



April 29, 2021

The Honorable David N. Cicilline
Chairman
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

The Honorable Ken Buck
Ranking Member
Subcommittee on Antitrust,
Commercial and Administrative Law
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Cicilline and Ranking Member Buck:

Consumer Reports is pleased that the Subcommittee is continuing its bipartisan efforts to examine and address competition problems in our economy.

Throughout our 80+ year history, Consumer Reports has emphasized the fundamental importance of competition for ensuring a marketplace that works for consumers, by empowering them with the leverage of choice, the ability to go elsewhere for a better deal, which means businesses have to be responsive to consumers' interests. This is no less true in the health care sector. It is critical in the lives of Americans, and it needs to function effectively to provide high quality products and services at affordable prices.

In recent decades, the health care sector has experienced significant consolidation, in hospitals, medical practices, health insurance, and prescription drugs. There has been vertical integration between hospitals and medical practices, and between health insurers, pharmacies, and clinics. We raised concerns in this Subcommittee regarding the potential for the 2018 merger of CVS and Aetna to restrict consumer choices.¹

This Subcommittee's bipartisan leadership in promoting competition in the health care marketplace has made a tremendous difference.

Last year, your efforts achieved a signal success – eliminating the antitrust exemption the health insurance industry had obtained in the McCarran-Ferguson Act of 1945, and had been using since then to shield itself from the forces of competition under the antitrust laws. We had been advocating for this pro-consumer change for decades,² and were pleased to see it finally achieved.

¹ <https://advocacy.consumerreports.org/wp-content/uploads/2018/02/CU-House-Judiciary-testimony-CVS-Aetna-2-27-18-FINAL.pdf>.

² https://advocacy.consumerreports.org/press_release/congress-acts-to-restore-competition-to-health-insurance-by-removing-75-year-old-antitrust-exemption/.

The year before, your efforts led to enactment of the CREATES Act, removing two anti-competitive roadblocks imposed by brand name drug manufacturers against competition by more affordable generic alternatives. They were blocking access to samples that generics need for testing, and were blocking participation by generics in FDA-required protocols for safe distribution and use. Both these tactics took unfair advantage of FDA requirements designed to ensure that medications are safe and effective – exploiting a legitimate FDA safeguard to block competition.

The CREATES Act was one of a number of bills the Subcommittee advanced in the last Congress to stop harmful anticompetitive practices by brand-name drug makers that are costing consumers billions of dollars, by delaying or blocking generic entry into the marketplace, so that the brand-name drug maker can unjustly prolong its monopoly profits. We understand three bills that were approved by the Judiciary Committee with strong bipartisan support have been reintroduced:

- H.R. 2883, the “Stop Stalling Access to Affordable Medications Act.” This bill would prohibit the abusive use of so-called “citizen petitions” by brand-name drug makers to raise spurious concerns that stall progress on developing generic alternatives. This petition process was established to provide citizens to have an opportunity to bring concerns to the FDA’s attention in a timely fashion. But the procedure has been commandeered by brand-name drug makers to raise dubious concerns, often numerous times, that require the FDA to suspend while it investigates and responds. One brand-name drug company reportedly filed 43 such petitions against a single generic applicant.³
- H.R. 2891, the “Preserve Access to Affordable Generics and Biosimilars Act.” This bill would prohibit anti-competitive “pay for delay” schemes, in which brand-name prescription drug makers effectively pay off manufacturers of more affordable generic and biosimilar alternatives to stay out of the way – perversely gaming a system designed to *promote* expedited entry of generics and biosimilars. After a sustained decade-long effort, the Federal Trade Commission obtained a Supreme Court ruling that pay-for-delay deals are subject to the antitrust laws and can be found unlawful.⁴ But drug makers have continued to resist that ruling, and to look for ways to evade it. Having to bring a new full-fledged antitrust challenge each time is costly and time-consuming.
- H.R. 2873, the “Affordable Prescriptions for Patients Through Promoting Competition Act.” This bill would strengthen and clarify the authority of the Federal Trade Commission to stop the anticompetitive use of “product hopping.” Product hopping is the practice of making a minor, inconsequential change in a drug in order to artificially prolong the brand-name drug maker’s patent-protected monopoly profits, while at the same time discontinuing the just-as-effective version that generics are on the verge of replicating at a lower price.

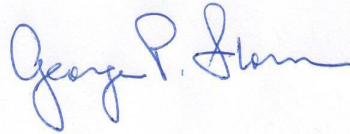
³ <https://www.ftc.gov/news-events/press-releases/2017/02/ftc-charges-shire-viropharma-inc-abused-government-processes>.

⁴ *FTC v Actavis, Inc.*, 570 U.S. 136 (2013).

Consumer Reports has long supported and informed consumers about constructive efforts to bring down the high prices consumers pay for prescription drugs – in our advocacy work, as well as in our journalism. See our August 2016 article, “Is There a Cure for High Drug Prices?”⁵; our April 2018 article, “How to Pay Less for Your Meds”⁶; and our November 2019 article, “The Shocking Rise of Prescription Drug Prices.”⁷ These articles, reporting on the results of nationally representative telephone surveys we conducted, confirmed that escalating prescription drug costs have forced many consumers to choose between cutting back on needed medications or on other basic necessities.

These three bills would all significantly advance efforts to improve competition in the development and sale of medications, so that consumers who need them will be able to obtain them and afford them. We are very encouraged that all three bills have carried strong bipartisan support.

Sincerely,



George P. Slover
Senior Policy Counsel
Consumer Reports

cc: Members, Subcommittee on Antitrust, Commercial, and Administrative Law

⁵ <https://www.consumerreports.org/drugs/cure-for-high-drug-prices>.

⁶ <https://www.consumerreports.org/drug-prices/how-to-pay-less-for-your-meds>.

⁷ <https://www.consumerreports.org/drug-prices/the-shocking-rise-of-prescription-drug-prices/>.