

Federal Trade Commission Statement Concerning Reliance on Prior PBM-Related Advocacy Statements and Reports That No Longer Reflect Current Market Realities

The Federal Trade Commission (“FTC” or “Commission”) cautions against reliance on certain of its prior advocacy statements and reports relating to the pharmacy benefit manager (“PBM”) market. The Commission is currently engaged in a major study of the PBM industry, undertaken in large part due to the Commission’s recognition that substantial changes have taken place over the last two decades.¹ This study will enable the Commission to consider the extent to which prior conclusions about the PBM industry remain valid. Accordingly, until it is completed, reliance on the Commission’s conclusions in certain prior statements and reports may be misplaced. with increased vertical integration and horizontal concentration; the growth

¹ See Press Release, Fed. Trade Comm’n, FTC Launches Inquiry Into Prescription Drug Middlemen Industry (June 7, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/06/ftc-launches-inquiry-prescription-drug-middlemen-industry>.

² One Commissioner notably dissented from these policy positions on the basis of changing PBM market dynamics driven by consolidation. See Letter from Comm’r Julie Brill to Larry Good, Executive Secretary ERISA Advisory Council, U.S. Dep’t of Labor (Aug. 19, 2014), <https://www.ftc.gov/system/files/documents/public-statements/579031/140819erisaletter.pdf> (dissenting due to concerns that staff’s conclusions were based on outdated information). See also Dissenting Statement of Comm’r Julie Brill Concerning the Proposed Acquisition of Medco Health Solutions Inc. by Express Scripts, Inc., FTC File No. 110-

undermine patients, pharmacies, and fair competition. The study⁸ culmination of the FTC's long-standing and bipartisan interest in promoting competition in pharmaceutical markets concerns about how PBMs may be using market power to undermine competition from independent pharmacies⁹ and its concerns about the role of PBMs in determining the prices consumers pay for prescription drugs, including the impact of PBM rebates¹⁰ and rebates¹¹

Despite these changes in market realities, advocates continue to cite prior Commission work in opposition to efforts by lawmakers, enforcers, and regulators to make PBM

⁸ See Press Release Fed. Trade Comm'n, FTC and Justice Department to Hold Day-Long Virtual Public Workshop Examining Antitrust Enforcement in the Pharmaceutical Industry (May 31, 2022), <https://www.ftc.gov/news-events/news/press-releases/2022/05/ftc-justice-department-hold-two-day>

transparency requirements.¹² We believe this reliance is misplaced in light of significant changes in market conditions. Pharmaceutical markets have evolved, and the Commission is concerned that these older statements, studies, and reports may no longer reflect current market realities.

Accordingly, the FTC warns against relying on the following nine Commission advocacy letters advocating against proposals to increase regulatory oversight and transparency of PBMs:

- x April 8, 2004 letter to Rhode Island Attorney General Patrick C. Lynch and Rhode Island State Senator Juan M. Pichardo regarding Rhode Island General Assembly Bills e 2004-H 7042, 2004-H 7047, 2004-H 7129, 2004-H 7131, 2004-H 7417, 2004-S 2015, and 2004-S 2140;
- x September 7, 2004 letter to California Assembly Member Greg Aghazarian regarding California Assembly Bill No. 1960;
- x March 8, 2005 letter to North Dakota State Senator Richard L. Brown regarding North Dakota House Bill 1332.¹⁵

¹² See Complaint and Prayer for Declaratory and Injunctive Relief at Pharmaceutical Care Management Association v. HHS et al (Jan. 11, 2021) (citing Sept. 7, 2004 Letter from FTC Staff to Greg Aghazarian, California State Assembly Member, California State Assen (Sept. 7, 2004) <https://www.ftc.gov/sites/default/files/documents/advocacydocuments/ftccommenthon.gregaghasharianconcerningca.b.1960requiringpharmacybenefitmanagersmake disclosures purchasers and prospective purchasers/v040027.pdf>); Pharmaceutical Care Management Association Public Comment in Response to FTC Solicitation for Public Comments on the Business Practices of PBMs (May 25, 2022) <https://www.pcmnet.org/wp-content/uploads/2022/05/PCA-FTC-Public-Comment-Letter-May-25-20221.pdf> (citing Letter from FTC Staff to Hon. James L. Seward, New York Senator, 1st District (Mar. 31, 2009), <https://www.ftc.gov/sites/default/files/documents/advocacydocuments/ftcstaff-commenthonorablejamesl.sewardconcerningnew-york-senate-bill-58-pharmacy-benefit-managers-pbms/v090006newyorkpbm.pdf>).

¹³ Letter from FTC Staff to Patrick C. Lynch, Attorney General, State of Rhode Island and Providence Plantations, and Juan M. Pichardo, Senate Deputy Majority Leader, Rhode Island Senate (Apr. 8, 2004), <https://www.ftc.gov/sites/default/files/documents/advocacydocuments/ftcstaff-commenthon.patrickc.lynch-and-hon.juanm.pichardeconcerningcompetitiveeffectsri-generalassemblybills-containingpharmaceuticalfreedom/ribills.pdf>

¹⁴ Letter from FTC Staff to Greg Aghazarian, California State Assembly Member, California State Assembly (Sept. 7, 2004), <https://www.ftc.gov/sites/default/files/documents/advocacydocuments/ftccommenthon.gregaghasharianconcerningca.b.1960requiringpharmacybenefitmanagersmake disclosures purchasers and prospective purchasers/v040027.pdf>

¹⁵ Letter from FTC Staff to Richard L. Brown, Senator, North Dakota Senate (Mar. 8, 2005), <https://www.ftc.gov/sites/default/files/documents/advocacydocuments/ftcstaff-commenthonorablelrichardl.brown-concerning-north-dakota-h.b.1332-regulate-contractual-relationship-between-pharmacy-benefit-managers-and-covered-entities/050311northdakotacomnts.pdf>

Benefit Managers: Ownership of Mail-Order Pharmacies²² These reports may no longer accurately reflect the current state of the PBM industry.

The Commission discourages reliance on these letters and Commission reports until its current PBM study is complete. Earlier materials can be reevaluated in light of current market conditions.

²² FED. TRADE COMM'N AND DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (July 2004), <https://www.ftc.gov/sites/default/files/documents/reports/improving-health-care-dose-competition-report-federal-trade-commission-and-department-justice/040723healthcarerpt.pdf>; FED. TRADE COMM'N, PHARMACY BENEFIT MANAGERS: OWNERSHIP OF MAIL-ORDER PHARMACIES (Aug. 2005), https://www.ftc.gov/sites/default/files/documents/reports/pharmacy-benefit-managers-ownership-mail-order-pharmacies-federal-trade-commission-report/050906pharmbenefitrpt_0.pdf