Lina Khan
Chair
Federal Trade Commission
600 Pennsylvania Avenue, NW
Washington, DC 20580

April 8, 2022

RE: Solicitation for Public Comments on the Business Practices of Pharmacy Benefit Managers and Their Impact on Independent Pharmacies and Consumers

Dear Chair Khan,

Northeast Pharmacy Service Corporation (NPSC) is a pharmacy service administrative organization (PSAO) that provides services to independent community pharmacies in New England with group purchasing opportunities, third party consultation, advocacy, regulatory affairs along with education and training on new business development.

On behalf of NPSC and its participating pharmacies, we would like to thank you for the opportunity for us to address the FTC on what we have seen over the years where pharmacy benefit managers (PBMs) are concerned. PBMs have greatly and willfully harmed the healthcare marketplace, our participating pharmacies and countless New England patients with little to no repercussions. Unfortunately, PBMs have become more focused on making money instead of focusing on patient care. While we understand that we are in a capital marketplace, there are risks to where PBMs become monopolies. We have reached that point. This needs to end now as independent community pharmacy is in dire straits which is threatening patient care and access.

We feel it is important to highlight the services that a pharmacy provides its community for your educational purposes as well as to demonstrate why we need independent pharmacies.

- Serve economically disadvantaged neighborhoods
- Provide home delivery for emergency and same day needs
- Provide compounded medications by credentialed providers
- Provide vaccinations at home, work and elsewhere when needed
- Host Narcan clinics to fight substance abuse disorders like the opioid crisis
- Provide disease management services
- Provide medication synchronization services
- Help patients access medication either through using patient assistance programs or provide patients with in-store store credit accounts to help ensure adherence and lower healthcare costs
- Provide specialized medication packaging to meet patient and caregiver needs

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One timely real-world example of what is happening to pharmacy

A real-world example of what we are about to portray in this letter is happening now with the Express Scripts contract. Express Scripts (ESI) is a PBM based in St. Louis, MO. There is a current Medicare Part D contract offering to network pharmacies for 2023. The Centers for Medicare and Medicaid Services (CMS) has a proposed rule for comment on Direct and Indirect Remuneration (DIR) fees. The proposed rule can be found here. We will discuss DIR and its impact on pharmacy later in this letter as CMS is investigating DIR abuses in this proposed rule. However, ESI's new contract for Medicare Part D 2023 for pharmacies seeks to move into a post-DIR world since scrutiny around the PBMs usage of DIR has increased. While welcomed, this latest attempt by ESI should not be applauded.

Unfortunately, through this new contract, ESI has decided to play a game of Three-card Monte with the regulators and the industry. Reimbursement manipulation is always the name of the game with PBMs, especially when it comes to DIR fees. After being sporadically forced in some states to place all transaction costs at the point of sale instead of clawing back confusing fees from the pharmacy months after the pharmacy dispenses a drug, ESI has managed to give the illusion that they have eliminated pharmacy profiteering by dropping DIR fees from the new contract. Instead, they are forcing pharmacies to accept reimbursement below cost, have stripped the little financial incentives to the pharmacies that existed under DIR and making the least reimbursement that a pharmacy can receive, to now be the maximum reimbursement a pharmacy can receive. Essentially, it is our interpretation that ESI is saying "you are in this network unless you opt out and you are guaranteed to be reimbursed below cost for every transaction". There is no way for the pharmacies who participate in that network to escape going financially in the red! This will inevitably force pharmacies out of business.

Many who are unfamiliar with this industry advise pharmacies to simply not sign these contracts. This answer is not as black and white as one may think. Since the 1990s, PBMs have been slowly gaining monopolistic control of the market by doing the following:

- They own mail order pharmacies that compete with retail pharmacies setting up conflict of interest issues
- Created certain lists called preferred drug lists and determine which drugs get on these lists
- Force manufacturers to give PBMs rebates for network access
- Pocketing the difference of the rebate monies they negotiated with the manufacturer instead of passing those savings to the patients they serve.
- Giving patients cost savings was the goal behind the creation of Medicare Part D. This is called spread pricing.
- PBMs control which pharmacies are in the networks that PBMs create
- PBMs determine the reimbursement for their own pharmacies and give lower reimbursement to their pharmacy competitors
- All of this is done with no federal oversight while enjoying the market dominant position that any grievances or disputes must come back to the PBM to adjudicate.

Thus, since a small handful of PBMs control all the networks and market power to set and determine pharmacy contract terms, a pharmacy has no choice but to sign these contracts to keep what little business they have. Each year the reimbursement goes lower for pharmacies, with the PBM's goal to eventually absorb all patients due to a sustained downward trend in independent pharmacies that are able to operate.

This has all occurred because PBMs have evolved so fast that they have made the current applicable antitrust regulations antiquated. We need a modernized set of these laws.

Below are a few outlined issues that NPSC has fought for on both the state and federal levels, however; these principles have lacked regulatory oversight from the FTC in order to make them enforceable.

The Problems with PBMs

PBMs are using DIR fees to harm pharmacies: According to the National Association of Chain Drug Stores, "DIR fees are the result of a loophole in Medicare regulations. Often more than half a year after a pharmacy fills a Medicare prescription, payers are taking back money paid to pharmacies. Payers are claiming they are taking back money due to a pharmacy's performance on so-called quality measures. However, these quality measures can be unknown, unpredictable, inconsistent, and outside of a pharmacy's control. The federal Centers for Medicare & Medicaid Services says that the use of DIR fees has exploded by 107,400 percent between 2010 and 2020 – a dramatic increase from the 45,000 percent growth that CMS reported between 2010 and 2017. Inmar produced a white paper that describes DIR fees."[1]

Since states have been slowly enacting PBM sunshine laws on certain PBM practices, PBMs have been able to abusively use DIR fees as a tool to get pharmacies to pay them for being allowed to be a member of the PBM's pharmacy network (pay to play).

PBMs have been reimbursing pharmacies below cost for years: While generic utilization is encouraged to bring down healthcare costs, PBMs have taken advantage of the patchwork of state laws regulating Maximum Allowable Cost (MAC). A "maximum allowable cost" or MAC list refers to a payer or PBM-generated list of products indicating the maximum amount that a plan will pay for generic drugs and brand name drugs that have generic versions available ("multi-source brands"). Originally created by CMS (formerly HCFA) this was a way to simplify reimbursements. Unfortunately, it has been co-opted by the PBMs and turned into a proprietary product where PBMs arbitrarily set the prices for multisource generic products. Thus, MAC lists are not uniform internally within a PBM nor between PBMs, as each PBM has the ability to select products for their MAC lists and set their own pricing. There is no industry standardization regarding criteria for drug inclusion on MAC lists, methodology used to determine maximum price, or methods for updating and changing list information.

[1] National Association of Chain Drug Stores (NACDS) DIR Fee Relief: Reducing Costs, improving Health https://www.nacds.org/dir-fees/

PBMs have taken advantage of no uniform state or federal licensure requirements: PBMs have morphed into being an integral part of the healthcare system due to lack of oversight and have been allowed to create and maintain cost inefficiencies to the system. What is surprising to NPSC and our participating network of pharmacies is that there are barely any state licensure procedures. At the federal level there are none since there is no federal agency that oversees PBMs. Thus, PBMs have been allowed to have free reign at being anti-competitive, while supply chain partners like pharmacies and plan sponsors are not able to adequately address any grievances when it comes to network discrimination or ensuring adequate reimbursement.

PBMs have no oversight: Pharmacies have no recourse to combat PBM predatory pricing practices. What we find amazing is that every corner of the healthcare system is highly regulated, especially when it comes to federal funds being exchanged between parties. Why are insurers regulated but PBMs are not? It gets even more complicated when insurers are allowed to purchase PBMs; have the PBMs continue to function independently while allowing some insurance plans to claim no knowledge about how market stakeholders are negatively impacted by these aggressive PBM practices.

PBMs provide a perfect example of why the FTC and DOJ need to investigate mergers: According to a January 18 FTC release seen here, *"the Federal Trade Commission (FTC) and the Justice Department's Antitrust Division launched a joint public inquiry aimed at strengthening enforcement against illegal mergers. Recent evidence indicates that many industries across the economy are becoming more concentrated and less competitive – imperiling choice and economic gains for consumers, workers, entrepreneurs, and small businesses. These problems are likely to persist or worsen due to an ongoing merger surge that has more than doubled merger filings from 2020 to 2021. To address mounting concerns, the agencies are soliciting public input on ways to modernize federal merger guidelines to better detect and prevent illegal, anticompetitive deals in today's modern markets."*

There are definitely horizontal and vertical integrations going on where PBMs are concerned that have been overlooked in the past and foreseen in the future. The FTC needs to take an aggressive look at what has been allowed and whether it should have been allowed. Having a dormant FTC in past Administrations has not been good for the market.

PBMs have been allowed to get away with not sharing cost savings with patients: Until recently with some sporadic state oversight, PBMs have been allowed to manipulate patient cost sharing to pad their profits. Under our current system, patients are responsible for some cost sharing via their copays, while the plan sponsor pays the remaining cost of the patient's care. However, PBMs have been implementing a practice known as copay "claw backs" where the cost of the medication is lower than the patient's copay, but the patient's PBM instructs the pharmacy to charge the patient an inflated copay. Later the PBM "claws back" the excess from the pharmacy and pockets the difference.

PBMs have been using pharmacy audits in an abusive manner: Payor audits are usually done by PBMs on the plan's behalf. These are done with an intent to eliminate any fraud, waste and abuse to the system by verifying that there were no improper payments by any stakeholder (plan, PBM,

consumer) as well as to ensure that the proper medications got to the proper patient(s). However, PBMs have focused on whether a pharmacy has dispensed high brand name medications; will essentially accuse a pharmacy of an error; will demand to temporarily be given back the amount of the drug dispensed while an investigation occurs; and then after a certain time will close the case without any wrongdoing found. Audits are to be used when there is wrongdoing, not for fishing expeditions as pharmacy audits use significant pharmacy operational resources. Additionally, some of the PBM auditors are paid based on the number of "discrepancies" found, which creates a conflict of interest.

PBM affiliated pharmacies get preferential treatment over other retail pharmacies

Since PBMs own their own pharmacies and control which pharmacies can get into a PBM controlled network, PBMs favor placing their own pharmacies in an advantageous position. We believe that it is anticompetitive for a PBM owned pharmacy like CVS who also owns Caremark to be able to dictate which competitor pharmacies are allowed into their network while also dictating how much their competitors are reimbursed.

This manifests itself in a few ways. First PBMs that own retail pharmacies steer patients away from retail pharmacy competitors by using mined patient data, while sending the patients confusing letters that insinuate that patients can no longer use the pharmacy of their choice. Additionally, PBMs ensure that their own pharmacies are reimbursed at a higher rate than retail competitors. This practice needs to be investigated and reigned in.

Conclusion

We would like to thank you for the opportunity to address the FTC on how the business practices of pharmacy benefit managers (PBMs) have negatively impacted our participating pharmacies and the patients they serve. These are a few of the major issues with PBMs, and we wanted to give the FTC a window into what we are seeing and advocate strongly to you that balance needs to be restored to the marketplace via FTC oversight. As more independent pharmacies close, the demand for the services will either be unmet or provided at a greater distance which will undoubtedly harm patients.

We would like to offer you the opportunity to reach out to us as a resource, should you wish to gain more information on what is happening in the New England region.

If you have any questions, please do not hesitate to contact us.

Best regards,

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