

## Oral Remarks of Commissioner Christine S. Wilson

### Open Commission Meeting on February 17, 2022

Advanced Notice of Proposed Rulemaking Concerning Earnings Claims

6(b) Orders to Study Pharmacy Benefit Managers' (PBMs) Relationships  
with Affiliated and Independent Pharmacies

#### I. Advanced Notice of Proposed Rulemaking Concerning Earnings Claims

Thank you, Madam Chair. And thank you also to Melissa Dickey for her excellent and informative presentation on the FTC's enforcement experience with earnings claims.

I remain skeptical of unleashing a tsunami of rulemakings to address common unfair or deceptive acts or practices. But I do not oppose seeking comment on today's ANPRM for three reasons.

First, we contemplate this rule against the backdrop of *AMG*.<sup>1</sup> The Supreme Court's recent decision limits the Commission's authority to use Section 13(b) of the FTC Act to obtain monetary relief for consumers harmed by misleading earnings claims. A rule would not prevent fraudsters from engaging in deceptive earnings claims, but it would enhance the FTC's ability to strip them of their ill-gotten gains and return that money to consumers. But for *AMG*, I would be skeptical about the need for rules regarding conduct frequently targeted by the FTC's extensive fraud program. That said, a 13(b) fix would be preferable to having the FTC pursue a cornucopia of rules. And if a 13(b) fix is enacted during the pendency of this rulemaking, I likely would ask the Commission to terminate the process.

Second, whether false earnings claims are made by frauds or legitimate businesses, no benefit accrues to consumers or competition. In fact, a 2020 FTC Data Spotlight about "income scams" stated that the median loss associated with business and work-at-home opportunities is \$3,000.<sup>2</sup> Losses for consumers related to deceptively marketed investment seminars are higher, exceeding \$16,000.<sup>3</sup> But even in the face of decades of aggressive enforcement and extensive consumer and business education efforts, deceptive earnings claims persist.<sup>4</sup>

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<sup>1</sup> *AMG Capital Mgmt., LLC v. FTC*, 141 S. Ct. 1341 (2021).

<sup>2</sup> Emma Fletcher, *Income scams: big promises, big losses*, FTC ec0 Tc 01 (e)Fi0 Tc 0n.E.0.006 Tw3-7 (ig)TJP i(2ion >253 0 494006 Tc

Third, consumers cannot analyze the costs and benefits of investing significant resources to pursue these opportunities without accurate representations from sellers. But the true value of these opportunities is best assessed by the entities offering them. As our academic commenters observed, we see significant information asymmetries between consumers and the entities that make earnings claims. The monetary value of an opportunity is likely the central, material claim that consumers consider before spending hundreds, thousands, or even tens of thousands of dollars on financial-improvement opportunities. This ANPRM seeks information on how to ensure that when disclosures are made, they are substantiated.

For these reasons, I do not oppose an ANPRM that explores ways to incentivize establishing a reasonable basis for earnings claims.

## **II. 6(b) Orders to Study Pharmacy Benefit Managers' (PBMs) Relationship with Affiliated and Independent Pharmacies**

First, let me thank the Congressmen and members of the public for their input. As always, hearing directly from stakeholders is highly informative. Second, I want to thank staff and leadership in the Bureau of Economics, the Office of Policy Planning, Mergers I, and the Health Care Division for their efforts. The PBM Team has worked diligently on several iterations of a possible PBM study in recent months. And I know that members of the Chair's Office and staff worked hard in the last couple of days to prepare the latest permutation that I received at 9 pm last night. Unfortunately, I was unable to discuss this proposal with our experienced staff before this open Commission meeting.

As Commissioner Phillips described in his remarks, the latest version of the proposed study is far more comprehensive than what was originally envisioned, for which I am grateful. For example, I do think it is important to examine manufacturer rebate issues, which I have been advocating for months and which the latest version finally adds. But commenters raised other issues today that are not reflected in the current version of the study. It will be useful to reflect on the input from stakeholders to ensure we are addressing the most pertinent concerns. I am confident that the FTC can design a study that employs a data-driven approach to conduct an empirical and objective examination of important questions about competition in the PBM industry. But I am not yet confident that the latest permutation possesses those qualifications.



- x Steer patients to vertically integrated pharmacies and mandate the use of mail order pharmacy services against patient wishes;<sup>12</sup>
- x Require prior authorization and step therapy to the point of delaying or denying patient access to needed medication;<sup>13</sup>
- x Drive independent pharmacies out of business, thereby creating pharmacy deserts;<sup>14</sup> and
- x Lessen competition through mergers.<sup>15</sup>

The PBMs respond that many of these accusations are baseless, and point to data demonstrating that PBMs:

- x Receive compensation primarily through fees from plan sponsors, not by keeping a portion of rebates;<sup>16</sup>
- x Pass through an increasing percentage of rebates to health plans;<sup>17</sup>
- x Reduce plan sponsor and consumer drug spending;<sup>18</sup>
- x Have significantly lower margins than the drug manufacturers that capture a large proportion of drug supply chain profits;<sup>19</sup>
- x Do not reimburse independent pharmacies at lower rates than PBM-owned pharmacies;<sup>20</sup>

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<sup>12</sup> NATIONAL COMMUNITY PHARMACISTS ASSOCIATION, PHARMACY BENEFIT MANAGERS: MAIL ORDER SERVICES 101, [http://www.ncpa.co/pdf/leg/aug11/pbm\\_mailorder101.pdf](http://www.ncpa.co/pdf/leg/aug11/pbm_mailorder101.pdf).

<sup>13</sup> Robert Kings, *PBM industry report claims greater use of tools can generate \$1T in savings over next decade*,



like to example the impact of PBM mergers, both vertical and horizontal, on competition and consumers.

But we must use our significant authority and scarce resources judiciously. I have observed previously that stakeholders frequently seek to coopt the government in their battles against rivals.<sup>27</sup> I am wary of having the FTC used as a pawn to boost the profitability of certain sectors, or to insulate them from competition.<sup>28</sup> It is not the role of the FTC to pick winners and losers. Our mission is to protect consumers and competition, not competitors. For these reasons,