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June 4, 2024

Grace Lee
Competition Policy and Advocacy Section, Antitrust Division
U.S. Department of Justice
950 Pennsylvania Ave., N.W., Suite 3337
Washington, DC 20530

Re: Request for Information on Consolidation in Health Care Markets [Docket No. ATR 102]

Dear Ms. Lee:

The National Community Pharmacists Association (NCPA) appreciates the opportunity to provide comments to DOJ, HHS and FTC on the *Request for Information on Consolidation in Health Care Markets*.

NCPA represents America's community pharmacists, including 19,400 independent community pharmacies. Almost half of all community pharmacies also 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 $94 billion healthcare marketplace, employ 230,000 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 submits these comments on behalf of both community and LTC independent pharmacies.

In the RFI, the agencies request information on the competitive effects of transactions involving multiple healthcare entities, including pharmacy benefit managers (PBMs) and pharmacies, where there are concerning trends and recent research indicating these categories of transactions may harm health care quality, access, and/or costs.

Multiple horizontal[1] and vertical[2] mergers by and between payors, PBMs and pharmacies over the past 20 years have resulted in a highly concentrated market structure that allows pharmacy benefit managers to "exercise undue market power."[3] Three vertically integrated companies[4]

[1] "PBM Mergers – Acquisitions – Contracts Timeline." NCPA. Accessed May 15, 2024. https://ncpa.org/sites/default/files/2023-03/pbm-mergertimeline-2023.pdf.
[2] "Vertical Business Relationships Among Insurers, PBMs, Specialty Pharmacies, Retail Pharmacies, Mail-Order Pharmacies and Providers, 2024." NCPA. Accessed May 15, 2024. https://ncpa.org/sites/default/files/2024-05/VerticalBusiness_2024_040324.pdf.
[3] Council of Economic Advisors, Reforming Bio Pharmaceutical Pricing at Home and Abroad (February 2018) at 10.
[4] Aetna-CVS-Caremark; UHG-Optum; Cigna-ESI.

now control access to approximately 80%[5] of all prescriptions filled in the United States. Each PBM is vertically integrated upstream with insurers and downstream with their own pharmacies. These transactions resulted in an oligopolistic national market, and local market monopolies that the PBMs exploit to their advantage.

There are many ways in which PBMs exploit their market power. For example, 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 and serve as a barrier to obtaining redress from CVS Caremark's practices. These are not the terms of a contract forged in a competitive marketplace.

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, 25% of all neighborhoods in the U.S. are pharmacy shortage areas (approx. eighty-one million people), accounting for 36.7% of the 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.

In the PBM-pharmacy industry, "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. Retail pharmacy suffers from bad actors that create closed-loop or "walled gardens," where the dominant actors establish a market and control access to the market of insured lives that are managed by their vertically integrated PBM 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.

[5] Fein, Adam. "The Top Pharmacy Benefit Managers of 2023: Market Share and Trends for the Biggest Companies—And What's Ahead." Drug Channels. April 9, 2024. https://www.drugchannels.net/2024/04/the-top-pharmacy-benefit-managers-of.html.

Because the PBM market is highly consolidated,[6] **NPCA recommends the agencies 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 PBM and pharmacy is an inherently local market. 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 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%.[7] In Jackson, Michigan, Express Scripts' commercial market share is an astonishing 96%.[8] 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 merger will impact competition significantly for market participants and the Merger Guidelines should address these factors. **NCPA recommends that the agencies account for concentration that impacts a merged firm's ability to effectuate a closed-loop market.**

Similarly, the agencies should note additional discussion on the impact a merged firm's control has on access to the market of consumers. Community pharmacies compete with and are now forced to depend on firms that control access to the beneficiaries of prescription benefits managed by PBMs. 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. 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.[9] 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

[6] Fein, note 5, above.
[7] 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.
[8] Id.
[9] https://www.jstor.org/stable/23053795.

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.

Especially in the wake of the Change Healthcare cyberattack, NCPA suggests the agencies consider discussing 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.

Properly defining the market 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 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,"[10] 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. Because PBMs control access to beneficiaries, PBMs instead impose non-negotiable terms on pharmacies that include below cost reimbursement, junk fees, unattainable dispute resolution, and unilateral one-sided no notice contract changes. These terms are driving independent pharmacies out of business – and their customers are steered to the PBM-affiliated pharmacies, further consolidating market power into the vertical entity. Importantly, consumers do not receive any benefits from these terms that squeeze independent pharmacies.

NCPA encourages the agencies to consider monopsony power in the context of mergers in a vertically closed environment like those forced on pharmacy. Such considerations should include non-price effects and harm to competition, such as a closed-loop analysis when it arises in the monopsony context.

[10] Complaint P II. Available at: https://ncpa.org/sites/default/files/2024-05/prh_ss_complaint.pdf.

NCPA thanks DOJ, HHS and FTC for the opportunity to provide feedback, and we stand ready to work with the agencies to offer possible solutions and ideas. Please let us know how we can assist further, and should you have any questions or concerns, please feel free to contact me at steve.postal@ncpa.org or (703) 600-1178.

Sincerely,

Steve Postal, JD
Director, Policy & Regulatory Affairs
National Community Pharmacists Association