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AMERICAN ECONOMIC LIBERTIES PROJECT

The Pharmacy Benefit Mafia:

The Secret Health Care Monopolies Jacking Up Drug Prices and Abusing Patients and Pharmacists

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The Federal Trade Commission is currently planning to investigate Pharmacy Benefit Managers (PBMs) for their negative effects on patients, drug costs, and independent pharmacies. This is an opportunity to reverse decades of FTC policy that protects a particularly harmful industry from regulation, despite the negative effects of PBMs on the ever-increasing cost of drugs in America, and their importance in the health care system overall.

WHAT IS A PHARMACY BENEFIT MANAGER?

If you've never heard of Pharmacy Benefit Managers, you're not alone. PBMs were originally created to simply process drug claims for health insurance companies, but today they do much more. They bargain with pharmaceutical companies to determine drug prices, decide which drugs are covered by insurance, decide which pharmacies are in and out of a health insurer's network, and decide how much you, the pharmacy, and your insurance company must pay for a drug. On top of this, they own physical, mail-order, and specialty retail pharmacies of their own, and they manage pharmaceutical benefits for government programs like Medicare Part D and Medicaid.

PBMs are one of health care's ultimate corporate middlemen, sitting in the middle of pharmacies, health insurance plans, drug makers, and patients. With immense control over drug prices in the United States, PBMs are responsible for many of the problems in our country's pharmaceutical care system.

WHY ARE PBMS A PROBLEM TODAY?

The three main problems with PBMs are **vertical integration, consolidation**, and **conflicts of interest** that are baked into their business models.

Vertical Integration

The top PBMs are vertically integrated into the largest health insurance corporations, and they own their own pharmacies. Caremark is owned by pharmacy chain CVS, which also owns health insurer Aetna. The PBM Express Scripts is owned by insurer Cigna, and PBM OptumRx by insurer UnitedHealth. So as a patient going to an independent pharmacy, your health insurer owns the PBM deciding which drugs are covered and how much they cost, and also might own the competing pharmacy down the street.

Consolidation

The top three PBMs – Caremark, Express Scripts, and OptumRx – manage 80% of drug claims in the United States.[1] This gives them enormous leverage over drug prices, patient choice, and independent community pharmacies. PBMs chronically under-reimburse community pharmacies for drugs. For example, an analysis by the Ohio Times-Dispatch found that in late 2017, CVS Caremark sharply cut payments to pharmacists across the country, potentially to help finance its acquisition of Aetna.[2] States have also found that PBMs have over-charged taxpayers for administering Medicaid drug benefits, sometimes by hundreds of millions of dollars.[3]

Conflicts of Interest

As a result, when dealing with Medicaid, Medicare, employer health plans, and pharmacists, PBMs have a built-in incentive to self-deal. The more a PBM can overcharge taxpayers through a health plan like Medicare or Medicaid, and then under reimburse independent pharmacies that they compete with – and pocket the difference between the two – the more money they make.

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1 Adam J. Fein, "The Top Pharmacy Benefit Managers of 2021: The Big Get Even Bigger," Drug Channels Institute, April 5, 2022, https://www.drugchannels.net/2022/04/the-top-pharmacy-benefit-managers-of.html

2 Marty Schladen and Lucas Sullivan, "CVS Caremark cut payments to pharmacies amid $70 billion deal to buy Aetna," The Columbus Dispatch, June 24, 2018, https://stories.usatodaynetwork.com/sideeffects/cvs-caremark-cut-payments-pharmacies-amid-70-billion-deal-buy-aetna/

3 Marty Schladen, "Reports show pharmacy middlemen making big money in other states," The Columbus Dispatch, March 14, 2019, https://stories.usatodaynetwork.com/sideeffects/reports-shows-pharmacy-middlemen-making-big-money-states/

HOW DO PBMS CONTRIBUTE TO RISING DRUG PRICES?

PBMs maintain "formularies" for health insurance companies, which are lists of drugs that govern which medications are prioritized for coverage by a health insurer. For a drug company, a drug's position on a PBM's formulary is the difference between success and failure – patients will have trouble accessing a drug if it is lower on the PBM's formulary.[4]

To gain more favorable formulary placement, drug manufacturers will offer discounts to PBMs in the form of "rebates" that the manufacturer pays to the PBM, who then pays the insurance company. Yet because PBMs are exempt from an anti-kickback statute under Medicare, they are allowed take a cut of the rebate. The larger a rebate for a drug is, the more the PBM can profit. If not for the exemption, kickbacks like this are normally a felony offense.

When dealing with drug companies to determine formulary placement, PBMs have an incentive to pick a drug that comes with a larger rebate, so that they get a larger cut, even if the drug is more expensive overall. A 2021 Senate investigation found that "PBMs used their size and aggressive negotiating tactics, like the threat of excluding drugs from formularies, to extract more generous rebates, discounts and fees from insulin manufacturers."[5] This dynamic, the investigators found, contributed to skyrocketing insulin prices and discouraged price decreases for the drug.

Rather than drug manufacturers competing for patients by providing cheaper and better drugs, manufacturers compete for formulary placement by offering higher rebates to the PBM, pushing drug prices up.

HOW DO PBMS HURT PATIENTS?

In addition to contributing to rising drug costs, PBMs also steer patients away from competing independent pharmacies and toward their own mail-order pharmacy services. Mail-order is often a worse way of getting drugs to patients, particularly during the pandemic when delivery times have increased and become more unreliable.[6] In rural communities across the country, patients who were once served by local, independent pharmacies now must deal with life-threatening delays to get their prescriptions.

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4 Francis Ying, Julie Appleby, Stephanie Stapleton, "VIDEO: Little-Known Middlemen Save Money On Medicines — But Maybe Not For You," NPR, August 2, 2017, https://www.npr.org/sections/health-shots/2017/08/02/540918790/video-little-known-middlemen-save-money-on-medicines-but-maybe-not-for-you

5 "Release: Grassley, Wyden Release Insulin Investigation, Uncovering Business Practices Between Drug Companies and PBMs That Keep Prices High," United States Senate Committee on Finance, January 14, 2021, https://www.finance.senate.gov/chairmans-news/grassley-wyden-release-insulin-investigation-uncovering-business-practices-between-drug-companies-and-pbms-that-keep-prices-high

6 "Release: Warren, Casey Release New Findings from Investigation Of Delivery Delays for Mail-Order Prescription Drugs Under Trump's Postal Service Chief Louis DeJoy," Office of Senator Elizabeth Warren, September 9, 2020, https://www.warren.senate.gov/newsroom/press-releases/warren-casey-release-new-findings-from-investigation-of-delivery-delays-for-mail-order-prescription-drugs-under-trumps-postal-service-chief-louis-dejoy

Until the practice was outlawed in 2018, many PBM contracts also included "gag clauses," which prohibited pharmacists from recommending cheaper drugs to patients when a PBM would profit less.

HOW DO PBMS HURT PHARMACISTS?

PBMs have a well-documented history of under-reimbursing the pharmacies they compete with, often to the point of bankruptcy.[7] CVS even used to reduce payments to pharmacies, and then offer to buy them out.[8] Roughly 16% of rural independent pharmacies shuttered between 2003 and 2018,[9] likely due, in part, to extractive PBM business practices. PBMs can conduct surprise "audits" of community pharmacies and will charge excessive fees if they find even small clerical errors.[10]

HOW HAVE STATES TRIED TO REGULATE PBMS?

State governments have tried to regulate PBMs over the past two decades, aiming to increase transparency in PBM pricing. These state-level laws have been effective in stopping specific types of PBM malfeasance, but over the years PBMs have found new ways to tax independent pharmacies.[11] More generally, PBMs' market share and integration with health insurers and pharmacies gives them a structural advantage that is hard to rein in with a patchwork of state regulations.

HOW DID THE FTC WORK TO PROTECT PBMS?

In the past, the FTC has worked to protect PBMs by allowing PBM mergers, actively lobbying against state-level regulation, and producing industry-friendly reports. In 2004, the FTC produced a joint report with the Department of Justice that explicitly opposed state laws to rein in PBMs. In 2005, the FTC published a 240-page document on PBM self-dealing allegations, claiming to have found no evidence of self-dealing by PBMs that owned mail-order pharmacies. From 2004 to 2011, the FTC sent letters to lawmakers in six states, arguing against passing PBM transparency legislation.[12] Putting it simply, the FTC believed that more powerful PBMs provided a check on skyrocketing drug costs.

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7 Marty Schladen and Lucas Sullivan, "CVS Caremark cut payments to pharmacies amid $70 billion deal to buy Aetna," The Columbus Dispatch, June 24, 2018, https://stories.usatodaynetwork.com/sideeffects/cvs-caremark-cut-payments-pharmacies-amid-70-billion-deal-buy-aetna/

8 Ibid.

9 Abiodun Salako, Fred Ullrich, Keith J. Mueller, "Update: Independently Owned Pharmacy Closures in Rural America, 2003-2018," RUPRI Center for Rural Health Policy Analysis, July 2018 https://rupri.public-health.uiowa.edu/publications/policybriefs/2018/2018%20Pharmacy%20Closures.pdf

10 Zach Freed, "Reining in Pharmacy Middlemen," Institute for Local Self-Reliance, January 31, 2020, https://ilsr.org/reining-in-pharmacy-middlemen/

11 Ibid.

12 Stacy Mitchell, Zach Freed, "How the FTC Protected the Market Power of Pharmacy Benefit Managers," February 19, 2021, https://www.promarket.org/2021/02/19/ftc-market-power-pharmacy-benefit-managers/

WHY IS A NEW PBM STUDY SO IMPORTANT?

A new PBM study will allow the agency to correct the record and help bring in a new chapter where the agency protects fair competition in the pharmaceutical space. Despite growing evidence of PBM self-dealing and unfair conduct, the FTC has not publicly changed its position on PBMs. The agency's inaction has allowed the industry's lobbying group, the Pharmaceutical Managed Care Association (PCMA), to cite older FTC studies and testimony when arguing against regulation. Although Commissioners Christine Wilson and Noah Phillips voted against a new study on February 18, 2022, the Commission voted unanimously in favor of the study on June 8. The Commission's unanimous vote for the new 6(b) study marks a new chapter in the FTC's history--one in which the agency protects fair competition on behalf of patients, community pharmacists, and doctors.

ADDITIONAL RESOURCES

For a more detailed explanation of Pharmacy Benefit Managers, check out Economic Liberties' comment letter to the FTC supporting its proposed 6(b) study of PBM business practices: *http://www.economicliberties.us/wp-content/uploads/2022/05/AELP-PBM-Comment_Final-.pdf*

For more information on how PBMs work, see the National Community Pharmacists Association (NCPA)'s PBM Storybook: *https://ncpa.org/sites/default/files/2022-05/PBM-Storybook-12pg.pdf*

For more on the FTC and PBMs, please read Stacy Mitchell and Zach Freed's piece for ProMarket, "How the FTC Protected the Market Power of PBMs:" *https://ncpa.org/sites/default/files/2022-05/PBM-Storybook-12pg.pdf*

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