

September 5, 2023

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 draft “merger guidelines” issued on July 19, 2023. NCPA represents the interests of America’s community pharmacists, including 19,400 independent community pharmacy locations. 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 (LTC) settings. Together, our members represent a \$78.5 billion healthcare marketplace, employ 240,000 individuals, and provide an expanding set of healthcare services to millions of patients every day. Our members are small business owners who are among America’s most accessible healthcare providers. NCPA is well-situated to comment on the draft Guidelines because its members have been negatively impacted by the

narrow template of previous Guidelines that has enabled massive consolidation in the pharmacy benefit manager space.¹

As you are aware, multiple horizontal² and vertical³ mergers in the health care industry over the past 20 years have resulted in a highly concentrated market structure that allows pharmacy benefit managers to “exercise undue market power.”⁴ Three vertically integrated companies⁵ now control access to more than 80%⁶ of all prescriptions filled in the United States. These transactions resulted in an oligopolistic market structure that the PBMs exploit to their advantage, as each PBM is vertically integrated upstream with insurers and downstream with their own pharmacies.

There are many ways in which PBMs exploit the oligopolistic market structure. For example, recently, CVS Caremark sent a unilateral non-negotiable notice of a change to contract terms related to arbitration. Notably, CVS Caremark made these changes after losing several arbitrations over the past few years. Our members report that terms now require, at the time an arbitration claim is filed, a pharmacy to escrow the alleged amount at issue, estimated attorneys’ fees and other expenses, but in no event should the amount be less than \$50,000. If the dispute, claim, or controversy is over \$1 million, CVS Caremark’s dispute provisions now require a panel of three (3) arbiters, one of whom needs to be a retired judge. If the dispute is for less than \$1 million, then a single arbitrator who is a retired judge will decide the matter. The onerous terms go on from there. These are not the terms of a contract forged in a competitive marketplace.

¹ PBM mergers – acquisitions – contracts timeline - NCPA. Accessed September 5, 2023. <https://ncpa.org/sites/default/files/2023-03/pbm-mergertimeline-2023.pdf>.

² *Id.*

³ Vertical business relationships among insurers, pbms, specialty ... - NCPA. Accessed September 5, 2023. <https://ncpa.org/sites/default/files/2023-03/verical-bus-chart.pdf>.

⁴ Council of Economic Advisors, Reforming Bio Pharmaceutical Pricing at Home and Abroad (February 2018) at 10.

⁵ Aetna-CVS-Caremark; UHG-Optum; Cigna-ESI; Humana-Primark.

⁶ 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>.

Consolidation harms small businesses, competition, and consumers alike. Working with researchers at the University of Southern California’s Schaeffer School of Pharmacy, NCPA and USC found that in 2020, in Ohio, sixty percent (60%) (n = 535) of low-income neighborhoods were pharmacy shortage areas affecting 638,169 low-income residents,⁷ or forty percent (40%) of the total low-income population. In the first 20 years of the 21st Century, neither the FTC nor the DOJ challenged a single transaction in this market with anything more substantial than targeted divestitures of retail stores. Many transactions did not even receive a Second Request. Too often, merger reviews were constrained by a narrow template that resulted in regulators clearing mergers despite those mergers substantially lessening competition, raising prices at the point of sale to consumers, and diminishing access and innovation. Merger review under the recently repealed guidelines was ultimately unable to protect sixty percent of low-income neighborhoods in Ohio.

NCPA Welcomes a Broader Set of Guidelines

The draft Guidelines go a long way in addressing the need to use a broad sample of real-world mergers to serve as evidence of harm to competition that will rely on structural presumptions and historical comparisons, but more can be done. The discussion in Section II, Paragraph 1, is a welcome change from prior Guidelines. In the PBM-pharmacy industry, we would argue that “concentration” reflects the number and relative size of PBMs competing to offer access to insured lives, while simultaneously competing with independent pharmacies to fill and dispense prescriptions to those same beneficiaries. Like the technology space, retail pharmacy suffers from bad actors that create closed-loop or “walled gardens,” where the

⁷ “Information provided by the USC-NCPA Pharmacy Access Initiative; Pharmacy Shortage Areas Mapping Tool.” <https://sites.usc.edu/pmph/2022/11/02/high-tech-map-promotes-access-to-medicine-and-pharmacy-services/>

dominant actors establish a market and control access to the market through rules and fees that disadvantage competitors. PBMs create and exploit these walled gardens through their pharmacy networks. The PBMs also further consolidate control of the market with take it or leave it network contracts with unconscionable terms that offer below cost reimbursement, are wrought with junk fees, and leave access to dispute resolution unattainable to most.

Because the PBM market is highly consolidated,⁸ NPCA recommends the agencies consider expanding its definition of “concentration” to account for control of access to the market of eligible consumers, even in instances where a merger eliminates a relatively small competitor. This need is especially necessary in pharmacy because patients generally are unable to “shop” for their pharmacy benefit manager. Patients are captive to whichever PBM is aligned – either through vertical integration or contractually – with their insurer. They are also captive to situations where PBMs “collaborate” like in the case of Cigna/Express Scripts’ collaboration with Prime Therapeutics. PBMs are only substituted rarely and are so substituted at the plan sponsor or non-aligned payor level. As a result of PBMs and health plans vertically integrating, and further consolidation through collaboration, substitution is often impossible. For example, in Michigan, according to a study released in October 2022 by the American Medical Association, Express Scripts dominates the commercial market with a market share of 89%.⁹ In Jackson, Michigan, Express Scripts’ commercial market share is an astonishing 96%.¹⁰ Express Scripts’ near 100% market share is directly attributable to both its integration with Cigna and its “alignment” with the PBM that services many Blues plans. When there is very little choice already for the consumer, and little opportunity to exercise Customer Substitution, even a small

⁸ Fein, note 3, above.

⁹ José R. Guardado, *Competition in Commercial PBM Markets and Vertical Integration of Health Insurers with PBMs* at 4, Policy Research Perspectives, American Medical Association (2022), <https://www.ama-assn.org/system/files/prp-pbm-shares-hhi.pdf>.

¹⁰ Id.

merger will impact competition significantly for market participants and the Merger Guidelines should address these factors. The discussion in Section II, Paragraph 1, should therefore be amended to account for concentration that impacts a merged firm's ability to effectuate a closed-loop market.

Similarly, Section II, Paragraph 5 could benefit from additional discussion on the impact a merged firm's control has on access to the market of consumers. NCPA sees parallels with the agencies' discussion concerning merged firms that substantially lessen competition by creating a firm that controls what its rivals might use. Community pharmacies compete with and are now forced to depend on firms that control access to the market. Through vertical consolidation, PBMs and their affiliated pharmacies control access to customers and have a tremendous ability and a number of incentives to weaken and exclude its rivals, who are our members. That consolidation has also hurt consumers.

From a consumer perspective, we have seen PBMs control market access using competitively sensitive information that they extract from their network pharmacies and through their consolidated entities. Previously, the Merger Guidelines did not address the impact on competition of access to competitively sensitive information of rivals by merged firms, the way the draft Merger Guidelines do. While there has been a tremendous amount of horizontal consolidation in the PBM industry, the vertical consolidation is equally troubling due to the data the consolidated entities now have access to, which further enables the ability of the vertically integrated entity to foreclose competitors.

For example, UnitedHealth Group's acquisition of Change Healthcare gave UnitedHealth Group access to Change's eRx network (which is a "switch" in pharmacy parlance). It is now part of OptumInsight. The switch contains an inordinate amount of data that has both medical

and pharmaceutical implications for insurability and healthcare utilization.¹¹ It also contains sensitive information of UnitedHealth Group's competitors. A switch possesses data that gives a comprehensive view of patients' claims, bills, payments, and pharmacy interactions across nearly all insurers. It also contains competitive information on pharmacy benefit managers, insurers, patients, and pharmacies that compete at various levels with the UnitedHealth Group vertical which includes OptumRx – UnitedHealth Group's mail order pharmacy. UnitedHealth Group can now use that data to surveil patient habits like which patients are most adherent, which patients are on the most lucrative drug regime, which patients are on a competitor's insurance plan or use a competitor PBM, and which patients are the most profitable. UnitedHealth Group can then use that data to steer the most lucrative patients to their own insurance plans, PBM, and pharmacy thereby harming competition along each vertical.

NCPA suggests the agencies consider adding to the draft Guidelines a discussion on how such use of competitively sensitive information can impact consumers from a perspective of non-price effects. Consumers who choose to use a community pharmacy over mail order might now be forced to use mail order because a vertically consolidated insurer/PBM/pharmacy determined that consumer is more profitable and therefore, should be steered to using only the consolidated entity's services.

NCPA Encourages a Broader Discussion and Explanation of How the Agencies Will Analyze Mergers in the Context of Monopsony Power

Properly defining concentration in pharmacy is particularly important because of the monopsony power PBMs possess. Unlike where U.S. publishers Penguin Random House and Simon & Schuster “compete vigorously to acquire publishing rights from authors and

¹¹ <https://www.jstor.org/stable/23053795>

provide publishing services to those authors ... [where] [t]his competition has resulted in authors earning more for their publishing rights in the form of advances (i.e., upfront payments made to authors for the rights to publish their works), and receiving better editorial, marketing, and other services that are critical to the success of their books,”¹² the biggest 3 PBMs do not compete for pharmacy networks in the same way. If they did, pharmacies would be able to obtain favorable terms similar to what authors receive in publishing. The PBMs do not operate in a competitive environment and do not seek to attract pharmacies into their networks by offering competitive contract terms. Instead, pharmacies receive, for example, below cost reimbursement, junk fees, unattainable dispute resolution, and unilateral one-sided no notice contract changes. Importantly, consumers do not receive any benefits from these terms that squeeze independent pharmacies.

NCPA encourages the agencies to consider providing more discussion and explanation in Section II, Paragraph 11, as to how the agencies will view monopsony power when considering such power in the context of mergers in a vertically closed environment like those forced on pharmacy. Appendix III of the draft Merger Guidelines’ focus on merging sellers “to simplify exposition” leaves entire industries like pharmacy, convenience stores, grocers, and family farms without the benefit of a full monopsony analysis. A single sentence acknowledging a decrease in the offered price or a worsening of the terms, does little to fully analyze the non-price effects of harm to competition and consumers. Therefore, we believe that an expansion of this discussion is warranted and should include non-price effects and harm to competition, such as a closed-loop analysis when it arises in the monopsony context.

¹² Complaint P II. <https://www.justice.gov/opa/press-release/file/1445916/download>

Conclusion

The draft Merger Guidelines are a positive step towards considering *all* the benefits of competition – quality, choice, lower costs – in evaluating the competitive effects of a transaction. NCPA appreciates the hard work the agencies have put into the draft, but would appreciate greater attention to exclusionary effects, nonprice effects, and foreclosure. PBMs have killed much of the dynamism of the marketplace, and their actions represent many of the same characteristics that spawned the Sherman Act and the Clayton Act. NCPA’s members are simply looking to have Merger Guidelines that level playing field, foster a competitive marketplace that enables higher quality services, choice, and fair prices for their patients.

Sincerely,

Matthew Seiler

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