

November 4, 2022

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

**RE: Commercial Surveillance ANPR, R111004 – Solicitation for Public
Comments Trade Regulation Rule on Commercial Surveillance and
Data Security**

Dear Chair Khan:

The National Community Pharmacists Association (NCPA) welcomes the opportunity to provide comments to the Federal Trade Commission on the “Trade Regulation Rule on Commercial Surveillance and Data Security.” NCPA is well positioned to comment on the necessity of rules that would clarify and make fair the ways in which companies can collect, aggregate, use, transfer, share, sell or otherwise monetize data. Specifically, NCPA can provide insights that reflect the realities of how data is used in a way that is unfair and deceptive in the pharmacy industry and that will guide the Commission in identifying and proscribing harmful, unlawful, and anticompetitive practices.

The nature and prevalence of harmful “commercial surveillance” in pharmacy.

The three largest Pharmacy Benefit Managers (PBMs) control at least 80% of the health plan pharmacy benefit markets,¹ and control, through PBM-affiliated pharmacies, more than 65%

¹ Fein, A. (2022). *DCI's Top 15 Specialty Pharmacies of 2021—And Three Factors That Will Reshape 2022*. Drugchannels.net. Retrieved 5 May 2022, from <https://www.drugchannels.net/2022/05/dcis-top-15-specialty-pharmacies-of.html>.

of total prescription revenues from pharmacy-dispensed specialty drugs (\$122.2 billion in 2021).² In ten states, a single PBM controls over 70% of the commercial drug coverage market.³ Three out of four states have highly concentrated PBM markets, and four out of five metropolitan areas have highly concentrated markets.⁴ In addition to this market concentration, the three largest PBMs have vertically and horizontally integrated in ways that give them access to volumes of data about patients that the public knows little about. UnitedHealth Group—the largest commercial health insurer in the country⁵—serves as a prime example. Over the past several years, UnitedHealth Group acquired Pacificare (Prescription Solutions), and recently, rival health technology company Change Healthcare. UnitedHealth Group’s subsidiary Optum acquired PBMs Diplomat (CastiaRx)/Specialty Pharma, Avella Specialty Pharmacy, Genoa Healthcare, and Catamaran. As a result of these acquisitions, UnitedHealth Group has a 360° view of healthcare data for almost all commercially insured patients in the United States.

Though UnitedHealth Group successfully argued before the U.S. District Court in the District of Columbia that it has firewalls to protect against misuse of data, independent pharmacies and their patients have experienced otherwise. For example, the customers of one independent

² AllianceRx Walgreens Prime/Walgreens Stores have a 10% share and competitors split the remaining 25%. Fein, A. (2022). *DCI’s Top 15 Specialty Pharmacies of 2021—And Three Factors That Will Reshape 2022*. Drugchannels.net. Retrieved 5 May 2022, from <https://www.drugchannels.net/2022/05/dcis-top-15-specialty-pharmacies-of.html>.

³ Guardado, José R. *Policy Research Perspectives: Competition in Commercial PBM Markets and Vertical Integration of Health Insurers with PBMs*. American Medical Association, <https://www.ama-assn.org/system/files/prp-pbm-shares-hhi.pdf>.

⁴ *Id.*

⁵ “Competition in Health Care Research.” *American Medical Association*, 13 Oct. 2022, <https://www.ama-assn.org/delivering-care/patient-support-advocacy/competition-health-care-research>.

pharmacist reported receiving solicitation letters from a competing specialty pharmacy named Genoa Healthcare. The customers received these letters the day before UnitedHealthcare, a subsidiary of UnitedHealth Group, stopped allowing its customers to get medicine from this independent pharmacist. As noted above, Genoa is *owned* by UnitedHealth Group, having been purchased by its Optum subsidiary in 2019. UnitedHealthcare can—and does—use its patient and consumer data to steer unwitting patients to its affiliated pharmacies, harming both independent pharmacies and consumers. None of the patients or pharmacies reported receiving notice from UnitedHealthcare that their information would be used to UnitedHealth Group’s commercial advantage.

While acquisition of individual PBMs provided UnitedHealth Group significant volumes of data about its own covered patients and consumers, the addition of Change Healthcare has given UnitedHealth Group access to patient data about its rival insurance companies, PBMs, and pharmacies. UnitedHealth Group’s acquisition of Change Healthcare gives UnitedHealth access to all claims data that passes through Change’s “switch.” A switch is an entity that routes claims data from the pharmacy to the plan/payer. Claims data includes, at a minimum, the beneficiary’s name, prescription, and plan ID number. Because Change Healthcare’s customers include many commercial payers that are competitors of UnitedHealth Care, this acquisition gives UnitedHealth Group access to not only data about its patients and consumers, but also that of competitors – to all entities within the vertical– physician groups, pharmacies, and commercial insurers. As a result, UnitedHealth Group has access to patient data for consumers who never had the opportunity to knowingly consent to such use.

While having access to this data might seem benign or even necessary for efficient care, we know that health insurers, like UnitedHealth Group, Aetna, and Cigna, are vacuuming up data from other sources to make coverage determinations and other business decisions that are not in the best interests of consumers. Insurers do this to allegedly craft plans that will meet patient needs. However, this aggregated data is then used to raise rates, steer patients to the insurers' own affiliated offerings and make profit-based coverage determinations. This leads to higher costs for consumers and greater difficulty for some to obtain coverage—all resulting from unfair and deceptive data collection and use practices.

According to ProPublica, insurance companies are following the things Americans buy, the food we eat, the time we spend watching TV, and our social media posts.⁶ Insurers maintain records of a patient's race, education level, marital status, and net worth.⁷ ProPublica reported that Optum, UnitedHealth's PBM/care delivery service/analytics subsidiary, has collected the medical diagnoses, tests, prescriptions, costs, and socioeconomic data of 150 million Americans dating back to 1993.⁸ The insurers' PBMs then use this data to "cherry-pick" the patients that are on the highest yield drugs (those that generate the highest profit margin for insurance providers) and steer

⁶ Allen, Marshall. "Health Insurers Are Vacuuming up Details about You - and It Could Raise Your Rates." *ProPublica*, 17 July 2018, <https://www.propublica.org/article/health-insurers-are-vacuuming-up-details-about-you-and-it-could-raise-your-rates>.

⁷ See Allen, *supra*.

⁸ See Allen, *supra*.

the cherry-picked patients to their own affiliated pharmacies – leaving independent pharmacies (and their better customer service)⁹ unavailable.

The balance of costs and countervailing benefits of such practices for consumers and competition, as well as the costs and benefits of any given potential trade regulation rule.

As we have heard, time-and-time-again, health insurers and their affiliated PBMs claim they segment all this data analysis behind firewalls and use it to improve patient outcomes. Certainly, there is a use for collecting specific lifestyle information and combining that with health information to help patients find the best care and coverage. However, independent pharmacies have witnessed insurers and their affiliated PBMs using data to limit access to certain drugs, namely generics and biosimilars, for patients with diagnoses of diabetes, rheumatoid arthritis, AIDS, and asthma, amongst many others. The PBMs limit access to generics and biosimilars because the brand name drugs for these diagnoses provide a much greater opportunity for manufacturer rebating (for instance, to a PBM-affiliated offshore group purchasing organization, such as Emisar Pharma Services) and spread pricing. Spread pricing occurs when PBMs charge health plans and payers more for a prescription drug than what they reimburse to the independent or unaffiliated pharmacy.

NCPA encourages the FTC to work with the Department of Health and Human Services Office for Civil Rights to ensure any commercial surveillance rule applies to covered entities and

⁹ Gill, Lisa L. "Consumers Still Prefer Independent Pharmacies, CR's Ratings Show." *Consumer Reports*, <https://www.consumerreports.org/pharmacies/consumers-still-prefer-independent-pharmacies-consumer-reports-ratings-show/>.

business associates, as defined by the Health Insurance Portability and Accountability Act (HIPAA) and prohibits vertically integrated entities from acquiring and using patient and consumer data in an unfair, deceptive, or abusive manner for the purposes of steering customers back to the vertically integrated entities.

While the sharing of HIPAA-protected information between related entities for an undisclosed commercial use by that related entity would fall within the FTC’s Unfair, Deceptive, or Abusive Acts or Practices (UDAP) authority, NCPA and its members believe it is important for both the FTC and HHS OCR to understand the extent to which these competitive harms negatively impact access for various patient populations. Ensuring the Trade Regulation Rule on Commercial Surveillance and Data Security prohibits the unfair, deceptive, and abusive use of patient and consumer data by vertically integrated insurance providers and PBMs will increase competition in the marketplace between those vertically integrated entities and independent pharmacies.

This competition also will likely lead to lower costs for consumers. For example, the Ohio Medicaid program found that “CVS used its role as a pharmacy middleman for the Ohio Medicaid program to pay some of its biggest retail competitors far less than it pays its own stores...”¹⁰ If a level playing field is created by a commercial surveillance rule, independent pharmacies can and will compete to provide better services and provide competitive offerings to patients. Without it,

¹⁰ “CVS Paid Itself Far More than Some Major Competitors, Report Says.” Side Effects, 20 Jan. 2019, <https://stories.usatodaynetwork.com/sideeffects/cvs-paid-far-major-competitors-report-says/#:~:text=itself%20far%20more-,than,competitors%2C%20report%20says&text=CVS%20used%20its%20role%20as,in%20court%20to%20keep%20secret.>

PBMs will continue to steer patients to their own pharmacies and gouge patients, their plan sponsors, and the government health plans in the process.

Proposals for protecting consumers from harmful and prevalent commercial surveillance.

A rule that would: 1) require clear notification to consumers about the collection and use of their data by insurance providers, their affiliated PBMs, group purchasing organizations, and pharmacies; 2) limit data use and sharing for the purposes of steering and cherry-picking insured consumers; 3) require firewalls between vertically and horizontally integrated entities; 4) require attestations to the efficacy of those firewalls; and 5) prescribe penalties for failure to adhere to those firewalls could solve many of the ongoing issues we see in pharmacy today. Such a rule could also limit the future impact of unabated consolidation where pay-to-play, data throttling, and access denials will only become more frequent.

Conclusion

Due to the amount of consolidation in the health insurance and pharmacy marketplaces that has occurred over the last 40 years, single entities now control vast amounts of data on patients and healthcare consumers. Those consolidated companies use that data for both good and bad purposes. Unfortunately, the bad purposes are outweighing the good, as we see year-over-year premium price increases in health insurance, while those same companies earn record profits and sit atop the list of Fortune 500 companies. We see it when our patients are being told they must resort to mail-order prescriptions or travel out of town to patronize a CVS. We see it when an independent pharmacy owner's sixteen-year-old son is told he cannot fill his

prescription at his father's pharmacy. We see it when an AIDS patient is told they must fill their prescription at an insurance/PBM-affiliated specialty pharmacy (which is often mail-order).

The FTC's rulemaking in the area of protecting consumers from unfair and deceptive practices involving their data is critical in all sectors, but nowhere more than in healthcare. We believe consumer protection in this area is not adequately provided for by HIPAA, and the FTC's rulemaking is an important tool to protect both individual consumers and the pharmacy market as a whole. Without it, the insurance/PBM/pharmacy verticals will continue to exploit patient data, resulting in higher drug prices, less competition, and fewer choices for consumers.

Sincerely,

Matthew Seiler

Matthew Seiler, R.N., CIPM, Esq.