Pharmacists United for Truth & Transparency
TruthRx.org

September 18, 2023

Office of the Secretary
Federal Trade Commission
400 7th St., SW
Washington, DC 20024

RE: Support for the Federal Trade Commission's Draft Updated Guidelines for Mergers

Chairwoman Khan and Commissioners,

On behalf of Pharmacists United for Truth and Transparency (PUTT), an organization that unites pharmacists and pharmacy stakeholders dedicated to promoting honesty, clarity, and the public's right to transparent healthcare practices, **I write to express our strong support for the Federal Trade Commission's (FTC) recent introduction of new guidelines related to mergers**.

While mergers can sometimes lead to efficiencies and economies of scale, they can also result in anti-competitive behaviors, higher prices, and reduced access for patients. Over the years, our country has witnessed a significant uptick in merger activities within the health insurance and healthcare provider sectors, with enormous, negative, unintended consequences stemming from dominant market concentration among a very few players. Please see "Health Care's Intertwined Colossus", an article that recently ran in *The American Prospect*, for a detailed description of how a nonprofit physician practice and its for-profit management company combined to become the behemoth we now call UnitedHealth Group, included with this letter.

In healthcare, the largest healthcare payers acquiring the largest pharmacy benefit managers (PBMs), have made an elite few managed care organization (MCO) CEOs and C-suite executives very wealthy, while directly affecting the ability of pharmacists to provide quality care, transparent services, and fair prices.

Even with all 50 states having at least one PBM regulation law enacted, PBMs continue to hoard profits, interfere in patient care, and obstruct patient access to treatments and medications prescribed by their providers. Onerous contracts that have been judged unconscionable by state courts have not stopped PBM anti-competitive practices.

Examples of the kinds of PBM anti-competitive practices we are referring to include:

> **PBM-owned pharmacies, self-dealing and patient steering.** The largest PBMs own mail order, retail and specialty pharmacies that compete directly with the pharmacies PBMs contract through Pharmacy Services Administrative Organizations (PSAOs). The most familiar example is

CVS/Caremark, with its 9,700 locations across the U.S. It is estimated that 70 percent of Americans live within a 3-mile radius of a CVS pharmacy[1], but CVS also holds mail order and specialty pharmacies. Express Scripts, arguably larger than CVS/Caremark, owns several mail order and specialty pharmacies. PBMs design benefits plans to direct patients to their own pharmacies (called "self dealing") and offer special pricing incentives to their plan participants to use PBM-owned pharmacies, offering special deals that network pharmacies are specifically prohibited by PBM contract from offering. This type of activity is another anti competitive tactic called "steering".

Non-transparent reimbursement policy, spread pricing and appeals process. PBMs reimburse pharmacies weeks or months after the pharmacy has dispensed the medication, and do not share with pharmacies the rate of reimbursement they can expect for the dispensed drugs. Because PBMs employ a tactic called "spread pricing" - in which they charge the plan sponsor an agreed upon rate while reimbursing the pharmacy for that same drug at a significantly less rate, often below cost - pharmacy owners frequently lose money on the transaction. PBMs do not share this information with plan sponsors or pharmacies, citing "proprietary" or "trade secrets" but the result is small business pharmacies closing by the hundreds each year.[2] And while many states have appeal laws, most PBMs reimburse less than 1 percent of appeals, and often at rates equivalent to pennies on the dollar.[3]

Clawbacks. Clawbacks happen when the cost of a prescription is less than the copay charged to the patient — the insurance company "claws back" the difference, which is then paid back to the insurance company's PBM. For example, a $50 prescription drug copay on a drug that costs $12 to fill would result in a "claw back" of $38 to the PBM, not the patient, who not only paid the copay but also pays a monthly premium for the insurance "discount" in the first place. Pharmacies are prohibited by the PBM "gag clause" from disclosing the true cost (or loss) of prescriptions to patients, but pharmacies are implicated in the crisis of skyrocketing drug costs because of their forced silence.

DIR Fees. Associated with Medicare Part D, DIR stands for "direct and indirect remuneration" and was originally created by the Centers for Medicaid and Medicare (CMS) as a way to track the annual amount of drug manufacturer rebates and other price adjustments applied to prescription drug plans impacting the total cost of Medicare Part D medications.[4] It was presumed the savings from rebates received by the PBM would be returned to CMS. DIR fees now can mean the price a pharmacy pays to participate in a PBM/plan's network; the contracted rate the PBM reimburses the pharmacy for a medication, or the reimbursement or fee to a pharmacy for meeting or failing

[1] Q&A: How would $69B Aetna bid for CVS change your healthcare? The Associated Press. December 4, 2017 at 12:25 pm http://www.whittierdailynews.com/2017/12/04/qa-69b-aetna-bid-pushes-cvs-deeper-into-consumers-lives/
[2] Source: National Community Pharmacists Association. 1,752 independent pharmacies closed between 2005-2014
[3] Interview with PBM Executive, M. Whitney. November 2017
[4] The Dirt on DIR Fees. Blair Thielemier, PharmD. Pharmacy Times, July 25, 2016. www.pharmacytimes.com/contributor/blair-thielemier-pharmd/2016/07/the-dirt-on-dir-fees

to meet certain quality measures. DIR fees do the most damage to small, independent pharmacies, who used to experience this type of clawback long after prescriptions have been filled and will soon have to accommodate not just lagging DIR clawbacks, but those to be collected upfront at the point of sale.

Pocketing manufacturer rebates. Manufacturer rebates are supposed to help defray the rising costs of prescription drugs but evidence suggests not only do rebates contribute to rising prices, but it remains unclear if rebates are finding their way back to health plan sponsors or patients. Rebates are actually incentives provided to the PBM in return for formulary placement. It is estimated nearly 3 million Americans generate the highest number of rebates - some $50 billion from the purchase of medications to treat the most serious of illnesses (cancer, multiple sclerosis, HIV and autoimmune diseases) but no one is clear where, exactly, the rebates are going, except to the PBMs.[5] Rebates are relabeled as "administrative fees", "grants" or "discounts", allowing PBMs by contract to reimburse themselves for the prices they purport to negotiate on behalf of the client.[6]

These are just a few of the practices PBMs engage in that make it difficult, if not impossible, for America's independent and community pharmacies to compete. Because PBMs can set up their own pharmacy distribution networks and keep their practices opaque and above question, they can threaten, bully, intimidate, dismiss and push around the patient, the insurance payer, the manufacturer and the pharmacy - while simultaneously profiting off of each. **This is why PBMs are multi-billion dollar profit centers for their MCO parents and affiliates.**

By considering broader factors and conducting a more in-depth examination of potential anti-competitive effects, the FTC is equipping itself with a more comprehensive toolkit to evaluate mergers. This is crucial for ensuring that such mergers genuinely benefit consumers, rather than merely advancing corporate interests at the expense of public health and wellbeing.

By strengthening the scrutiny on mergers and acquisitions, the FTC is not only safeguarding competition but also supporting the core values of transparency, honesty, and patient-centered care that PUTT and its members hold dear. We trust that with these guidelines in place, the balance will shift towards a landscape where innovation thrives, and where patients and healthcare providers can expect fairness and transparency.

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[5] Reduce drug prices by eliminating PBM rebates. By Robert Goldberg, Opinion Contributor, The Hill. 02/14/17 01:35 PM EST 9 http://thehill.com/blogs/congress-blog/healthcare/319479-reduce-drug-prices-by-eliminating-pbm-rebates

[6] Don't Get Trapped By PBMs' Rebate Labeling Games. Linda Cahn. Managed Care Magazine, January 2009 https://www.managedcaremag.com/archives/2009/1/don-t-get-trapped-pbms-rebate-labeling-games

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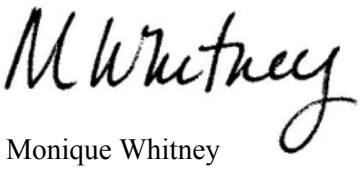
We thank the Federal Trade Commission for its commitment to a more competitive and transparent healthcare marketplace and are grateful for the much-needed attention the FTC is putting toward corporate concentration in the healthcare sector.

PUTT stands ready to assist the Commission in any way possible, providing insights from our unique perspective as frontline healthcare providers. We look forward to continued collaboration and dialogue.

Thank you for your dedication to ensuring a competitive and transparent marketplace for all.

In advocacy,



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