April 21, 2022

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

The Honorable Jonathan Kanter
Assistant Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

RE: Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers

Dear Chair Khan and Assistant Attorney General Kanter:

The National Community Pharmacists Association (NCPA) welcomes the opportunity to provide comments to the Federal Trade Commission and the Antitrust Division of the Department of Justice on the "merger guidelines" -- the 2010 Horizontal Merger Guidelines and the 2020 Vertical Merger Guidelines. NCPA is well positioned to comment on the necessity of Guidelines, as NCPA can provide insights that both reflect modern market realities and that will guide the Agencies in identifying and proscribing unlawful, anticompetitive practices.

NCPA represents America's community pharmacists, including 19,400 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 long-term care settings. Our members represent a $67 billion health care marketplace, employ 215,000 Americans, and provide an expanding range of health care services

to millions of patients every day. Our members are small business owners who are among America's most accessible health care providers.

NCPA's members continue to suffer from the anticompetitive effects of multiple horizontal and vertical mergers in the health care industry over the past 20 years. These mergers have resulted in a highly concentrated market structure that allows pharmacy benefit managers to "exercise undue market power."[1] Three vertically integrated companies[2] now control access to more than 80%[3] of all prescriptions filled in the United States. They also have access to competitively sensitive information about their competitors. Each of these three companies possess market power in one or more product markets and in several relevant geographic markets.[4] The harm caused by the consolidation is not *only* to competitors who are squeezed out through exclusionary practices made possible by vertical integration, but also to competition and consumers. The White House Council of Economic Advisors reports that "[p]ricing in the pharmaceutical drug market suffers from high market concentration in the pharmaceutical distribution system and a lack of transparency."[5] The Agencies did not challenge a single transaction in this market with anything more substantial than targeted divestitures. Many did not even receive a Second Request. Something is broken with merger review.

Broaden the Scope of the Guidelines

The Guidelines need a broad sample of real-world mergers that serve as evidence of harm to competition that rely on structural presumptions and historical comparisons. As

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[1] Council of Economic Advisors, Reforming Bio Pharmaceutical Pricing at Home and Abroad (February 2018) at 10.
[2] Aetna-CVS-Caremark; UHG-Optum; Cigna-ESI; Humana-Primark.
[3] Fein, Adam. "The Top Pharmacy Benefit Managers of 2021: The Big Get Even Bigger." Drug Channels. April 5, 2022. https://www.drugchannels.net/2022/04/the-top-pharmacy-benefit-managers-of.html?m=1.
[4] Competition in Health Insurance: A Comprehensive Study of US Markets (2017 Update).
[5] Supra fn. 1.

currently constructed and implemented, the Guidelines identify a very narrow type of mergers for which there is overwhelming and compelling evidence of harm to competition – *e.g.*, merger to monopoly, or that are susceptible to econometric analysis. Transactions that do not fit within the obvious category or the narrow template are cleared despite appearing to the general public to be a substantial lessening of competition, higher prices for consumers, and diminished access and innovation. In short, the Guidelines as currently constructed and *applied* subvert the intention of the statute as enacted by Congress.

Application of the Guidelines relies too heavily on complex economic modeling rather than real-world behaviors and structural presumptions. This over-reliance on economic analysis has created a "CSI" effect in courtrooms with judges mistakenly believing, and thus requiring, that judges can and must predict merger effects with precision in each case. In turn, the econometric analysis takes over, with each side spending millions to develop complicated modeling that is often proven wrong within just a few years of the deal closing. This "CSI" effect could be ameliorated by the reintroduction of structural presumptions that are based on what actually has happened in the market.

The FTC's Bureau of Economics and the DOJ's Economic Analysis Group have access to data and information that they can use to compare the actual outcome against the predicted outcome painted by the parties. For instance, an entity with 35% market share acquires a downstream entity with a significantly lower market share. The parties claim – consistent with the 1987 and 2020 Vertical Guidelines – that because the transaction will eliminate double-marginalization (contracting friction), the combined entity will be more efficient and end prices to consumers will decrease. After several years, the market share of the downstream entity increases and matches the market share of the upstream entity. Meanwhile, competitors of the downstream

entity are exiting the market, and the price of the output paid by consumers increases. Studying the actual effects of consummated transactions[6] would be instructive for assessing the competitive effects of the next transaction in the industry that involves an upstream and downstream entity in that market or a similarly structured one.

Apply the Guidelines as Written

Challenge vertical mergers that create or enhance barriers to entry and stop focusing on price as the sole indicator of when to act. Short of rewriting the Guidelines, the Agencies application of the Guidelines as written would result in significantly more robust enforcement. For example, the 2020 Vertical Guidelines identify the conditions which potentially raise significant competitive concerns. Yet, challenges to vertical transactions are rare – once every 40 years – despite the increasing number of vertically integrated entities, particularly in healthcare and technology.

In the technology space, the creation of these closed loop barriers to entry is referred to as "walled gardens." The concept is the same in healthcare: establish a market, control access to customers, and construct rules to disadvantage competitors. Vertical transactions that create or enhance barriers to entry and allow for exclusion of rivals essentially are ignored as a result of the Guidelines' focus on price.[7] These exclusionary behaviors do directly affect price and they harm the competitive process which ultimately results in additional harm to consumers.[8] The recent

[6] *E.g.*, the retrospective undertaken by the FTC in the early 2000's that examined its hospital merger enforcement; or HOW ACQUISITIONS AFFECT FIRM BEHAVIOR AND PERFORMANCE: EVIDENCE FROM THE DIALYSIS INDUSTRY, Paul J. Eliason, Benjamin Heebsh, Ryan C. McDevitt and James W. Roberts (June 18, 2018) https://faculty.fuqua.duke.edu/~rcm26/ESRD_mergers.pdf

[8] In our market, we have seen how a walled garden directly leads to increased prices for consumers. For example, the three largest PBMs which account for 80% of all prescriptions filled in the U.S., are each vertically integrated with a health insurer (Cigna, Aetna, and UnitedHealth) upstream and a pharmacy downstream. Each of the upstream insurer has market power in multiple geographic areas in the U.S. The affiliated PBM leverages that market power

Complaint filed by the DOJ challenging UnitedHealth Group's acquisition of Change Healthcare is the rare example of an enforcement action that meets the foreclosure concerns identified in the Guidelines and brings into focus the data implications of the merger.

Data Must Become a Factor in Enforcement

Analyze how data can be used to foreclose downstream rivals, limit consumer choice, and increase costs. There is no discussion in the Guidelines of "data" as a product or necessary input, nor is there discussion of the use of data as weapon to exclude rivals. *Trinko* has given a free pass to exclusionary practices in the non-merger context, so the only opportunity to prevent harm from misuse of data is to prevent these practices at the incipiency stage.

Actions to exclude rivals or new entrants can take many forms, including raising rivals' cost (e.g., predatory contract clauses like what we see in the PBM-independent pharmacy relationship), manipulation of the regulatory frameworks, and steering of consumers. A vertically integrated company can simply foreclose rivals from necessary customers or other inputs. Yet, the harm caused by these behaviors are not necessarily immediately quantifiable in terms of the "price" that the consumer pays. Often, the impact of these actions is only apparent over time through a sizable reduction in the number of alternatives available to consumers. A loss of competitive alternatives will result in higher costs. For example, a vertical merger that involves a captive set of customers will often alter the merged firm's incentives to engage with downstream rivals. The merged firm will now have an incentive, even an imperative, to foreclose downstream rivals. This foreclosure will drive them from the marketplace and reduce competitive alternatives. Because the

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to benefit its integrated downstream pharmacy by excluding independent pharmacies from the PBM network; and/or, by swapping off the formulary less expensive drugs for more expensive drugs and then steering business to the integrated pharmacy. The Ohio Attorney General found that a PBM reimbursed its vertically integrated pharmacy more for the same prescription than it paid to an independent pharmacy – resulting in higher overall costs for consumers.

customers are captive, there is no countervailing incentive, e.g., reduced sales or customer leakage, that would dissuade the upstream entity from blocking the access of downstream rivals to customers of the upstream entity. This is particularly true where the upstream entity has market power and there is little likelihood of customer switching. The increased appetite for and reliance on data will further enable merged entities to take action to diminish competition downstream.

Combine Vertical and Horizontal Guidelines

Both Agencies should adopt a single set of Guidelines. The prevailing circumstances of having separate Guidelines – one set that the Agencies update every 10-15 years and the other set has been ignored for a generation – creates two issues. First, it has the effect of siloing transactions into one bucket or the other. Many horizontal transactions have vertical elements and vice versa. The competitive effects of all aspects of the transaction should be part of the competitive analysis. Second, two sets of Guidelines create the impression that there are different standards by which to evaluate transactions - quantitative on the one hand and qualitative on the other. This also creates the impression that one set is more sophisticated and therefore reliable than the other.

Consider Non-price Effects

The analysis of nonprice effects on competition should be on equal footing with the analysis of price effects. Less consolidated markets are susceptible to transactions that substantially lessen competition and lead to the domino effect. For example, an upstream entity that competes in a relatively consolidated market acquires a downstream entity that competes in a less consolidated market. The upstream entity customers are now captive to the newly acquired entity, and the upstream entity controls where customers can buy products and how much those products will cost the customers. We see this every day in the PBM-patient relationship. Where one of the entities controls access to customers, there is tendency for the horizontal competitors of

the upstream or downstream entity to engage in copycat behavior and make their own acquisition of the type of entity that controls customers. This is clear from the consolidation between insurers, pharmacy benefit managers, and pharmacies. Staying competitive now requires entry at two levels, and the remaining horizontal competitors will engage in copycat transactions where possible. This creates highly concentrated markets with vertically siloed competitors, each of which controlling access to its defined set of customers. The remaining entities that only compete at one level of the vertical are then susceptible to exclusionary conduct of the vertically siloed competitors.

For example, in 2006, CVS Corporation, a retail pharmacy chain acquired Caremark Rx., Inc., a pharmacy benefit manager. The FTC cleared the transaction despite identifying significant anticompetitive effects and the potential for adverse unilateral effects, including raising rivals' costs and foreclosure. By 2010, a growing chorus of concern resulted in the FTC investigation of alleged exclusionary conduct by the combined CVS/Caremark. In the intervening years between the merger and the review, Caremark's share of CVS's prescription business increased from about 1% to 35%, yet Caremark's overall market share remained steady at about 19%.[9] What could explain this significant increase in the business Caremark delivered to CVS while experiencing no increase in Caremark's own market share? Control of access to its own defined set of customers.[10] Yet, after a review of CVS' practices, the FTC declared that the steering and other exclusionary contracting practices that Caremark adopted after its acquisition by CVS did not raise competitive concerns, which opened the door for other entities to mimic the same conduct.[11] Shortly thereafter, UnitedHealth Group's reorganized data analytics arm, Optum, entered into a series of acquisitions

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[9] https://www.drugchannels.net/2009/11/cvs-caremark-pharmacy-gain-pbm-pain.html; https://www.hmpgloballearningnetwork.com/site/frmc/article/pbms-wall-street-view.
[10] https://privacyrights.org/resources/caremark-reportedly-shares-confidential-prescription-information-steer-business-cvs.
[11] https://www.ftc.gov/sites/default/files/documents/closing_letters/cvs-caremark-corporation/120112cvsclosingletter.pdf.

of other PBMs.[12] Then Cigna purchased the pharmacy benefit manager Express Scripts. Notably, both Optum and Express Scripts adopted a lot of the same practices used by Caremark (increase the prescription services business it delivered to CVS) to increase prescription services through their own controlled pharmacies.

The types and sources of evidence used by the Agencies to assess the competitive effects of a transaction should be broader. The Horizontal Guidelines state that the Agencies will use any reasonably available and reliable evidence to address the central question of whether a merger may substantially lessen competition. The Guidelines then discuss several ways to discern the possible price effects of a transaction. But in the era of "data," price to the consumer before and after an acquisition is not relevant. The competitive effects might be a greater likelihood of "lock in" as described above in the above PBM transactions. Therefore, the types and sources of evidence used to assess competitive effects should depend on broad sources of evidence that makes the target valuable to the acquirer and not price alone.

Consider Non-price Effects on Consumers

Better articulate in the Guidelines that non-price effects can also harm consumers. The Guidelines' tight focus on pricing among incumbents has diverted attention not only from potential competition, but also from various nonprice effects that can also harm consumers. Indeed, in many industries the nonprice effects of mergers are at least as important as pricing. For example, in healthcare, quality and access are important competitive considerations. The 2010 Merger Guidelines and the 1992 Merger Guidelines state that non-price effects sometimes might occur,

[12] UnitedHealth Group acquisition of PBM Pacificare (Prescription Solutions); Optum acquisitions of PBMs Diplomat (CastiaRx)/Specialty Pharma; Avella Specialty Pharmacy; Genoa Healthcare; and Catamaran.

but then adds an assurance that the analysis of such outcomes is analogous to that for price, which is not necessarily the case. The Guidelines also contain a subsection that focuses on innovation and product variety that the Agencies may examine. While a start, the 2010 Guidelines' discussion of non-price effects lacks the structure and rigor of the discussion of price effects. Updated guidelines should address this imbalance and articulate a framework for analyzing non-price effects.

For example, specialty drugs account for 53% of pharmacy spend.[13] Specialty drugs spending is split across the pharmacy benefit and the medical benefit. Further, patients who take specialty drugs tend to have high medical expenses. Managing this integration, and capturing the specialty drug spend, made payor-PBM integration attractive. What are the competitive effects? The integrated entity retains any cost savings resulting from the elimination of double-marginalization as profits. The integrated entities retain the profits rather than pass them to the plan sponsor or patients because many commercial insurance markets lack competition. Patients then lose choice, access, and care.

In comparison to the detailed analysis that the Agencies give to price effects, the current treatment of non-price effects reflects uncertainty and lack robust enforcement or review mechanisms. In addition, the analysis of price effects and non-price effects is different. Whereas a concentrated market typically leads to higher prices, it is also often the case that concentration will decrease quality, which can reflect how different consumers perceive a product. Similarly, while a vertically integrated entity may obtain cost-savings (and theoretically pass those savings to consumers) through the elimination of double-marginalization, deficient performance of the vertically integrated entity may offset lower costs. For instance, deficient performance where

[13] https://www.iqvia.com/insights/the-iqvia-institute/reports/the-use-of-medicines-in-the-us.

certain products may be unavailable to customers (e.g., biosimilar drugs), or customers experience a reduction in quality because the vertically integrated entity does not offer in-person customer assistance or guidance on how to use the product (mail order pharmacies) can offset lower costs.

Examples of unchallenged mergers that have resulted in lessening of competition and harm to consumers include:

- UnitedHealth Group acquisition of Pacificare PBM (Prescription Solutions); Optum acquisitions of Diplomat PBM (CastiaRx)/Specialty Pharma; Avella Specialty Pharmacy; Genoa Healthcare; Optum acquisition of Catamaran PBM.
- Aetna-CVS Health/Caremark Rx: Effectively created a walled garden in which Caremark controlled access to Aetna insureds; and access to beneficiaries of other plans it administers and forced utilization of CVS pharmacies.
- Cigna/Express Scripts.

There is no evidence of consumers receiving any of the potential benefits – e.g., pass through of lower dispensing fees, copays or coinsurance, or post-point-of-sale fees assessed on the pharmacy (i.e., direct, and indirect remuneration) – because of these three examples. In fact, non-vertically integrated pharmacies, *e.g.*, pharmacies that contract directly with pharmaceutical companies, typically offer prescriptions at lower prices than the Insurer/PBM/Pharmacy monoliths.

Consider a More Thoughtful and Nuanced Exposition of Monopsony

In monopsony situations, elevate consideration of buyer-side effects. The 2010 revisions to the Guidelines include a small, but significant tweak to the discussion of monopsony. When Agencies define markets, the Agencies focus on the alternatives available to sellers as the

result of a decrease in the price paid by a monopsonist. As the DOJ and FTC have both recently recognized in enforcement actions and workshops, the Agencies found monopsony in everything from auction bidding to college admissions to labor markets. Notably, none of these examples originates from a merger review.[14] Yet, seller-side consolidation is rampant. Monopsony power can result from both horizontal and vertical transactions. For example, vertical integration can lead to monopsony power where there is a captive set of customers of an entity within the vertical that controls the downstream purchases of those customers. This is exactly the situation with the vertical consolidation of health insurers with PBMs and downstream pharmacies. The PBM controls from whom the insurer's customers purchase pharmaceuticals and controls, to a large extent, the out-of-pocket cost to those same customers. Non-affiliated pharmacies have little choice but to take the reimbursement or "price" offered by the PBMs to gain access to the insurer/PBM customers. Because the PBMs can direct their "customers" to their affiliated downstream pharmacies, the PBM has an incentive to drive down the price offered to "non-affiliated" pharmacies for prescription filling. The insurer/PBM does not pass through the lower "price" offered to the non-affiliated pharmacy to the customers. Given the prevalence of monopsony in the economy, we encourage the Agencies to include a more thoughtful and nuanced exposition of policy and approaches that would elevate buyer-side merger analysis to the same level of importance as seller-side analysis.

Conclusion

Over the last 40 years, the accommodating policy toward mergers found in the current structure and application of the Guidelines has resulted in a substantial lessening of competition

[14] We recognize that in December 2020, the Department of Justice filed a civil lawsuit to block the proposed merger of Penguin Random House and Simon & Schuster in which the focus is on a monopsony theory of harm.

throughout the economy. Even the simple step of more faithfully applying the Guidelines as currently written would have a positive impact. Greater attention to exclusionary effects, nonprice effects, and vertical foreclosure do not require much more. As things stand, the dynamism of the marketplace that enabled and spurred innovation has been replaced by many of the same market characteristics that spawned the Sherman Act and the Clayton Act. Law professors teach students that the antitrust laws level the playing field, fostering a competitive marketplace that produces higher quality goods, consumer choice, and lower prices. The Agencies should work to ensure that the Merger Guidelines consider *all* of those benefits of competition – quality, choice, lower costs – in evaluating the competitive effects of a transaction.

Sincerely,

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