

November 15, 2018

Federal Trade Commission  
Office of the Secretary  
600 Pennsylvania Avenue NW  
Suite CC-5610  
Washington, DC 20580

**Re: Comments to the Federal Trade Commission's (FTC) 21st Century Hearings, Constitution Center September 21st Hearings Session (Docket ID: FTC-2018-0076)**

Dear Sir or Madam:

The National Community Pharmacists Association ("NCPA") appreciates the opportunity to provide comments to the Federal Trade Commission's ("FTC") 21st Century Hearings, Constitution Center September 21st Hearings Session (Docket ID: FTC-2018-0076). NCPA represents the interests of America's community pharmacists, including the owners of more than 22,000 independent community pharmacies. Together, they represent an \$80 billion healthcare marketplace and employ more than 250,000 individuals on a full or part-time basis. NCPA will be commenting on the effect of monopsony in the healthcare industry, particularly the grave impact this type of market has had on community pharmacies.

Monopsony power heavily exists in the healthcare industry as recent consolidation amongst major Pharmacy Benefit Managers (PBMs) has led to extraordinary PBM market power and buyer power. The top three PBMs control approximately 89% of the market: 238 million lives<sup>1</sup> out of 266 million lives.<sup>2</sup> This dominance has allowed PBMs to leverage their market power to the detriment of plan sponsors (government and commercial payors), providers and consumers. Additionally, PBMs claim that they help plan sponsors generate savings by negotiating rebates, however, recent analyses have shown the opposite. For example, a 2017 report found that PBMs have been utilizing their market power to try to increase their profits and encourage higher list prices for prescription drugs, which increases co-pays for patients.<sup>3</sup>

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<sup>1</sup> Mathematical calculation based on number of covered lives CVS/Caremark, UnitedHealth, and Express Scripts, Inc. self-reported, *available at* <https://www.caremark.com/wps/portal>; <https://www.uhc.com/individual-and-family/member-resources/pharmacy-benefits>; <http://lab.express-scripts.com/>.

<sup>2</sup> From testimony of PCMA CEO Mark Merritt before the U.S. House of Representatives Energy & Commerce Committee Subcommittee on Health, December 13, 2017.

<sup>3</sup> Steve Pociask, "Pharmacy Benefit Managers: Market Power and Lack of Transparency," Am. Consumer Inst. ConsumerGram (2017), *available at* <http://www.theamericanconsumer.org/wp-content/uploads/2017/03/ACI-PBM-CG-Final.pdf>.

During this FTC hearing, Joseph Stiglitz of Columbia University suggested that courts look for direct evidence of market power, including persistent high profits, and the ability to force customers to accept onerous contractual terms. To address PBM market dominance, NCPA has long argued for additional scrutiny of inherent PBM conflicts of interest, increased transparency in PBMs' business practices, and fair contract negotiation between PBMs and independent pharmacies. Even though beneficiaries and plan sponsors rely on PBMs in plan benefit design, PBMs operate without transparency by failing to disclose key plan details that may financially enrich the PBM. In addition, PBMs own mail order and specialty pharmacies while simultaneously setting reimbursement rates for retailers that compete with PBM-owned pharmacies, thus creating a conflict of interest. Lastly, NCPA continues to express concern over PBMs' leverage over the contract process, which forces pharmacies to accept contracts that are anticompetitive, one-sided, onerous and detrimental to patients. We urge the FTC to take a closer look at the PBMs anticompetitive practices to ensure consumers have access to prescription drugs in the most transparent and cost-effective manner.

### **PBM Monopsony Power**

Monopsony power, or buyer power, is defined as significant market power in purchasing a product or service, while monopoly power is significant market power in selling a product or service.<sup>4</sup> By engaging in price discrimination and offering take-it-or-leave-it contracts, a monopsonist can extract the maximum from suppliers.<sup>5</sup> As buyers in the healthcare market, PBMs purchase pharmacy services via contract and limit the amount of services they buy by restricting their networks. The relationship between PBMs and the pharmacies they contract with exemplifies a monopsonist relationship because, in order to maintain patient access to prescription drugs,<sup>6</sup> independent pharmacies often face no choice but to enter into one-sided contracts due to their minimal negotiating power compared to PBMs' immense market power.

The antitrust laws are designed to protect against harm to competition and consumers due to monopsony power, not harm to producers and competitors.<sup>7</sup> However, the laws often fail to address the impact of substantial market power on small sellers, such as independent pharmacies. These pharmacies are some of the most accessible healthcare providers in the community as they live within 5 miles of their patients and see their complex patients an

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<sup>4</sup> Debbie Feinstein & Albert Teng, "Two Recent Federal Trade Commission Enforcement Actions Shed Light on the Treatment of Buyer Power," *Arnold & Porter* (Aug. 7, 2018), *available at* <https://www.arnoldporter.com/en/perspectives/publications/2018/08/two-recent-federal-trade-commission-enforcement>.

<sup>5</sup> Roundtable on Monopsony and Buyer Power, Directorate for Financial Enterprise Affairs Competition Committee, Organisation for Economic Co-operation and Development, United States (DAF/COMP/WD(2008)79).

<sup>6</sup> 91% of prescriptions are covered by insurance. If the medication is covered by insurance, the patient's price is set by the PBM, not by the pharmacy. In a cash transaction, the pharmacy sets the price. See "2017 Employer Health Benefits Survey," Section 9: Prescription Drug Benefits (Sep. 19, 2017), *available at* <https://www.kff.org/report-section/ehbs-2017-section-9-prescription-drug-benefits/>.

<sup>7</sup> Rani Habash & John Scalf, "An Inside Look at Monopsony Issues in the FTC's Express Scripts-Medco Merger Investigation," *Antitrust Health Care Chronicle* (Sept. 2012), *available at* [https://www.nera.com/content/dam/nera/publications/archive2/PUB\\_AT\\_HC\\_Chronicle\\_0912.pdf](https://www.nera.com/content/dam/nera/publications/archive2/PUB_AT_HC_Chronicle_0912.pdf).

average of 35 times a year.<sup>8</sup> Any monopsony power analysis that lacks careful examination of the impact on small sellers (who in this case are also competitors in the market), such as community pharmacies, is incomplete.<sup>9</sup> In addition to forcing pharmacies into unfavorable contracts, PBM monopsony power and conflicts of interest lead to patient steering and limit patients' ability to choose their preferred pharmacy.

### **PBM Market Power and Conflicts of Interest**

PBM's inherent conflicts of interest in the healthcare marketplace warrant further scrutiny. Each of the largest PBMs own mail order pharmacies and specialty pharmacies. PBMs also contract with other retail pharmacies to form pharmacy networks that are direct competitors to the PBM-owned pharmacies. PBMs regularly design plans, including plans with preferred networks, that require or incentivize patients to use the PBM-owned pharmacy option over a retail pharmacy. Moreover, when a PBM contracts with a retail pharmacy, PBMs have wide latitude in setting requirements for a pharmacy to be included in a network: the PBM determines how much the pharmacy will be reimbursed, which drugs will be covered, the day supply that the pharmacy can dispense, the patient co-pay, and many other factors. PBMs also routinely audit retail pharmacies and through this process have access to purchasing records and invoices.

When PBMs own mail order or specialty pharmacies, PBMs utilize such road blocks to steer patients to their proprietary pharmacies. Specifically, in the specialty pharmacy space,<sup>10</sup> PBMs arbitrarily define high-cost drugs as "specialty drugs" and encourage or require that beneficiaries fill these prescriptions at PBM-owned or affiliated specialty pharmacies. Forcing patients, particularly those on specialty drugs for complex conditions, to get their prescriptions from a pharmacy with which it has no personal relationship severely limits patients' choice and may impact the quality of care and adherence.

In addition, it is a common misconception that steering patients into mail order will lower drug costs for consumers. Evidence demonstrates that mail order pharmacies consistently dispense costlier brand-name drugs and fewer generics than retail pharmacies.<sup>11</sup> Because PBMs often use mail to hinder patient choice and access, and steer patients towards costlier drugs, we urge the FTC to closely examine PBM-owned mail order and specialty pharmacies.

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<sup>8</sup> "Community Pharmacy Enhanced Services Network: A Different Kind of Pharmacy for Patients Who Need a Higher Level of Care," available at <https://www.communitycarenc.org/sites/default/files/2018-04/CPESN.pdf>; Warren S. Grimes, "Buyer Power and Retail Gatekeeper Power: Protecting Competition and the Atomistic Seller," 72 Antitrust L. J. 563, 570 (2005), available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1754748](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1754748) [hereinafter "Grimes, "Buyer Power""].

<sup>9</sup> Grimes, "Buyer Power."

<sup>10</sup> Note that currently there is no industry-wide definition of specialty drug, and increasingly PBMs are simply moving the most expensive drugs – often with the highest profit margins – into their own specialty tiers.

<sup>11</sup> A Comparison of the Costs of Dispensing Prescriptions through Retail and Mail Order Pharmacies, available at [http://www.ncpanet.org/pdf/leg/feb13/comparison\\_costs\\_dispensing\\_prescriptions\\_retail\\_mail\\_order.pdf](http://www.ncpanet.org/pdf/leg/feb13/comparison_costs_dispensing_prescriptions_retail_mail_order.pdf).

## **PBM Issue One-Sided, Non-Negotiable Contracts**

PBM contracts with pharmacies are often one-sided and non-negotiable. Most often, community pharmacists are forced to sign these take-it-or-leave-it contracts from PBMs with unilateral provisions and offensive language. If the pharmacy “chooses” not to sign, the pharmacy will not be able to fill prescriptions for that plan sponsor’s patients, thus potentially losing a significant percentage of its business. These contracts contain multiple provisions that include overly broad confidentiality requirements and non-disparagement clauses, which are sometimes embedded in lengthy provider manuals. PBMs update their provider manuals at their discretion and hold pharmacies responsible for staying abreast of these updates but claim essentially no obligation to notify the pharmacy of such updates. For example, a PBM included the following language in their contract:

**Unilateral:** It shall be the Provider’s responsibility to check for any updates to the Provider Manual to ensure that Provider has the most recent version of such Provider Manual; . . . The Provider Manual may be revised from time to time by XXX in its sole discretion.

PBMs place strict requirements on pharmacies to follow the contract terms but relieve themselves of any responsibility to ensure the provisions are fair. In addition, PBMs include vague confidentiality language that prohibits pharmacists from discussing drug costs, services, business practices or “other information” (undefined) contained in the contract or Provider Manuals. Some PBMs have even included provisions that pharmacists interpret as prohibiting communication with news media, policy makers and elected officials. For example, some of the largest PBMs have included the following provisions in their contracts and Provider Manuals:

**Confidentiality:** Any information or data obtained from, or provided by, XXX or any Benefit Sponsor to the Participating Pharmacy is confidential. This includes, but is not limited to, products, programs, services, business practices, procedures, MAC lists or other information acquired from the contents of the Pharmacy Participation Agreement, Provider Manual and related Exhibits or other XXX documents.

**Contacting Sponsors or Media:** Provider hereby agrees (and shall cause its affiliates, employees, independent contractors, shareholders, members, officers, directors and agents to agree) that it shall not engage in any conduct or communications, including, but not limited to, contacting any media or any Sponsor and/or Sponsor’s Members or other party without the prior consent of [PBM].

These overly-broad provisions effectively prohibit all sorts of pharmacist communications with patients and others for fear of retaliation by the PBM. Violation of any of these provisions or others may lead the PBM to terminate the contract with the pharmacy and remove the pharmacy from the PBM’s networks. This results in the inability of the pharmacy to continue to service a substantial portion of its customers, potentially causing access problems for patients and subjecting the pharmacy to retaliation in the form of abusive audits. Therefore, NCPA asks

the FTC to evaluate PBMs' one-sided negotiation and contracting strategies due to the nature of their all-or-nothing offers.

### **Lack of Transparency**

PBMs routinely manipulate the system to increase their own profits at the expense of consumers, employers, and government programs. PBMs have a unique vantage point in the middle of the supply chain to have access to critical claims and financial data through their contracts with manufacturers and pharmacies and their multitude of other revenue streams. PBMs negotiate rebates with pharmaceutical manufacturers and determine which drugs are included on formularies, ultimately determining what drugs patients will have access to and at what cost. They also contract with employers to manage their prescription drug benefit, and in doing so, heavily influence prescription drug benefit designs.

PBMs typically enter into contracts in which they will assume no fiduciary duty to plan sponsors. As a result, the PBM has no affirmative obligation to disclose that certain plan benefit designs may financially enrich the PBM or that the PBM may be profiting from the sale of claims data derived from that plan sponsor. Ultimately, this enables PBMs to operate without transparency that would enable plan sponsors and beneficiaries to determine PBM cost-effectiveness.

PBMs have consistently and expressly indicated that they have no responsibility to manage costs. Earlier this year, the city of Rockford, Illinois sued Express Scripts, expressing concerns over expensive prescription drugs financially crippling the whole city. In its motion to dismiss, Express Scripts denied any wrongdoing and argued that it is not "contractually obligated to contain costs."<sup>12</sup> Further, in *John Doe et al. v. Express Scripts, Inc. and Anthem, Inc.*, Express Scripts and Anthem argued that they were not fiduciaries when negotiating and setting drug prices.<sup>13</sup> A fiduciary duty would force PBMs to consider plans' financial interests, and therefore obligate PBMs to help contain costs in the drug supply chain.

Further, the PBM rarely reimburses the pharmacy the same amount it charges the plan for a particular drug. Typically, the PBM "marks up" the cost of the drug, charging the plan more than the pharmacy is reimbursed, and keeps the difference as profit. It is precisely these hidden spread amounts that need to be disclosed to plan sponsors and consumers. Because PBMs often have significant market power vis-à-vis large plan sponsors, they are able to leverage their customers to accept that they will not assume any fiduciary obligations. A fiduciary duty would force PBMs to put plans' financial interests before their own. With increased transparency, plan sponsors would have greater ability to negotiate more competitive

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<sup>12</sup> 60 Minutes, *The Problem with Prescription Drug Prices* (May 6, 2018), available at <https://www.cbsnews.com/news/the-problem-with-prescription-drug-prices/>.

<sup>13</sup> Brief of Amici Curiae for Pharmaceutical Care Management Association, America's Health Insurance Plans, and the Chamber of Commerce of the USA, *John Doe et al. v. Express Scripts, Inc. and Anthem, Inc.*, Case 18-346 (Jun. 2018).

contracts. This would effectively shed light on opaque PBM practices that are aggressively increasing senior and taxpayer costs in this highly concentrated market.

**Conclusion**

NCPA greatly appreciates the opportunity to share with you our comments and suggestions on the FTC's 21st Century Hearings, Constitution Center September 21st Hearings Session (Docket ID: FTC-2018-0076).

Sincerely,



Ronna B. Hauser, PharmD  
Vice President, Pharmacy Policy & Regulatory Affairs  
National Community Pharmacists Association