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Federal Trade Commission
WASHINGTON, D.C. 20580

Office of the Chair

**Remarks of Chair Lina M. Khan
Regarding the 6(b) Study on Pharmacy Benefit Managers
Commission File No. P221200**

February 17, 2022

We'll now turn to our next agenda item, the use of the Commission's investigative authority under Section 6(b) of the Federal Trade Commission Act to issue orders to large pharmacy benefit managers (PBMs) to study a range of their commercial practices. This study would give us better insight into PBMs' drug pricing practices and their contracts with pharmacies, including for the purpose of examining whether they negatively impact independent or unaffiliated pharmacies.

Over recent decades we have witnessed two trends in the drug prescription sector. On the one hand, patients pay ever-higher prices for drugs, including those needed for survival.¹ These price increases have impacted both the insured as well as the uninsured or underinsured, who as captive customers are forced to ration, or even completely forgo, vital medicines.²

We have also seen a troubling trend in the drug retailing and fulfillment sector, where small, local, and family-owned pharmacies—the backbone of so many communities across the nation—have been closing shop and vanishing at an alarming rate.³ This trend is especially concerning because these types of community institutions have at times proven themselves to be superior at delivering for their patients and customers.⁴ For example, during the early months of

¹ See, e.g., Joshua Cohen, *Insulin's Out-Of-Pocket Cost Burden To Diabetic Patients Continues To Rise Despite Reduced Net Costs To PBMs*, FORBES (Jan. 5, 2021), <https://www.forbes.com/sites/joshuacohen/2021/01/05/insulins-out-of-pocket-cost-burden-to-diabetic-patients-continues-to-rise-despite-reduced-net-costs-to-pbms/>; see also Transcript of FTC Open Commission Meeting, FED. TRADE COMM'N, at 14-15 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/public_events/1597522/20211021opencommissionmeetingtranscript.pdf (public commenter Matthew Dinger describing that he feels “completely beholden” to insulin manufacturers, and that “[he] is a job loss away from financial ruin because the concentration of economic power, when it comes to the price of insulin, lies almost entirely in the hands of three companies.”). See also *id.* at 15 (public commenter Anna Squires noting that [m]any diabetics live below the poverty line and are unable to afford basic necessities, let alone \$900 a month in medications,) and that “[i]f giving prescriptions should not be a for-profit business venture for people who already own three homes.”).

² Press Release, Kaiser Family Foundation, *Poll: Nearly 1 in 4 Americans Taking Prescription Drugs Say It's Difficult to Afford Their Medicines, including Larger Shares Among Those with Health Issues, with Low Incomes and Nearing Medicare Age* (Mar. 1, 2019), <https://www.kff.org/health-costs/press-release/poll-nearly-1-in-4-americans-taking-prescription-drugs-say-its-difficult-to-afford-medicines-including-larger-shares-with-low-incomes/>.

³ Markian Hawryluk, *The Last Drugstore: Rural America is Losing Its Pharmacies*, WASH. POST (Nov. 10, 2021), <https://www.washingtonpost.com/business/2021/11/10/drugstore-shortage-rural-america/>; Markian Hawryluk, *How Rural Communities Are Losing Their Pharmacies*, KAISER HEALTH NEWS (Nov. 15, 2021), <https://khn.org/news/article/last-drugstore-how-rural-communities-lose-independent-pharmacies/>.

⁴ See Stacy Mitchell, *Small Pharmacies Beat Big Chains at Delivering Vaccines. Don't Look So Shocked.*, WASH. POST (Feb. 5, 2021), <https://www.washingtonpost.com/outlook/small-pharmacies-beat-big-chains-at-delivering->

the COVID-19 vaccine rollout, community pharmacies in some cases proved to be more nimble, agile, and efficient than their large-chain counterparts in getting Americans vaccinated, with states like West Virginia quickly vaccinating the elderly and those in need.⁵

Pharmacy benefit managers, the companies that manage prescription drug benefits on behalf of private health insurers, Medicare plans, employers, and other payers, have in recent decades vertically integrated with affiliated health insurance companies and retail and specialty pharmacies, potentially creating financial incentives for them to steer patients towards affiliated services.⁶ And for the last several years, independent pharmacies and others stakeholders across the drug supply chain have argued that these vertically integrated PBMs play a major role in the increased cost of drugs to patients and in the gradual elimination of independent pharmacies from the marketplace.⁷

In particular, these stakeholders note practices such as the charging of after-the-fact Direct and Indirect Remuneration (DIR) and related fees, as well as complicated and opaque pricing terms. These practices may allow PBMs to reimburse independent pharmacies at less than the cost of acquiring medicines, and ultimately increase costs for patients at the pharmacy counter when purchasing the medicines they need to survive. Stakeholders have also indicated that vertically integrated PBMs deploy unfair pharmacy network terms that allow PBMs to “claw back” patient copays and deductibles, and implement gag clauses, audit provisions, and other terms that squeeze independent and unaffiliated chain pharmacies—ultimately resulting in a windfall for these PBMs.

In addition, stakeholders have surfaced a growing concern with the impact of “PBM rebates” and other fees applied by drug manufacturers in their negotiations with PBMs that may increase patients’ prices at the pharmacy counter.⁸ They have pointed out that patients usually have to pay copays, deductibles, and coinsurance based on the gross drug prices as if no discount has been applied to the actual price of the drug through rebates, since the rebates are shared only with PBMs and payers.⁹ In other words, while PBMs may benefit from negotiating these rebates, it is unclear whether patients, who ultimately need to buy medicine, fully benefit from these reduced prices. We have heard numerous complaints about the price of insulin, for example, and some commentators have suggested that the price and associated copays of insulin and many

[vaccines-dont-look-so-shocked/2021/02/05/6bb307ec-671b-11eb-886d-5264d4ceb46d_story.html](https://www.consumerreports.org/cro/pharmacies/buying-guide/index.htm); Lisa L. Gill, *Consumers Still Prefer Independent Pharmacies, CR's Ratings Show*, CONSUMER REPORTS (Dec. 7, 2018), <https://www.consumerreports.org/cro/pharmacies/buying-guide/index.htm>.

⁵ See, e.g., William A. Galston, *COVID-19 vaccinations: Why are some states and localities so much more successful?*, BROOKINGS (Jan. 25, 2021) (noting that “West Virginia was the only state in the country to opt out of the vaccine distribution partnership between the federal government and two national pharmacy chains—CVS and Walmart—for vaccinating residents at nursing homes and other long-term care facilities,” instead relying on “a network of nearly 250 independent pharmacies.”), <https://www.brookings.edu/blog/fixgov/2021/01/25/covid-19-vaccinations-why-are-some-states-and-localities-so-much-more-successful/>.

⁶ *Vertical Integration Isn't Great for Health Care Consumers or Purchasers*, PURCHASER BUSINESS GROUP ON HEALTH (Aug. 23, 2022), <https://www.pbgh.org/despite-claims-vertical-integration-isnt-great-for-health-care-consumers-or-purchasers/#:~:text=Known%20as%20vertical%20integration%20mergers,80%25%20of%20the%20PBM%20market>.

⁷ Catherine Candisky, *State report: Pharmacy middlemen reap millions from tax-funded Medicaid*, COLUMBUS DISPATCH (June 21, 2018), <https://www.dispatch.com/story/news/2018/06/21/state-report-pharmacy-middlemen-reap/11893680007/>.

⁸ *Id.*

⁹ *Id.*

other drugs might be artificially inflated due to these PBM rebate practices.¹⁰

We have also received complaints that PBMs and pharmacy plans may face incentives to drive patients to more expensive drugs that come with rebates instead of the most affordable drugs available. Complaints about these apparently problematic incentives have only grown worse with the rise of high-deductible health plans and the increasing use of expensive biologics. Additionally, individuals have pointed out that patients have less choice between pharmacies and drug products than ever before, as PBMs may increasingly rely on restricted formularies and dispensing options.

Recent studies conducted by both chambers of Congress have confirmed some of these claims, finding that the large, vertically integrated PBMs play an outsized role in driving up drug prices and lessening competition among drugstores and pharmacies.¹¹ These studies are coupled with hundreds of complaints the Commission has received in our public docket and during our Commission meetings from suffering patients and aggrieved pharmacists, urging us to address the issues they have identified.¹²

Therefore, and despite the agency's limited resources, I believe it is vital to launch this study. We have an imperative to better understand and ultimately tackle anticompetitive conduct that may be contributing to sky-high drug prices and the decline of independent pharmacies, and better grasping the role of PBMs is a key part of that work.

The FTC has a long history of pursuing market studies to deepen our understanding of market conditions and business conduct, including a PBM study that Congress required the Commission to conduct in 2005.¹³ Much has changed in this industry since that first study was conducted.¹⁴ Therefore, I believe that we should direct our efforts towards updating our understanding of this industry and scrutinizing the practices that many suggest are culprit.

¹⁰ Request for Public Comment Regarding Contract Terms That May Harm Fair Competition, REGULATIONS.GOV (searching for "PBM"), <https://www.regulations.gov/docket/FTC-2021-0036/comments?filter=pbm>; *see, e.g.*, Public Comments for the July 1, 2021 Open Commission Meeting, Fed. Trade Comm'n, https://www.ftc.gov/system/files/documents/public_events/1591478/open_commission_meeting_comments_july_1_2021redacted.pdf; *see also* Transcript of October 21, 2021 FTC Open Commission Meeting, *supra*, note 1.

¹¹ *See* STAFF OF H. COMM. ON OVERSIGHT AND REFORM, 117TH CONG., A View From Congress: Role of Pharmacy Benefit Managers in Pharmaceutical Markets (Dec. 10, 2021), <https://republicans-oversight.house.gov/wp-content/uploads/2021/12/PBM-Report-12102021.pdf>; Press Release, U.S. Senate Committee on Finance, Grassley, Wyden Release Insulin Investigation, Uncovering Business Practices Between Drug Companies and PBMs That Keep Prices High (Jan. 14, 2021), <https://www.finance.senate.gov/chairmans-news/grassley-wyden-release-insulin-investigation-uncovering-business-practices-between-drug-companies-and-pbms-that-keep-prices-high>.

¹² *See infra*, note 10.

¹³ Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies, FED. TRADE COMM'N. (Aug. 2005), https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf.

¹⁴ The PBM industry has undergone continued consolidation and integration since 2005. *See, e.g.*, Andrew Ross Sorkin, *CVS to Buy Caremark in All-Stock Deal*, N.Y. TIMES (Nov. 1, 2006), <https://www.nytimes.com/2006/11/01/business/01cnd-drug.html>; Press Release, Fed. Trade Comm'n, FTC Closes Eight-Month Investigation of Express Scripts, Inc.'s Proposed Acquisition of Pharmacy Benefits Manager Medco Health Solutions, Inc. (Apr. 2, 2012), <https://www.ftc.gov/news-events/press-releases/2012/04/ftc-closes-eight-month-investigation-express-scripts-incs>; Press Release, Cigna, Cigna Completes Combination with Express Scripts, Establishing a Blueprint to Transform the Health Care System (Dec. 1, 2018), <https://newsroom.cigna.com/Cigna-Completes-Combination-with-Express-Scripts-Establishing-a-Blueprint-to-Transform-the-Health-Care-System>.

In addition to the orders the Commission would send out to PBMs, I would also seek voluntary comments from the public for their views on how large, vertically integrated PBMs are affecting drug prices and competition in these markets.

I want to thank again the staff who worked diligently for months on this study and who went to great lengths to produce a document that could win majority support at the Commission. I view this as a critical issue for the Commission and believe this study would advance our mission and benefit the people we are charged with protecting.
