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

Chair Lina M. Khan

**Statement of Chair Lina M. Khan**
**Joined by Commissioners Alvaro M. Bedoya & Rebecca Kelly Slaughter**
**Regarding the Pharmacy Benefit Managers Interim Staff Report**
**Commission File No. P221200**

**July 9, 2024**

The Federal Trade Commission's work in healthcare markets can have life-or-death stakes for millions of Americans. In recent years the FTC has heard an outpouring of concern from doctors, patients, and pharmacists about pharmacy benefit managers (PBMs), which act as influential middlemen in our healthcare system. We've heard accounts of how the business practices of PBMs may deprive patients of access to the most affordable medicines and how doctors find themselves having to subordinate their independent medical judgment to PBMs' decision-making at the expense of patient health.[1] Pharmacists from West Virginia to Texas have written to the FTC, expressing concern that PBMs' business practices are creating risk for their patients while squeezing independent pharmacies that have served their communities for

[1] *See, e.g.*, Comment Submitted by Aaron Broadwell, Solicitation for Public Comments on the Impact of Benefit Managers' Business Practices, *Regulations.gov* (Apr. 19, 2022), https://www.regulations.gov/comment/FTC-2022-0015-0329; (comment from doctor stating that the most affordable medications for their patients are often excluded from PBMs' formularies); *see also* Comment of Dr. Madeline Feldman at Apr. 14, 2022 Listening Forum on Effects of Mergers in Health Care Industry, https://www.ftc.gov/system/files/ftc_gov/pdf/FTC-DOJ-Listening-Forum-%20Health-Care-Transcript.pdf; Comment Submitted by Julie Patel, Solicitation for Public Comments on the Impact of Benefit Managers' Business Practices, *Regulations.gov* (Apr. 15, 2022), https://www.regulations.gov/comment/FTC-2022-0015-0265 (comment from doctor recounting how a patient faced significant delays obtaining prescribed medication due to hurdles imposed by a PBM, which resulted in the patient losing vision in one eye and ultimately losing her eye); Comment Submitted by Grace Wright, Solicitation for Public Comments on the Impact of Benefit Managers' Business Practices, *Regulations.gov* (Apr. 21, 2022), https://www.regulations.gov/comment/FTC-2022-0015-0362 (lamenting that PBM policies have interfered in her treatment of patients, forcing her to choose treatments that she would not otherwise recommend).

decades.[2] Against this backdrop, the Commission in 2022 unanimously voted to launch an inquiry into PBMs using the Commission's 6(b) authority to conduct market studies.[3]

Given the stakes, there is enormous urgency in understanding PBMs' practices. Accordingly, we strongly support the issuance of the interim staff report issued today, *Pharmacy Benefit Managers: The Powerful Middlemen Inflating Drug Costs and Squeezing Main Street Pharmacies*.[4] Even as FTC staff continue to collect and analyze information from the PBMs, the team has already examined thousands of documents and surfaced key facts. The PBM Interim Report discusses how increased concentration and vertical integration have given PBMs significant power over prescription drug access and prices, and explains that these trends may be enabling PBMs to disadvantage rivals and inflate drug costs.[5] It describes how PBMs may wield substantial influence over independent pharmacies, including evidence of their use of confusing and unfavorable contracts that can harm independent pharmacies and the communities they serve. Most strikingly, the Report describes evidence indicating that PBMs are overcharging for two case study cancer drugs (generic Gleevec and Zytiga) and reimbursing their affiliated pharmacies at significantly higher rates than unaffiliated pharmacies for these same drugs.[6] This overcharging represents billions of dollars in drug spending and reveals the incentives PBMs can have to preference their own affiliated pharmacies regardless of what is best for patients.

Commissioner Holyoak dissents from the issuance of the Report, lamenting that the staff's work is incomplete and dismissing its analysis. We disagree with her conclusion that the analysis in the Report is not worth sharing with the public. The Report sketches out how the PBM market has changed over the last two decades and describes key developments, including horizontal and vertical consolidation, the growth of specialty drugs, the lower reimbursements paid to pharmacy competitors, and the evidence suggesting that PBMs are using rebates to exclude certain generic rivals. Although staff continues to push respondents for the production of

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[2] Comment Submitted by Heidi Romero, Solicitation for Public Comments on the Impact of Benefit Managers' Business Practices, *Regulations.gov* (May 31, 2022), https://www.regulations.gov/comment/FTC-2022-0015-0819 (One pharmacist from rural West Virginia, whose family pharmacy has operated since 1892, was not able to use her own pharmacy to fill her prescription for critical medication during her pregnancy because her health insurer would only provide coverage if she got the medicine from its PBM-affiliated specialty pharmacy—a process so onerous that it took several weeks, putting her pregnancy at risk.); Comment Submitted by Infinity Pharmacy Solutions, Solicitation for Public Comments on the Impact of Benefit Managers' Business Practices, *Regulations.gov* (June 3, 2022), https://www.regulations.gov/comment/FTC-2022-0015-1138 at 4 ("[I]n Texas, a PBM controls an overwhelming portion of the market, [and] the pharmacy must 'agree' to the terms and conditions the PBM dictates, or risk being excluded from those crucial networks. In other words, because of their market dominance, PBMs have created an atmosphere in which every pharmacy contract is a contract of adhesion—pharmacies have no meaningful opportunity to negotiate such contracts, and must simply accept the harshest possible terms and conditions").

[3] Press Release, Fed. Trade Comm'n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry. It is odd that Commissioner Holyoak recycles other people's process grievances from a period when she was not on the Commission to form her own independent views.

[4] FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: THE POWERFUL MIDDLEMEN INFLATING DRUG COSTS & SQUEEZING MAIN STREET PHARMACIES – INTERIM STAFF REPORT (2024) [hereinafter *PBM Interim Report* or *Report*]

[5] PBM Interim Report at 2-4.

[6] PBM Interim Report at 40-44 (describing how "pharmacies affiliated with the Big 3 PBMs are often paid 20- to 40-times the average acquisition cost of the drugs, and significantly more than unaffiliated pharmacies, for the two case study specialty generic drugs).

the data necessary to conduct a full analysis of prices,[7] the report lays out an initial economic analysis, including a discussion of how exclusionary rebates may be having negative spillover effects on competition in drug markets, impeding generic entry.[8] We also disagree with Commissioner Holyoak's view that the two case studies alone are not worth releasing. Thousands of cancer patients depend on these medicines to survive; the PBMs marking up those drugs by up to 4,000 percent the average acquisition cost is enormously significant. We see no good reason to withhold this information from the public, even as the team continues its analysis.

Commissioner Holyoak also attacks the Report's lack of reliance on a PBM report the FTC issued in 2005, as well as the Commission's decision last year to disavow prior FTC advocacy. But the market today bears little resemblance to the market of 2005.[9] In the intervening two decades, forty independent entities have been subsumed by one of the three major PBMs.[10] Whereas the top three PBMs managed 52 percent of prescription drug claims in 2004, today's Report describes how their share has since ballooned to close to 80 percent.[11] Research also casts serious doubt on the continued validity of the 2005 study's conclusion that drugs purchased through PBM-owned mail-order pharmacies were generally lower priced than drugs purchased through pharmacies not owned by PBMs.[12] Recent reporting has documented the ways in which PBMs may be marking up drug prices such that drugs delivered by PBM-owned mail-order pharmacies are significantly more expensive than those delivered by independent pharmacies—suggesting the exact opposite of what the 2005 study concluded.[13] Meanwhile, the PBMs have extensively cited the FTC's 2005 report and other FTC advocacy letters when fighting efforts by state and federal lawmakers to oversee them—arguing that the FTC's work undercuts the case for greater transparency and other regulation.[14] We are glad the Commission took steps last year to ensure that PBMs cannot weaponize decades-old FTC writings to undermine modern-day efforts by policymakers to address potentially harmful business practices by PBMs.[15]

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[7] Commissioner Holyoak criticizes the decision to disclose in the PBM Interim Report that some of the study respondents have not yet completed their submissions. We disagree with the suggestion that informing the public of the PBMs' lack of progress is inappropriate. The PBM Interim Report provides an update to the public about the study's progress; failures by the study's respondents to timely provide the requested information are a necessary part of that progress report.

[8] PBM Interim Report at 66-71.

[9] The data the 2005 report relies on is even older, spanning 2002-2003.

[10] PBM Interim Report at 8, Fig. 3.

[11] PBM Interim Report at 5.

[12] *See, e.g.*, PBM Interim Report at § 3(b); Rebecca Robbins & Reed Abelson, *The Opaque Industry Secretly Inflating Prices for Prescription Drugs*, N.Y. TIMES (June 21, 2024), https://www.nytimes.com/2024/06/21/business/prescription-drug-costs-pbm.html#:~:text=The%20job%20of%20the%20P.B.M.s,New%20York%20Times%20investigation%20found; Jared Hopkins, *Mail-Order Drugs Were Supposed to Keep Costs Down. It's Doing the Opposite*, WALL ST. J. (June 25, 2024), https://www.wsj.com/health/pharma/higher-drug-costs-mail-order-prescription-bf37886f.

[13] *The Opaque Industry Secretly Inflating Prices for Prescription Drugs, supra* note 12; *Mail-Order Drugs Were Supposed to Keep Costs Down. It's Doing the Opposite, supra* note 12.

[14] *See* Press Release, Fed. Trade Comm'n, FTC Votes to Issue Statement Withdrawing Prior Pharmacy Benefit Manager Advocacy (July 20, 2023), https://www.ftc.gov/news-events/news/press-releases/2023/07/ftc-votes-issue-statement-withdrawing-prior-pharmacy-benefit-manager-advocacy.

[15] *See* Ltr. from Sens. Grassley, Cantwell, et al. to Chair Lina M. Khan (Jan. 22, 2024), https://www.grassley.senate.gov/imo/media/doc/grassley_cantwell_colleagues_to_ftc_-_pbm_investigation.pdf

In his concurrence, Commissioner Ferguson writes that he supports the release of this Report but expresses concern regarding the Report's inclusion of public comments, some of which are anonymous.[16] The opportunity to submit public comments to the FTC is an important mechanism for market participants across the country and across walks of life to share information with the Commission. Learning from these public comments, in turn, helps the Commission mitigate blind spots and balance out hearing primarily from well-heeled firms and executives who can use their resources and connections to engage with the FTC. We are extraordinarily grateful to the thousands of people who submitted public comments as part of this market inquiry, including those who sought anonymity out of fear of retaliation. To the extent some of these sources may be "market opponents" of PBMs, the PBM respondents have ample opportunity to provide their own information and data to the FTC—yet despite receiving requests over two years ago, some of them still have not fully done so.

As the FTC uses public resources to investigate an issue of enormous public concern, we have an obligation to inform the public as findings become available. Even as the FTC continues to gather and analyze information about PBMs, this initial analysis can inform the constellation of state and federal policymakers who are also scrutinizing the PBMs. Indeed, a bipartisan group in Congress has urged the FTC to act *more* quickly, not less—and in January, a bipartisan group of fourteen Senators requested that the FTC issue a progress report on this study, even as it remains ongoing.[17] We are grateful to these Senators and to other members on both sides of the aisle for their leadership on this issue.

Lastly, we are tremendously grateful to FTC staff that are working on the PBM 6(b) study and those that prepared this PBM Interim Report. They have worked swiftly despite stonewalling by entities subject to the study and have spent many months gathering and analyzing evidence. We look forward to the team's continued work on this inquiry.

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(thanking Commission for withdrawing "prior advocacy statements and studies that no longer reflect current market realities").

[16] Commissioner Ferguson also speculates that progress on the PBM report was halted due to Commission focus on other priorities, like the Non-Competes Rule. This claim is unfounded, given that the PBM team is comprised of people with entirely different skillsets (healthcare economists and researchers) from those on the Non-Competes Rule (labor economists and specialists in administrative law). And contrary to his claim that the Non-Competes Rule consumed "massive quantities of manpower," that team—like many teams at the FTC—was small.

[17] Ltr. from Sens. Grassley, Cantwell, et al. to Chair Lina M. Khan, *supra* note 16; Transcript of Feb. 17, 2022 Open Commission Meeting (Congressman Buddy Carter attending Open Commission Meeting to provide information and express concerns about PBMs), https://www.ftc.gov/system/files/ftc_gov/pdf/FTC%20Transcript%20February%2017%2C%202022%20Open%20Commission%20Meeting.pdf; *see* also Ltr. from Sen. Grassley to FTC on PBMs (Mar. 9, 2022), https://www.judiciary.senate.gov/imo/media/doc/grassley_to_federal_trade_commission_-_pharmacy_benefit_managers.pdf; Ltr. from Sen. Lankford to Chair Khan Regarding PBM 6(b) Study (June 15, 2022), https://www.lankford.senate.gov/wp-content/uploads/media/doc/Lankford%20FTC%20PBM%20Letter.pdf; Ltr. from Sens. King and Warren to Chair Khan re PBMs (Aug. 3, 2022); Ltr. from Sens. Grassley, Cantwell, Hyde-Smith, Lankford, Blackburn, Moran, Tillis Regarding PBM 6(b) Study (Oct. 6, 2022), https://www.grassley.senate.gov/imo/media/doc/grassley_et_altoftcpbminvestigation.pdf; Ltr. from Indiana State Sens. to Chair Khan Regarding PBMs (Oct. 13, 2023).