changes in quality*.[8]

While the empirical evidence, research, and data is most well developed for vertical integration among healthcare providers, the reality is that nearly all aspects of the U.S. healthcare system exhibit high and increasing levels of concentration. A dwindling number of vertically integrated companies now dominate virtually every level of the healthcare sector: the three largest PBMs collectively control 77% of the market;[9] the two largest pharmacy chains command a 50-70% share across the country's largest markets;[10] and the four largest commercial health insurers account for more than 80% of 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.[11]

Century Hearings, Doc. ID: FTC-2018-0076 at 2-3 (Nov. 15, 2018) [hereinafter "NCPA 21st Century Competition Letter"], available at: https://www.ftc.gov/system/files/documents/public_comments/2018/11/ftc-2018-0076-d-0018-162492.pdf.

[6] In challenging the proposed acquisition of an independent medical medical group in Nampa, Idaho by the leading health system in the area, the FTC focused exclusively on a narrow horizontal overlap in adult primary care services without addressing potential vertical anticompetitive effects alleged by rival hospitals. *See, e.g., St. Alphonsus Med. Ctr.* 778 F.3d at 782.

[7] *See, e.g.*, Thomas G. Koch, Brett W. Wendling, Nathan E. Wilson, Fed, Trade Comm'n Bureau of Economics Working Paper No. 337, "The Effects of Physician and Hospital Integration on Medicare Beneficiaries Health Outcomes" at 5 (July 2018) (finding that "[o]verall. . . vertical integration rarely leads to better outcomes, and sometimes leads to worse outcomes . . . [these] results indicate that vertical integration is not associated with improvements in health, despite the fact that the literature has found it to be associated with increased expenditures"); Hannah T. Neprash and J. Michael McWilliams, "Provider Consolidation and Potential Efficiency Gains: A Review of Theory and Evidence," 82 Antitrust Law Journal No. 2 551, 553 (2019) (reviewing literature and finding that "[i]n total, the literature suggests that consolidation among healthcare providers, whether horizontal or vertical, does not, on average, result in welfare enhancing efficiencies."); *id.* at 577 (noting that researchers have yet to find conclusive evidence supporting claims that physician-hospital integration will consistently reduce redundant and wasteful care or improve quality through care coordination."); Laurence C. Baker, M. Kate Bundorf, and Daniel P. Kessler, "Vertical Integration: Hospoital Ownership of Physician Practices is Associated with Higher Prices and Spending," 33 Health Affairs No. 5, 756, 762 (2014) (finding that "hospital ownership of physician practices leads to higher prices and higher levels of hospital spending," and that "a one standard deviation increase in the market share of hospitals that own physician practices was associated with significant increases in prices and spending of 2-3%.").

[8] Brady Post et al, Vertical Integration of Hospitals and Physicians: Economic Theory and Empirical Evidence on Spending and Quality, 75 Medical Care Research & Rev. 399, 418 (2018).

[9] 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

[10] Thomas L. Greaney, The New Health Care Merger Wave: Does the 'Vertical Good' Maxim Apply?, 46 J. Law, Medicine & Ethics 918, 921 (2018).

[11] *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.

As one prominent healthcare antitrust scholar explains, this makes these markets especially vulnerable to anticompetitive transactions and conduct: "The health care sector . . . exhibits *textbook conditions of a market susceptible to consumer harm*. Provider, payer, pharmaceutical, insurance, and intermediary management markets exhibit key pre-conditions for harm from vertical mergers: Most are highly concentrated, exhibit durable barriers to entry, and have historically performed poorly."[12]

Pharmaceutical Rebates and The Impact on Drug Prices

The Centers for Medicare and Medicaid Services (CMS) grants Part D plan and PBMs significant latitude in designing their formularies, which is a list of the prescription drugs the plans will cover. There are few requirements mandated by law other than the required coverage of six protected classes and some procedural aspects about how a formulary must be designed. Otherwise, each Part D plan or PBM can design their formulary as they see fit.

Because placement on these formularies often drive patients to consume a particular drug, and therefore the economic success of that drug, PBMs know pharmaceutical manufacturers are coerced into offering rebates to PBMs to place their products on the PBM's list. These placements come at the expense of competing therapies and generics – which can be more economical for the patient. This creates a wall around a particular product – at the expense of the patient where they are forced to pay a greater share of the cost of the more expensive drug.[13] This is known as a "rebate wall."

In fact, the FTC report to Congress on PBM behaviors notes that rebate walls "may give payers strong incentives to block patient access to lower-priced medicines, whereas absent rebates a lower-priced equally effective product would tend to take sales from the higher priced incumbent product.[14]" There is no transparency into the rebating process and consumers and government authorities are left in the dark with the false promise they reduce premiums.[15]

Rebate driven games can wreak havoc on the costs for the patients – as the coinsurance is based upon the list price rather than net price of a drug – requiring seniors to pay more out of pocket for their prescriptions. Additionally, PBMs have an incentive to select higher priced drugs for their formulary in order to capture greater rebates at the expense of less expensive competing drugs and therapies or generics. **All of this behavior increases the price of drugs by thirty cents for every dollar**[16], increases the economic advantage of corporate operating pharmacies, and further squeezes the community retail pharmacy out of the market.

Conclusion

Ultimately, consolidation in the healthcare sector has exacerbated harm to both patients and community pharmacies. The ability of PBMs to game the system not only results in the closure of pharmacies in rural and underserved communities but increased costs for the patient at the point of sale. NCPA is

[12] Greaney, supra note 2 at 2 (emphasis added); *see also* Greaney, supra note 10 at 921.
[13] https://www.drugchannels.net/2019/02/how-health-plans-profitand-patients.html
[14] https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-report-rebate-walls/federal_trade_commission_report_on_rebate_walls_.pdf
[15] https://www.pcmanet.org/pharmacy-benefit-managers-continue-to-keep-medicare-part-d-premiums-affordable/
[16] Medicine Spending and Affordability in the United States: Understanding Patients' Costs For Medicine. IQVIA Institute for Human Data Science

encouraged by the steps taken to date by the FTC and the Administration to cast more of a skeptical eye on proposed mergers. NCPA welcomes the continued oversight of the Senate on these matters and stands ready to work with Congress on policies to meaningfully reduce the costs of prescription drugs for patients.