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UNITED STATES OF AMERICA
Federal Trade Commission
WASHINGTON, D.C. 20580

STATEMENT OF COMMISSIONER ROHIT CHOPRA

Regarding the Commission's Report on Pharmacy Benefit Manager Rebate Walls

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Drug prices are out of control, and too many players in the pharmaceutical industry have failed to follow the law. There is a growing consensus that the Federal Trade Commission's approach to overseeing the pharmaceutical industry is not working. For example, I am unable to identify an instance where the FTC has filed a lawsuit in federal court to block a merger of pharmaceutical companies. In addition, the FTC largely stood by as the pharmacy benefits manager (PBM) industry consolidated to three main giants and even took steps to undermine state legislation.[1]

While the agency has taken steps to combat other anticompetitive practices like pay-for-delay deals among branded and generic pharmaceuticals, there are several other practices in the industry that warrant more serious attention by the agency and by policymakers. In particular, the secretive kickback practices through so-called "rebate walls" between pharmaceutical companies and PBMs are worrisome.

PBMs are supposed to exert their bargaining power on behalf of patients to get better prices on drugs. However, today's industry suffers from serious conflicts of interest and lack of transparency. PBMs develop a list of drugs that insured patients can access. If a drug maker's product is not on this formulary, patients cannot use their insurance to cover the costs of the drug. Getting favorable placement on a PBM's formulary can be the key to success for a drug product.

Drug manufacturers pay large "rebates" to PBMs to ensure they get prominent placement on the formulary. Manufacturers may offer larger rebates – sometimes up to 50 percent of a drug's list price – conditioned on giving their product preferred status over a competing one, or for achieving a market share requirement. This creates a "wall" around their lucrative products in ways that can squelch out competitors. Third party payers will not turn to rival drugs in this situation, because they cannot afford to pay the full list price when the drug manufacturer stops paying the rebate.

In some situations third party payers may even be subject to having previously paid rebates "clawed back." Making matters worse, drug manufacturers may pay for the rebate by increasing list prices of their drugs. This raises the question of whether PBMs are incentivized to select *higher* list price drugs instead of lower list price drugs for their formularies in order to collect a higher rebate. Because rebating practices from drug companies to PBMs can make it more difficult for new, lower-priced

[1] Stacy Mitchell & Zach Freed, *How the FTC Protected the Market Power of Pharmacy Benefit Managers*, PROMARKET (Feb. 19, 2021), https://promarket.org/2021/02/19/ftc-market-power-pharmacy-benefit-managers/.

drugs to succeed in the marketplace, PBMs may actually be causing drug prices to increase, rather than decrease.

The FTC and Congress must take concrete steps to address the conflicts of interests embedded in the structure of the PBM industry. In addition to problematic rebating practices, we must also examine whether PBMs are engaged in coercive practices that harm patients, independent pharmacists, and public health. In addition to legislative efforts, it will be critical for the FTC to rethink its approach of bringing individual enforcement actions, since this strategy is unlikely to combat these problems in a timely fashion. It would be more effective for the Commission to pursue research and to conduct rulemakings that specify when certain pharmaceutical industry practices, such as PBM rebating, are unlawful under Section 5 of the Federal Trade Commission Act.