



May 3, 2022

Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

Re: Public Comment on Impact of Pharmacy Benefit Managers' Practices; FTC-2022-0015

On behalf of the U.S. Chamber of Commerce (“the Chamber”), we are pleased to submit these comments to the Federal Trade Commission (“FTC”) in response to its Solicitation for Public Comments on the Impact of Pharmacy Benefit Managers (“PBMs”). We wish to express three major points in these comments:

- *First*, the FTC should analyze PBMs in an objective and empirical manner consistent with past reviews. It is critical that the FTC always conduct evaluations without bias and simply assess and follow the facts to draw conclusions from any analysis. During the past two decades, and under the leadership of both Republican and Democratic Chairs, the FTC has repeatedly examined PBMs and found that they can enhance consumer welfare.
- *Second*, and relatedly, the Chamber has serious concerns that the FTC’s current Solicitation is structured to elicit biased information about PBM business practices, their impact on patients, physicians, employers, and independent and chain pharmacies. Almost every single question appears to presuppose negative intent and actions. The Chamber strongly encourages the FTC to evaluate all facets of PBMs, including their benefits to consumers, plan sponsors, and other entities in the health care ecosystem.
- *Third*, the FTC should ensure that it conducts a comprehensive evaluation before proposing new regulations of PBMs. During the past two decades, the FTC has repeatedly and rightly warned other policymakers against regulating PBMs in ways that, while perhaps well-intended, likely would harm competition and lead to higher prices for consumers. The FTC’s current inquiry should lead to a public report that then could form the basis for a policy discussion and recommendations, rather than to direct regulatory action.

DISCUSSION

I. The FTC Should Analyze PBMs in an Objective Manner Consistent with Past Reviews, Which Found that PBMs Can Enhance Consumer Welfare

In a 2005 report entitled “Pharmacy Benefit Managers: Ownership of Mail-Order Pharmacies,”¹ the FTC found that vertically integrated PBMs can lower prices for consumers. Specifically, the FTC’s report concluded that, “in 2002 and 2003, prescription drug plan sponsors generally paid lower prices for drugs purchased through PBM-owned mail-order pharmacies than for drugs purchased through mail-order or retail pharmacies not owned by PBMs.” The FTC’s report explained that PBMs can secure more favorable pharmaceutical pricing for dispensing drugs via mail.

A decade later, the FTC affirmed its general conclusion that PBMs can enhance consumer welfare.² Citing two completed investigations into PBMs, the FTC observed that, “Many of the economic principles and market characteristics that the FTC’s 2005 study identified as important determinants of competition continued to be significant in 2012.”

As part of its current inquiry, the FTC should examine PBMs objectively and empirically.³ As in any review of any industry, the FTC should not rely solely on anecdotes, suppositions, or complaints from other entities in the supply chain. The FTC should approach any evaluation without presupposition or bias.

II. The FTC’s Current Request for Information Appears Biased Against PBMs

In contrast to its past work in the area, the FTC’s current inquiry gives the appearance of bias against PBMs. The FTC has issued a “Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on *Independent Pharmacies* and Consumers [emphasis added].”⁴ We have concerns that the FTC is narrowly focused on the impact of PBMs on other pharmacies. As Commissioner Wilson pointed out, “stakeholders frequently seek to coopt the government in their battles against rivals ... It is not the role of the FTC to pick winners and losers. [The FTC’s] mission is to protect consumers and competition, not

¹ Report, at <https://www.ftc.gov/news-events/news/press-releases/2005/09/ftc-issues-report-pbm-ownership-mail-order-pharmacies>.

² FTC Report, at https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-erisa-advisory-council-u.s.department-labor-regarding-pharmacy-benefit-manager-compensation-fee-disclosure/140819erisaadvisory.pdf.

³ See e.g., HHS OIG Study of Part D Reimbursement, at <https://oig.hhs.gov/oei/reports/oei-03-19-00010.pdf>.

⁴ FTC Solicitation, at https://www.ftc.gov/system/files/ftc_gov/pdf/Solicitation%20for%20Public%20Comments%20on%20the%20Business%20Practices%20of%20Pharmacy%20Benefit%20Managers.pdf (emphasis added).

competitors.”⁵ We strongly believe that the FTC should strictly adhere to its mandate, focus on competition and avoid picking sides in the marketplace.

Indeed, almost every single question in the Solicitation presupposes harmful conduct by PBMs. Question 2 suggests that PBMs may endanger patient health; Question 3 that PBMs force patients to substitute drugs; Questions 4, 5, 6, and 8 that they engage in anticompetitive tactics; and Question 7 that they inflate prices. None of the questions put forward in the RFI solicit information about the benefits that PBMs may offer consumers, plan sponsors, or other entities in the health care ecosystem. According to a public report,⁶ the FTC’s chief economist resigned in protest over the FTC’s inquiry into PBMs. The FTC’s slanted Solicitation suggests that she may have had valid reasons to do so. As such, we strongly encourage the FTC to include the potential benefits of PBM services in its analysis. Other focus areas could include the impact on consumers of anti-tiering, anti-steering, anti-specialty, and anti-mail order laws.

III. The FTC Should Issue a Public Report Regarding PBMs Rather than Initiate New Rulemaking

While it is unclear where this Solicitation is ultimately headed, the Chamber reminds the FTC that the agency has repeatedly cautioned against regulatory approaches that offer superficial appeal but that ultimately would harm consumers. For example, almost two decades ago, the FTC cautioned against proposals in California designed to have the effect of “increasing cost transparency in transactions between PBMs and their health plan clients, providing more information to consumers and prescribers with respect to certain drug substitutions, and ensuring that realized cost savings are passed on to consumers” -- as the FTC explained, these proposals, if implemented, would have limited competition, increased costs, raised health insurance premiums, and reduced the availability of coverage.⁷

Similarly, the FTC explained that so-called “freedom of choice” and “any willing provider” proposals in Rhode Island, if enacted, “would likely have the unintended consequences of limiting competition, undermining freedom of choice, and increasing

⁵ Comm’r Wilson remarks, at https://www.ftc.gov/system/files/ftc_gov/pdf/oral-remarks-wilson-open-meeting-february.pdf.

⁶ Politico story, at <https://www.politico.com/news/2022/02/25/ftcs-top-economist-resigned-amid-dispute-over-pharma-study-00011878>. ⁷ FTC letter, at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf.

⁷ FTC letter, at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-comment-hon.greg-aghazarian-concerning-ca.b.1960-requiring-pharmacy-benefit-managers-make-disclosures-purchasers-and-prospective-purchasers/v040027.pdf.

the costs of pharmaceutical services.”⁸ Accordingly, before the FTC proposes any new regulations of PBMs, it should release a public report, solicit feedback, and carefully consult the economic literature. Given the complexity of health care markets, any hasty or haphazard effort to regulate PBMs likely would have the unintended consequences of limiting competition, harming consumers, and raising prices.

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The Chamber strongly supports antitrust law and enforcement. Where antitrust concerns arise, they should be handled without politicization, by the federal antitrust agencies on a case-by-case basis, governed by the consumer welfare standard, and evaluated under the rule of reason. The FTC’s chief concern must be the protection of consumers and the competitive process, rather than particular entities in the supply chain. As you weigh the comments you receive, the Chamber asks that you be mindful of the limited role regulation should play in managing competition.

Thank you for your attention to these comments.

Sincerely,



Neil L. Bradley
Executive Vice President, Chief Policy Officer
and Head of Strategic Advocacy
U.S. Chamber of Commerce

⁸ FTC letter, at https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-hon.patrick-c.lynch-and-hon.juan-m.pichardo-concerning-competitive-effects-ri-general-assembly-bills-containing-pharmaceutical-freedom/ribills.pdf.