February 16, 2023

The Honorable Maria Cantwell, Chair
U.S. Senate Committee on Commerce, Science and Transportation
Russell Senate Office Building, Room 254
Washington, DC 20510

Dear Chair Cantwell:

On behalf of the American Economic Liberties Project, we submit this statement for the record in preparation for your hearing, "Building Transparency and Accountability to Pharmacy Benefit Managers." Economic Liberties is a non-profit and non-partisan organization that fights concentrated economic power to ensure free and fair opportunity for all.

We applaud your tireless work to investigate and crack down on pharmacy benefit managers (PBMs), a highly consolidated industry of drug market middlemen that is driving up costs and making it harder for Americans to fill their prescriptions. Please find enclosed our report detailing the major companies dominating this industry and how their use of mergers, rebates, hidden fees, pharmacy self-preferencing, and other tactics harm competition for affordable medications and independent drugstores in the United States.

This hearing addresses your and Sen. Chuck Grassley's (R-Iowa) legislation, "Pharmacy Benefit Manager Transparency Act of 2023." If passed and signed into law, this measure would give health plans and pharmacies much-needed clarity into how much extra money PBMs are charging them and their patients for prescription drugs. However, these hidden fees are just some of the anti-competitive strategies that PBMs use. They also sell market share to manufacturers in exchange for large rebates that lower-cost drug makers cannot compete with, leverage their monopoly power to resist pressure from payers (three PBMs control 80% of the industry), and steer patients away from independent providers and toward their own pharmacies.

Especially on the heels of such egregious conduct as Tricare PBM contractor Express Scripts removing retired and active military servicemembers' local drug stores from its network and numerous state attorneys general accusing PBMs of overcharging government payers for pharmacy services, Congress should strengthen its reform of the industry even beyond the changes proposed in this bill. Without revisions, the legislation will miss an opportunity to reverse the many inefficiencies that PBMs bring to prescription drug markets, that lead to higher drug costs overall.

Hidden Fees: Spread Pricing, Clawbacks, and Rebates

PBMs commonly shield how much they reimburse and charge pharmacies for filling a prescription between a) how much they are invoicing health plans for the prescription and b) how much patients are paying as part of their cost sharing agreements. This secrecy allows them to keep excess payments – in what are known as spread pricing and clawbacks – as profits without their customers' knowledge. The Pharmacy Benefit Manager Transparency Act would ban these practices, unless PBMs either pass rebates from manufacturers on to health plans in full, or disclose what they pay versus what they charge, any additional fees, or the total remuneration they receive

from drug makers. It also empowers the Federal Trade Commission (FTC) with greater oversight and regulatory authority. Several changes would strengthen the bill:

1. **Eliminate loopholes.** The text on prohibiting clawbacks and reduced compensation to pharmacies bans PBMs from "arbitrarily, unfairly, or deceptively, by contract or other means" imposing these fees. However, these modifiers give PBMs a legal defense to justify their anti-competitive conduct in court. Removing this language would eliminate this loophole and give a clearer indication to the courts of Congress's intent.

2. **Outright ban spread pricing and clawbacks.** If PBMs choose to reveal fees rather than abandon spread pricing and clawbacks, they would be unlikely to significantly reduce their use. PBMs claim these numbers are part of their proprietary business models and thus will draw out implementation of such mandatory disclosures with costly litigation. A total prohibition would give the courts a clearer indication of Congress's intent in the event of a legal challenge. In addition, horizontal integration has entrenched each PBM's market power such that they would not face competitive pressure to meaningfully curb the added fees.

3. **Outright ban manufacturer rebates.** Since PBMs keep a percentage of manufacturer rebates without having the burden of raising premiums or paying for drugs themselves, they're motivated to provide better insurance coverage – or sell greater market share – to higher-cost drugs. Removing this incentive would force PBMs to negotiate discounts at the time of sale, bringing competition to drug maker pricing.

4. **Strengthen reporting requirements to the FTC.** The legislation currently mandates that PBMs file annual reports on the difference between the aggregate amounts they charge health plans and paid to pharmacies for prescription drugs. As University of Southern California health policy researchers Neeraj Sood and Karen Van Nuys wrote in *Health Affairs:* "While reporting aggregate spreads, [direct and indirect remuneration] fees, and clawbacks annually to the FTC may alert the commission to potentially anticompetitive practices, disaggregating those data to the drug or drug-class level would provide insight into how well specific drug or drug-class markets are working, and enable more targeted intervention to address anticompetitive behavior."[1]

<u>Horizontal and Vertical Consolidation</u>

Horizontal and vertical consolidation are among the primary forces driving PBMs' deceptive practices. because they face minimal competitive and regulatory pressure to reform their conduct. The Pharmacy Benefit Manager Transparency Act could address these issues by incorporating the following changes:

1. **Strengthen FTC regulation of horizontal mergers.** PBMs already face resistance today from drug makers, health insurers, patient advocates, and independent pharmacies for unfairly increasing their costs with hidden fees. Yet, they do not fear losing customers enough to change their tactics since they have entrenched market power after years of

[1] https://www.healthaffairs.org/do/10.1377/forefront.20220707.601993/

horizontal mergers and acquisitions. Today, just three companies -- Caremark, Express Scripts, and Optum Rx -- control 80% of the industry. Giving the FTC greater leeway to block future deals and unwind past ones would force PBMs to compete more with one another and pressure them into improving their services.

2. **Ban PBM-owned pharmacies.** Each of the three major PBMs owns its own mail-order pharmacy that competes with the independent drug stores they contract with. For Caremark, this includes sharing a parent company with the largest pharmacy retail chain in the United States, CVS. These conflicts of interest incentivize PBMs to lower reimbursements for, charge higher fees to, or kick independent drug stores out of their networks. This results in patients losing access to their community pharmacies and PBMs facing little competitive pressure to improve their own dispensing services. Outlawing PBM-owned pharmacies would restore efficiencies to provider markets.

3. **Strengthen FTC regulation of vertical mergers.** In addition to having their own pharmacies, the three major PBMs are all owned by some of the largest insurers and physician employers in the United States. Caremark parent CVS Health owns Aetna; Express Scripts is a subsidiary of Cigna; and Optum Rx is a business of UnitedHealth Group. Such vertical consolidation gives PBMs disproportionate bargaining power over independent health plans, pharmacies, drug makers, and doctors. Enhancing FTC authorities to block vertical mergers in the future and unwind past ones would restrict this monopoly power.